



House of Commons
Home Affairs Committee

Justice and Home Affairs Issues at European Union Level

Third Report of Session 2006–07

Volume I

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Report, together with formal minutes

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The Home Affairs Committee

The Home Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Home Office and its associated public bodies; and the 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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Contents

Report	<i>Page</i>
Summary	3
1 Introduction	7
The Committee's inquiry	7
Our approach in the inquiry	7
2 Context	9
The Challenges Posed by Crime and Migration	9
Crime across the EU	9
Cross-border crime and terrorism	12
Legal migration	14
Illegal migration	16
JHA Issues in the EU—The Institutional Landscape	19
The European Union institutions	19
Treaty arrangements for Justice and Home Affairs	19
What the pillar structure means	20
The special position of the UK	21
Alleged difficulties with the pillars	22
What difference would the Constitutional Treaty have made?	23
The current picture	24
Justice and Home Affairs spans national borders	24
European priorities—the Hague Programme	24
Approaches to European co-operation	24
Beyond the Hague Programme	25
A timely inquiry	26
3 The effectiveness of European action in particular fields	27
Policing	27
Police co-operation across the EU	27
UK input into co-operation: is SOCA sufficient?	28
Bilateral arrangements	29
Europol	30
The Schengen Convention and Article 96 data	34
Addressing deficiencies in data exchange	36
Exchange of criminal records	36
Pilot project on interoperability of criminal records	40
The principle of availability	41
The Prüm Treaty	43
Criminal Justice: Judicial Co-operation	45
The goal: an area of freedom, security and justice	45
Eurojust	45
Mutual recognition instruments	48

The European Arrest Warrant	48
The scope for further mutual recognition measures	52
Harmonisation	54
EU procedural rights	57
Is action needed?	57
The Framework Decision	59
Borders and migration	63
Migration	63
Illegal migration—Commission priorities	63
Borders	66
Frontex	66
Schengen ‘pick and mix’—is the UK position tenable?	69
Safeguarding data	71
Sharing data to fight crime effectively	71
Inside the EU—the need for better protection	71
Existing provisions in the third pillar	72
The draft Data Protection Framework Decision (DPFD)	73
Data sharing between the EU and third countries	75
4 Institutional Questions	78
The debate about third-pillar decision-making	79
Reasons for the problems	80
Is QMV the answer?	81
Future options for JHA decision-making	83
Institutional changes: conclusions	86
5 Parliamentary scrutiny: serving the UK interest	87
Conclusions and recommendations	92
Annex: Terms of Reference of the inquiry as agreed by the Committee on 31 October 2006	102
Formal minutes	104
List of witnesses	105
List of written evidence	106
List of unprinted written evidence	106
Reports from the Home Affairs Committee	107

Summary

Terrorism, crime and migration are trans-national challenges requiring trans-national responses. The Hague Programme, adopted in 2004, set out a way forward in respect of Justice and Home Affairs (JHA) at the EU level, but the failure of the Constitutional Treaty may mean that a reprioritisation is needed. We looked at developments in several fields, considering the extent to which the three possible approaches of practical co-operation, mutual recognition or harmonisation offer the best way forward.

We have looked at selected issues from the perspective of the actual challenges faced by EU countries, particularly those of cross-border crime and border control. We have attempted to assess the current and future effectiveness of EU action in meeting those challenges. Throughout our evidence sessions, we consistently asked our witnesses “How big is the problem? What’s the evidence that action *x*, *y* or *z* is necessary?”

One consistent theme emerging from the responses has been that policy-makers often lack sufficient information about the practical problems which action at EU level ought to be aimed at tackling. In our view, policy initiatives at EU level should only be pursued if there is a solid evidence-base that they are likely to make a real practical difference to the effectiveness with which the common challenges facing EU Member States in the JHA field can be tackled.

Practical arrangements for bilateral co-operation between police forces can be very fruitful. We recommend that the Government should explore a central mechanism for co-ordinating liaison between UK police and their counterparts in other EU states on crime other than serious organised crime. The creation of Europol has been a positive development but it has been held back from reaching its full potential by a lack of trust and co-operation on the part of some Member States. We are not convinced there is a pressing need for a further extension of Europol’s powers. The UK Government should not give its approval to any changes in the status of Europol unless provision is made for a scrutiny role for national parliaments in conjunction with the European Parliament.

We support the UK Government’s case for access to data gathered under Article 96 of the Schengen agreement. It is not acceptable that crime-fighting should be hindered simply in an attempt to force the UK to take a different attitude towards participation in the Schengen border-control regime.

Recent improvements in the exchange of information between Member States about criminal records redress a real deficiency, but there is still a lack of specificity about the format and content of the information exchanged. We are particularly concerned about the fact that police are not notified when an individual convicted abroad is released from custody or re-enters this country.

We regret that the UK missed the opportunity to take part in a pilot project by some EU countries to make their criminal records systems interoperable. The fact that the UK has, in its own interests, opted out of certain EU initiatives (the single currency, the borders part of the Schengen Convention) makes it all the more important that it should be an effective player in all the other areas.

We considered more wide-ranging proposals to improve data-sharing between law enforcement agencies. The 'principal of availability', if adopted, would have far-reaching implications. We recommend that the UK Government should insist on an independent impact assessment of the potential use of data under the principle. However, it is possible that adoption of the principle will be superseded by the incorporation of the Treaty of Prüm into the framework of EU law.

This treaty is an agreement by a small group of EU Member States to facilitate data exchange in the JHA field. Its likely transposition into EU law sets a worrying precedent whereby a small group of Member States may reach an agreement among themselves which then is presented to the wider EU almost as a *fait accompli*. Thus it raises the danger of a two-track Europe developing. Nonetheless we welcome the provisions in Prüm for more effective police co-operation.

We praise Eurojust as an excellent example of what can be done to build mutual trust between practitioners and through them Member States in one another's judicial systems. The European Arrest Warrant is frequently cited as an effective mutual recognition instrument. Its implementation demonstrates that sufficient political will can drive agreement in the field of mutual recognition. We regard the abolition of dual criminality for a defined and agreed set of offences under the EAW as acceptable, but recommend that the working of the system should be monitored as some fine-tuning of the list of 32 offences may be desirable.

We agree with the UK Government, and a wide number of practitioners, that there is no case for a full-scale harmonisation of European criminal justice or legal systems. However, for mutual recognition in the field of judicial co-operation to be effective, some degree of common standards in tightly limited areas may be desirable. Nonetheless, no proposal should be considered without powerful evidence of the scale of the problem to be tackled and the gains to be delivered by any such proposal. As we note in our overall conclusions, we do not believe the case has been made out at present for a shift of decision-making in this area from the third to the first pillar.

There are grounds for concern about the absence of procedural safeguards for UK citizens in some other EU Member States. It is difficult to quantify the problem. There should be detailed independent monitoring of the extent of rights abuses in Member States. The level of rights for defendants in the UK is high, and any EU-wide binding agreement must also offer high standards. There is a real risk that setting common standards in EU criminal procedures might set up an alternative rights regime in Europe in parallel with the ECHR. We support the UK Government's view that the starting point should be to use existing mechanisms to ensure that the rights enshrined in the ECHR are uniformly observed across the EU. The choice currently before the Council of Ministers, between a watered-down draft Framework Decision and a non-binding Resolution is not an attractive one.

We recommend that the UK Government reconsider its support for a Resolution and give renewed consideration to the proposals in the Framework Decision.

The relationship between legal and illegal migration is a complex one. The development of effective action on illegal migration remains the priority and the case for developing a common EU approach to legal migration is less clear. There is room for debate as to whether, in the future, it may be in the UK's interest to accept a stronger common EU approach to legal migration.

The European Borders Agency, Frontex, is a young organisation with untapped potential which needs proper resourcing if its efforts are not to be largely diverted into emergency operations. We support the Government's bid for the UK to become a full member of Frontex.

On balance the UK is right to remain outside the Schengen border-control regime. However, its selective participation in Schengen may continue to exclude it from important measures.

If proposals for a draft Data Protection Framework Decision were to be superseded by the data protection provisions in the Prüm Treaty, we would have concerns as to whether these were adequate. The Government should continue to support the principle of making provision for data protection in the EU third pillar through a Framework Decision. This should include provision for specific minimum standards ensuring adequate data protection for data exchange with third countries, as both the Passenger Name Record and SWIFT cases give cause for serious concern about the casual use of data about millions of EU citizens without adequate safeguards to protect privacy.

The Constitutional Treaty proposed making elements of criminal law subject to qualified majority voting in the Council of Ministers, and the Commission still supports this proposal. The evidence we have seen does not persuade us that, as things stand at present, there are sufficient benefits in terms of tackling crime, either here in the UK or across the EU, to justify such a major transfer of power away from Member States as would be entailed by a switch of criminal law from the third to the first pillar.

However, an equally strong risk to our effective sovereignty may be posed by a proliferation of informal decision-making structures such as those devised by the participants in the Prüm treaty. It is highly regrettable that the UK did not participate in the Prüm process from the start. Similar informal arrangements within small groups of Member States may produce *de facto* changes over which we have less influence than we would through the mechanisms of QMV. This is one reason why the UK should not absent itself again from such informal discussions.

The UK Government should make clear to its EU partners that at present the case for moving criminal law matters from the third pillar has not been made. There is room for debate as to whether, in the future, it may be in the UK's interests to accept such a change. Members of our Committee hold different views as to whether it might ever be acceptable to agree to this. It is indisputable that such a change would be of great significance. The UK Government should not agree to any such proposal without full and specific parliamentary consideration of the issue.

Finally, we review the extent to which it is possible for departmental select committees such as the Home Affairs Committee to conduct effective scrutiny of issues at EU level. We believe the House and its committees should take concrete steps to bridge the current divide in EU scrutiny between the policy-based work of DSCs and the document-focused work of the European Scrutiny Committee. We would welcome greater efforts to 'mainstream' EU scrutiny by engaging DSCs more fully in the process of examining key EU proposals. We recommend that the Home Office should consult us directly when major EU JHA developments are in their formative stage. We will aim to maintain a high level of informal dialogue with British MEPs on key issues.

1 Introduction

The Committee's inquiry

1. On 26 July 2006 we announced our intention to conduct a broad-ranging review of Justice and Home Affairs (JHA) issues at the European Union (EU) level and their implications for the UK. On 31 October 2006 we published more detailed terms of reference. We decided to focus particularly on:

- a) Practical co-operation between Member States
- b) Mutual recognition, including the development of minimum standards across the EU
- c) The harmonisation of criminal justice systems
- d) The process of decision-making and whether problems are driven by 'third pillar' procedure
- e) The significance of a trend towards internal agreements between groups of Member States outside the EU framework
- f) Current developments in common border controls and visa arrangements.

The full terms of reference are annexed to this report.

2. During the course of the inquiry we took oral evidence on five occasions and received 22 memoranda. A list of those who gave oral evidence is set out at page 105 below. We also visited the European Parliament in Brussels and the headquarters of Frontex, the new European border control agency, in Warsaw.

3. The evidence in the inquiry was taken before the transfer of certain functions of the Home Office (prisons, probation, sentencing and aspects of criminal justice) to the new Ministry of Justice which came into being on 9 May 2007. Our report therefore deals with JHA issues which fell within the responsibilities of the Home Office prior to that date.

4. We would like to express particular gratitude to our Specialist Adviser, Dr Valsamis Mitsilegas of Queen Mary College, University of London.

Our approach in the inquiry

5. Within a field as broad as "justice and home affairs" there is at any given moment a multitude of policy initiatives proceeding at various rates of progress, and with varying chances of being finally adopted and implemented, through the institutions of the EU and its Member States. In this report we have not attempted a comprehensive survey of these. Instead we have tried simply to take a 'snapshot' of a few significant issues. We are mindful that our colleagues on the House of Commons European Scrutiny Committee and on Sub-Committees F (Home Affairs) and E (Law and Institutions) of the House of Lords European Union Committee produce regular reports looking in detail at particular EU proposals. We have not sought to duplicate the valuable work done by those committees. (However, we make some comments later in this report on gaps in the overall level of

scrutiny given by Westminster to EU issues in the JHA field, and how those gaps might be filled.)

6. What we have aimed to do is to look at selected issues from the perspective of the actual challenges faced by EU countries, particularly those of cross-border crime and border control. We have then attempted to assess the current and future effectiveness of EU action in meeting those challenges. Throughout our evidence sessions, we consistently asked our witnesses “How big is the problem? What’s the evidence that action *x*, *y* or *z* is necessary?”

