



House of Commons
Justice Committee

Ministry of Justice measures in the JHA block opt-out

Eighth Report of Session 2013–14

*Report, together with formal minutes, and oral
evidence relating to the report*

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The Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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Summary

This report deals with the sixteen Ministry of Justice measures which form part of the so-called JHA block opt-out. It is the Committee's response to the House's invitation to it, together with the Home Affairs and European Scrutiny Committees, to submit a report relevant to the exercise of the opt-out by the end of October 2013, before the start of negotiations between the Government and the European Commission, Council and other EU member states on measures which the UK wishes to rejoin following exercise of the block opt-out.

The UK's right to exercise a block opt-out, and the conditions attached to the exercise of that right, are contained in Article 10 of Protocol 36 annexed to the EU Treaties. The block opt-out covers those EU police and criminal justice measures which had been adopted prior to 1 December 2009, the date of the entry into force of the Treaty of Lisbon.

Our report considers the background to the exercise of the opt-out, the context and reasoning behind the Government's approach, and the process of discussion which has taken place so far between Parliament, its committees and the Government on the subject. Referring to the delays we and other committees have encountered in obtaining information from the Government to enable us to carry out effective scrutiny, we criticise the "cavalier fashion" in which Parliament has been treated. We also call on the Government to provide an assessment of the effect of the extension of the jurisdiction of the Court of Justice of the European Union over the measures.

The Ministry of Justice measures include six mutual recognition measures, on financial penalties, previous convictions, prisoner transfer, probation measures, judgments in absentia, and the European Supervision Order. Some of these measures are related to the European Arrest Warrant, which the Government is seeking to rejoin with some modifications to its operation to make it more workable. The Government proposes to seek to rejoin all these instruments except that relating to probation measures, arguing that there are concerns over how it might operate arising from vagueness of drafting. Subject to the fact that we do not have a full impact assessment on all the measures, and the fact that we have had limited time to conduct this scrutiny exercise, we broadly consider that on balance the Government is right to seek to rejoin the five measures. We say that we would not wish to rule out participation in the Probation Measures Framework Decision if concerns about its drafting can be overcome as part of the forthcoming negotiation process.

There are six "minimum standards" measures setting out EU-wide minimum penalties and sanctions for various offences, such as counterfeiting of the euro or corruption of officials, which the Government does not propose to rejoin. We note that the UK already meets all the standards concerned, and conclude that the arguments for opting into these measures are "primarily symbolic", and those arguments do not "outweigh the disadvantages of bringing wide areas of criminal justice in the UK unnecessarily into the jurisdiction of the Court of Justice of the European Union".

Of the remaining four measures, we agree with the Government's intention to rejoin measures on data protection in police and judicial co-operation and a data protection secretariat, and we agree that it does not make sense to rejoin a redundant Schengen agreement on road traffic offences. In respect of a measure on settlement of conflicts of jurisdiction, which the Government does not propose to rejoin, we say that the arguments are more finely balanced, and that the Government needs to address concerns expressed to us in evidence that there are realistic circumstances in which withdrawal from the measure could be disadvantageous to the UK or British citizens.

Finally we call for an early debate in the House at which this report and the reports of the Home Affairs Committee and the European Scrutiny Committee, along with a Government response to them, can be considered, and in which the House can express a view on the addition or subtraction of measures from the Government's list of 35 which it proposes to rejoin. We add that following the conclusion of negotiations with the Commission, there will need to be another debate and vote in the House on the outcome of the process.

1 Introduction

The Committee's inquiry

1. On 9 July 2013 the Home Secretary made a Statement to the House explaining the Government's intention to exercise the so-called block opt-out from those EU police and criminal justice measures which had been adopted prior to 1 December 2009, the date of the entry into force of the Treaty of Lisbon.¹ At the same time the Government published a Command Paper entitled *Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union*.²

2. This Command Paper sets out the legal and procedural position in relation to the exercise of the block opt-out, as provided for in Article 10 of Protocol 36 annexed to the EU Treaties. It also contains a list of 35 measures which the Government says the UK will seek to rejoin, as well as five Explanatory Memoranda (EMs) giving information on all the 130-odd police and criminal justice measures forming part of the block opt-out. After a brief description of the provisions of each measure, the EMs contain a short section describing the policy implications of the UK participating (or not participating) in each measure, and a fundamental rights analysis in relation to each.

3. Most of the measures in the block opt-out fall within the responsibility of the Home Office, and three of the EMs in Cm. 8671 relate to these measures. The Home Office measures include the European Arrest Warrant, on which much of the debate about the exercise of the opt-out has focused. They also include Eurojust, which supports and co-ordinates criminal investigations and prosecutions, including through the use of joint investigation teams, which the Government proposes to rejoin, and the European Judicial Network, a less formal framework for co-operation between lawyers and judges in different member states on matters such as training and mutual assistance, which is not on the list of 35. The fourth EM covers the sixteen measures for which the Ministry of Justice is responsible.³ A fifth and final EM relates to a small number of measures which are the responsibility of other Government Departments.

4. On 15 July the House debated the block opt-out and agreed the following Resolution:

That this House believes that the UK should opt out of all EU police and criminal justice measures adopted before December 2009 and seek to rejoin measures where it is in the national interest to do so and invites the European Scrutiny Committee, the Home Affairs Select Committee and the Justice Select Committee to submit relevant reports before the end of October, before the Government opens formal discussions with the Commission,

¹ HC Deb 9 July 2013, cc 177–193. The block opt-out is often referred to as the JHA (Justice and Home Affairs) block opt-out, although it does not apply to the whole range of areas falling within Justice and Home Affairs.

² Article 10 of Protocol 36 sets out the legal basis for the exercise of the opt-out. In this report the Command Paper is henceforth referred to as "Cm.8671".

³ Explanatory Memorandum (EM) on Article 10(4) of Protocol 36 to the Treaty on the Functioning of the European Union (TFEU) – the "2014 decision": Ministry of Justice measures, 4/13, Cm. 8671, pp 122–142.

Council and other Member States, prior to the Government's formal application to rejoin measures in accordance with Article 10(5) of Protocol 36 to the TFEU.⁴

The wording of this Resolution followed the Government's acceptance of an amendment to its original motion tabled by our Chair, along with other select committee Chairs, intended to make clear that the House was not being asked at that stage to endorse the Government's list of 35 measures.⁵

5. The following day we agreed to launch an inquiry in response to the House's invitation, and on 18 July we issued a call for evidence on those measures.

Call for evidence:

The Justice Committee seeks written evidence addressing the following questions in relation to the measures referred to in the Explanatory Memorandum on Ministry of Justice measures contained on pages 122 to 141 of Cm 8671. You may comment on any or all of the measures.

- do you agree with the list of measures falling within the Ministry of Justice's responsibility that the Government proposes the UK should seek to rejoin after exercise of the block opt-out? Do you consider that the UK should seek to rejoin measures which are not contained in the Government's list, or, conversely, do you consider that the UK should not seek to rejoin measures which are contained in the Government's list?
- do you have any comments on the analysis of policy implications and fundamental rights provided in the Ministry of Justice's Explanatory Memorandum?
- what is your assessment of the national interest involved in rejoining the measures for which the Ministry of Justice is responsible?
- do you consider any other factors should be taken into account in deciding whether the UK should seek to rejoin each measure?

The Committee is not seeking views on the question of whether or not the UK should exercise the block opt-out.

6. We received written evidence from Fair Trials International, the Law Societies of England and Wales and of Scotland, Justice Across Borders, and Mr Christopher Gill. In addition, under cover of a letter of 7 October 2013 from the Secretary of State, the Ministry of Justice provided further information on the Government's reasoning for their approach in relation to four of the MoJ measures.⁶ On 16 October the Lord Chancellor and Secretary of State for Justice, Rt Hon Chris Grayling MP, gave oral evidence to us, and the Ministry

⁴ Votes and Proceedings, Monday 15 July 2013

⁵ The amendment, moved by our Chair, left out the words "on the set of measures in Command Paper 8671" which appeared after the words "Member States" in the Government's motion.

⁶ The Prisoner Transfer Framework Decision, the European Supervision Order, the Data Protection Framework Decision and the Mutual Recognition of Financial Penalties Framework Decision

followed that oral evidence up with a supplementary letter on 21 October. We are grateful to all those who provided evidence to our inquiry.

The Committee's prior involvement

7. While, as described above, our formal inquiry into this subject began in July 2013, our interest in the subject of the exercise of the block opt-out is a longstanding one. We first wrote to the then Lord Chancellor and Secretary of State for Justice, Rt Hon Kenneth Clarke QC MP, on 21 March 2012 asking for information on the Government's position on the exercise of the block opt-out. Mr Clarke provided a list of the measures which at that time were potentially subject to the block opt-out, but he said that he was not in a position to provide further information as the matter was subject to ongoing internal discussion within Government.

8. Our letter of March 2012 was the first of a number of attempts which we have made, in some cases by ourselves and in some cases in concert with the European Scrutiny Committee and the Home Affairs Committee, to ensure that the decision-making process in respect of exercise of the block opt-out properly involves Parliament and its committees.

9. The history of discussion between the Government and parliamentary committees on this matter, and the extensive correspondence associated with it, was chronicled by the European Scrutiny Committee in a Report which concluded scathingly that:

The Government has not only failed to satisfy our requests for timely information, but has also failed to meet its own deadlines for the provision of its Explanatory Memoranda and to provide any reasonable justification. We consider the delay to be unacceptable and irreconcilable with the Government's professed commitment to enhanced Parliamentary scrutiny of EU justice and home affairs matters.⁷

10. The problem which has faced us, and our fellow committees, has been the absence of information to enable us to undertake effective scrutiny. The five Explanatory Memoranda on the measures, which the Government had told us it hoped to be able to make available by mid-February 2013, did not see the light of day until 9 July. There is still no sign of the full impact assessment which the European Scrutiny Committee has requested on the measures which the Government proposes to seek to rejoin as well as those it does not intend to rejoin.

