



House of Commons
Home Affairs Committee

**Pre-Lisbon Treaty EU
police and criminal
justice measures: the
UK's 2014 opt-in
decision:
Government Response
to the Committee's
Ninth Report of
Session 2013-14**

**Fourth Special Report of Session
2013-14**

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Home Affairs Committee

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Fourth Special Report

On 31 October 2013 the Home Affairs Committee published its Ninth Report of Session 2013–14, *Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision* (HC 615). The Government's response to the Report was received on 31 December 2013, and is published as an Appendix to this Special Report.

Appendix: Government response

Letter from Rt Hon Theresa May MP, Home Secretary, 31 December 2013

I would like to express my thanks for the Committee's work on the 2014 opt-out decision. The Government considers it important that Parliament is given every opportunity to scrutinise this matter and to hold us to account.

I will now reply to each of the points raised by your report.

Introduction

1. We make this Report to the House in accordance with its Resolution of 15 July 2013. We are disappointed that the House was invited to approve the opt-out decision before we had an opportunity to scrutinise the proposed opt-in package, which runs contrary to the Government's previously stated desire for the full involvement of Parliament in the 2014 decision. We hope, nevertheless, that our Report will inform the Government's final proposals and the manner of its future consideration by Parliament. (Paragraph 6)

Your report has been extremely useful in informing the Government's negotiating position. I am also confident that your report will also help inform Parliament's views on this matter.

The European Arrest Warrant

2. The European Arrest Warrant has significantly reduced the time taken to process an extradition within the EU, and has played an important role in ensuring rapid justice in a number of high-profile and serious cases. The vast majority of warrants received by the UK are for non-UK citizens, reflecting a trend towards the internationalisation of crime. Law enforcement bodies both at a national and European level believe the EAW is an essential weapon in the fight against such crime. (Paragraph 36)

It is clear that the EAW has sped up the process of extradition. In terms of surrender from the UK to another country, it takes approximately three months to extradite someone under an EAW. A Part 2 extradition (i.e. extradition to non-EU countries) takes approximately ten months but can, and often does, take considerably longer. The swift

return of Hussain Osman to the UK can be contrasted with the protracted extraditions of terrorist suspects including Abu Hamza, Babar Ahmad, Syed Ahsan, Khaled Al Fawwaz and Adel Abdul Bary to the US.

The EAW has also led to prompt convictions in a number of high profile and serious cases. The cases cited in the Government's written evidence submitted to your Inquiry – the case of David Heiss (a German national who murdered British student Matthew Pyke on 19 September 2008) and the case of Tomasz Marczykowski (a Polish national convicted of sexual activity with a child) are just two examples of the effective use of the EAW by law enforcement bodies over the last few years. During our consultation law enforcement partners made it clear that the EAW is a vital tool in combating cross-border crime and keeping our streets safe. That is why we are seeking to rejoin the measure.

I noted with interest the evidence submitted to your Inquiry by senior law enforcement officers and prosecutors which confirmed the Government's views on the value of the instrument and supported the Government's decision to rejoin. I agree with the view of law enforcement that the EAW is an essential weapon in the fight against crime.

3. However, in its existing form, the EAW is fundamentally flawed. It is based on a system of mutual recognition of legal systems which in reality vary significantly. Some countries may seek extradition simply to expedite their investigations, whereas others do so in pursuit of relatively minor crimes. For these reasons the UK receives disproportionately more warrants than it issues. Not only does this undermine credibility in the system, it is also costly to the taxpayer. Furthermore, the EAW is based on a flawed assumption of mutual trust in the standards of justice in other Member States. As such, it has facilitated miscarriages of justice in a number of cases, irrevocably damaging the lives of those affected. (Paragraph 37)

4. The UK could opt out of the EAW and seek to agree new arrangements with the rest of the EU, though it is uncertain how successful it would be in doing so, and it is not the Government's preferred option. We therefore welcome and support the proposed reform package, which would go some way towards rectifying the problems highlighted. However, there remain further ways in which the EAW can be improved, both within the current Framework Decision, and through its renegotiation. We also note that there remains uncertainty as to whether unilateral reforms by the UK would be acceptable to the Commission in the context of the opt-in negotiations, or whether they would in the future be struck down by the European Court of Justice. (Paragraph 38)

I shall address these recommendations together given the links between them. I note the concerns raised by the Committee in relation to the EAW. I have been clear on a number of occasions that while the Government recognises the operational importance of the EAW, there are problems with its operation.

In October 2012 I raised particular concerns about the disproportionate use of the EAW for trivial offences. I am aware that your Committee has previously raised concerns about the number of EAWs we receive from Poland. It is noteworthy that the number of EAWs received from Poland has reduced by around 25% in the last few years. I further understand that Polish legislation will enter into force in July 2015 that is anticipated to

make further reductions in the number of EAWs issued to the UK. Indeed, I believe the efforts made by this Government to engage directly with our Polish counterparts on this matter have helped in this regard. However, I remain firmly of the view that the proportionality bar is necessary to reduce the unnecessary burden of disproportionate requests on our Courts, and their impact on people's lives.

