HOUSE OF LORDS

European Union Committee

13th Report of Session 2012–13

EU police and criminal justice measures: The UK's 2014 opt-out decision

HL Paper 159

HOUSE OF LORDS

European Union Committee

13th Report of Session 2012–13

EU police and criminal justice measures: The UK's 2014 opt-out decision

Ordered to be printed 16 April 2013 and published 23 April 2013

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£17.50

HL Paper 159

The European Union Committee

The Committee considers EU documents in advance of decisions being taken on them in Brussels, in order to influence the Government's position and to hold them to account.

The Government are required to deposit EU documents in Parliament, and to produce within two weeks an Explanatory Memorandum setting out the implications for the UK. The Committee examines these documents, and 'holds under scrutiny' any about which it has concerns, entering into correspondence with the relevant Minister until satisfied. Letters must be answered within two weeks. Under the 'scrutiny reserve resolution', the Government may not agree in the EU Council of Ministers to any proposal still held under scrutiny; reasons must be given for any breach.

The Committee also conducts inquiries and makes reports. The Government are required to respond in writing to a report's recommendations within two months of publication. If the report is for debate, then there is a debate in the House of Lords, which a Minister attends and responds to.

The Committee has six Sub-Committees, which are:
Economic and Financial Affairs (Sub-Committee A)
Internal Market, Infrastructure and Employment (Sub-Committee B)
External Affairs (Sub-Committee C)
Agriculture, Fisheries, Environment and Energy (Sub-Committee D)
Justice, Institutions and Consumer Protection (Sub-Committee E)
Home Affairs, Health and Education (Sub-Committee F)

Our Membership

The Members of the European Union Committee are:

Lord Boswell of Aynho (Chairman)	Lord Hannay of Chiswick	The Earl of Sandwich
Lord Bowness	Lord Harrison	Baroness Scott of Needham Market
Lord Cameron of Dillington	Lord Maclennan of Rogart	Lord Teverson
Lord Carter of Coles	Lord Marlesford	Lord Tomlinson
Lord Dear	Baroness O'Cathain	Lord Trimble
Baroness Eccles of Moulton	Lord Richard	Baroness Young of Hornsey
Lord Foulkes of Cumnock		

This inquiry was conducted jointly by two Sub-Committees–Sub-Committee on Justice, Institutions and Consumer Protection:

Lord Anderson of Swansea	Lord Bowness (Chairman)	Baroness Corston
Lord Dykes	Viscount Eccles	Lord Elystan-Morgan
Lord Hodgson of Astley Abbotts	Baroness Liddell of Coatdyke	Baroness O'Loan
Lord Rowlands	The Earl of Sandwich	Lord Stoneham of Droxford

Sub-Committee on Home Affairs, Education and Health:

Lord Avebury	Lord Judd	Lord Richard
Lord Blencathra	Lord Lingfield	Lord Sharkey
Viscount Bridgeman	Lord Mackenzie of Framwellgate	The Earl of Stair
Lord Hannay of Chiswick (Chairman)	Baroness Prashar	Lord Tomlinson

Information about the Committee

For information freely available on the web, our homepage is http://www.parliament.uk/hleu

Sub-Committee Staff

The current staff of Sub-Committee F are Michael Torrance (Clerk), Paul Dowling (Policy Analyst) and Alice Ryder (Committee Assistant). The current staff of Sub-Committee E are Michael Thomas (Legal Adviser), Arnold Ridout (Deputy Legal Adviser), Tim Mitchell (Assistant Legal Adviser), Elisa Rubio (Clerk) and Amanda McGrath (Committee Assistant).

Contacts for the European Union Committee

Contact details for individual Sub-Committees are given on the website. General correspondence should be addressed to the Clerk of the European Union Committee, Committee Office, House of Lords, London, SW1A 0PW. General enquiries 020 7219 5791. The Committee's email address is euclords@parliament.uk

CONTENTS

Evidence is published online at http://www.parliament.uk/hleuf and available for inspection at the Parliamentary Archives (020 7219 5314)

References in footnotes to the Report are as follows:
Q refers to a question in oral evidence.
Witness names without a question reference refer to written evidence.

SUMMARY

Under Protocol 36 to the EU Treaties, the Government must decide whether or not the UK should continue to be bound by around 130 EU police and criminal justice (PCJ) measures which were adopted before the Treaty of Lisbon entered into force in 2009, or whether it should exercise its right to opt out of them all. That decision must be made at the latest by 31 May 2014.

If the Government do not opt out, on 1 December 2014 these measures will become subject to the jurisdiction of the Court of Justice of the European Union (CJEU) and the enforcement powers of the European Commission. If the Government do exercise the opt-out, the PCJ measures will cease to apply to the UK on 1 December 2014. The CJEU's jurisdiction and the Commission's enforcement powers will then apply in relation to the measures for all the Member States except the UK. The UK may later rejoin any of the measures subject to conditions set out in the Protocol.

On 15 October 2012, the Home Secretary said the Government's "current thinking" was that the UK should opt out of all the pre-Lisbon measures and negotiate to rejoin individual measures where that is in the national interest. Shortly after this announcement we commenced our inquiry into the decision that needs to be taken by the Government. The Government have undertaken to consult both Houses of Parliament before it reaches a final decision, and this report is intended to support that process.

The decision on the opt-out is one of great significance, with far-reaching implications not only for the UK but also for the other Member States and the EU as a whole. Cross-border cooperation on policing and criminal justice matters is an essential element in tackling security threats such as terrorism and organised crime in the twenty-first century.

In the course of taking evidence from a wide range of witnesses, we found that supporters of the opt-out have several areas of concern, including:

- The risks associated with extending the jurisdiction of the CJEU in relation to the pre-Lisbon PCJ measures to include the UK, including the risk of "judicial activism" and the potential for undermining the UK's common law systems;
- The loss of national control over areas of police and criminal justice policy;
- Many of the PCJ measures are of little use or are defunct;
- Many of the areas of cooperation could be achieved by non-legislative means or through alternative arrangements;

They also wish the UK to use the opt-out to promote the reform of certain measures, in particular the European Arrest Warrant (EAW).

Opponents of the opt-out, on the other hand, considered that:

- The pre-Lisbon measures are in the UK's national interest and some are vital to our internal security;
- The measures are beneficial to UK citizens who may become the victims of crime or are suspected of committing a crime in another Member State and also in permitting the rapid extradition of criminals from other Member States who have come to the UK;

- The CJEU's jurisdiction would provide the benefits of legal clarity and the stronger and more consistent application of EU measures across the EU;
- There is no risk to the UK's common law systems and there has been no evidence of any harm caused to those systems from any PCJ measures or judgments;
- Withdrawing from some of those PCJ measures would result in the UK having to rely upon less effective means of cooperation;
- The UK would lose influence over existing and future EU police and criminal justice policies and agencies.

We conclude that the concerns of proponents of opting out, in particular as regards the role of the CJEU, were not supported by the evidence we received and did not provide a convincing reason for exercising the opt-out. We have failed to identify any significant, objective, justification for avoiding the jurisdiction of the CJEU over the pre-Lisbon PCJ measures in the UK and note that the Government appeared to share that view in respect of the number of post-Lisbon PCJ measures to which they have opted in. Indeed, we believe that the CJEU has an important role to play, alongside Member States' domestic courts, in safeguarding the rights of citizens and upholding the rule of law.

It would be theoretically possible for the UK to continue cooperating with other Member States through alternative arrangements, but we found that these would raise legal complications, and result in more cumbersome, expensive and less effective procedures, thus weakening the hand of the UK's police and law enforcement authorities. The negotiation of any new arrangements would also be a time-consuming and uncertain process. The most effective way for the UK to cooperate with other Member States is to remain engaged in the existing EU measures in this area.

The European Arrest Warrant is the single most important of the measures which are subject to the opt-out decision. In some cases, the operation of the EAW has resulted in serious injustices, but these arose from the consequences of extradition, including long periods of pre-trial detention in poor prison conditions, which could occur under any alternative system of extradition. Relying upon alternative extradition arrangements is highly unlikely to address the criticisms directed at the EAW and would inevitably render the extradition process more protracted and cumbersome, potentially undermining public safety. The best way to achieve improvements in the operation of the EAW is through negotiations with the other Member States, the use of existing provisions in national law, informal judicial cooperation, the development of EU jurisprudence and the immediate implementation of flanking EU measures such as the European Supervision Order.

If the opt-out is exercised, the UK may seek to rejoin individual PCJ measures but this process would not necessarily be automatic or straightforward. Witnesses who opposed exercising the opt-out were concerned that the procedures for rejoining measures are uncertain and depend on the decisions of the Commission and the other Member States; about timing (whether it would be practicable to rejoin measures without any hiatus in their application); and about cost (the potential to incur financial consequences assessed by the Commission, and sunk costs, for example, substantial multi-million pound contributions to the development of second generation Schengen Information System (SIS II) if the UK did not rejoin

that system). Watertight transitional arrangements would have to be agreed, and there is a clear risk that gaps and legal uncertainties would arise.

We are unable to form a firm view on the merits and adequacy of any list of measures that the Government might seek to rejoin, were the opt-out to be exercised, since they have not provided us with any list of measures they might seek to rejoin, nor even a summary of the reactions of the other Member States to the Government's intention to exercise the opt-out, which may be critical in assessing the potential success or otherwise of the UK's negotiations to rejoin particular measures. A proper assessment by Parliament of whether or not the opt-out should be exercised is necessarily linked with the measures which the Government wish (or are able) to rejoin.

In light of the evidence we have received, including a preponderant view among our witnesses from the legal, law enforcement and prosecutorial professions, we conclude that the Government have not made a convincing case for exercising the opt-out and that opting out would have significant adverse negative repercussions for the internal security of the UK and the administration of criminal justice in the UK, as well as reducing its influence over this area of EU policy.

EU police and criminal justice measures: The UK's 2014 opt-out decision

CHAPTER 1: INTRODUCTION

The opt-out decision

1. Article 10 of Protocol 36 to the EU Treaties (added by the Treaty of Lisbon) enables the Government to decide, at the latest by 31 May 2014, whether or not the UK should continue to be bound by the approximately 130 police and criminal justice (PCJ) measures which were adopted before the Treaty of Lisbon entered into force, or whether it should exercise its right to opt out of them all. No other Member State has this option under Protocol 36. The text of Article 10 is in Box 1.[1]

2. If the Government do not opt out then these measures will become subject to the jurisdiction of the Court of Justice of the European Union (CJEU) and the enforcement powers of the European Commission on 1 December 2014 in relation to the UK as they will to all the other Member States. If the Government do exercise the opt-out, on 1 December 2014 the changes to the jurisdiction of the CJEU and the powers of the Commission will come into effect for all the Member States except the UK. The status quo is not an option for any Member State. For the UK, if the opt-out is exercised, all the measures will cease to apply to it (subject to the possibility of opting back in)—hence it is referred to as a "block opt-out"—or, if the opt-out is not exercised, the measures will continue to apply and the changes concerning the CJEU and the Commission will come into effect as they will for the rest of the Member States.

3. The PCJ measures in question fall into the following categories:

   - measures for mutual recognition of national decisions such as the European Arrest Warrant (EAW);
   - measures harmonising the definitions of certain criminal offences and minimum penalties;
   - measures on criminal procedure;
   - measures to facilitate cross-border cooperation, in particular between police and law enforcement agencies, including the exchange of information and the investigation of crime;
   - measures establishing EU agencies (Europol, Eurojust and the European Police College (CEPOL));
   - agreements with third countries on information sharing, mutual legal assistance and extradition; and

[1] The remainder of Article 10(4) and Article 10(5) to Protocol 36 appears in Box 10 at the beginning of Chapter 8

- a number of Schengen-building measures.

BOX 1

Text of Articles 10(1) to (4), Protocol (No 36) on transitional provisions

(1) As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.

(2) The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.

(3) In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon.

(4) 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. In case the United Kingdom has made that notification, all acts referred to in paragraph 1 shall cease to apply to it as from the date of expiry of the transitional period referred to in paragraph 3. This subparagraph shall not apply with respect to the amended acts which are applicable to the United Kingdom as referred to in paragraph 2.

The Government's statement to Parliament on 15 October 2012

4. In a statement to the House of Commons on 15 October 2012, the Home Secretary said that "we do not need to remain bound by all of the pre-Lisbon measures. Operational experience shows that some of the pre-Lisbon measures are useful, some less so; and some are now, in fact, entirely defunct" and that the Government's "current thinking" was that the UK should opt out of all the pre-Lisbon measures and negotiate to opt back in to individual measures that it is in the national interest to rejoin. The Home Secretary also repeated an earlier Government undertaking to hold votes in both Houses of Parliament, as well as to consult the relevant Parliamentary committees—including this Committee—on the organisation of these votes,

before reaching a final decision on whether or not the opt-out should be exercised.[2]

The Committee's inquiry

5. Even before the Home Secretary's statement on 15 October 2012, this Committee's Justice, Institutions and Consumer Protection Sub-Committee and its Home Affairs, Health and Education Sub-Committee had identified this matter as one of great significance, with far ranging implications not only for the security of the UK but also for the other Member States and the EU as a whole. Both Sub-Committees regularly scrutinise individual EU measures including those to which opt-in provisions apply under Protocol 21 to the EU Treaties or to which a decision not to opt-out apply in the case of Schengen-building measures.[3] They therefore decided to conduct a joint inquiry, which was announced on 1 November 2012, shortly after the Home Secretary's statement. A substantial amount of written evidence was received before Christmas 2012 and the Sub-Committees held 17 oral evidence sessions, with a total of 40 individuals, in January and February 2013, including a visit to Brussels on 29 and 30 January.

6. Before and during the inquiry, there was also a significant amount of public interest in the opt-out decision, which was demonstrated by the publication of a number of high quality and detailed reports on this matter by external organisations, as well as a number of stakeholder seminars. These reports proved particularly useful to the Committee and are referred to, where appropriate, in this report. For reference, a list of these documents is provided in Appendix 7 to this report.

7. This report considers the merits of exercising the opt-out as well as identifying what we consider to be the most important PCJ measures for the UK. In the absence so far of any indicative list of measures that the Government, in the context of their intention to exercise the opt-out, would like to rejoin, with their reasons for doing so, we have not felt able to make a firm recommendation on that aspect.

8. In Chapter 2 we set out the background to our report, including a detailed overview of the development of EU justice and home affairs measures and the UK's involvement with this area of EU cooperation. In Chapter 3 we make clear our dissatisfaction with the Government's consultation of Parliament, and of the Devolved Administrations and other stakeholders. We then, in Chapter 4, consider the CJEU's record so far of its jurisdiction over PCJ measures, and the interaction of UK and EU law. The practicalities for the UK of relying upon alternative arrangements for cross-border cooperation are considered in Chapter 5. Because of its importance, Chapter 6 deals specifically with the EAW and examines the implications if the UK were to withdraw from that measure, as well as the prospects for its reform. In Chapter 7 we consider the consequences for the UK if it were to exercise the block opt-out and not rejoin certain measures. We examine the process for rejoining particular PCJ measures and the complexities that may arise

---

2 Oral Ministerial Statement regarding European Justice and Home Affairs Powers by the Home Secretary, HC Deb 15 October 2012 cols 34–45; repeated in the House of Lords by the Minister of State for Justice and Deputy Leader of the House, HL Deb 15 October 2012 cols 1302–1310.

3 The opt-in arrangements under Protocol 21 are distinct from the opt-out under Protocol 36 which is the subject of this report. There are also distinct opt-out arrangements under Protocol 19.

during this process in Chapter 8. In Chapter 9, we consider whether or not the Government should exercise the opt-out; and certain key considerations if they choose to do so, including the Irish dimension.

9. The members of the Justice, Institutions and Consumer Protection Sub-Committee and of the Home Affairs, Health and Education Sub-Committee who conducted this joint inquiry are listed in Appendix 1, showing their declared interests. We are most grateful to all those who gave us written and oral evidence; they are listed in Appendix 2. The call for evidence that we issued is reproduced in Appendix 3. A list of the approximately 130 PCJ measures caught by the opt-out decision, as at the date we adopted this report, is provided in Appendix 4. A summary of EU and UK court judgments which were cited in the evidence we received is provided in Appendix 5 and statistics regarding the use of the EAW are set out in Appendix 6. The list of documents referred to in paragraph 6 above is provided in Appendix 7 and a glossary of terms and acronyms is contained in Appendix 8. The evidence we received is available online, as is the correspondence between the Committee and the Government.[4]

10. **We make this report to the House for debate.**

4 http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-home-affairs-sub-committee-f-/inquiries/parliament-2010/protocol-36/

CHAPTER 2: BACKGROUND

11. The UK has a complex history of involvement in EU justice and home affairs cooperation, which includes police and criminal justice measures. In order to put the opt-out decision in its proper context, an overview of the main developments is provided in this chapter, which ends by considering the origins of Article 10, Protocol 36. Box 2 provides a timeline of EU cooperation in this area (the acronyms and titles are explained in Appendix 8).

BOX 2

Evolution of EU Justice and Home Affairs/Police and Criminal Justice cooperation

1957-Treaty of Rome establishing the European Economic Community (EEC)–commitment to free movement of people; adoption of Council of Europe Convention on Extradition

1973-UK accedes to the European Communities

1975-TREVI group of Interior Ministers and officials established

1985-Schengen Agreement

1986-Single European Act-commitment to remove internal border controls

1990-Schengen Implementing Convention

1992-Target date for establishing the Single Market (therefore increasing the free movement of goods, workers, capital and services)

1993-Treaty of Maastricht enters into force-creation of JHA (Third) Pillar covering asylum, immigration, border controls and cooperation between customs, police and judicial authorities

1995-Creation of the Schengen Area and the removal of internal border controls between participating states

1999-Treaty of Amsterdam enters in force-police and judicial co-operation on criminal matters remains in the Third Pillar; UK and Irish opt-in begins to apply in relation to migration, asylum and border controls in First Pillar; Schengen Area incorporated into the EU Treaties and provision made for the UK and Ireland to apply to participate in Schengen-building measures; Europol becomes operational; adoption of Tampere Programme

2001-CEPOL established

2002-Eurojust established

2004-EAW entered into force; adoption of Hague Programme

2007-Protocol on transitional provisions (Protocol 36) inserted into the Treaty of Lisbon

2009-Treaty of Lisbon enters into force on 1 December 2009; abolition of Third Pillar; UK and Irish opt-in widened to apply to all JHA matters, including provision to opt out of Schengen-building measures. Adoption of the Stockholm Programme

31 May 2014-deadline for any opt-out decision to be made by the UK under Protocol 36

1 December 2014-end of transitional provisions under Protocol 36; CJEU assumes jurisdiction over old Third Pillar measures and Commission enforcement powers apply

Early European cooperation

12. Following a number of terrorist acts, including the hostage taking during the 1972 Munich Olympic Games, the TREVI group was established during the December 1975 European Council meeting in Rome by Member States' ministers of justice and the interior.[5] It was an intergovernmental committee, or forum, which met and deliberated outside the formal framework of the European Economic Community (EEC). TREVI met biannually at the ministerial level, with more frequent meetings of the relevant government officials and law enforcement authorities in a number of working groups. While it initially focused on coordinating effective counter-terrorist responses among its members, it gradually began to consider wider cross-border policing and security issues. It continued to meet regularly until it was superseded by the Third Pillar arrangements under the Treaty of Maastricht.

The Schengen Area

13. In 1985, five of the then 10 EEC Member States, not including the UK or Ireland, signed the Schengen Agreement,[6] which provided for the gradual abolition of internal border controls and a common visa policy. The Agreement was supplemented by the Schengen Implementing Convention in 1990, which eventually led to the creation of a borderless Schengen Area in 1995.[7] The main purpose of the Convention was to provide for greater freedom from border controls of movements of goods, persons and services, alongside compensatory measures to enhance customs and police cooperation. It also contained provision for the pursuit of criminals across Member States' borders, cooperation on asylum and immigration, joint action against drug-trafficking and terrorism and the establishment of a computer database—the Schengen Information System (SIS)—for the exchange of information between law enforcement agencies. Until 1999, Schengen operated outside the EU Treaties, and the lack of democratic and judicial oversight was the subject of frequent criticism. It was formally incorporated into EU law by the Treaty of Amsterdam.

Treaty of Maastricht

14. Justice and home affairs cooperation first became part of the formal EU agenda with the entry into force of the Treaty of Maastricht in November 1993, which created the pillar system. The European Community (EC) became the First Pillar, and the Second and Third Pillars were the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA) respectively. Unlike the First Pillar, under which action generally required decisions of the Council on the basis of proposals from the Commission,

---

5 TREVI stands for *Terrorisme, Radicalisme, Extrémisme et Violence Internationale* but the name derived from its first meeting in Rome, which took place close to the Trevi Fountain.

6 Germany, France, Belgium, Luxembourg and the Netherlands

7 It now includes 26 European countries, including all of the EU Member States, except the UK and Ireland, and four non-EU countries: Iceland, Liechtenstein, Norway and Switzerland. Bulgaria, Romania and Cyprus have yet to be admitted as full members of the Schengen Area.

with the participation of the European Parliament and qualified majority voting (QMV) in the Council of Ministers, the Second and Third Pillars were "intergovernmental" in nature. Measures adopted within the Third Pillar required unanimity in the Council and the European Parliament had only a limited consultative role. The Commission's right to bring infringement actions against Member States for failure to fulfil their obligations under the Treaties, for example by incorrectly transposing legislation, and the jurisdiction of the European Court of Justice (ECJ), did not apply to the Second and Third Pillars.

Treaty of Amsterdam

15. With the entry into force of the Treaty of Amsterdam on 1 May 1999, the concept of an Area of Freedom, Security and Justice (AFSJ), covering all aspects of JHA, was born. One of the principal changes it introduced was the transfer of immigration and asylum measures, border controls and the areas of civil and family law, from the Third Pillar into the First Pillar (which became Title IV TEC). The Third Pillar was renamed Police and Judicial Cooperation in Criminal Matters, to reflect the change, becoming Title VI TEU. Thereafter, the Commission's enforcement powers and ECJ's jurisdiction applied to all Title IV TEC measures, broadly in line with the existing measures under the First Pillar. This was not the case with respect to the Third Pillar, which remained intergovernmental in nature, unless Member States made a declaration accepting the ECJ's jurisdiction (which a number of Member States did).

16. The UK and Ireland negotiated an opt-in arrangement in a Protocol which allowed them to control their level of participation in AFSJ measures (under the provisions transferred from the Third Pillar to the First).[8] Article 3 of the Protocol permitted the UK to choose, on a case-by-case basis, whether to opt in to measures proposed by the Commission under Title IV TEU within three months, by notifying the Council of its intention to participate. If it did not choose to opt in it was also entitled, under Article 4, to opt in at any time after its adoption by the Council (but was unable to renegotiate its terms at that stage) by notifying and securing the agreement of the Commission. The unanimity requirement[9] for the agreement of measures (Framework Decisions, Council Decisions and Conventions) under the Third Pillar obviated the need for any opt-in to be negotiated in this area; if the UK did not like a proposal, it could block it by voting against it.

17. The Schengen Protocol integrated the Schengen *acquis* (body of law) into the EU Treaty framework.[10] When this Protocol was agreed the UK and Ireland did not participate in any aspect of the Schengen *acquis*. Accordingly, Article 4 of the Protocol confirmed that both the UK and Ireland were not bound by the Schengen *acquis* but might at any time "request to take part in some or all of the provisions of the *acquis*", with the Council deciding such requests by unanimity. Article 5 set out provisions on "Schengen-building measures", which the UK and Ireland were also given the option of applying to the

8 Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice

9 Under unanimity, all Member States covered by the measure must be in agreement before a proposal can be adopted. Abstention does not prevent agreement being reached.

10 Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union

Council to participate in. Following the entry into force of the Treaty of Amsterdam, the Council approved a request from the UK to participate in some aspects of the Schengen *acquis* and a Decision was adopted in 2000, followed by an implementing Decision in 2004.[11] The UK now participates in the policing and criminal justice aspects of the Schengen *acquis*, but not the immigration aspects.

Treaty of Lisbon

18. The Treaty of Lisbon entered into force on 1 December 2009 and merged the First and Third Pillars. Title IV TEC and Title VI TEU became Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU), and almost all JHA matters are now dealt with by QMV, with the European Parliament enjoying equal rights with the Council in the Ordinary Legislative Procedure (formerly known as co-decision).[12] However, measures concerning operational police cooperation and the establishment of a European Public Prosecutor's Office (EPPO) are subject to a Special Legislative Procedure, which continues to require unanimity in Council, with the European Parliament being consulted in the first case[13] but having to consent in relation to an EPPO proposal.[14]

19. Under the old Title VI TEU the right to initiate proposals was shared by the Commission and the Member States (whereas the Commission had the sole right of initiative in the majority of other EU measures). As a result some Framework Decisions were initiated by Member States. The Treaty of Lisbon retained the shared right of initiative but required that at least a quarter of the Member States would have to initiate a proposal for it to be valid.

Opt-ins

20. The UK and Ireland negotiated a new Protocol in the Treaty of Lisbon (Protocol 21) on the position of the UK and Ireland in respect of the whole AFSJ under Title V TFEU, which extended the opt-in procedure to include proposals under what had been Third Pillar provisions. Since the adoption of post-Lisbon PCJ measures no longer requires unanimity, they cannot be blocked by the UK alone; but if the government of the day do not like them, they need not opt in to them.

Schengen opt-outs

21. In line with the new Protocol 21, the Schengen Protocol was amended to permit the UK (and Ireland) complete freedom to decide whether to participate in Schengen measures. Article 5(2) of the Protocol provides additional flexibility for the UK to decide not to participate in measures

---

11 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 (OJ L 131, 1 June 2000, p. 43) and 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 (OJ L 395, 31 December 2004, p. 70)

12 Under the Ordinary Legislative Procedure, both the European Parliament and the Council must be in agreement before a proposal can be adopted.

13 Article 87(3) TFEU

14 Article 86(1) TFEU

which build upon aspects of the Schengen *acquis* in which it already participates. In such cases, there is a presumption that the UK will participate, but the UK may notify the Council within three months that it does not wish to take part in the Schengen-building measure in question, by opting out of the requisite proposal.

Court of Justice of the European Union jurisdiction and Commission enforcement powers

22. Under the TFEU the CJEU will have the same jurisdiction in relation to all AFSJ (Title V) measures as it does for any other measure. This however is subject to a 5-year transitional provision—by virtue of Article 10 of Protocol 36—which expires on 30 November 2014. Until then, the powers of the CJEU in relation to Third Pillar measures adopted before the coming into force of the Treaty of Lisbon remain as under the former TEU, that is, so far as concerns the UK, it has no jurisdiction to make preliminary rulings. Article 10 also provides that the Commission cannot initiate infringement proceedings (under Article 258 TFEU) in relation to those measures.

Post-Lisbon police and criminal justice measures

23. The CJEU's jurisdiction and the Commission's enforcement powers have, however, automatically applied to new or amending PCJ measures, which have been adopted since the entry into force of the Treaty of Lisbon. To date the Government have opted into the majority of these PCJ measures—many of which replace pre-Lisbon Third Pillar measures.

The origins of Protocol 36

24. The circumstances surrounding the negotiation and agreement of Article 10, Protocol 36, as part of the Treaty of Lisbon remain obscure. What is clear is that the previous Government negotiated its inclusion in the draft Treaty of Lisbon during the second half of 2007[15] and that it was agreed by the other Member States.[16]

25. Following the rejection of the Constitutional Treaty by French and Dutch voters in referendums in 2005, the Member States negotiated the Treaty of Lisbon which, in contrast to the Constitutional Treaty, consisted of a series of amendments to the existing EU Treaties. Ahead of the June 2007 European Council, which was to agree to convene an Intergovernmental Conference to negotiate a new Treaty, the Government set out four conditions—its "red lines"—which any new Treaty would have to reflect fully. These included the protection of the UK's common law systems, and its police and judicial processes. A Command Paper, which the Government published the following month, set out their negotiating aims in more detail. This did not mention securing a block opt-out option as a negotiating

---

15 Gordon Brown MP became Prime Minister at the beginning of the period in question, on 27 June 2007, and Jacqui Smith MP was appointed Home Secretary on the following day.

16 During its ratification by the UK Parliament in 2008, by way of the European Union (Amendment) Bill, Protocol 36 attracted no substantive discussion in the House of Lords. In the House of Commons the then Shadow Chief Secretary to the Treasury introduced an amendment at the Committee Stage, on 29 January 2008, which would have required the Government to notify the Council of their decision to opt-out before the expiry of the transitional period. This amendment was ultimately withdrawn.

objective.[17] The Treaty was concluded under the Portuguese EU Presidency in Lisbon on 19 October 2007 by the Member States meeting as an Inter-governmental Conference. It was in the final stages of this meeting that agreement was reached for the UK to have the option of exercising a block opt-out from the pre-Lisbon PCJ measures.

26. At the time the Treaty of Lisbon was agreed there appeared to be an expectation that many of the PCJ measures subject to the opt-out decision would be replaced by post-Lisbon PCJ measures. Hugo Brady, from the Centre for European Reform (CER), noted this and referred to the negotiation of the opt-out as an "insurance policy" for the UK in this respect.[18] A Declaration was annexed to the Treaty of Lisbon, inviting the European Parliament, Council and Commission "to seek to adopt, in appropriate cases and as far as possible within the five-year period referred to in Article 10(3) of the Protocol on transitional provisions, legal acts amending or replacing" the police and criminal justice measures.[19]

27. In our report on the Treaty of Lisbon, we also anticipated that this would be the case, saying that

> "We would expect the Commission to introduce measures to convert some of the more significant Title VI instruments, such as the European Arrest Warrant, soon after the Treaty of Lisbon enters into force … It seems unlikely that the Commission will seek to convert all Title VI measures. We urge the Government to liaise closely with the Commission to ensure that measures which require redrafting or renegotiating are the subject of amendment measures before the end of the transitional period".[20]

28. The Minister for Immigration, Mark Harper MP, told us "Arguably, the way the previous Government negotiated that arrangement is not the best way, where we have to opt out of everything in order to opt back into the things we want to opt back into. A more sensible arrangement might have been to allow us to opt out of the things that we did not want to be in, but that is the way that it is set up".[21] The Lord Chancellor[22] echoed this point, saying that "it would have been much easier and much more straightforward if we had been able to deal with one issue at a time".[23]

29. Articles 10 (4) and (5) of Protocol 36 only apply to the UK. Ireland did not seek to have the option of opting out of the pre-Lisbon PCJ measures. Dr Gavin Barrett, an expert in JHA matters from University College Dublin, told us that the greater role that the Treaty of Lisbon envisaged for the CJEU and for the Commission regarding the former Third Pillar "did not sound the same alarm bells in Ireland, either politically or officially, that it might

---

17 FCO, *The Reform Treaty: The British Approach to the European Union Intergovernmental Conference*, July 2007, Cm 7174

18 Q 127

19 Declaration No. 50 concerning Article 10 of the Protocol on transitional provisions, TFEU

20 EU Committee, *The Treaty of Lisbon: an impact assessment* (10th Report of Session 2007–08, HL Paper 62), paragraphs 6.323 and 6.324

21 Q 269, oral evidence session on the EU's Global Approach to Migration and Mobility (GAMM), 31 October 2012

22 The minister's full title is Lord Chancellor and Secretary of State for Justice. For reasons of brevity we refer to 'the Lord Chancellor' throughout the report.

23 Q 306

have in the UK. The prospect of the involvement of both institutions has been regarded with some equanimity in Ireland".[24] Hugo Brady suggested that Ireland had not signed up to the opt-out in order to avoid the risk of uncertainty.[25] Denmark has its own Protocol to the Treaties, which governs its relationship with the EU in this area.[26] We discuss this further in Chapter 5.

A decision for the UK alone

30. None of our witnesses disputed the UK's right to exercise the opt-out. Jean-Claude Piris, the former Director General of the Council Legal Service,[27] emphasised that the decision was entirely at the discretion of the UK Government, without any need for the consent or consultation of the other Member States or the Commission.[28] The Government were also clear that the "UK would be exercising a Treaty right if we choose to opt out and seek to rejoin certain measures. The EU institutions and its Member States are all bound to respect the obligations and choices that flow from the Treaties".[29]

31. In the event that the Government were to choose not to exercise the block opt-out, and then seek to rejoin particular measures that would become subject to Commission infringement procedures and the CJEU's jurisdiction, it is the Government's view, with which we concur, that this would not require a referendum under the European Union Act 2011.[30]

32. **It is clear that it is the right of the United Kingdom to exercise the opt-out decision under Article 10, Protocol 36 to the Treaty of Lisbon. This right was recognised by the other Member States when they chose to ratify the Treaty of Lisbon.**

---

24 Q 249

25 Q 131

26 Protocol (No 22) on the position of Denmark

27 In this capacity Jean-Claude Piris was Legal Counsel to the European Council and the Council of Ministers.

28 Jean-Claude Piris

29 UK Government. Also see Q 300 (Home Secretary)

30 See HL Deb 15 October 2012 col 1309

CHAPTER 3: THE GOVERNMENT'S CONSULTATION OF PARLIAMENT AND STAKEHOLDERS REGARDING THE OPT-OUT DECISION

Statements regarding the possible exercise of the opt-out

33. The Conservative 2010 General Election manifesto sought a mandate to negotiate the return of "criminal justice" powers, among others, from the EU to the UK.[31] In contrast the Liberal Democrat's 2010 manifesto contained a pledge to "Keep Britain part of international crime-fighting measures such as the European Arrest Warrant, European Police Office (Europol), Eurojust, and the European Criminal Records Information System, while ensuring high standards of justice".[32] The Labour party manifesto made no reference to this matter.[33]

34. The first time the handling of the 2014 opt-out decision was brought to the attention of Parliament by the Government was on 20 January 2011, when the Minister for Europe, David Lidington MP, made a Written Ministerial Statement concerning the Government's decision to strengthen parliamentary scrutiny of EU business, including individual opt-in and Schengen opt-out decisions. Regarding the 2014 opt-out decision he stated that

> "Parliament should have the right to give its view on a decision of such importance. The Government therefore commit to a vote in both Houses of Parliament before they make a formal decision on whether they wish to opt-out. The Government will conduct further consultations on the arrangements for this vote, in particular with the European Scrutiny Committees, and the Commons and Lords Home Affairs and Justice Select Committees and a further announcement will be made in due course".[34]

35. On 21 December 2011, the Home Secretary sent a letter to the European Scrutiny Committee in the House of Commons and this Committee, which repeated these undertakings, and also provided—for the first time—a list of the approximately 130 PCJ measures that they considered would fall within the scope of the block opt-out. The list included 109 third pillar measures and 24 Schengen-building measures. We understand that this list was produced following discussion between the Government and the Council Secretariat. Also listed were the PCJ measures that the Government had opted in to post-Lisbon and which would repeal and replace, or amend, pre-Lisbon PCJ measures (and as a result fall outside the scope of the opt-out). The Home Secretary wrote to Lord Boswell of Aynho, the Chairman of this Committee, on 18 September and 15 October 2012, updating the list of measures and repeating the earlier undertakings.

36. By the time of the second letter, the Prime Minister had stated, during a media interview in Rio de Janeiro on 28 September 2012, that the opt-out

---

31 *Invitation to join the government of Britain*, Conservative Manifesto 2010

32 Liberal Democrat Manifesto 2010

33 *A future fair for all*, Labour Manifesto 2010

34 HC Deb 20 January 2011 col 51WS

decision had "to be done before the end of the year, and the opt-out is there. We'll be exercising that opt-out". Later that day the Deputy Prime Minister warned about the dangers of opting-out of measures such as the EAW and stated that "Any opt-out in this area is still under review and discussion. Our decision must follow the interests of national security, public safety and Britain's international reputation for leadership on cross-border security matters".[35]

37. On 9 October, Lord Boswell of Aynho, sent a letter to the Home Secretary expressing his dismay at the Prime Minister's announcement, as it appeared to cut across the Government's undertakings to consult both Houses before making an opt-out decision, and sought clarity from the Government about their official position on the matter.[36]

38. In a statement to the House of Commons on 15 October, the Home Secretary adopted a more nuanced position saying that the Government's "current thinking" was that the opt-out should be exercised and that it would be subject to a vote in both Houses; and undertaking (again) to consult a wide range of Committees in both Houses before reaching a definitive position. The Home Secretary later told us that this was an "agreed Coalition Government statement".[37]

39. On 23 January 2013 the Prime Minister delivered a major speech on Europe, in which he stated that the Government were "Launching a process to return some existing justice and home affairs powers".[38]

40. All these statements preceded any engagement of the consultation processes set out in the Minister for Europe and the Home Secretary's undertakings.

The Government's analysis of the EU police and criminal justice measures

41. On 1 February 2013 the Government told us that their analysis of each PCJ measure falling within the scope of the opt-out decision began "in earnest" in December 2011 when the initial list of measures was first made available to the Committee.[39] This analysis would seek to establish which of the measures was in the national interest, which would be informed by each measure's contribution to public safety and security, as well as its impact on civil liberties and rights.[40] However, they also stated that they would not be able to confirm when they expected to complete this analysis until discussions with "operational partners, EU institutions, Member States and other interested parties have taken place".[41]

42. The Home Secretary also told us that "The basis on which the Government indicated its current intention was an initial exercise in looking at the

---

35 The Guardian, *David Cameron and Nick Clegg at odds over European arrest warrant*, 28 September 2012

36 Letter from Lord Boswell of Aynho to the Home Secretary dated 9 October 2012. Contained in the volume of correspondence, which is available online.