7. One consistent theme emerging from the responses has been that policy-makers often lack sufficient information about the practical problems which action at EU level ought to be aimed at tackling. In our view, policy initiatives at EU level should only be pursued if there is a solid evidence-base that they are likely to make a real practical difference to the effectiveness with which the common challenges facing EU Member States in the JHA field can be tackled. If what is being contemplated is a change to the decision-making processes of the EU itself—such as abandoning the current requirement that decisions on policing, legal migration and judicial co-operation on criminal matters should be made on the basis of unanimity amongst Member States—it is all the more important that a proper case should be made out for the practical benefits to be brought by such changes.

8. Throughout this report, therefore, we have tried to set the current debates about policy and institutional change against the test of problem-based and evidence-based action. However, we recognise also the danger that if action is not taken in certain areas through the central EU institutions, groups of individual Member States may collaborate amongst themselves in *ad hoc* arrangements, which then become adopted formally by the EU, as is in process of happening with the Prüm Treaty. We recognise that future UK governments may have to weigh the disadvantages of engaging with initiatives they deem to be insufficiently evidence-based against those of being excluded from key negotiations on what may ultimately be adopted as EU policy.

9. In the next section of the report, we provide some information about the prevalence of crime across the EU and about recent migration trends. We then summarise the current and proposed future arrangements for EU decision-making in the JHA field. In the remainder of the report, we consider recent EU policy responses to the challenges posed by crime and migration.

2 Context

The Challenges Posed by Crime and Migration

Crime across the EU

10. At present, statistics about crime within Europe are collected almost entirely by individual Member States. Because categories of crime and methods of recording crime differ between countries, it is difficult to assemble Union-wide data which can be used with any confidence.

11. One exception to this generalisation is the European Crime and Safety Survey (EU ICS), carried out in 2005 in the 15 ‘old’ EU countries plus three of the recently acceded states (Poland, Estonia and Hungary). The results were published in 2007.¹ The survey looked at victimisation rates, and built on earlier surveys which had been conducted in four main rounds since 1987.² The fieldwork was undertaken by a consortium of research institutes led by Gallup Europe.

12. The survey found that levels of common crimes such as burglaries, thefts, robberies and assaults had decreased significantly over the past 10 years everywhere in the Union, with the possible exceptions of Belgium and Ireland. Its authors noted that “in line with developments observed in North America and Australia, most EU countries are now recovering from a ‘crime epidemic’ that has lasted for three or even four decades”.³

13. The survey found that almost 15% of the population of the 18 EU countries had been a victim of a crime in 2004. Levels of crime were highest in Denmark, Estonia, Ireland, the Netherlands and the UK, and were lowest in Finland, Hungary, Portugal and Spain. Factors associated with high levels of crime included urbanisation and the proportion of young people in the population. Risks of being assaulted were highest in Belgium, Denmark, Ireland, the Netherlands, Sweden and the UK, and lowest in France, Hungary, Italy, Spain and Portugal. Rates of violent crime were found to be associated with the levels of consumption of alcohol per population. The survey asked respondents whether they had been requested to pay bribes to public officials over the past 12 months. On the basis of the responses, bribe-seeking appeared to be most common in Estonia, Greece, Hungary and Poland, and least common in Finland, the Netherlands, Ireland, Sweden and the UK.⁴

14. Table 1 below shows the percentage of people per country victimised once or more in 2004 by any of the ten common crimes—the overall one-year victimisation prevalence rate. This result is a simple measure for the overall risk of crime in 18 countries of the EU. Figure 1 below illustrates levels of crime across Europe, as indicated by the survey.

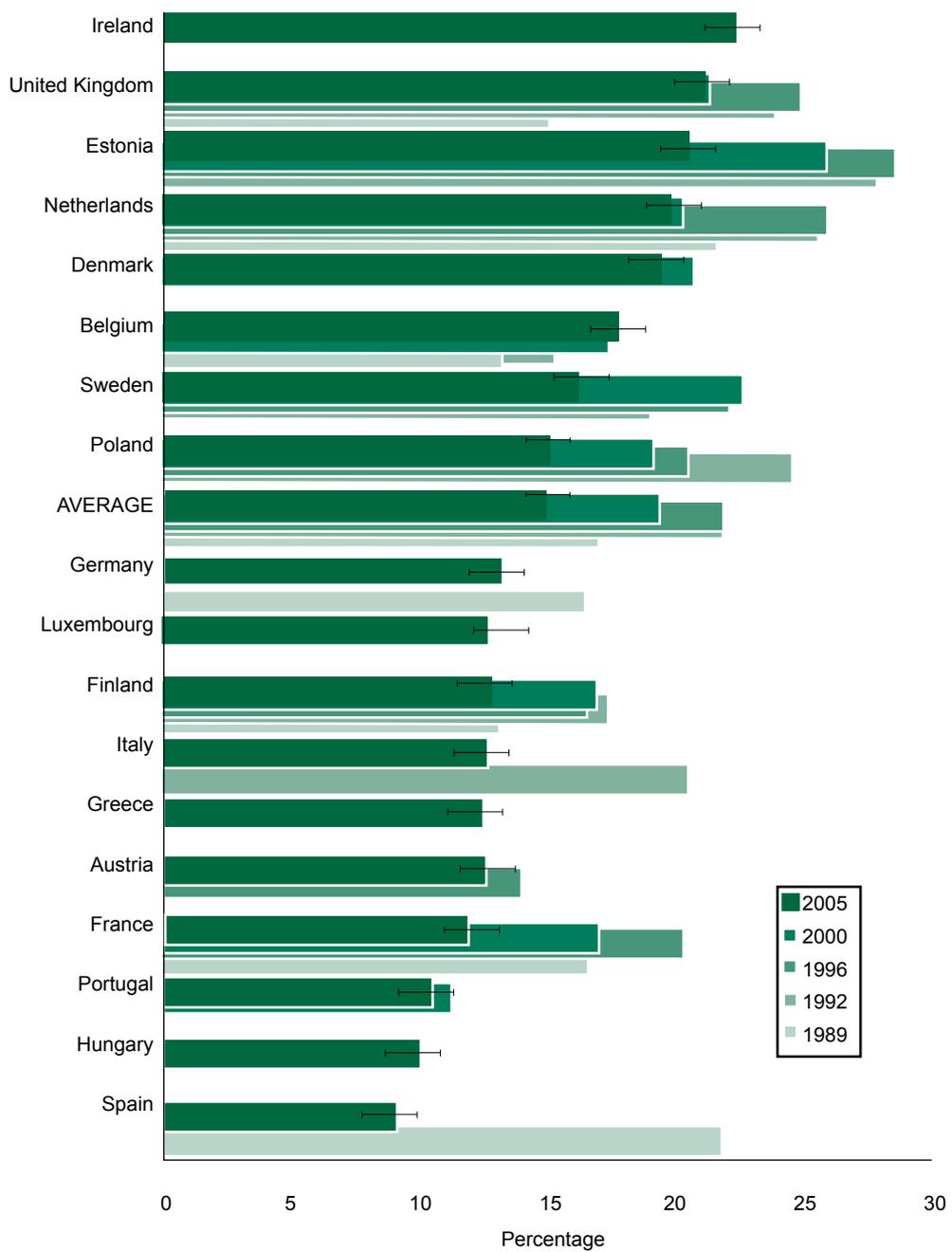
1 Jan van Dijk et al., *The Burden of Crime in the EU: Research Report: A Comparative Analysis of the European Crime and Safety Survey (EU ICS) 2005* (2007)

2 These were the *International Crime Victimization Surveys* (ICVS).

3 EU ICS (2005), *Highlights and Policy Implications*, p 2

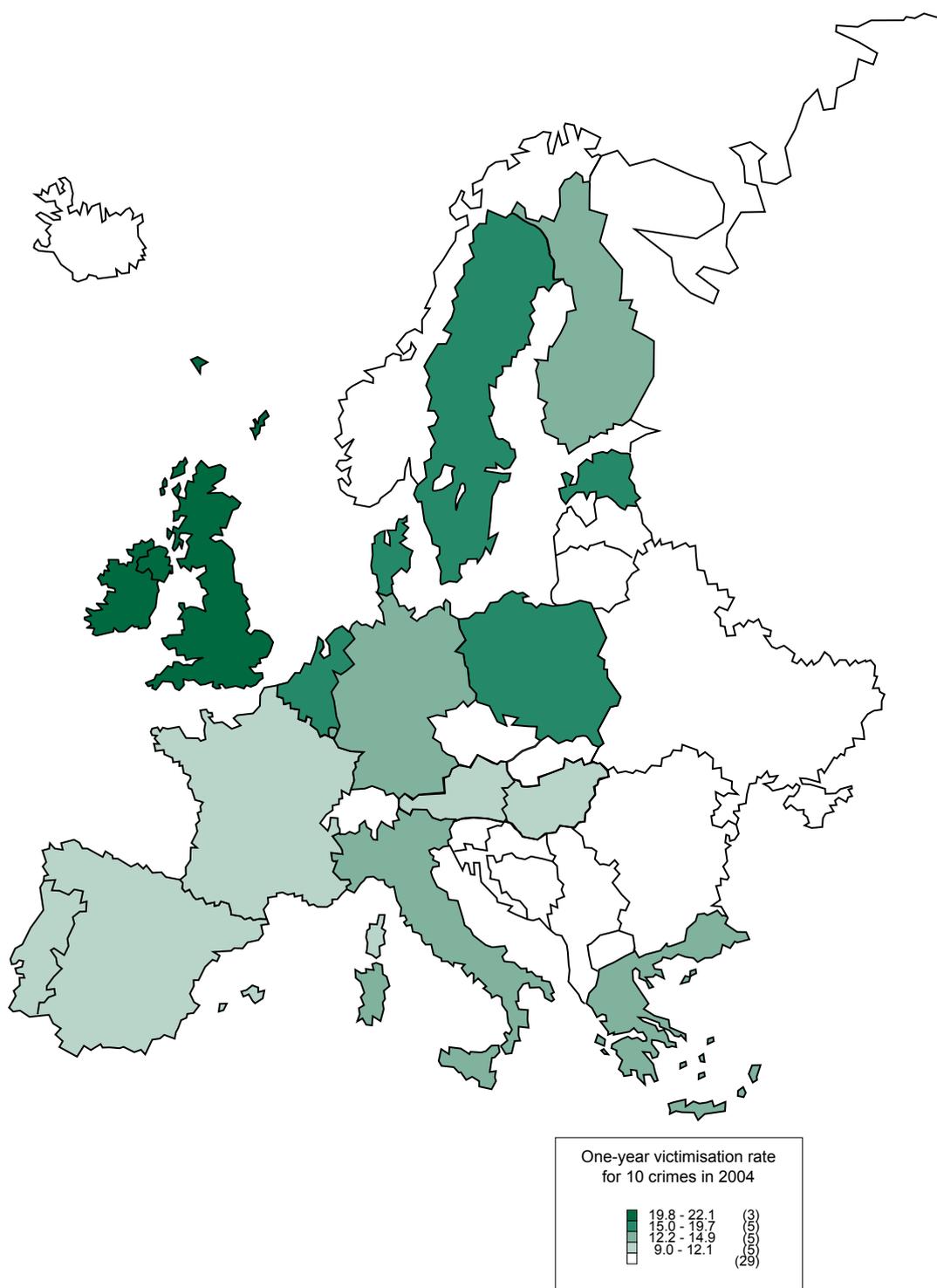
4 *The Burden of Crime in the EU*, p 2

Table 1: Prevalence victimisation rates for 10 common crimes in 2004 and results from earlier ICVS surveys



Data source: Jan van Dijk et al., 'The Burden of Crime in the EU', p. 19 (see full details at footnote 1)

Figure 1: Levels of crime across the Member States of the European Union, 2004



Data source: Jan van Dijk et al., 'The Burden of Crime in the EU', p. 20 (see full details at footnote 1)

15. The survey contained profiles of individual countries. That for the UK stated that:

Levels of crime have been declining in the United Kingdom since 1995 but not to the extent as in some other EU countries. The UK remains a high crime country in the EU context. Levels of crime, including violent crime were lower in Scotland and Northern Ireland than in the UK as a whole. The UK shows higher than average scores on all five crime indicators as well as on the three responses to crime

indicators. The UK stands out with the highest percentage of the public favouring imprisonment for burglars.⁵

16. It should be pointed out that the UK Government was severely critical of the conclusions drawn from this survey. Tony McNulty MP, Minister of State at the Home Office, argued that the study took no account of recent crime reduction measures in the UK. He stated that “The European Crime and Safety Survey echoes the results of our own British Crime Survey, which shows that crime and violent crime have fallen by over a third in the last 10 years. But the European survey is three years out of date and we have concerns about its quality and the comparisons.” He also commented that the report failed to recognise that burglary had fallen by 55% since 1997 in England and Wales.⁶