I also have particular concerns about the lengthy pre-trial detention of some British Citizens overseas and the use of the EAW for actions that are not considered to be crimes in the UK. The Government has addressed these concerns by proposing amendments to the Extradition Act 2003, which were introduced through the Anti-Social Behaviour, Crime and Policing Bill on 10 July. These reforms build on the recommendations made by Sir Scott Baker in his review of the UK's extradition arrangements, the practices of other EU Member States and the fundamental rights and legal principles that are enshrined in EU law. As set out in written evidence to the House of Lords Inquiry into the 2014 decision, the Government believes that the domestic reforms are fully consistent with the UK's desire to rejoin the EAW, including our obligations under that Framework Decision and the EU Treaties.

As I said in my Statement on 9 July, cooperation on cross-border crime is vital, but we must also safeguard the rights of British Citizens, and the changes that we propose will do that. I note and welcome your support in this respect.

I note your point on the different legal systems operated in other Member States. The Government acknowledges this point. These different legal systems often result in different judicial and penal standards to those operating in the UK. That is a fact and not one that is a by-product of the EAW scheme itself. I noted with interest the evidence provided by the former Director of Public Prosecutions to your Committee to that effect in September. The Government's view is that in order to find solutions to commonly acknowledged problems, we should work with and challenge the EU institutions for reform of EU law where it is required, and work bi-laterally with other Member States to address practical problems.

There are several recent notable examples of this:

- Working to secure UK objectives on new Mutual Recognition instruments such as the European Investigation Order; and
- Provision of bilateral support to the Romanian Government to developing options for prison reform using private sector investment.

The recent European Parliament 'Own Initiative' draft report indicates that the UK is not alone in its concerns regarding the operation of the EAW. This report provides some pragmatic recommendations that, if implemented, would support the domestic amendments that are currently before our Parliament. In particular, we welcome the report's recommendations on proportionality.

The report proposes two legislative solutions to the proportionality issue. Firstly, it recommends a proportionality check for the issuing State. This would place the obligations set out in the EAW handbook on a legislative footing. Such an obligation would oblige the issuing state to consider the seriousness of the offence and the application of less intrusive

measures prior to issuing an EAW. This would lend weight to our domestic proportionality bar, which requires the Judge to consider the same factors.

Secondly, the report recommends a Fundamental Rights Ground of refusal which would allow the executing state to bar surrender where to do so would be incompatible with Article 6 of the Treaty. Article 1(3) of the Framework Decision expressly provides that the instrument shall not have the effect of modifying the obligation to respect fundamental rights and principles as enshrined in Article 6 of the Treaty, which by virtue of the Charter of Fundamental Rights, are subject to the principle of proportionality. We believe such an addition would provide additional support for the UK as the executing state, to bar surrender on grounds of proportionality.

I am clear that we must work to ensure that the EAW, and mutual recognition in general, is both operationally effective and politically sustainable. I hope that the European Parliament's report will help lay the groundwork in the EU for wider improvements to the operation of the EAW in future. The negotiations on the European Investigation Order which, for example, introduced a human rights ground for refusal and more explicit provisions on proportionality, made important headway on this. The UK has been at the forefront of both developments in the EIO and this has been a significant UK negotiating success. This must continue and we must drive for greater consistency across all mutual recognition measures.

I note your concerns about the viability of alternatives to the EAW. The Government shares these concerns. In coming to a decision on whether to seek to rejoin measures the Government considered how a measure contributes to public safety and security, whether practical cooperation is underpinned by the measure, and whether there would be a detrimental impact on such cooperation if pursued by other mechanisms. The impact of a measure on civil rights and liberties was also a consideration. Our consideration of the EAW was no different from that of any other measure.

Before the implementation of the EAW, a number of Member States did not allow the extradition of their own nationals. We know that many Member States have constitutional bars to the surrender of nationals, and the following countries made reservations to the 1957 Council of Europe Convention on Extradition (ECE) making clear that they would not extradite their own nationals under that system: Bulgaria; Croatia; Cyprus; Estonia; France; Germany; Hungary; Lithuania; Luxemburg; Netherlands; Poland; Portugal; and Romania. Even those Member States that did not make reservations to the ECE could still refuse to extradite their own nationals.. Under the EAW, however, Member States are precluded from refusing the surrender of their own nationals in prosecution cases because it is a system of judicial surrender, rather than extradition. Indeed, many dangerous criminals have now been returned to the UK to face justice, from EU Member States that otherwise maintain the constitutional bar. Under the ECE that would have been highly unlikely. While not an EU case, the extradition request to Russia for Alexander Lugavoy provides a vivid illustration of the drawbacks of the nationality bar in cross-border justice. The request was refused due to the bar in the Russian constitution on extradition of their nationals; because it would be undesirable for such a grave case to be tried anywhere than on UK soil, the victim's murder remains unpunished.

The Government has said previously that we believe we would be able to rely on the ECE if we decided not to participate in the EAW. This remains the case. However, we believe it is in the national interest to rejoin the EAW and have sought to address concerns with its operation through amendments to the Extradition Act 2003 through the Anti-Social Behaviour Crime and Policing Bill.

5. The UK's membership of the EAW is the single most controversial aspect of the Government's opt-in package. In this Report we have discussed its pros and cons, but ultimately we believe it is for the House to determine the UK's ongoing membership. Accordingly, we recommend that the EAW be considered separately to the rest of the opt-in package by way of a debate and vote on a discrete motion. If the House votes in favour of the UK retaining the EAW, we further recommend that the Government seek agreement with other Member States for reform of the Framework Decision itself as part of the opt-in negotiations. If the House votes against the UK retaining the EAW, we recommend that the Government attempt to negotiate an agreement with the EU on an effective successor regime to safeguard the UK's interests. (Paragraph 39)

The UK will seek to rejoin the EAW measure in its existing form. Rejoining this measure under the opt-out and reforming the EAW at an EU level are two separate issues that should not be conflated. Other Member States are clear that we should not attempt to make changes to the EAW during the process of rejoining the measure and will not look kindly on any attempt to do so.