37 Q 286

38 Prime Minister's speech, *Britain and Europe*, 23 January 2013

39 Letter from the Home Secretary and the Lord Chancellor to Lord Boswell of Aynho dated 1 February 2013. Contained in the volume of correspondence, which is available online.

40 UK Government

41 Letter from the Home Secretary and the Lord Chancellor to Lord Boswell of Aynho dated 1 February 2013. Contained in the volume of correspondence, which is available online.

measures and making an assessment of the benefits of the measures to the UK. That work continues in greater detail" and "this was not a decision that this Government suddenly came to".[42]

Consultation of Parliament

43. From the very beginning the Government have consistently emphasised the role that Parliament should play in helping them to reach a final decision on the opt-out. We also note that the Prime Minister emphasised the role of democratic accountability in his January 2013 speech, in which he called for a "bigger and more significant role for national parliaments" as "the true source of real democratic legitimacy and accountability in the EU".[43] However, the Government's stated good intentions have repeatedly been undermined by delay and the limited provision of information. This led the Committee to question the Government's commitment to engage effectively with Parliament about the opt-out decision, as well as undermining our ability to scrutinise this important and very complex matter. This has been illustrated by the frequent late receipt of correspondence from the Home Office and Ministry of Justice, in response to our questions about the opt-out decision; the late receipt of five Explanatory Memorandums (EMs) detailing all of the PCJ measures caught by the opt-out, which the Government promised to deposit with our Committee and the European Scrutiny Committee in the House of Commons between early January and mid-February, but by the stage that this report was adopted had not yet been made available;[44] and the late notification that officials would not be permitted to meet with the Committee.[45] No satisfactory explanation has ever been provided for each of these unfortunate developments but the Home Secretary apologised for the delayed provision of the EMs when she gave evidence on 13 February.[46] The absence so far of any list of measures that the Government would like to rejoin, were the opt-out to be exercised, is considered separately in Chapter 8.

44. We note that the European Scrutiny Committee in the House of Commons has voiced similar concerns.[47]

45. The Home Secretary and the Lord Chancellor did not agree that more prior consultation should have taken place ahead of the 15 October 2012 statement. The Home Secretary stressed that Parliament was now more fully consulted on European matters than under any previous Government and that "The final decision will be taken following reports that have been received and views that have been taken from a wide variety of organisations,

---

42 Q 284

43 Prime Minister's speech, *Britain and Europe*, 23 January 2013

44 These Explanatory Memorandums were originally requested from the Government in a joint letter, dated 22 November 2012, from the Chairs of the European Scrutiny Committee, the Home Affairs Committee and the Justice Committee in the House of Commons. A copy of the joint letter is available here: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmeuleg/798/798.pdf

45 See the letter from Lord Bowness and Lord Hannay of Chiswick to the Home Secretary and the Lord Chancellor dated 3 December 2012 and their response dated 14 December 2012. Contained in the volume of correspondence, which is available online. See also Q 179, which concerns the UK National Member of Eurojust.

46 Q 294

47 European Scrutiny Committee, *The 2014 block opt-out: engaging with Parliament* (Thirty-seventh Report of Session 2012–13, HC 798)

individuals and groupings within Parliament". The Lord Chancellor told us that, since the 15 October statement, the Government had "significantly accelerated, enhanced and deepened the nature of the discussions we have been having about these issues, having made an initial statement to Parliament to indicate a direction of travel" and that he would make no apology for adopting that approach.[48]

Consultation of the Devolved Administrations

46. Scotland and Northern Ireland are both separate legal jurisdictions within the UK, alongside that of England and Wales.[49] They each have distinct criminal justice systems.[50] We consider the possible impact of the opt-out decision on the UK's relationship with the Republic of Ireland in Chapter 9.

47. Kenny MacAskill MSP, the Cabinet Secretary for Justice in the Scottish Government, told us that

> "Given the potential implications for the efficient operation of justice in Scotland, I wrote to UK Ministers in April 2012 and again in August 2012, emphasising the need for effective dialogue and consultation before any decision on the opt-out was taken. I was disappointed, therefore, that no prior notification was received by Scottish Ministers ahead of the Home Secretary's statement on 15 October confirming the UK Government's preferred position".[51]

Another member of the Scottish Government, Frank Mulholland QC, the Lord Advocate, confirmed that he had not been consulted prior to the Home Secretary's statement either.[52]

48. David Ford MLA, the Minister of Justice in the Northern Ireland Executive, told us that he had received assurances from the Home Secretary and the Lord Chancellor that, in making their decision, the devolution settlements would be taken into account, together with the practical implications of all the options for all parts of the UK. While he welcomed these assurances he also told us that he remained concerned that "the potentially very significant effects on Northern Ireland may not be fully recognised in Whitehall" and that "It is vital that the decisions made are those in the best interests of all parts of the UK".[53]

49. It was subsequently confirmed that James Brokenshire MP, the Security Minister, met all of the above Ministers during January 2013.[54] The Lord Chancellor also confirmed that he had met David Ford MLA in early February 2013.[55]

---

48 QQ 277–278

49 Northern Ireland law is a common law system, which is similar to that of England and Wales but with distinct features. Scots law is a mixed system, containing both common law and civil law elements.

50 Policing and justice was devolved to the Scottish Parliament in 1999 but was not devolved to the Northern Ireland Assembly until April 2010. At the same time a Justice Department was established at Stormont and David Ford MLA, the leader of the Alliance Party, became the first Minister of Justice.

51 Letter from Kenny MacAskill MSP to Lord Boswell of Aynho dated 18 December 2012. Contained in the volume of evidence, which is available online.

52 Q 264

53 Letter from David Ford MLA to Lord Boswell of Ayhno dated 12 December 2012. Contained in the volume of evidence, which is available online.

54 Q 264

55 Q 276

50. Regular meetings of a Joint Ministerial Committee (JMC), which includes representatives of the UK Government, the Scottish Government, Northern Ireland Executive and Welsh Government, take place to discuss matters of common interest. We note that meetings of the Joint Ministerial Committee (Europe) took place on 11 June 2012 and 15 October 2012, the day of the Home Secretary's statement, but it is unclear whether the opt-out decision was discussed at either of these meetings.[56]

51. The Home Secretary told us that there were prior consultations at the official level with the Devolved Administrations, which had continued after the 15 October statement, with additional consultations at the ministerial level.[57]

Consultation of stakeholders

52. It is common for the Government to consult interested and relevant stakeholders about proposed policy developments, by undertaking formal consultations, and through informal meetings between relevant officials and stakeholders. With regard to any significant change in the law, we would expect the UK legal professions to be consulted. While the Bar Council of England and Wales and the Law Societies of England and Wales, Scotland and Northern Ireland called on the Government to conduct a full public consultation about the decision following the Prime Minister's remarks in Brazil, no such consultation took place.[58] The Bar Council and the Law Society of England and Wales told us that "before indicating any intention concerning the question of whether to exercise the opt-out, the Government should first have consulted publicly on the question, including on its potential practical and legal implications".[59] We understand that a meeting between Government officials and the Law Society subsequently took place on 30 January 2013 and with JUSTICE and Fair Trials International (FTI), regarding the EAW, in early February. We also understand that a meeting was to be held with the Bar Council.[60]

53. Keir Starmer QC, the Director of Public Prosecutions (DPP), told us that his office was not formally consulted before the 15 October statement but that he had been given a "proper opportunity" to make his views known subsequently.[61]

54. The Home Secretary told us on 13 February 2013

> "The Justice Secretary and I held a meeting last month with representatives of ACPO, SOCA, the Metropolitan Police, HMRC, the National Crime Agency, which we are establishing, and the Security Service, and this month we have met with the Director of Public Prosecutions and the Serious Fraud Office. There are bilateral

---

56 JMC (Europe) meets on a quarterly basis to discuss forthcoming meetings of the European Council and European issues affecting the UK and the Devolved Administrations. JMC (Europe) is normally chaired by the Foreign Secretary or the Minister for Europe.

57 Q 276. Letter from the Home Secretary and the Lord Chancellor to Lord Boswell of Ayhno dated 12 March 2013. Contained in the volume of correspondence, which is available online.

58 On 5 October 2012, the three UK Law Societies jointly, and the Bar Council separately, issued press releases calling for a full and open consultation by the Government. See also Q 49.

59 Bar Council and LSEW supplementary evidence

60 Q 119. The Bar Council stated that it had made a number of informal attempts to engage with officials on the opt-out decision from 2011 onwards but that these attempts had met with limited success.

61 Q 214

> discussions taking place as well with other Ministers, and officials have been meeting with a variety of other interested parties, such as the Law Society, Open Europe and the Centre for European Legal Studies, so we are trying to cast our net wide in terms of talking to and hearing from people about these issues".[62]

55. **Given the significant implications of the opt-out decision we believe that the Government should have conducted more detailed analysis of this matter, including that of each measure affected by the opt-out, at a much earlier stage. It is regrettable that very little work appeared to have been completed in this respect by the time of the Home Secretary's announcement on 15 October 2012.**

56. **We regret that the Government have not complied with their own undertakings to engage effectively with Parliament regarding the opt-out decision. While understanding the Lord Chancellor's concern that Parliament should first have been informed of the Government's inclination to opt out, before they entered into detailed discussions with the Devolved Administrations and stakeholders, we still consider that it would have been wise to have sought the views of the Devolved Administrations and other stakeholders at a much earlier stage before reaching even a provisional decision on the merits of opting out.**

Review of the Balance of Competences between the UK and the EU

57. On 12 July 2012 the Foreign Secretary announced that the Government were carrying out a 'Review of the Balance of Competences between the UK and the EU', including how each EU competence was used, and what it meant for the UK and the national interest.[63] The Review will involve Government departments conducting subject-by-subject "audits" of EU competences through the consultation of stakeholders and the relevant Parliamentary committees, before producing a report on each policy area. It is intended that all of these reports will have been produced by the end of 2014. The review of the EU's police and criminal justice competence has been scheduled to take place between spring and autumn in 2014; that is to say after the 31 May 2014 deadline for exercising the opt-out.

58. We asked the Government how the opt-out decision related to the Balance of Competences Review. They replied that

> "The 2014 opt-out is a separate decision that is provided for under the EU Treaties and one which we are obliged to make; the Balance of Competence review is a commitment in the Coalition Programme for Government. The review aims to deepen public understanding of the nature of our EU membership and provide a constructive and serious contribution to the wider European debate about modernising, reforming and improving the EU. As such, the review must be considered separately from the 2014 decision".[64]

---

62 Q 276

63 FCO, *Review of the Balance of Competences between the UK and the European Union*, Cm 8415 (July 2012)

64 Letter from the Home Secretary and the Lord Chancellor to Lord Boswell of Aynho dated 14 December 2012. Contained in the volume of correspondence, which is available online.

59. **It is unfortunate that the Government have decided to commence their Balance of Competences review of the EU's police and criminal justice competence in spring 2014, at which point the opt-out decision is likely to have been made. In any event, we expect the Government to take account of this report during their consideration of that particular range of competences.**

The UK's future role in the EU

60. When we asked the Government what the wider implications would be for the UK's relations with the EU if the opt-out were to be exercised they replied: "The Government has been working hard to make it clear to other Member States and EU partners that this is a one-off decision granted by the Treaty of Lisbon and as such can be considered separate from other areas of EU cooperation. We have been clear that this decision is not about the UK disengaging from Europe and that the Government remains committed to playing a leading role in the EU. We continue to engage with Member States and the EU institutions to make these points clear and ensure that our wider relations with our EU partners are not affected".[65] The Home Secretary later repeated this point and also told us that she had received no evidence to suggest that the opt-out was having any impact on other areas of EU cooperation, including in the JHA area.[66]

61. **We believe that the nature and extent of the United Kingdom's continued involvement in EU policing and justice cooperation should be considered on their own merits, and should not become obscured by the wider debate about the United Kingdom's relationship with the EU.**

---

65 UK Government

66 Q 300

CHAPTER 4: THE COURT OF JUSTICE OF THE EUROPEAN UNION, THE RELATIONSHIP BETWEEN UK AND EU LAW, AND THE COMMISSION

Background

62. The UK is currently bound, as a matter of law, by all of the pre-Lisbon PCJ measures, which were agreed by unanimity in Council. If the Government were not to exercise the opt-out and remained bound by those measures, two changes would occur on 1 December 2014: the measures would become subject to the jurisdiction of the CJEU, including its power to give preliminary rulings regarding the interpretation of EU law in cases referred to it by national courts and tribunals, and the Commission would be able to initiate infringement proceedings against Member States for not implementing particular PCJ measures or for doing so incorrectly. This will be the position in all other Member States from 1 December 2014.

63. Under the Treaty of Amsterdam the CJEU only had jurisdiction to give preliminary rulings on the validity and interpretation of pre-Lisbon PCJ measures in response to references from a national court if the Member State concerned had made a declaration accepting the CJEU's jurisdiction. Eleven Member States made such a declaration in 1999, but the UK did not, alongside France, Ireland and Denmark, among others.[67] In 1999 the CJEU also acquired jurisdiction over the remaining JHA areas—asylum, immigration and civil law—with respect to all the Member States. This will continue to be the case whether or not the opt-out is exercised.

64. In their written evidence the CJEU confirmed that the majority of the CJEU's 41 judgments concerning PCJ measures so far were concerned with three measures—the Framework Decision on the standing of victims in criminal proceedings, the EAW Framework Decision and the Schengen Implementing Convention (regarding the principle of *ne bis in idem*).[68]

The Court of Justice of the European Union and the European Court of Human Rights

65. The CJEU is charged with ensuring that "in the interpretation and application of the Treaties, the law is observed".[69] The CJEU has jurisdiction notably to hear: (i) infringement actions against Member States by the Commission or other Member States for non-compliance with EU law; (ii) preliminary references—providing interpretative judgments at the request of national courts and tribunals in order to help them decide a case with an EU law dimension; (iii) reviewing the legality of acts by the EU institutions, including actions for annulment of EU legislation or to require an institution to act, brought by a Member State or by one of the EU institutions.

---

67 Since then, eight other Member States have accepted CJEU jurisdiction.

68 CJEU. This principle restricts the possibility of a defendant being prosecuted repeatedly on the basis of the same offence, act or facts.

69 Article 19(1) TEU.

Alongside Member States' courts and tribunals, it ensures the uniform application and interpretation of EU law.[70]

66. It is important to emphasise that the CJEU only has jurisdiction over matters of EU law. The Bar Council of England and Wales stressed that the CJEU does not deliver final rulings on cases before national courts, either in fact or in law, but merely interprets the applicable EU law.[71] Similarly, Jodie Blackstock, from JUSTICE, noted that, when a national court makes preliminary references to the CJEU, the CJEU limits itself to interpreting EU law and does not interfere with its application in the Member State concerned.[72] The Lord Advocate made a similar point.[73]

67. While the CJEU in Luxembourg and the European Court of Human Rights (ECtHR) in Strasbourg are regularly confused by journalists, politicians and the public alike, they are distinct entities with different roles and functions. The ECtHR is an international court established by the Council of Europe—a separate intergovernmental organisation of 47 member states—and is charged with hearing applications alleging that a contracting state has breached the provisions in the European Convention on Human Rights (ECHR).[74] Applications can be lodged by individuals, groups of individuals or other contracting states, and, besides judgments, the ECtHR can also issue advisory opinions. There are connections between the EU and the Council of Europe. All the Member States of the EU are also members of the Council of Europe and are parties to the ECHR, which the ECtHR upholds. Fundamental rights as guaranteed by the ECHR constitute part of the "general principles" of EU law and, following changes introduced by the Treaty of Lisbon, the EU is committed to accede to the ECHR in its own right.

Other international courts with jurisdiction over the UK

68. The UK is also subject to the jurisdiction of a number of other international courts, including the International Court of Justice; the International Criminal Court; the International Tribunal for the Law of the Sea; the World Trade Organisation Dispute Settlement Body; and the Court of Justice of the European Free Trade Association States.

Democratic accountability and the rule of law

69. Open Europe has stated that EU cooperation on PCJ matters, including the role of the CJEU, has negative implications for the UK's "democratic control" of these matters.[75] The Fresh Start Project has also argued that the UK should retain "national democratic accountability over such a vital area

---

70 The CJEU is split into three tiers: the upper tier is the Court of Justice (CJ) which was formerly known as the European Court of Justice (ECJ); beneath the CJ is the General Court (GC) which was formerly known as the Court of First Instance (CFI); and the third tier consists of a specialised court, the Civil Service Tribunal (CST).

71 Bar Council

72 JUSTICE

73 Q 268

74 The judges of the ECtHR are elected by the Parliamentary Assembly of the Council of Europe (PACE) by a majority of the votes cast from lists of three candidates nominated by each member state.

75 Open Europe, *An Unavoidable Choice* (by Stephen Booth, Christopher Howarth and Vincenzo Scarpetta)

of policy and law-making".[76] However, Justice Across Borders considered these arguments to be misrepresentations as "Democracy is underpinned by the rule of law. Independent courts uphold the rule of law and are not directly accountable to Parliament under any system".[77] The Centre for European Legal Studies (CELS) also criticised the suggestion that, unlike the UK's own courts, the CJEU was not democratically accountable, saying that "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".[78]

70. A number of witnesses emphasised the role of the CJEU in upholding the rule of law. James Wolffe QC, from the Faculty of Advocates, told us that its jurisdiction over EU law was a "necessary part of the rule of law in Europe"[79] and Dr Gavin Barrett stated that "Very serious cooperation is going on in the police and criminal law field at European level, and it is appropriate to have judicial control over that. It is not appropriate to have that level of power without a corresponding increase of protection of the individual, provided in part by the courts".[80] The LibDem UK MEPs remarked that "The jurisdiction of the CJEU should not be viewed as unacceptable meddling in our legal system, but as an opportunity to ensure that the rule of law triumphs over political backsliding or inept administration in other Member States".[81]

71. **As many of the police and criminal justice measures engage the fundamental rights of EU citizens, including UK nationals travelling or living in other Member States, we believe that the CJEU has an important role to play, alongside Member States' domestic courts, in safeguarding these rights and upholding the rule of law.**

The UK's common law systems

72. The beginning of Title V TFEU states that "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States".[82] Despite this, concerns have been raised that the UK's common law systems are under threat from the development of EU law and any extension of the CJEU's jurisdiction and the Commission's enforcement powers.

73. UKIP's view was that EU PCJ measures had "mainly failed to achieve any legitimate purposes, but instead has placed our own legal system into a situation of a constitutional crisis, with sovereignty, rule of law, and our most fundamental liberties all in jeopardy".[83] Open Europe, Dominic Raab MP

---

76 Fresh Start Project, *Manifesto for Change*

77 Justice Across Borders

78 CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos)

79 Q 50

80 Q 263

81 LibDem UK MEPs

82 Article 67(1) TFEU

83 UKIP

and the Fresh Start Project have also noted the distinctiveness of the UK's common law systems, from civil or continental legal systems, and the need for their preservation.[84] The Lord Chancellor emphasised the distinctive nature of the UK common law systems and stressed that the Government had to be very careful before it ceded sovereignty over those systems, which may unexpectedly impinge or erode some of their principles while also effectively making the CJEU the supreme court in the UK with the ability to evolve its jurisprudence accordingly.[85] However, he made it clear that he was "not accusing the European Court of trying to subvert the British system of justice in the common law".[86]

74. Many of our other witnesses told us that they did not have any such concerns. The Law Society of England and Wales (LSEW), the Law Society of Scotland (LSS), the Bar Council of England and Wales, the Faculty of Advocates, the Lord Advocate, Hugo Brady and Jago Russell from FTI told us that they were not aware of any negative implications for either English and Welsh or Scots law.[87] The CELS and Jeremy Hill, from Justice Across Borders, agreed that the PCJ measures did not pose a threat to the common law, instead suggesting that "if anything, they involve cultural transfers in the other direction".[88] Dr Maria O'Neill, from University of Abertay Dundee, told us that interaction between EU and common law is irrelevant to the provisions on cross border law enforcement[89] and the DPP stated that bodies such as Eurojust worked well as an "interface" between common law and civil law jurisdictions.[90]

75. The LibDem UK MEPs told us that, in the context of the European Parliament, the UK common law systems were usually accommodated because of a high regard for the UK legal system.[91] Baroness Sarah Ludford MEP, a member of the European Parliament's Civil Liberties, Justice and Home Affairs (LIBE) Committee, did not accept that there was a threat to the UK legal systems from EU cooperation, saying that it was not right to generalise all continental systems as being of one type and all common law systems of another. She also stated that "the point of European co-operation is to make those legal, policing and law enforcement systems talk to each other, not to make things uniform … I always stress that the word "harmony" means to sing together; it does not mean to have one voice".[92] Another member of the LIBE Committee, Claude Moraes MEP, stressed that other Member States also had their own distinctive legal traditions,[93] while Klaus-Heiner Lehne MEP, the Chair of the European Parliament's Legal Affairs (JURI) Committee, stated that his Committee had a lot of

---

84 Fresh Start Project, *Manifesto for Change*; Open Europe, *An Unavoidable Choice* (by Stephen Booth, Christopher Howarth and Vincenzo Scarpetta); Q 87

85 Q 284, Q 289

86 Q 307

87 LSEW, Q 51, Q 111, Q 116, Q 269

88 CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos); Q 33, Q 35

89 Dr Maria O'Neill

90 Q 210

91 LibDem UK MEPs

92 Q 166

93 Q 170

respect for different national traditions and were not conscious of any EU proposals or jurisdiction that may interfere with these.[94]

76. **Each Member State has a distinct legal system. The United Kingdom has an essentially common law system, including within it three distinct jurisdictions—England and Wales, Scotland and Northern Ireland. The overwhelming weight of evidence suggests that none of the pre-Lisbon police and criminal justice measures undermines the United Kingdom's common law systems in any way and would not do so if they became justiciable in the CJEU.**

A pan-European criminal law code?

77. The Fresh Start Project has stated that the PCJ measures are "widely regarded as stepping stones towards a pan-European criminal code, decided by qualified majority voting, overseen by the Commission and enforced by the ECJ and a European Public Prosecutor".[95] Open Europe's view is that the CJEU has a history of ruling in favour of "ever closer union" and therefore the UK would be taking a gamble if it chose to cede more sovereignty to the CJEU.[96] Dominic Raab MP used similar language, referring to the "Commission's stated ambition of developing a uniform pan-EU criminal code" and considering the opt-out decision to be an "important historic juncture" in this context.[97] The Lord Chancellor emphasised that while some PCJ measures were about international crime fighting, others concerned "judicial harmonisation", which were the "building blocks of a European justice system".[98] Martin Howe QC told us that "the only serious argument for staying in is if you believe it is in our national interest to participate in the creation of a super-state with an integrated criminal law".[99]

78. Professor John Spencer, from the CELS, dismissed the notion of a pan-European criminal law code as a "Euro-myth", but said that "Even if there were such a plan, there is nothing in any of these … measures that contribute towards it; quite the opposite, a large body of them are mutual recognition measures designed to try to enable the Member States' diverse legal systems to continue to work co-operatively while maintaining their diversity". He also stated that the idea of mutual recognition "was basically a British invention put forward to preclude the case for having any kind of pan-European criminal code".[100] Justice Across Borders, Helen Malcolm QC, from the Bar Council, and Mike Kennedy, a former President of Eurojust and former Chief Operating Officer at the Crown Prosecution Service (CPS), were also sceptical about any moves in this direction[101] and JUSTICE remarked that, if there were, then the UK could simply decide not to opt-in under Protocol 21.[102] Klaus-Heiner Lehne MEP stressed that no such proposals had been

---

94 Q 174

95 Fresh Start Project, *Manifesto for Change*

96 Open Europe, *An Unavoidable Choice* (by Stephen Booth, Christopher Howarth and Vincenzo Scarpetta)

97 Open Europe, *Cooperation not Control* (by Dominic Raab MP); Q 87

98 Q 284

99 Q 1, Q 4. Also see Martin Howe QC

100 Q 34. Also see CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos)

101 Justice Across Borders, Q 47, Q 64, Q 243

102 JUSTICE, Q 116

suggested by the Commission, who had instead adopted a "very careful approach to criminal law" and that there was "no chance" of a majority of Member States supporting something of this nature, nor of MEPs in the European Parliament.[103]

79. **We consider the stated concerns about the possible development of a pan-EU criminal code to be misplaced. There is at present no evidence that the Commission has any intention of developing such a code and even were it minded to do so, the United Kingdom would not be compelled to participate in such a venture thanks to its right under Protocol 21 to the Treaties not to opt in to proposals in this area.**

"Judicial activism" and "unexpected judgments"

80. A number of witnesses made reference to the CJEU's "judicial activism" and the problems that could be caused by its "unexpected judgments".

81. UKIP stated that "The significance of subjection to the jurisdiction of European Court of Justice must not be underestimated. [The] ECJ is a 'political' court of very poor judicial quality, and it should be expected to use its new powers to actively promote the EU-integrationist constitutional agenda, rather than uphold the rule of law or do justice in individual cases" and that it "often does not keep its judgement within the limits of the question referred by the national court, but seeks to intrude into the national court's area of competence. For example, rather than simply resolving the 'EU law' question, ECJ would seek to re-write the national court's findings of fact".[104]

82. Stephen Booth, from Open Europe, told us that the CJEU had made rulings "that national Ministers had no idea or anticipation of that have radically changed the nature of secondary legislation at the EU level, not necessarily in this field but in other fields as well" and that the risks presented by the CJEU's jurisdiction outweighed the benefits of not opting-out.[105] Martin Howe QC made a similar point and also told us that, if the Government did not opt-out, "then these practical measures will be interpreted by a court that has avowedly said that it will interpret all measures under the Treaties in the light of the overall objective of furthering European unity". He also stated that CJEU judges were, by and large, "integrationist enthusiasts".[106] However, he agreed that the CJEU was capable of making judgments that respected the autonomy of national systems and perhaps even improve the operation of PCJ measures, on occasion.[107] Timothy Kirkhope MEP remarked that all EU institutions had ambitions to extend their competence, including the CJEU,[108] and the Lord Chancellor made this point with regard to international courts more generally.[109]

---

[103] Q 178

[104] UKIP. Also see UKIP supplementary evidence (letter to the Committee dated 6 March 2013)

[105] Open Europe, *An Unavoidable Choice* (by Stephen Booth, Christopher Howarth and Vincenzo Scarpetta); Q 86, QQ 93–94, Q 106

[106] Martin Howe QC, Q 1, Q 4, Q 19, Q 20

[107] Q 18

[108] Q 171

[109] Q 289

83. The Lord Chancellor went on to tell us that "The courts are there to take decisions independently of the Executive; sometimes I may find them infuriating. I may sometimes disagree if I am directly involved in it and regret a judgment … if I do not like the decision the court takes I should change the law as a legislator, I should not attack the court. However, in the case of the international courts we do not have that same flexibility".[110] Martin Howe QC made a similar point[111] and Stephen Booth considered that "In such a sensitive area … the UK has potentially set itself up for unintended and unexpected consequences, which … are very difficult to amend once they are in EU law".[112]

84. Professor Steve Peers told us "by and large if you look at that body of case law, there is no evidence of judicial activism". He considered that, on the whole, the CJEU had been "relatively deferential to Member States, particularly as regards national criminal procedure and the Framework Decision on crime victims" with several recent judgments stating explicitly that the EU measure could not be interpreted "to undercut the fundamental elements of the national criminal justice systems of Member States". He and the CELS did not accept that the CJEU had federalist ambitions.[113] FTI considered that there is "little evidence" to suggest that the CJEU is judicially activist or that its judgments undermined the UK common law systems.[114] The CER has stated that the Government and other critics of the CJEU had not yet articulated any precise threats posed by the extension of its jurisdiction to the UK legal system and that there was "no evidence to back up the claim that [it] would be inherently bad for Britain".[115] Jodie Blackstock welcomed the potential role of the CJEU in improving justice rather than being expansionist.[116] Jeremy Hill considered that the CJEU's jurisprudential record was "sound" and could not be described as "wayward or activist".[117] Professor Anagnostopoulos, from the Council of Bars and Law Societies of Europe (CCBE), told us that they were optimistic rather than critical of CJEU judgments and had not detected any evidence of judicial activism.[118] The LSEW remarked that unexpected judgments were an "inevitable feature of all legal systems where courts have a role in interpreting legislation" and that uncertainty was unlikely to be avoided by exercising the opt-out, which would generate greater complexities instead.[119] The Lord Advocate had no concerns about the role of the CJEU in relation to Scots law.

85. The Lord Advocate also remarked that the recent *Radu* judgment[120] could have adopted an expansionist approach but did not.[121] Helen Malcolm QC

---

110 Q 288

111 Q 1

112 Q 94

113 Q 33, Q 36

114 FTI

115 CER, *Britain's 2014 justice opt-out: Why it bodes ill for Cameron's EU strategy* (by Hugo Brady)

116 QQ 117–118

117 Q 65. Also see Q 175 (Klaus-Heiner Lehne MEP)

118 Q 151. Also see Q 50 (Evanna Fruithoff, Bar Council)

119 LSEW

120 Case C-396/11 *Radu*. This case is considered in more detail in Chapter 6.

121 Q 268. Baroness Ludford MEP made the same point-Q 170. Also see Bar Council and LSEW supplementary evidence

echoed this point.[122] The Lord Chancellor did not expect the CJEU to make an expansionist judgment in every instance but he emphasised that it "definitely does happen"; having seen this being demonstrated very clearly during his time as Employment Minister.[123]

The judgments of the Court of Justice of the European Union

86. A number of witnesses cited particular CJEU judgments to support their arguments about the intentions of the CJEU. A summary of some of these judgments, including their citations, is provided in Appendix 5.

87. The Government, Martin Howe QC, Open Europe, Dominic Raab MP and UKIP have all cited judgments in support of their view that the CJEU undermined UK law, but only one of these cases—*Pupino*—concerned a pre-Lisbon PCJ measure. Open Europe cited the *Metock* and *Pupino* judgments as examples of the CJEU's judicial activism.[124] The Home Secretary cited the *Metock* judgment, which concerned free movement, as a reason why the Government were wary of accepting the CJEU's jurisdiction; stating that this unexpected ruling had led to an increase in sham marriages.[125] Martin Howe QC was particularly critical of the CJEU's extension of the EU "doctrine of conforming interpretation" to Framework Decisions in *Pupino* because while the UK "presumption of conformity" did not override the wishes of Parliament the former EU doctrine often would.[126] The Government also referred to the *Pupino* case but did not suggest that they disagreed with the judgment.[127] Martin Howe QC referred to the *Association Belge des Consommateurs Test-Achats* judgment, in which the CJEU had struck down the derogation in the Gender Directive regarding insurance companies on the basis that it was non-compliant with the Charter of Fundamental Rights.[128] Stephen Booth also referred to the insurance case and Open Europe has referred to the *SiMAP* and *Jaeger* judgments concerning the Working Time Directive, which they considered had created significant burdens on the UK.[129]

88. FTI considered *Metock* to be a positive judgment,[130] while the LSEW and the Bar Council stated that it reflected an "orthodox and entirely foreseeable view of EU law", which expressly recognised the right of Member States to protect themselves from the conferral of rights by fraudulent means, including by sham marriages, and that there was no evidence of the CJEU

---

122 Q 151

123 QQ 288–289

124 Open Europe, *An Unavoidable Choice* (by Stephen Booth, Christopher Howarth and Vincenzo Scarpetta); Open Europe, *Cooperation Not Control* (by Dominic Raab MP); UK Government, Martin Howe QC, UKIP

125 Q 285

126 Martin Howe QC, Q 18, Q 20. He also noted that the UKSC *Assange* case had overruled an earlier ruling by the House of Lords, which had applied the *Pupino* ruling to UK law with respect to pre-Lisbon PCJ measures to which the UK is a party, so that now only the lesser doctrine of the presumption of conformity with international obligations applies.

127 UK Government

128 Martin Howe QC, Q 5

129 Open Europe, *An Unavoidable Choice* (by Stephen Booth, Christopher Howarth and Vincenzo Scarpetta); Q 94. Case C-303/98 *Sindicato de Medicos de Asistencia Publica (SiMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* and Case C-151/02 *Landeshauptsadt Kiel v Norbert Jaeger*

130 FTI

attempting to interfere in domestic law.[131] With regard to the *Pupino* judgment the LibDem UK MEPs stated that it was "hardly surprising or shocking" and remarked that the Government could not have been too concerned about it as they had decided to opt-in to the post-Lisbon PCJ Directive that replaced it.[132] Professor Anagnostopoulos agreed, saying that the CCBE did not consider *Pupino* to have adopted a "subversive approach".[133] With regard to Martin Howe QC's point about judicial interpretation, the LSEW and the Bar Council considered that the two doctrines to which he referred produced a similar result.[134] The LibDem UK MEPs, FTI, the Bar Council and JUSTICE also cited other CJEU judgments concerning PCJ measures, including *Pupino*, as having regularly deferred to the autonomy of national systems. These included *Gueye and Sanchez*; X; *Giovanardi*; *Advocaten voor de Wereld*; *Wolzenburg*; and *Radu*.[135]

89. **We have considered the CJEU judgments concerning pre-Lisbon police and criminal justice measures and we can discern no convincing evidence that the CJEU has been either judicially activist or that its rulings set out to undermine the autonomy of Member States' criminal justice systems.**

90. **We do not consider the Government's concerns about unexpected judgments being made by the CJEU to be a reasonable or substantive reason for rejecting the CJEU's jurisdiction in relation to the pre-Lisbon PCJ measures. All courts, including the UK Supreme Court, can make unexpected judgments which are not necessarily favourable to the executive. This is an inevitable consequence of upholding the rule of law. However, we do accept the Lord Chancellor's point that in the case of decisions of international courts, there is not the same flexibility to legislate to overturn such decisions as there is within our domestic system.**

The drafting and application of the police and criminal justice measures

91. The Government told us that the "vast majority" of pre-Lisbon PCJ measures were not drafted with CJEU jurisdiction in mind and had often been agreed at the "lowest common denominator" in order to secure unanimity. As a result, much of the drafting was "not of a high standard and may be open to expansive interpretation by the ECJ". Their concerns were also compounded by the fact that the CJEU had ruled "in unexpected and unhelpful ways from a UK perspective".[136] Stephen Booth made the same point.[137] The Lord Chancellor elaborated, saying "They are not always necessarily the most perfect legal instruments. If they are passed over to the jurisdiction of the European Court—which has a remit to encourage and support European integration—then I would expect in a number of cases the jurisprudence to evolve in a way that goes beyond the detail of the original

---

131 Bar Council and LSEW supplementary evidence

132 LibDem UK MEPs. Also see CER, *Cameron's European 'own goal'* (by Hugo Brady)

133 Q 151

134 Bar Council and LSEW supplementary evidence

135 FTI, LibDem UK MEPs, JUSTICE, Bar Council

136 UK Government. Also see Q 291 (Home Secretary)

137 Q 96

measures".[138] He cited the pre-Lisbon Framework Decision on the standing of victims as an example of a measure that could have caused problems in this regard. However, he stated that these issues had now been clarified, which was why the Government had decided to opt-in to the post-Lisbon Directive, which had replaced that Framework Decision.[139]

92. Jeremy Hill disagreed, stating that those drafting the pre-Lisbon PCJ measures "were conscious that they were legal texts and were focused on the wording".[140] He also stated that, in general, EU measures were commonly drafted in more general terms than domestic legislation so the CJEU was often faced with the challenge of how to interpret provisions that may not always be entirely clear in that context, which they considered it had managed to do very well.[141] Jodie Blackstock agreed, adding that the Council and Commission Legal Services were always consulted before a measure was adopted.[142]

93. Many of our witnesses welcomed the prospect of the CJEU's jurisdiction and the Commission's enforcement powers as potentially bringing significant advantages in terms of ensuring the consistent application and interpretation of PCJ measures, including national courts being allowed to make preliminary references.[143] FTI made reference to a decision of the UK Supreme Court in which Baroness Hale of Richmond commented that the inability of the court to refer a question to the CJEU made it difficult to interpret unclear points of EU law.[144] They also stressed the CJEU's role in ensuring that measures were applied in conformity with basic fair trial standards.[145] Open Europe acknowledged these benefits, in theory, but stressed that they had to be weighed against the potential costs, including loss of national sovereignty and control.[146] The COPFS said that even if the UK was not subject to the CJEU in certain areas of PCJ cooperation it would be "unduly optimistic" to suppose that the opt-out would insulate UK court decisions from being influenced by CJEU judgments alongside other foreign and international jurisprudence.[147]

94. We considered this point in our report on the Lisbon Treaty and concluded that "The increase in the jurisdiction of the ECJ is a significant development. It replaces the complex existing regime of jurisdiction with a clear and uniform rule and is likely to increase consistency and legal certainty in the application of EU law".[148]

---

138 Q 288

139 Q 284

140 Q 65. Jeremy Hill was the JHA Counsellor and Legal Adviser in the UK Permanent Representation (UKRep) in Brussels between 1995 and 1998, when he took part in negotiations on the early pre-Lisbon JHA measures.