11. The internal discussion within Government on the list of measures which it proposes to rejoin appears to have lasted well over a year. On publication of that list the Government's original intention appeared to be to ask the House to endorse the principle of the exercise of the opt-out and the list of 35 measures proposed to be rejoined in a debate to take place 6 days later. Only a prompt intervention by this Committee and the other Committees concerned was able to ensure that the eventual resolution agreed by the House permitted a breathing space for greater scrutiny.

⁷ European Scrutiny Committee, Thirty-seventh Report of Session 2012–13, *The 2014 block opt out: engaging with Parliament*, HC 798, para 1.11

12. We find it extraordinary that after such a prolonged period of internal consideration within Government, during which repeated attempts by select committees to obtain the information necessary for them to undertake effective scrutiny have been stonewalled, the Government should have considered it acceptable to attempt to present an effective *fait accompli* to Parliament with wholly inadequate time for consideration of the issues involved. The contrast between the lengthy period of time which the Government itself required to arrive at a decision and the six days which the Government originally deemed sufficient for the House of Commons before it was asked to express a view on that decision speaks eloquently of the cavalier fashion in which Parliament has been treated in this process.

2 Our report

The purpose of this report

13. This report is one of three being produced to inform the House's consideration of the subject of the exercise of the block opt-out. We consider that the House has endorsed the principle of exercising the block opt-out in its resolution of 15 July, and that we have been asked by the House to express a judgment on the merits of seeking to rejoin each of the sixteen measures falling within the Ministry of Justice's responsibility. In addition, we express our views on the future involvement of the House in the decision-making process.

The context of this report

14. The European Scrutiny Committee has a different role to departmentally-related select committees, and we expect that in its report to the House it will set out fully the background to the UK's right to the block opt-out, explain the procedures and practicalities applying to the exercise of the block opt-out and the subsequent process for rejoining certain measures, and provide a summary of each of the measures to which the block opt-out applies, together with an assessment of the reasoning and evidence provided by the Government in support of its approach in respect of each.

15. Much of the wider context for the House's consideration of this matter is therefore likely to be set by the work of the European Scrutiny Committee. There are however several of these contextual issues we wish to highlight as particularly relevant to our own work, and some general comments we wish to make on the Government's approach, before considering the sixteen Ministry of Justice measures themselves in more detail.

16. First, there is a relationship between judgments on some of the MoJ measures and some of the Home Office measures. This is particularly the case in respect of the European Arrest Warrant (EAW), where the Home Secretary in her Statement to the House on 9 July 2013 made it clear that use of the provisions of the Prisoner Transfer Framework Decision was one of the safeguards which would increase protections for those wanted for extradition under the EAW.⁸

17. The Justice Secretary told us in evidence that he had had constructive discussions with the Home Secretary on the measures in the overall block opt-out and there had not been pressures one way or the other.⁹ We do not know what view the Home Affairs Committee will take on the desirability of the UK rejoining the EAW and the prospects for reforming the EAW system in the manner envisaged by the Government, but where the case for rejoining particular MoJ measures appears contingent, to a greater or lesser extent, on the decision on whether to rejoin the European Arrest Warrant, we have made that clear.

18. Secondly, the term "block opt-out" may give a misleading impression that the UK is opting out of the entirety of the EU legislative framework on justice and home affairs. This is far from the case. The opt-out covers only police and criminal justice measures adopted

⁸ HC Deb 15 July 2013, cc 778–9

⁹ Q 36

before the Treaty of Lisbon entered into force on 1 December 2009. It does not cover measures into which the UK has opted since that date, including measures amending, repealing or replacing pre-1 December 2009 measures. Indeed, since the Government published its original list of measures subject to the block opt-out, two of the Ministry of Justice measures have been replaced by new measures in which the UK has decided to participate.¹⁰ Nor does the block opt-out cover measures in the wider justice and home affairs (JHA) field on asylum, immigration and judicial co-operation in civil matters.

19. Finally, while we focus in this report on the MoJ measures subject to the block opt-out, it is essential to bear in mind that decisions taken now will, for good or ill, have long-term implications for the UK's future position in respect of EU cross-border arrangements and co-operation in criminal justice matters, in many cases with a direct impact on British citizens. We received evidence, for example, on the potential role of further EU legislation on procedural rights of defendants, particularly the Directive on the right of access to a lawyer, in buttressing protections across the EU, including in relation to the exercise of the EAW.¹¹

Government reasoning

20. Replying to the debate in the House on 15 July Mr Grayling explained the basis of the Government's approach to the question of the exercise of the opt-out:

The Government have reached a settled view that we do not want to participate in all the 130-plus measures. We do not want to be part of a European justice system, but we do want to be part of the fight against international crime. We do not want courts across Europe to be told by Brussels the minimum standards that should apply to the sentences they impose. We do not want matters that should be resolved by member states to be legislated for at a European level. We want to bring powers in those areas back to the UK.¹²

21. In oral evidence to us on 16 October Mr Grayling further explained:

It is never an exact science, but, broadly speaking, what we have done in that list of 35 is to identify measures that it is obviously in the national interest to be part of as part of the strategy of fighting serious and organised crime. But we do not want to be part of measures, for example, that set minimum standards for sentencing and take us down the road towards the creation of a European justice system. That, to me, has guided what we have done in the decisions that we have taken.¹³

¹⁰ Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, repealed and replaced Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings; and Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography repealed and replaced Council Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography.

¹¹ [Fair Trials International](#) and [The Law Societies of England and Wales and of Scotland](#)

¹² HC Deb 15 July 2013, cc 850–1

¹³ Q 3

Mr Grayling recognized that these two principles could be in conflict, and argued that in such cases a judgement needed to be made, taking account of the national interest. He also recognized that some measures, such as the Prisoner Transfer Framework Decision, did not entirely conform to either of the principles.¹⁴

22. Apart from the two main philosophical principles enunciated by the Government, various other specific reasons have been adduced in the Ministry's evidence for withdrawing from or seeking to rejoin measures. Such reasons include–

- reputational benefits or avoidance of reputational harm to the UK;¹⁵
- other Government policy objectives;¹⁶
- financial benefits;¹⁷
- lack of evidence on the likely effectiveness of measures which have only been implemented by few member states;¹⁸
- the fact that implementation will enable the European Arrest Warrant system to work more effectively;¹⁹
- effective law enforcement across the EU.²⁰

23. The original logic for the establishment of the UK's block opt-out right was that the UK should be entitled to change a previous decision to participate in a police and criminal justice measure in light of the changed circumstances, under the Treaty of Lisbon, which mean that the UK's compliance with the measures concerned will become subject to the enforcement powers of the European Commission and the jurisdiction of the Court of Justice of the European Union (CJEU) from 1 December 2014. For the Government, the prospect of CJEU jurisdiction over police and criminal justice matters is clearly a major element of the "Europeanisation" of justice which has motivated the decision to exercise the opt-out.

24. The likely effects of CJEU jurisdiction in these areas are of major importance in the debate on the opt-out and in determining which measures it would be desirable to opt back into. In oral evidence Mr Grayling expressed particular concern about interpretation by the CJEU of vaguely drafted measures, which, if unwelcome to the UK, could not be addressed by Parliament changing the law, as is the case in relation to interpretation of domestic

¹⁴ Q 4

¹⁵ Cm 8671 p 127 and p134 (in relation to the Framework Decision on the application of the principle of mutual recognition to financial penalties and the Data Protection Framework Decision)

¹⁶ *Ibid*, p130 (in relation to the Prisoner Transfer Framework Decision)

¹⁷ *Ibid*, p131 and p 137 (in relation to the Prisoner Transfer Framework Decision and the European Supervision Order)

¹⁸ *Ibid*, p132 (in relation to the Probation Measures Framework Decision. On p 137 of Cm 8671 the Government refers to similar uncertainties about the European Supervision Order, in relation to which the Government has the contrary intention of rejoining the measure.

¹⁹ Ministry of Justice (in relation to the Prisoner Transfer Framework Decision and the European Supervision Order)

²⁰ *Ibid*, (in relation to the Data Protection Framework Decision)

legislation by the UK courts with which Parliament disagrees.²¹ It is the case that, when there is unclear wording in EU legislation, the CJEU will use the general objectives in the Treaties to guide its interpretation, and as a result CJEU case-law has a tendency to move in an integrationist direction. ***We note that the Government's Command Paper Cm.8671 contains no assessment of the probable effects of extension of CJEU jurisdiction to the police and criminal justice measures subject to the block opt-out, including those measures which it is proposed to rejoin, and we recommend that the Government should provide such an assessment in its response to this report.***

²¹ Q 9

3 The measures

25. Of the 16 measures falling within the responsibility of the Ministry of Justice which form part of the block opt-out, the Government proposes to opt back into seven. The 16 measures in question can be broadly categorised as follows:

- 6 measures for **mutual recognition** of national decisions and systems—the Government proposes to opt back into all of them except the Probation Measures Framework Decision;
- 6 measures establishing **minimum standards** for certain criminal offences and penalties, such as fraud and counterfeiting, none of which the Government proposes to opt back into; and
- 4 **other** measures, two of which the Government proposes to opt back into, including a Framework Decision on protection of personal data exchanged between member states as part of police and judicial co-operation.

We consider each of these categories of measures in turn.

Mutual recognition measures

26. Mutual recognition has been defined as “the principle whereby the decisions and rulings of the courts and other competent authorities of one Member State are accepted by the courts and competent authorities of the other Member States and enforced on the same terms as their own”.²² Mutual recognition needs to be a reality, not an aspiration, amongst all Member States. The six MoJ measures which can be classified in this category are considered below, in chronological order of adoption.