17. In a domestic UK context, data from the national survey of victimisation, the British Crime Survey, is supplemented by statistics for recorded crime. In the context of the EU, however, there is no equivalent body of EU-wide data on recorded crime recorded in a standardised way. The Home Office publishes an occasional digest of international crime statistics which makes use of national data from some EU countries. However, this is of limited usefulness because it appears only at long intervals (the most recent edition dates from 2003, covering the period 1997–2001), and because, as the Home Office itself cautions, its data is “the outcome of different legal and administrative systems and may also be derived from different statistical data collection processes”.⁷

Cross-border crime and terrorism

18. The type of crime where concerted action at EU level is most likely to be beneficial is organised crime operating on a cross-border basis. However, as in other areas of crime within the EU, hard statistical information is lacking. In December 2006, the European Parliament’s rapporteur on a proposed framework decision on the “fight against organised crime” posed the question, “How big is organised crime in Europe?”, and answered it as follows:

Nobody knows. There are no statistics. Each of the 25 European Union member states collects statistics about crime in its own different way. Their statistics are incompatible with each other so there is no overall picture.⁸

19. There is widespread recognition that a major effort to acquire relevant statistics on an EU-wide basis is needed. In 2003 the European Commission organised in Dublin what was described as “the first European Congress on “Tackling Organised Crime in Partnership”. The ‘Dublin Declaration’ produced by this congress called for the development of common “European crime statistics to help in the assessment of crime trends, benchmarking of policy effectiveness and to facilitate valid comparisons”.⁹

5 Ibid. p 92

6 www.news.bbc.co.uk, 5 February 2007; The Guardian, 6 February 2007

7 Gordon Barclay and Cynthia Tavares, *International comparisons of criminal justice statistics 2001* (Home Office, 2003), para 2

8 Bill Newton Dunn MEP, *Create a European FBI? A Police Force to Fight Cross-Border International Crime*, European Movement Policy Paper No. 6 (December 2006), p 4

9 www.tocpartnership.org/orgcrime2003

20. The European Commission has now put forward proposals along these lines, stating that :

The future EU crime statistics system should collect information from law enforcement agencies and also quantitative information based on citizen and business surveys, as well as measuring crime and victimisation in specific groups to aid decision-making in different policy areas. This crime statistics system will be developed in collaboration with Member States, using, as needed, the Community Statistical Programme. Further development, testing and dissemination of a methodology for studies of economic sectors' vulnerability to organised crime are also needed. On this basis the Commission intends to produce an annual or biennial EU crime report in the future.¹⁰

21. Although not based on systematic data collection, the annual reports of Europol give the best available indications of trends in cross-border organised crime. With effect from 2006, Europol's annual Organised Crime Report was replaced by an Organised Crime Threat Assessment (OCTA), intended to be a more "forward-looking document [which] will help decision-makers identify strategic priority areas in the fight against serious and organised crime".¹¹

22. OCTA provides a qualitative analysis of the threat to EU countries from organised crime (OC). It argues that "the main threatening aspects of OC groups are, first, the overwhelming obstacles in dismantling them because of their international dimension or influence, and second, their level of infiltration in society and economy".¹²

23. The report identifies four main categories of organised crime groups:

- principally territorially based, indigenous OC groups, with extensive transnational activities; especially such with possibilities to shield their leadership and assets even inside the EU;
- mainly ethnically homogeneous groups with their leadership and main assets abroad;
- dynamic networks of perpetrators, whose organisational setup is less viable to attack from a law enforcement perspective than their communications and finances; and
- OC groups based on strictly defined organisational principles without an ethnic component, coupled with a large international presence.¹³

24. OCTA observes that there are particular regional patterns of cross-border crime:

- South West Europe: illegal immigration, cocaine and cannabis trafficking for further distribution in the EU

10 Commission Communication, 2 June 2005, *Developing a strategic concept on tackling organised crime* (COM (2005) 232 final), para 8. We are not aware that any such report has yet been published.

11 Europol, *EU Organised Crime Threat Assessment 2006*, p 4

12 *Ibid.*, p 5

13 *Ibid.*, p 5

- South East Europe: heroin trafficking, illegal immigration and trafficking in human beings, aimed at the whole of the EU;
- North East Europe: highly taxed products aimed at the Nordic countries and beyond;
- particular transportation hubs, such as harbours and airports in the ‘Atlantic region’: movement of various commodities to and from the EU, especially drugs; and
- the UK and Ireland are “linked to the criminal hub which seems to have developed in the Netherlands, Belgium, western Germany, Luxembourg and northern France”.¹⁴

25. With regard to types of crime, OCTA notes that “the criminal situation within the EU is constantly evolving” but that in recent years there have been no “sudden and unexpected changes”. Methods used by organised crime groups to achieve their ends include violence, corruption, falsified documents, and exploitation of the opportunities provided by decreased border controls. Drug trafficking is the most frequent principal activity of such groups, followed by trafficking in human beings, primarily for sexual exploitation, and facilitation of illegal immigration (both of which require complex organisation, and are linked to crimes such as document counterfeiting). Fraud comprises a vast array of activities, including credit-card and internet fraud. Money laundering plays a pivotal role in organised crime, while counterfeiting of commodities and currency is increasing.¹⁵

26. In addition to OCTA, Europol also produces an annual EU Terrorism Situation and Trend Report. The 2007 report, published in March 2007, stated that 498 terrorist attacks had been carried out in the EU in 2006. The vast majority of these resulted in limited material damage and were not intended to kill. About nine-tenths of the attacks were carried out by separatist terrorists, particularly in the Basque regions and Corsica. However, the report observed that “the failed attack in Germany and the foiled London plot demonstrate that Islamist terrorists ... aim at mass casualties”. A total of 706 individuals suspected of terrorism offences were arrested in 15 Member States in 2006; about half of these were related to Islamist terrorism. France, Spain and the UK were the countries most severely affected by terrorism, on the basis of number of terrorist attacks and arrested suspects, as well as the average penalties handed out by the courts.¹⁶

Legal migration

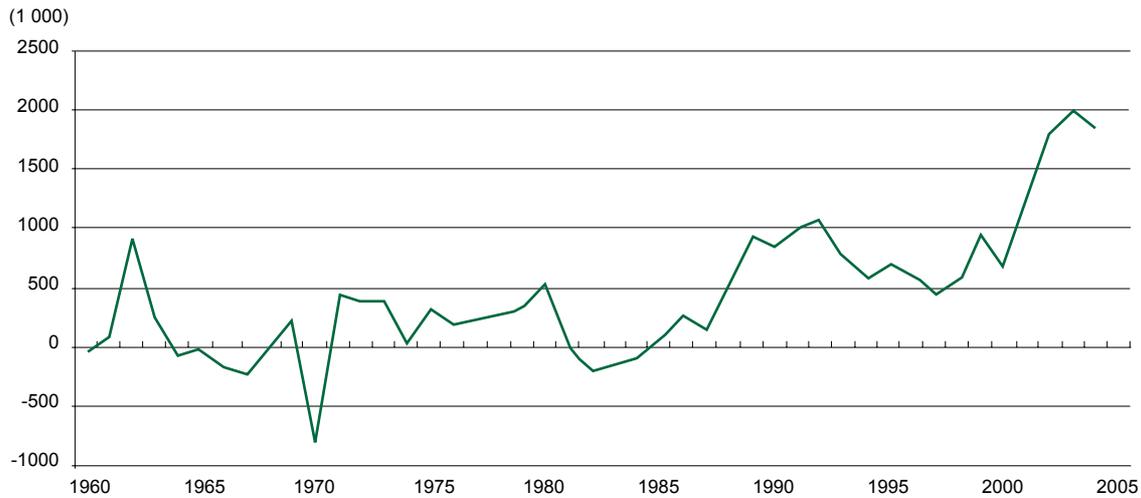
27. There has been a steep increase in the number of migrants coming into the EU in recent years. Figure 2 below shows that net migration in the EU-25 increased from 590,000 persons in 1994 to 1.85 million in 2004.¹⁷ These figures are under-estimates of the true extent of migration flows between countries, as they do not include clandestine migration (such as illegal immigrants or human trafficking).

14 Ibid., pp 6, 7–8

15 Ibid., pp 8–9

16 Europol, *EU Terrorism Situation and Trend Report 2007* (March 2007), pp 3–4

17 Source: *Eurostat Yearbook 2006–07*, p 73

Figure 2: Net migration into EU-25

Data source: Eurostat Yearbook 2006–07, p. 75

28. The most important migration flows from third countries into the EU in 2004 (the most recent year for which figures are available) came from Romania,¹⁸ Morocco, Bulgaria,¹⁹ Turkey, Ukraine and the Russian Federation. Inflows have become more diversified, with increasing numbers of immigrants from new sources in Central and Eastern Europe, Asia (especially China) and Central and Latin America (especially Ecuador).²⁰

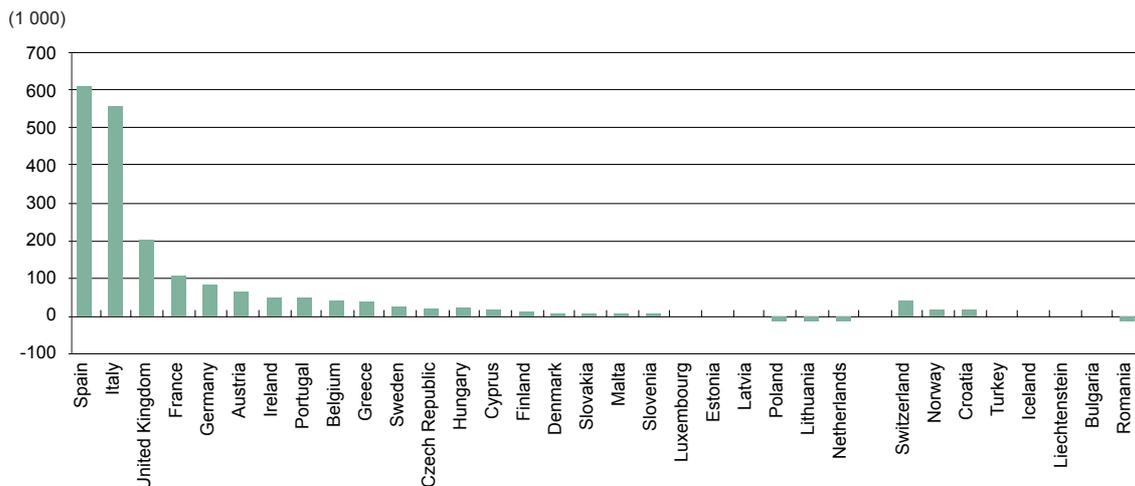
29. As shown in Figure 3 overleaf, almost all EU states faced net inward migration in 2004, with Spain and Italy experiencing the highest levels, with 610,100 and 558,300 respectively.²¹ Together these two countries account for almost two-thirds of the EU-25 total. The UK had the third highest level of net inward migration, with 202,000, followed by other western European states: France, Germany, Austria, Ireland and Portugal. The only EU states which recorded net outward migration in 2004 were the Baltic states, Poland and the Netherlands.

18 On 1 January 2007, Romania and Bulgaria acceded to EU membership and are thus no longer third countries.

19 See previous footnote

20 European Commission Communication, *The Global Approach to Migration One Year On: Towards a Comprehensive European Migration Policy*, p 2

21 Eurostat Yearbook 2006–07, p 77

Figure 3: Net Migration into the EU-25, 2004

(1) EU-25, 1.85 million immigrants in 2004; EU-15, 1.81 immigrants in 2004.

Data source: Eurostat Yearbook 2006–07, p. 77

30. The percentage of non-UK nationals living in the UK is lower than the EU average. The total number of non-nationals living in the EU in 2004 was around 25 million. The EU average percentage of non-nationals was 7.3%. The equivalent figure in the UK was 4.7%. The citizenship of the largest non-national group in the UK was Irish. Thirteen countries had a higher percentage of non-national residents than the UK, and 11 had a lower percentage. The majority of non-nationals, EU-wide, are from non-EU countries. In 2004, Luxembourg had the greatest proportion of non-nationals (38.6%), followed by Latvia (22.2%) and Estonia (20.0%). In no other Member State was the proportion of non-nationals more than 10%. In twelve Member States non-nationals amounted to less than 5% of the population.²²

Illegal migration

31. Illegal immigration is a major phenomenon across a range of EU countries, although for obvious reasons there is little reliable data on the numbers of illegal migrants. The term “illegal immigration” itself encompasses several different categories of person:

- a) third-country nationals who enter the territory of a Member State illegally by land, sea and air, including airport transit zones, often with the aid of forged documents, or with the help of organised criminal networks
- b) persons who enter legally with a valid visa or under a visa-free regime, but who ‘overstay’ or change the purpose of stay without the approval of the authorities
- c) ‘failed’ asylum seekers who are not removed after a final negative decision.