141 Q 65

142 Q 118

143 Justice Across Borders, COPFS (and supplementary evidence), Bar Council, JUSTICE, FTI, LibDem UK MEPs, LSEW, LSS, Q 65, Q 113, Q 117, Q 263, Q 268

144 FTI. Also see *Assange v The Swedish Prosecution Authority*, [2012] UKSC 22, dissenting judgment of Lady Hale, paragraphs 179 and 185

145 FTI. Also see JUSTICE

146 Open Europe, *An Unavoidable Choice* (by Stephen Booth, Christopher Howarth and Vincenzo Scarpetta)

147 COPFS

148 EU Committee, *The Treaty of Lisbon: An impact assessment* (10th Report of Session 2007–2008, HL Paper 62), paragraph 6.88

95. The Government are concerned about submitting the pre-Lisbon measures to the CJEU's jurisdiction apparently on the ground that these measures were not prepared and adopted with the CJEU's jurisdiction in mind. It is difficult to draw general conclusions from the detailed drafting of individual measures but we note that 19 Member States had by 2010 accepted the jurisdiction of the CJEU.

96. **We believe that the ability of courts in the United Kingdom to make preliminary references to the CJEU should help to promote the consistent application and interpretation of police and criminal justice measures both in the United Kingdom and across the EU.**

Concerns about caseload volume and delays

97. A number of our witnesses expressed concerns about the impact of the extension of the CJEU's jurisdiction, including the facility for national courts to make preliminary references, on its workload and the possible delays that may be caused as a result. We have considered the CJEU's workload in a previous report[149] and it will also be the subject of a forthcoming follow-up report.

98. UKIP expressed concerns about possible delays.[150] JUSTICE also acknowledged capacity and logistical issues but did not consider this to be a good reason for exercising the opt-out.[151] The Bar Council, Justice Across Borders and Professor Anagnostopoulos also had concerns about delays but believed that these issues were either already being addressed or would be in the near future.[152]

99. In order for cases to be dealt with quickly in situations where national courts make a request to the CJEU for a preliminary reference, where an individual is held in custody, a fast track preliminary ruling procedure was introduced prior to the Treaty of Lisbon.[153] Martin Howe QC considered that the availability of preliminary rulings to UK courts would result in "very significant delays" notwithstanding the fast track procedure, which he stated was rarely used.[154] The Bar Council, the Faculty of Advocates and the LSEW all referred to the existence of the fast track procedure as a mitigating factor in this respect.[155] The CELS stated that there was no risk of serious delay due to the existence of this facility.[156]

100. Professor Peers also stressed that, despite the fact that many of the largest Member States had already accepted the CJEU's jurisdiction, the volume of cases received each year concerning PCJ measures was low and that there

---

149 EU Committee, *The Workload of the Court of Justice of the European Union* (14th Report of Session 2010–12, HL Paper 128)

150 UKIP

151 JUSTICE

152 Bar Council, Justice Across Borders, Q 152

153 Used for the first time in the case of C-195/08 *Inga Rinau* (AFSJ) [2009] 2 WLR 972. Following the French acronym for *Procédure Préjudicielle d'Urgence* this is often referred to in the evidence as the PPU system. It is now available under Article 267 TFEU

154 Q 16. Also see Martin Howe QC

155 Faculty of Advocates, LSEW, Q 50, Q 65, Q 152

156 Q 36

was no reason to think that this would increase suddenly when the CJEU assumed full jurisdiction at the end of 2014.[157]

Post-Lisbon police and criminal justice opt-ins

101. The LibDem UK MEPs noted that the Government had opted in to the majority of post-Lisbon measures, which indicated, in their view, that the Government considered those measures to be valuable for the UK.[158] The LSEW and FTI noted that the jurisdiction of the CJEU would automatically apply to these measures, so exercising the opt-out would not remove the UK from the jurisdiction of the CJEU on PCJ measures altogether.[159] Regarding the proposed Proceeds of Crime Directive, to which the Government had chosen not to opt-in to at this stage, the DPP and the Lord Advocate considered that it would be helpful if they did so.[160] This Committee has supported the UK's participation in the majority of these measures, some of which are listed in Box 3.[161]

BOX 3

List of post-Lisbon police and criminal justice measures and the Government's participation

Measures that will repeal and replace, or amend, measures on the opt-out list:

- Initiative of the Kingdom of Belgium, the Republic of Bulgaria,the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive regarding the European Investigation Order in criminal matters, which will replace Council Framework Decision 2008/978/JHA [European Evidence Warrant], and apply instead of corresponding provisions of Schengen Convention, Council of Europe Convention and Protocols on mutual assistance, and EU Convention and Protocol on mutual assistance [opted in]
- Proposal for a Directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA [opted in]
- Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [adopted and applies to the UK]

---

157 *ibid.*

158 LibDem UK MEPs

159 LSEW, LSS, FTI, Bar Council

160 Q 222, Q 273. This was the subject of a short report by the Committee, which supported a UK opt-in and was endorsed by the House—*The UK opt-in to the draft directive on proceeds of crime* (32nd Report of Session 2010–12, HL Paper 295)

161 For a more comprehensive list see HM Government, *Report to Parliament on the Application of Protocols 19 and 21 TEU and TFEU in Relation to EU JHA Matters (1 December 2009–30 November 2010)*, January 2011 (Cm 8000) and *Report to Parliament on the Application of Protocols 19 and 21 TEU and TFEU in Relation to EU JHA Matters (1 December 2010–30 November 2011)*, January 2012 (Cm 8265). Also see Letter from the Home Secretary to Lord Boswell of Aynho dated 18 September 2012. Contained in the volume of correspondence, which is available online.

- 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 [adopted and applies to the UK]
- Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [adopted and applies to the UK]
- Proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection of prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, which would replace Council Framework Decision 2008/977/JHA [did not opt out]
- Proposal for a Directive on the freezing and confiscation of proceeds of crime in the European Union, which would replace Council Framework Decision 2005/212/JHA [did not opt in]
- Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law, which would replace the Convention on protection of EU financial interests and its Protocols [not subject to the opt-in]
- Proposal for a Regulation on the establishment of an evaluation mechanism to verify the application of the Schengen *acquis*, which would replace SCH/Com-ex (98) 26 def setting up a Standing Committee on the evaluation and implementation of Schengen [did not opt-out]
- Proposal for a Directive on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA [opt-in period still running]
- Proposal for a Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA [opt-in period still running]

Measures that do not replace pre-Lisbon PCJ measures on the opt-out list

- Directive 2010/64/EU on the right to interpretation and translation in the framework of criminal proceedings [adopted and applies to the UK]
- Directive 2011/99/EU on the European protection order [adopted and applies to the UK]
- Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest [did not opt in]
- Directive 2012/13/EU on the right to information in criminal proceedings [adopted and applies to the UK]

- Regulation 542/2010 amending Decision 2008/839/JHA on migration from the SIS to SIS II [adopted and applies to the UK]
- Proposal for a Directive on the use of Passenger Name Record data for the prevention, detection, investigation and presentation of terrorist offences and crime [opted in]
- Proposal for Directive on criminal sanctions for insider dealing and market manipulation [did not opt in]

102. However, Stephen Booth's concerns about the CJEU's potential judicial activism also extended to these measures[162] and Martin Howe QC told us that he had "very serious reservations of principle about the Government's decision to opt in to" the majority of these measures, saying that his preference would be not to opt-in to any at all.[163] The Fresh Start Project has advocated the negotiation of Treaty change to allow the UK to opt out of these measures, particularly the European Investigation Order (EIO), and UKIP also stated that further work along these lines was necessary.[164] We consider this possibility further in Chapter 5.

103. The Government's position is to approach each post-Lisbon PCJ proposal on a case-by-case basis and the Lord Chancellor stated that the Government had already decided to opt in where it was in the "national interest" to do so, which was essentially the same assessment that they were making regarding the opt-out decision as a whole.[165] He also stated that he would never rule out accepting the CJEU's jurisdiction—they had already accepted it regarding the measures in which they had decided to participate—but that they needed to be "very careful" before deciding to do so.[166] The LSEW considered that if the UK accepted the CJEU's jurisdiction for some measures but not for others then this would risk creating "incoherence and further complexity".[167]

104. **We note that the CJEU already has jurisdiction over pre-Lisbon EU civil, asylum and immigration measures. The Government have raised no concerns about the CJEU's role in these areas. We further note that the CJEU has, or will have, jurisdiction also over the post-Lisbon police and criminal justice measures to which the Government have decided to opt in. No concerns have been raised about the CJEU's prospective role over these measures by the Government. We welcome this clear evidence that the Government therefore have no objection of principle to accepting the CJEU's jurisdiction.**

105. **We have not identified any significant, objective justification for avoiding the jurisdiction of the CJEU over the pre-Lisbon police and criminal justice measures in the United Kingdom.**

---

162 Q 97

163 QQ 7–8

164 Fresh Start Project, *Manifesto for Change*; UKIP

165 Q 282, Q 308

166 Q 307

167 LSEW

European public prosecutor

106. The Treaty of Lisbon foresees the possible creation of a European Public Prosecutor's Office (EPPO) "from Eurojust" in order to combat crimes affecting the EU's financial interests.[168] The decision to set up an EPPO would be taken by the Council acting by unanimity after obtaining the consent of the European Parliament, or in the absence of unanimity, nine or more Member States could take such a proposal forward under the enhanced cooperation procedure.[169] The Commission's proposal is expected to be published before the summer.[170] Michèle Coninsx, the President of Eurojust, told us that she understood that a separate Regulation would be published concerning Eurojust alongside one on the EPPO.[171]

107. Since its inclusion as part of the *Corpus Juris* project in April 1997 the idea of a European Public Prosecutor in whatever form has proved controversial for successive UK Governments.[172] On 6 February 2012, over 100 Conservative backbench MPs signed a letter to the Telegraph, supporting the opt-out and also saying, among other things, "We do not wish to subordinate UK authorities to a pan-European public prosecutor".[173] The Coalition Agreement says that "Britain will not participate in the establishment of any European Public Prosecutor"[174] and the European Union Act 2011 has made its creation subject to a referendum and an Act of Parliament.[175] We have recently considered the creation of an EPPO in our report on fraud against the EU's finances.[176]

108. Both Dominic Raab MP and the Fresh Start Project make reference to a speech by President Barroso, the President of the Commission, which he delivered in September 2012, when he confirmed the Commission's intention to introduce a proposal for an EPPO.[177] While they did not make any reference to the UK's option not to participate in the EPPO, other witnesses were clear that the UK would not be obliged to participate. Justice Across Borders noted that the perceived connection between the prosecutor and Eurojust stemmed from the language of the relevant Treaty provision but it was also clear that the UK did not need to opt in and if it did that a referendum would be required.[178] Jodie Blackstock considered the UK's

---

168 Article 86(1)TFEU

169 Enhanced cooperation is a procedure under Article 20 TEU which allows a minimum of nine Member States to establish advanced integration or cooperation in an area, including through the adoption of EU legislation, but without the remaining Members States being subject to its terms.

170 Q 238

171 Q 186

172 The Committee conducted an inquiry onto the *Corpus Juris* idea in 1999—*Prosecuting Fraud on the Communities' Finances-the Corpus Juris* (9th Report of Session 1998–99, HL Paper 62). The Committee was not persuaded by the arguments for a *Corpus Juris* and concluded that a European Public Prosecutor would raise "very difficult issues" for the UK. The report also said that "[I]t would be rash … to rule out any possibility of its future value", paragraph 143.

173 The Telegraph, *Repatriate powers on crime and policing, say Conservative MPs: Letter on Europe signed by 102 Conservative MPs*, 6 February 2012

174 The Coalition Agreement, page 19

175 European Union Act 2011, section 6(3)

176 EU Committee, *The Fight Against Fraud on the EU's Finances* (12th Report of Session 2012–13, HL Paper 158)

177 Open Europe, *Cooperation Not Control* (by Dominic Raab MP); Fresh Start Project, *Manifesto for Change*

178 Justice Across Borders, Q 78. See also Justice Across Borders supplementary evidence

exclusion from participating in the EPPO to be "cast-iron" in this respect.[179] However, UKIP told us that Eurojust was destined to "mutate" into the EPPO and that it would be better for the UK to opt out of both.[180] Timothy Kirkhope MEP and Anthea McIntyre MEP, both members of the LIBE Committee, told us that, if the UK is to continue participating in Eurojust, it must consider how to achieve this without being required to participate in the EPPO.[181] Mike Kennedy considered such concerns to be misguided, saying that the UK and other Member States opposed to the creation of an EPPO would not be in danger of becoming subject to this body simply by retaining a seat in Eurojust.[182]

109. Professor Anagnostopoulos told us that the CCBE had concerns about the proposed EPPO and did not consider it to be a priority.[183] They also suggested that, as the UK did not need to opt in to any proposal on the EPPO, that consideration should not influence the opt-out decision.[184] The LSEW and Justice Across Borders agreed that it was a separate consideration from the opt-out decision.[185] Evanna Fruithoff, from the Bar Council, said it was likely that the proposal would proceed by way of enhanced cooperation, because of opposition from a number of Member States, not just the UK.[186] Klaus-Heiner Lehne MEP also expressed opposition to the creation of an EPPO.[187]

110. **In the context of the opt-out decision, concerns about the prospective role of a European public prosecutor are misplaced. The United Kingdom has the right not to opt-in to any such proposal and the Government have already announced that they have no intention of doing so. Furthermore, even were they to wish to opt in, the European Union Act 2011 would require a referendum to be held and primary legislation to be passed before they could do so. We therefore consider that the consideration of this particular issue should have no bearing on the 2014 opt-out decision.**

The Commission's enforcement powers and unimplemented police and criminal justice measures in the UK

111. The majority of our witnesses expressed no concerns about the prospect of the Commission assuming enforcement powers over the implementation of the pre-or post-Lisbon PCJ measures in the UK. The Faculty of Advocates stated that, although the Commission's infringement role may not be popular with governments, it is essential to ensure that the law is applied fairly.[188] Many of our witnesses also mentioned the UK's strong record of implementing EU legislation and considered that there was no substantial

---

179 Q 116

180 UKIP

181 Timothy Kirkhope MEP and Anthea McIntyre MEP

182 Mike Kennedy

183 The CCBE have published a position paper on the EPPO, which is available online: www.ccbe.eu

184 Q 160

185 LSEW, Q 64

186 Q 160

187 Q 177

188 Faculty of Advocates

risk of infringement proceedings being brought against the UK by the Commission in the short term.[189]

112. The Government however confirmed that 15 pre-Lisbon PCJ measures had not yet been fully implemented in the UK and that their non-implementation should be considered in the context of the opt-out decision.[190] Some of these are considered to be defunct and others will be superseded by post-Lisbon PCJ measures once they enter into force. The measures are listed in Box 4.

BOX 4

List of pre-Lisbon police and criminal justice measures that have not yet been implemented in full by the UK

- Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence [to be partially superseded by the EIO]
- Council Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism; and Council Decisions 2006/228/JHA, 2006/229/JHA & 2006/631/JHA fixing the date of application of certain provisions of Decision 2005/211/JHA
- Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognitions to confiscation orders [European Confiscation Order]
- Council Decision 2008/615/JHA on stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime; and Council Decision 2008/616/JHA on its implementation [the Prüm Decisions]
- Council Framework Decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters [European Evidence Warrant, to be superseded by the EIO]
- Council Framework Decision 2009/905/JHA on accreditation of forensic service providers carrying out laboratory activities
- Council Framework decision 2009/829/JHA on the application between Member States of the European Union of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [European Supervision Order]
- Council Framework Decision 2008/947/JHA 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 [European Probation Order]
- Council Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings

[189] CER, *Cameron's European 'own goal'* (by Hugo Brady); UK Government, LibDem UK MEPs, Bar Council, LSEW, LSS, JUSTICE, Jean-Claude Piris, Justice Across Borders, Q 166

[190] UK Government

- Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/514/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 [amendment to the EAW Framework Decision]
- Agreement on Cooperation in Proceedings for Road Traffic Offences and the Enforcement of Financial Penalties Imposed in Respect Thereof (SCH/III (96)25rev18) [considered to be defunct]

113. The FTI, CER and JUSTICE all considered that it was unfortunate that the Government had chosen not to implement these measures[191] and Jeremy Hill thought that they "would help enhance the protection of British citizens".[192] The DPP also considered the non-implementation of the asset recovery measures to be "unhelpful" as they had to rely upon slower and less reliable bilateral arrangements to freeze assets and to enforce confiscation orders as a result.[193]

114. The Lord Chancellor told us that there was no single reason why these measures had not been implemented but it was sometimes for financial or legislative reasons, not only in the UK but also other Member States.[194] UKIP said the Government had good grounds for not implementing these measures, including civil liberties concerns,[195] while Dominic Raab MP was clear that the Government were under no obligation to do so.[196]

115. **We consider that it is unlikely that the United Kingdom will become subject to infringement proceedings by the Commission regarding the non-implementation of these police and criminal justice measures in the short term. But in any case we believe that the Government should take steps to implement those of value.**

191 Q 125

192 Q 80

193 Q 221

194 Q 292

195 UKIP

196 Open Europe, *Cooperation Not Control* (by Dominic Raab MP)

CHAPTER 5: ALTERNATIVE ARRANGEMENTS FOR CROSS-BORDER COOPERATION

The need for cross-border police and criminal justice cooperation

116. None of our witnesses doubted the need for the UK to cooperate with other Member States on cross-border policing and criminal justice matters. The Police Foundation stated that most modern criminal activity was organised, international and cross-border in character.[197] The Government also emphasised that the scope of the threat was global in nature, and that they were committed to working closely with international partners to safeguard the UK's national security.[198]

117. We note that this approach is reflected in the 2010 National Security Strategy, which emphasises the UK's "vital partnership" with the EU.[199] In the Government's 2011 organised crime strategy—*Local to Global*—they promise actively to participate in the Standing Committee on Internal Security (COSI); develop their cooperation with Europol and Eurojust; and support more operational collaboration between law enforcement agencies in the other Member States.[200] The Prime Minister's speech on Europe also acknowledged the EU's important role in tackling terrorism and organised crime.[201]

118. **Cross-border cooperation on policing and criminal justice matters between the United Kingdom and the other Member States is an essential element in tackling security threats such as terrorism and organised crime. In the early twenty-first century no Member State can hope to assure its internal security or the enforcement of the rule of law without such cooperation.**

Alternative arrangements for cross-border cooperation

119. A number of witnesses suggested that if the opt-out was exercised it would be possible for the UK to fall back on alternative arrangements for cross-border cooperation with the other Member States. We therefore considered how practical or feasible any alternative arrangements could be, including the likelihood that other Member States would be able or willing to facilitate such an approach.

120. Open Europe and the Fresh Start Project have both suggested that "practical cooperation" and "operational effectiveness" could readily be achieved with other Member States without relying upon EU measures to do so.[202] Dominic Raab MP agreed, stating that "functional cooperation" could be achieved through "ad hoc" bilateral or multilateral cooperation, pursuant to a Memorandum of Understanding (MoU) coupled as necessary with

---

197 Police Foundation. Also see JUSTICE and Europol

198 UK Government

199 HM Government, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, October 2010 (Cm 7953)

200 HM Government, *Local to Global: Reducing the Risk from Organised Crime*, 2011

201 Prime Minister's speech, *Britain and Europe*, 23 January 2013

202 Fresh Start Project, *Manifesto for Change*; Q 87, Q 108

domestic implementing legislation, or—where an international legal basis is required—a treaty framework or EU instrument that is not supervised and enforced by the Commission and the CJEU. He cited SOCA's conclusion of MoUs with the US, Australia, New Zealand and Canada regarding cyber crime as examples of this.[203] He has also said that "Far from reflecting ideological Euroscepticism, this approach is designed to increase the prospects of, and scope for, operational law enforcement cooperation, by maximising the forms and models through which it can be delivered".[204]

121. UKIP stressed that Council of Europe Conventions and other non-EU mechanisms of international cooperation were already well developed and provided an "adequate" legal framework which, though the change may cause some inconvenience for law enforcement authorities, they saw no practical problems with falling back on it.[205] Martin Howe QC told us that if it was possible to achieve the practical benefits from securing extradition and other means of JHA cooperation, which avoided being subject to the jurisdiction of the CJEU, then he firmly believed that the UK should pursue such an approach.[206]

122. The Government also suggested, if the opt-out was exercised, that reliance on alternative arrangements would be possible, through the negotiation of bilateral agreements that would effectively replace certain EU measures; reliance on pre-existing Council of Europe Conventions or bilateral agreements; or by rejoining certain PCJ measures if considered beneficial. In some instances they considered that no alternative agreement may be required in order for cooperation to continue.[207] The Home Secretary emphasised her preference for "practical co-operation at a working level", which did not necessarily require EU legal measures. In this respect the Government were examining each PCJ measure and asking "Could we achieve the same aims in different ways?"[208] The Lord Chancellor told us that it was "theoretically possible" to have bilateral and multilateral arrangements with other Member States but that there were no recent precedents due to the existing EU arrangements. He referred instead to what he called the Government's plentiful experience of negotiating bilateral agreements with third countries, citing a prisoner transfer agreement with Albania as an example.[209]

123. Many of our witnesses were unconvinced about the merits of relying upon alternative arrangements. The Scottish Government stressed that it was incumbent on the UK Government to demonstrate that any alternative arrangements would be more effective in combating cross-border crime.[210] The DPP told us that the opt-out would not present any problems in some areas, particularly those that were subject to future EU measures or where there were already workable bilateral arrangements in place. However, he added, in relation to other areas "failure to opt back in could result in an

---

[203] Open Europe, *Cooperation Not Control* (by Dominic Raab MP); Q 99, Q 107,

[204] Open Europe, *Cooperation Not Control* (by Dominic Raab MP)

[205] UKIP

[206] Q 4, Q 28

[207] UK Government

[208] Q 282

[209] Q 302

[210] Scottish Government

uncertain, cumbersome and fragmented approach, which is likely to have a damaging impact on the prosecution of crime in England and Wales, unless equally effective measures replace them".[211]

124. The Bar Council stated that it would be undesirable to rely upon alternative arrangements, which it referred to as cumbersome, inconsistent and less efficient.[212] The LibDem UK MEPs said that operating outside of the EU frameworks would "inevitably cause legal conflicts and extended procedures which would be not only ineffective but costly".[213] The Association of Chief Police Officers in Scotland (ACPOS) told us that the existing EU measures provided Scottish police forces with efficient tools that they had come to rely upon and that reverting to previous arrangements would be cumbersome, unwieldy and "a retrograde step in modern policing".[214]

125. JUSTICE stated that it would take an incredibly long time to negotiate a series of alternative bilateral agreements with 27 other Member States for some of the 130 PCJ measures, and Mary Honeyball MEP, a member of the JURI Committee, considered the prospect of 130 bilateral agreements to be "completely ridiculous" and a "recipe for total chaos", which had not been thought through.[215] The Association of Chief Police Officers (ACPO) thought this "would be a massive step back for UK policing that would benefit no one".[216]

Working under the old arrangements

126. We asked some of our witnesses, who had experienced cross-border work under the pre-EU arrangements, for their thoughts on how well it had worked. William Hughes, the former Director-General of SOCA, told us that a great deal of progress had been made in this area over the last ten years and that previously it was a "very convoluted and complex legal process, which I certainly would not want to go back to". He said that its protracted nature allowed criminals to divest themselves of assets and destroy evidence in the meantime, and because it only concentrated on serious crimes, a lot of cases "fell by the wayside" and intelligence was not shared properly. He considered that alternative arrangements "would fall considerably short on effectiveness, timeliness and simple workability". He also stressed the importance of the personalities involved, saying that the UK's relationship with some of its neighbours used to be dreadful.[217]

127. Mike Kennedy agreed, stating that the prior arrangements often depended on trust and confidence developing between individuals over a long period of time, which would be disrupted when the individuals concerned moved posts or retired. He said that permanent bodies such as Europol and Eurojust had provided benefits by replacing these hit-or-miss arrangements and making multilateral cooperation easier and quicker, which was essential in responding to international crime effectively. If the UK fell back on the old arrangements then the uncertainty of ad-hoc cooperation would return and

---

211 Q 209. Also see Q 219 (Hugo Brady)

212 Bar Council

213 LibDem UK MEPs

214 ACPOS

215 JUSTICE, Q 172

216 ACPO

217 William Hughes, QQ 231–232

new relationships would have to be fostered all over again. He concluded that the UK would be unable "even at very substantial cost to the UK taxpayer, to replicate the 21st century arrangements, tools, facilities and networks that are currently available" to investigators and prosecutors under the PCJ measures.[218]

Council of Europe Conventions

128. A number of witnesses referred to pre-existing Council of Europe Conventions, many of which had been replaced by equivalent EU measures. A list of these is provided in Table 1. We consider the possible reversion to the 1957 Council of Europe Convention on Extradition in the following chapter, which concerns the EAW.

TABLE 1

Council of Europe Conventions, the equivalent EU measures, and their status

Council of Europe Convention	Status	Equivalent EU PCJ measure	Status
ETS 24 Convention on Extradition (1957)	Ratified by all 27 Member States + Croatia	Framework Decision on the European Arrest Warrant	In force
ETS 30 Convention on Mutual Assistance in Criminal Matters (1959)	Ratified by all 27 Member States + Croatia	EU MLA Conventions + Protocols Framework Decision on the European Evidence Warrant	Not in force but due to be replaced by a post-Lisbon measure (EIO)
ETS 51 Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (1964)	Ratified by 12 (+ Croatia) and signed by 4 Member States; not including the UK	Framework Decision on the European Supervision Order	In force but not implemented in the UK
ETS 70 Convention on the International Validity of Criminal Judgments (1970)	Ratified by 12 and signed by 6 Member States; not including the UK or Croatia	Framework Decisions on taking account of previous convictions and ECRIS	In force
ETS 90 Convention on the Suppression of Terrorism (1977)	Ratified by all 27 Member States + Croatia	Framework Decision on combating terrorism	In force

[218] Mike Kennedy, QQ 231–232

ETS 112 Convention on the Transfer of Sentenced Persons (1983)	Ratified by all 27 Member States + Croatia	Framework Decision on transfer of sentences and alternative sanctions	In force
ETS 141 Convention Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990)	Ratified by all 27 Member States + Croatia	Framework Decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property	In force
ETS 173 Criminal Law Convention on Corruption (1999)	Ratified by 24 (+ Croatia) and signed by 3 Member States; including Austria, Germany and Italy	Framework Decision on combating corruption in the private sector	In force

Source: Statewatch, The UK's planned 'block opt-out' from EU justice and policing measures in 2014 (October 2012)

129. Some of our witnesses noted that, while the Council of Europe Conventions provided alternative legal frameworks in some instances, they did not cover all of the same areas as the PCJ measures; were less detailed and more cumbersome than these measures; and, in many cases, had not been signed or ratified by the UK or all of the other Member States, which rendered them less effective as a result.[219] The CELS said that if the UK wanted to rely upon them then it would have to ratify the ones that did not yet apply to the UK and also encourage other non-participating Member States to do the same.[220] The LSEW and the LSS also stated that even where the Conventions had been ratified their implementation in some Member States may have been superseded by subsequent EU measures. This would make relying upon them impractical, requiring bilateral agreements to be negotiated instead.[221]

130. The Bar Council considered this possibility to be "neither practical nor desirable" remarking that, if those agreements had been sufficient, there would have been no need to adopt the EU measures replacing them in the first place. Professor Spencer was also unconvinced.[222] Justice Across Borders noted that because the EU measures placed binding legal obligations on Member States this created a stronger legal regime than non-binding

[219] Statewatch, *The UK's planned 'block opt-out' from EU justice and policing measures in 2014* (by Professor Steve Peers); CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos); JUSTICE, LSEW, LSS, Timothy Kirkhope MEP and Anthea McIntyre MEP, Q 162

[220] CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos)

[221] LSEW, LSS

[222] Bar Council, Q 43

mechanisms could.[223] The LSEW also stated that the great advantage of EU measures was that they provided a single framework governing all 27 Member States; with all parties able to become accustomed to a single document, procedure and time limits, thus achieving a significantly more efficient system.[224]

131. While Open Europe had suggested the Conventions as a possible fall back option they also recognised they were more cumbersome and less comprehensive than the EU measures. However, Dominic Raab MP wanted to keep an open mind about their potential use.[225] The Government and UKIP suggested that if the EIO had not become operational by 1 December 2014, and the UK did not rejoin the EU Mutual Legal Assistance Convention, then this type of cooperation could continue on basis of the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters.[226]

The role of the other Member States in facilitating alternative arrangements

132. A number of witnesses emphasised that the negotiation and implementation of, or reversion to, alternative arrangements would depend on the goodwill and legislative timetables of the other Member States.[227]

133. JUSTICE, the LSS, Evanna Fruithoff and Professor Anagnostopoulos remarked that some Member States would need to amend their legislation to bring the UK back within the remit of these arrangements.[228] The LibDem UK MEPs considered it unwise to presume that this would happen expeditiously.[229] Justice Across Borders, who considered that such a process would be fraught with difficulties, were of the view that other Member States may not accord them legislative priority and that discrepancies in the instruments' implementation and interpretation may arise, with no mechanism to rectify them.[230] The Lord Chancellor also recognised that legislation may be necessary in some Member States to bring old bilateral arrangements back into force.[231]

134. FTI, Justice Across Borders and Dr Maria O'Neill also believed that it was unlikely that some Member States would be willing to make special arrangements for the UK; that the UK's negotiating hand would be significantly weaker with no certainty that it would secure its preferred

---

223 Justice Across Borders, Q 84

224 LSEW

225 Open Europe, *An Unavoidable Choice* (by Stephen Booth, Christopher Howarth and Vincenzo Scarpetta); Open Europe, *Cooperation Not Control* (by Dominic Raab MP); Q 100

226 UK Government, UKIP. ETS no. 030, Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20.IV.1959

227 In legal systems following the "monist" constitutional rule, international treaties form part of national law as soon as they are ratified. In legal systems following the "dualist" constitutional rule, international treaties must be implemented into national law before they can take effect. The UK adheres to the dualist approach.

228 JUSTICE, LSS, Q 155, Q 162. Also see CER, *Britain's 2014 justice opt-out: Why it bodes ill for Cameron's EU strategy* (by Hugo Brady)

229 LibDem UK MEPs

230 Justice Across Borders

231 Q 302, Q 308

objectives; and that there was a real risk that its requests for assistance under alternative arrangements would not be prioritised and instead go to the "bottom of the pile" as a result of the UK's disengagement from this area.[232]

135. Martin Howe QC asked that "apart from pique, what is to stop [the other Member States] negotiating sensible alternative arrangements?"[233] The Lord Chancellor said "I think my sense is that our partners in Europe will want to work with us and it is in their interest to work with us in the way that it is in our interest to work with them".[234]

136. **We recognise the theoretical possibility for the United Kingdom to conclude multiple bilateral and multilateral agreements with the other Member States, in place of some existing EU measures, and that other Member States would have an interest in putting effective mechanisms in place. But this would be a time-consuming and uncertain process, with the only claimed benefit being tailor-made arrangements excluding the CJEU's jurisdiction. In some cases new bilateral agreements would be dependent on the legislative timetable of the other Member States, which may accord them a low priority.**

137. **We consider that the most effective way for the United Kingdom to cooperate with other Member States is to remain engaged in the existing EU measures in this area.**

138. **If the United Kingdom reverted to Council of Europe Conventions instead of the equivalent EU measures, this would raise legal complications, and could also result in more cumbersome, expensive and weaker procedures. It would also weaken the ability of the United Kingdom's police and law enforcement authorities to cooperate with the equivalent authorities in other Member States regarding cross-border crime.**

The Frontex "model"

139. In addition to the alternative arrangements outlined above, Dominic Raab MP has also suggested that more informal mechanisms could also be developed for the UK to cooperate with EU agencies analogous to the 'Frontex' model, particularly in relation to Europol.[235] The Fresh Start Project has made a similar suggestion.[236] A description of the UK's current involvement in Frontex is set out in Box 5.

---

232 FTI, Justice Across Borders, Dr Maria O'Neill

233 Q 28

234 Q 302

235 Open Europe, *Cooperation Not Control* (by Dominic Raab MP)

236 Fresh Start Project, *Manifesto for Change*

BOX 5

The UK's involvement in Frontex

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, or 'Frontex', is responsible for coordinating the activities of national border guards in ensuring the security of the EU's external borders. It is based in Warsaw, Poland. Frontex was established by Regulation 2007/2004.

The UK challenged the Council's decision not to allow its full participation in the Frontex Regulation because it was not a member of the Schengen Area, arguing that it was entitled to participate in Schengen-building measures under the EU Treaties. The UK lost its case before the CJEU.[237] As a result it does not participate in the above measure.

However, Article 12 of the Frontex Regulation states that the Agency shall facilitate operational cooperation of the Member States with Ireland and the UK. This has allowed the UK to participate in several joint operations by Frontex subject to the acceptance on a case-by-case basis of the Management Board, on which the UK only has observer status. It has supported these operations both financially and through the provision of technical equipment.

140. Rob Wainwright, the Director of Europol, did not think that the UK's participation in Frontex was a good model for its possible involvement with Europol, due to differences in the operation of each body. He considered that relying upon an ad-hoc authorisation process for the UK to participate in specific operations would not be a workable alternative, considering the high proportion of Europol activity that it was involved in. The UK could also lose its place on the Europol management board under such an arrangement, which would dilute its influence, and only full members would be able to access Europol databases. His view was that negotiating such an arrangement would have uncertain results, potentially resulting in "less efficient, less coherent and less extensive" arrangements.[238]

141. **We consider the possibility of the United Kingdom cooperating with Europol or Eurojust on the same basis that it currently does with Frontex to be neither practical nor desirable, as it would reduce the benefits that the United Kingdom currently enjoys through its full participation in both EU agencies.**

The Danish Justice and Home Affairs opt-out

142. In the longer term, some of our witnesses' preference was for Treaty change to be negotiated so that the UK could participate in JHA matters on a more "flexible" basis. Open Europe has referred to the Danish JHA opt-out as a possible model in this regard, which would allow the UK to continue cooperating with the other Member States on JHA matters but outside the EU legal framework and without being subject to the CJEU's jurisdiction.[239]

---

[237] Case C-77/05 *UK v Council*. The relevant background is considered in the our report—*FRONTEX: the EU external borders agency* (9th Report of Session 2007–08, HL Paper 60)

[238] Europol, Q 134, Q 136, Q 140

[239] Open Europe, *An Unavoidable Choice* (by Stephen Booth, Christopher Howarth and Vincenzo Scarpetta)

Dominic Raab MP and the Fresh Start Project have also made similar suggestions.[240] A summary of the Danish JHA opt-out is provided in Box 6.

BOX 6

The Danish Justice and Home Affairs opt-out: Protocol (No 22) on the position of Denmark

After the Treaty of Maastricht was rejected by Danish voters in a 1992 referendum, Denmark secured a series of opt-outs, including from the old JHA Third Pillar, in the Edinburgh Agreement. Following the Treaty of Amsterdam, the Title IV measures under the old First Pillar did not bind Denmark. However, it was possible for Denmark to apply to the Commission to be associated with these measures under parallel intergovernmental agreements. The Commission was not obliged to accept these applications and has rejected three out of six Danish applications. However, the remaining PCJ measures (Title VI) in the old Third Pillar did apply to Denmark. With respect to Schengen-building measures falling under Title VI, Denmark (having joined the Schengen Area) was entitled to implement these measures into their national law 6 months after they had been adopted, and it usually did so. They played no role in the negotiation of those measures.

By Protocol 22 to the EU Treaties Denmark's opt-out was extended to apply to all of Title V TFEU, as was its existing right to implement Schengen-building measures into national law, six months after their adoption, at which point an international legal obligation would be created between Denmark and the other Member States bound by the measure. However, PCJ measures adopted before the entry into force of the Treaty of Lisbon which are amended shall continue to be binding upon and applicable to Denmark.

Under Protocol 22, Denmark is permitted to change its position under the Protocol from a complete opt-out to the case-by-case opt-in arrangement akin to that of Ireland and the UK under Protocol 21, whenever they wish. The Danish government which was elected in 2011 initially intended to hold a referendum in 2012 on converting its JHA opt-out accordingly. However, this possibility has now been placed on indefinite hold.