Financial Penalties Framework Decision

27. The Financial Penalties Framework Decision²³ requires Member States to collect financial penalties of over 70 euros transferred by other Member States. Between June 2010 and September 2012 England and Wales received 393 cases from other Member States with a total value of £90,000; and between December 2010 and October 2012 there were 126 outgoing penalties amounting to approximately £50,000. The Ministry says in its original Memorandum that the Framework Decision ensures that “offenders are not able to escape justice simply because they do not live in the Member State where they offend. As such, participation in the measure could have reputational benefits.”²⁴ In its supplementary memorandum the Ministry adds that, as an example, visitors in the UK from another

²² *Opting out of EU Criminal law: What is actually involved?*, Alicia Hinarejos, J.R. Spencer and Steve Peers, CELS Working Paper, New Series, No.1, September 2012

²³ Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties

²⁴ Cm. 8671 p 127.

Member State may be less inclined to commit road traffic offences if they know they will still be likely to have to pay the resulting fine imposed for any offence.²⁵

28. Fair Trials International make the point that the availability of a mechanism for enforcement of financial penalties “creates an alternative for other Member States to use in order to enforce punishment for minor crimes instead of seeking extradition in respect of a short-term prison sentence”, and consider that the measure is therefore potentially helpful in aiding a proportional application of the EAW.²⁶

Previous Convictions Framework Decision

29. The Previous Convictions Framework Decision²⁷ requires courts to take account of a defendant’s previous convictions in any other Member State “to the extent previous national convictions are taken into account”. The Government proposes to opt back into this measure. The MoJ’s memorandum says that the Decision was implemented in England and Wales in the Coroners and Justice Act 2009, but the principle of taking into account overseas convictions was already present in statute and common law. If the UK were not to rejoin this instrument, the Ministry says “other Member States would not be bound to take into account previous convictions from UK courts”.

30. The Framework Decision is usually referred to as a mutual recognition measure, but it goes beyond mutual recognition and places certain requirements on member states’ courts. Mr Grayling was asked at the European Scrutiny Committee meeting on 10 October why he did not consider this measure to be one which contributed to Europeanising the UK justice system: he replied that it was in the interests of international crime-fighting and of the UK to have a clear process in place for courts to have access to information on previous convictions elsewhere.²⁸

Prisoner Transfer Framework Decision

31. The Prisoner Transfer Framework Decision²⁹ provides for the transfer of foreign national offenders (FNOs) who are EU nationals to serve their sentence in their home country, provided they have more than 6 months to serve. The prisoner’s consent is not required, although they may make representations against transfer. In evidence to us Mr Grayling said this meant the system was “not as tight as I would wish it to be”.³⁰

32. As at 30 March 2013 there were 4,058 EU nationals in UK prisons,³¹ and in oral evidence Mr Grayling estimated that about 1,400 of these were serving sentences of the

²⁵ Ministry of Justice

²⁶ Fair Trials International

²⁷ Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the MS of the EU in the course of new criminal proceedings

²⁸ Uncorrected transcript of evidence taken before the European Scrutiny Committee on 10 October 2013, HC 683-i: Q 41; Q 61

²⁹ Council Framework Decision 2008/909/JHA of 27 Nov 2009 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 EU

³⁰ Q 6

³¹ Cm 8671 p. 130

requisite length to be subject to potential transfer.³² The Ministry's second memorandum says that no EU prisoners have been transferred out of the UK on a voluntary basis and that the first four compulsory transfers have just been completed; and that five British offenders have been transferred back to the UK under the Framework Decision.³³

33. The Government proposes to opt back into this measure. The MoJ in its original Memorandum says that it is Government policy to reduce the number of FNOs in UK prisons, and that non-participation in the measure could lead to foregone savings to the UK in the form of current and future prison places. The Ministry's second memorandum says that reducing the FNO population is "a top priority" for the Government. The measure is also described by the Ministry as "an important part of the overall reform package for the European Arrest Warrant" which will enable UK nationals convicted to serve sentences abroad to be able to serve those sentences in the UK.³⁴ In evidence to us Mr Grayling said "it is just very obvious to me that it is something that is in our national interest to be part of".³⁵

Probation Measures Framework Decision

34. The Probation Measures Framework Decision³⁶ provides a basis for the mutual recognition and supervision of suspended sentences, licence conditions and alternative sanctions (i.e. community sentences), with the consent of the offender and the receiving Member State. The Government does not propose to opt back into this measure. It says in its Memorandum that there is a lack of clear understanding of how the measure will operate in practice, that only 7 Member States had implemented it by November 2012, and that there is a risk of uneven application across the EU. In evidence to us, and to the European Scrutiny Committee on 10 October, Mr Grayling said his concerns centred around the vagueness of drafting of the measure, which could lead to unwelcome interpretation of its provisions by the CJEU.³⁷

35. Following the session Mr Grayling expanded on these concerns, explaining that the Government were "unclear as to what happens in the event an individual is deported, the probation decision or alternative sanction is transferred, and there is a subsequent breach. In particular, Member States may make a declaration that they will not deal with breach locally, under certain circumstances, but will transfer jurisdiction back to the issuing Member State"³⁸

³² Q 5

³³ Ministry of Justice

³⁴ *Ibid*

³⁵ Q 4

³⁶ Council Framework Decision 2008/947 JHA of 27 Nov 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

³⁷ Q 9; HC 683-i Q 25

³⁸ Ministry of Justice

36. In addition Mr Grayling said:

I also have a concern about the doing of justice. If we send somebody back to serve a period of probationary supervision elsewhere, I would want to know that they were actually going to get that period of supervision and it was going to be done properly in the way it is done in this country.³⁹

But he also stated: “I would not rule out a future Government deciding that they wanted to be part of a European probation measure”.⁴⁰

37. He conceded that similar arguments could be invoked against the European Supervision Order, but said that after giving the matter hard thought he had been swayed in relation to the ESO by individual cases involving British citizens stranded abroad for long periods awaiting trial.⁴¹

38. The Law Societies have noted that, in his review of extradition arrangements (The Scott Baker Review), Sir Scott Baker highlighted the potential value of the Probation Measures Framework Decision, suggesting that it could enable other Member States to transfer probation or non-custodial measures to the UK for execution rather than issuing an EAW for a sentence imposed in default, thus potentially reducing the number of EAWs issued.⁴²

Judgments in absentia Framework Decision

39. The Judgments in absentia Framework Decision⁴³ amends various EU instruments which contain provisions about judgments in absentia, including the financial penalties, prisoner transfer and probation measures framework decisions referred to above as well as the instruments on the EAW and the mutual recognition of confiscation orders which come under Home Office responsibility. The Framework Decision clarifies the circumstances in which orders made in a person’s absence can be recognized and executed in other Member States, and provides for safeguards for defendants. The Government proposes to opt back into this measure. It says that the Decision means that fewer criminals will be able to evade justice by arguing their conviction was unfair; and points out that the measure also provides for grounds for refusal to endorse an EAW when a person has been tried in his absence if certain procedural requirements have not been fulfilled. The Law Societies contended that the measure could improve the procedural rights of the accused in EAW cases.⁴⁴

³⁹ Q 11

⁴⁰ *Ibid.*

⁴¹ Q 12

⁴² A Review of the United Kingdom’s Extradition Arrangements, Home Office, September 2011, para 11.22,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf

⁴³ 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, 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the applications of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial

⁴⁴ Ministry of Justice

European Supervision Order

40. This Framework Decision⁴⁵ establishes a European Supervision Order (ESO) under which a suspect or defendant subject to non-custodial pre-trial supervision, such as supervised bail, may on a voluntary basis be returned to their home member state to be supervised there until their trial takes place. The Government says in its Memorandum that it is not possible to assess how the measure is being used as the implementation date of 1 December 2012 is so recent. The Government proposes to opt back into this measure, saying that non-participation in the ESO could lead to foregone savings to the UK from transferring foreign suspects to the member state in which they are resident while they are awaiting trial in the UK, but those savings would have to be weighed against the costs of receiving UK nationals back.

41. The House of Lords EU Committee in its Report on the opt-out decision regretted the Government's delay in implementing the ESO pending the decision on the opt-out being made, and urged the Government to implement the ESO "without further delay", arguing that there was "no justification for British citizens to be deprived of the benefits of this measure".⁴⁶ The Law Societies and Fair Trials International have also expressed support for the ESO. The former argued that "from a practical perspective, if the ESO is made available this would benefit many accused, including those subject to an EAW, and their family members who would be able to spend a pre-trial period together in their Member State of residency prior to the accused facing trial elsewhere."⁴⁷ Fair Trials International stated that "unless the ESO is implemented into UK law, it will not be available to the many British citizens who may spend months or years in foreign prisons awaiting trial away from home, often in horrendous conditions."⁴⁸

42. In its supplementary memorandum the Ministry says the potential benefits of the ESO are clear and could "go some way to help avoiding lengthy pre-trial detention for some suspects surrendered under an EAW".⁴⁹

Conclusions on mutual recognition instruments

43. The case for opting back into each of these mutual recognition measures rests not just on the merits of UK participation in each measure but in some cases to their inter-relationships and their relationship to the European Arrest Warrant. The Government itself contends that use of the provisions of the Prisoner Transfer Framework Decision and the European Supervision Order could contribute to making the operation of the EAW more acceptable. As noted above, others consider that a similar case could be made in relation to the Probation Measures Framework Decision, the Framework Decision on

⁴⁵ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application between MS of the EU of the principle of mutual recognition to decisions of supervision measures as an alternative to provisional detention

⁴⁶ House of Lords European Union Committee, *EU police and criminal justice measures: The UK's 2014 opt-out decision*, 13th Report of Session 2012-13, HL Paper 159, para 179

⁴⁷ [Ministry of Justice](#)

⁴⁸ Fair Trials International – Written Evidence to the House of Lords EU Select Committee.

⁴⁹ [Ministry of Justice](#)

mutual recognition of judgments in absentia, and the Framework Decision on the mutual recognition of financial penalties.

44. Subject to the fact that we do not have the full impact assessment on all measures which has been requested by the European Scrutiny Committee, and the fact that we have had limited time in which to undertake this scrutiny exercise, we broadly consider that on balance it is right to seek to rejoin the five Ministry of Justice mutual recognition measures which are on the list of 35. Rejoining these measures is intended to serve both the national interest and the interests of effective cross-border co-operation in criminal justice matters within the EU.