I am clear that there are changes to domestic legislation that can be made to address some of the longstanding concerns of many Parliamentarians including your Committee. That is why we have proposed changes, supported by your Committee, through amendments in the Anti-social Behaviour Crime and Policing Bill. Even if there were appetite from other Member States to reform fundamentally the EAW next year, and I am clear that there is not, the European Parliamentary elections in May next year would make this impossible to agree ahead of rejoining the EAW.

Nevertheless, longer term I accept that reform of the EAW is necessary and the Government will continue to pursue this at an EU level. The response above at recommendation 4 sets out our longer term approach.

The Government notes the Committee's views that the EAW should be subject to a separate vote. Discussions will take place through the usual channels on the form and content of a second vote.

Europol

6. We recommend that the Home Office reconsider its policy of requiring employees of the UK law enforcement bodies to resign their post before they can work for Europol. It is clearly not an effective way of promoting UK involvement in that body. (Paragraph 41)

The Home Office does not have a policy of requiring employees of the UK law enforcement bodies to resign their post before they can work for Europol.

Existing legislation allows officers undertaking such service to return to their force in their old rank (or to be promoted within the force during the period of service), to count the period of service for the purposes of pay progression, and to retain their membership of the police pension scheme.

It is a local decision for Chief Constables and local policing bodies (i.e. Police and Crime Commissioners, the Mayor's Office for Policing and Crime and the Common Council of the City of London) whether to allow a police officer to undertake such a period of service. The consent of the Home Secretary is required, but it is not Home Office policy to refuse to consent to secondments to Europol.

7. Europol has played an important role in assisting co-operation between Member States in tackling serious and organised crime, and countering terrorism, but as the Home Secretary has recognised its focus may now be “state-building”. The UK is a leading contributor to, and beneficiary of, its work. The Government and the House support the UK’s future participation in the body, subject to certain conditions on the extent of its powers. As such, it seems strange to us that, in the short intervening period between the opt-out and the new Regulation, the Government proposes to create ambiguity over the UK’s relationship with Europol by seeking to opt in to only one of its measures. This would seem to run contrary to the logic of its stated policy. (Paragraph 49)

We accept that Europol has played an important role in assisting co-operation between Member States in tackling serious and organised crime. Our evidence to your Committee sets out details of just a few (Operation Rescue, Operation SEAGRAPE) of the numerous examples of operations whereby UK law enforcement has cooperated with Europol colleagues to tackle organised cross-border crime.

However, it is the Government’s position that we do not believe that we need to rejoin the associated measures to participate in Europol. These measures have no material impact on UK participation, or that of any other State, and they have no impact on our ability to cooperate with others through Europol. For example:

- Council Decision 2005/511/JHA which requires Member States to issue a declaration that Europol act as the central office for combating euro counterfeiting. The UK has already issued the declaration as required by Article 2 of this measure and has therefore already designated Europol as the central office for combating euro counterfeiting. The measure does not set out any ongoing requirements following the issue of this declaration. We also understand that not all Member States were party to the Convention in the first place, and paragraph 1.7 of the annex specifically provides that where Europol is unable to carry out the tasks required, the ‘national central offices of the Member States shall retain competence’. Given that some Member States were not party to the Convention and it specifically provides for a difference in approach, the Government can see no reasons why we would need to opt in to this measure. Finally, Article 5(5) of the main Europol Council Decision states that Europol shall act as the Central Office for combating euro counterfeiting in line with this measure.
- Council Decision 2009/935/JHA determines the list of Third States and organisations with which Europol can conclude agreements. We are clear that

Article 23 of the main Europol Council Decision is the most important provision concerning Europol's Relations with third states and organisations. Many of these provisions are merely repeated in other measures. Article 23(2)) provides that agreements may only be concluded after approval by the Council. We believe that this is sufficient to allow us to cooperate through Europol. The obligations contained in 2009/935/JHA are procedural ones for Europol and not for Member States. The obligations require Europol to 'prioritise the conclusion' of cooperation agreements and 'inform the Management Board' of progress. As a result this measure has no material impact on UK participation in Europol or on the operation of Europol.

- Council Decision of 2 December 1999 amends an earlier Council Act with regards to the remuneration, pensions and other financial entitlements in Euros. This measure serves one purpose; Article 1 ensures that employees are paid in Euros rather than Dutch guilders. Clearly this measure has no impact on the UK's participation, nor will it impact on our ability to cooperate through Europol. Additionally we have questions about whether the staff regulations are still relevant. Over time these regulations have been superseded by general EU staff regulations (see Articles 39 and 57 of the main Europol Council Decision and Article 55 of the new Europol proposal which make it clear that the standard EU staff regulations apply). These specific Europol Staff Regulations only apply in relation to existing contracts and are otherwise no longer in effect.

However, The Government has repeatedly acknowledged that the final package of measures will be subject to negotiations with the EU. Indeed I said to the House of Lords European Union Committee on 9 October that *'this is going to be a process of negotiation'* and *'of course we have yet to sit down with the European Commission and discuss the list of 35 measures'*.