143. Some of our witnesses identified downsides with such a model. Professor Peers referred to the fact that the Commission had frequently refused permission for the Danes to conclude agreements in certain areas and that when it did agree this was usually made contingent on the acceptance of the CJEU's jurisdiction.[241] The CER agreed, stating that such an arrangement would be a less flexible option for the UK as it would lose its right to opt in.[242] The LibDem UK MEPs also noted the propensity of the Commission to refuse permission for agreements and, although they did not consider the negotiation of such an arrangement to be entirely out of the question, they did think that it would require a great deal of legal preparation and negotiation and that the UK's capacity to influence new proposals would

240 Open Europe, *Cooperation Not Control* (by Dominic Raab MP); Fresh Start Project, *Manifesto for Change*

241 Q 43

242 CER, *Cameron's European 'own goal'* (by Hugo Brady)

also be reduced.[243] Open Europe also recognised that the UK would have no formal role in negotiating new proposals or amending existing ones and that the Commission may refuse permission for the UK to join measures that it wanted to. They further acknowledged that the other Member States were unlikely to accommodate such an arrangement.[244]

144. **We do not consider the negotiation of Treaty change to achieve a Danish-style JHA opt-out for the United Kingdom to be desirable. It would place the United Kingdom in a disadvantageous position with respect to future proposals for police and criminal justice measures by removing both their right to opt in to a proposal and their ability to influence its content through participation in the negotiations. In any event, this possibility has no bearing on the 2014 opt-out decision.**

[243] LibDem UK MEPs

[244] Open Europe, *An Unavoidable Choice* (by Stephen Booth, Christopher Howarth and Vincenzo Scarpetta); Q 108

CHAPTER 6: THE EUROPEAN ARREST WARRANT

145. The European Arrest Warrant (EAW) is undoubtedly the most prominent and controversial of the PCJ measures subject to the opt-out. This Committee has produced a number of reports on the EAW in the past.[245]

The benefits of the European Arrest Warrant

146. The majority of our witnesses considered the EAW to be an important PCJ measure that brought benefits to the UK. They said that it had led to the creation of a more efficient, simpler, quicker, cheaper, more reliable and less political system of extradition, which allowed for the return of those wanted for trial in the UK as well as allowing dangerous criminals to be extradited to other Member States. It had also increased mutual trust between Member States and was a marked improvement on the system of extradition that had existed previously within Europe.[246]

147. Some of our witnesses cited the prompt return of Hussain Osman from Italy as a good example of the EAW[247] in contrast to the slower procedures involved in extraditing Abu Hamza to the US or the pre-EAW extradition of Rachid Ramda to France.[248] Others pointed to the EAW's success in facilitating the return of large numbers of fugitives from Spain to the UK to face trial and the normalisation of previously poor bilateral extradition arrangements between the UK and other Member States such as Ireland and Spain.[249] The DPP provided some examples of where the EAW had been of practical benefit to the CPS.[250]

148. Statistics regarding the number of EAWs requested and received by the UK are provided in Appendix 6. They confirm that the number of extraditions increased significantly after the introduction of the EAW and have been increasing, year-on-year, ever since.

---

245 EU Committee, *Counter-Terrorism: The European Arrest Warrant* (6th Report of Session 2001–02, HL Paper 34); *The European Arrest Warrant* (16th Report of Session 2001–02, HL Paper 89); and *European Arrest Warrant-Recent Developments* (30th Report of Session 2005–06, HL Paper 156)

246 CER, *Cameron's European 'own goal'* (by Hugo Brady); COPFS, ACPO, ACPOS, Jean-Claude Piris, Faculty of Advocates, JUSTICE, Bar Council, LSS, LSEW, Police Foundation, William Hughes, Dr Maria O'Neill, CPS, Timothy Kirkhope MEP and Anthea McIntyre MEP, Q 231, Q 59, Q 68, Q 116, Q 144, Q 166, Q 183, Q 205, Q 212, Q 233, Q 238, Q 265. JUSTICE was by no means uncritical of the EAW's operation, however.

247 UK Government, Mike Kennedy, Justice Across Borders, ACPO, PSNI, Q 68, Q 77, Q 180, Q 183. Hussain Osman, a naturalised British citizen, was identified as a suspect for the failed London bombings on 21 July 2005. He was extradited to the UK in September 2005 and was found guilty of conspiracy to murder on 9 July 2007.

248 Justice Across Borders, ACPO, PSNI, Q 68, Q 180. Abu Hamza, an Egyptian national, was eventually extradited to the US in 2012, to face terrorism charges, eight years after his arrest in the UK. In 1995 Rachid Ramda, an Algerian national, was arrested in the UK in connection with a terrorist attack on the Paris transport system. He was not extradited to France until 2005.

249 CER, *Cameron's European 'own goal'* and *Britain's 2014 justice opt-out: Why it bodes ill for Cameron's EU strategy* (by Hugo Brady); Dr Maria O'Neill, Q 82, Q 103, Q 111, Q 130. Also see Justice Across Borders, Q 68(Jeremy Hill) and Q 236 (William Hughes) for discussion of the Crimestoppers and Operation Captura initiatives.

250 CPS

Criticisms of the European Arrest Warrant

149. While the Government considered the EAW to be a "vital tool" in the fight against international crime, which had had some success in streamlining the extradition process, they also had a number of concerns about its operation, including its disproportionate use for trivial offences and for actions that were not considered to be crimes in the UK; and the lengthy pre-trial detention of individuals abroad.[251] Open Europe shared these concerns and has stated that the benefits of swift extraditions need to be balanced against the potential infringement of British nationals' civil liberties, as well as pointing to what they perceive to be the lack of procedural safeguards in the EAW.[252]

150. UKIP was highly critical of the EAW. They considered its benefits to be "illusory", and that it had not speeded up, simplified or made extradition proceedings any cheaper.[253] Dominic Raab MP raised similar concerns and remarked that the high number of EAW requests received by the UK placed operational strains on UK policing.[254] However, Commander Gibson, from ACPO, considered this analysis to be flawed and stated that the EAW provided a much cheaper system.[255]

151. There have been allegations of injustice arising from the operation of the EAW. The Government cited the case of Andrew Symeou, as did other witnesses.[256] Commander Gibson emphasised that the EAW had provided a better deal for victims, as more people had been brought to justice. He also stated that the perceived injustices in the Symeou case had not been caused by the EAW instrument itself but resulted from the poor prison conditions in Greece.[257] The Bar Council emphasised that only a relatively small number of those extradited from the UK have been British nationals, with the Police Foundation stating that in 2011, 93% of the individuals surrendered by UK under the EAW were foreign nationals.[258]

Should the UK continue to participate in the European Arrest Warrant?

152. Many of our witnesses were of the view that the Government should seek to rejoin the EAW, were the opt-out to be exercised.[259] Stephen Booth said that the police's concerns about losing the EAW should be listened to.[260] Dominic Raab MP said the EAW needed to be reformed but did not advocate "throwing the baby out with the bathwater". He, alongside Timothy

---

251 UK Government

252 Open Europe, *An Unavoidable Choice* (by Stephen Booth, Christopher Howarth and Vincenzo Scarpetta)

253 UKIP

254 Open Europe, *Cooperation Not Control* (by Dominic Raab MP); Q 92, Q 101

255 Q 233. The Home Secretary stated that an average EAW request cost the UK £20,000-Q 304

256 Open Europe, *Cooperation Not Control* (by Dominic Raab MP); UK Government, UKIP, ACPO and FTI. Andrew Symeou, a UK national, was extradited to Greece in July 2009 in connection with the death of a young man at a nightclub on a Greek Island, which had occurred in July 2007. He spent over 10 months in poor prison conditions before being released on bail but was not permitted to leave Greece. The trial commenced in March 2011 and he was acquitted on 17 June 2011.

257 Q 226, Q 233, Q 239, Q 240

258 Bar Council, Police Foundation

259 CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos); COPFS, Bar Council, Faculty of Advocates, LSEW, LSS, ACPO, PSNI, Police Foundation

260 Q 104

Kirkhope MEP and Anthea McIntyre MEP, suggested that the Government should use the opt-out as an opportunity to press for modest reform of the EAW as a condition of opting back in.[261] FTI also considered that reform of the EAW was essential but, as they did not expect the reforms to be put in place before the decision on the opt-out must be made, would be content provided a commitment to reform it was secured.[262] The CER and Jodie Blackstock agreed but did not make rejoining the EAW contingent upon securing reforms, which FTI did.[263] UKIP and the Fresh Start Project did not want the UK to rejoin the EAW under any circumstances.[264] The possibility of implementing other "flanking" measures to improve the operation of the EAW is considered at the end of this Chapter.

Reversion to the 1957 Council of Europe Convention on Extradition

153. The Government and Martin Howe QC considered that the UK's extradition relations with Europe would be governed by the 1957 Council of Europe Convention on Extradition[265] (the 1957 Convention) if it did not rejoin the EAW.[266] UKIP agreed, but wanted it to require a *prima facie* case against the accused and Dominic Raab MP wanted the Convention to contain stronger safeguards. He also acknowledged that extradition under the Convention would be slower than under the EAW.[267] Others also acknowledged that the Convention could be relied upon if the UK stopped participating in the EAW.[268]

154. However, many witnesses also criticised the Convention system as being inefficient, cumbersome, slow (which resulted in long periods of pre-trial detention for suspects), expensive, technical, political, restrictive, containing a series of loopholes and subject to less judicial oversight.[269] The Bar Council considered that reverting to such a system would be a "retrograde" step.[270] Others suggested that relying upon the Convention, or other bilateral agreements, in place of the EAW would also suffer from the faults identified in the EAW, and only result in fewer and slower extraditions, which would be a worse deal for suspects and victims.[271] The legal differences between the Convention and the EAW are explored in Box 7.

155. On 25 October 2012, Kenny MacAskill MSP told the Scottish Parliament that "The Home Office might believe that [we] could revert to the Council of Europe Convention on Extradition of 1957. Irrespective of whether that is possible, however, those arrangements would not be as satisfactory. The

---

261 Timothy Kirkhope MEP and Anthea McIntyre MEP; Open Europe, *Cooperation Not Control* (by Dominic Raab MP); QQ 87–88. Dominic Raab MP suggested that some embassies he had consulted were sympathetic to this approach.

262 FTI, Q 111, Q 115

263 CER, *Cameron's European 'own goal'* (by Hugo Brady); Q 122

264 Fresh Start Project, *Manifesto for Change*; UKIP

265 ETS no. 024, European Convention on Extradition, Paris, 13.XII.1957

266 UK Government, Q 8

267 Open Europe, *Cooperation Not Control* (by Dominic Raab); UKIP

268 ACPO, PSNI, FTI, LSS

269 CER, *Cameron's European 'own goal'* (by Hugo Brady); LSEW, LSS, JUSTICE, Bar Council, William Hughes, Police Foundation, Jean-Claude Piris, Q 67, Q 82, Q 121, Q 207, Q 265

270 Bar Council, Q 61

271 Jean Claude Piris, LSEW, PSNI, FTI, ACPO, Mike Kennedy, JUSTICE, ACPOS, Q 211, QQ 213–214, Q 215, Q 219, Q 226, Q 233

actions and attitude of the UK Government towards Europe are jeopardising the administration of justice in Scotland".[272]

BOX 7

Differences between the Convention and the Framework Decision

The Convention was adopted in 1957 but was not ratified by the UK until 1991. It contains an obligation on the contracting parties to extradite but this is subject to a double criminality requirement—that is, the offence in question is against the law in both States—and a number of exceptions for political, fiscal or military offences. The extraditable offences are offences punishable in both the requesting and requested States by a custodial sentence for a maximum period of at least one year, and, in conviction cases, custodial sentences of at least four months. It allows the contracting parties the right to refuse the extradition of their own nationals.[273] It does not require requesting States to submit *prima facie* evidence but permits States to adopt this requirement if they chose to do so (the UK chose not to do so).

The Framework Decision was adopted in 2002. It removed executive decision-making from the surrender process and changed it into an exclusively judicial procedure. It simplifies the procedure for extradition and makes it quicker by imposing a scheme of time limits on the executing State. It removes the double criminality requirement with respect to 32 types of offences so long as these are punishable in the issuing Member State with at least three years' imprisonment. It also removed the exceptions for political, fiscal and military offences. Like the Convention it does not require the requesting State to submit *prima facie* evidence but, unlike the Convention, removes the option for Member States to require this.

156. The Bar Council suggested that, in order for the Convention to apply in some Member States, legislative changes may be required, while in others it may have been superseded following the adoption of the EAW.[274] The DPP raised concerns about the gaps and risks that may arise as a result of this situation, including the difficulties that the UK may experience in securing the return of suspects to stand trial for serious cases.[275] Helen Malcolm QC and Françoise Le Bail, the Director-General of DG JUSTICE at the Commission, referred to Article 31 of the Framework Decision, which explicitly states that it will replace all earlier treaties between Member States including the Convention. Director-General Le Bail told us that the Commission Legal Service was investigating the legal situation.[276]

---

272 Scottish Parliament Official Report 25 October 2012 col 12604

273 The Convention is still applied by the UK to non-EU countries in Europe such as Russia and Turkey. This is why the Russian authorities were able to refused to extradite those suspected of killing Alexander Litvinenko, the former FSB officer who had been granted asylum in the UK, in 2006—this is mentioned by the DPP at Q 213

274 QQ 59–60. See also Q 67, Q 191, Q 233

275 Q 213

276 Q 60, Q 207, Director-General Le Bail also promised to make a copy of their advice available to the Committee in due course.

The consequences for the UK of opting out of the European Arrest Warrant

157. The Lord Advocate told us that he would have "real concerns" if the UK were to opt out of the EAW[277] and the DPP told us that to do so would result in a poorer deal for victims of crime.[278] ACPO and Mike Kennedy emphasised the significant percentage of EU nationals from other Member States that were arrested in London each year and suggested that it would be more difficult to return them to their Member State of origin.[279] ACPO stated that withdrawing from the EAW would be a mistake and could jeopardise justice and public safety,[280] while the President of Eurojust told us that it would make it harder for the UK to tackle cross-border crime.[281]

158. The same problems arising from having to negotiate and rely upon alternative arrangements, which have already been discussed in Chapter 5, were also raised in relation to replacing the EAW.[282] JUSTICE, Justice Across Borders and Dr Maria O'Neill stated that criminals would exploit any differences that arose between any different extradition arrangements that were put in place[283] and others suggested that it could result in the UK becoming a "bolt-hole" or "safe haven" for criminals engaged in organised crime or terrorism, because they were subject to more cumbersome extradition procedures than elsewhere.[284] Regarding this possibility the Home Secretary said "I will not be doing anything that I believe would put the safety and security of UK citizens in jeopardy and that has to be the first and foremost consideration".[285]

159. The potential consequences for Ireland if the UK were to leave the EAW are considered in Chapter 9.

160. **We consider the European Arrest Warrant to be the single most important pre-Lisbon police and criminal justice measure. If the United Kingdom were to leave the EAW and rely upon alternative extradition arrangements, it is highly unlikely that these alternative arrangements would address all the criticisms directed at the EAW. Furthermore, it is inevitable that the extradition process would become more protracted and cumbersome, potentially undermining public safety. If the opt-out is exercised then the Government should apply to the Commission to rejoin the European Arrest Warrant so as to avoid any gap in its application.**

161. **We acknowledge that in some cases the operation of the EAW has resulted in serious injustices for UK and other EU nationals. We do not belittle the seriousness of these cases. However, those injustices resulted not directly from the operation of the EAW but from the**

---

277 QQ 264–265

278 APCO, ACPOS, Q 84, Q 211, Q 267

279 ACPO, Mike Kennedy, Q 233

280 ACPO, Q 233

281 Q 191

282 Q 121, Q 123, Q 255

283 Dr Maria O'Neill, JUSTICE, Justice Across Borders, Q 68, Q 70, Q 82

284 CER, *Cameron's European 'own goal'* (by Hugo Brady); Faculty of Advocates, LSS, APCO, Justice Across Borders, JUSTICE, LibDem UK MEPs, Q 66

285 Q 301

consequences of extradition, including long periods of pre-trial detention in poor prison conditions, which could also occur under any alternative system of extradition.

Possible improvements to the operation of the European Arrest Warrant

162. The operation of the EAW was considered by Sir Scott Baker's review of the UK's extradition procedures in 2011.[286] His report concluded that the EAW had improved the scheme of surrender between Member States and that broadly speaking it had operated reasonably well. The report's recommendations for how the EAW could be improved are set out in Box 8.

BOX 8

Sir Scott Baker's Extradition Review: the European Arrest Warrant recommendations

- The Government should work with the EU and other Member States through the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings and other measures to urgently improve standards.
- Any future amendment to the Framework Decision, or any future related legislative instrument, should include a proportionality test, to be applied in the issuing Member State.
- In the meantime, consideration should be given to encouraging Member States to consider using other measures of cooperation where appropriate, including: recognising and enforcing fines imposed by Member States; the European Supervision Order, in part, to address the problem of lengthy periods of pre-trial detention; transferring probation or non-custodial measures to the UK for execution rather than issuing an EAW for a sentence imposed in default; transferring sentences to the UK where appropriate; serving a summons pursuant to Part 1 of the Crime (International Cooperation) Act 2003; and using a European Investigation Order (once this is in force) to allow for an efficient and effective investigation to take place before a decision is taken about whether to issue an EAW.
- The accused and convicted persons should be legally represented in both the issuing and executing Member States. Any move toward "dual representation" would have to proceed on the basis of an EU-wide initiative.

163. In their response to Sir Scott Baker's Review the Government stated that they intended to "work with the European Commission, and with other Member States, to consider what changes can be made to improve the EAW's operation".[287] The Home Secretary told us that the opt-out provided them with an opportunity to look at the EAW, and that they were now

---

[286] Sir Scott Baker, *A Review of the UK's Extradition Arrangements*, 30 September 2011

[287] *The Government Response to Sir Scott Baker's Review of the UK's Extradition Arrangements*, 17 October 2012 (Cm 8458)

consulting other Member States about possible reforms, but that that these discussions were at an early stage. She also stated that the Government had not made any suggestion that they intended to leave the EAW.[288] FTI and the LSEW welcomed the Government's intention to work with their European partners to reform the EAW.[289]

164. While many of our witnesses supported the UK's continued participation in the EAW, they were not blind to its failings and were unanimous that its implementation needed to be improved.[290] Others stressed that the problems with the EAW's operation needed to be resolved within the existing framework rather than outside, which would be easier for the UK to achieve as its negotiating hand would be stronger.[291] JUSTICE considered that all of the problems identified with the EAW could be resolved through existing or forthcoming proposals, including implementation of the European Supervision Order and procedural rights measures.[292] The improvements that were suggested are considered below.

The prospects of amending the Framework Decision

165. Hugo Brady noted that there was reluctance to reopen the original measure because it had been very difficult to agree in Council and, now that the European Parliament had to agree such measures under the OLP, the task of agreeing an amendment to it may be even more difficult to achieve.[293] We understand that the Commission is reluctant to reopen the EAW[294] and Director-General Le Bail appeared to confirm this when she told us that the Commission detected no appetite among Member States to amend the EAW and that it could be improved by other means.[295] However, we note that a minimum of seven Member States have the option of initiating legislation in this respect, as the CER, FTI and the Home Secretary acknowledged.[296]

Proportionality

166. In 2011 the Joint Committee on Human Rights produced a report on the UK's extradition policy and, among other things, urged the Government to work with the Commission and other Member States to amend the Framework Decision to include provision for a proportionality principle.[297] A

---

288 UK Government, QQ 293–294, Q 304

289 FTI, LSEW

290 CER, *Cameron's European 'own goal'* (by Hugo Brady); Police Foundation, LibDem UK MEPs, Faculty of Advocates, Justice Across Borders, Bar Council, William Hughes, ACPO, LSS, JUSTICE, Q 75, Q 144, Q 215, Q 269

291 William Hughes, LSEW, ACPO, Justice Across Borders, Q 111, Q 239, Q 271

292 JUSTICE. See also JUSTICE, *European arrest warrants: ensuring an effective defence*, 29 August 2012

293 CER, *Cameron's European 'own goal'* and *Britain's 2014 justice opt-out: Why it bodes ill for Cameron's EU strategy* (by Hugo Brady); Q 121

294 In The Telegraph on 30 December 2012, Vice-President Reding was reported as not being sympathetic to reform, saying: "I am not planning to change it … We do not need to change it. What I have done is build a new system around it which protects the rights of suspects".

295 Q 205

296 CER, *Cameron's European 'own goal'* (by Hugo Brady); FTI, Q 121, Q 293,

297 JCHR, *The Human Rights Implications of UK Extradition Policy* (15th Report of Session 2010–12, HL Paper 156/HC 767)

number of our witnesses suggested that the Framework Decision may need to be amended to include, among other things, a proportionality test.[298]

167. Although the use of EAWs for trivial offences has occurred in different parts of the EU, the problem is commonly associated with Poland, as it makes the largest number of requests to other Member States, particularly the UK. One of the reasons for this is said to be that Polish prosecutors do not have the discretion not to prosecute. The Police Service of Northern Ireland (PSNI) and the DPP agreed that proportionality was an issue but that the number of EAWs issued for trivial offences had reduced in recent years.[299] The Police Foundation attributed this reduction to the work carried out by the Metropolitan Police Service, the Home Office and the CPS with the Polish prosecution authorities.[300] Director-General Le Bail also emphasised that the Commission's work with the Polish authorities was yielding results, including a 20 per cent reduction in the number of EAW requests made by that Member State.[301] The DPP provided figures to the Committee which show that the number of EAW requests that Poland has made to the UK has reduced by approximately 40 per cent in the period from 2009/10 to 2011/12.[302]

168. During our inquiry, the CJEU issued its judgment on the *Radu* case (on 29 January 2013).[303] Some of our witnesses had hoped that, in line with the Advocate General's Opinion, this judgment would expressly permit proportionality considerations, as well as stronger human rights considerations, to be taken into account during the future consideration of EAW requests.[304] However, the CJEU did not follow the Advocate General's Opinion and instead adopted a narrow approach to the case. Despite this, FTI thought that the CJEU could still play a role in improving the operation of the EAW in due course but Martin Howe QC considered this to be the proper role of the legislature, as did Dominic Raab MP, who was also critical of the CJEU for having taken so long to consider such matters.[305] Jodie Blackstock, James Wolffe QC and the Lord Advocate also referred to the recent consideration of proportionality matters in cases concerning the EAW before UK courts.[306]

169. Some of our witnesses emphasised the role of existing guidance on use of the EAW[307] but the DPP considered the non-legally binding status of the

---

298 Mike Kennedy, Jean-Claude Piris, FTI, Justice Across Borders, Timothy Kirkhope MEP and Anthea McIntyre MEP, Q 60, Q 123, Q 216. Also see CEPS, *Europe's most wanted? Recalibrating Trust in the European Arrest Warrant System*, No. 55/March 2013, section 3.1

299 PSNI, Q 215

300 Police Foundation. Other witnesses also mentioned the importance of this work -Q 75 (Jeremy Hill), Q 158 (Evanna Fruithof), Q 239 (Allan Gibson)

301 QQ 205–206

302 CPS

303 Case C-396/11. See Appendix 5 for a summary of the judgment.

304 Bar Council, LSEW, Mike Kennedy, FTI, Q 42, Q 54, Q 113, Q 158, Q 242

305 Q 95

306 Q 124, Q 265. *BH and KAS v Lord Advocate and Scottish Ministers* [2012] UKSC 24; *Gita Fridenberga v Public Prosecutor, Prosecutor General Office for the Republic of Latvia* [2013] EWHC 317 (Admin); *H(H) v Deputy Prosecutor of the Italian Republic Genoa, H(P) v Same, F-K v Polish Judicial Authority* [2012] 3 WLR 90; *H v Lord Advocate* [2012] 3 WLR 151, 2012 SC (UKSC) 308; and *The Queen on the application of Cazan v Judge Trandafir Bagriela, Huneadora Court of Law, Romania* [2012] EWHC 3991 (Admin)

307 Police Foundation, LibDem UK MEPs, Q 54, Q 75, Q 166, Q 206

guidance to be problematic,[308] while the Home Secretary stated that the use of guidance and non-legislative routes to improve the operation of the EAW had not so far produced the desired results.[309]

170. The COPFS and Justice Across Borders emphasised the role played by the European Judicial Network in facilitating contact between judges and prosecutors.[310] However, UKIP considered that "secretive institutions" such as this posed "at least a potential threat to the independence of judiciary".[311] In this respect, we note that the Judicial Office, which supports the judiciary in England and Wales, has announced a project to establish a European Arrest Warrant Judicial Network which will create a permanent support structure for judges in all Member States who regularly deal with the EAW. The Network will develop and expand the existing EAW Network of Judges, set up in 2010, assist in the delivery of training in the operation of the EAW across all Member States and provide opportunities for judicial office holders from all Member States to contribute their views on how the EAW is working in practice.[312]

Human rights

171. The LSEW and Baroness Ludford MEP drew attention to section 21 of the Extradition Act 2003, which allows a judge to discharge someone subject to an extradition request if they decide that the person's extradition would be incompatible with their Convention rights as set out in the Human Rights Act 1998.[313] The Lord Advocate stressed that the compatibility of an EAW request with Article 8, ECHR was regularly taken into account under this provision.[314] UKIP suggested to us that one of the results of the CJEU *Radu* judgment had been to "overrule" the UK Parliament and hold that section 21 was "illegal and void", which in any event they already deemed to be "illusory and of no practical effect".[315]

172. **In our view UKIP's interpretation of the *Radu* judgment is mistaken. It is clear to us that courts in the United Kingdom continue to have the option to decline an EAW request on human rights grounds**.

Minimum procedural rights for defendants

173. UKIP and Dominic Raab MP cited Lord Justice Thomas's evidence to the Scott Baker review, when he said "One of the problems with the way in which a lot of European criminal justice legislation has emerged is that it presupposes a kind of mutual confidence and common standards that actually don't exist".[316] FTI made a similar point, saying that the underlying assumption of mutual recognition PCJ measures—that trial standards and compliance with human rights are at the same level across the EU—was a

---

308 Q 215. The DPP also confirmed that the CPS applied its own proportionality test domestically.

309 Q 293, Q 304

310 Justice Across Borders, COPFS supplementary evidence. Also see Q 266 (David Dickson)

311 UKIP

312 Further information is available at: http://eawjnp.judiciary.gov.uk/

313 LSEW, Q 166

314 Q 265

315 UKIP supplementary evidence (Letter to the Committee dated 19 February 2013)

316 Sir Scott Baker Review, transcript of oral evidence by Lord Justice Thomas, 7 April 2011

flawed one.[317] The Centre for European Policy Studies has also published a report which considers this issue, among other things.[318]

174. In 2009 the Council adopted a "Roadmap" of five legislative measures and a Green Paper concerning criminal procedural rights. The Commission has brought forward three measures in the Roadmap, which concern the right to interpretation and translation; the right to information; and the right to legal advice. We have already noted that the UK decided to participate in the first two proposals, which have been adopted, but not the third, which they have reserved the right to opt in to after it has been adopted.[319] The Lord Chancellor told us that he did not object to this measure in principle.[320]

175. Many of our witnesses considered that the UK should opt in to all of the Roadmap measures.[321] We also note that, in the same evidence session referred to above, Lord Justice Thomas went on to emphasise that he thought that many of the problems related to the EAW could be solved by adherence to the Roadmap measures.[322]

European Supervision Order

176. The European Supervision Order (ESO) was adopted in 2009 and the deadline for Member States to implement its provisions into national law was 1 December 2012.[323] We have already noted that it has not yet been implemented in UK law. It provides a mechanism under which a judicial authority in Member State A could impose a non-custodial supervision measure (grant conditional bail, in English law terms) on the foreign suspect which would be recognised and enforced in Member State B where he is normally resident. The authorities in Member State B would supervise compliance with the order and would also be responsible for returning him for trial if he did not return on his own when summoned to do so by the trial State. When this Committee examined the Commission's proposal for an ESO it concluded that it was "a meritorious and welcome proposal. It addresses a serious issue affecting the liberty of the individual and has the potential to reduce hardship for some thousands of EU citizens".[324]

177. Many of our witnesses emphasised that the implementation of the ESO could help to mitigate some of the EAW's problems by allowing British citizens to be supervised in the UK until the trial in the requesting Member State was ready to begin, thereby helping to avoid a repeat of the Symeou

---

317 FTI, Q 115

318 CEPS, *Europe's most wanted? Recalibrating Trust in the European Arrest Warrant System*, No. 55/March 2013

319 The Committee supported the Government's initial position in their report on *The European Union's Policy on Criminal Procedure* (30th Report of Session 2010–12, HL Paper 288)

320 Q 287

321 CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos); Justice Across Borders (including supplementary evidence), JUSTICE, LibDem UK MEPs, FTI, Q 75, Q 115, Q 206

322 Sir Scott Baker Review, transcript of oral evidence by Lord Justice Thomas, 7 April 2011

323 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ L 294, 11 November 2009, p. 20)

324 EU Committee, *European Supervision Order* (31st Report of Session 2006–07, HL Paper 143)

case.[325] However, the Lord Chancellor told us that while the ESO could bring benefits, he also expressed doubts about how easy it would be to ensure that someone on bail in another Member State could be returned to the UK to stand trial. He said "I am not saying that we oppose the European Supervision Order; I am not saying that we support the European Supervision Order; I am saying that it is not as clear cut as you might think".[326] During a Lords debate on 4 March 2013, Lord McNally, the Minister for Justice, echoed the Lord Chancellor's point when he said

> "In practice, the European Supervision Order is unlikely to help to avoid lengthy pre-trial custody in cases where an EAW has been used to secure the return of the suspect. That is for the simple reason that, the EAW having been needed to secure the return, the suspect has shown himself to be a flight risk, having already resisted voluntary return. In those circumstances, it is difficult to see the same suspect persuading the court to allow him to return home again".[327]

Following this debate we note that FTI wrote to Lord McNally to contest this statement, as well as making it clear that in their view the Government's failure to implement the ESO into UK law meant that "some British citizens may needlessly spend months or years awaiting trial away from home".[328]

178. At present, there is no EU-wide summons procedure available. Two of our witnesses mentioned the potential utility of such a procedure in passing and we also note that one of Sir Scott Baker's suggested improvements to the EAW involves relying upon an existing non-EU measure in this area.[329]

179. **We very much regret that the Government have chosen not to implement the European Supervision Order, pending their decision on the opt-out being made, and urge them to implement this measure without further delay. There is no justification for British citizens to be deprived of the benefits of this measure, especially as it could help prevent a repeat of the Symeou case.**

180. **We consider that the best way to achieve improvements in the operation of the EAW is through a process of negotiations with the other Member States; the use of existing provisions in national law; informal judicial cooperation; the development of jurisprudence at the Member State and EU level, including on matters of proportionality, as well as the immediate implementation of flanking EU measures such as the European Supervision Order and the Roadmap procedural rights measures, to which the Government should opt in where they have not already done so.**

---

[325] CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos); CER, *Britain's 2014 justice opt-out: Why it bodes ill for Cameron's EU strategy* (by Hugo Brady); LSEW, LSS, LibDem UK MEPs, JUSTICE, ACPO, Police Foundation, FTI, Timothy Kirkhope MEP and Anthea McIntyre MEP, Justice Across Borders supplementary evidence, Q 42, Q 54, Q 58, Q 75, Q 120, Q 158, Q 170, Q 219, Q 239, Q 269

[326] Q 292

[327] HL Deb 4 February 2013 col GC16

[328] Letter from FTI to Lord McNally dated 25 February 2013. It is available at: http://www.fairtrials.net/wp-content/uploads/Letter-to-Lord-McNally_ESO.pdf

[329] Q 42, Q 239. For the relevant recommendation by Sir Scott Baker see Box 9.

CHAPTER 7: WHAT WOULD BE THE CONSEQUENCES OF LEAVING POLICE AND CRIMINAL JUSTICE MEASURES?

181. This chapter considers some of the most significant measures that were raised by our witnesses. In the absence of the Government's promised Explanatory Memorandums and of an indicative list of measures they would seek to rejoin in the event of the opt-out being exercised, we were not in a position to draw final conclusions on the measures subject to the opt-out as a whole. We may need to return to this matter in a subsequent report.

"Defunct" measures

182. The Home Secretary's 15 October 2012 statement mentioned that some of the PCJ measures were "now, in fact, entirely defunct". We asked the Government to provide a list of the measures they considered to fall into this category. As their analysis of the measures was not yet complete, they provided a provisional list of three measures.[330] No further list had been made available by the time this report was adopted. The Home Secretary confirmed that the final list of defunct measures would be made available as soon as possible. She believed that a defunct measure could still have potential implications for the UK.[331]

183. While some of our witnesses agreed that some of the measures could indeed be defunct, none of them considered this to be a valid reason for exercising the opt-out, as these measures were also considered to be harmless insofar as the UK was concerned.[332] Beyond the Government, only Dominic Raab MP has named measures he considers to be defunct, including the Convention on Driving Disqualifications.[333]

184. In general terms, and quite separately from the opt-out decision itself, other witnesses suggested that it would be a good idea for the Commission to conduct a "spring clean" of any redundant or obsolete measures, with a view to either amending or repealing them.[334] Director-General Le Bail confirmed that the Commission was conducting a more general "fitness check" of all EU legislation to make sure it was all still relevant and Stefano Manservisi, the Director-General of DG HOME at the Commission, stated that any such measures would have to be repealed in the same manner as they were adopted.[335] We note that on 15 March 2013, in the context of reducing regulatory burdens on SMEs, the European Council agreed to "identify and propose … the withdrawal of regulations that are no longer of use.[336]

185. **We do not consider that the existence of "defunct" measures on the list caught by the opt-out decision should be a material factor in**

---

330 Annex B to the letter from the Home Secretary and the Lord Chancellor to Lord Boswell of Aynho dated 1 February 2013. Contained in the volume of evidence, which is available online. These defunct measures were originally mentioned in the Government's written evidence. The redundant measures are considered in Chapter 4.

331 Q 283

332 Faculty of Advocates, LSS, Bar Council, LSEW, Jean-Claude Piris, Dr Maria O'Neill, Q 53

333 Open Europe, *Cooperation Not Control* (by Dominic Raab MP)

334 Bar Council, LSEW, Jean-Claude Piris, Dr Maria O'Neill, Q 33, Q 40, Q 47, Q 63, Q 105, Q 127, Q 155

335 Q 203

336 European Council Conclusions, 14 March 2013

deciding whether or not to exercise the opt-out. If some measures are indeed defunct then they are likely to be harmless insofar as the United Kingdom is concerned. However, we welcome the Commission's intention to review the *corpus* of police and criminal justice measures to identify those which no longer serve any purpose with a view to either amending or repealing them without further delay.

Harmonisation measures

186. About a dozen measures have been adopted by the EU which seek to "establish minimum rules concerning the definition of criminal offences and sanctions" regarding particularly serious cross-border crimes. Among other things these measures include Framework Decisions on terrorism, drug-dealing, fraud, and racism and xenophobia. In his evidence, the Lord Chancellor sought to make a distinction between measures to combat international crime and those that "take us a step further towards the integration of the justice system, towards common penalties in every country for individual crimes, towards common processes".[337] He did not identify particular measures but he may well have been referring to these measures on offences and penalties.

187. The CELS have stated that the vast majority of these measures required no changes to be made to UK law because these offences were already criminalised at the time of each measure's adoption and that if the UK were to withdraw it would make little difference in each instance unless it wanted to decriminalise the measures in question.[338] The DPP echoed this view and said that as a result the measures were "not particularly" helpful for prosecutors and that little use was made of them.[339] Likewise, the Lord Advocate did not consider these measures to be important in the Scottish context.[340]

188. The Fresh Start Project has stated that these measures are "predominantly irrelevant to cross-border operational co-operation" so should be left to "elected and accountable UK law-makers to decide and the UK Supreme Court to interpret".[341] Dominic Raab MP has stated that there would be no need for the Government to rejoin these measures, particularly the one concerning racism and xenophobia as such matters are more appropriately dealt with at the domestic level.[342] ACPO suggested that the measure concerning terrorism could potentially weaken UK legislation in this area and these concerns have been echoed by Open Europe.[343] However, in response to this point, Jodie Blackstock made it clear that a standard "non-regression" clause in the harmonisation measures prevented the diminution of pre-existing domestic laws in the same area,[344] while FTI pointed out that

---

337 Q 290

338 CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos). Also see Bar Council and LSEW supplementary evidence

339 Q 224

340 Q 270

341 Fresh Start Project, *Manifesto for Change*

342 Open Europe, *Cooperation Not Control* (by Dominic Raab MP)

343 Open Europe, *An Unavoidable Choice* (by Stephen Booth, Christopher Howarth and Vincenzo Scarpetta); Q 104

344 Q 112

the same measures did not prevent the UK from going further than any of the provisions contained therein.[345]

189. **While it is clear from the assessment of these harmonisation measures that there are differences of opinion as to their use and value, we do not consider them to be "building blocks" of a pan-European justice system.**

Mutual recognition measures

190. The principle of mutual recognition requires the decisions and rulings of the courts in one Member State to be accepted by the courts in other Member States and enforced on the same terms as their own. This principle has formed the cornerstone of judicial co-operation in both civil and criminal matters within the EU since the adoption of the Tampere Programme for EU JHA cooperation in 1999 and about a dozen measures have since been adopted on this basis. Two of these—the European Arrest Warrant and the European Supervision Order—have already been considered in Chapter 6. The other measures concern the mutual recognition of freezing orders; fines; confiscation orders, probation orders; and of prison sentences. In general terms, this Committee has been consistently supportive of these measures during the scrutiny process.