45. We note the Government's concerns about the drafting of the Probation Measures Framework Decision, and in particular the possibility that this might lead to overturning of deportation decisions. In view of the potential value of the Framework Decision we consider that the Government should pursue the matter in their negotiations on the opt-in list to see whether these concerns can be dealt with. We would not wish to rule out participation in the measure if concerns about its drafting can be overcome as part of the forthcoming negotiation process or at a later stage.

46. We share the view of the House of Lords European Union Committee and some of those who gave evidence to us that the Government should implement the European Supervision Order without further delay.

Minimum standards measures

47. The six “minimum standards” measures falling within the MoJ’s responsibility, none of which the Government proposes to rejoin, are set out below.

Corruption involving officials

48. The 1997 Convention⁵⁰ requires member states to have minimum standards for criminal offences and penalties relating to public sector corruption, and the 2003 Decision⁵¹ makes the Convention applicable to Gibraltar. The Government says the Convention was implemented in the UK through the Bribery Act 2010 and that the UK would continue to meet those standards if it opted out of the instrument.

Counterfeiting of the euro

49. These two Framework Decisions⁵² require Member States to have minimum standards of criminal law and penalties to combat counterfeiting of the euro and other currencies.

⁵⁰ Convention on the fight against corruption involving officials of the EU or officials of member states of the EU (1997)

⁵¹ 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 EC or officials of member states of the EU

⁵² 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; and Council Framework Decision 2001/888/JHA of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro

The Government says the UK has extensive legislation meeting the standards of these measures, and they are being replaced by a new Directive, which the UK has decided not to opt into.

Fraud and counterfeiting of non-cash means of payment

50. This Framework Decision⁵³ requires all Member States to ensure that fraud and non-cash (i.e. cheque and credit card) counterfeiting are criminal offences backed up by effective sanctions. The Government says the UK's domestic legislation made it already compliant with the Decision before it was agreed, and that the UK will continue to meet the required standards if it no longer participates in the instrument.

Corruption in the private sector

51. The Framework Decision⁵⁴ requires Member States to have minimum standards for criminal law on corruption in the private sector. The Government says it has been implemented in the UK through the Bribery Act 2010, and there would be no effect from opting out of the instrument.

Conclusions on minimum standards measures

52. As mentioned above, the Government has already decided not to opt in to a new Directive to protect the euro and other currencies from counterfeiting, and it does not propose to rejoin any of the other four measures falling within this category. In evidence to us Mr Grayling said "I am very firmly of the view that I do not want penalties in our courts to be decided at a European level rather than at a UK level."⁵⁵ He was not persuaded that there could be reputational damage to the UK from leaving the measures. In fact, he made the reverse argument, that leaving the measures could lead to an enhancement of the reputation of the UK's legal system:

We talk a lot about how our system of law, our common law system and our legal traditions have an impact around the world, and the UK is looked to by many around the world as being a place where they want to come. That is why London is such a major centre for legal services to deal with complex issues. If we accept that our legal system will become more and more Europeanised, then, by definition, our USP on the world will become less and less visible.⁵⁶

53. Justice Across Borders, on the other hand, contended that leaving the Framework Decision on combating fraud and counterfeiting of non-cash means of payment could cause "reputational damage to the UK and a loss of influence."⁵⁷ They made a similar argument against leaving the Framework Decision on combating corruption in the private

⁵³ Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment

⁵⁴ Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector

⁵⁵ Q 19

⁵⁶ Q 21

⁵⁷ Justice Across Borders

sector, suggesting that, by not affirming these types of measures, the UK was “abandoning one of the main avenues for building the rule of law in these important areas [...] where for many years the UK has encouraged other EU Member States and accession countries to adopt precisely these measures.”⁵⁸

54. The legal consequences of withdrawing from each of the four measures are similar in each case. The Government has confirmed that in all cases UK legislation meets or exceeds the requirements in the relevant EU measure; that no legislative changes would therefore be needed if the UK were to leave each of them; and that there would be negligible economic impact from non-participation.

55. Given that the UK already meets the minimum EU standards in respect of these measures, the likelihood of compliance proceedings against the UK in the CJEU appears highly remote. The sole legal and practical consequence from leaving these measures would appear to be that the UK would be free in the future, if it so chose, to reduce its standards below those contained in the EU measures. We are not aware of any intention to do so. **We conclude that the arguments for opting into the four minimum standards measures are primarily symbolic, and our view is that those arguments do not outweigh the disadvantages of bringing wide areas of criminal justice in the UK unnecessarily into the jurisdiction of the Court of Justice of the European Union.**

Other measures

56. We now consider the four remaining measures falling within the MoJ’s responsibility.

Data protection in police and judicial co-operation

57. The Data Protection Framework Decision⁵⁹ governs protection of data processed within the framework of police and judicial co-operation in criminal matters: its purpose 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 exchange personal data. It aims to balance the rights of data subjects with the need to protect the public. The Government proposes to rejoin: it says that participation could enhance the UK’s reputation by signalling its commitment to data protection. A new Directive, on which we reported with some criticisms in 2012, has been put forward by the European Commission as part of a data protection reform package. If agreed, it will replace this Framework Decision, although we understand negotiations on it are progressing slowly in the Council of Ministers.

58. In its second Memorandum the Ministry says: “A fully-functional law enforcement and criminal justice system within the EU needs to share data in an appropriate manner to protect the public and the rights of individuals. The [Framework Decision] achieves this well.”⁶⁰ The Ministry also pointed out that the measure provides the data protection

⁵⁸ [Justice Across Borders](#)

⁵⁹ Council Framework Decision 2008/977/JHA of 27 Nov 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters

⁶⁰ [Ministry of Justice](#)

framework for a number of post-Lisbon JHA measures into which the UK has opted. The Law Societies saw the measure as important from the perspective of data protection.⁶¹

59. We asked Mr Grayling whether he foresaw any problems with the CJEU exercising jurisdiction over the mechanisms for exchange of personal data between competent authorities in different member states. He responded:

If you said to me would I prefer that this was still done on an intergovernmental basis, yes, I would, but it is not, and therefore it is one of those ones where we have to take a decision and say, where does the UK national interest lie? In my judgment, this is an area that is important for us in combating cross-border crime. It is also important for us in being able to share information about people arrested in this country. It is one of those ones where, in my judgment and the Home Secretary's judgment, it is in the national interest to remain part of it.⁶²

Data protection secretariat

60. The Decision⁶³ establishes a single, independent joint secretariat for the existing supervisory data protection bodies set up under the three conventions listed in the title. The Government proposes to rejoin: it says that its intention is consequential on decisions on participation in other measures relating to Schengen information systems.

Settlement of conflicts of jurisdiction in criminal matters

61. This Framework Decision⁶⁴ provides a framework of non-mandatory procedural guidance for Member States to put in place in order to protect against the possibility of parallel proceedings on the same matters being taken in different member states. The Government does not propose to rejoin: it says that much of the Decision represents best practice which is already well established in the UK.⁶⁵

62. Mr Grayling told us he saw this measure as falling within a category of “pretty meaningless” measures where there was “no need to turn them into a Europeanised system under the jurisdiction of the court.”⁶⁶ On the other hand, the Law Societies took the view that the instrument could be helpful, and that withdrawing from it could be to the detriment of the UK's interests, for example in a case where the UK would like to prosecute but another member state prosecutes before proceedings begin in the UK, when double jeopardy rules would preclude the UK from prosecuting.⁶⁷

⁶¹ The Law Societies of England and Wales and of Scotland

⁶² Q 26

⁶³ Council Decision 2000/641/JHA of 17 Oct 2000 establishing a secretariat for the joint supervisory data protection bodies set up by the Convention on the establishment of EUROPOL, the Convention on the use of information technology for Customs Purposes and the Schengen Convention

⁶⁴ Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal matters

⁶⁵ Cm 8671, p 138

⁶⁶ Q 27

⁶⁷ The Law Societies of England and Wales and of Scotland

Schengen agreement on road traffic offences

63. The sole block opt-out measure under the Schengen Convention falling within the MoJ's responsibility is this agreement.⁶⁸ Details of the measure are given in the Home Office's Explanatory Memorandum covering all the Schengen measures. The agreement requires Member States to provide contact details of drivers associated with a licence plate on request, as well as enabling service overseas of penalty notices and the ability to transfer enforcement of any fine to the authorities where the offender resides. The Government does not propose to rejoin: it says this measure does not appear to be in force and is unlikely to come into force as it has been superseded, largely by measures on the mutual recognition of financial penalties (see paragraphs 27 and 28 above) and exchange of information under the Prüm Treaty.⁶⁹

Conclusions on other measures

64. We agree with the Government that the UK should rejoin the Data Protection Framework Decision and the Data Protection Secretariat Decision. We also agree that the Schengen agreement on road traffic offences appears redundant and no purpose would be served by rejoining it. The arguments are more finely balanced in respect of the Framework Decision on settlement of conflicts of jurisdiction. Given the Law Societies have concerns that there are realistic circumstances in which withdrawal from the measure could be disadvantageous to the UK or British citizens, the Government needs to address these concerns.

⁶⁸ SCH/Com-ex (99) 11 rev 2 (agreement on cooperation in proceedings for road traffic offences).

⁶⁹ Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration (May 2005).

4 The next steps

65. It will be seen from our conclusions on the individual measures as set out in the previous chapter of this report that, taking as read the House's endorsement of the Government's proposal to exercise the block opt-out, we broadly agree with the Government's intentions in respect of whether or not to seek to rejoin each of the measures falling within the MoJ's responsibility, but with two important exceptions:

- we consider the Government should seek to resolve concerns about the drafting of the Probation Measures Framework Decision as part of the forthcoming negotiation process; and
- we consider that, given concerns that there are realistic circumstances in which withdrawal from the Framework Decision on settlement of conflicts of jurisdiction could be disadvantageous to the UK or British citizens, the Government needs to address those concerns.