The proposed opt-in package

8. The UK has received some benefits from its membership of Europol and Eurojust, operationally through the use of joint investigation teams, and as a result of data-sharing via ECRIS and Naples II. The balance of evidence we received from practitioners supported the UK's continued involvement in these and other measures. This included the law enforcement bodies which use these measures on a day-to-day basis. However, there is also a legitimate argument that the UK could seek to co-operate through alternative arrangements. The issue comes down to a trade-off between the benefits of continued involvement under the current arrangements, combined with the uncertainty associated with submitting to the jurisdiction of the European Court of Justice, versus the uncertainty of negotiating new arrangements, but with the certainty that they would not be subject to supranational control. (Paragraph 74)

We are pleased that the Committee is supportive of the Government's decision to rejoin Europol, Eurojust, Joint Investigation Teams, ECRIS and Naples II. The Government consulted widely with operational partners before reaching a decision on the measures that we will seek to rejoin. The Government's written evidence to the Committee set out detailed information on the use of these measures, and provided examples of the operations and practical cooperation that they have helped to support.

I noted with interest that the former Director of Public Prosecutions Keir Starmer stated that the Crown Prosecution Service used Eurojust ‘quite heavily’ and that there are ‘a number of benefits from a prosecutorial point of view’. I also noted his comments about ‘JITs doing very good work, particularly in drugs and trafficking’ cases. I also noted that the Law Societies of England, Wales and Scotland ‘welcomed’ the Government’s list of 35 measures and stated that prosecutors regarded ECRIS and JITs as ‘particularly valuable’. Additionally I agree with Professor Stephen Peers’ assessment of Naples II being ‘tremendously useful in practice’.

As I set out above in relation to the EAW, in coming to a decision on whether to seek to rejoin measures the Government considered how a measure contributes to public safety and security, whether practical cooperation is underpinned by the measure, and whether there would be a detrimental impact on such cooperation if pursued by other mechanisms. The impact of a measure on civil rights and liberties was also a consideration. We considered alternative methods of cooperation for all of these measures.

For example, as we set out in our written evidence to your Committee, there is no viable alternative to ECRIS that would allow us to maintain the current level of cooperation with our EU partners. Before EU criminal records exchange, information relating to previous convictions was not shared between Member States to the same extent. Under the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters, the UK did not send any notifications to other Member States detailing convictions of their nationals in the UK, nor did we send any requests to other Member States for the previous convictions of their nationals being prosecuted in the UK. We received very few requests for the previous convictions of UK nationals being prosecuted in another Member State and relatively few conviction notifications for UK nationals. By contrast, since May 2012 France alone has sent 1909 notification messages¹ to the UK and the UK has sent 887 notification messages to France.

I have been clear throughout this process on the potential threats posed by the ECJ and its ability to rule in unexpected and unhelpful ways. I accept the Committee’s assertion of the need to balance the benefits of rejoining measures, with particular reference to the practical support they offer, with the risk of unhelpful interpretations by the ECJ. That is exactly the approach I set out in evidence to the House of Lords Inquiry recently. It is also the approach that the Government adopted when assessing the measures subject to this decision and reaching a view on the 35 measures we will seek to rejoin.

9. If the Government proceeds with the opt-in we recommend that it consider including certain other measures, such as the EU Mutual Legal Assistance Convention 2000, the remaining Europol measures and the European Judicial Network, not just for the sake of coherence, but because they are valued by practitioners. We see no merit in excluding measures purely on the basis that they increase the numerical size of the opt-in package. (Paragraph 75)

We are grateful for the views of Committee in this regard, and will take due account of this during negotiations. The Government has carefully considered each of the measures set

¹ Notification messages include both new convictions and changes to previously transmitted convictions.

out above, including the additional evidence submitted to your Inquiry and included in your report.

The Mutual Legal Assistance Convention (MLAC)

It is important to note that the Government has opted into the European Investigation Order ('the EIO') and has been an active participant throughout negotiations. By opting in to the EIO and being one of main driving forces in negotiations we have shown our clear commitment to mutual legal assistance and improving the current system. As I said in my Statement to the House of Commons on 27 July 2010:

„...MLA has not been without its faults. The process is fragmented and confusing for the police and prosecutors, and it is too often too slow. In some cases it takes many months to obtain vital evidence. Indeed, in one drug trafficking case the evidence arrived in the UK after the trial had been completed. The European Investigation Order is intended to address those problems by simplifying the system, through a standardised request form and by providing formal deadlines for the recognition and execution of requests.’

Even within the current system, our cooperation with other Member States is not based uniformly on the MLAC and its Protocol. For example, the UK currently cooperates with Ireland, Italy, Croatia and Greece using the 1959 Council of Europe Convention and its 1st Additional Protocol (and the 2nd Additional Protocol with Ireland and Croatia). This is because these four countries have not fully implemented the MLAC. Furthermore, Estonia, Ireland, Italy, Croatia and Greece have not fully implemented the Protocol to the 2000 EU Convention on Mutual Assistance in Criminal Matters. This has posed no practical difficulties and there is no evidence of the UK providing or receiving a different level of service, in MLA terms, with these countries than with those with which we use the EU Convention on Mutual Assistance in Criminal Matters. Consequently, we have no reason to believe that reverting to the 1959 Convention as the basis for our cooperation with all Member States until such time as the EIO is operational will have a detrimental impact on our ability to cooperate with other States.