32. The European Commission stated in 2006 that:

Estimates of illegal migration flows can only be derived from relevant indicators, such as the numbers of refused entries, of illegal immigrants apprehended at the

border or in a Member State, of applications for national regularisation procedures and of removals. A further useful indicator is given by the considerable number of those who enter legally and then “overstay”. From these indicators, estimates of annual inflows of illegal immigration into the EU-25 are thought to reach over six figures.²³

33. The original Commission study from which this estimate was taken, published in 2004, added that “more precise figures cannot be considered reliable. Moreover, such estimates do not add to the understanding of the complexities of illegal migration and are open to misinterpretation. The scale of illegal migration is nevertheless considered to be significant, and the reduction of illegal migration flows is a political priority at both national and EU level.”²⁴

34. The Commission has commented that “devising a proper European Union asylum and immigration policy requires having reliable data on the scale of migration flows, their origins and the patterns of migration in and out of the European Union”. Under the Hague Programme, an Action Plan for the collection and analysis of EU statistics in the field of migration and asylum is in process of implementation. In September 2005 the Commission proposed a Regulation on statistics on migration which would specify “the data to be collected, the timetables to be applied, the definitions and the quality standards”. The data in question would include those on “prevention of illegal entry and stay (apprehensions and refusals at the border)”.²⁵

35. The Commission has begun to produce annual data on enforcement measures against illegal migration: refusals at the frontier, apprehensions of illegally present non-EU citizens, and returns. The statistics are collected on a monthly basis from Ministries of Interior and Justice and related national agencies. However, the Commission notes that “an ongoing concern is the poor supply of these data by some Member States that reduces the usefulness of the statistics and restricts the extent to which comparisons can be made between countries and over time; the Commission will continue to raise this issue with data suppliers”.²⁶

36. The International Organisation for Migration (IoM) in its 2005 *World Migration Report* stated that, according to the highest estimates, there were about three million irregular migrants in Europe in 1998, compared with under two million in 1991. More than half of these appeared to be living in France, Italy and Spain, these ‘Latin’ European countries being the preferred gateway for irregular migrants from the Maghreb, as well as from Sub-Saharan Africa and Asia.²⁷

37. Frontex, the European Borders Agency, states that the EU Member States and Schengen-associated countries noted a decreasing trend of illegal entries at their external

23 European Commission, Memo/06/296, *EU policy to fight illegal immigration* (July 2006), para 5

24 Commission Communication, Study on the links between legal and illegal migration (COM (2004) 412 final), p 11

25 European Commission website: ec.europa.eu/justice_home/fsj/asylum/statistics

26 Commission Staff Working Paper, *Annual report on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders, and the return of illegal residents* (SEC (2004) 239) (October 2004), p 17

27 IoM World Migration Report 2005, p 78

EU/Schengen borders in 2006. Based on operational experience, Frontex suggests there is significant regional variation in the nature and scale of illegal immigration into EU states:

- Contrary to the general decreasing trend, in 2006 detections and apprehensions increased at the Spanish external borders and in Greece, mainly at the Turkish land border.
- As in previous years, detection figures at the external Schengen land borders (mainly Austrian and German external Schengen land borders) were significantly higher than those at the EU external land borders.
- The main nationalities detected at the eastern external land borders in 2006 were Ukrainians, Romanians, Bulgarians, Serbians, Albanians, Moldovans and Indians.²⁸
- The main border sections in regards to detection, apprehension and refusal of entry of illegal migrants are: the land border between Slovakia and Ukraine, between Slovenia and Croatia, between Greece and Albania as well as between Greece and Turkey. The Austrian external Schengen borders, the Spanish towns of Ceuta and Melilla, the Canary Islands, Sicily and the island of Lampedusa, the United Kingdom air and sea borders and the Greek-Turkish sea border are also sites of significant illegal immigration.
- Frontex noticed an increase of illegal entries/refusals at the air borders; the airports of Paris Charles de Gaulle, London Heathrow, Frankfurt, Amsterdam, Madrid and Milan remain the focal points of illegal immigration via air. The main nationalities detected at the air borders are South and Central Americans, Chinese and Nigerians.
- France and other Member States reported being indirectly affected by illegal immigration transiting from Africa to Spain and Italy. Due to the current legislation in place in some Member States, a significant number of migrants are released from detention after 30/40 days and then some of them continue their journey in the area of free movement of persons.
- The top nationality of detected illegal immigrants at the southern EU maritime borders were Moroccans (circa 70% of all detections at the Italian sea borders) followed by Sub Saharan nationals (mainly to Canary Islands), Eritrean nationals and Egyptians (mainly to Italy and Malta).²⁹

28 See footnote 18 above

29 Frontex *Annual Report 2006*, p7

JHA Issues in the EU—The Institutional Landscape

The European Union institutions

38. Under European Community law (the so-called ‘first pillar’—see paragraphs 41 and 44–45 below for an explanation of the pillar structure), the **Council of Ministers** (which meets in ‘sectoral’ policy formations—e.g. the Justice and Home Affairs Council, the Economic and Financial Affairs Council, etc.) is the voice of Member States, which are represented by the competent Ministers. European Community law is in principle adopted by the Council of Ministers and the European Parliament as co-legislators. In the majority of first pillar matters the Council decides by qualified majority voting, whereby each country is allocated a number of votes in accordance with its population. The **European Parliament** consists of directly elected representatives from each Member State (the MEPs). It is the only democratically elected EU institution, and its co-decision role means that it may ultimately veto legislation endorsed by the Council. Proposals for Community law are tabled by the European Commission. The **Commission** has in principle the sole right of initiative as regards tabling EC law proposals, and is the ‘guardian of the Treaties’, as it has the task to monitor and enforce the application and implementation of Community law. The Commission has the power to institute in this context infringement proceedings before the **Court of Justice** in Luxembourg, in cases where it considers that a Member State has not implemented or has not implemented properly Community law. The Court also has jurisdiction to rule on the validity and legality of Community law, as well as to give preliminary rulings on questions of interpretation of Community law sent in by national courts. Finally, an important impetus to the adoption of EC law is provided by the **European Council**, which consists of the heads of state or government of Member States. The European Council’s main role is to adopt political guidelines as to the future direction of EC and EU law—which can then be transformed into legislation by the other institutions (the Tampere Conclusions and the Hague Programme are prime examples of European Council action in Justice and Home Affairs).

Treaty arrangements for Justice and Home Affairs

39. Systematic co-operation at a European level in the field of Justice and Home Affairs was introduced by the provisions of the Treaty on European Union (the Maastricht Treaty) of 1992.

40. The key decisions as to how JHA issues would be treated arose from the process of negotiating that treaty. Some Member States proposed that the competence of the European Community (as it then was) be extended into the areas of foreign policy, security and defence policy, asylum and immigration policy, criminal co-operation, and judicial co-operation. However, other Member States opposed this proposal on the grounds that it would be an unacceptable encroachment upon national sovereignty and that such sensitive matters were better handled inter-governmentally. The eventual compromise, which is still in force in modified form, was that the additional matters would be dealt with at European level, not by the traditional European Community method involving qualified majority voting, but by a new ‘European Union method’ whereby unanimous agreement of all Member States would be required.

41. The ensuing situation was summed up using an architectural metaphor. The European Union as established by the Maastricht Treaty was represented as the pediment of a temple resting on three pillars. The first pillar consisted of matters subject to the traditional 'Community method' set out in the original Treaty of Rome. The second and third pillars dealt with matters to be decided inter-governmentally: the second pillar consisting of foreign policy, security and defence issues, and the third pillar of Justice and Home Affairs.

42. The handling of JHA at EU level has subsequently been developed through the provisions of the Treaties of Amsterdam (signed in 1997, came into force 1999) and Nice (signed 2001, came into force 2003). Most important among these changes has been the transfer of policy on asylum, migration and borders, and judicial co-operation in civil matters to the first pillar, effected by the Amsterdam Treaty. As a consequence, the third pillar has been renamed Police and Judicial Co-operation in Criminal Matters (PJCC). The term Justice and Home Affairs is still used to encompass both the third pillar and the areas transferred to the first pillar.

43. As the situation currently stands,³⁰

- a) **illegal migration, asylum and borders** (including the relevant part of the Schengen acquis) and judicial co-operation in civil matters **are subject to the first-pillar, 'Community' method of decision-making** (in Title IV of the EC Treaty) **using qualified majority voting** in the Council of Ministers, and involving co-decision with the European Parliament;
- b) **Policing and judicial co-operation** in criminal matters, including drugs, trafficking, terrorism, and serious and organised crime, **are subject to the third-pillar, 'Union' or 'inter-governmental' method requiring unanimity** of Member States in the Council of Ministers, and with the European Parliament having a consultative role only; and
- c) something of an anomaly: **economic migration**, though in the first pillar under Title IV, remains subject to the requirement for unanimity, with mere consultation of the European Parliament.

What the pillar structure means

44. As we have seen, under the first pillar legislation is decided by qualified majority voting (QMV). Each Member State has a fixed number of votes. The number allocated to each country is roughly determined by its population, but progressively weighted in favour of smaller countries. To pass a vote by QMV the proposal must be supported by about 74% of the votes, it must be backed by a majority of Member States, and the countries supporting the proposal must represent at least 62% of the total EU population. The European Parliament has a co-decision role, meaning that it passes legislation jointly with the Council of the European Union. Both institutions must agree on an identical text before it can be adopted. The European Court of Justice (ECJ) has jurisdiction over Title IV measures, but not all national courts can send requests for preliminary rulings to

³⁰ Following the move in the Amsterdam Treaty of migration, asylum and border issues from the third to the first pillar (in Title IV of the EC Treaty), the integration of the Schengen acquis into EC/EU law and subsequent changes in Title IV decision-making.

Luxembourg (where the court meets)—it is only the highest courts of the land which have the power to do so. The European Commission also has formal powers to bring infringement proceedings against any Member State which fails to implement a Council Directive.

45. Under the third pillar legislation is decided by unanimity. Every Member State must agree to the proposal, and if one does not it effectively vetoes the proposal and it cannot be agreed. The European Parliament is afforded a consultative role—the Council of the European Union is obliged to consult the Parliament, but is not bound by its opinion. Member States have the power, along with the European Commission, to table proposals for legislation in the third pillar. The European Court of Justice has limited jurisdiction, and the Commission no powers to tackle non-implementation. This last means that in practice Member States can sign up to measures and then fail to transpose them into national legislation, without facing the threat of sanctions by the Court of Justice.

The special position of the UK

46. The UK has a special position regarding its participation in first-pillar JHA measures, in particular those related to migration and border controls. As noted above, the Amsterdam Treaty ‘communitarised’ these matters and incorporated the Schengen acquis in the EC/EU framework. However, the UK does not participate fully in Schengen—it does take part in the majority of measures on police co-operation, but not in the measures on border controls. Concerns regarding loss of sovereignty have led to the UK not abolishing its border controls with the other EU Member States, and being sceptical about the move of these matters to the ‘Community method’.

47. The UK’s special position was embodied in two Protocols attached to the Amsterdam Treaty. According to Protocol 4, **the UK is exempted from measures adopted under Title IV of the EC Treaty, but has a right to ‘opt in’ to such measures.** (Sometimes, rather confusingly, this is referred to as a right to ‘opt out’). The UK has three months from the Commission’s tabling of a proposal to notify other Member States of its intention to take part (which would in practice mean that the UK would participate in the negotiations of the measure). Even if the UK decides not to participate at this stage, it does have the option of joining in at a later stage (though in practice this means that it would have to comply with a *fait accompli*, and having done so it would have no further right to be exempted from the measures). Ireland has a similar right of exemption and ‘opt in’.

48. The particular situation of the UK with regard to Schengen is addressed by Protocol 2. According to that Protocol, full Schengen members may implement the Schengen acquis via Community/Union law. **The UK may request to be bound by parts of the Schengen acquis in which it does not participate—however, such participation must be approved unanimously by the full Schengen members.** This position has generated a degree of controversy with regard to the ability of the UK to participate in subsequent ‘Schengen-building’ measures, such as the Regulation establishing Frontex, the European Borders Agency (for which, see paragraphs 247 to 262 below).