66. It is plain from the evidence which Mr Grayling gave to us that the Government does not intend to return to the House to enable it to express its views in a further debate before embarking on formal negotiations with the European Commission on the list of 35. Instead the Government would bring proposals back to the House after those negotiations had crystallised a Commission view. Mr Grayling argued:

We have to do it that way round because, of course, we are in negotiation with the Commission as well. I guess we have to say to Parliament, "Please don't tie our hands for that negotiation," because if we have effectively agreed a UK position before that negotiation there is not much room for negotiation. What we have to do is listen to Parliament, have discussions with the Commission on the basis of the views both of the Government and of Parliament, but then bring the Commission's views back to Parliament to say, "Is that okay or not?"⁷⁰

67. Mr Grayling's argument would have considerably more force had the Government ensured before now that as part of this process there had been adequate time and information provided to enable the House of Commons to debate these matters thoroughly. By its failure to engage with the House at an earlier stage, and its failure to meet its long-standing commitment to consult Parliament itself on the arrangements for a vote, the Government has created the difficulties of timing and process which now confront it.

68. *This report is intended to inform the House, and we do not see that the Government's negotiating position could conceivably be weakened by an early debate informed by this report and the reports of the European Scrutiny and Home Affairs Committees. On the contrary, such a debate would in our view be of assistance to the Government in the conduct of negotiations, enabling them to enter those negotiations backed by the House's views. We consider that the House should have an early debate in which the reports of the*

⁷⁰ Q 30

three committees and a Government response to them can be considered, and in which the House can express a view on the addition or subtraction of measures from the Government's list of 35.

69. Following the conclusion of negotiations with the Commission, there will need to be another debate and vote in the House on the outcome of the process.

Conclusions and recommendations

The Committee's inquiry

1. We find it extraordinary that after such a prolonged period of internal consideration within Government, during which repeated attempts by select committees to obtain the information necessary for them to undertake effective scrutiny have been stonewalled, the Government should have considered it acceptable to attempt to present an effective fait accompli to Parliament with wholly inadequate time for consideration of the issues involved. The contrast between the lengthy period of time which the Government itself required to arrive at a decision and the six days which the Government originally deemed sufficient for the House of Commons before it was asked to express a view on that decision speaks eloquently of the cavalier fashion in which Parliament has been treated in this process. (Paragraph 12)

Government reasoning

2. We note that the Government's Command Paper Cm.8671 contains no assessment of the probable effects of extension of CJEU jurisdiction to the police and criminal justice measures subject to the block opt-out, including those measures which it is proposed to rejoin, and we recommend that the Government should provide such an assessment in its response to this report. (Paragraph 24)

Mutual recognition measures

3. We note the Government's concerns about the drafting of the Probation Measures Framework Decision, and in particular the possibility that this might lead to overturning of deportation decisions. In view of the potential value of the Framework Decision we consider that the Government should pursue the matter in their negotiations on the opt-in list to see whether these concerns can be dealt with. We would not wish to rule out participation in the measure if concerns about its drafting can be overcome as part of the forthcoming negotiation process or at a later stage. (Paragraph 45)
4. We share the view of the House of Lords European Union Committee and some of those who gave evidence to us that the Government should implement the European Supervision Order without further delay. (Paragraph 46)

Minimum standards measures

5. We conclude that the arguments for opting into the four minimum standards measures are primarily symbolic, and our view is that those arguments do not outweigh the disadvantages of bringing wide areas of criminal justice in the UK unnecessarily into the jurisdiction of the Court of Justice of the European Union. (Paragraph 55)

Other measures

6. We agree with the Government that the UK should rejoin the Data Protection Framework Decision and the Data Protection Secretariat Decision. We also agree that the Schengen agreement on road traffic offences appears redundant and no

purpose would be served by rejoining it. The arguments are more finely balanced in respect of the Framework Decision on settlement of conflicts of jurisdiction. Given the Law Societies have concerns that there are realistic circumstances in which withdrawal from the measure could be disadvantageous to the UK or British citizens, the Government needs to address these concerns. (Paragraph 64)

The next steps

7. This report is intended to inform the House, and we do not see that the Government's negotiating position could conceivably be weakened by an early debate informed by this report and the reports of the European Scrutiny and Home Affairs Committees. On the contrary, such a debate would in our view be of assistance to the Government in the conduct of negotiations, enabling them to enter those negotiations backed by the House's views. We consider that the House should have an early debate in which the reports of the three committees and a Government response to them can be considered, and in which the House can express a view on the addition or subtraction of measures from the Government's list of 35. (Paragraph 68)
8. Following the conclusion of negotiations with the Commission, there will need to be another debate and vote in the House on the outcome of the process. (Paragraph 69)

Formal Minutes

Tuesday 29 October 2013

Members present:

Sir Alan Beith, in the Chair

Steve Brine	Mr Elfyn Llwyd
Rehman Chishti	Andy McDonald
Jeremy Corbyn	Yasmin Qureshi
Nick de Bois	Graham Stringer

Draft Report (*Ministry of Justice measures in the JHA block opt-out*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 69 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Eighth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence was ordered to be published.

[Adjourned till Tuesday 5 November at 9.15am.]

Witnesses

Wednesday 16 October 2013

Question number

Rt Hon Chris Grayling MP, Lord Chancellor and Secretary of State for Justice,
and **Rebecca Stimson**, Deputy Director, International Policy, Ministry of
Justice

Qq 1–38

Published written evidence

The following written evidence was received and can be viewed on the Committee's inquiry web page at www.parliament.uk/justicecttee.

[Justice Across Borders](#)

[Fair Trials International](#)

[The Law Societies of England and Wales and of Scotland](#)

[Ministry of Justice](#)

[Ministry of Justice](#)

[Christopher Gill](#)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the Committee's website at www.parliament.uk/justicectte

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2010–12

First Report	Revised Sentencing Guideline: Assault	HC 637
Second Report	Appointment of the Chair of the Judicial Appointments Commission	HC 770
Third Report	Government's proposed reform of legal aid	HC 681-I (Cm 8111)
Fourth Report	Appointment of the Prisons and Probation Ombudsman for England and Wales	HC 1022
Fifth Report	Appointment of HM Chief Inspector of Probation	HC 1021
Sixth Report	Operation of the Family Courts	HC 518-I (Cm 8189)
Seventh Report	Draft sentencing guidelines: drugs and burglary	HC 1211
Eighth Report	The role of the Probation Service	HC 519-I (Cm 8176)
Ninth Report	Referral fees and the theft of personal data: evidence from the Information Commissioner	HC 1473(Cm 8240)
Tenth Report	The proposed abolition of the Youth Justice Board	HC 1547 (Cm 8257)
Eleventh Report	Joint Enterprise	HC 1597 (HC 1901)
Twelfth Report	Presumption of Death	HC 1663 (Cm 8377)
First Special Report	Joint Enterprise: Government Response to the Committee's Eleventh Report of Session 2010–12	HC 1901

Session 2012–13

First Report	Post-legislative scrutiny of the Freedom of Information Act 2000	HC 96-I (Cm 8505)
Second Report	The budget and structure of the Ministry of Justice	HC 97-I (Cm 8433)
Third Report	The Committee's opinion on the European Union Data Protection framework proposals	HC 572 (Cm 8530)
Fourth Report	Pre-legislative scrutiny of the Children and Families Bill	HC 739 (Cm 8540)
Fifth Report	Draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013	HC 927
Sixth Report	Interpreting and translation services and the Applied Language Solutions contract	HC 645 (Cm 8600)
Seventh Report	Youth Justice	HC 339 (Cm 8615)
Eighth Report	Scrutiny of the draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013	HC 965 (HC 1119)
Ninth Report	The functions, powers and resources of the Information Commissioner	HC 962 (HC 560, Session 2013–14)
First Special Report	Scrutiny of the draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013: Government Response to the Committee's Eighth Report of Session 2012–13	HC 1119

Session 2013–14

First Report	Sexual Offences Guidelines: Consultation	HC 93
First Special Report	The functions, powers and resources of the Information Commissioner: Government Response to the Committee's Ninth Report of Session 2012–13	HC 560
Second Report	Women offenders: after the Corston Report	HC 92 (Cm 8279)
Third Report	Transforming Legal Aid: evidence taken by the Committee	HC 91
Fourth Report	Environmental Offences Guideline: Consultation	HC 604
Fifth Report	Older prisoners	HC 89
Sixth Report	Post-legislative Scrutiny of Part 2 (Encouraging or assisting crime) of the Serious Crime Act 2007	HC 639
Seventh Report	Appointment of HM Chief Inspector of Probation	HC 640

Oral evidence

Taken before the Justice Committee on Wednesday 16 October 2013

Members present:

Sir Alan Beith (Chair)

Steve Brine
Jeremy Corbyn
Nick de Bois
Gareth Johnson

Mr Elfyn Llwyd
Andy McDonald
Graham Stringer

Examination of Witnesses

Witnesses: **Rt Hon Chris Grayling MP**, Lord Chancellor and Secretary of State for Justice, gave evidence. **Rebecca Stimson**, Deputy Director, International Policy, Ministry of Justice, was in attendance.

Q1 Chair: Welcome. You are getting used to attending other Committees on the first of the subjects we are going to discuss this morning—

Chris Grayling: There have been a few of those, yes, Sir Alan.

Chair:— European opt-outs.

We will divide the session into two parts and will move on to legal aid in the second part. At that stage we may have interests to declare but not at this stage. You will know that the Committee was not much helped by the fact that we did not get the Government's general intentions indicated to us back in February when we originally expected them, and, therefore, all the three Committees involved—or, including the Lords, four Committees—had to have a rather rushed operation in order to scrutinise and assist the Government in their thinking. That is water under the bridge, but it is part of the background to what has happened.

Chris Grayling: If I might say on that, Sir Alan, I regret that and I apologise to the Committee for that being the case. As you will understand, there are really three stages to this process. We have to sort out a common Government approach, we then have to agree that approach or vary it with Parliament, and then we have to negotiate with the Commission. It is difficult to move on to each of the next stages until you have completed the one before.