191. In Chapter 4 we referred to the views of some witnesses that the UK had supported, indeed promoted, the principle of mutual recognition from the beginning. Professor Peers also told us that "in light of that fact, other Member States will think it is very peculiar that we turn our back on a system that we played such a large role in developing".[346] UKIP were less convinced by the merits of mutual recognition measures, stating that "Mutual recognition effectively means that every ex-communist prosecutor or judge in an East European state run by a local mafia is given an equal standing to the judges in the Old Bailey".[347]

192. A number of our witnesses stressed the importance of the mutual recognition measure on the transfer of prison sentences.[348] The Lord Chancellor told us that this measure, which entered into force on 5 December 2011, had "many potential advantages".[349] While the Government confirmed that no prisoners had yet been transferred from England and Wales to other Member States under the measure, 157 prisoners have been identified for potential transfer and they noted that EU nationals from other Member States accounted for approximately 36 per cent (3,950) of the current prison population of foreign nationals. They expected the remaining Member States to have implemented the measure by 2014 and once this was the case they expected to see the number of prisoners transferred steadily increasing. With regard to the mutual recognition measure on freezing orders they confirmed that so far

---

345 FTI

346 Q 44

347 UKIP

348 CER, *Cameron's European 'own goal'* (by Hugo Brady); Justice Across Borders, JUSTICE, Letter from David Ford MLA to Lord Boswell of Aynho dated 12 December. Contained in the volume of evidence, which is available online.

349 Q 292

they had only received six incoming requests pursuant to this measure and had not made any outgoing requests.[350]

EU agencies and measures encouraging cross-border cooperation

Europol

193. The European Police Office (Europol) aims to improve the coordination of Member States' law enforcement agencies to tackle cross-border crime through the exchange of intelligence. It was established in 1995 and is currently constituted on the basis of a Council Decision adopted in 2009, the draft of which was the subject of a report by this Committee in 2008.[351] Many of our witnesses considered it to be a useful agency[352], including the Home Secretary who thought Rob Wainwright was doing a "very good job" as its Director.[353] However, UKIP considered that Europol was modelling itself on the FBI and that there were well-founded concerns that it has the potential to develop into a "political secret police".[354]

194. Rob Wainwright told us that, if the UK stopped participating in Europol, in his opinion there was no doubt that it would become more difficult for it to investigate international crimes in operational terms, as it would no longer have access to Europol's information, analysis and intelligence; forensic and technical support; training; threat assessments or strategic analysis; and lose the right to post liaison officers in The Hague. He said "It would increase the risk of serious crimes, therefore, going undetected or not prevented in the UK" and as the UK was a common destination for drug and people trafficking "Any diminution of the UK's capability to deal with those problems would clearly increase public safety risk". He also said that the UK's involvement in Europol was a much more efficient and cost-effective arrangement through having access to 40 countries in one place rather than through a network of bilateral arrangements.[355] He stressed that in general Europol was a very cost-effective organisation, which had recently made efficiency savings, and only constituted a tiny fraction of the JHA budget (0.77 per cent).[356] Mike Kennedy and William Hughes agreed that it provided good value for money.[357]

195. Rob Wainwright told us that the consequences for Europol if the UK were to leave the agency "would be pretty disastrous, frankly … Quite simply, we are stronger together if we stay together; it is as simple as that". He explained that the UK was the first or second most important Member State in terms of the volume of intelligence shared and amount of operational work that is conducted through Europol, with over 50 per cent of cases having a British dimension, either because it is led by them or involves them. If the UK left,

---

350 UK Government

351 EU Committee, *EUROPOL: Coordinating the fight against serious and organised crime* (29th Report of Session 2007–08, HL Paper 183)

352 ACPO, ACPOS, Piris, Mike Kennedy, JUSTICE, LSS, PSNI, Europol, Justice Across Borders, LSEW, Police Foundation, William Hughes, Timothy Kirkhope MEP and Anthea McIntyre MEP, Q 235

353 Q 295

354 UKIP

355 Europol, Q 133. Timothy Kirkhope MEP and Anthea McIntyre MEP made a similar point.

356 Q 138

357 Mike Kennedy, Q 237

then this would also go against the international trend, as a number of non-EU countries are seeking to establish liaison offices in The Hague at the same time as the UK, and other Member States, are closing bilateral liaison officer posts elsewhere in Europe in order to centralise them in Europol.[358] He told us that over the last three years UK law enforcement agencies had doubled the amount of evidence they were sharing with Europol; and SOCA was also relying upon Europol intelligence to a greater extent than before.[359]

Eurojust

196. The EU's Judicial Cooperation Unit (Eurojust) aims to improve the coordination of investigations and prosecutions among Member States' competent judicial authorities. It was established by a 2002 Council Decision, which was amended in 2009. This Committee published a report on its operation in 2004.[360] Many of our witnesses considered Eurojust to be a useful agency.[361] Michèle Coninsx told us that if the UK left Eurojust it would be unable to benefit from its services, including the judicial co-ordination meetings, judicial cooperation agreements with third countries, office facilities, the facilitation of mutual legal assistance requests, the acceleration and execution of EAWs and the funding and establishment of Joint Investigation Teams (JITs).[362]

197. The DPP stressed that the UK's involvement in Eurojust provided many benefits with the coordination meetings being the most important. He also considered Eurojust to be good value for money, costing the UK a relatively modest £360,000 per annum. Costs would be much greater if the UK were to rely upon a network of bilateral liaison magistrates in each country instead of the centralised liaison facilities made available in The Hague. He also provided some examples of where Eurojust had been of practical benefit to the CPS.[363] The Lord Advocate also considered Eurojust to be very beneficial in terms of encouraging a coordinated approach to cross-border investigations, among other things, and he said that he would be concerned if the UK left this body.[364]

198. Dominic Raab MP contrasted the large increases in Eurojust's budget over the years with its performance and suggested it could benefit from more evaluation of its operations.[365] While UKIP accepted that it was of "some utility", it also suggested that its advice function could be provided by

---

358 Europol, QQ 133–134

359 Europol, Q 135, Q 143. Timothy Kirkhope MEP and Anthea McIntyre MEP made a similar point.

360 EU Committee, *Judicial Co-operation in the EU: the role of Eurojust* (23rd Report of Session 2003–04, HL Paper 138). It concluded that Eurojust was meeting a "real and increasing need for assistance in facilitating the investigation and prosecution of complex cross-border criminal cases", as well as providing "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".

361 CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos); Bar Council, Jean-Claude Piris, Mike Kennedy, JUSTICE, LSS, PSNI, Police Foundation, Justice Across Borders, LSEW, ACPO, COPFS, William Hughes, Q 52, Q 235

362 Q 180, Q 190

363 CPS, Q 210, Q 218

364 Q 267

365 Q 104

international law firms on a private basis.[366] The Home Secretary told us it was difficult to indicate Eurojust's degree of effectiveness based upon the casework data that was available for 2011 and 2012.[367]

European Police College (CEPOL)

199. CEPOL is currently located in England at Bramshill. Many of our witnesses considered it to be a useful body,[368] including ACPO who told us that it played a positive role in UK policing; and its location also allowed the UK to influence police teaching at senior level, while enhancing the reputation of its own policing across the EU.[369] However UKIP was concerned that the organisation was being misused for "indoctrination" purposes and to advance the "Euro-federalist political agenda".[370]

200. The possibility of merging CEPOL with Europol is discussed in Chapter 8.

Joint Investigation Teams (JITs)

201. A JIT consists of judicial and police authorities from at least two Member States, who conduct a specific cross-border criminal investigation for a limited period. When we considered them in our report on the EU's Internal Security Strategy, the Government told us they considered JITs to be a "valuable tool" and supported the Commission's plan to expand their use.[371] Many of our witness also cited JITs as being a useful measure.[372] Rob Wainwright and Michèle Coninsx told us that their use had greatly increased over the years, with the UK being involved in an average of nine out of 30 JITs per annum.[373] Eurojust subsequently confirmed that, in 2011/12, the UK participated in the most JITs of any Member State.[374] The DPP also stressed that JITs provided benefits including speedier cross-border coordination, enabling the deployment of UK law enforcement authorities to other Member States, providing all participating Member States with direct access to the same evidence, as well as the increased admissibility of this evidence, which was commonly challenged before the courts under the previous bilateral agreements. He also provided examples of where JITs had been of practical benefit to the CPS.[375]

---

366 UKIP

367 Q 295. The Government later confirmed that 18 per cent of new cases opened at Eurojust in this period involved the UK. See Letter from the Home Secretary and the Lord Chancellor to Lord Boswell of Aynho dated 12 March 2013. Contained in the volume of correspondence, which is available online. Eurojust also provided figures in their written evidence.

368 Bar Council, Jean-Claude Piris, JUSTICE, LSS, LSEW, ACPO

369 ACPO

370 UKIP

371 EU Committee, *The EU Internal Security Strategy* (17th Report of Session 2010–12, HL Paper 149)

372 Bar Council, ACPOS, Mike Kennedy, ACPO, PSNI, LSEW, Justice Across Borders, Q 270. APCO, CPS, Justice Across Borders and Eurojust provided examples of successful JITs.

373 Q 144, Q 180, Q 184

374 Eurojust. 78 JITs were established during that period and the UK was involved in 25 (32 per cent)

375 CPS, Q 210

Measures concerning the exchange of information

Schengen Information System II (SIS II)

202. The Schengen Information System (SIS) is a database system which enables the collection and exchange of information relating to immigration, policing and criminal law throughout the EU. The UK does not currently participate in the SIS but is scheduled to participate in the second generation system (SIS II) from towards the end of 2014. It will only have access to the policing and criminal law data. SIS II was originally due to become operational in 2007 but experienced severe delays since its inception and eventually became operational for the other Member States on 9 April 2013. The Committee reported on the development of SIS II in 2007.[376] The Government have confirmed that the UK's total projected spend, on its preparations to join SIS II at the end of the financial year 2012/13, will be £83.3 million.[377] Many of our witnesses expected that this would become a valuable measure once it becomes operational in the UK.[378]

Exchange of criminal records/European Criminal Records Information System (ECRIS)

203. The Framework Decision on the exchange of criminal records requires Member States that convict non-nationals to send notifications of those convictions, including any updates, to the home Member State of those non-nationals. Member States can also request detailed information about convictions from another Member State, which can then be taken into consideration in their domestic criminal proceedings. A related Framework Decision established ECRIS, a computer system which allows the efficient exchange of these records. The whole system became operational in April 2012. Many of our witnesses emphasised the benefits of this system.[379]

204. ACPOS told us that opting out of this measure would have a severe negative impact on the ability of UK law enforcement authorities to assess fully the risks and criminal history of foreign nationals residing in the UK and accused of committing crimes here.[380] The DPP also stressed that without them a defendant from another Member State would be presented as a person of good character and that prosecutors would be unable to deploy bad character evidence. He explained that the ready availability of this information was crucial and that "operationally" one of the "biggest risks" they had identified of the UK withdrawing from these measures was the possibility that someone who would otherwise not have been granted bail, because they might commit

---

376 EU Committee, *Schengen Information System II (SIS II)* (9th Report of Session 2006–07, HL Paper 49). The Committee concluded that the "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".

377 Letter from James Brokenshire MP, Security Minister, to Lord Boswell of Ayhno dated 13 December 2012. Available at: http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/cwm/CwMsubF1Nov30nov2012.pdf

378 Jean-Claude Piris, ACPO, ACPOS, PSNI, Timothy Kirkhope MEP and Anthea McIntyre MEP, Q 270

379 COPFS, Bar Council, Jean-Claude Piris, PSNI, Police Foundation, Justice Across Borders, ACPOS

380 ACPOS

a further serious offence, might be given bail.[381] Dominic Raab MP agreed that cross-border criminal record checks brought obvious benefits but suggested that this could be facilitated on an "administrative" basis without the need for an underpinning EU measure.[382]

205. The Government told us that from August to October 2012 the UK had made 7,872 notifications, regarding convictions and updates, and received 2,070 notifications in the same period. From August to October 2012 the UK made 5,492 outgoing requests and received 1,165 incoming requests. Replies to approximately 30 per cent of the outgoing requests disclosed previous convictions.[383]

The Prüm Decisions

206. Some of our witnesses referred to the Prüm Decisions, which implement the Prüm Treaty into EU law.[384] The Decisions aim to introduce procedures for promoting the fast, efficient and inexpensive means of cross-border data exchange regarding DNA, fingerprint and vehicle registration data. Member States were obliged to have implemented all of the Decisions' provisions by 2011. The Fresh Start Project have voiced concerns about the Prüm regime, including the potential consequences for ordinary citizens, the disproportionate burden it may place on the UK, as well as data protection issues and the risk of mistaken identifications.[385] The Home Secretary reminded the Committee that the Government had already made it clear that they would not be implementing the Prüm Decisions in the short term, primarily because of the costs involved.[386]

Measures detrimental to the UK

207. Beyond concerns about the EAW, which we have already discussed in Chapter 6, very few of our witnesses drew our attention to any specific measures that they considered to be detrimental to the interests of the UK. Dominic Raab MP expressed concerns about the sharing of data[387] and UKIP considered that many of the measures posed a serious threat to civil liberties and the rule of law in the UK.[388]

208. **We therefore consider that there are compelling reasons of national interest for the United Kingdom to remain full participants in most of the measures and agencies referred to in this Chapter. As to the remainder we have identified no persuasive reason for the United Kingdom to withdraw from them.**

---

381 QQ 210–211

382 QQ 87–88

383 UK Government

384 Jean-Claude Piris, ACPOS, PSNI. This Committee produced a report on the Treaty in 2007—*Prüm: an effective weapon against terrorism and crime?* (18th Report of Session 2006–07, HL Paper 90)

385 Fresh Start Project, *Manifesto for Change*

386 Q 285

387 Q 89

388 UKIP

CHAPTER 8: THE PROCEDURE FOR REJOINING PARTICULAR POLICE AND CRIMINAL JUSTICE MEASURES

The Procedure

209. If the Government decide to exercise the opt-out, the Commission will present a proposal for a Decision to the Council, to be decided by QMV, regarding transitional arrangements, which may allow for the continued application of some measures to and in the UK—outstanding EAWs for example—for a defined period. The UK will not participate in the adoption of this decision.

210. If the opt-out has been exercised, then the UK may "at any time afterwards" notify the Council of its "wish" to participate in—or rejoin—measures that have ceased to apply to it by virtue of that decision. Once the UK has rejoined a particular PCJ measure by this route then that measure will become subject to the CJEU's jurisdiction and the Commission's enforcement powers. The procedure is set out in Articles 10(4) and (5) of Protocol 36, reproduced in Box 9.

BOX 9

Text of transitional and financial provisions in Articles 10(4) and (5), Protocol (No 36)

(4) The Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary consequential and transitional arrangements. The United Kingdom shall not participate in the adoption of this decision. A qualified majority of the Council shall be defined in accordance with Article 238(3)(a) of the Treaty on the Functioning of the European Union. The Council, acting by a qualified majority on a proposal from the Commission, may also adopt a decision determining that the United Kingdom shall bear the financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts.

(5) The United Kingdom may, at any time afterwards, notify the Council of its wish to participate in acts which have ceased to apply to it pursuant to paragraph 4, first subparagraph. In that case, the relevant provisions of the Protocol on the Schengen *acquis* integrated into the framework of the European Union or of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, as the case may be, shall apply. The powers of the institutions with regard to those acts shall be those set out in the Treaties. When acting under the relevant Protocols, the Union institutions and the United Kingdom shall seek to re-establish the widest possible measure of participation of the United Kingdom in the *acquis* of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence.

211. The majority of the PCJ measures subject to the opt-out do not form part of the Schengen *acquis*.[389] We should make clear that, for non-Schengen measures, it is the Commission that will primarily determine any application to opt back in. The procedure for rejoining the non-Schengen measures is for the UK to notify the Commission and the Council of its wish to rejoin. The Commission must "confirm" the participation of the UK in the measures concerned within four months of the UK's notification of its intention to opt back in. Transitional measures may be imposed if necessary. If the Commission is not satisfied that the UK fulfils all the conditions for participating in the measures, it must set out what the UK must do to bring itself into compliance and a deadline for a further examination of the notification to opt back in. If, after the deadline, the Commission is still not satisfied, the UK may refer the matter to the Council for determination. The Council would act by QMV. The UK would not have a vote.[390]

212. The procedure in relation to Schengen measures requires a decision of the Council, acting by unanimity (so one Member State could block the adoption of a decision). The UK would participate in the adoption of such decisions.

213. Article 10(5) of Protocol 36 provides that the EU Institutions and the UK must seek to "re-establish the widest possible measure of participation of the UK" but "without seriously affecting the practical operability" of the EU *acquis* on freedom, security and justice. The European Parliament will not have a formal role in this process but is likely to be kept informed by the Commission.[391]

Discussions with the other Member States

214. As the other Member States will play an important role in many aspects of the procedures that will apply to any UK attempts to rejoin certain measures, we asked the Government what contact they had made with the other Member States to this effect. The Government told us that they had written to the Interior and Justice Ministers of all Member States following the 15 October 2012 announcement and had also had discussions with their counterparts at the October and December JHA Councils.[392] The Home Secretary told us that bilateral discussions were now underway, at the ministerial and official level, on the implications for areas that the UK may opt-out of, as well as the areas where they may wish to rejoin. She said that after a final decision on the opt-out has been made following votes in both Houses, further discussions will take place with those Member States at a "different level" regarding the subsequent decisions in the Council.[393]

215. When we asked for an account of those discussions, the Home Secretary told us that they did not feel it would be appropriate to disclose this as to do so "would potentially put in jeopardy the willingness of other Member States to … have open discussions with us".[394] The Government also rejected a similar

---

[389] With reference to the list of measures contained in Appendix 4, 24 are Schengen measures and the remaining 109 are non-Schengen measures.

[390] Protocol 21 and Article 331(1) TFEU

[391] Q 165, Q 194

[392] UK Government

[393] Q 280

[394] Q 281

request which the Committee made in writing, in a letter to the Home Secretary and the Lord Chancellor dated 19 December 2012.[395]

216. **We regret that the Government have not provided us with even a summary of the reactions of the other Member States to the Government's intention to exercise the opt-out, as these may be critical in assessing the potential success or otherwise of negotiations regarding any attempts by the United Kingdom to rejoin particular measures.**

Rejoining particular police and criminal justice measures

217. In a previous report, the Committee considered the Government's prospects of rejoining particular measures were the opt-out to be exercised, and concluded "We share the scepticism that it will be possible for the UK to "pick and mix" by opting out of all the subsisting pre-Lisbon legislation and immediately opting back in to some only".[396]

218. Many of our witnesses also suggested that this may not be a straightforward process, and would incur risks, depending on the reaction of the other Member States to any attempt by the Government to "cherry pick" particular measures. Others suggested that the requirement for unanimity in the Council for Schengen-related measures would inevitably lead to difficulties and could lead to conditions being imposed by some Member States in order to provide their consent.[397] Some witnesses noted that the Council had, in the past, refused requests by the UK to participate in pre-Lisbon Schengen measures, including the Visa Information System and Frontex.[398]

219. Some witnesses considered that the wording of Article 10(5), obliging the EU institutions and the UK to "seek to re-establish the widest possible measure of participation of the UK" in those measures "without seriously affecting the practical operability" of those measures and "respecting their coherence" meant that it was unlikely that the Commission and the Council would refuse the UK permission to rejoin certain measures subject to the practicality and coherence requirements being met.[399] Professor Peers considered that this wording arguably placed a "binding obligation" on the Commission to allow the UK to participate and that a "fairly high threshold" would have to be reached before it could refuse permission. However, as this threshold may be interpreted differently by some Member States or the

---

395 See the response letter from the Home Secretary and the Lord Chancellor to Lord Boswell of Aynho dated 1 February 2013. Contained in the volume of correspondence, which is available online.

396 EU Committee, *The European Union's Policy on Criminal Procedure* (30th Report of Session 2010–12, HL Paper 288), paragraph 115

397 CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos); CER, *Cameron's European 'own goal'* and B*ritain's 2014 justice opt-out: Why it bodes ill for Cameron's EU strategy* (by Hugo Brady); LibDem UK MEPs, Bar Council, Faculty of Advocates, LSEW, LSS, Jean-Claude Piris, ACPOS, David Anderson QC, William Hughes, Mike Kennedy, Police Foundation, Dr Maria O'Neill, JUSTICE, Justice Across Borders, Timothy Kirkhope MEP and Anthea McIntyre MEP, Q 38, Q 63, Q 127, Q 165, Q 166

398 LibDem UK MEP s, Bar Council

399 LibDem UK MEPs, Bar Council, Dr Maria O'Neill, LSEW

Commission, given the risks involved, he considered that it would be better not to exercise the opt-out at all.[400]

220. While Jean-Claude Piris considered that the Government's approach to the opt-out would be based on a "gamble", in principle, he considered that it would also be in interests of the other Member States for the UK to rejoin some measures.[401] Dominic Raab MP has stated that the other Member States have a strong "vested interest" in the UK remaining part of some PCJ measures, because of its expertise and experience, and that attempting to isolate the UK would substantially weaken EU cooperation in this area.[402]

221. Director-Generals Manservisi and Le Bail told us that the process for rejoining measures could not begin until the Government had notified the Council of their decision on the opt-out and, if it is to be exercised, which of the measures they would like to rejoin. However, the Commissioners for Justice and Home Affairs, Vice-President Reding and Commissioner Malmström, have both been reported as saying that it will not be an automatic process. Vice-President Reding, in particular, has stated that it will be "complex, time-consuming, leave a lot of legal uncertainty and … problems".[403]

222. The Government did not comment on their prospects for rejoining particular PCJ measures beyond confirming that the UK has a Treaty right to seek to do so.[404] However, when the former Lord Chancellor, Kenneth Clarke MP, spoke to us about this matter for a previous inquiry he was sceptical that the UK would be allowed to adopt a "pick and mix" approach.[405] According to Open Europe, James Brokenshire MP, the Security Minister, has also suggested that any conditions attached by the Commission might only allow the UK to join groups of related measures, some of which they might like and others they might not.[406]

223. **While in our discussion with the Commission we found no inclination on their part to obstruct or make the process of opting back in difficult, seeking to rejoin particular measures would not necessarily be automatic or straightforward. Either the Commission, or where appropriate, the Council, may seek to impose conditions on such requests.**

How interconnected are the police and criminal justice measures?

224. Many of our witnesses considered that some of the PCJ measures were interconnected and that they were much more effective when used as a package during cross-border investigations and prosecutions. As a result, if

---

400 Statewatch, *The UK's planned 'block opt-out' from EU justice and policing measures in 2014* (by Professor Steve Peers); Q 38

401 Jean-Claude Piris

402 Open Europe, *Cooperation Not Control* (by Dominic Raab MP)

403 Guardian, *EU warns Tories that UK security opt-out 'doesn't make sense'*, 14 February 2013. Also see Financial Times, *Cameron challenged over EU cherry picking*, 9 December 2012

404 UK Government

405 EU Committee, *The European Union's Policy on Criminal Procedure* (30th Report of Session 2010–12, HL Paper 288), paragraph 114

406 Open Europe, *An Unavoidable Choice* (by Stephen Booth, Christopher Howarth and Vincenzo Scarpetta), section 3.2.1

the UK only rejoined particular measures, then this may present technical difficulties, as well as undermining the utility of the package as a whole.[407]

225. Among other examples, we heard that JITs were connected to Eurojust, as they received funding from this agency; that Europol was an integral part of the SIS; that Eurojust played an important role regarding EAWs, freezing and asset recovery orders, and the transfer of criminal proceedings; and that Eurojust and Europol regularly work closely together.[408] Europol stated that it was only "indirectly" affected by some measures, including SIS and JITs.[409] The LSEW and the Bar Council stated that some groups of measures must naturally "stand or fall together" such as the Eurojust measures and the measures allowing for the exchange of criminal records and establishing ECRIS.[410]

226. Directors-General Manservisi and Le Bail told us that the Commission was currently assessing coherence issues but that further work was contingent upon a precise list of the measures that the Government would like to rejoin being made available. They added that "it is very difficult to define coherence in particular in a system where all measures support each other".[411]

227. The Home Secretary agreed and told us that their discussions with the Commission were attempting to clarify exactly which measures were interconnected and to what degree, which would have an impact on the measures that they may wish to rejoin. She accepted that it may either prove necessary for the UK to rejoin or opt in to a related measure and that the Commission may make this a requirement during the negotiations.[412]

228. **From the evidence given to us by the Commission, it is clear that they consider adherence to the principle of coherence a matter of paramount importance. Any application to rejoin measures must meet that test.**

Timing and transitional arrangements

229. Some of our witnesses expressed concerns about the uncertainty that may arise as to the timing of any notification to rejoin measures and legal lacunae which may arise during the period between the opt-out (if exercised) taking effect on 1 December 2014 and the date on which the Government rejoins particular measures.[413]

230. Director-General Manservisi stated that technical legal discussions were ongoing between the Commission and Government regarding the "concrete matter" of when the UK could notify its wish to rejoin certain measures—on

---

[407] CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos); CER, *Cameron's European 'own goal'* (by Hugo Brady); LSEW, LibDem UK MEPs, JUSTICE, ACPO, Police Foundation, Q 155, Q 139

[408] ACPO, Q 139, Q 188, Q 210, Q 248

[409] Europol supplementary evidence

[410] Bar Council and LSEW supplementary evidence

[411] Q 193, Q 197

[412] Q 279, Q 297

[413] Bar Council, Faculty of Advocates, Jean-Claude Piris, Justice Across Borders, Timothy Kirkhope MEP and Anthea McIntyre MEP, Q 166

1 June 2014 or 1 December 2014.[414] Professor Peers considered that Article 10 placed no time limit on when the Government could seek to rejoin measures and that they could notify their desire to do so "at any time" although they were likely to do so in advance of the 31 May 2014 deadline.[415]

231. Some witnesses referred to the EAW as an example of the complications and uncertainty that could arise for individuals facing extradition, including the scope for legal challenges.[416] Notwithstanding possible transitional arrangements to the contrary, the CELS have stated that the natural consequence of the UK leaving the mutual recognition measures is that it would no longer be obliged to execute EAWs, and other court orders, that were received from other Member States and vice versa.[417] Professor Peers referred to potential complications with the transition from the EAW to the Council of Europe Convention on Extradition and the execution of EAWs issued before the opt-out date, saying that it was likely to be difficult to draft a transitional arrangement "that perfectly clearly caters for all of the important legal issues and that is not subject to many different questions of interpretation or even validity".[418] Writing for Statewatch he has also suggested that the Council may decide that the transitional arrangements should require any EAWs transmitted to the UK by other Member States before 1 December 2014 to be executed in the interim period and vice versa.[419] Helen Malcolm QC believed that clients subject to an EAW could experience a great deal of uncertainty if these were placed on hold from 1 December 2014 until alternative arrangements come into effect.[420]

232. In order to allow enough time for these complex issues to be addressed, and for new measures to be developed, CER, Open Europe, Martin Howe QC, Timothy Kirkhope MEP and Anthea McIntyre MEP and Jeremy Hill have all suggested that the opt-out decision should be made sooner rather than later in order to allow for a long enough lead-in period.[421] Professor Peers, on behalf of Statewatch, has suggested that the Government's best approach would be to apply to rejoin specific measures as soon as it has officially notified its decision on the opt-out, to allow the EU institutions to decide during the period between 1 June 2014 and 1 December 2014 that the measures concerned will continue to apply to the UK from 1 December 2014, without any gap in their application.[422] Europol and Mike Kennedy emphasised these risks should be mitigated by carefully drafted transitional arrangements[423] but the CELS and Statewatch have stated that these

---

414 Q 195, Q 198

415 Q 38

416 Mike Kennedy, LSEW, Q 131, Q 144

417 CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos)

418 Q 41

419 Statewatch, *The UK's planned 'block opt-out' from EU justice and policing measures in 2014* (by Professor Steve Peers)

420 Q 52

421 Also see CER, *Britain's 2014 justice opt-out: Why it bodes ill for Cameron's EU strategy* (by Hugo Brady); Open Europe, *An Unavoidable Choice* (by Stephen Booth, Christopher Howarth and Vincenzo Scarpetta); Timothy Kirkhope MEP and Anthea McIntyre MEP, Q 25, Q 71, Q 73

422 Statewatch, *The UK's planned 'block opt-out' from EU justice and policing measures in 2014* (by Professor Steve Peers)

423 Europol, Mike Kennedy

arrangements may be subject to legal challenges in the UK or other Member States, as well as forming the subject of preliminary references to the CJEU.[424]

233. The Director-Generals told us that the transitional arrangements will be produced on the basis of "technical examination" but that more formal discussions could not begin until the Government had made their decision on the opt-out and on the list of measures they wish to rejoin. However, substantial work was already ongoing to prepare the ground as they were keen to minimise complexities in this area. Director-General Manservisi told us that "We are perfectly aware of the fact that we are entering into a situation that could legally be very unstable and unclear", including the risk of potential legal challenges.[425]

234. The Home Secretary stated that timetabling discussions were taking place with the Commission and that the Government were "working to ensure that the transitional arrangements are such that measures continue to apply as far as possible to the UK during that period" and she was "not intending that there will be any significant gap between the initial opt-out and the opting back into any individual measures that we would choose to opt back into".[426]

235. **Considering the legal complexities and uncertainty that may arise, were the Government to exercise the opt-out and seek to rejoin particular police and criminal justice measures, the Government would have done well to have commenced negotiations at a much earlier stage. We consider it to be imperative that, in the Home Secretary's own words, there should not be any significant gap between the initial entry into force of the opt-out, were it to be exercised, and rejoining certain measures. The longer it takes for the Government to agree a definitive list of police and criminal justice measures that it wishes to rejoin, the less time they will have to negotiate these with the Commission and the Council, as well as agreeing watertight transitional arrangements. That in turn will increase the risk of gaps and uncertainties developing in the interim period.**

If the opt-out is exercised which measures should the UK seek to rejoin?

236. If the opt-out is exercised then some of our witnesses suggested that the Government should seek to rejoin as many measures as possible, beyond those that had been identified as defunct.[427] Professor Peers referred to rejoining a core list of 44 measures, including all of the mutual recognition measures, Eurojust, Europol, SIS II and the Prüm Decisions.[428] On the same basis, Jeremy Hill referred to a core list of 29–45 measures, which included the EAW, Europol and Eurojust, among others.[429] Stephen Booth stated that

---

424 CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos); Statewatch, *The UK's planned 'block opt-out' from EU justice and policing measures in 2014* (by Professor Steve Peers)

425 Q 193, QQ 199–200

426 Q 284

427 LSEW, Q 48, Q 172

428 Professor Steve Peers, Q 33

429 Q 63

rejoining certain measures should not be ruled out[430] and Dominic Raab MP agreed, identifying 60 measures of "some practical value" to the UK, including Eurojust, Europol, CEPOL, criminal records/ECRIS, JITs, SIS II, mutual legal assistance, prisoner transfers and the EAW.[431] ACPO analysed 108 of the measures that they considered to be concerned with law enforcement and stated that the Government should seek to rejoin 29 measures, of which 13 were considered to be vital. These included Eurojust, Europol, criminal records/ECRIS, JITs, SIS II and the EAW. They also listed another 55 measures that they had no view on as leaving them would have no impact on UK policing; 12 measures that they did not think should be rejoined;[432] and another 12 measures that were likely to be replaced by post-Lisbon measures.[433] The Lord Advocate also suggested that the Government should seek to rejoin 17 measures, including Eurojust, Europol, criminal records/ECRIS, JITs, SIS II, the European Judicial Network, the ESO and the EAW.[434]

237. During the course of the Committee's inquiry it became clear that the list of measures that the Government may wish to rejoin, were the opt-out to be exercised, was the subject of protracted negotiations between the two parties in the Coalition Government.[435] The Lord Chancellor confirmed this[436] and said that negotiations could not begin in Brussels until an agreement had been reached in this respect. However, he was unable to indicate when they would be able to present Parliament with the list, saying "All I can say is that as soon as we are in a position to provide … a list we will do so".[437] The Government have already undertaken to provide an Impact Assessment on the final package of measures that they wish to rejoin.[438]

238. Director-General Manservisi told us that technical legal discussions were ongoing between the Commission and the Government to identify all of the measures which fell within the scope of Protocol 36. Director-General Le Bail indicated that the list of 'Justice' measures had been finalised.[439]

239. Aside from these discussions, the total number of measures on the list also remains uncertain. This is because it is subject to the publication of further Commission proposals which may amend or replace pre-Lisbon measures ahead of the 1 December 2014 deadline, and which are subject to a decision by the Government on whether or not to opt-in, as well as existing proposals to amend or replace pre-Lisbon measures that may or may not be adopted before 1 December 2014.[440]

---

430 Q 108

431 Q 87, QQ 89–90

432 Commander Allan Gibson clarified that rejoining these measures was considered to be unnecessary rather than problematic for the UK-Q 247

433 ACPO

434 COPFS supplementary evidence

435 An article in the Guardian on 31 January 2013—*Coalition talks stumble over mass opt-out from EU rules*—reported that these talks had "effectively broken down".

436 Q 286

437 Q 298

438 UK Government

439 Q 195, Q 198

440 A list of these measures is provided in Box 3

240. This raises the complicated matter of when pre-Lisbon measures can be deemed to have been "amended", therefore triggering their removal from the list of measures subject to the opt-out.[441] We asked the Government for their view on this and they replied that this was being discussed with the Commission and Council Legal Services in order to reach a "shared understanding", including whether "adoption" or "entry into force" is the date on which the underlying pre-Lisbon measures cease to fall within the scope of the opt-out decision. They confirmed that no firm agreement had yet been reached; that there were a number of possible scenarios that could apply in this regard and that Parliament will be updated once this issue has been resolved.[442]

241. **We are unable to form a firm view on the list of measures that we consider the Government should seek to rejoin, were the opt-out to be exercised, until they provide us with their provisional list of measures, and supporting analysis contained in an Impact Assessment. A proper assessment by Parliament of whether or not the opt-out should be exercised is necessarily linked with which measures the Government wish, and are able, to rejoin.**

The forthcoming proposals for Europol and Eurojust Regulations

242. In 2012, the Commission announced that proposals for two new Regulations to adapt Europol and Eurojust, following the entry into force of the Treaty of Lisbon, would be proposed to the Council in 2013. The Europol Regulation was duly published on 27 March 2013[443] and the Eurojust Regulation is expected to be published before the summer. If the Government were to exercise their right to opt in to the negotiations on both of these proposals within three months of their publication and they took effect before December 2014, then they would no longer fall within the scope of the opt-out decision. The Home Secretary considered that the UK's involvement in both of these EU agencies would be determined separately from the opt-out decision, saying "I do not believe Europol and Eurojust will be in the list". With respect to Europol the Home Secretary's view was contingent upon the proposal not containing any provision for the agency to gain coercive powers or requirements on Member States to forward data to it.[444]

243. Before it was published, Rob Wainwright told us that the Europol Regulation would be concerned with housekeeping matters rather than revolutionising Europol's legal framework. With regard to the possibility that the Regulation could also seek to merge Europol and CEPOL he said that he was not enthusiastic about this prospect, primarily because of the resource implications. He also suggested that the LIBE Committee were unsupportive of such a move. He was uncertain if the new Europol Regulation would be adopted by the Council by 1 December 2014 partly due to the expected hiatus

---

441 The Committee considered this point in their report on *The Treaty of Lisbon: An impact assessment* (10th Report of Session 2007–2008, HL Paper 62), paragraphs 6.326 to 6.334

442 UK Government

443 COM (2013) 173, *Proposal for a Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA*, 27.3.2013. The three-month period during which the Government can choose to opt-in to the negotiations on this proposal will expire three months after the Commission has presented it to the Council. This will be the subject of separate opt-in report by this Committee.

444 QQ 295–296

in the proceedings of the European Parliament that year for elections.[445] Europol considered that the potentially adverse consequences of exercising the opt-out could be mitigated by the Government choosing to opt in to the proposed Regulation as soon as possible.[446] With regard to the forthcoming Eurojust Regulation Michèle Coninsx stated that "The timing here is essential because you have time between June 2014 and 1 December 2014, and there might be a chance that you fall out of the basket, so to speak, and that is a risk which I think is realistic".[447]

244. Professor Peers also noted that the six measures concerning Europol and the three measures concerning Eurojust would potentially be removed from the list of measures caught by the opt-out, if the Government decided to opt into the new Regulations.[448] Europol also confirmed that five of the Europol measures on the list were "directly connected" to each other.[449]

245. **In our view it is in the United Kingdom's interest to remain a full participant in both Europol and Eurojust. The steadily increasing use that the UK law enforcement authorities make of both these agencies is testimony to their value.**

246. **If the Government choose to opt in to the proposals for Europol and Eurojust Regulations, thus potentially removing the consideration of the United Kingdom's engagement in these agencies from the wider matter of the opt-out decision, we urge them to take care to avoid any gaps developing between the opt-out decision, if it is exercised, taking effect on 1 December 2014 and these new measures entering into force.**

The organisation of the vote in the House of Lords

247. In her statement to the House of Commons on 15 October 2012, the Home Secretary said "… as with many EU matters the process of decision-making is a complicated one. We wish to ensure that before that point we give this House and the other place sufficient time to consider this important matter … However, discussions are ongoing within Government and therefore no formal notification will be given to the Council until we have reached agreement on the measures that we wish to opt back into … The Government will then aim to bring forward a vote in both Houses of Parliament. The timeframe for this vote will depend on progress in our discussions with the Commission and Council. An update will be provided to Parliament early in the New Year on when we can expect the vote to take place".[450]

248. **If, despite the view expressed in paragraph 275, the Government decide to exercise the opt-out, in our view the House should not be asked to vote on that decision without simultaneously being provided with and invited to pronounce on the list of police and criminal justice measures that the Government (a) consider to be defunct, (b) wish to rejoin and (c) do not wish to rejoin with, in each case, an explanation of the alternative arrangements that are envisaged.**

---

445 Q 137, Q 146

446 Europol

447 QQ 186–187

448 Professor Steve Peers

449 Europol supplementary evidence

450 This update has not yet been made to Parliament for the reasons alluded to.

CHAPTER 9: SHOULD THE GOVERNMENT EXERCISE THE OPT-OUT?