The Government acknowledges in Command Paper 8671 that the principal benefit of the EU Convention on Mutual Assistance in Criminal Matters over the 1959 Convention and the 1st Additional Protocol is the provision for Joint Investigation Teams in Article 13 of the MLAC. This is also provided for in Article 20 of the 2nd Additional Protocol to the 1959 Convention but, to date, only 17 EU Member States have brought the 2nd Additional Protocol into force. The Government recognises the importance of being able to form Joint Investigation Teams with other Member States and that is why the Government is seeking to rejoin the Joint Investigation Team measure – number 38 on the list. This is applicable in all Member States and provides the broadest coverage in this respect.

Consequently, it can be seen the Government’s decision not to seek to rejoin the MLAC is an evidence based one.

Associated Europol measures

See response to recommendation 7 above.

The European Judicial Network

The Government's decision on which measures to rejoin was based on the evidence before it; this includes the decision not currently to seek to rejoin the European Judicial Network (EJN). Whilst the Government does not believe that the ideas underpinning EJN are without merit we do not consider that the EJN is a measure that underpins practical cooperation.

Broadly speaking, the EJN is about establishing contact points (mainly prosecutors) to enable and facilitate discussion on matters regarding judicial cooperation, maintaining a website with information on judicial cooperation law and practices in European countries (not just Member States), and a means to establish a regular forum (through plenary sessions) for contact points to meet and discuss these issues. Whilst the Government recognises that the lists of Contact Points are undoubtedly helpful, the Government believes, as set out in Command Paper 8671 that;

„it may be possible to maintain those contacts without formally participating in this Council Decision. Practical experience has shown that the contacts are not always the right people to speak to; often the contact points have a coordinating role. We judge that practitioners will know the names and numbers of people they need to speak to regularly.“

Furthermore, prosecutors consider that Eurojust offers a more effective mechanism for coordinating and ensuring the right practical tools are employed in complex or difficult cross-border cases. We would also note that that Command Paper 8671 evidences that our, *'experience of the EJN plenary meetings has shown that they add little or no value'*.

10. There is a degree of interdependence between a number of the measures, which means there is a logic to their being considered as a single package, with the exception of the European Arrest Warrant. Accordingly, we recommend that the Government put forward a single motion for consideration by the House setting out the measures it proposes to rejoin. We expect that Members will table amendments to add measures to, or remove them from, the Government's proposed list. The House should have an opportunity, at the conclusion of the debate, to come to a decision on every amendment which is selected. (Paragraph 76)

As I set out to Parliament, the second vote will be on the final package of measure we will formally apply to rejoin. This can only take place after we have concluded 'in principle' negotiations and while we would hope to have agreement from the EU Institutions and other Member States as soon as possible, we are not able to give an indication of when the second vote will take place at this stage.

The Government has noted your views with interest. I accept that further discussion on this matter will be necessary through the usual channels.

However, I feel it necessary to challenge the assumption that the EAW can be singled out from the rest of the package of measures we will seek to rejoin. In my view this is incorrect and is likely to cause difficulties in our discussions with the Commission and other Member States. The Commission will look at the *'coherence'* and *'practical operability'* of our overall package, as required by Protocol 36.

Within this context, the Government acknowledges that some measures are both practically and operationally interlinked and has taken this into account when deciding on the set of 35 measures we wish to rejoin.

For example, we know that it is a commonly held view in Europe that in order for the European Supervision Order (ESO) to function properly all States, including the UK, would need to participate in the European Arrest Warrant. This is because of ESO Articles 15 and 21.

Therefore, singling out individual measures for separate votes may not be appropriate. However, as I noted above, discussions will take place through the usual channels on the form and content of a second vote.

11. If the Government proceeds with the opt-in as proposed, we note that it will not result in any repatriation of powers. Indeed, the increased jurisdiction of the ECJ may result in a net flow of powers in the opposite direction. Even so, we would argue that the Government has sent a message to the EU that has changed, for better or for worse, the perception of the UK's future engagement in European police and criminal justice policy. (Paragraph 77)

I am clear that the UK is exercising a Treaty right which is part of the process of bringing powers back home. I do not accept that the opt-out has resulted in a flow of powers to Brussels.

If we had done nothing with regards to the opt-out, the default position was that the UK would become subject to Commission enforcement powers and the full jurisdiction of the ECJ. The decision to opt out means that a much smaller set of measures will be subject to ECJ jurisdiction and Commission enforcement powers. The transitional period, which ends on 1 December 2014, may have delayed the effect of this transfer, but I am clear sovereignty passed on the signature of the Lisbon Treaty.

There are also good legal reasons for this assessment. For example, when assessing the competence of the EU to act externally under Article 3(2) TFEU, the extent of internal measures can be relevant in legal terms in deciding the extent of that competence. The Prime Minister's letter to the President of the Council of Ministers on 24 July put beyond doubt that the pre-Lisbon measures cannot be used in relation to the UK when assessing the extent of that competence after 1 December 2014 for over ninety measures that the UK will not seek to rejoin.

The pre-Lisbon measures remain binding on the UK until 1 December 2014 only by virtue of the transitional provisions in Protocol 36. As I have said previously, many of these measures were negotiated without the full enforcement powers of the ECJ in mind and some are poorly drafted. Although they are binding now, I am clear that the reality of those measures will change when they can be enforced before the ECJ. International courts and tribunals sharpen the effect of public international law and the ECJ is a particularly significant international court. By opting out of the measures in question we have considerably reduced the influence of this Court in matters of policing and criminal justice the UK.