Alleged difficulties with the pillars

49. It has been argued that the split of Justice and Home Affairs between two different pillars throws up the following difficulties:

- a) lack of efficiency (the difficulty of taking decisions requiring the unanimous agreement of 27 countries);
- b) poor quality of proposals (which are arguably watered down to accommodate individual Member States' requirements, resulting in the setting of very low common standards);
- c) the democratic deficit (with the directly elected European Parliament having a very limited say in sensitive matters impacting upon fundamental rights);
- d) limited judicial protection (with limits imposed by the Treaties on the jurisdiction of the Court of Justice);
- e) the creation of a Europe 'à la carte' (with countries picking and choosing which parts of EU law they will participate in); and
- f) an artificial divide between closely interconnected subjects, such as borders and policing. It is claimed that this can cause operational difficulties, such as police and border guards who conduct joint operations but have different mandates and powers.

50. **A key question for our inquiry has been whether these alleged difficulties with the current arrangements are significantly affecting the ability of the UK and the EU to tackle crime and manage migration. A subsidiary question is whether failure to tackle these difficulties is driving, and will drive, some EU Member States to make their own arrangements for co-operation outside the formal structures of the Union.** These questions will be addressed more fully under section 4 of this report.

51. Whilst there are undoubtedly difficulties with the current pillar arrangements, there are also strong arguments for retaining a high degree of national control over Justice and Home Affairs. JHA issues are very closely tied up with national sovereignty, and each state's ability to determine its own laws and manage its justice system. Quite different justice systems have grown organically out of national cultures and their specific conditions. Perhaps the most obvious example is the contrast between the common-law and adversarial system in England, Wales and Ireland compared to the constitutional and inquisitorial systems in most of Continental Europe.

52. This issue of national sovereignty continues to be at the heart of discussions about moving the entirety of Justice and Home Affairs from the third pillar to the first, which would be likely to involve relinquishing some national control over these sensitive areas. However, advocates of such a transfer would argue that the cross-border challenges facing Europe are increasing and the response to these challenges must be reappraised on a regular basis.

What difference would the Constitutional Treaty have made?

53. The Constitutional Treaty was signed by all the Member States in 2004, and was due to enter into force on 1 November 2006. The Treaty would have replaced the existing overlapping treaty arrangements governing the EU, with the aim of streamlining decision-making. It would also have included in its second part the EU Charter of Fundamental Rights. Ratification of the Treaty was halted by 'no' verdicts in referenda in France and the Netherlands in 2005. As at May 2007, 16 out of 27 Member States had ratified the Treaty, and a further two had completed parliamentary procedures necessary for ratification.

54. The Treaty proposed a number of significant changes to Justice and Home Affairs. Most importantly, it would have abolished the pillar structure and granted the European Union legal personality (currently the European Community under the first pillar has legal personality, but not the Union under the second and third pillars). The main changes resulting from abolition of the pillar structure under the Constitutional Treaty relating to Justice and Home Affairs would have been:

- a) Direct effect of EU legislation. Under the principle of direct effect of Community law, individuals can evoke rights conferred on them by Community law directly in national courts if certain conditions are met. Currently this happens under the first pillar, but not under the third pillar. Under the latter the absence of direct effect means that individuals affected by Framework Decisions which have not been properly implemented (or not implemented at all) by Member States cannot seek redress in the national courts of their Member State. With abolition of the pillars, individuals could invoke direct effect of third pillar Framework Decisions in national laws.
- b) Compliance with EU law. Under the third pillar the Commission does not have the power to bring infringement proceedings against Member States which have signed up to Framework Decisions but have failed to implement them. Abolishing the pillar structure would give the Commission power to bring infringement proceedings in the European Court of Justice, as is currently the case under the first pillar.
- c) Role of the European Court of Justice. The Court would gain (with few exceptions) full jurisdiction over third pillar matters. National courts would be able to send requests for a preliminary reference to Luxembourg, without any restrictions by Member States.
- d) Decision-making. Under the Treaty decision-making would be primarily by the 'Community method' currently governing only the first pillar. This would include qualified majority voting, and co-decision between the Council and the European Parliament. For legislation relating to criminal law and procedure the move to QMV would be offset by an 'emergency brake' provision: if a Member State considered that a proposal for EU law in this context would affect fundamental principles of its criminal justice system, it could request the draft legislation to be referred to the European Council (Heads of State). Negotiations would be suspended and after discussion, the European Council could either refer the draft back to the Council (and negotiations would begin again) or request the Commission (or the Member States tabling the proposal) to submit a new draft.
- e) The right of initiative. Currently any Member States can table proposals in the third pillar. Under the Treaty, the Commission would have sole right of initiative in all areas

except policing and judicial co-operation. In this area Member States would retain some right of initiative, but a quarter of Member States (7 out of 27) would be required.

The current picture

Justice and Home Affairs spans national borders

55. Terrorism, crime and migration are trans-national challenges requiring trans-national responses. Our summary of trends in cross-border crime in paragraphs 18 to 26 above indicates that, though hard statistical data is lacking, such crime is undoubtedly a major problem for Member States. Increased movement of people, goods and money, the abolition of internal borders between the majority of EU Member States, the creation of an internal market without internal frontiers and rapid developments in technology mean that co-operation between EU countries is necessary to fight terrorism and crime, manage migration and improve access to and equality of justice.

European priorities—the Hague Programme

56. The first comprehensive agenda for Justice and Home Affairs at EU level was set by the Tampere Summit in 1999. The summit set the goal of constructing an ‘Area of Freedom, Security and Justice’ across the Union, and generated the ‘Tampere Programme’ for Justice and Home Affairs, a five-year agenda which came to an end in 2004.

57. Following discussions in 2004 the European Council, during the Dutch Presidency, adopted a new programme for the years 2005–10, known as the ‘Hague Programme’. This set out a number of measures in the fields of asylum, migration and borders, and policing and judicial co-operation. The programme placed a particular emphasis on immigration and asylum, counter-terrorism, the sharing of police information, and making greater use of Europol, the EU police office, and Eurojust, the EU judicial co-operation body.

58. The Hague Programme and its provisions anticipated the coming into force of the Constitutional Treaty in 2006, and many of its measures were linked to the Treaty provisions. The failure of the Treaty has posed some difficulties for the Programme’s implementation. In July 2006, as part of its mid-term review of the Hague Programme, the Commission responded to this situation by producing a Communication entitled ‘Implementing the Hague Programme—the way forward’.³¹ This summarised progress so far against the programme, and laid out key priority areas for the next few years. There is agreement amongst Member States that the implications for the Hague Programme of the failure of the Treaty mean that a reprioritisation of Justice and Home Affairs priorities for the next few years is needed. Such reprioritisation is likely to focus on a few key objectives.

Approaches to European co-operation

59. In the last decade there has been a lively debate over the right principle on which to base JHA co-operation. Three possible approaches emerged: harmonisation, mutual recognition and practical co-operation. The relatively pragmatic Hague Programme draws

31 COM (2006) 331 final

heavily on both practical co-operation and mutual recognition, both of which are supported by the UK Government as the basis for future co-operation.

Harmonisation

60. During most of the 1990s the dominant thinking with regard to European integration in criminal matters centred on the issue of harmonisation of criminal offences and sanctions. A number of offences were harmonised, including trans-national and organised forms of criminality (money laundering, organised crime, corruption, drug trafficking).

Mutual recognition

61. ‘Mutual recognition’ provides a possible alternative to the formal harmonisation of standards across the EU. The principle provides that the courts of one Member State will recognise and execute judgements of a court in another Member State, with the minimum of formality and on the basis of mutual trust. A number of Member States, including the UK, have welcomed the principle of mutual recognition. However, its practical application—in light of the very different criminal justice systems existing across the EU—has raised a number of concerns. For instance, in relation to a mutual recognition instrument such as the European Arrest Warrant, objections have been voiced regarding the abolition of dual criminality (that is, the requirement that a crime be recognised as such in both countries concerned) and the protection of the rights of the defendant once surrendered.

Practical co-operation

62. Although there is no formal definition of the approach, practical co-operation has become a key concept in the JHA field. It places an emphasis on working together at operational level, often through informal or bilateral arrangements, as opposed to seeking common policies or legislation across the EU.

Beyond the Hague Programme

63. The current German Presidency has made clear its intention to open up debate about the future of the European Union. It promulgated a statement, the so-called ‘Berlin Declaration’, reaffirming the core principles of the Union. This was signed by EU leaders on 27 March 2007. It called for institutional changes—in effect, adoption of the Constitutional Treaty either in its original or a modified form—to be in place before the European Parliament elections in mid-2009. Recent press reports have emphasised that the agenda for the forthcoming Justice and Home Affairs Council, to be held on 12–13 June 2007, is more than likely to be dominated by negotiations on institutional changes, including big questions about changes to third pillar Justice and Home Affairs procedures.³²

32 For example: Guardian leader article, 10 May 2007; Guardian article *Brussels braced for change as new reformist joining the EU dream team*, 7 May 2007

64. The Hague Programme comes to an end in 2010 and discussion about its successor programme will intensify over the coming months. At the Justice and Home Affairs Council, in February 2007, ministers agreed to set up a small informal working group comprising representatives of the Commission and of Member States which will hold the presidency in the near future. This will be charged with considering ideas for the development of justice and home affairs from 2010 onwards. The working group will report to the Council in 2008. The UK Government has told us that informal discussions are already taking place at senior levels.³³

A timely inquiry

65. The EU Justice and Home Affairs agenda is arguably at the most difficult juncture since its inception in 1999. The Hague Programme faces uncertainty thrown up by the failure of the Constitutional Treaty and a mid-term review, enlargement beyond the current 27 Member States will require a change in voting arrangements (the current Nice Treaty only provides for voting arrangements for up to 27 Member States), increasing disquiet is being expressed with the current institutional arrangements in the third pillar and a wider debate is opening up over the future of the European Union.

66. The nature of the forthcoming agenda for Justice and Home Affairs will necessarily be influenced by the outcome of the wider debate on the future of the European Union's institutional arrangements. However, the nature of some of the key challenges over the next decade is already clear. They will include:

- a) Structural challenges resulting from the current institutional arrangements. Pressures resulting from the current decision-making structures look set to continue, with frustration among some Member States about the continuing requirement (in the absence of the Constitutional Treaty) of unanimity on 'third pillar' issues. If they are not addressed in a structured way, it looks increasingly likely that those states which are keen to increase third pillar co-operation will employ methods outside the formal EU structure.
- b) Philosophical approaches to co-operation. The Tampere Summit in 1999 introduced the principle of mutual recognition as a cornerstone of police and judicial co-operation in criminal matters and an alternative to harmonisation of substantive criminal law. A number of European policy-makers have expressed the opinion that mutual recognition is reaching its limits as a fundamental principle of co-operation. Some would like to see more harmonisation between the law and policy of Member States. Others would advocate practical co-operation measures alone.
- c) Practical challenges of crime, migration and terrorism. Undoubtedly terrorists and organised criminals will continue to become ever more sophisticated, and illegal migrants continue to find new ways of crossing borders. The Union must find new ways to respond to these fluid challenges, bearing always in mind the principles of proportionality and respecting rights as well as enforcing security.

- d) Tensions between the state and the individual. A rise in the threat from terrorism and organised crime has highlighted the difficulty in ensuring adequate security provisions at the European and national levels whilst preserving fundamental rights and freedoms of individuals. The Union must aim to strike a balance which places weight on both sides of the argument.

3 The effectiveness of European action in particular fields

Policing

Police co-operation across the EU

67. There are a large number of different national and European bodies operating in the policing field. At the UK level the Serious Organised Crime Agency (SOCA) and the Association of Chief Police Officers (ACPO) are key players, and individual forces have a number of localised agreements with police organisations in other EU Member States. At the European level the major organisation is the European Police Office known as 'Europol'. Europol was established in 1995 by the Europol Convention, which entered into force in 1999, with the objective "to improve the effectiveness and co-operation of the competent authorities in the Member States in preventing and combating all forms of serious international crime". It exists to aid national policing agencies to co-operate one with another in tackling cross-border crime. There are also a number of other organisations which facilitate closer informal co-operation, including the European Police Chiefs Task Force and the European Police College (CEPOL). Outside the EU there is a further layer in the form of international organisations such as Interpol.

68. Close co-operation between law enforcement agencies across the European Union is crucial to the UK and EU ability to fight crime effectively. Liaison between UK police and their EU counterparts is carried out by SOCA in regard to serious organised crime, but there is no equivalent central agency to carry out a similar role in regard to other forms of crime. The gap is partly filled by bilateral contacts between police forces and between other policing organisations on a more or less *ad hoc* operational basis, where the need for co-operation is specific or specialist. In other cases the nature of the problem is pan-European, and it may be more effective to have an EU-wide agreement or legal framework in place to facilitate co-operation.

69. In the context of our inquiry, which aims to be a 'snapshot' of current EU developments in the whole field of JHA, we have not had the opportunity to investigate European police co-operation in depth. Rather we have isolated a number of topics of current concern, particularly where there are claimed to be deficiencies in current arrangements.