249. This Chapter considers the potential consequences for the UK if the Government decide to exercise the block opt-out, notwithstanding the possibility that they may attempt to rejoin a number of measures. We begin by summarising the main arguments for and against exercising the block opt-out that we have considered so far.

The arguments for and against exercising the opt-out

250. The reasons for exercising the opt-out given by those who support that option can be summarised as follows:

- The risks associated with extending the jurisdiction of the CJEU in relation to the pre-Lisbon PCJ measures to include the UK, including the risk of judicial activism and the potential for undermining the UK's common law systems;
- The loss of national control over areas of police and criminal justice policy;
- Many of the PCJ measures are of little use or are defunct;
- Many of the areas of cooperation could be achieved by non-legislative means or through alternative arrangements;
- The opportunity to use the opt-out to promote the reform of certain measures.

251. Those who oppose the exercise of the opt-out give the following reasons:

- The pre-Lisbon measures are in the UK's national interest and some are vital to our internal security;
- The measures are beneficial to UK citizens who may become the victims of crime or suspected of committing a crime in another Member State;
- The CJEU's jurisdiction would provide the benefits of legal clarity and the stronger and more consistent application of EU measures across the EU;
- There is no risk to the UK's common law systems and no evidence of any harm caused to those systems from any of the PCJ measures;
- Withdrawing from some of those PCJ measures would result in the UK having to rely upon less effective means of cooperation;
- The UK would lose influence over existing and future EU police and criminal justice policies and agencies.

252. Those who are opposed also cite the following risks were the opt-out to be exercised and the UK sought to rejoin measures:

- The procedures for rejoining measures are uncertain and depend on the decisions of the Commission and the other Member States;
- Timing-whether it will be practicable to rejoin measures without any hiatus in their application;

- Cost–the potential to incur "financial consequences" assessed by the Commission, and sunk costs (for example, contributions to the development of SIS II if the UK did not rejoin that system).

The practical consequences of exercising the opt-out

Operational difficulties

253. Many of our witnesses raised concerns about the possibility of the opt-out reducing the operational effectiveness of police and law enforcement authorities in tackling cross-border crime, in the UK and the other Member States, thereby reducing their opportunities to prevent crime and apprehend criminals.[451] This would result from, among other things, the UK losing the ability to participate in JITs, EU databases, such as SIS II, and the ability to exchange information with other Member States through Eurojust and Europol.

Loss of influence

254. Helen Malcolm QC remarked that the UK had been at the forefront of the development of international criminal law since the Nuremberg Trials.[452] We also heard that British nationals had played prominent roles in the development of these policies from the very beginning of EU JHA cooperation.[453] This was demonstrated by the fact that the current Director of Europol is British; two former Presidents of Eurojust have been British (both of whom provided us with evidence—Mike Kennedy and Aled Williams);[454] and the location of CEPOL at Bramshill in England. The first two Director-Generals of the former DG JHA were also British.[455] William Hughes referred to the high regard in which UK law enforcement officials were held within bodies such as the European Police Chiefs Task Force and COSI, which had subsumed it.[456] Rob Wainwright remarked that "Most of Europol's internal architecture, its current policies and its strategy are very much defined in British terms at the moment".[457] David Anderson QC, the Independent Reviewer of Terrorism Legislation, referred to the UK's influence on counter-terrorism policy across the EU while others told us that systems and approaches which had originally been developed in the UK had influenced the creation of similar EU-wide equivalents, including Europol's

---

451 CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos); CER, *Cameron's European 'own goal'* (by Hugo Brady); Faculty of Advocates, LSEW, Jean-Claude Piris, ACPOS, Bar Council, Europol, William Hughes, JUSTICE, Dr Maria O'Neill, Mike Kennedy, COPFS, Timothy Kirkhope MEP and Anthea McIntyre MEP, Q 111, Q 209

452 Q 55, Q 57. Hugo Brady made a similar point-Q 128

453 CER, *Cameron's European 'own goal'* (by Hugo Brady); Bar Council, Europol, Police Foundation, LibDem UK MEPs, William Hughes, David Anderson QC, Dr Maria O'Neill, Europol, JUSTICE, LSS, Timothy Kirkhope MEP and Anthea McIntyre MEP, Q 106, QQ 149–150

454 Mike Kennedy became the first President of Eurojust and held the position from 2002 to 2007. Aled Williams held the position from 2010 to 2012.

455 Adrian Fortescue became the first Director General of DG JHA on its creation in 1999, having already worked on JHA matters in the Commission for a number of years. Jonathan Faull then held this position from 2003–2010, until it was split in two to form DG JUSTICE and DG HOME. He is now the Director General of DG Internal Market and Services.

456 William Hughes

457 Q 143

Organised Crime Threat Assessment survey, the organised crime policy cycle, the European Criminal Intelligence Model and SIS II.[458]

255. Some of our witnesses expressed fears that this historic influence could be jeopardised, sending negative signals to law enforcement authorities in the other Member States, while also diluting British input into the operation of key EU agencies and the development of future PCJ measures, despite the fact that all of these would continue to impact upon the UK regardless of the opt-out being exercised.[459] Other witnesses remarked that as British nationals would continue moving about the EU—to live, travel, work, and occasionally become embroiled in the criminal justice system of another Member State—it was important for the UK to remain fully engaged in this area in order to ensure that standards of justice remained high across the EU. Disengaging would make it harder to achieve high standards.[460] Vice-President Reding is reported to have said: "It's going to damage Britain … All these elements of collaboration between security forces and police co-operation have been built up in order to combat crime and catch criminals … everyone has said this will result in the UK being sidelined".[461]

256. Martin Howe QC was not convinced that the UK's influence in any of these areas would diminish if it exercised the opt-out.[462] The Home Secretary agreed that the UK had played a leading role in many JHA areas but said that, regardless of the opt-out decision, they would continue to play a full role in JHA matters, within the Council and beyond and that she did not accept that this necessarily had to be on the basis of EU legislative measures.[463] UKIP were of the view that exercising the opt-out would improve the UK's relations with the other Member States rather than make them worse.[464]

Financial consequences

257. Article 10(4) of Protocol 36 states that "The Council, acting by a qualified majority on a proposal from the Commission, may also adopt a decision determining that the UK shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts".

258. The Faculty of Advocates and the LSS considered that the adverse financial consequences could be substantial,[465] and cited the UK's withdrawal from CEPOL, EU databases and SIS II as potentially incurring costs.[466] We also heard suggestions that the UK could be liable for the costs incurred domestically and in the other Member States resulting from any transitional

---

458 David Anderson QC, William Hughes, Maria O'Neill, Europol, Timothy Kirkhope MEP and Anthea McIntyre MEP

459 Timothy Kirkhope MEP and Anthea McIntyre MEP, Q 124, Q 141

460 CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos); Justice Across Borders, JUSTICE, Mike Kennedy, LSS, FTI, Bar Council, Timothy Kirkhope MEP and Anthea McIntyre MEP, Q 66, Q 114, Q 124

461 Guardian, *EU warns Tories that UK security opt-out 'doesn't make sense'*, 14 February 2013

462 Q 12, Q 31

463 Q 300

464 UKIP

465 Faculty of Advocates, LSS

466 CER, *Cameron's European 'own goal'* (by Hugo Brady); ACPO, Q 196

arrangements; the development, negotiation and agreement of alternative arrangements and measures; any subsequent amendments to Member States' domestic law and any legal costs which may be incurred as a result of litigation.[467] Director-General Manservisi told us, however, that the financial consequences would be assessed "in quite a restrictive way", including whether the impact on the EU budget should be borne by the UK or the other Member States.[468] Timothy Kirkhope MEP and Anthea McIntyre MEP also emphasised the potential budgetary implications for the UK if it had to rely upon 27 bilateral arrangements, in times of financial restraint, instead of more cost and time effective central EU facilities.[469]

259. The Government told us that, until discussions were at a more advanced stage with the EU Institutions and other Member States, it was impossible to say with any certainty whether the UK would be held liable for any costs, but they considered a "high threshold" would have to be met before this proved to be the case.[470] Despite the clear wording contained in Article 10, UKIP considered that there would be no legal grounds to impose costs on the UK.[471]

260. **It is too early to speculate about the potential financial consequences for the United Kingdom which would result from a decision to exercise the opt-out. However, we urge the Government to take all necessary and reasonable steps to minimise any potential costs. We expect this issue to be considered in more detail in the Government's Impact Assessment when it is eventually forthcoming.**

The Irish dimension

261. We were first alerted to the Irish dimension when we took evidence from the former Home Secretary, Charles Clarke, for an earlier inquiry.[472] A number of other witnesses expressed concern about the potential consequences of the opt-out decision for the close working relationship between the UK and the Republic of Ireland on policing, security and criminal justice matters, partly as a result of the Common Travel Area, and in the context of the shared land border between Ireland and Northern Ireland. The historical backdrop is well known, including cross-border organised crime and terrorist activity, which continues to be a problem.

Anglo-Irish cooperation on policing and criminal justice matters

262. The Minister of Justice in the Northern Ireland Executive, David Ford MLA, told us that as a result of the peace process the last decade had seen greater cooperation between authorities on both sides of the border, which had been enhanced by the devolution of policing and justice powers to the

---

467 Bar Council, JUSTICE, LSEW, LSS, Q 53, Q 157

468 Q 196, Q 201

469 Timothy Kirkhope MEP and Anthea McIntyre MEP

470 UK Government

471 UKIP

472 Q 172, oral evidence for GAMM inquiry, 18 July 2012

Northern Ireland Assembly in 2010.[473] With the PSNI and Dr Gavin Barrett, he also emphasised the practical and operational considerations that arose from the land border in the context of the opt-out decision.[474]

263. After an informal JHA Ministerial meeting, which took place in Dublin on 16 January 2013, at the beginning of the Irish Presidency of the EU, the Minister for Justice and Equality in the Irish Government, Alan Shatter TD, told the Irish Times that it would be a "mistake" for the UK to end its involvement in PCJ measures, as such a move could have implications for the peace process since the measures were of "crucial importance" in dealing with terrorism and organised crime between Northern Ireland and the Republic of Ireland. He said that the opt-out could affect the exchange of "crucial information that protects people's lives when there are threats" and also stated he was not "entirely convinced that the full implications of opting out of the range of instruments were necessarily fully assessed when the [15 October 2012] announcement was made". He also stated that the Irish Government were "very anxious to provide whatever assistance is necessary to resolve any concerns that exist".[475] The PSNI raised similar concerns.[476]

264. Dr Gavin Barrett told us that there would certainly be implications for Ireland if the opt-out was exercised and it "would be very regrettable to see a well functioning system of criminal law cooperation of this nature operating between our two countries jeopardised [because] of concerns that really have nothing to do with either of our systems". He stated that the close cooperation between the two countries was based upon a "veritable Gordian Knot" of domestic and EU measures. Of the EU measures, Europol; the criminal and customs mutual legal assistance measures; some drugs and organised crime measures; information exchange measures; and those concerning databases of criminal records and false documents, were all important and replacing them would be a challenge. He said there was "absolutely no doubt that the European Arrest Warrant is the one that is inspiring the most concern".[477] He also suggested that because of the similarities between their legal systems Ireland would be concerned about the possibility of losing the UK as a large Member State and an ally in the EU JHA domain. However, while he had no doubt that the Irish preference would be for the opt-out not to be exercised, he also suggested that the UK Government could rely upon a lot of "good will" from Ireland whatever decision was eventually made.[478]

265. The Government told us that they valued the close working relationship with Ireland in these areas and that the Home Secretary and the Lord Chancellor had met with Irish Ministers to discuss the opt-out decision and welcomed

---

473 The *Intergovernmental Agreement on Cooperation on Criminal Justice Matters* was signed by the UK and Irish Governments in 2005 to provide a framework for this cooperation. It makes provision for regular meetings between the Justice Ministers from both sides of the border, who receive reports from a Working Group made up of officials from both jurisdictions.

474 PSNI, Q 252, Letter from David Ford MLA to Lord Boswell of Aynho dated 12 December 2012. Contained in the volume of evidence, which is available online.

475 Irish Times, *Shatter warns UK against ending involvement in EU justice measures*, 19 January 2013. Also see Financial Times, *Warning on EU justice laws opt-out*, 16 January 2013

476 PSNI

477 Q 251

478 Q 259, Q 262

their views on the matter.[479] They were confident that effective cooperation between the two Member States would continue in the future.[480] Dominic Raab MP told us that he understood the sensitivities involved but did not consider these to be "insurmountable".[481]

The European Arrest Warrant

266. Before the EAW entered into force in the UK and Ireland both countries were signatories to the 1957 Council of Europe Convention on Extradition. Ireland ratified the Convention in 1966, the UK in 1991. Both countries enacted domestic legislation—the Backing of Warrants (Republic of Ireland) Act 1965 in the UK[482] and the Extradition Act, 1965, in Ireland—to regulate extradition between the two countries.[483] From 1 January 2004 these arrangements were replaced by the EAW.[484]

267. PSNI stated that since 2004, of the 50 EAW requests that Northern Ireland made to other Member States, 30 of these had been made to Ireland.[485] Dr Gavin Barrett told us that the extradition figures between the two countries were "striking", with 170 out of the 601 individuals (28 per cent) surrendered by Ireland between 2004 and 2011 being surrendered to the UK, and 160 out of the 184 individuals (87 per cent) surrendered to Ireland during the same period being surrendered by the UK.[486]

268. David Ford MLA, PSNI, Dr Maria O'Neill and Dr Gavin Barrett emphasised the operational benefits that the EAW had provided between the two countries.[487] Commander Gibson told us "trying to manage the tensions in Ireland—North, South—without the ability to extradite effectively seems to me very difficult".[488] Hugo Brady suggested that the Irish Government were concerned that if the 1957 Convention had to be relied upon in place of the EAW then it would become harder to extradite Irish nationals for political offences.[489] The exception for political offences in the Convention, according to the COPFS, had previously led to the refusal of requests by the UK in serious cases.[490]

269. David Ford MLA told us that Alan Shatter TD shared his concerns about the UK possibly leaving the EAW and had confirmed that Ireland no longer had the necessary legislation in place for the Council of Europe Convention

---

479 The Home Secretary also met with Alan Shatter specifically at the JHA Councils in October and December 2012. See letter from the Home Secretary and the Lord Chancellor to Lord Boswell of Ayhno dated 1 February 2013. Contained in the volume of correspondence, which is available online.

480 UK Government

481 Q 103

482 The 1965 Act was repealed by the UK Extradition Act 2003. The 2003 Act implements the EAW into UK law.

483 COPFS

484 Ireland continues to apply the Convention to the UK territories of the Channel Islands and the Isle of Man

485 PSNI. The COPFS also told us that Spain and Ireland accounted for over 35% of the outgoing EAWs from Scotland.

486 Q 251

487 Letter from David Ford MLA to Lord Boswell of Aynho dated 12 December. Contained in the volume of evidence, which is available online; Dr Maria O'Neill, PSNI, Q 130, Q 246, Q 251

488 Q 246

489 CER, *Cameron's European 'own goal'* (by Hugo Brady); Q 130

490 COPFS

to be implemented.[491] Dr Gavin Barrett confirmed that the Convention system no longer applied in Ireland with respect to the UK and would require legislation to bring it back into force. While he suggested that relying upon the Convention was possible in theory, he did not consider that it would provide a satisfactory basis for an alternative system of extradition between the two countries "with all the defects, all its imperfections, all its outdatedness, all its afflictions and all its potential for endless litigation with an uncertain outcome in relation to the surrender of individuals". He also stated that if the UK were to withdraw from the EAW then Ireland would want to replace it with something just as efficient and that the more notice they had to begin preparing alternatives the better, but that it would be "positively dangerous" if any void developed between the old and new systems.[492]

270. **We share the concerns that have been raised by the Irish and Northern Irish Justice Ministers regarding the potential damage that exercising the opt-out could cause to cooperation between the United Kingdom and Ireland on tackling cross-border crime and terrorism. With regard to the potential loss of the EAW in this context, we do not consider that the 1957 Council of Europe Convention on Extradition would provide an adequate alternative for extradition between the two countries.**

Should the opt-out be exercised?

271. UKIP, the Fresh Start Project and Martin Howe QC were in favour of the opt-out being exercised and did not consider that the Government should seek to rejoin any of the PCJ measures.[493] Open Europe and Dominic Raab MP also support the opt-out being exercised but agree that the Government should seek to rejoin useful measures on a case-by-case basis.[494] Andrea McIntyre, a Conservative MEP on the LIBE Committee, was also in favour[495] but Monika Hohlmeier MEP, a member of the LIBE Committee, told us that the European People's Party would prefer the UK not to exercise the opt-out.[496] In contrast to his Westminster colleagues, Sajjad Karim MEP, the European Conservatives and Reformists Group coordinator on the JURI Committee, told us that in his view the Government would not achieve "some or any of the stated public aims" by exercising the opt-out and then rejoining particular measures.[497]

272. A clear majority of our witnesses were not in favour of the Government exercising the opt-out, including the LSS, the LSEW, the Bar Council, the Faculty of Advocates, the Police Foundation, the LibDem UK MEPs, Dr Maria O'Neill, Hugo Brady, Professor Peers, Jodie Blackstock and

---

491 Letter from David Ford MLA to Lord Boswell of Aynho dated 12 December. Contained in the volume of evidence, which is available online. Like the UK, Ireland adheres to the "dualist" constitutional rule, which requires an international treaty to be implemented into national law before it can take effect.

492 Q 251, Q 255, Q 258

493 Fresh Start Project, *Manifesto for Change*; UKIP, Q 166

494 Open Europe, *Cooperation Not Control* (by Dominic Raab MP)

495 Q 166

496 *ibid.*

497 Q 172

William Hughes.[498] Professor Spencer and Helen Malcolm QC were also both "emphatically" opposed to the opt-out.[499] When we took evidence from Charles Clarke, for an earlier inquiry, he told us that he regretted that the previous government had negotiated the opt-out because as a former Home Secretary he did not consider it to have been necessary and hoped that the present Government would decide not to exercise it.[500]

273. The Lord Advocate told us that the Scottish Government had not yet reached a position on the opt-out but their written evidence made it clear that they considered that a decision should not be taken "without a clear and compelling case, which would justify the potential disruption to existing cross-border co-operation and practical measures that assist authorities in tackling serious and organised crimes".[501] David Anderson QC did not express a view either way but said his only concern was that the Government should not put at risk its ability to rely on PCJ measures, which were of genuine assistance in the fight against terrorism.[502]

274. **We were struck by the clear and preponderant view among our witnesses from the legal, law enforcement and prosecutorial professions as to the potentially negative implications for the United Kingdom either of exercising the opt-out or ceasing to participate in particular measures.**

275. **On the basis of the evidence we have received we do not consider that the Government have made a convincing case for exercising the opt-out. We are not persuaded by the arguments in favour of exercising the opt-out which some witnesses have made, and we find that the evidence supports the reasoning of those opposed to its exercise. Opting out of the police and criminal justice measures would have significant adverse negative repercussions for the internal security of the United Kingdom and the administration of criminal justice in the United Kingdom.**

276. **We do not believe that any possible alternative arrangements, which would involve a great deal of work to conceive, would be worth it simply to avoid the jurisdiction of the CJEU, which we do not believe poses an objective threat and whose jurisdiction in this area cannot be completely excluded in any event.**

---

498 CELS, *Opting out of EU Criminal law* (by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos); CER, *Cameron's European 'own goal'* (by Hugo Brady); LibDem UK MEPs, Bar Council, Faculty of Advocates, LSEW, Police Foundation, Dr Maria O'Neill, JUSTICE, Q 33, Q 47, Q 48, Q 63, Q 238

499 Q 33, Q 47

500 Q 172, oral evidence for the GAMM inquiry, 18 July 2012

501 Letter from Kenny MacAskill MSP to Lord Boswell of Aynho dated 18 December 2012. Contained in the volume of evidence, which is available online; Q 265

502 David Anderson QC

CHAPTER 10: SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Chapter 1: Introduction

277. We make this report to the House for debate (paragraph 10).

Chapter 2: Background

278. It is clear that it is the right of the United Kingdom to exercise the opt-out decision under Article 10, Protocol 36 to the Treaty of Lisbon. This right was recognised by the other Member States when they chose to ratify the Treaty of Lisbon (paragraph 32).

Chapter 3: The Government's consultation of Parliament and stakeholders regarding the opt-out decision

Consultation of stakeholders

279. Given the significant implications of the opt-out decision we believe that the Government should have conducted more detailed analysis of this matter, including that of each measure affected by the opt-out, at a much earlier stage. It is regrettable that very little work appeared to have been completed in this respect by the time of the Home Secretary's announcement on 15 October 2012 (paragraph 55).

280. We regret that the Government have not complied with their own undertakings to engage effectively with Parliament regarding the opt-out decision. While understanding the Lord Chancellor's concern that Parliament should first have been informed of the Government's inclination to opt out, before they entered into detailed discussions with the Devolved Administrations and stakeholders, we still consider that it would have been wise to have sought the views of the Devolved Administrations and other stakeholders at a much earlier stage before reaching even a provisional decision on the merits of opting out (paragraph 56).

Review of the Balance of Competences between the UK and the EU

281. It is unfortunate that the Government have decided to commence their Balance of Competences review of the EU's police and criminal justice competence in spring 2014, at which point the opt-out decision is likely to have been made. In any event, we expect the Government to take account of this report during their consideration of that particular range of competences (paragraph 59).

The UK's future role in the EU

282. We believe that the nature and extent of the United Kingdom's continued involvement in EU policing and justice cooperation should be considered on their own merits, and should not become obscured by the wider debate about the United Kingdom's relationship with the EU (paragraph 61).

Chapter 4: The Court of Justice of the European Union, the relationship between UK and EU law, and the Commission

Democratic accountability and the rule of law

283. As many of the police and criminal justice measures engage the fundamental rights of EU citizens, including UK nationals travelling or living in other Member States, we believe that the CJEU has an important role to play, alongside Member States' domestic courts, in safeguarding these rights and upholding the rule of law (paragraph 71).

The UK's common law systems

284. Each Member State has a distinct legal system. The United Kingdom has an essentially common law system, including within it three distinct jurisdictions—England and Wales, Scotland and Northern Ireland. The overwhelming weight of evidence suggests that none of the pre-Lisbon police and criminal justice measures undermines the United Kingdom's common law systems in any way and would not do so if they became justiciable in the CJEU (paragraph 76).

A pan-European criminal law code?

285. We consider the stated concerns about the possible development of a pan-EU criminal code to be misplaced. There is at present no evidence that the Commission has any intention of developing such a code and even were it minded to do so, the United Kingdom would not be compelled to participate in such a venture thanks to its right under Protocol 21 to the Treaties not to opt in to proposals in this area (paragraph 79).

"Judicial activism" and "unexpected judgments"

286. We have considered the CJEU judgments concerning pre-Lisbon police and criminal justice measures and we can discern no convincing evidence that the CJEU has been either judicially activist or that its rulings set out to undermine the autonomy of Member States' criminal justice systems (paragraph 89).

287. We do not consider the Government's concerns about unexpected judgments being made by the CJEU to be a reasonable or substantive reason for rejecting the CJEU's jurisdiction in relation to the pre-Lisbon PCJ measures. All courts, including the UK Supreme Court, can make unexpected judgments which are not necessarily favourable to the executive. This is an inevitable consequence of upholding the rule of law. However, we do accept the Lord Chancellor's point that in the case of decisions of international courts, there is not the same flexibility to legislate to overturn such decisions as there is within our domestic system (paragraph 90).

The drafting and application of the police and criminal justice measures

288. We believe that the ability of courts in the United Kingdom to make preliminary references to the CJEU should help to promote the consistent application and interpretation of police and criminal justice measures both in the United Kingdom and across the EU (paragraph 96).

Post-Lisbon police and criminal justice opt-ins

289. We note that the CJEU already has jurisdiction over pre-Lisbon EU civil, asylum and immigration measures. The Government have raised no concerns about the CJEU's role in these areas. We further note that the CJEU has, or will have, jurisdiction also over the post-Lisbon police and criminal justice measures to which the Government have decided to opt in. No concerns have been raised about the CJEU's prospective role over these measures by the Government. We welcome this clear evidence that the Government therefore have no objection of principle to accepting the CJEU's jurisdiction (paragraph 104).

290. We have not identified any significant, objective justification for avoiding the jurisdiction of the CJEU over the pre-Lisbon police and criminal justice measures in the United Kingdom (paragraph 105).

European public prosecutor

291. In the context of the opt-out decision, concerns about the prospective role of a European public prosecutor are misplaced. The United Kingdom has the right not to opt-in to any such proposal and the Government have already announced that they have no intention of doing so. Furthermore, even were they to wish to opt in, the European Union Act 2011 would require a referendum to be held and primary legislation to be passed before they could do so. We therefore consider that the consideration of this particular issue should have no bearing on the 2014 opt-out decision (paragraph 110).

The Commission's enforcement powers and unimplemented police and criminal justice measures in the UK

292. We consider that it is unlikely that the United Kingdom will become subject to infringement proceedings by the Commission regarding the non-implementation of these police and criminal justice measures in the short term. But in any case we believe that the Government should take steps to implement those of value (paragraph 115).

Chapter 5: Alternative arrangements for cross-border cooperation

The need for cross-border police and criminal justice cooperation

293. Cross-border cooperation on policing and criminal justice matters between the United Kingdom and the other Member States is an essential element in tackling security threats such as terrorism and organised crime. In the early twenty-first century no Member State can hope to assure its internal security or the enforcement of the rule of law without such cooperation (paragraph 118).

Alternative arrangements for cross-border cooperation

294. We recognise the theoretical possibility for the United Kingdom to conclude multiple bilateral and multilateral agreements with the other Member States, in place of some existing EU measures, and that other Member States would have an interest in putting effective mechanisms in place. But this would be a time-consuming and uncertain process, with the only claimed benefit being

tailor-made arrangements excluding the CJEU's jurisdiction. In some cases new bilateral agreements would be dependent on the legislative timetable of the other Member States, which may accord them a low priority (paragraph 136).

295. We consider that the most effective way for the United Kingdom to cooperate with other Member States is to remain engaged in the existing EU measures in this area (paragraph 137).

296. If the United Kingdom reverted to Council of Europe Conventions instead of the equivalent EU measures, this would raise legal complications, and could also result in more cumbersome, expensive and weaker procedures. It would also weaken the ability of the United Kingdom's police and law enforcement authorities to cooperate with the equivalent authorities in other Member States regarding cross-border crime (paragraph 138).

The Frontex "model"

297. We consider the possibility of the United Kingdom cooperating with Europol or Eurojust on the same basis that it currently does with Frontex to be neither practical nor desirable, as it would reduce the benefits that the United Kingdom currently enjoys through its full participation in both EU agencies (paragraph 141).

The Danish Justice and Home Affairs opt-out

298. We do not consider the negotiation of Treaty change to achieve a Danish-style Justice and Home Affairs opt-out for the United Kingdom to be desirable. It would place the United Kingdom in a disadvantageous position with respect to future proposals for police and criminal justice measures by removing both their right to opt in to a proposal and their ability to influence its content through participation in the negotiations. In any event, this possibility has no bearing on the 2014 opt-out decision (paragraph 144).

Chapter 6: The European Arrest Warrant

299. We consider the European Arrest Warrant to be the single most important pre-Lisbon police and criminal justice measure. If the United Kingdom were to leave the EAW and rely upon alternative extradition arrangements, it is highly unlikely that these alternative arrangements would address all the criticisms directed at the EAW. Furthermore, it is inevitable that the extradition process would become more protracted and cumbersome, potentially undermining public safety. If the opt-out is exercised then the Government should apply to the Commission to rejoin the European Arrest Warrant so as to avoid any gap in its application (paragraph 160).

300. We acknowledge that in some cases the operation of the EAW has resulted in serious injustices for UK and other EU nationals. We do not belittle the seriousness of these cases. However, those injustices resulted not directly from the operation of the EAW but from the consequences of extradition, including long periods of pre-trial detention in poor prison conditions, which could also occur under any alternative system of extradition (paragraph 161).

301. In our view UKIP's interpretation of the *Radu* judgment is mistaken. It is clear to us that courts in the United Kingdom continue to have the option to decline an EAW request on human rights grounds (paragraph 172).

302. We very much regret that the Government have chosen not to implement the European Supervision Order, pending their decision on the opt-out being made, and urge them to implement this measure without further delay. There is no justification for British citizens to be deprived of the benefits of this measure, especially as it could help prevent a repeat of the Symeou case (paragraph 179).

303. We consider that the best way to achieve improvements in the operation of the EAW is through a process of negotiations with the other Member States; the use of existing provisions in national law; informal judicial cooperation; the development of jurisprudence at the Member State and EU level, including on matters of proportionality, as well as the immediate implementation of flanking EU measures such as the European Supervision Order and the Roadmap procedural rights measures, to which the Government should opt in where they have not already done so (paragraph 180).

Chapter 7: What would be the consequences of leaving police and criminal justice measures?

304. We do not consider that the existence of "defunct" measures on the list caught by the opt-out decision should be a material factor in deciding whether or not to exercise the opt-out. If some measures are indeed defunct then they are likely to be harmless insofar as the United Kingdom is concerned. However, we welcome the Commission's intention to review the *corpus* of police and criminal justice measures to identify those which no longer serve any purpose with a view to either amending or repealing them without further delay (paragraph 185).

305. While it is clear from the assessment of these harmonisation measures that there are differences of opinion as to their use and value, we do not consider them to be "building blocks" of a pan-European justice system (paragraph 189).

306. We therefore consider that there are compelling reasons of national interest for the United Kingdom to remain full participants in most of the measures and agencies referred to in this Chapter. As to the remainder we have identified no persuasive reason for the United Kingdom to withdraw from them (paragraph 208).

Chapter 8: The procedure for rejoining particular police and criminal justice measures

Discussions with the other Member States

307. We regret that the Government have not provided us with even a summary of the reactions of the other Member States to the Government's intention to exercise the opt-out, as these may be critical in assessing the potential success or otherwise of negotiations regarding any attempts by the United Kingdom to rejoin particular measures (paragraph 216).

Rejoining particular police and criminal justice measures

308. While in our discussion with the Commission we found no inclination on their part to obstruct or make the process of opting back in difficult, seeking

to rejoin particular measures would not necessarily be automatic or straightforward. Either the Commission, or where appropriate, the Council, may seek to impose conditions on such requests (paragraph 223).

How interconnected are the police and criminal justice measures?

309. From the evidence given to us by the Commission, it is clear that they consider adherence to the principle of coherence a matter of paramount importance. Any application to rejoin measures must meet that test (paragraph 228).

Timing and transitional arrangements

310. Considering the legal complexities and uncertainty that may arise, were the Government to exercise the opt-out and seek to rejoin particular police and criminal justice measures, the Government would have done well to have commenced negotiations at a much earlier stage. We consider it to be imperative that, in the Home Secretary's own words, there should not be any significant gap between the initial entry into force of the opt-out, were it to be exercised, and rejoining certain measures. The longer it takes for the Government to agree a definitive list of police and criminal justice measures that it wishes to rejoin, the less time they will have to negotiate these with the Commission and the Council, as well as agreeing watertight transitional arrangements. That in turn will increase the risk of gaps and uncertainties developing in the interim period (paragraph 235).

If the opt-out is exercised which measures should the UK seek to rejoin?

311. We are unable to form a firm view on the list of measures that we consider the Government should seek to rejoin, were the opt-out to be exercised, until they provide us with their provisional list of measures, and supporting analysis contained in an Impact Assessment. A proper assessment by Parliament of whether or not the opt-out should be exercised is necessarily linked with which measures the Government wish, and are able, to rejoin (paragraph 241).

312. In our view it is in the United Kingdom's interest to remain a full participant in both Europol and Eurojust. The steadily increasing use that the UK law enforcement authorities make of both these agencies is testimony to their value (paragraph 245).

313. If the Government choose to opt in to the proposals for Europol and Eurojust Regulations, thus potentially removing the consideration of the United Kingdom's engagement in these agencies from the wider matter of the opt-out decision, we urge them to take care to avoid any gaps developing between the opt-out decision, if it is exercised, taking effect on 1 December 2014 and these new measures entering into force (paragraph 246).

The organisation of the vote in the House of Lords

314. If, despite the view expressed in paragraph 275, the Government decide to exercise the opt-out, in our view the House should not be asked to vote on that decision without simultaneously being provided with and invited to pronounce on the list of police and criminal justice measures that the Government (a) consider to be defunct, (b) wish to rejoin and (c) do not

wish to rejoin with, in each case, an explanation of the alternative arrangements that are envisaged (paragraph 248).

Chapter 9: Should the Government exercise the opt-out?

The practical consequences of exercising the opt-out

315. It is too early to speculate about the potential financial consequences for the United Kingdom which would result from a decision to exercise the opt-out. However, we urge the Government to take all necessary and reasonable steps to minimise any potential costs. We expect this issue to be considered in more detail in the Government's Impact Assessment when it is eventually forthcoming (paragraph 260).

The Irish dimension

316. We share the concerns that have been raised by the Irish and Northern Irish Justice Ministers regarding the potential damage that exercising the opt-out could cause to cooperation between the United Kingdom and Ireland on tackling cross-border crime and terrorism. With regard to the potential loss of the EAW in this context, we do not consider that the 1957 Council of Europe Convention on Extradition would provide an adequate alternative for extradition between the two countries (paragraph 270).

Should the opt-out be exercised?

317. We were struck by the clear and preponderant view among our witnesses from the legal, law enforcement and prosecutorial professions as to the potentially negative implications for the United Kingdom either of exercising the opt-out or ceasing to participate in particular measures (paragraph 274).

318. On the basis of the evidence we have received we do not consider that the Government have made a convincing case for exercising the opt-out. We are not persuaded by the arguments in favour of exercising the opt-out which some witnesses have made, and we find that the evidence supports the reasoning of those opposed to its exercise. Opting out of the police and criminal justice measures would have significant adverse negative repercussions for the internal security of the United Kingdom and the administration of criminal justice in the United Kingdom (paragraph 275).

319. We do not believe that any possible alternative arrangements, which would involve a great deal of work to conceive, would be worth it simply to avoid the jurisdiction of the CJEU, which we do not believe poses an objective threat and whose jurisdiction in this area cannot be completely excluded in any event (paragraph 276).