Next steps

12. The Government has notified the Council of its intention to exercise the opt-out well before the deadline of 1 May 2014. It is vital that it now moves quickly to begin negotiations for any opt-in. However, as with the opt-out decision, we believe there should be a parliamentary mandate for any opt-in package before formal negotiations can commence. We therefore recommend that the Government schedule consideration of the opt-in package on which it proposes to negotiate at the earliest opportunity to provide such a mandate. The Government should also be explicit on what would happen if the proposed opt-in could not be agreed. (Paragraph 85)

The Government is clear that the motion approved by Parliament supported the Government's exercise of the opt-out. It also provided until the end of October for the relevant Committees to report on this matter, before the Government began formal negotiations. I am clear that the Government does not need to hold a further debate in order to commence discussions with the Commission and other Member States on the package of measures we are seeking to rejoin. The Government does not seek a mandate to negotiate on specific opt-in measures under those arrangements and we see no need to do so here.

I do accept the need to move quickly on the negotiation process but the Government could do no more to ensure this process is smooth. As Professor Stephen Peers said in evidence to your Committee on 10 September:

‘There certainly ought to be enough time. I would say it would not be the Government's fault if there is no decision by December next year. It would be some kind of political difficulty that the Council and the Commission have dreamed up.’

Our objective will be to conclude negotiations as quickly as possible whilst ensuring the best possible outcome for UK interests.

13. If the Government secures that mandate, there will remain political and financial uncertainties over the opt-in process. Although it is not possible to predict the outcome of future negotiations with Member States, we believe the Government should seek to gauge the financial implications of its proposals, not least to assist Parliament in informing its decision on the opt-in package. As such, we recommend that the Government undertake and publish such analysis as part of its response to the current parliamentary scrutiny process. (Paragraph 86)

As you will be aware, the Council may adopt a Decision determining that the UK shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the former third pillar acts. The UK will participate in this Decision.

The Security Minister responded to Parliamentary Question 124839 from Rushanara Ali MP (Bethnal Green and Bow) on the 22 October 2012 on this topic. His reply stated;

‘The Council, acting by qualified majority on a proposal from the Commission, may adopt a Decision determining that the UK shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the

cessation of its participation in the third pillar acts. Until we hold discussions with the EU Institutions and other Member States it is impossible to say with any certainty whether the UK will be held liable for any costs. However, the Government considers this to be a high threshold to meet”.

I am clear that the set of measures announced by the Government includes all the tools which are important to ensure we maintain operational EU police and judicial cooperation. This is based on evidence gathered from operational partners and other Member States. As a result I do not envisage any costs under this provision unless difficulties are created by others with regards to rejoining measures.

An Impact Assessment on the final list of measures we will apply to rejoin will be provided in good time ahead of the second vote.

14. To date we have been disappointed with the extent and timeliness of the Government’s involvement of Parliament in scrutinising the 2014 opt-out and proposed opt-in. We hope that it will engage more constructively with Parliament for the remainder of this process. (Paragraph 87)

We have been clear throughout this process that Parliament should play a full and active role in scrutinising this matter and it is perhaps instructive to set out a full chronology of our engagement with Parliament.

On 20 January 2011 the Minister for Europe David Lidington set out in a Written Ministerial Statement the Government’s commitment to consulting Parliament on this matter. He stated:

“The treaty of Lisbon provides for a five-year transitional period after which the infringement powers of the European Commission and the jurisdiction of the European Court of Justice (ECJ) will apply to all unamended police and criminal justice instruments adopted under the pre-Lisbon "third pillar" arrangements. The transitional period began on 1 December 2009 and will end on 30 November 2014. The UK has until 31 May 2014 to choose whether to accept the application of the Commission's infringement powers and jurisdiction of the ECJ over this body of instruments or to opt out of them entirely, in which case they will cease to apply to the UK on 1 December 2014.

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

Since that commitment the Government have taken steady and consistent steps to engage with Parliament and help with and contribute to allowing the relevant Committees to scrutinise this matter.

On 21 December 2011 I wrote to the European Scrutiny Committee (ESC) in relation to the 2014 opt-out decision and provided a list of measures subject to the decision. The letter reiterated the Government's commitment to Parliamentary scrutiny and stated:

“I am committed to ensuring that Parliament is able to scrutinise the decision that flows from Article 10(4) of Protocol 36 of the Treaty of Lisbon as part of our undertaking to hold a debate and vote in both Houses on this decision. We look forward to engaging with Parliament fully in this matter.”

This letter was copied to the then Chair of the House of Lords EU Committee (HoL EUC), Lord Roper. At this point we contend it would have been possible for scrutiny of each of these measures, and the overall opt-out decision, to begin.

In July 2012 Dominic Raab MP posed 125 Parliamentary Questions on this matter. The Government provided responses to each of the Parliamentary Questions posed, including information on how measures have been implemented and how they are used. The Government recognised Parliament's interest in this matter and the need for full disclosure to help inform scrutiny of this matter. We note that the information provided in response to these questions helped to inform the Open Europe report: *Cooperation Not Control: The Case for Britain Retaining Democratic Control over EU Crime and Policing Policy*. We also note that this report was able to draw its own conclusions on the use of the opt-out and how useful individual measures were and we commend Mr Raab MP for his work in this regard.