UK input into co-operation: is SOCA sufficient?

70. We explored with our witnesses the question of whether the proliferation of police organisations had led to unnecessary duplication of functions, and whether there were gaps in co-ordination. ACPO told us that SOCA guards against duplication in the field of serious organised crime by providing a gateway function for UK police to European co-operation, co-ordinating access to Schengen, Europol and Interpol: “SOCA provides a one-stop facility in respect of serious organised crime, a bespoke agency”.³⁴ SOCA also represents the UK on a number of police working groups in Brussels.

71. We were given an example of how SOCA can co-ordinate police co-operation in relation to serious organised crime:

One of the operations we did recently was an operation called Flamage, which is an ongoing operation involving the smuggling of Class A drugs through Europe into the UK. So far we have facilitated numerous outbound Article 40 requests for international surveillance of the main targets in Holland and Spain. So far intelligence we have got from the surveillance has led to the seizure of 50 kilos of cocaine and arrests in the United Kingdom, and it is an ongoing operation which we are still working on with Spanish and Dutch colleagues.³⁵

72. Whilst SOCA provides mechanisms for liaison in relation to serious organised crime, it has no oversight of day to day contact on more minor issues between UK police and their European partners. ACPO raised this as a problem: “we would be in a stronger position if we had a single body in the UK that dealt with [police co-operation on] the non-serious organised crime side”.³⁶

73. We asked ACPO to give an example of the kind of crime which would not be covered by SOCA in its co-ordinating role. In response Chief Constable Paul Kernaghan told us:

SOCA does not have a role, for instance, in respect of murder, or in respect of a single paedophile etc. That is incredibly important information which is exchanged between all the police forces of the European Union. There is lots of serious crime which is not serious *organised* crime. It is not the *raison d'être* but it is what I would call day-to-day bread and butter policing which engages all 52 territorial forces of the UK.³⁷

74. Bill Hughes, Director-General of SOCA, agreed that although ACPO and SOCA do their best to liaise in a pragmatic way about serious but non-organised crime, nonetheless this was not within SOCA’s remit, and there was a deficiency in liaison at this level.³⁸ ACPO pointed out that this arises from the devolved nature of UK policing, with no national police force: Chief Constable Paul Kernaghan said that “we lack a central police body, a core of staff, and that does cause problems”. Mr Kernaghan also said that, to the

34 Q 115

35 Q 119

36 Q 115

37 Q 116

38 Q 116

best of his knowledge, with one exception, other Member States either had a national police force, or else one designated to take the national lead on particular issues. He gave the example of The Netherlands which, although devolved, has “one national police agency which literally deals with any function that a territorial force neither wishes to or is not resourced to”.³⁹

75. We raised with the Parliamentary Under-Secretary at the Home Office, Joan Ryan MP, whether the Government had any plans to establish a central policing body for exchange of information on more minor criminality. Ms Ryan replied that she was not aware of the issue, but would send further comments in writing.⁴⁰

76. On 27 February, Ms Ryan wrote to us in the following terms:

The possibility of a central UK police body to deal with EU functions and issues

The Government is aware that this issue was raised by members of the ACPO and SOCA when they gave evidence to your Committee on 9 January. There is already good co-operation between UK police forces and counterparts in the EU, in part facilitated by ACPO, liaison officer networks and Europol, but it is true that the structures in place at EU level tend to concentrate on supporting co-operation in tackling organised crime because this has been identified as the EU-level priority. However, the Government takes seriously the views expressed by ACPO and SOCA and is committed to improving police co-operation with other Member States, whether it is serious or not. We will therefore consider jointly with ACPO and SOCA what improvements could be made to current arrangements, including at a planned Law Enforcement Forum in April.⁴¹

77. We welcome the Government’s assurance that it will give consideration to setting up some central mechanism for co-ordinating liaison between UK police and their counterparts in other EU states on crime other than serious organised crime. It is clear from the comments made to us by police representatives that the absence of such a mechanism causes difficulties. We are therefore surprised that prior to our evidence session on 9 January it appears that the Government was not aware of ACPO’s and SOCA’s concerns in this regard—which in turn suggests a failure of liaison between the Government and its senior police advisers.

Bilateral arrangements

78. Practical arrangements for bilateral co-operation between police forces to deal with localised or specialist subjects can be very fruitful. ACPO cited the example of the Cross Channel Intelligence Conference :

Typical of the evolution of good co-operation in a recognised border region is the Cross Channel Intelligence Conference. Co-operation is based on both bi-lateral and multilateral localised agreements between the various police services and, in some

39 Q 141

40 Q 315–6

41 Ev 175–6

cases, governmental representatives in the respective regions ... Membership derives from police forces in coastal regions of The Netherlands, Belgium, France and England.⁴²

79. ACPO also gave the example of the Joint Initiative between the Préfet of the Pas-de-Calais and the Chief Constable of Kent Police:

Agreed in June 2004, this initiative agrees the practice of daily trans-frontier co-operation there are clear benefits to be derived from: developing co-operation between their services to improve levels of arrest and prosecution [and] improving the exchange of intelligence.⁴³

80. SOCA praised the speed and flexibility of practical arrangements:

The main benefit [of practical co-operation] continues to be the co-operation through bilateral channels within national law of the Member States. This co-operation is quicker and can take place without any formal legislative framework.⁴⁴

81. SOCA expanded on this in oral evidence, saying that UK police bodies favour a pragmatic approach to problems as they arise, rather than setting in place structures to anticipate problems. It suggested that this approach is often best accomplished through practical arrangements:

Bilateral, sometimes multilateral, working in small groups and small working arrangements we can get on and achieve a considerable amount. It seems to work quite well but there is a danger all the time of creating structures to deal with all the known or unknown circumstances that could arise and we are generally not in favour of that type of approach.⁴⁵

82. We asked the police if more arrangements are needed. SOCA emphasised the need to ensure what is already in place works properly:

We do not necessarily need more agencies, more institutions, or even more legislation actually. If anything, we need to streamline the current arrangements and make better use of what, in many respects, are significant capabilities that are already out there.⁴⁶

Europol

83. Whilst practical co-operation between European police forces can be effective without the assistance of any centralised EU agency, some police co-operation arrangements require co-ordination at EU level. The chief mechanism for achieving this is provided by Europol, the European Police Office.

42 Ev 96

43 Ev 97

44 Ev 169

45 Q 121

46 Q 129

84. Following the entry into force of the Maastricht Treaty, Member States signed in 1995 the Europol Convention, which entered into force in 1999. Prior to that date, operational co-operation between police forces in the EU took place primarily through Europol's predecessor, the European Drugs Unit. Europol is a third pillar body with legal personality. Its task is to facilitate bilateral or multilateral practical co-operation between police forces in individual countries. Its remit is to "improve the effectiveness and co-operation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international organised crime".⁴⁷

85. The criminal activities against which Europol's work is primarily directed include illicit drug trafficking, illicit immigration networks, terrorism, forgery of money (counterfeiting of the euro) and other means of payment, trafficking in human beings including child pornography, illicit vehicle trafficking and money-laundering.

86. The Europol Convention describes Europol's key tasks in assisting national police forces as:⁴⁸

- to facilitate the exchange of information between the Member States;
- to obtain, collate and analyse information and intelligence;
- to notify the competent authorities of the Member States without delay via the national units referred to in Article 4⁴⁹ of information concerning them and of any connections identified between criminal offences;
- to aid investigations in the Member States by forwarding all relevant information to the national units;
- to maintain a computerized system of collected information containing data in accordance with Articles 8, 10 and 11.⁵⁰

87. Europol is based in The Hague. As at December 2006 it had 566 staff, including 105 Europol 'liaison officers' (ELOs) seconded from Member States and around 100 intelligence analysts. The total number of staff has almost doubled since 2000. Europol's budget for 2006 was 66 million euros.⁵¹

88. The recent increase in resourcing for Europol has reflected an extension of its remit. Its competence has expanded from five to 27 specific forms of crime. It is now authorised to participate in "joint investigations teams" in the Member States and empowered to request individual states to "initiate, conduct or co-ordinate investigations in specific cases". Three

47 Europol Convention Article 2.1

48 Europol Convention Article 3.1

49 Article 4 defines the national unit of each Member State, saying that "Each Member State shall establish or designate a national unit to carry out the tasks listed in this article" (Europol Convention Article 4.1)

50 Article 8 deals with 'content of the information system', Article 10 with 'collection, processing and utilization of personal data' and Article 11 with an 'index system'.

51 Europol *Annual Report* 2006 (March 2007), p23-5

protocols giving force to these changes have been ratified by national parliaments and had entered into force by April 2007.⁵²

89. In their evidence to us, UK police praised the value of Europol. Bill Hughes, Director-General of SOCA, told us:

Europol already represents the single mechanism within the EU to co-ordinate Member States' response against serious and organised crime. We would encourage all Member States to make the best use of that organisation, and use that the single method of co-ordinating our work. It does work effectively in many cases. I am not sure that its potential has yet been fully realised.⁵³

90. Our police witnesses maintained that the UK co-operates well with Europol:

The analytical working files, ... there are 18 of those which cover a wide spectrum of organised crime. The UK participates in 15 of those, and we are just about to participate in the sixteenth ... we are one of the good guys because we work with Europol and Interpol and we support what they are doing.⁵⁴

91. ACPO gave us an example of where, in their view, bilateral co-operation between police forces needs to take place within a formal legal framework supplied by Europol:

There is good professional co-operation but I think on certain occasions it is very important that there are treaties and protocols signed up between Member States to ensure that police work can be translated into evidence before a court to secure a conviction. ... A good example would be the protocol that has set up joint investigation teams which enables police forces very openly and publicly to send an officer to another jurisdiction, and for that individual to participate in the investigation. We do need a framework.⁵⁵

92. However, we note that it is still early days for Joint Investigation Teams (JITs). According to figures from Eurojust, so far there have been only 16 JITs set up within the EU, of which only one involved the UK.⁵⁶

93. Some witnesses suggested that the effectiveness of Europol is being undermined by the fact that not all Member States use it or provide information to the same degree. A 'High Level Conference' held in February 2006 found that "some information is still not supplied to Europol because the potential providers in the Member States do not know what will

52 European Commission press release IP/07/528 (20 April 2007)

53 Q 129

54 Q 135

55 Q 122

56 Eurojust figures supplied by UK Revenue and Customs Prosecutions Office (RCPO). The UK has had 1 JIT (with the Netherlands). Belgium has had 2 (with France and the Netherlands). Estonia has had 1 (with Finland). France has had 10 (9 with Spain and 1 with Belgium). The Netherlands has had 2 (with Belgium and the UK). Slovakia has had 1 (with Germany). Sweden has had 2 (with Finland). However, RCPO cautions that the figures may not be completely accurate, because not all Member States responded to the request for figures, and there may be some JITs which have not been reported to the national centres. (Evidence reported to the House but not printed.)

happen with that information”.⁵⁷ Neither the conference nor the Commission’s follow-up paper arrived at conclusions as to how this attitudinal problem might be remedied.