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

The Members of the Sub-Committees that conducted this inquiry were:

Sub-Committee on Justice, Institutions and Consumer Protection

Lord Anderson of Swansea
Lord Bowness (Chairman)
Lord Elystan-Morgan
Lord Hodgson of Astley Abbots
Baroness Liddell of Coatdyke
Baroness Corston
Lord Dykes
Viscount Eccles
Baroness O'Loan
Lord Rowlands
Earl of Sandwich
Lord Stoneham of Droxford

Sub-Committee on Home Affairs, Health and Education

Lord Avebury
Lord Blencathra
Viscount Bridgeman
Lord Hannay of Chiswick (Chairman)
Lord Judd
Lord Lingfield
Lord Mackenzie of Framwellgate
Baroness Prashar
Lord Richard
Lord Sharkey
Earl of Stair
Lord Tomlinson

Declaration of Interests

Sub-Committee on Justice, Institutions and Consumer Protection

Lord Bowness (Chairman)
Holder of Solicitor's and Notary's Practising Certificate

Lord Anderson of Swansea
Member, Legal Affairs Committee of Parliamentary Assembly of Council of Europe

Lord Elystan-Morgan
No relevant interests

Lord Hodgson of Astley Abbots
Trustee of Fair Trials International Baroness Liddell of Coatdyke

Baroness Corston
No relevant interests

Lord Dykes
No relevant interests

Viscount Eccles
No relevant interests

Baroness O'Loan
No relevant interests

Lord Rowlands
No relevant interests

Earl of Sandwich
No relevant interests

Lord Stoneham of Droxford
No relevant interests

Sub-Committee on Home Affairs, Health and Education

Lord Hannay of Chiswick (Chairman)
Member, Advisory Board of the Centre for European Reform
Member, The Future of Europe Forum, the proactive advisory board for the Centre for British Influence through Europe

Lord Avebury
No relevant interests

Lord Blencathra
No relevant interests

Viscount Bridgeman
No relevant interests

Lord Judd
Trustee, Saferworld

Lord Lingfield
No relevant interests

Lord Mackenzie of Framwellgate
Non-executive Director, Eximious Ltd (business and security consultancy)
Managing Director, Mack Diligence Limited (security consultancy)
Security Consultant, Dynamiq Limited (security consultancy)

Baroness Prashar
Member of the Committee appointed to consider UK's involvement in Iraq
Governor and Member of Management Committee, Ditchley Foundation
Deputy Chair, British Council

Lord Richard
No relevant interests

Lord Sharkey
Governor, Institute for Government

Earl of Stair
No relevant interests

Lord Tomlinson
No relevant interests

The following Members of the European Union Select Committee attended the meeting at which the report was approved:

Lord Boswell of Aynho
Lord Bowness
Lord Dear
Baroness Eccles of Moulton
Lord Foulkes of Cumnock
Lord Hannay of Chiswick
Lord Harrison
Lord Maclennan of Rogart
Lord Richard
Earl of Sandwich
Baroness Scott of Needham Market
Lord Tomlinson
Lord Trimble
Baroness Young of Hornsey

During consideration of the report the following Members declared an interest:

Lord Dear
Previously served in senior ranks in the police in England and Wales

Lord Trimble
Trustee, Henry Jackson Society

A full list of Members' interests can be found in the Register of Lords Interests:

http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at www.parliament.uk/hleuf and available for inspection at the Parliamentary Archives (020 7219 5314)

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with * gave both oral evidence and written evidence. Those marked with ** gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

Oral evidence in chronological order

*	QQ 1–31	Martin Howe QC
**	QQ 32–45	Dr Alicia Hinarejos, Centre for European Legal Studies
		Professor John Spencer, Centre for European Legal Studies
*		Professor Steve Peers, Centre for European Legal Studies
*	QQ 46–61	Law Society of England and Wales
		Law Society of Scotland
		Bar Council of England and Wales
		Faculty of Advocates
*	QQ 62–84	Justice Across Borders
**	QQ 85–109	Open Europe
**	QQ 110–131	Centre for European Reform
*		Fair Trials International
*		JUSTICE
*	QQ 132–147	Europol
**	QQ 148–162	Council of Bars and Law Societies of Europe
*		Bar Council of England and Wales
**	QQ 163–171	Monika Hohlmeier MEP, Civil Liberties, Justice and Home Affairs Committee (LIBE), European Parliament
		Baroness Ludford MEP, Civil Liberties, Justice and Home Affairs Committee (LIBE), European Parliament
		Claude Moraes MEP, Civil Liberties, Justice and Home Affairs Committee (LIBE), European Parliament
		Birgit Sippel MEP, Civil Liberties, Justice and Home Affairs Committee (LIBE), European Parliament
*		Timothy Kirkhope MEP, Civil Liberties, Justice and Home Affairs Committee (LIBE), European Parliament
*		Anthea McIntyre MEP, Civil Liberties, Justice and Home Affairs Committee (LIBE), European Parliament
**	QQ 172–178	Sebastian Valentin Bodu MEP, Legal Affairs Committee (JURI), European Parliament
		Antonio Masip Hidalgo MEP, Legal Affairs Committee (JURI), European Parliament

		Mary Honeyball MEP, Legal Affairs Committee (JURI), European Parliament
		Sajjad Karim MEP, Legal Affairs Committee (JURI), European Parliament
		Klaus-Heiner Lehne MEP, Legal Affairs Committee (JURI), European Parliament
**	QQ 179–191	Michèle Coninsx, President of Eurojust
**	QQ 192–208	Françoise Le Bail, Director-General of DG JUSTICE
		Stefano Manservisi, Director-General of DG HOME, European Commission
*	QQ 209–228	Keir Starmer QC, Director of Public Prosecutions, Crown Prosecution Service
*	QQ 229–248	Association of Chief Police Officers
*		William Hughes
**		Aled Williams
*		Mike Kennedy
**	QQ 249–263	Dr Gavin Barrett, University College Dublin
*	QQ 264–273	Rt. Hon Frank Mulholland QC, Lord Advocate, Crown Office and Procurator Fiscal Office
*	QQ 274–308	Rt. Hon Theresa May MP, Home Secretary, Home Office
		Rt. Hon Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

Alphabetical list of all witnesses

	David Anderson QC
*	Association of Chief Police Officers
	Association of Chief Police Officers in Scotland
*	Bar Council of England and Wales
**	Dr Gavin Barrett, University College Dublin
**	Sebastian Valentin Bodu MEP, Member of the JURI Committee
**	Centre for European Reform
**	Council of Bars and Law Societies of Europe
	Court of Justice of the European Union
*	Crown Office and Procurator Fiscal Service
**	Eurojust
*	Europol
*	Faculty of Advocates
*	Fair Trials International
*	Rt. Hon Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice
**	Dr Alicia Hinarejos, Centre for European Legal Studies

**	Monika Hohlmeier MEP, Member of the LIBE Committee
**	Mary Honeyball MEP, Member of the JURI Committee
*	Martin Howe QC
*	William Hughes
*	JUSTICE
*	Justice Across Borders
**	Sajjad Karim MEP, Member of the JURI Committee
*	Mike Kennedy
*	Timothy Kirkhope MEP, Member of the LIBE Committee
	Lynda Lacy
*	Law Society of England and Wales
*	Law Society of Scotland
	Liberal Democrat UK MEP Group
**	Françoise Le Bail, Director-General of DG JUSTICE
**	Klaus-Heiner Lehne MEP, Member of the JURI Committee
**	Baroness Ludford MEP, Member of the LIBE Committee
**	Stefano Manservisi, Director-General of DG HOME
**	Antonio Masip Hidalgo MEP, Member of the JURI Committee
*	Rt. Hon Theresa May MP, Home Secretary, Home Office
*	Anthea McIntyre MEP, Member of the LIBE Committee
**	Claude Moraes MEP, Member of the LIBE Committee
*	Rt. Hon Frank Mulholland QC, Lord Advocate
	Northern Ireland Executive
	Dr Maria O'Neill, University of Abertay Dundee
**	Open Europe
*	Professor Steve Peers, Centre for European Legal Studies
	Jean-Claude Piris
	The Police Foundation
	Police Service of Northern Ireland
	Scottish Government
**	Birgit Sippel MEP, Member of the LIBE Committee
**	Professor John Spencer, Centre for European Legal Studies
*	Keir Starmer QC, Director of Public Prosecutions, Crown Prosecution Service
	United Kingdom Independence Party (UKIP)
**	Aled Williams

APPENDIX 3: CALL FOR EVIDENCE

The House of Lords EU Committee, chaired by Lord Boswell of Aynho, is launching an inquiry into the United Kingdom's 2014 opt-out decision and its potential implications for the United Kingdom. We invite you to contribute evidence to this inquiry. Written evidence is sought by Friday 14 December 2012. The inquiry will be conducted jointly by the Justice, Institutions and Consumer Protection Sub-Committee, chaired by Lord Bowness, and the Home Affairs, Health and Education Sub-Committee, chaired by Lord Hannay of Chiswick, which have been considering the matter since the beginning of this year.

Background

Protocol 36 of the Treaty of Lisbon enables the Government to decide, by 31 May 2014, whether or not the UK should continue to be bound by the approximately 130 police and criminal justice (PCJ) measures, which were adopted by unanimity in the Council of Ministers before the Lisbon Treaty entered into force, or if it should exercise its right to opt-out of them all. If the UK does not opt-out then these measures will become subject to the Court of Justice's jurisdiction and the enforcement powers of the European Commission for the first time. A list of the PCJ measures caught by the opt-out decision is available at the following address:

http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/Protocol36OptOut/LetterfromHSreProtocol36151012.pdf

In a statement to Parliament on 15 October 2012, the Home Secretary stated that "the Government are clear that we do not need to remain bound by all the pre-Lisbon measures" and that the Government's current thinking is that the United Kingdom would opt-out of all the pre-Lisbon measures and negotiate to opt back in to individual measures that it is in the national interest to rejoin. The Government have undertaken to facilitate a debate and vote in each House before a decision is made.

Particular questions raised to which we invite you to respond are as follows (there is no need for individual submissions to deal with all of the issues)

The 2014 opt-out decision

(1) Should the Government exercise its block opt-out?

(2) What are the likely financial consequences of exercising the opt-out?

(3) What are the wider implications for the United Kingdom's relations with the European Union if the Government were to exercise the opt-out?

The UK's current participation in PCJ measures

(4) Which of the pre-Lisbon PCJ measures benefit the United Kingdom the most? What are the benefits? What disadvantages result from the United Kingdom's participation in any of the measures?

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

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

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

(8) What would be the practical effect of the Court of Justice having jurisdiction to interpret the measures? Have past Court of Justice judgments caused any complications regarding the operation of PCJ measures in the United Kingdom, in terms of their interaction with the common law or otherwise?

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

The potential consequences of exercising the opt-out

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

(11) What would the implications be for United Kingdom police forces, prosecution authorities and law enforcement agencies—operationally, practically and financially—if the Government chose to exercise its opt-out? Would there be any consequences for other Member States in their efforts to combat cross-border crime?

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

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

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

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

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

APPENDIX 4: EU POLICE AND CRIMINAL JUSTICE MEASURES SUBJECT TO THE OPT-OUT DECISION

This is the list of measures subject to the opt-out, produced by the Home Office as at 15 October 2012, which has been subsequently updated through correspondence.[503] We have re-ordered the list and grouped the measures under headings. The reference numbers in the first column are those in the original Home Office list and the descriptions in the last column are taken from the list published by the Home Office.

No.	Year of adoption	Title	Description (Home Office)
		CRIMINAL OFFENCES AND PENALTIES These measures require Member States to have in their national systems of criminal law prohibitions of certain types of conduct and minimum penalties for offences.	
		Fraud	
1	1995	Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests	Under the Convention and its protocols, all Member States must take the necessary measures to ensure that all acts of fraud and corruption affecting both expenditure and revenue of the EU budget receive adequate punishment including custodial sentence if offence is of a serious nature, to discourage and act as a form of deterrence to potential criminals. The instruments require provision in Member States' criminal law relating, for example, to the definition of criminal acts (fraud, corruption, money laundering), criminal liability or admissible sanctions in criminal proceedings.
8	1996	Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities' financial interests	
12	1997	Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests	
24	2000	Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro	The Framework Decision is designed to ensure that the Euro is appropriately protected against counterfeiting
34	2001	Council Framework Decision 2001/888/JHA of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing	

[503] See http://www.homeoffice.gov.uk/publications/about-us/corporate-publications/2014-decision/table-of-measures?view=Binary, as well as the volume of correspondence, which is available online.

No.	Year of adoption	Title	Description (Home Office)
		protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro	
33	2001	Council Decision 2001/887/JHA of 6 December 2001 on the protection of the euro against counterfeiting	This measure lays down procedures for expert analysis of suspected counterfeit notes and coins and requires that the results of those analyses are forwarded to Europol.
29	2001	Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment	The Framework Decision ensures minimum standards for offences and penalties for fraud and counterfeiting involving all forms of non-cash means of payment (e.g. credit card and cheques).
		Corruption	
9	1997	Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union	The Convention of 26 May 1997 requires Member States to have minimum standards for criminal offences and penalties relating to public sector corruption. The 2003 Council Decision makes the Convention applicable to Gibraltar.
49	2003	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	
47	2003	Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector	The Framework Decision requires Member States to have minimum standards for criminal law on corruption in the private sector.
		Drugs	
7	1996	Joint Action 96/750/JHA concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking	The aim of this measure is to ensure Member States take measures to tackle drug addiction, drug tourism and drug trafficking, including imposing penalties for drug trafficking offences. These objectives are broad based, e.g. consider further legislative proposals to combat synthetic drugs, endeavour to work with EU enforcement partners, take the most appropriate steps towards illicit plants
20	1999	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	The 2005 Council Decision places a requirement on the UK to share information and intelligence with other Member States on new psychoactive substances (narcotic and psychotropic) (NPS) and, if required by a decision of the European Council, the UK is under a duty to submit a NPS to control measures and criminal sanctions. The other measures listed are the instances where the Council has made such decisions and required such control measures.

No.	Year of adoption	Title	Description (Home Office)
36	2002	Council Decision 2002/188/JHA of 28 February 2002 concerning control measures and criminal sanctions in respect of the new synthetic drug PMMA	
50	2003	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	
62	2005	Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances	
76	2008	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	
54	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	The instrument requires member states to ensure their domestic legislation meets minimum standards on the constituent elements of criminal acts and penalties in the field of drug trafficking.
		Pornography	
23	2000	Council Decision 2000/375/JHA to combat child pornography on the internet	The Decision sets out how Member States should tackle online child pornography through the development of an appropriate law enforcement response, close working with the internet industry, and international cooperation.
		Terrorism	
39	2002	Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism	These measures set requirements for the creation of a number of terrorism and terrorism-related offences. Whilst not prescriptive, they require that Member States must be capable of prosecuting those offences, both where they are committed wholly or partially within its territory, and also where an offence has been committed elsewhere but extradition is not possible.
87	2008	Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism	
		Illegal migration	
43	2002	Council Framework Decision 2002/946/JHA of 28 November	This Framework Decision requires Member States to create a penal regime

No.	Year of adoption	Title	Description (Home Office)
		2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence	to prevent the facilitation and unlawful entry of illegal migrants to the EU
		Crimes against humanity	
51	2003	Council Decision 2003/335/JHA on the investigation and prosecution of genocide, crimes against humanity and war crimes	The purpose of this measure is to increase cooperation between Member States in the investigation and prosecution of persons who have committed or participated in the commission of genocide, crimes against humanity or war crimes. Under this measure Member States shall take necessary measures for law enforcement authorities to be informed when facts are established which give rise to a suspicion that a migrant has committed such crimes. It includes three obligations a) to assist one another in investigating and prosecuting these crimes; b) to obtain relevant information where an application for leave to remain gives rise to suspicion (where the applicant has previously sought residence in another Member State), and; c) to oblige a Member State to inform if they become aware that a suspected person is in another Member State.
		Cyber attacks	
60	2005	Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems	The measure sets out how Member States should tackle attacks on information systems, such as illegal access, data theft and damage. The measures seek to tackle cyber crime through legislative, law enforcement and public/private partnership measures.
		Organised crime	
84	2008	Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	The measure relates to Member States having legislation in place to counter organised crime, including minimum maximum imprisonment penalties (i.e. specifically to make it a criminal offence to participate in a criminal organisation in the Member States of the European Union with a maximum sentence of at least x years). It aims to enhance police and judicial cooperation in serious criminal matters with cross border dimensions.
		Racism	
86	2008	Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and	The Framework Decision calls on Member States to take necessary measures to ensure that criminal law is implemented in order to safeguard citizens

No.	Year of adoption	Title	Description (Home Office)
		xenophobia by means of criminal law	from racism and xenophobia.
		CRIMINAL PROCEDURE	
		Confiscation of criminal assets These measures require Member States to ensure that they have in their national systems of criminal law provisions enabling the tracing and confiscation of proceeds of crime, and that these provisions can be accessed from other Member States.	
17	1998	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	This Joint Action encourages improved cooperation between law enforcement authorities of Member States by ensuring that arrangements are in place that will permit investigators and prosecutors to direct requests from Member States for assistance in asset identification, tracing, freezing, or seizing and confiscation through appropriate channels.
31	2001	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 measure recommends that Member States take steps to ensure that all requests from overseas authorities that relate to asset identification, tracing, freezing, or seizing and confiscation are processed with the same priority as given to domestic proceedings. It also recommends that that the scope of criminal activities which constitute principal offences for money laundering should be uniform and sufficiently broad in all Member States.
58	2005	Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-related Proceeds, Instrumentalities and Property	The aim of this measure is to ensure all Member States have effective rules governing the confiscation of proceeds from crime, and that they can confiscate all a criminal's assets and not just those generated by the instant conviction. Essentially it requires Member States to take measures to enable them to perform two types of confiscation: • Confiscation of instrumentalities and proceeds of crime that are punishable by deprivation of liberty for more than a year, or property of a value corresponding to such proceeds; and • Confiscation of property belonging directly or indirectly to persons convicted of certain serious offences, in particular where the property has been obtained as a result of criminal activities.
		Victims in criminal proceedings This measure provides for the involvement of victims in criminal proceedings.	

No.	Year of adoption	Title	Description (Home Office)
28	2001	Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings	The Framework Decision requires each Member State to give minimum rights to victims of crime to ensure that they have a suitable level of protection in criminal proceedings.
		MUTUAL RECOGNITION OF NATIONAL DECISIONS These measures provide for the decisions of national courts and other authorities to be accepted in other Member States and enforced on the same basis as those of their own courts and authorities.	
15	1998	Council Act of 17 June 1998 drawing up the Convention on Driving Disqualifications	By virtue of the EU driving licence directives (in particular Directive 2006/126/EC), European Economic Area (EEA) drivers who are disqualified in the State of residence which issued their driving licence are also disqualified from obtaining another licence in any other EEA State—effectively preventing them from driving anywhere else in the EEA. This Convention on Driving Disqualifications is in addition to the above mentioned principles in the driving licence directives. It would enable such a driving disqualification to be recognised across the EEA. The Convention has not come into force since being adopted in 1998 and would only come into force if all signatories ratified it. Other than the UK and Ireland, only six Member States have ratified it so far.
41	2002	Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States	The European Arrest Warrant (EAW) provides a mechanism for the surrender of alleged offenders between Member States.
48	2003	Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence	This measure establishes rules under which a Member State recognises and executes a "Freezing Order" for property or evidence issued by the judicial authority of another Member State in the framework of criminal proceedings.
59	2005	Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties	This Framework Decision requires Member States to collect fines (of over €70) transferred to them by other Member States as they would a domestic fine.
68	2006	Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognitions to confiscation orders	This instrument facilitates the direct execution of confiscation orders for the proceeds of crime by establishing simplified procedures for recognition among Member States and rules for dividing confiscated property between the Member State issuing the confiscation order and the one executing it.

No.	Year of adoption	Title	Description (Home Office)
83	2008	Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings	This Framework Decision requires each Member State to ensure that its courts take account of previous convictions in EU Member States "to the extent previous national convictions are taken into account".
85	2008	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	The Framework Decision permits Member States to transfer prisoners without the consent of the prisoner or the receiving Member State.
88	2008	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	The Framework Decision provides a basis for the mutual recognition and supervision of suspended sentences and alternative sanctions (e.g. community sentence) where a person has been sentenced in one Member State and voluntarily wishes to return to the Member State where he is ordinarily and lawfully resident, or where he wishes to go to another Member State and that State is willing to accept the sentence.
91	2008	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	The European Evidence Warrant was intended to speed up MLA between Member States through the introduction of a standardised request form and deadlines for dealing with requests (principally for search and seizure).
92	2009	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	EU instruments require mutual recognition of judgements in absentia (trial decisions where the defendant did not appear). This measure amends each to ensure adequate safeguards for the defendant.
97	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 [bail] as an alternative to provisional detention	The European Supervision Order (ESO) provides a mechanism for a person to be released on bail back to their Member State of residence and supervised there, while awaiting criminal proceedings in another Member State.
		COOPERATION BETWEEN POLICE AND OTHER NATIONAL AUTHORITIES These measures provide for forms of cooperation between the police forces and other enforcement authorities of the Member States.	

No.	Year of adoption	Title	Description (Home Office)
		Corruption	
135	2008	Council Decision 2008/852/JHA on a contact-point network against corruption	This measure seeks to improve cooperation between Member States by creating a network of contact points to prevent and combat corruption in Europe.
		Drugs	
4	1996	Joint Action 96/698/JHA on cooperation between customs authorities and business organizations in combating drug trafficking	This measure aims to combat drug trafficking by requiring Member States to establish or further develop Memoranda of Understanding (MoUs) between the customs authorities of the Member States and business organisations operating in the EU, and provides guidelines for what such a MoU may include.
5	1996	Joint Action 96/699/JHA concerning the exchange of information on the chemical profiling of drugs to facilitate improved cooperation between Member States in combating illicit drug trafficking	The aim of this piece of legislation is to enable the exchange of information relating to chemical profiling of drugs; facilitating interaction between Europol and Member States through Europol National Units and liaison bureaux. The instrument envisages the exchange of information relating to the chemical profiling of cocaine, heroin, LSD, amphetamines and their ecstasy-like derivatives MDA, MDMA and MDEA.
		Terrorism	
3	1996	Joint Action 96/610/JHA concerning the creation and maintenance of a Directory of specialized counter-terrorist competences, skills and expertise to facilitate counter-terrorist cooperation between the Member States of the European Union	This measure seeks to create and maintain a Directory of specialised counter- terrorist competences, skills and expertise to facilitate counter-terrorist co-operation between EU Member States.
66	2005	Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences	The decision relates to the provision of information concerning terrorist offences to Eurojust, Europol and to other Member States. This includes designating a specialised service within the police service or law enforcement authorities to access, collect and make information available to Europol and Eurojust.
		Crimes against humanity	
40	2002	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	The purpose of Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes.

No.	Year of adoption	Title	Description (Home Office)
		Organised crime	
6	1996	Joint Action 96/747/JHA concerning the creation and maintenance of a directory of specialized competences, skills and expertise in the fight against international organized crime, in order to facilitate law enforcement cooperation between the Member States of the European Union	The aim of this piece of legislation is to create a directory of areas of specialised competences, skills and expertise, which would make the latter more widely and easily available to authorities in Member States, thus enhancing the means at the disposal of Member States in the fight against crime.
13	1997	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 allows GENVAL Working group to conduct peer reviews. This aims to allow Member States to evaluate the application and implementation of instruments designed to combat international organised crime.
		Threats to order	
10	1997	Joint Action 97/339/JHA of 26 May 1997 with regard to cooperation on law and order and security	This measure mandates information sharing between Member States regarding large scale events which are attended by large numbers of people from more than one Member States such as sporting events, rock concerts, demonstrations etc. The primary purpose of this information sharing arrangement is to maintain law and order, protect people and their property and prevent criminal offences.
37	2002	Council Decision 2002/348/JHA of 25 April 2002 concerning security in connection with football matches with an international dimension	These instruments set up the National Football Information Points to co-ordinate and facilitate international police co-operation and information exchange in connection with football matches with an international dimension.
72	2007	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	
44	2002	Council Decision 2002/956/JHA of 22 November 2002 setting up a European Network for the Protection of Public Figures	These relate to setting up a European Network for the Protection of Public Figures (ENPPF) to enable the sharing/exchanging of information and intelligence relating to the protection of public figures (such as Heads of State) and members of Royal Families.
96	2009	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	
		Vehicle crime	

No.	Year of adoption	Title	Description (Home Office)
56	2004	Council Decision 2004/919/EC of 22 December 2004 on tackling vehicle crime with cross-border implications	The instrument aims to create an effective network of Law Enforcement specialists (single points of contact) to exchange information and best practice in how to tackle organised (cross-border) vehicle crime.
		Investigations, evidence and exchange of information	
11	1997	Joint Action 97/372/JHA of 9 June 1997 for the refining of targeting criteria, selection methods, et. and collection of customs and police information	The action requires Member States to make the best use of targeting and selection methods to select consignments for examination to tackle drug trafficking. The action also requires the exchange of information and intelligence through the various EU information systems and action through joint operations.
14	1997	Council Act of 18 December 1997 drawing up the Convention on mutual assistance and cooperation between customs administrations	Naples II allows for the exchange of information and administrative assistance in order to combat the illicit trafficking of goods, in particular tobacco, drugs, weapons and terrorist materials. It is the basis for most cooperation between EU customs services on criminal matters.
16	1998	Joint Action 98/427/JHA of 29 June 1998 on good practice in mutual legal assistance in criminal matters	This measure requires Member States to send the Council Secretariat a statement of their good practice in the sending and executing of requests for mutual legal assistance (MLA).
18	1998	Joint Action 98/700/JHA of 3 December 1998 concerning the setting up of a European Image Archiving System (FADO)	FADO is a computerised archive containing images and textual information relating to falsified and authentic identity documents such as passports, identity cards, visas, residence permits and driving licences. A read-only, control version of the database called iFADO has also been developed which has been made available over the Government Secure Intranet (GSI) to the UK Border Agency and to other UK government departments with an interest in checking identity documents, such as the police, IPS, DVLA and the DWP.
22	2000	Council Decision 2000/261/JHA of 27 March 2000 on the improved exchange of information to combat counterfeit travel documents	Council Decision 2000/261/JHA of March 2000 introduces a standard form and questionnaire for use when providing information alerts about counterfeit documents other Member States. The instrument followed on from Joint Action 98/7000/JHA of 3 December 1998 concerning the setting up of a European Image Archiving System (FADO). It was recognised that it would be some years before FADO was fully functional and this standard form was designed to fill the gap until then.
25	2000	Council Act of 29 May 2000 establishing the Convention on mutual assistance in criminal matters between the Member States	The Convention on mutual assistance in criminal matters between the Member States ('the 2000 Convention') is currently one of the main

No.	Year of adoption	Title	Description (Home Office)
		of the European Union	instruments used between Member States for the provision of mutual legal assistance (MLA). It supplements the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters. It provides for some forms of co-operation (e.g. interception) that is not specifically provided for in the 1959 Convention. Its Protocol deals with requests for banking information
32	2001	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	
27	2000	Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements between financial intelligence units of the Member States in respect of exchanging information	The purpose of this Decision is to build upon the earlier EU Directive 91/308/EEC of 10 June 1991 which permits cooperation between contact points within Member States to receive suspicious transaction reports on suspicious financial transactions and underlying criminal activity to prevent and combat money laundering. This Decision aims to enable the improved disclosure and exchange of financial information between Member State Financial Investigation Units (FIUs) in combating money laundering.
30	2001	Council Decision 2001/419/JHA of 28 May 2001 on the transmission of samples of controlled substances	The instrument provides a system for transmitting seized samples between authorities of Member States for the purposes of detection, investigation and prosecution of offences or for the forensic analysis of samples. Specifically, this instrument sets down the framework for exchange, and requires the UK to have a central coordinating body who will manage all elements of the exchange/transmission of samples.
38	2002	Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams	The instrument provides a framework for competent authorities in two or more Member States to set up a joint investigation team (JIT) to carry out criminal investigations in one or more of the Member States setting up the team.
69	2006	Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union	This instrument provides a systemised (standard form to be used) and time bound (8 hours) process for the exchange of information between Member State's law enforcement agencies.
79	2008	Council Decision 2008/615/JHA of 23 June 2008 on stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime	Prüm requires Member States to allow the reciprocal searching of each others' databases for: • DNA Profiles–required in 15 minutes. • Vehicle Registration Data (VRD)–required in 10 seconds. • Dactyloscopic Images (Fingerprints)–required in 24 hours.

No.	Year of adoption	Title	Description (Home Office)
			For DNA and fingerprints the initial reply is a hit/no-hit. Personal data is not exchanged in this process. Prüm does not set out any requirements for following up any hits. For VRD personal data about the registered keeper will automatically be transmitted following a hit. Prüm also contains provisions relating to the following areas: • supply of data in relation to major events; • supply of information in order to prevent terrorist offences; • other measures for stepping up cross-border police cooperation.
80	2008	Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Council Decision 2008/615/JHA on stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime	
81	2008	Council Decision 2008/617/JHA of 23 June 2008 on the improvement of cooperation between the special intervention units of the Member States of the European Union in crisis situations	The instrument is designed to provide a legal framework for Member States to provide law enforcement assistance (equipment or operational support) to one another in order to deal with man-made crisis situations, e.g. terrorist attack, hi-jacking, hostage-taking etc. It provides for a list of competent authorities to act as contact points and the provision of expertise, equipment and support to a requesting Member State.
93	2009	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	These instruments require Member States to inform each other about convictions of EU nationals in another Member State. They also permit Member States to request the previous convictions of individuals from the Member State of nationality.
94	2009	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	
98	2009	Council Decision 2009/902/JHA of 30 November 2009 setting up a European Crime Prevention Network (EUCPN) and repealing Decision 2001/427/JHA	The EUCPN focuses on reducing 'volume crime' deemed to be juvenile, urban and drug related via the sharing of best practice examples and promotion of crime prevention cooperation at national and local level. A public access website has been set up to facilitate this exchange.
99	2009	Council Framework Decision 2009/905/JHA of 30 November 2009 on accreditation of forensic service providers carrying out laboratory activities	The measure focuses on the quality standards to apply to forensic science laboratories covering DNA profiling and fingerprint development to ensure that the results of these activities carried out by accredited forensic science providers in one Member State are recognised by the authorities responsible

No.	Year of adoption	Title	Description (Home Office)
			for the prevention, detection and investigation of criminal offences as being equally reliable as the results of laboratory activities carried out by forensic science providers within any other Member State.
100	2009	Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes	Customs Information System (CIS) is an EU database which aims to strengthen and improve customs law enforcement cooperation through the sighting and reporting of discreet surveillance or specific checks. Specific checks refer to searches on individuals, objects and means of transport.
		Exchange of personnel	
2	1996	Joint Action 96/277/JHA of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union	The Joint Action establishes a framework for the posting or the exchange of liaison magistrates between Member States on the basis of bilateral or multilateral arrangements and outlines their function. More specifically, the Joint Action 'establishes a framework for the posting or the exchange of magistrates or officials with special expertise in judicial cooperation', and 'guidelines' of the joint action 'serve as a reference' when Member States 'decide to send liaison magistrates to another Member State.'
46	2003	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	The aim of this instrument is to promote cooperation between Member States in relation to the use of their Liaison Officers (LO) posted in third countries and international organisations. It provides that LOs should meet regularly and that and that they should respond to a request to exchange information from another Member States that does not have an LO as speedily as possible and in accordance with their national law (no requirement to provide the information). The amending Decision allows Member States to request assistance from Europol LOs if they do not have a LO in that country.
65	2006	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	
		Recovery of proceeds of crime	
73	2007	Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from,	This instrument obliges Member States to set up or designate national Asset Recovery Offices (ARO) to facilitate, through cooperation, the tracing and identification of the proceeds of crime and other crime related assets by

No.	Year of adoption	Title	Description (Home Office)
		or property related to, crime	exchanging information and best practice.
		Cooperation among prosecutors	
89	2008	Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network	The aim of the European Judicial Network is to improve judicial cooperation between EU Member States both at the legal and practical level in order to combat serious crime.
		International cooperation	
57	2005	Council Common Position 2005/69/JHA of 24 January 2005 on exchanging certain data with Interpol	This measure provides for the exchange of data with Interpol in relation to lost and stolen passports. It also provides that where a 'hit' is made that every effort shall be made to verify that data.
		Jurisdiction	
107	2009	Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal matters	This Framework Decision lays down procedures to be followed to prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts. It obliges authorities in one Member State to contact authorities in another Member State where they have reasonable grounds to believe that parallel proceedings are being conducted in that other Member State and to enter into direct consultations. If they fail to reach consensus the matter must be referred to Eurojust if it is competent to act.
		INSTITUTIONS These measures establish EU agencies to facilitate cooperation between national authorities.	
		Europol	
19	1999	Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees	Europol is mandated to support Member States in the fight against organised crime and terrorism; to combat specific forms of serious crime and; to deal with crimes such as drug trafficking, trafficking in human beings, computer crime and forgery. Europol also has a role in assessing threats from a European perspective, producing relevant threat assessments and strategic analyses. Europol
21	1999	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	

No.	Year of adoption	Title	Description (Home Office)
64	2005	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	provides a secure platform enabling direct contact between liaison officers from the EU member states and a number of third countries based in Europol's Headquarters.
95	2009	Council Decision 2009/371/JHA establishing the European Police Office (Europol)	
104	2009	Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information	
105	2009	Council Decision 2009/935/JHA of 30 November 2009 determining the list of third countries with which Europol shall conclude agreements	
106	2009	Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files	
108	2009	Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information	
		Data protection	
26	2000	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)	The Decision establishes a single, independent joint secretariat for the existing supervisory data protection bodies set up under the three Conventions listed in its title—the Europol Convention, the Convention on the Use of Information Technology for Customs Purposes and the Schengen Convention.
		Eurojust	
35	2002	Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime	Eurojust is mandated to "stimulate and improve coordination and cooperation" between judicial and law enforcement authorities in the investigation and prosecution of serious cross-border crime involving two or more Member States. Eurojust itself does not lead on or direct investigations or prosecutions. Rather, Eurojust's core role is about support to judicial and law enforcement
77	2008	Council Decision 2009/426/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	

No.	Year of adoption	Title	Description (Home Office)
			authorities in the investigation and prosecution of serious offences across Member States.
		European Police College	
67	2005	Council Decision 2005/681/JHA of 20 September 2005 establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA	CEPOL provides training courses, seminars and conferences for senior police officers across the EU. Its specific tasks are: (17) to increase knowledge of the national police systems and structures of other Member States and of cross-border police cooperation within the European Union; (18) to improve knowledge of international and European Union instruments; and, (19) to provide appropriate training with regard to respect for democratic safeguards, with particular reference to the rights of defence.
		AGREEMENTS WITH THIRD COUNTRIES These are international agreements made between the EU and third countries. Those on exchange of information contain provisions related to both criminal law and foreign policy issues.	
		Exchange of information	
53	2004	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 Agreement between Bosnia and Herzegovina and the European Union on security procedures for the exchange of classified information	These agreements put in place the rules by which classified EU information is shared with these third countries.
55	2004	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	
61	2005	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	

No.	Year of adoption	Title	Description (Home Office)
		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)	
63	2005	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	
70	2006	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	
71	2006	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	
75	2007	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	
78	2008	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	
109	2009	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	
		Mutual Legal Assistance	
101	2009	Agreement on mutual legal assistance between the European Union and the United States of America	The EU-US agreement required a number of changes to the pre-existing 1994 MLA treaty between the UK and US (UK-US Treaty). Amendments were made to the UK-US treaty via an Exchange of Notes on 16 December 2004. These amendments were intended to supplement, not replace,

No.	Year of adoption	Title	Description (Home Office)
			bilateral arrangements.
		Extradition	
102	2009	Agreement on extradition between the European Union and the United States of America	The EU-US Mutual Legal Assistance (MLA) and Extradition Agreements were proposed as part of a counter-terrorism package at a Justice and Home Affairs Council in September 2001 and entered into force on 01 February 2010. In order to meet the requirements of the EU-US Agreement the US and each of the EU Member States (including the UK) either entered into new agreements or adopted changes to current extradition treaties. Council Decision 2009/933/CFSP extended the territorial scope of the Agreement to the Dutch Antilles.
103	2009	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	
134	2003	Council Decision 2003/169/JHA determining which provisions of the 1995 Convention on simplified extradition procedure between the Member States of the European Union and of the 1996 Convention relating to extradition between the Member States of the European Union constitute developments of the Schengen acquis in accordance with the Agreement concerning the Republic of Iceland's and the Kingdom of Norway's association with the implementation, application and development of the Schengen acquis[504]	This measure seeks to establish which elements of the 1995 and 1996 Conventions, both of which relate to extradition procedures between Member States, constitute development of the Schengen acquis.
		OTHER	
45	2002	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	The instrument establishes a mechanism for peer evaluation of legal systems between Member States with regards to the fight against terrorism. The instrument provides that the Presidency shall select evaluation teams of experts from experts proposed by Member States to visit and assess the national arrangements in Member States.
90	2008	Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters	The measure governs data protection for data processed within the framework of JHA. The purpose of the measure is to encourage the cross-border exchange of law enforcement information by establishing a common level of privacy protection and a high level of security when Member States

[504] Added in October 2012 following consultation with EU Institutions.

No.	Year of adoption	Title	Description (Home Office)
			exchange personal data. It aims to balance the rights of data subjects with the need to protect the public.