On 18 September 2012 I wrote to the ESC to provide an update on this matter. This letter set out the changes to the list as a result of measures being repealed and replaced by new Commission proposals. This letter also informed of changes to the list as a result of further technical level discussions at official level with the Council Secretariat and European Commission. Finally the letter reiterated the Government's commitment to Parliamentary scrutiny of this matter and stated:

“The Government has also committed to consulting the relevant Committees as to the form of that vote. I will be writing in the coming months to invite you, and all other relevant Committee chairman, to engage on this important issue.”

This letter was copied to your Committee, the HoL EUC, and the Justice Select Committee (JSC).

On 15 October 2012 I announced in a statement to Parliament that the Government's current thinking was to exercise the opt-out and seek to rejoin measures that were in the national interest. The Government considered it important to communicate the proposed direction of travel on this matter at an early stage to enable scrutiny of that position to take place. This is in line with standard practice on post-Lisbon opt-in decisions where relevant Committees have informed the Government that it is helpful to have an early indication of the Government's thinking in order to allow for proper scrutiny. Consequently, we found criticism of this position to be somewhat surprising.

My statement also invited the Committees to consider this matter in more detail:

“I fully expect that these committees will want to undertake their own work on this important decision. The government will take account of the committees’ overall views of the package that the UK should seek to apply to rejoin. So that the government can do that, I would invite the committees to begin work, including gathering evidence, shortly and to provide their recommendations to government as soon as possible.”

On 15 October 2012 the Government wrote to all the relevant Parliamentary Committees to advise you of my announcement on this matter. This letter provided an updated list of measures subject to the decision. A fact sheet providing further information was placed in the House Library. The letter stated:

“This Government has done its utmost to ensure that Parliament has the time to properly scrutinise our decisions relating to the European Union and that its views are taken into account. We would like to take this opportunity to assure you that the 2014 decision will be no exception. On 20 January 2011 the Minister for Europe, by way of a Written Statement, set out the Government’s commitment not only to holding a vote prior to the final decision being taken, but also to consulting you on the arrangements for that vote. In line with the commitment made in January 2011, and following my statement to the House today we would now like to seek your views on this matter.”

On 7 November 2012 I wrote to the Chair of the Joint Committee on Human Rights, Dr Hywel Francis, inviting his Committee to undertake work on this matter. The letter stated:

“The Government is interested to hear the views of Parliament before coming to a final decision. Should the Joint Committee on Human Rights wish to undertake any work in this regard the Government would of course take due account of that work.”

This letter was copied to your Committee, the ESC, the HoL EUC, and the JSC.

On 7 November 2012 I wrote to the Chair of the ESC Mr William Cash MP with regards to the opt-out. In this letter I stated: 16

“I would like to assure you that my statement on 15 October and the Prime Minister’s announcement on 28 September were not in any way intended to preempt any view the European Scrutiny Committee may wish to express on this matter. Indeed, my statement actively invited your Committee to take forward work on this matter.”

This letter was copied to your Committee, the HoL EUC, and the JSC.

On 28 November 2012 The Security Minister provided evidence to the ESC and answered thirty-five questions in relation to the opt-out during this session. The Security Minister reiterated the Government’s commitment to engaging constructively with Parliament throughout this session.

In December 2012 the Government submitted twelve pages of written evidence to the HoL EUC Inquiry. Our evidence provided detailed information on the use made of measures such as the European Arrest Warrant, Article 40 of the Schengen Convention, the Mutual Legal Assistance Convention, Freezing Orders, Europol, Joint Investigation Teams,

Eurojust, ECRIS and the Prison Transfer Framework Decision. In addition, our submission provided evidence on the measures that the UK was yet to implement in full and the process for rejoining measures.

On 13 February 2013 I, alongside the Justice Secretary, appeared before the HoL EUC to support its Inquiry into this matter. During this session we answered thirty four questions on a number of topics related to this decision. Our responses included information on our consultation with operational partners and the Devolved Administrations. We also set out in detail the Government's concerns about ECJ jurisdiction.

On 23 April the HoL EUC produced its report: *EU police and criminal justice measures: The UK's 2014 opt-out decision*. We were very grateful to the Committee for heeding our call to report on this matter and producing its report in a timely fashion. As we noted in our response to that report, this was very helpful in informing our view about which measures the Government is now seeking to rejoin. It was disappointing that the other relevant Committees did not submit reports on this matter, despite the Government's request for them to do so. Whilst the Government accepts that the late provision of the Explanatory Memoranda may have been unhelpful in this regard we do not accept that it was not possible for a report to be published without them – the HoL EUC report is testament to that.

The Security Minister, James Brokenshire, attended a HoL EUC seminar on 26 June organised to support the publication of their report. During this seminar the Security Minister set out the Government's current position on its consideration of this matter and debated with members of the HoL EUC, Emma Reynolds MP, Helen Malcolm QC and Martin Howe QC

On 12 June 2013, an Opposition Day Debate was called in the House of Commons. I responded on behalf of the Government. This debate lasted for just over two hours and runs to thirty-three columns in Hansard. During this debate I repeated the commitment to consult with Parliament on this matter. I set out clearly that a full list of the measures that we would seek to rejoin would be provided to Parliament ahead of a vote. I stated:

“it is indeed the Government's intention to provide Parliament with a list of the measures that we wish to opt back into, so Parliament will have that before it votes on the matter.”