94. The civil liberties organisation Statewatch has argued that:

Some Member States’ police forces are clearly reluctant to co-operate with Europol in the way that the Convention envisaged, preferring to co-operate through traditional bilateral channels. Europol is certainly providing logistical support to cross-border investigations and operations such as ‘controlled deliveries’ (the surveillance of cross-border shipments of drugs, people or illegal goods) but is clearly hampered by a lack of practical intelligence from the Member States.⁵⁸

95. Europol itself confirmed that it is not receiving full co-operation from all members of the EU. Deputy Director Michel Quille told us:

We have some Member States (and it is not my task to deliver good or bad scores) who do not use the full potential of Europol. Our fight in Europol is to try to convince all Member States to use Europol ... we have to convince Member States to send information ... to increase the awareness of Europol.⁵⁹

96. An internal debate on the future of Europol has been taking place within EU institutions over the past 18 months. The Commission has argued that there is a need to put Europol on a firmer legal footing by replacing the current patchwork system of conventions with a “fully fledged legislative system”. In December 2006 it put forward a proposal for a Council Decision to re-establish Europol on a new legal basis. As the Commission explained, “the main advantage of a Decision over a Convention is that it is relatively easy to adapt to changing circumstances because it does not require ratification” by national parliaments. The proposed Decision would also further extend Europol’s mandate, to cover crime which was not specifically linked to organised crime, and would give it power to gather and handle information “as necessary to achieve its objectives”.⁶⁰

97. Our UK police witnesses did not support any significant further extension of the organisation’s current, recently expanded, powers and remit. For instance, SOCA told us that what was needed was for Europol to do better “what it already does pretty well”.⁶¹ And Europol itself commented “we have to stabilise our work, and not to expand too much”.⁶²

98. The European Parliament’s Civil Liberties, Justice and Home Affairs Committee (LIBE) held a hearing on the future of Europol on 10 April 2007. At this meeting, concerns were expressed about a lack of democratic scrutiny in the Commission’s proposal. The proposal gave only a marginal role to the EP and did not mention national parliaments at all. This contrasted with the provision in the stalled Constitutional Treaty for joint scrutiny of Europol by the EP and by national parliaments. MEPs on the LIBE Committee also

57 Council Presidency document 7868/06, p 4

58 Statewatch, *The future of Europol* (August 2006), at www.statewatch.org

59 Q 130

60 European Commission, *Proposal for a Council Decision establishing the European Police Office (EUROPOL)* (COM (2006) 817 final) (December 2006)

61 Q 135; see also Q 136

62 Q 137

criticised the Commission's proposal for lacking safeguards on the handling of personal data.⁶³

99. We believe that the creation of Europol has been a positive development in facilitating police co-operation, particularly by building confidence and knowledge between Member States. We do not believe Europol has yet achieved its full potential. A significant aspect of this is a lack of full trust and co-operation between Member States. Although the UK is fully engaged with the work of the agency, its work appears to be hampered by the varying degrees of co-operation it receives from other Member States. It is disappointing that the Commission has not done more to address the evident reluctance of some Member States to supply their national Europol liaison officers with needed information. We recommend that the UK Government should take such steps as are open to it to encourage all Member States to co-operate fully with Europol. We recommend that the Commission should consider practical ways to promote Member States' confidence in Europol and encourage better data-sharing; and also that it should draw public attention to the failure of some individual Member States fully to co-operate with Europol.

100. The Commission's recent proposal further to extend the powers of Europol will require careful examination by the UK Government. In the light of the evidence we have received from UK police, it does not appear to us that there is a pressing need for a further extension of powers on top of the significant extension recently approved.

101. We are also concerned that the Commission's proposal contains no reference to scrutiny of Europol by national parliaments. In this respect it marks a step backwards from the proposals in the Constitutional Treaty. We recommend that the UK Government should not give its approval to any changes in the status of Europol unless provision is made for a scrutiny role for national parliaments in conjunction with the European Parliament.

The Schengen Convention and Article 96 data

102. Although the United Kingdom has not participated in the 1990 Schengen Convention insofar as this abolishes border controls between Member States, it is a signatory of the Council Decision implementing in EU law those parts of the Convention which relate to police co-operation. These provide for mutual assistance and direct information exchange between police services, cross-border surveillance and pursuit of suspects, improved communication links and information exchange via central law enforcement agencies. The Schengen Information System (SIS), in operation since 1995, is a computer network containing information on wanted persons, stolen objects and vehicles. Different parts of the information system can be consulted by police, border police, customs, Europol, Eurojust and by authorities responsible for delivering visas and residence permits. The Commission is developing proposals for the design and establishment of the second generation Schengen Information System (SIS II), to meet the challenges of enlargement. This was expected to become operational in 2007, but implementation has been delayed until 2008 for technical reasons.

63 Information on the LIBE hearing supplied by the UK National Parliament Office, Brussels

103. Since January 2005 the UK has participated in all Schengen police and judicial co-operation measures, except “hot pursuit”. The terms of the Schengen acquis provide for police agencies to assist one another by the exchange of information on a police-to-police basis for the prevention and detection of criminal offences. Most exchanges of information take place between designated central bureaux in each Member State (SOCA provides this function in the UK), although closer bilateral ties in border areas are not precluded. ACPO told us that the UK is a gross exporter of requests for assistance from other Member States, receiving “vastly more information from abroad than is released”.⁶⁴

104. Because the UK does not participate in the border control measures of the Schengen Agreement, it has been excluded from access to data gathered under the provisions of Article 96 of the agreement. ‘Article 96’ data is designated for immigration and visa purposes, and consists of alerts put on the Schengen system for specific individuals. ACPO told us that many of the subjects of Article 96 alerts have been refused access to the Schengen area because of criminal convictions or national security issues.

105. We questioned ACPO about the consequences for UK police of not having access to this data. Chief Constable Paul Kernaghan told us in response:

I want as much information to protect the public as I can get my hands on and it does worry me that there will be information available which I will not have access to. ... It could be if there is a notorious case ... the media will be able to say, “Did you know under Article 96 in the following country they knew this person was a mad axeman” or whatever, and ... the police chief in Britain will be stood looking at the cameras saying, “No, I was not aware of that”. ... We would like access to Article 96 but at this point in time we have not got it.⁶⁵

106. SOCA’s Director-General, Bill Hughes, gave an example of an anomaly arising from the current situation:

an individual could be refused entry to France by a French police officer who is based in Kent at the juxtaposed controls for the Channel Tunnel on the grounds that the French officer is aware that he is a threat to national security from the information that he has from the Schengen Information System. That French officer can turn that individual back without us having access to that same information.⁶⁶

107. The police argued to us that although they could “work around” the difficulties caused by UK exclusion from access to Article 96 information, it should not be necessary to resort to such expedients.⁶⁷

108. The UK Government supports the police in their request for access to Article 96 data. It argues that Article 96 data bears on law enforcement and not only immigration and it is therefore appropriate for the UK to have access. The Parliamentary Under-Secretary at the Home Office, Joan Ryan MP, told us that “where there is information that impacts upon

64 Ev 92

65 Q 152

66 Q 150

67 Q 153

law enforcement issues, then we should have access to that and yes, we are pressing the point very hard”.⁶⁸ She stated that the Government is making its case in all appropriate forums: at the Council, with the Commission and with the Council for Legal Services, as well as through bilateral ministerial contacts. Ms Ryan told us, however, that other Schengen countries are not very sympathetic to the UK’s position: “we do not have a lot of support for our argument, I have to say”.⁶⁹

109. We support the UK Government in its efforts to persuade the relevant EU institutions and other Member States that enabling UK police to access Article 96 data would be in the best interests both of the UK and the EU at large. It is not acceptable that crime-fighting should be hindered simply in an attempt to force the UK to take a different attitude towards participation in the Schengen border-control regime.

Addressing deficiencies in data exchange

110. ACPO told us that the principal gaps they would identify in current police co-operation throughout the EU were in respect of “firstly, the standard identification of individuals and secondly, automatic sharing of criminal records throughout the EU”.⁷⁰ SOCA concurred with this analysis.

Exchange of criminal records

111. Until 2005 the exchange of criminal records of nationals of one Member State who were convicted in another Member State was governed by Article 22 of the 1959 Council of Europe Convention on Mutual Legal Assistance in Criminal Matters. Article 22 did not set any deadlines for the speed of exchange of information, nor for the quality of content. On timing, it required only that States should “communicate ... information to each other at least once a year”. As the Home Office has commented, “this wording conveyed no sense of urgency”. The inadequacy of these arrangements was flagged up at the EU level by a series of high-profile cases in France and Belgium, including the Fourniret case.⁷¹

112. Concerns prompted by this case led to an EU Council Decision in November 2005 requiring Member States to exchange information on convictions via a designated ‘Central Authority’. In the UK such an authority was set up as part of ACPO in May 2006.

113. At our evidence session on 9 January 2007, we asked Chief Constable Paul Kernaghan, representing ACPO, if the arrangements prior to the creation of the UK Central Authority meant that serious offenders could enter the UK without the authorities being aware. Mr Kernaghan agreed that this had been the case:

Until the ACPO criminal records office was created to support European legislation, and let us use an emotional but I think it is a very valid example, someone could go

68 Q 346

69 Q 346

70 Q 129

71 In 2003, Michel Fourniret, 63, was arrested by the Belgian Police for the murder of six French and one Belgian girl. He had previously been sentenced in France to seven years imprisonment for rape and indecent assault on minors in France. The Belgian authorities were unaware of his previous convictions. It is thought that he may have murdered up to 40 victims.

to, let us say, Germany, commit a sexual offence, be convicted by the German courts, rightly and properly serve his sentence and that would not be known to any British police officer when they came back to the UK and it frankly would not be known to the British courts when they re-offended in Britain and went before the courts, they would go with a clean record which obviously affects the sentence. That is a totally unacceptable position I would say professionally and crucially from a public protection point of view. Over a period information was supplied to the UK and frankly sat in box files. It was not entered into the Police National Computer and there was a gap.⁷²

114. This evidence was widely reported in the press and provoked considerable criticism of the Home Office, particularly when it emerged that prior to our evidence session Home Office Ministers had not been aware of the systematic failure to put details of overseas criminal convictions of UK citizens onto any police database.

115. In response to these criticisms, Ministers set up an internal Home Office inquiry into what had happened. The resulting report, by Dusty Amroliwala OBE, was published in February 2007.⁷³ Amongst its conclusions were the following:

- The lack of provision in the 1959 Convention for timely exchange of information, compounded by the poor quality and inconsistent formatting of much of the information received under Article 22, mean that “from the outset, it appears that this data was viewed by successive generations of handling authorities in the United Kingdom as little more than a subordinate set of statistical information”.
- “For reasons that the Inquiry has not been able to establish fully, the practice of forwarding these notifications to the Metropolitan Police ceased around 1995. ... Thereafter, an accumulation of Article 22 notifications began to grow in the Home Office.”
- “Ministers were not told over a period of more than ten years about the accumulating notifications, even during the latter part of 2006 when the potential seriousness of the issue was beginning to be realised. The first Ministers knew of it, therefore, was on 9 January 2007 when the Chief Constable of Hampshire Constabulary gave evidence to the Home Affairs Select Committee.”⁷⁴

116. The Amroliwala report made a number of criticisms of Home Office working practices, chief amongst them being the absence of structured and systematic handovers between outgoing and incoming occupants of posts. It also recorded “a strong sense ... that witnesses had a particularly narrow view of their personal responsibilities”, a lack of leadership, and an absence of proper risk assessment.⁷⁵

72 Q 149

73 *Report of the Inquiry into the handling by Home Office officials of notifications, by other European countries, of criminal convictions for UK citizens*, by Dusty Amroliwala OBE (Home Office, February 2007)

74 *Ibid.*, paras 1.13, 2.1–27

75 *Ibid.*, section 4

117. ACPO told us that the benefits of the new situation arising as a result of the 2005 EU agreement and the consequent setting up of the UK Central Authority have been considerable.⁷⁶ They include the following:

- The exchange of criminal records will enable patterns of criminality to be more readily identified, facilitating the appropriate operational response. People smuggling, international paedophilia, drug trafficking, as well as terrorist related offences are crimes which are trans-national by nature.
- Courts will be able to take account of a convicted person's complete offending history when considering sentencing.
- Having a dedicated Central Authority within the UK has already ensured greater accuracy in the creation and updating of records. The unit is also able to ensure consistency in identification of the offender by encouraging the exchange of fingerprints, (and perhaps later DNA), to prove identity.
- There will be an increased opportunity to identify wanted persons, both in the UK and those subject of a European Arrest Warrant. This will lead to the apprehension of offenders, denying them the opportunity to commit further, often serious crime.
- The ability to identify offenders and their offending patterns (e.g. Fourniret) who commit serious crime in one country and who later move to and continue to commit crime in another country (the SIS can also be used to identify the arrival of certain offenders before they reoffend).
- The timely creation of full and accurate conviction information on PNC and other national databases, such as the Violent and Sex Offenders' Register (ViSOR), in support of policing purposes.

118. However, although records are now being entered onto police databases, the 2005 agreement only addressed the speed and manner of the records exchange and not the content and quality of the records:

Whilst this new agreement will ensure that such convictions are transmitted to the UK within weeks of the conviction, only the bare details of the offender are received, i.e. name, date and place of birth. The important identification material is not sent with the notification because the record offices within the EU do not have access to this data.⁷⁷

119. When we raised this issue with Parliamentary Under-Secretary at the Home Office, Joan Ryan MP, she agreed that the quality of information received is still poor:

It is the case, as I understand it, that some countries send through very good information and some countries do not; it is all very variable. Yes, we have had some

76 Ev 95

77 Ev 96

difficulty with some of the conviction data we have received in actually identifying who the individual is who we are talking about.⁷⁸

120. ACPO identified a further problem: that because of the split between immigration and police systems, the police do not automatically know when an individual convicted abroad re-enters the country:

people are not checked against a criminal record database or a police database, it is against immigration databases, so there is a gap at this point in time. I hope that with the implementation of e-Borders and as and when we join up with Schengen, more information will be available so that whilst they may well be allowed into the UK there will be an update as to the fact that they are now in the UK.⁷⁹

They argued that measures need urgently to be put in place to regulate the quality of data on criminal records, suggesting that “at some stage there should be automatic recognition of convictions throughout the EU”.⁸⁰

121. Ms Ryan informed us on 20 March that the Home Secretary wrote to the Prime Minister and Cabinet on 16 January 2007 about a proposed review of information on criminality to consider “how information about criminality is recorded and shared both within the UK and between the UK and other countries as well as how such information is used to protect the public”. She told us that the Home Secretary had proposed the following draft terms of reference: “To thoroughly examine and recommend necessary improvements for recording and sharing information about criminality within the UK and between the UK and other countries; and to the way in which this information is used to protect the public and the relevant procedures and responsibilities.”⁸¹

122. The EU Council Decision in 2005 on exchange of information about criminal records provides a good example of both the value of action and the limitations of decision-making at European level. On the positive side, the decision redressed a real deficiency in the practice of Member States, including the UK, and prompted them to set up more effective systems for exchanging information. We consider that this is a significant step forward and to be welcomed.