Q2 Chair: Of course the House expressed its concern on the process in an adverse vote for the Government. What discussions have actually taken place between the Government and the Commission over this period up to now?

Chris Grayling: In terms of detailed discussions about the list we have put forward, discussions have not taken place. Clearly, they are aware of what our proposed list is because they saw the announcement, the command paper and so forth at the time when we laid it before Parliament, but we have not had discussions with them about that list. There have been informal discussions over the months on an on-and-off basis, as there have been with other member states. There has been a lot of curiosity from other member states about opposition. I have had brief discussions with the Justice Commissioner; likewise the Home

Secretary has had brief discussions with Cecilia Malmström, who is the Commissioner for her area. But there have been no substantive conversations.

It is very much our belief that we need to wait now. As I described that three-stage process, we are now at the point where Parliament is. We have tabled the Government's considered position. Parliament is now studying that carefully. We are waiting for reports from all of the different Committees involved. We will not be starting substantive discussions with the Commission until the entire process is completed.

Q3 Chair: On more than one occasion, including before the Scrutiny Committee, you have set out your philosophical case as being that you do not want Britain to be part of a European justice system, but you do want Britain to be part of the fight against international crime. That is a neat formulation, but is it a real distinction?

Chris Grayling: In my view it is, and I think it is an important distinction. You have to understand what we are doing here, which I am sure you do, Sir Alan. What we are doing now is moving from the pre-Lisbon situation, where Justice and Home Affairs co-operation was done on an intergovernmental basis, to one where we are effectively handing over jurisdiction in perpetuity over these areas to the European Court of Justice. So these are areas where we will no longer have the final say. That is quite a big step to take. Therefore, it seems to me that we have to think very carefully about the way in which we take that step.

I have to say I was not always the greatest fan of the last Government, but I do think that their negotiation of the opt-out was enormously helpful to this country. I do not think there is any will in this country to Europeanise justice, and so they gave us the tools that we needed to ensure that we do not do that. We have exercised that post-Lisbon, but this is now the pre-Lisbon debate, as you know.

My belief is that there is an essential national interest in us fighting serious and organised crime across borders. We all know that it is a challenge, whether it is terrorism threats, drug gangs and the rest. We have looked very carefully—and the Home Secretary has looked particularly very carefully—at this. She has

 16 October 2013 Rt Hon Chris Grayling MP and Rebecca Stimson

had extensive discussions with police bodies, SOCA and others who are involved in this battle to establish what measures, in her judgment, are essential in our national interest to be part of in order to continue to fight organised crime in the most effective possible way.

Alongside that, there are a number of measures here that are much more about Europeanising justice, and there is a very clear objective in the Commission to take more and more steps to create, basically, a single European justice area. The Commissioner made a speech recently where she talked about a single European Justice Minister. I do not believe that is right for this country; I do not believe it is what this country wants; I do not believe it is what the people of this country want. It is certainly not what the last Government wanted in terms of negotiating the opt-out and it is certainly not what this one wants.

It is never an exact science, but, broadly speaking, what we have done in that list of 35 is to identify measures that it is obviously in the national interest to be part of as part of the strategy of fighting serious and organised crime. But we do not want to be part of measures, for example, that set minimum standards for sentencing and take us down the road towards the creation of a European justice system. That, to me, has guided what we have done in the decisions that we have taken.

It is worth adding that there are a number of other measures that we have not included in our list that are either redundant or have little impact, where it is simply a question of, if we do not have to hand over jurisdiction and if there is no benefit in doing so, then why would we?

Q4 Chair: What do you say to those who say you are going to be subject to the European Court of Justice on a number of these areas and it is a creeping menace? Once you become subject to it in one area, in some way we will be trapped into a wider European justice system. Some people who have given us evidence have argued that case. What do you say to them?

Chris Grayling: There is certainly a desire in Brussels to move much further down the road towards the Europeanisation of justice. I do not want that to happen. I am very strongly opposed to it. It is the wrong thing for this country. I actually think it is the wrong thing for other member states as well, but we equally have to operate in the national interest. The Home Secretary, in her discussions with the police, identified a number of areas where, in her judgment, it was essential to international crime fighting to maintain cross-European arrangements. We have to accept that some things are just in our national interest to do. In the current paradigm, if we are going to be part of the European Union and if we are going to collaborate on international crime fighting, the Home Secretary's judgment is that these are necessary measures.

There are one or two others that do not completely conform but which are just very obvious. If you take the prisoner transfer agreement, it does not quite conform to either of those two principles, but it is just very obvious to me that it is something that is in our

national interest to be part of. I do not believe in minimum standards measures that set minimum penalties. I am very wary of measures that start to establish legal principles, unless there is an obvious benefit to our citizens. In some of the areas we are seeing now, I see this as being a route towards much greater Europeanisation and it has to be resisted at all costs because that is not where this country needs to be.

Q5 Steve Brine: Good morning, Lord Chancellor. Thank you for coming back. I just wanted to touch, if I may, on the framework decision in respect of prison transfers and prisoners. You say that it will be a no brainer not to opt in to this one. By the end of March this year, there were 4,058 foreign prisoners in our system in UK prisons. Do we know how many of them have more than six months to serve on their sentences and therefore would be eligible for transfer under the framework decision?

Chris Grayling: It is a smaller number. At the moment, if I remember rightly, it is about 1,400 that are potentially available for transfer. I will have to check. It is around 1,400.

Steve Brine: So that is the pool—

Chris Grayling: That is the pool we are working with.

Q6 Steve Brine: I notice in the notes it says that "prisoners' consent is not required, although they may make representations against transfer," which rings alarm bells with me. What does that actually mean in practice, Lord Chancellor?

Chris Grayling: It means the system is not as tight as I would wish it to be. It is as set out in the original measure itself—that prisoners do have a right to object to their transfer. We also have to go through a deportation process; so we deport them and then they are released. They cannot come straight back again. This is a system that has just been bedded down. Now we are beginning to make transfers under the agreement. Not all member states have implemented it yet. Some of our bigger partners, such as Poland for example, will not be part of it until 2016. This is the kind of mechanism we will want to have in place. The ability to move prisoners from other parts of Europe out of our jails as soon as we can is one that is advantageous to us. As you rightly say, we have short-sentenced prisoners. We also have a large block of prisoners from outside the EU, but I want to see a steady reduction in the number of foreign national prisoners in our jails, and a sensible measure that enables us to do that is clearly something we would wish to be part of. I might like a more streamlined process and less discretion, but, equally, there is a balance to be had to it.

Q7 Steve Brine: Yes. Although you say it is advantageous for us to do so, is it imperative for us to do so purely from a capacity issue in the UK's prisons?

Chris Grayling: If we are going to combine budget reductions over the medium term, which I hope will not happen but I would not want to be unprepared for it, we will need to reduce the burdens on our criminal justice system. There are two obvious ways of doing

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that. One is for the rehabilitation reforms to have an impact and to reduce the number of people who are reoffending and going round and round the system. The other is to reduce the number of foreign national offenders. Even those 1,400 people who are eligible for transfer probably represent three prisons between them, so it is clearly advantageous if we can. There are UK prisoners in jails elsewhere, but there are more foreign national offenders in our prisons than there are UK prisoners in jails elsewhere. My judgment is that this is an obviously advantageous thing to be part of. It is not an area where I see great sovereignty concerns. It is a European agreement of the kind we would want to be part of on an intergovernmental basis. The question to me was, does the new status compromise this? In my judgment, I think this is in the national interest to be part of.

Q8 Steve Brine: Understood. Please do check this, but is the 1,400 figure that you have given a net figure?

Chris Grayling: We have 4,000 EU FNOs in total. That includes people on remand, for example, so 1,400 of those are actually eligible for transfer.

Q9 Steve Brine: The second part of my question—then I am going to hand over to my colleague Mr de Bois—is, of the six mutual recognition instruments covered by the MOJ’s memorandum, you propose to opt back in to all of them except the probation measures framework decision. Try saying that! I know you told the European Scrutiny Committee last week you were concerned about the vagueness of the drafting of this. Could you just expand on that for this Committee?

Chris Grayling: One of the issues we have around the pre-Lisbon measures is that they were very often political compromises and were quite loosely drafted. Of course, what happens is, if you have a piece of loosely drafted legislation, the courts will decide what it really means. Within the UK, if we as a Parliament draft something loosely and the courts say, “That is not clear enough and this is how we are going to interpret it,” and we do not like that, we can change the law. It is a very different situation at a European level. My concern is that in a number of cases—probation is probably the biggest example of this—the drafting is pretty vague.

Let me give you a specific example about that, Mr Brine. Basically, if we transfer an offender to another country to serve a period of probation, we would very probably deport them at the same time so they can’t just come back again. If we then discover that they have breached their probation conditions, it is unclear what the deportation status then is if the country involved says they must be recalled to prison, for example. That is where it becomes very vague and where we might find ourselves in a position where the European Court of Justice was taking decisions about our deportation system without our ability to control it. That is a good example of why I am worried that, in measures that are vague and in a number of the measures we have rejected across the two Departments, there is an issue about vague drafting and concern that handing over effectively to the

European Court of Justice the decision of what they actually mean is not in our national interest.

Q10 Chair: Your fear is that the European Court of Justice might in some way be able to override the deportation decision.

Chris Grayling: That is possible—or they would define how our deportation system could or could not work. I think that is a matter for this country and not for the European Court of Justice.

Q11 Chair: Do you have any helpful statement of your lawyers’ assessment of the legal position on that? I am not looking for—

Chris Grayling: We can certainly provide a note for you of that.

Chair: Yes.

Chris Grayling: If that would be of help to you, we are very happy to do that. I should say that we have not been able to identify any situation where the probation measure has been used. It has only been implemented by a limited number of countries, and therefore I would not rule out a future Government deciding that they wanted to be part of a European probation measure; but at the moment the evidence is not there.