Schengen' measures

No.	Year of adoption	Title	Description (Home Office)
110	1985	Convention implementing the Schengen Agreement of 1985 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))	These measures set the basis for the UK's participation to a part of the Schengen Acquis—the UK participates in the police cooperation elements of Schengen which include SIS II. The UK's participation in these articles includes MLA, sharing of assistance and equipment, cooperation on tackling narcotic drugs and cross border surveillance. The cross border surveillance sets out the process by which law enforcement officers can get assistance with continued surveillance if the person they're surveying crosses into another state.
120	2000	Council Decision 2000/586/JHA of 28 September 2000	

No.	Year of adoption	Title	Description (Home Office)
		establishing a procedure for amending Articles 40(4) and (5), 41(7) and 65((2) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.	
121	2003	Council Decision 2003/725/JHA of 2 October 2003 amending the provisions of Article 40(1) and (7) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders	
111		Accession Protocols: (amended in conformity with article 1 (b) of CD 2000/365/EC and CD 2004/926/EC article 1) Italy: Articles 2, 4 + common declaration on articles 2 and 3 to the extent it relates to article 2, Spain: Articles 2, 4 and Final Act, Part III, declaration 2 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	Extending the application of areas of Schengen to Switzerland, Spain, Portugal, Greece, Austria, Denmark, Finland and Sweden
122	2004	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	
132	2008	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	

No.	Year of adoption	Title	Description (Home Office)
112	1993	SCH/Com-ex (93) 14 on improving practical judicial cooperation for combating drug trafficking	Under this measure, states which refuse an MLA request must inform the requesting party of their reason for refusal and of any conditions which must be met for the request to be enforced.
113	1996	SCH/Com-ex (96) decl 6 rev 2 (declaration on extradition)	This measure requires states to notify other Member States when detention pending extradition no longer applies.
114	1998	SCH/Com-ex (98) 26 def setting up a Standing Committee on the evaluation and implementation of Schengen	This decision contains the SIRENE manual which controls the detailed rules for the exchange of supplementary information in relation to the Schengen Information System.
115	1998	SCH/Com-ex (98)52 on the Handbook on cross-border police cooperation	This handbook is intended to assist EU Member States' police authorities in setting out the parameters and obligations of law enforcement authorities with respect to handling pre-planned and urgent surveillance, the carriage of firearms to the UK by foreign surveillance officers and reciprocal assistance.
116	1999	SCH/Com-ex (99)6 on the Schengen acquis relating to telecommunications	The aim of this instrument is to achieve greater interoperability of EU communications systems. This instrument is about establishing technical standards
117	1999	SCH/Com-ex (99)7 rev 2 on liaison officers	This instrument provides for the reciprocal secondment of police liaison officers to advise and assist in the performance of tasks of security and checking at external (Schengen) borders.
118	1999	SCH/Com-ex (99)8 rev 2 on general principles governing the payment of informers	The EU instrument sets out general, non-binding principles for the payment of police informants in the Schengen area but without prejudice to Member States' national guidelines. The principles are intended to reflect best practice, aid inter-State co-operation and prevent informants shopping around for the best arrangements.
119	1999	SCH/Com-ex (99) 11 rev 2 (agreement on cooperation in proceedings for road traffic offences)	The agreement requires member states to provide contact details of drivers associated with a licence plate on request, service overseas of penalty notices and the ability to transfer enforcement of any fine to the authorities where the offender resides.
123	2005	Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism	Council Decision 2005/211/JHA amends the sub-categories of information that may be entered into SIS 1 in order to enhance public security, particularly national security, in the territories of the Member States participating in that system. The other three instruments set the date for the application of certain provisions of Council Decision 2005/211/JHA and are purely procedural in nature.
124	2006	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 hte Schengen Information System, including the fight against	

No.	Year of adoption	Title	Description (Home Office)
		terrorism	
125	2006	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	
126	2006	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	
127	2007	Commission Decision 2007/171/EC of 16 March 2007 laying down the network requirements for the Schengen Information System II (third pillar)	2007/171/EC sets out specific and detailed technical requirements as required by Article 4(a) of Council Decision 2001/886/JHA of 6 December 2001 on the development of the second generation Schengen Information System (SIS II). Council Decision 2008/173/EC sets out the detailed scope, organisation, coordination and validation procedures for certain SIS II tests.
129	2008	Council Decision 2008/173/EC of 18 February 2008 on the tests of the second generation Schengen Information System (SIS II)	
128	2007	Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)	SIS II is the new EU database for swapping alerts between Member States in relation to missing and wanted people and objects. It will also become the main way of transmitting data about people wanted on European Arrest Warrants (EAWs).
130	2008	Commission Decision 2008/334/JHA of 4 March 2008 adopting the SIRENE Manual and other implementing measures for the second generation Schengen Information System (SIS II)	This decision contains the SIRENE manual which controls the detailed rules for the exchange of supplementary information in relation to the Schengen Information System.
131	2008	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)	This Decision amends the C.SIS Financial Regulation by setting out the dates from which the Swiss Federation are liable for the installation and maintenance costs of the central SIS 1. Once SIS II enters into operation (scheduled for Quarter 1 2013) this Council Decision will no longer be valid.
133	2009	Commission Decision 2009/724/JHA of 17 September 2009 laying down the date for the completion of migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II)	This Commission Decision contains a sole article requiring Member States migrating from SIS 1+ to SIS II to use a specific, interim technical architecture under the arrangements provided for in Council Decision 2008/839/JHA.

Source: Home Office

APPENDIX 5: SUMMARY OF CASES MENTIONED IN EVIDENCE

CJEU

Pupino-Case C-105/03

Judgment of 16 June 2005

Measure: Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings

The case concerned provisions requiring Member States to enable victims to give evidence in the course of proceedings and, in the case of vulnerable victims, to give their evidence in a way which protects them from the effects of testifying in open court.

Questions were referred to the CJEU by an Italian court. Italy accepted the jurisdiction of the CJEU to give Preliminary Rulings in relation to pre-Lisbon police and criminal justice legislation.

The questions concerned the interpretation of the Framework Decision, in particular whether it required the Italian court to permit child victims of alleged assaults by a teacher the facility to give evidence under a Special Inquiry procedure, permitted under Italian law for some purposes. The Italian court considered that, under Italian law, the Special Inquiry procedure was not available in the specific circumstances of the case.

The CJEU held that—

- National law must be interpreted so as to give effect to the objectives of the (third pillar) Framework Decision in the same way as, under long-established case law of the CJEU, national law must achieve the objectives of a (first pillar) Directive, since both forms of legislation are binding on the Member States.
- The obligation on Member States to ensure such a "conforming" interpretation is limited in certain important respects—by general principles of law, such as non-retroactivity, and by the principle that no criminal liability on the part of an individual may result from a Framework Decision.
- The courts of a Member State may only interpret national law in accordance with the Framework Decision to the extent that the wording of national law allows that—it cannot be required to put a strained interpretation on national law.
- The Framework Decision must be interpreted in accordance with fundamental rights, notably the right of a defendant to a fair trial.

The CJEU interpreted the relevant provisions of the Framework Decision as setting the objective of ensuring that, where a vulnerable victim needed to be protected from giving evidence in open court, the victim must be able to testify in a way which meets the need for that protection. It said it was for the national court to decide whether the law on Special Inquiry procedure could be given a conforming interpretation and, if so, whether the use of such a procedure would prejudice the defendant's right to a fair trial.

Criminal proceedings against Gueye and Sanchez-Cases C-483/09 and C-1/10

Judgment of 15 December 2011

Measure: Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings

The case concerned the interpretation of provisions requiring Member States to enable victims of crime to be heard in evidence during proceedings, and to provide suitable level of protection for victims, as regards their safety and privacy.

Questions were referred to the CJEU by a Spanish court. Spain accepted the jurisdiction of the CJEU to give Preliminary Rulings in relation to pre-Lisbon police and criminal justice legislation.

The questions concerned whether the Framework Decision precluded the mandatory imposition, under Spanish law on domestic violence, of an ancillary penalty requiring the convicted person to stay away from his victim for a prescribed period. In the Spanish court, the victims had given evidence that they had each voluntarily resumed cohabitation with the offender.

The CJEU noted that Protocol 36 preserved the Court's jurisdiction to give Preliminary Rulings in relation to police and criminal justice measures where a Member State had accepted such jurisdiction.

The CJEU held that—

- The Framework Decision contains no provisions on the penalties which Member States provide in their criminal legislation.
- The Framework Decision must be interpreted having regard to fundamental rights, in particular the right to respect for family and private life.
- The obligation to ensure that victims must be able to give evidence leaves a large measure of discretion to the Member States. Victims must also be able to express opinions. But the right to be heard does not include any right in relation to the form or level of penalty which may be imposed.
- The obligation to protect victims does not restrict the choice of penalties in national criminal law systems.
- The Framework Decision does not preclude the imposition of mandatory penalties under national law, particularly where other interests besides those of the victim (such as the general interest of society) must be taken into account.

Criminal proceedings against X-Case C-507/10

Judgment of 21 December 2011

Measure: Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings

The case concerned provisions requiring Member States to enable vulnerable victims to give their evidence in a way which protects them from the effects of testifying in open court.

Questions were referred to the CJEU by an Italian court. Italy accepted the jurisdiction of the CJEU to give Preliminary Rulings in relation to pre-Lisbon police and criminal justice legislation.

The questions concerned the interpretation of the Framework Decision, in particular whether it required the Italian court put aside provisions of Italian law which (a) did not require a Public Prosecutor to make a request to use a Special Inquiry procedure, in order to take the evidence of a child victim, alleged to have been assaulted by a parent, in a preliminary investigation (instead of at trial), and (b) did not give the victim a right of appeal against the Prosecutor's decision. In this case, the procedure was available in law but the Prosecutor had not requested its use.

The CJEU noted that Protocol 36 preserved the effects of the Framework Decision and the Court's jurisdiction to give Preliminary Rulings where a Member State had accepted such jurisdiction.

The CJEU held that—

- Since the Framework Decision does not lay down specific provisions for achieving its objectives, national authorities had a large measure of discretion in relation to the means by which they implemented those objectives.
- The Framework Decision does not guarantee a victim a right to require that criminal proceedings are brought.
- The Framework Decision does not require the use of any particular national procedure and did not rule out national arrangements under which the Public Prosecutor is to make the decision on a victim's request to use a particular procedure. The absence of a right of appeal did not affect that conclusion.
- The Public Prosecutor is a judicial body with responsibility for bringing prosecutions in the national criminal law system and that system must be respected.
- The Court noted that there were other ways in which the victim could be protected under Italian law.

Criminal proceedings against Giovanardi-Case C-79/11

Judgment of 12 July 2012

Measure: Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings

The case concerned provisions requiring Member States to ensure that victims are able to obtain a decision on compensation from an offender within a reasonable time in criminal proceedings, except where national law provides for compensation to be awarded in a different manner.

Questions were referred to the CJEU by an Italian court. Italy accepted the jurisdiction of the CJEU to give Preliminary Rulings in relation to pre-Lisbon police and criminal justice legislation.

The questions concerned the interpretation of the Framework Decision in relation to a claim for damages, for injuries sustained in a workplace accident, from legal persons who had administrative liability under Italian law distinct from the

criminal liability. Italian law did not provide for a person to become a civil party in criminal proceedings against a body charged with administrative liability.

The CJEU noted that Protocol 36 preserved the effects of the Framework Decision and the Court's jurisdiction to give Preliminary Rulings where a Member State had accepted such jurisdiction.

The CJEU held that—

- The aim of the Framework Decision is to provide minimum standards of protection for victims in criminal proceedings. It does not require Member States to make legal persons liable in criminal law.
- Persons harmed as a result of an administrative offence, as defined in Italian law, are not to be regarded as victims of a criminal act for the purposes of the Framework Decision.

Advocaten voor de Wereld-Case C-303/05

Judgment of 3 May 2007

Measure: Framework Decision 2002/584/JHA on the European Arrest Warrant

The case in the national court concerned the validity of the Belgian law implementing the European Arrest Warrant. That depended on the validity of the Framework Decision.

Questions were referred to the CJEU by a Belgian court. Belgium accepted the jurisdiction of the CJEU to give Preliminary Rulings in relation to pre-Lisbon police and criminal justice legislation.

The CJEU held that—

- The purpose of the Framework Decision is to replace the multilateral system of extradition between Member States with a system of surrender, as between judicial authorities, of convicted person and suspects.
- The mutual recognition of arrest warrants is an instance of judicial cooperation in criminal matters.
- The Council was entitled to adopt the arrest warrant by Framework Decision and was not required to adopt a Convention merely because the measure replaced corresponding provisions of an earlier Convention. The Treaty did not establish an order of priority between the forms of legal instrument available in the third pillar.
- The abolition of the requirement for dual criminality in relation to arrests for certain offences is not contrary to the principle of legal certainty (which requires that a citizen must know whether behaviour will make her criminally liable). The definition of the offences and penalties concerned were determined by the national law of the issuing Member State.
- Nor did the Framework Decision breach the principles of equality and non-discrimination.
- Nothing in the relevant Treaty provisions makes the application of the European Arrest Warrant conditional on the harmonisation of the criminal laws of the Member States.

Wolzenburg-Case C-123/08

Judgment of 6 October 2009

Measure: Framework Decision 2002/584/JHA on the European Arrest Warrant

The case concerned provisions setting out the grounds for refusing to execute a European Arrest Warrant, in particular the ground allowing a Member State to refuse execution of a warrant against its own nationals or residents in the state, where the warrant is issued against a convicted person for the enforcement of a custodial sentence and that state undertakes to enforce the sentence in accordance with its own law.

Questions were referred to the CJEU by a Netherlands court. The Netherlands accepted the jurisdiction of the CJEU to give Preliminary Rulings in relation to pre-Lisbon police and criminal justice legislation.

The questions concerned an arrest warrant issued by a German court seeking the return from the Netherlands of a German citizen who was due to serve a prison sentence. Netherlands law implemented the option in the Framework Decision not to return residents but limited its scope to those who had resided in the Netherlands for at least five years. The defendant, the subject of the warrant, did not satisfy that residence test.

The CJEU held that—

- The defendant, as an EU citizen, was entitled to rely on the principle of non-discrimination on grounds of nationality under the EU Treaties to challenge the Netherlands law.
- Demonstrating five years residence does not depend on possession of a residence permit.
- When implementing the options in the Framework Decision concerning the grounds for refusing execution of an arrest warrant, Member States have a margin of discretion.
- If a state chooses to limit the situations in which its judicial authorities may refuse to execute an arrest warrant that reinforces the objective of the Framework Decision.
- The limitation in national law based on five years residence was proportionate to the objective of the optional ground, namely, to aid the reintegration into society of the defendant on completion of his sentence. The limitation was not discriminatory.

Radu-Case C-396/11

Judgment of 29 January 2013

Measure: Framework Decision 2002/584/JHA on the European Arrest Warrant

The case concerned the implications of the fundamental right to a fair hearing for the operation of the European Arrest Warrant system.

Questions were referred to the CJEU by a Romanian court. Romania accepted the jurisdiction of the CJEU to give Preliminary Rulings in relation to pre-Lisbon police and criminal justice legislation.

The questions were raised in proceedings brought in Romania by a Romanian national, residing there, against four arrest warrants issued in Germany seeking his

surrender to Germany for trial on charges of aggravated robbery. The defendant claimed that the Romanian court should refuse to execute the warrants on a ground not found in the Framework Decision but based on the right to a fair hearing, because he should have had the opportunity to be heard by the judicial authorities of the issuing state.

The CJEU held that—

- The purpose of the Framework Decision is to establish a simplified and more effective system for the surrender of convicted persons and suspects, to facilitate and accelerate judicial cooperation.
- In principle, Member States are obliged to act on a European Arrest Warrant. Execution of an arrest warrant may only be refused on the grounds set out in the Framework Decision.
- The fact that the subject of a European Arrest Warrant has not been able to state a case to the authorities of the issuing state is not a ground for refusing to execute the European Arrest Warrant. A right to be heard in those circumstances is not implied from the Charter of Fundamental Rights. Indeed, an obligation on the issuing state to hear the subject of the request for an arrest warrant would defeat the purpose of the system of surrender.
- The person subject to a European Arrest Warrant must be heard by the court in the executing state.

Metock-Case C-127/08

Judgment of 25 July 2008

Measure: Directive 2004/38 on the right of EU citizens and their family members to move and reside freely in the territory of the Member States

The case concerned the right of residence in Member States of third country nationals (i.e. non-EU citizens) who are family members, as defined in the Directive, of an EU citizen who has relied on Treaty rights of free movement within the EU.

Questions were referred to the CJEU by an Irish court. The measure was adopted under the Treaty establishing the European Community and was subject to the full jurisdiction of the CJEU.

The questions concerned the interpretation of the Directive in the context of Irish law which required third country family members to have resided lawfully in another Member State before arriving in Ireland, in order to benefit from a right of residence. Proceedings were brought by third country spouses of EU citizens who had moved to Ireland from other Member States, following the refusal to provide residence cards to the spouses. The national court found that none of the marriages was a marriage of convenience.

The CJEU held (*inter alia*) that—

- The Directive aims to facilitate the right of free movement conferred on EU citizens by the EC Treaty. It should not be construed restrictively.
- The Directive, and earlier EU legislation, recognises the importance of protecting the family life of nationals of the Member States in order to eliminate obstacles to one of the fundamental freedoms guaranteed by

the EC Treaty, namely free movement of people. All Member States are parties to the European Convention on Human Rights which enshrines respect for family life.

- If EU citizens were prevented from being joined by family members when they move between Member States, this would prevent them leading a normal family life and seriously impede their freedom of movement.
- The Court's decision in the case of *Akrich* (in 2003)—that in order to benefit from provisions in a different measure on free movement, a third country spouse must be lawfully resident in a Member State—should be reconsidered.
- The Directive contains no provision making its application to family members conditional on their having previously resided in a Member State and cannot be interpreted so as to include such a requirement. It must be interpreted as conferring rights of entry and residence on all third country family members, regardless of whether they have previously resided in another Member State.
- The EU has competence to adopt measures to bring about freedom of movement for EU citizens, including regulating the rights of family members. Member States do not have exclusive competence in this area.
- Member States may refuse entry on grounds of public policy, public security or public health, or in cases of abuse or fraud, such as marriages of sham marriages.

Association belge des Consommateurs Test-Achats-Case C- 236/09

Judgment of 1 March 2011

Measure: Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

The case concerned the validity of provisions of the Directive on equal treatment in relation to insurance services.

Questions were referred to the CJEU by a Belgian court. The measure was adopted under the Treaty establishing the European Community and was subject to the full jurisdiction of the CJEU.

The questions concerned a provision which enabled Member States that permitted the use of sex as an actuarial factor for calculating insurance premiums and benefits, to continue to do so. This was an exception to the general rule in the Directive providing for "unisex" premiums and benefits. Member States taking that option would have to review their decision after five years.

The CJEU held that—

- The Treaty on European Union and the EU Charter of Fundamental Rights provide that fundamental rights are recognised as general principles of EU law. The rights include equality between men and women and the prohibition of discrimination based on sex.
- Article 19 TFEU confers power to combat discrimination based on sex (and other factors). It is for the EU legislature to decide when to exercise

that competence but, when it does so, the action must contribute to the achievement of the objective.

- Since the use of sex as an actuarial factor was widespread, it was permissible for the EU legislature to allow appropriate transitional periods for the application of "unisex" premiums and benefits.
- But the Directive permits an exception without limit of time, thereby creating a risk that the exception would persist indefinitely. Such a provision worked against the achievement of the objective of equal treatment.

The Court held that the provision creating the exception was invalid but deferred the application of its decision on invalidity for "an appropriate transitional period" ending on 21 December 2012.

UK Supreme Court

Assange v The Swedish Prosecution Authority-[2011] UKSC 22

Judgment of 30 May 2012

Measure: Framework Decision 2002/584/JHA on the European Arrest Warrant

Reproduction of press summary from Supreme Court website

JUSTICES: Lord Phillips (President), Lord Walker, Lady Hale, Lord Brown, Lord Mance, Lord Kerr, Lord Dyson

Background to the Appeals

The appellant, Mr Assange, is the subject of a request for extradition by the Swedish Prosecuting Authority for the purposes of an investigation into alleged offences of sexual molestation and rape.

Mr Assange is in England. A domestic detention order was made by the Stockholm District Court in Mr Assange's absence, and was upheld by the Svea Court of Appeal. A prosecutor in Sweden thereafter issued a European Arrest Warrant ('EAW') on 2 December 2010 pursuant to the arrangements put in place by the Council of the European Union in the Framework Decision of 13 June 2002 on the EAW and the surrender procedures between Member States (2002/584/JHA)('the Framework Decision'), which were given effect in the United Kingdom in Part 1 of the Extradition Act 2003 ('the 2003 Act').

Mr Assange challenged the validity of the EAW on the ground (amongst others) that it had been issued by a public prosecutor who was not a 'judicial authority' as required by article 6 of the Framework Decision and by sections 2(2) and 66 of the 2003 Act. Sweden had designated prosecutors as the sole competent authority authorised to issue EAWs in accordance with article 6(3) of the Framework Decision. Mr Assange contended that a judicial authority must be impartial and independent both of the executive and of the parties. Prosecutors were parties in the criminal process and could not therefore fall within the meaning of the term. If, contrary to this argument, prosecutors could issue EAWs under the Framework Decision, then he still submitted that they fell outside the definition in the 2003 Act, as it was clear that Parliament had intended to restrict the power to issue EAWs to a judge or court.

His challenge failed before the Senior District Judge at the extradition hearing and on appeal before the Divisional Court. The Supreme Court granted permission to bring an appeal on this ground as the issue was one of general public importance.

Judgment

The Supreme Court by a majority of 5 to 2 (Lady Hale and Lord Mance dissenting) dismisses the appeal and holds that an EAW issued by a public prosecutor is a valid Part 1 warrant issued by a judicial authority within the meaning of section 2(2) and 66 of the 2003 Act.

Reasons for the Judgment

References in square brackets are to paragraphs in the judgment

Article 34 (2)(b) of the Treaty on European Union provides that Framework Decisions are binding on member states as to the result to be achieved but that national authorities may choose the form and method of achieving this. For the reasons given by Lord Mance in his judgment [208–217] the Supreme Court is not bound as a matter of European law to interpret Part 1 of the 2003 Act in a manner which accords with the Framework Decision, but the majority held that the court should do so in this case. The immediate objective of the Framework Decision was to create a single system for achieving the surrender of those accused or convicted of serious criminal offences and this required a uniform interpretation of the phrase 'judicial authority' [10][113]. There was a strong domestic presumption in favour of interpreting a statute in a way which did not place the United Kingdom in breach of its international obligations [122]

An earlier draft of the Framework Decision would have put the question in this appeal beyond doubt, because it stated expressly that a prosecutor was a judicial authority. That statement had been removed in the final version. In considering the background to this change, the majority concluded that the intention had not been to restrict the meaning of judicial authority to a judge. They relied, as an aid to interpretation, on the subsequent practice in the application of the treaty which established the agreement of the parties. Some 11 Member States had designated public prosecutors as the competent judicial authority authorised to issue EAWs. Subsequent reviews of the working of the EAW submitted to the European Council reported on the issue of the EAWs by prosecutors without adverse comment and on occasion with express approval [70][92][95][114–119][160–170].

Lord Phillips felt that this conclusion was supported by a number of additional reasons: (1) that the intention to make a radical change to restrict the power to issue EAWs to a judge would have been made express [61], (2) that the significant safeguard against the improper use of EAWs lay in the preceding process of the issue of the domestic warrant which formed the basis for the EAW [62], (3) that the reason for the change was rather to widen the scope to cover some existing procedures in member states which did not involve judges or prosecutors [65] and that the draft referred to 'competent judicial authority' which envisaged different types of judicial authority involved in the process of executing the warrant [66]. Lord Dyson preferred not to infer the reasons for the change [128] and did not find the additional reasons persuasive [155–159]. Lord Walker and Lord Brown also found these reasons less compelling [92][95]. Lord Kerr relied on the fact that public prosecutors in many of the Member States had traditionally issued arrest

warrants to secure extradition and a substantial adjustment to administrative practices would have been required [104].

Parliamentary material relating to the debates before the enactment of the 2003 Act were held by the majority to be inadmissible as an aid to construction under the rule in *Pepper v Hart* [1993] AC 593, given the need to ensure that the phrase 'judicial authority' had the same meaning as it had in the Framework Decision [12][92][98]. Lord Kerr remarked that that it would be astonishing if Parliament had intended radically to limit the new arrangements (thereby debarring extradition from a number of Member States) by use of precisely the same term as that employed in the Framework Decision [115][161].

Lord Mance, dissenting, held that the common law presumption that Parliament intends to give effect to the UK's international obligations was always subject to the will of Parliament as expressed in the language of the statute [217]. In this case, the correct interpretation of 'judicial authority' in the Framework Decision, a question of EU law, was far from certain [244]. Thus if Parliament had intended to restrict the power to issue EAWs to judges or courts, that would not have required a deliberate intention to legislate inconsistently with the Framework Decision. As the words in the statute were ambiguous, it was appropriate to have regard to ministerial statements, and those statements showed that repeated assurances were given that an issuing judicial authority would have to be a court, judge or magistrate [261]. Lady Hale agreed with Lord Mance that the meaning of the Framework Decision was unclear and that the Supreme Court should not construe a UK statute contrary both to its natural meaning and to the evidence of what Parliament thought it was doing at the time [191].

APPENDIX 6: STATISTICS ON THE USE OF THE EAW IN THE UK

All data in the following tables has been provided by the Serious Organised Crime Agency, which is designated as one of the Central Authorities for certifying EAWs in the UK. The Crown Office and Procurator Fiscal Service is also a Central Authority.

TABLE 2

EAWs to the UK from other EU Member States (Part 1 extradition requests): Requests received, arrests and surrenders for 2004–2011/12

	2004	2005	Jan–March 2006[505]	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12
Requests received by SOCA	1,865	5,986	2,067	3,515	2,483	3,526	4,100	6,032	5,832
Arrests	46	154	75	430	546	683	1,032	1,359	1,149
Surrenders	24	77	25	178	415	516	699	1173	922

Source: Serious Organised Crime Agency

N.B. All figures are per person rather than per EAW. Multiple EAWs are often issued for the same person therefore the actual number of EAWs issued will be much higher. For example, whilst 1,149 people were arrested on one or more EAWs in 2011/12, CPS case management data shows that this related to over 1,600 individual EAWs, each of which is dealt with separately in extradition proceedings.

Data is shown by calendar year for 2004 and 2005 and for fiscal year thereafter.

On 16 April 2013 the Home Secretary laid a Written Ministerial Statement in the House of Commons[506] which stated that she had been informed by the Chair of the SOCA that they have identified an error in the way in which the Agency has captured and reported the number of outgoing EAWs that have been issued since 2009/10. In order to ensure that any revised figures are completely accurate she had requested an audit of not only the outgoing EAW cases collected since 2009/10 but also that for incoming cases over the same time period. This work is expected to be completed by the middle of May 2013 and the House will be updated with accurate figures in due course. Therefore, the figures quoted for the periods 2009/10, 2010/11 and 2011/12 in this Appendix should be treated as provisional.

[505] In 2006 the statistics changed from calendar year to financial year so this column covers the first three months before the start of the 2006/07 financial year

[506] HC Deb 16 May 2013 cols 28–29WS

TABLE 3

Part 1 extradition requests received, arrests and surrenders by country

	2009/10			2010/11			2011/12		
Country	**Requests**	**Arrests**	**Surrenders**	**Requests**	**Arrests**	**Surrenders**	**Requests**	**Arrests**	**Surrenders**
Poland	2,403	630	425	2,011	863	761	1,536	626	514
Germany	235	29	21	788	32	27	748	33	20
Romania	197	28	18	564	55	35	584	47	35
Belgium	90	10	6	302	12	10	363	22	13
Netherlands	112	19	18	322	26	17	345	15	12
France	106	26	19	190	11	10	323	19	12
Spain	167	23	16	268	20	17	323	18	10
Lithuania	183	84	55	204	106	100	242	122	89
Italy	100	17	10	215	12	12	234	9	7
Czech Republic	120	53	34	280	61	51	216	70	65
Hungary	72	13	8	276	35	32	195	28	25
Slovakia	54	16	7	108	22	16	124	24	21
Sweden	11	6	6	55	5	3	98	8	7
Latvia	55	27	15	109	41	35	96	48	41
Austria	30	3	1	65	0	1	86	0	1
Bulgaria	42	1	1	122	4	1	70	4	5
Portugal	23	7	3	31	4	7	62	9	4

	2009/10			2010/11			2011/12		
Country	**Requests**	**Arrests**	**Surrenders**	**Requests**	**Arrests**	**Surrenders**	**Requests**	**Arrests**	**Surrenders**
Ireland	43	21	19	35	30	21	46	33	30
Greece	22	8	1	27	4	9	43	4	1
Finland	6	1	1	8	4	2	24	1	2
Slovenia	7	0	1	15	1	0	24	1	0
Cyprus	8	1	4	16	3	1	11	1	3
Denmark	3	0	0	4	0	0	11	0	0
Luxembourg	2	1	1	1	0	0	10	1	1
Malta	3	2	2	9	4	2	10	3	4
Estonia	6	6	7	7	4	3	4	2	0
Gibraltar	0	0	0	0	0	0	4	1	0
Total	**4,100**	**1,032**	**699**	**6,032**	**1,359**	**1,173**	**5832**	**1149**	**922**

Source: Serious Organised Crime Agency

TABLE 4

Part 1 extradition requests received, arrests and surrenders by offence type, 2011/12

Offence Type	Requests	Arrests	Surrenders
Drugs Trafficking	1,252	122	101
Other	728	225	169
Grievous Bodily Harm	624	86	72
Fraud	501	193	156
Theft	497	228	183
Murder	430	31	21
Immigration & Human Trafficking	420	30	19
Robbery	385	144	121
Armed Robbery	381	39	28
Rape	201	17	18
Kidnapping	170	8	7
Child Sex Offences	124	14	17
Terrorism	37	1	0
Arms Trafficking	34	4	1
Money Laundering	19	2	1
Arson	10	3	5
Counterfeiting	10	1	1
War Crimes	6	0	1
E-Crime	3	1	1
Racism & Xenophobia	0	0	0
Total	**5,832**	**1,149**	**922**

Source: Serious Organised Crime Agency

TABLE 5

EAWs sent by the UK to other Member States (part 3 extradition requests): EAW requests issued and surrenders to the UK 2004–2011/12

	2004	2005	Jan–March 2006[507]	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12
Requests issued	96	131	24	146	182	257	203	256	221
Surrenders	19	63	19	84	107	88	71	134	86

Source: Serious Organised Crime Agency

[507] In 2006 the statistics recording changed from calendar year to financial year so this column covers the first three months before the start of the 2006/07 financial year

TABLE 6

Part 3 EAW surrenders to the UK, 2009/10, 2010/11 and 2011/12

Country	2009/10	2010/11	2011/12
Ireland	11	22	17
Netherlands	17	26	17
Spain	20	38	14
France	6	14	7
Poland	5	3	5
Lithuania	0	3	4
Germany	1	4	3
Romania	2	4	3
Belgium	0	2	2
Denmark	0	0	2
Gibraltar	0	1	2
Italy	1	2	2
Bulgaria	0	1	1
Cyprus	2	1	1
Czech Republic	0	3	1
Estonia	0	1	1
Greece	2	0	1
Portugal	2	2	1
Slovakia	0	0	1
Sweden	1	1	1
Austria	0	2	0
Finland	0	1	0
Hungary	0	1	0
Malta	1	2	0
Total	**71**	**134**	**86**

Source: Serious Organised Crime Agency

N.B. These statistics are for surrenders to the UK and not requests made by country as that information is not available to us. In any event, these figures would be misleading because, where the location of a wanted person is unknown, we will send a request to several countries simultaneously.

APPENDIX 7: PUBLICATIONS CONCERNING THE OPT-OUT DECISION

(1) Open Europe, An unavoidable choice: More or less EU control over UK policing and criminal law by Stephen Booth, Christopher Howarth and Vincenzo Scarpetta (January 2012)[508]

(2) Fair Trials International, The UK's right to opt out of EU crime and policing laws from December 2014: Frequently Asked Questions (July 2012)[509]

(3) Centre for European Legal Studies, Opting out of EU Criminal law: What is actually involved? by Professor John Spencer, Professor Steve Peers and Dr Alicia Hinarejos (September 2012)[510]

(4) Centre for European Reform, Cameron's European 'own goal': Leaving EU police and justice co-operation? by Hugo Brady (3 October 2012)[511]

(5) Statewatch, The UK's planned 'block opt-out' from EU justice and policing measures in 2014 by Professor Steve Peers (16 October 2012)[512]

(6) Open Europe, Cooperation Not Control: The Case for Britain Retaining Democratic Control over EU Crime and Policing Policy by Dominic Raab MP (29 October 2012)[513]

(7) Fresh Start Group, Manifesto for Change: A new vision for the UK in Europe [Chapter 10: Policing and Criminal Justice] (16 January 2013)[514]

(8) Centre for European Reform, Britain's 2014 justice opt-out: Why it bodes ill for Cameron's EU strategy by Hugo Brady (January 2013)[515]

---

508 http://www.openeurope.org.uk/Content/Documents/PDFs/JHA2014choice.pdf

509 http://www.fairtrials.net/wp-content/uploads/2012/09/FTI2014opt-outJuly2012.pdf

510 http://www.cels.law.cam.ac.uk/Media/working_papers/Optout%20text%20final.pdf

511 http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/pb_hb_cameron_3oct12-6224.pdf

512 http://www.statewatch.org/analyses/no-199-uk-opt-out.pdf

513 http://www.openeurope.org.uk/Content/Documents/Pdfs/CooperationNotControl.pdf

514 http://www.eufreshstart.org/downloads/manifestoforchange.pdf

515 http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2013/final_brady_jha_20march13-7124.pdf

APPENDIX 8: GLOSSARY

ACPO	Association of Chief Police Officers
ACPOS	Association of Chief Police Officers in Scotland
AFSJ	Area of Freedom, Security and Justice
CCBE	Council of Bars and Law Societies of Europe
CEPOL	*Collège européen de police*. The French acronym for the European Police College
CELS	Centre for European Legal Studies
CEPS	Centre for European Policy Studies
CER	Centre for European Reform
CFR	Charter of Fundamental Rights
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
Common Travel Area	The travel zone between the United Kingdom and the Republic of Ireland, which also includes the Isle of Man and the Channel Islands. People moving between these territories are subject to minimal border controls. The respective authorities cooperate closely on immigration matters and in tackling cross-border crime
COPFS	Crown Office and Procurator Fiscal Service
COSI	*Comité permanent de coopération opérationnelle en matière de sécurité intérieure.* The French acronym for the Standing Committee on Operational Cooperation on Internal Security, constituted under Article 71 TFEU; a committee of officials who coordinate the EU's work on police and judicial cooperation in criminal justice matters
CPS	Crown Prosecution Service
Council of Europe	Founded in 1949, the Council of Europe is an intergovernmental organisation between 47 countries, which promotes cooperation in legal standards, human rights, democratic development, the rule of law and culture. It is distinct from the EU and the European Court of Human Rights (ECtHR) forms part of it. The judges of the ECtHR are elected by the Parliamentary Assembly of the Council of Europe (PACE) by a majority of the votes cast from lists of three candidates nominated by each member state
DG HOME	Directorate-General for Home Affairs, European Commission
DG JUSTICE	Directorate-General for Justice, European Commission

DPP	Director of Public Prosecutions
EAW	European Arrest Warrant
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice. This is now the CJEU
ECtHR	European Court of Human Rights
ECRIS	European Criminal Records Information System
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Area
EIO	European Investigation Order
Enhanced Cooperation	A procedure under Article 20 TEU which allows a minimum of nine Member States to establish advanced integration or cooperation in an area, including through the adoption of EU legislation, but without the remaining Members States being subject to its terms
EPCTF	European Police Chiefs Task Force
EPPO	European Public Prosecutor's Office
ESO	European Supervision Order
EU	European Union
Eurojust	European Union's Judicial Cooperation Unit
Europol	European Police Office
Fresh Start Project	A group of backbench Conservative MPs, which is examining the options for a new UK-EU relationship and making proposals for change
Frontex	*Frontières extérieures*. The French acronym for the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
Hague Programme	A five-year programme for Member States' cooperation on EU justice and home affairs matters for the period 2005 to 2009, which was adopted by the European Council in 2004
HMRC	Her Majesty's Revenue and Customs
JHA	Justice and Home Affairs
JIT	Joint Investigation Team
JMC	Joint Ministerial Committee
JURI	European Parliament Committee on Legal Affairs

JUSTICE	An all-party law reform and human rights organisation, which is the UK section of the International Commission of Jurists
Justice Across Borders	A cross-party, independent campaign, established to campaign against the UK Government exercising the opt-out
LIBE	European Parliament Committee on Liberty, Justice and Home Affairs
LSEW	Law Society of England and Wales
LSS	Law Society of Scotland
MEP	Member of the European Parliament
MLA	Member of the Legislative Assembly
MoU	Memorandum of Understanding
MPS	Metropolitan Police Service
MSP	Member of the Scottish Parliament
NGO	Non-governmental organisation
OCTA	Organised Crime Threat Assessment
Open Europe	An independent think tank, which contributes to the debate about the future direction of the EU
OLP	Ordinary Legislative Procedure
PCJ	Police and Criminal Justice
PNR	Passenger Name Record
PSNI	Police Service of Northern Ireland
QC	Queen's Counsel
QMV	Qualified Majority Voting
Schengen Area	The borderless area which is comprised of 26 European countries, including all EU Member States except the United Kingdom and the Republic of Ireland, and four non-EU countries: Iceland, Liechtenstein, Norway and Switzerland. However, Bulgaria, Cyprus and Romania have yet to become full members of the Area. It has a common external border
SIS	Schengen Information System
SIS II	Second generation Schengen Information System
SOCA	Serious Organised Crime Agency
Stockholm Programme	A five-year programme for Member States' cooperation on EU justice and home affairs matters for the period 2010 to 2014, which was adopted by the European Council in 2009

Tampere Programme	A five-year programme for Member States' cooperation on EU justice and home affairs matters for the period 2000 to 2004, which was adopted by the European Council in 1999
TD	*Teachta Dála.* The Irish term for a member of the Dáil Éireann, the lower House of the Oireachtas (the Irish Parliament)
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TREVI	*Terrorisme, Radicalisme, Extrémisme et Violence Internationale.* The French acronym for a pre-Maastricht intergovernmental forum, which used to discuss cross-border policing and security issues
UKIP	United Kingdom Independence Party
UKRep	The Brussels office of the United Kingdom Permanent Representative to the EU
UKSC	United Kingdom Supreme Court
VIS	Visa Information System