I also committed that the Government would:

“supply the Select Committees with explanatory memorandums and the list of measures that the Government propose to opt back into.”

On 9 July I reaffirmed the Government's intention to exercise the opt-out. This followed consultation with operational partners, discussions with the European Commission and other Member States, detailed analysis of all the measures within scope of this decision and a number of discussions with the Departments within the Government responsible for the measures. On the same day we provided Parliament with Command Paper 8671. This 155 page document sets out details of all the measures subject to this decision and highlights the 35 measures the Government believes it is in the national interest to rejoin. This fulfilled my commitment to provide Parliament with a full list of measures that the

Government will seek to rejoin ahead of a vote on this matter. It also fulfilled the Government's commitment to provide Explanatory Memoranda on this matter.

In deciding to make this announcement almost a year before the deadline we were particularly mindful of the evidence submitted to the HoL EUC Inquiry. We note that the Commission DG for Justice, Françoise Le Bail, said that *'the key issue is to have a decision by the British Government'* and that there is *'nothing else'* the Commission can do before that. We also considered carefully the recommendation at paragraph 225 of the HoL EUC report which stated *'Government would have done well to have commenced negotiations at a much earlier stage'*. Whilst we do not accept that it would have been possible to commence negotiations at an earlier stage, we do accept that it was necessary to communicate the Government position as early as possible.

Following this announcement the Government held a vote in both Houses of Parliament. This fulfilled the commitment from the Minister for Europe, David Lidington, set out above.

On 15 July I set out the Government's reasons for exercising the opt-out, to the House of Commons, and invited your Committee, the ESC and the JSC to submit reports before the end of October, in advance of the Government opening formal discussions with the European Commission and other Member States. The motion, supported by the House of Commons by a majority of 97, stated:

“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, 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.”

On 23 July Lord McNally repeated the reasons for exercising the opt-out to the House of Lords and invited the HoL EUC to reopen its Inquiry and submit reports before the end of October, in advance of the Government opening formal discussions. The motion, supported by the House of Lords by a majority of 112, stated:

“That this House considers that the United Kingdom should opt out of all European Union police and criminal justice measures adopted before December 2009 and should seek to rejoin measures where it is in the national interest to do so; endorses the Government's proposals in Cm 8671; and invites the European Union Committee to report to the House on the matter before the end of October, before the Government opens formal discussions with the Commission, 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 Treaty on the functioning of the European Union.”

I am clear that these successful votes demonstrate Parliament's support for the Government's approach and satisfaction with the information provided. If this were not the case we do not believe Parliament would have supported the Government in such

numbers. However, as I have said throughout this process, Parliament should play a full and active role in scrutinising this important matter. That is why the Government gave a commitment not to begin formal negotiations until November and why we invited all the relevant Parliamentary Committees to submit reports on this matter. That is also why we have continued to support the Committee's Inquiries.

In October the Government submitted three further pages of written evidence to support the reopened HoL EUC Inquiry. This evidence set out details of the reforms to the European Arrest Warrant that we are implementing to better safeguard the rights of British citizens.

The Government submitted eight of pages of written evidence to support your Inquiry. This provided further data and information on Eurojust, Europol, ECRIS, Naples 2, Joint Investigation Teams and the European Arrest Warrant.

The Government submitted four pages of written evidence to support the JSC Inquiry. This provided further information on the Prisoner Transfer Framework Decision, the European Supervision Order and the Data Protection Framework Decision.

On 9 October the Justice Secretary and I appeared before the HoL EUC to provide evidence. During the session we answered seventeen questions and provided detailed information on our reasons for not seeking to rejoin individual measures.

The Justice Secretary and I gave evidence to the ESC on 10 October and answered eighty-six questions. These covered a range of topics, including the Government's concerns about the threats of ECJ jurisdiction. We also set out in detail the 19

Government's reasons for seeking to rejoin the 35 measures set out in Command Paper 8671 and the approach that followed in considering whether rejoining these measures would be in the national interest.

I also provided evidence on 15 October to the HAC and answered ten questions including detailed questions on Europol and the reforms to the European Arrest Warrant.

On 16 October the Justice Secretary provided evidence to the JSC and answered thirty-eight questions relating to the opt-out, including some detailed questions on the Framework Decisions on prisoner transfer, probation and alternative sanctions, and data protection. Following the evidence session, on 21 October the Justice Secretary wrote to the Chair of the Committee, copying in your Committee and the other Committees, providing further detail on his concerns about rejoining the Framework Decision on probation and alternative sanctions.

The evidence sessions alone amount to well over ten hours of Ministerial time. I am clear that it cannot be said that we have failed to engage with Parliament on this issue. The Government has also been clear that we will continue to provide information as required on the measures subject to this decision, as appropriate. You will be aware that in October the Government responded to over 150 Parliamentary Questions requesting further information on measures that the Government is not seeking to rejoin.

The Government will continue to engage with Parliament as appropriate. You will be aware, as I set out on 15 July, that the Government will hold a second separate vote on the

measures the Government proposes to rejoin ahead of our formal application to do so. I am content to repeat that commitment here.

The Government has committed to a full impact assessment on the final package of measures we seek to rejoin. This will be provided in good time ahead of a second vote and set out the full details on all of the measures we seek to rejoin.

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