I also have a concern about the doing of justice. If we send somebody back to serve a period of probationary supervision elsewhere, I would want to know that they were actually going to get that period of supervision and it was going to be done properly in the way it is done in this country. It might be very tempting on occasion to say, “We have a bunch of foreign national offenders. Let’s ship them out,” but I do not want people reoffending elsewhere because we have not delivered adequate safeguards within our own system or made sure that those safeguards are happening elsewhere.

Q12 Chair: But does that not also apply to the supervision order?

Chris Grayling: We gave quite a lot of thought to the supervision order, and, arguably, it could apply to that. What we have seen on many occasions with the supervision order is that people who are charged in other countries may then be stranded in other countries not able to come back here, waiting for a long period of time before trial. It is probably the one I have thought about hardest as to whether we wanted to be part of that or not. I was swayed on that by the individual cases that we have seen over the years and the fact that it is almost certainly in the interests of British citizens to be able to come back and serve their periods of bail here. They are, after all, innocent until proven guilty. There have been long periods of instability for individuals in that case in the past.

Q13 Nick de Bois: Lord Chancellor, if you see it as beneficial for the mutual recognition to apply to pre-trial supervision and to prisons, is it not unreasonable to think that it should also apply to probation and rehabilitation? I know I am accused often of being obsessed with the European arrest warrant, but it is interesting that Sir Scott Baker argues that for conviction EAWs, when applied,

signing up to this might reduce the number of European arrest warrants. Do you agree with that view?

Chris Grayling: It could be in the future that the person in my job or Government of the day decides that they want to be part of a measure, but, to me, the big issue underlying all of this is that we are handing over, in perpetuity, jurisdiction over these areas to the court. It is not just about the philosophy of the measures themselves. Broadly speaking, I do not like the idea of passing over Justice and Home Affairs measures to the jurisdiction of the court. My natural instinct is that I want our justice system to remain a British justice system. It is one that is as good as any in the world. I want decisions about justice in this country to be taken in this Parliament, so there has to be a pretty good reason for passing control to a European level and passing jurisdiction in perpetuity to a European level. We are, on the whole, sceptical about measures that Europeanise justice.

In each of these cases we have discussed across the Government what is in the national interest, where there are strong feelings within the Government about the need to be part of them, and where there are strong feelings within the law enforcement world about the need to be part of them. We have broken it down and taken a decision one way or the other. I am not ruling out in perpetuity that we might want mutual arrangements across Europe for probation. I have not seen any evidence at the moment that what is on the table is either a good measure that is working or that it is a well drafted measure that does not have lots of question marks with it. Given those two things, I would not be acting in the national interest if I simply said, "Right, we will pass it over to the ECJ now in perpetuity."

Q14 Nick de Bois: I, for one, welcome your instincts on justice, but then that begs the question that, if we are going into negotiations, effectively, for example, as part of the overall European arrest warrant package on those negotiations, have you assessed and would you resist any attempt to insist that the UK rejoin the probation measures decisions as part of the negotiations with the EU if we say we want to opt back in to the EAW to which the Government are committed? Are you inclined to resist them if that is the case?

Chris Grayling: It is difficult to prejudge a negotiation. My position at the start of that negotiation was pretty clear and at the end it would be a matter for Parliament to decide ultimately whether what the Commission had said to us was right or not, but I do not want us to rejoin this measure and certainly I will not be offering that on the table to the Commission.

Q15 Chair: The European Court of Justice point, though, has another side to it, which is, if what you want to do is to ensure that other jurisdictions enforce something that is in the British national interest, then you have to have some means that goes beyond the jurisdiction of the UK courts, do you not?

Chris Grayling: This is one of the dilemmas, Sir Alan, in addressing these international issues. It is very easy to place an argument that says, if we do not

do this, then other countries will not behave well. My view is that I am not willing to see us compromise our own sovereignty and the integrity of our own justice system in the name of getting other people to improve theirs. We have something that is very good, and all too often we find ourselves in a situation where international courts are telling us to change our system in a way that this Parliament does not support, simply because if we do not do as it says then other countries may commit worse human rights abuses. I just do not think that is sustainable.

Q16 Chair: That is a different argument that applies to things like minimum standards measures. If the issue is ensuring that you can have enforcement of something, such as the return of people under the supervision order—and clearly we think it is in the British national interest that British citizens should not be languishing in foreign jails when they have not been proven guilty—then you need some mechanism to make sure that happens.

Chris Grayling: That is why, on balance, although I would rather not philosophically make the change around the bail measure precisely because of the issue of British citizens facing trial in other countries, I have fallen on the side of saying it is a price worth paying because it is in the interests of those citizens to do. I have not seen evidence to suggest that the probation measure meets the same criteria and that is why it is not on our list.

Q17 Mr Llwyd: Good morning. I am sure, Secretary of State, you are aware of this report by the Centre for European Legal Studies at the university of Cambridge by Professor John Spencer QC and others.

Chris Grayling: I am aware of its existence. I have not actually read it.

Q18 Mr Llwyd: It has been in existence since September 2012. I would just like to ask you what your view is on one of their conclusions: "If the opt-out were exercised, practical considerations would force the UK to seek to opt back into many of them"—that we agree—"and the ones from which the UK could safely remove itself permanently are ones which impose no practical constraints on the UK, from which a UK opt-out would serve no practical purpose."

Chris Grayling: I do not accept that. First, I am very clear I would not have got us here in the first place. The idea of having to opt out en bloc and then opt back in in the way that we have is not, if I had been designing this on a blank sheet of paper, how I would have designed the process. I would prefer us to be dealing with each measure one at a time in the same way that we can deal with new measures, but the treaty says otherwise. It is there in stone. That is the process we have to work with.

If you look at the measures we are talking about, I have taken a very clear decision in principle. I do not believe that Britain should sign up to common European criminal justice penalties. There are a number of measures in here that do that where it is not in our national interest to take a step in that direction, and therefore I do not propose to do so.

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Equally, within the Home Office area, the Home Secretary has decided there are measures she does not want to be part of. There are also measures, as I say, which have proved pretty ineffective, but, if we hand over jurisdiction, ultimately we do not know what future decisions the court will take in relation to them. So what we have tried to do, in our view, is to provide the best balance in the UK national interest. We have to opt out of everything en bloc if we are going to opt out of anything. This is the process that was set out in the treaty and we are simply following it. But I do not accept that, because an individual measure may not have a particularly massive effect on our criminal justice system, we should compromise on the principle of saying we do not want European penalties, because the more we have European penalties, the more we have decisions in Brussels about what the sentence for a prisoner in our courts should be, the less control we will have over our justice system and the more we will be in that creeping process that you described towards the Europeanisation of justice.

Q19 Mr Llwyd: Following on that answer, there are six measures on minimum standards for criminal offences and their penalties, which the Government do not plan to rejoin. In all cases you say that the UK, through domestic legislation, already complies with those standards and so no legislative change would be required from not rejoining. You also say there will be negligible economic impact from not rejoining. Would you agree that there is no practical legal effect from leaving these instruments either?

Chris Grayling: It is a question of principle. If we already have a tough law in a particular area, then we already have a tough law in a particular area. That is my point, Mr Llwyd. We already have a justice system that is comparable to anywhere in the world. The question is whether we want to pursue a path that will lead to fewer and fewer decisions about the nature of that justice system being taken in this Parliament rather than in Brussels. I do not believe we want to go down that route, and therefore what I am saying right now is I am not going to start. I am very firmly of the view that I do not want penalties in our courts to be decided at a European level rather than at a UK level. That is the reason for this decision.

Q20 Mr Llwyd: Is it realistic to envisage compliance proceedings against the UK in the European Court on these matters, given that we already comply in most respects?

Chris Grayling: The situation could only arise if we joined up with them, but it would inevitably constrain any future Government from taking a decision that they chose to take. My judgment is that I want sovereignty over our justice system to be here in London rather than in Luxembourg or Brussels.

Q21 Mr Llwyd: Do you think there could be some reputational damage to the UK from not rejoining them?

Chris Grayling: I don't think so. I think we have the best justice system of any anywhere in the world. It is a question of principle. Do we believe that we want

the UK justice system to be a UK one or do we want it to be a European one? We talk a lot about how our system of law, our common law system and our legal traditions have an impact around the world, and the UK is looked to by many around the world as being a place where they want to come. That is why London is such a major centre for legal services to deal with complex issues. If we accept that our legal system will become more and more Europeanised, then, by definition, our USP on the world will become less and less visible.

Q22 Mr Llwyd: You keep using the word "Europeanised". I don't know whether this is the byword at the moment, but whatever that particular word means—

Chris Grayling: What it means, Mr Llwyd, is that a penalty for a criminal offence is set on a European basis, not on a UK basis. It is a decision taken that what penalty should apply in our courts will be taken by European institutions rather than the UK Parliament. That is what it means.

Q23 Mr Llwyd: But doesn't your stance undermine the notion that as partners within the European Union we should be playing a co-operative role with other partners?

Chris Grayling: I have always been supportive of playing a co-operative role with other partners, but look at what the Lisbon treaty did. I would not have signed the Lisbon treaty. The Lisbon treaty was a bad step for this country. I disagree with it. My party would have put that to the country and I suspect the country would have said no to it. The Lisbon treaty moved Justice and Home Affairs from an intergovernmental basis to one which falls under the jurisdiction of the European institutions. That is a pretty big change. The last Government, thank goodness, took a view that that is not what we wanted and negotiated the opt-out and I praised them for it. It has given us the flexibility to decide what measures are in our national interest in terms of co-operation across Europe when it comes to fighting serious and organised crimes, but what measures are not in our interest because they involve moving jurisdiction over matters that are clearly for this Parliament to a European level. They gave us that choice and we are very grateful that they did—and we are implementing that choice.

Q24 Andy McDonald: Good morning, Lord Chancellor. Can I ask some questions initially about matters of data protection, as we now move to a new directive on the framework decision, although it is progressing slowly. In a memorandum it has been said: "A fully functional law enforcement and criminal justice system within the EU needs to share data in an appropriate manner to protect the public and the rights of individuals." You have already provided, under cover of your letter of 7 October, reasoning in support of the Government's wish to rejoin the framework decision on data protection in the police and judicial co-operation. Do you retain concerns about the draft directive on this subject currently

under negotiation in Brussels, which would replace the framework decision if agreed?

Chris Grayling: First of all, it is worth saying that the reason for seeking to rejoin the data protection framework at the moment is that it is essential for cross-border crime fighting. The transfer of data between member states is clearly important in that. We do not want to put any constraints on that. We do not see particular problems with the new directive. There are still issues that are subject to negotiation, but I don't see that as an area that we would want to not be part of.

Where we do have a significant issue at the moment in the data protection area, as you will be aware, Mr McDonald, is over the proposal for regulation that has a broader impact on business, where I am particularly concerned that in its current form the regulation would pose substantial extra costs for European businesses and for the European digital economy in a way that could do real damage to SMEs. It is worth saying that the impact assessment done by the Dutch, for example, shows a cost to Dutch business of in excess of €1 billion, which at a time of economic challenge to my mind does not make sense.

There are two parts to the debate at the moment. The directive part in relation to cross-border data exchange between law enforcement bodies is not the controversial part. That is the proposed regulation. We have argued very strongly for a directive rather than a regulation.

Q25 Chair: We, of course, reported on this on those lines.

Chris Grayling: Absolutely. My view of the data protection framework is that it is one of the ones that our law enforcement colleagues said was important to them where it is very clear that we do need to maintain cross-European mechanisms.

Q26 Andy McDonald: Do you see no potential problems with the Courts of Justice of the European Union exercising jurisdiction over arrangements for exchanges of personal data between criminal justice agencies in the UK and other member states?

Chris Grayling: If you said to me would I prefer that this was still done on an intergovernmental basis, yes, I would, but it is not, and therefore it is one of those ones where we have to take a decision and say, where does the UK national interest lie? In my judgment, this is an area that is important for us in combating cross-border crime. It is also important for us in being able to share information about people arrested in this country. It is one of those ones where, in my judgment and the Home Secretary's judgment, it is in the national interest to remain part of it.

Q27 Andy McDonald: Finally, what is the reason for not proposing to rejoin the framework decision on settlement of conflicts over jurisdiction in criminal matters? What problems would be avoided by not rejoining?

Chris Grayling: I mentioned at the start that there were really three categories of measure that we are talking about. There are those that we think are in our national interest because of the need to combat serious

and organised crime; there are ones that take us down the road towards the Europeanisation of justice; and there are also ones that are pretty meaningless and where I see no need to turn them into a Europeanised system under the jurisdiction of the court. The conflict of jurisdiction is effectively a co-operation mechanism between borders in different countries. It is not one where there is a particular need to have laws in place. It is not where we feel the need to say to the ECJ, "Here, you can take control of this." It is one of those ones. There are certainly some measures where there is not a lot of impact one way or the other. They do not add up to very much. They may have been put in place for political reasons rather than legal reasons and where we are going to carry on doing it anyway because there is no barrier one way or the other to it happening. This is simply about different bodies in different countries talking to each other. That is not going to stop.

Q28 Graham Stringer: I very much follow the logic of the pick and mix; you want us to be part of the processes that will be of benefit but not have a Europeanised justice system. I follow that logic. You probably know the history of the European Union better than I do. Do you not think there is a thin-end-of-the-wedge argument here—that you go so far and gradually those 35 measures get absorbed into the other measures?

Chris Grayling: There is definitely a thin-end-of-the-wedge issue. The reality is that there is a determination in Brussels to create a much more Europeanised system, to go much further than European Justice and Home Affairs measures have gone so far. I do not agree with that at all. We have opt-outs available to us in JHA measures, but it is also the case—and it is on record from the Council—that the Commission has tried in recent months to introduce measures under different parts of the treaty that are not subject to our type of live opt-outs, in an attempt to make sure that those measures apply across the whole European Union. This is a battle and it is one of the reasons why I am strongly in favour of renegotiation of our membership of the EU, because there is no doubt that there are those who would like to take this much, much further.

What I am trying to do at the moment is to make sure we use the treaty in the UK national interest, that we take advantage of the things that we have that protect our national interest, but we also have to be mindful of the fact that there are some things where if we were not part of them it would cause a very obvious and immediate problem to our law enforcement authorities. In a world of some pretty unpleasant serious and organised crime that crosses borders, it would be something that Government feel would not be right to do.

Q29 Graham Stringer: On that democratic basis, I suppose, is it your intention to put these 35 opt-ins for debate on the Floor of the House of Commons with the comments and recommendations of the different Committees that have considered it?

Chris Grayling: Before anything is finally agreed, there will be a full vote in the House. There will be

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full publication of all the documentation we have available. At that point we will be able to set out what the view of the Commission is because we have not had that detailed conversation. It will ultimately be a matter for Parliament to decide what we opt back into.

Q30 Graham Stringer: I am not quite sure what that means. Does that mean after you have negotiated the 35 opt-ins there will be a debate on whether they are the right 35?

Chris Grayling: We have to do it that way round because, of course, we are in negotiation with the Commission as well. I guess we have to say to Parliament, "Please don't tie our hands for that negotiation," because if we have effectively agreed a UK position before that negotiation there is not much room for negotiation. What we have to do is listen to Parliament, have discussions with the Commission on the basis of the views both of the Government and of Parliament, but then bring the Commission's views back to Parliament to say, "Is that okay or not?"

Q31 Graham Stringer: I understand that now. It is the end of a process.

Chris Grayling: Yes.

Q32 Graham Stringer: The Commons will get to discuss it. The opt-ins are irrevocable. What about the opt-outs? Can they be negotiated at some time in the future?

Chris Grayling: If we take the example of probation, if all the concerns about probation were allayed, I doubt that that is going to happen in the next 18 months, but it is possible for a future Government to decide to opt back in to that, or, indeed, there may be a successor measure that comes along and it is possible for Government to opt back in to that. None of the opt-outs are in perpetuity. They are the current the judgment of this Government as to what we want to be part of. I am not sure that any future Government would take a radically different view, but if it does it has the opportunity to do so.

Q33 Graham Stringer: We will, if we opt in, rejoin the Euro justice system. If that grows a European Public Prosecutor's Office, what will be the Government's attitude to that?

Chris Grayling: We are not in favour of a European Public Prosecutor. The coalition agreement states very clearly that we will not be a part of that. There are serious misgivings among other member states. The European Public Prosecutor will involve a real watershed step for this country and other member states because it allows an international body to initiate proceedings in this country, and that is not a route we are going to go down.

Q34 Chair: That is an interesting answer you gave because, whereas earlier you were referring to determination in the Commission to Europeanise justice, you rightly pointed out in the case of the European Public Prosecutor that quite a number of member states are not happy to go in this direction. Would it not be more accurate to describe an institution in which there is a tension at times between

the Commission's plans, ideas and visions and the views of member states? Yet, in most of your answers to our questions, it is, as it were, the UK versus the Commission that seems to be your way of looking at it, whereas we have many member state colleagues in the European Union who have either similar concerns or different concerns that are equally important to them, which may mean they do not agree with the Commission?

Chris Grayling: That is true. One of the challenges we have in the European institutions is the current position of the Council, because, of course, the Lisbon treaty gave co-decision making to the Parliament. My sense is that the Council needs to assert its opinions more strongly, but that requires other member states to be willing to do that. I will obviously continue to encourage my colleagues to do so. It is sensible for us to engage in constructive discussion but there are some areas where we just have to say no. The idea of having prosecutions taking place in this country outwith the remit of our prosecutor is one I am not willing to countenance.

Q35 Chair: This Committee has in the past recorded its opposition to the idea of a European Public Prosecutor, but so have a number of other countries too. Again, you refer to the Parliament. Parliament is elected by the citizens of all the member states. Again, you are attempting to lump it with the Commission as simply an institution with a single objective, whereas it is a Parliament, with all the diverse opinions that a Parliament contains.

Chris Grayling: It is of course, but it is the Council that is supposed to be the strong voice of member states. I would like to see the Council exert a stronger voice in some of these matters.

Q36 Chair: Just on another point, the larger part of the measures in the opt-out area comes within the Home Office's responsibility, including the European arrest warrant, for example. Have any of the decisions you have made been contingent upon Home Office decisions in relation to other measures?

Chris Grayling: No. We have sat down and had constructive discussions. The Home Secretary and I met police chiefs together, people in the intelligence services and so forth; so we did a lot of this together. There has not really been any issue of pressures one way or the other.

Q37 Gareth Johnson: Do you ideally see these 35 opt-in measures as something that would be rolled out globally rather than simply being kept as a European Union issue? It seems to me that some of these measures can be avoided simply by stepping outside the European Union, and therefore perhaps this is something where we need to look beyond the European Union in due course. I appreciate that is not the immediate decision you are making, but in time to come.

Chris Grayling: I would like to see the kind of measures that we are talking about within Europe shown around the world. I am not sure I would want to give the European Union complete discretion to negotiate agreements for us. We have been having

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little battles in the European Court of Justice over them doing this in relation to social security payments, for example. There are those who want to create a European Government and want the European Commission to act as their Government and want to take all those decisions for us. I am very keen to see co-operation in crime-fighting matters around the world but I do want decision-making about what is in the UK national interest, where it possibly can, to remain in the UK.

Q38 Jeremy Corbyn: You have used the word “Europeanisation” about 20 times this morning

already. Is this part of your campaign to withdraw Britain from the European Convention on Human Rights as well?

Chris Grayling: The two are very different issues. What we are talking about today is the creation of a European legal framework for justice within the European Union. As you know, the legal framework around the European Court of Human Rights is a very different one. It belongs to the Council of Europe; so, no, they are very different things.

Chair: Thank you very much indeed. At that point we will move to the other subject for this morning.

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