123. However, it has also become clear that the Council Decision itself was only a ‘half-way house’, which replicates some of the weaknesses of the original 1959 Convention, in particular the lack of specificity about the format and content of the information exchanged. We also note that some EU countries are being more vigorous than others in implementing the 2005 decision. This is therefore to be regarded as unfinished business. We recommend that the UK Government should pursue energetically in all relevant EU forums the objective of strengthening the 2005 decision by imposing requirements on Member States to supply full and usable information in a common format on convictions by other States’ nationals.

78 Q 301

79 Q 149

80 Q 149

81 Ev 181

124. We look forward to the results of the Home Secretary's review of information on criminality, and urge that this should address in particular the current deficiency whereby police are not notified when an individual convicted abroad is released from custody or re-enters this country.

125. We congratulate ACPO on drawing our attention, and thereby that of the wider public, to the highly unsatisfactory situation that had obtained in the UK prior to the 2005 decision, with information about overseas convictions being received by the Home Office and allowed to moulder on shelves rather than being made available to the police and the courts. We note the findings of the internal Home Office report, which reveal disfunctionality and poor performance within the Department; but we welcome the action that has been taken to tackle the deficiencies revealed in the report.

Pilot project on interoperability of criminal records

126. One solution to the problems identified with information exchange for policing purposes is the project currently being piloted by a number of EU countries to make their criminal records systems interoperable. Four EU Member States (France, Germany, Spain and Belgium) have set up a pilot project interconnecting their criminal record databases. The House of Lords European Union Committee has described and evaluated the pilot as follows:

This project operates along similar lines to the proposed Framework Decision, identifying the Member State of nationality as the State responsible for storing criminal record information. While the participants seem to consider the pilot a success, they highlight some of the problems yet to be resolved.

127. We asked the Government for its assessment of this project. The Parliamentary Under-Secretary, Ms Ryan, told us that she had notified the German Presidency:

that we now wish to join the pilot project around the exchange of criminal records and information. We want to move quite quickly on that. There are six Member States there at the moment, but it seems there is a difficulty of more than one State joining at any one time. We are hoping we will move very quickly on that. That will develop the electronic exchange of that information, which is what will make it usable. We think the likelihood is that that pilot project will actually become the basis for the European-wide system as we move towards a framework decision.⁸²

128. The Minister also stated that the pilot would contribute towards solving the problem of identifying when nationals convicted abroad re-enter the country:

If we get electronic exchange of information at the point of conviction, and that information goes on the Police National Computer, then it will stay on the Police National Computer, so whenever the person is released the information is still there and is recorded.⁸³

82 Q 299

83 Q 303

129. We fully support the Government's wish to sign up without delay to the pilot project on interoperability of criminal records data. It is very regrettable that the UK missed the opportunity to be one of the original pilot participants, and thus influence the project from the start. The fact that the UK has, in its own interests, opted out of certain EU initiatives (the single currency, the borders part of the Schengen Convention) makes it all the more important that it should be an effective player in all the other areas.

The principle of availability

130. A more wide-ranging measure to maximise information exchange between law enforcement agencies is in the pipeline. The development of police co-operation in the EU on the basis of the 'principle of availability' has been central in the Hague Programme. The principle is defined as follows:

Throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and ... the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement for ongoing investigations in that State.⁸⁴

131. The Commission tabled in October 2005 a proposal for a third pillar measure aimed at introducing the principle of availability, which covered a wide range of data fields including DNA profiles, fingerprints, vehicle registration data, ballistics, and telephone numbers and other communications data.⁸⁵ The proposal has not yet been adopted, but the principle may be introduced into the EU legal order for some categories of data via the incorporation of the Treaty of Prüm (for which, see paragraphs 138 to 145 below).

132. UK police have welcomed the principle as a good measure to improve information exchange. The Director-General of SOCA, Bill Hughes, told us that "we should be finding every way in which we can make that work more effectively".⁸⁶

133. Dr Valsamis Mitsilegas of Queen Mary, University of London, set out in written evidence some of the "far-reaching implications" of the principle, as outlined in the original Commission proposal. These include: that the exchange of information should take place on the basis of standard, pro-forma documents, thus becoming quasi-automated; that in principle no questions will be asked by the receiving authority about the purpose of the information (though the proposal currently includes a ground for refusal on human-rights grounds); that authorities cannot request that information be obtained by coercive measures, but can request information which has already been collected by coercive measures; and that a 'comitology' committee would determine which authorities can benefit from the principle, thereby bypassing parliamentary scrutiny at both EU and national levels.⁸⁷

84 *The Hague Programme*, para 2.1

85 COM (2005) 490 final

86 Q 129

87 Ev 148

134. The principle raises serious questions about data protection and privacy. The European Commission's spokesman, Mr Jonathan Faull, commented:

That is easy enough to say is a principle; it is harder to work out in practice. What do you do about DNA databases? What do you do about other forms of database, of which there are very many now being collected all over Europe? All of that needs to be worked out in practice.⁸⁸

135. ACPO told us that information shared under the principle would be shared on a 'need to know' basis. The principle would not give another European police force wholesale access to a UK database such as the DNA database:

Basically, people cannot go into a room and trawl through the DNA database to pass an idle hour *et cetera*. You have a sample, you put it against the database, which is independently managed in the UK, it is not a police serviced database and they say "hit" or "no hit".⁸⁹

136. SOCA told us that the police have a number of mechanisms in place to 'risk assess' all data sharing:

As with all areas of law enforcement in whatever country in the world you work, you need to take risk assessments of everything that you are doing in terms of sharing data and, of course, the source from which that data originates. We are doing that at every opportunity.⁹⁰

137. We believe that adopting the principle of availability has great potential to speed up and improve the quality of information shared between law enforcement agencies. Given the premium placed on good information-sharing by police practitioners, this will be an important development. However, there is a danger that if it is not implemented with sufficiently rigorous safeguards, in particular robust data-protection arrangements, the principle risks the dissemination of personal data of UK citizens without sufficient control over the subsequent use of that data. We recommend that the Government should insist that an appropriate impact assessment by an independent body be commissioned at EU level on the potential use of data under the principle before the principle is adopted (in whatever form that takes) and that the Opinion of the European Data Protection Supervisor be fully taken into account in so doing. We also recommend that appropriate monitoring arrangements are set up by the national information commissioners to pick up any abuse of the systems. We recommend that particular attention be paid to the admissibility of evidence obtained under the principle of availability, in particular if such evidence has been obtained by coercive measures.

88 Q 74

89 Q 162

90 Q 157

The Prüm Treaty

138. A recent measure aimed at improving police co-operation between EU Member States has major constitutional implications. The Prüm Treaty⁹¹ (named after the German town where it was signed) is a multilateral agreement designed to enhance exchange of information on the basis of the ‘principle of availability’ with regard to sensitive personal data such as DNA records and fingerprints. Its significance is that it was drawn up in secret by seven Member States outside the legal framework of the EU, and yet has now been accepted for incorporation within that framework.

139. The Prüm Treaty is an agreement between Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Spain. It was signed in May 2005. Neither the Commission nor any other Member States were involved in the negotiations on the Treaty. However, it is known that the UK Government was invited to take part in those negotiations, and declined to do so.⁹²

140. The main provisions of the Treaty relate to:

- a) DNA and fingerprint database searches and exchange of personal data following a match against a record
- b) access to vehicle registers
- c) measures to prevent terrorism
- d) guidance on deploying air marshals on aircraft
- e) guidance on service weapons
- f) measures to reduce illegal immigration, including document liaison officers and co-ordinated removals
- g) an ability to provide a basis for joint patrols in border areas, including prevention of danger and response to major incidents
- h) formalisation of routine checks including registered vehicle keepers, licences, addresses, telephone subscribers.⁹³

141. At the JHA Council in February 2007, Member States considered a draft Decision, drawn up by the German Presidency, to incorporate the Prüm Treaty into EU law. The Government told us that:

The Council mandated experts to prepare a Council decision for adoption in the coming months which would transfer the third pillar, the police co-operation element of that Treaty, into the EU.⁹⁴

91 Sometimes referred to as the ‘Prüm Convention’

92 See House of Lords European Union Committee, Eighteenth Report of Session 2006–07, *Prüm: an effective weapon against terrorism and crime?* (HL 90), published 9 May 2007, para 23

93 Ev 94

94 Q 292

ACPO tentatively welcomed this, but said that the UK had “clear reservations about certain elements of the Treaty”. They urged the Government to look for the “operational advantages held within the Treaty”.⁹⁵

142. The Parliamentary Under-Secretary, Joan Ryan MP, told us that the UK anticipated difficulty only with Article 18 of the Treaty.⁹⁶ Article 18 of the draft Decision (the equivalent to Article 25 of the Treaty) deals with “hot pursuit”. It would allow officers of one Member State to cross the border into another Member State without that State’s prior consent “in urgent situations” to take “any provisional measures necessary to avert immediate danger to life or limb”.⁹⁷ Following our session with the Minister another draft of the Framework Decision was produced, on 27 February 2007, which omitted Article 18.

143. The Prüm Treaty brings into force a number of the most significant elements of the principle of availability—in particular giving Member States reciprocal access to national databases covering DNA profiles, fingerprints and vehicle registration data. However, Prüm does not implement the principle as widely as the proposed Framework Decision which would have specifically brought the principle into force (discussed above in paragraph 131). It is not yet clear whether Prüm will have the effect of superseding the Framework Decision. Currently negotiations on the Framework Decision are in abeyance. However, a recent report on the Prüm Treaty by the House of Lords European Union Committee concluded that the German presidency of the EU is “attempting to sideline the EU initiative on the principle of availability in favour of ‘the promising model offered by the Prüm Treaty’—an attempt which has been conspicuously successful”.⁹⁸

144. The proposed transposition of the Prüm Treaty into the legal framework of the EU raises serious questions. In the case of Prüm, just as in the case of the pilot project on interoperability of criminal records (see paragraphs 126 to 129 above), the UK has missed out on an opportunity to influence a major European multi-country project from the start. Even more importantly, Prüm sets a worrying precedent whereby a small group of Member States may reach an agreement amongst themselves which then is presented to the wider EU almost as a *fait accompli*. Thus it raises the danger of a ‘two-track Europe’ developing. We deal with these issues of principle in section 4 of this report. We also note with alarm that if the draft Framework Decision implementing the principle of availability is superseded by the Prüm Treaty then the original design of an instrument introducing radical change to EU data-sharing will have been carried out outside the democratic processes of the EU.

145. Notwithstanding these concerns, we consider that the provisions within Prüm for more effective police co-operation are, in themselves, welcome. We support the UK Government’s decision to sign up to those provisions, and welcome the fact that it has secured agreement to drop Article 18.

95 Ev 94

96 Q 306–309

97 Document 6002/07, Article 18

98 House of Lords European Union Committee, Eighteenth Report of Session 2006-07, *Prüm: an effective weapon against terrorism and crime?* (HL 90), p 11

Criminal Justice: Judicial Co-operation

The goal: an area of freedom, security and justice

146. Member States enshrined the objective of a single area of freedom, security and justice in the Treaty of Amsterdam, which came into force in 1999. The European Commission describes action taken to enhance judicial co-operation as a means of achieving this goal:

- a) Practical co-operation. A number of bodies and networks have been put in place to help co-ordinate prosecutions and facilitate judicial co-operation. These include Eurojust and the European Judicial Network.
- b) Development of instruments based on the mutual recognition principle. Since the Tampere Council in 1999 mutual recognition of each other's judicial decisions by Member States has been the cornerstone for judicial co-operation. A number of instruments have been adopted or are being negotiated based on this principle (such as the European Arrest Warrant, or the Framework Decision on the execution of orders freezing property or evidence), as are others setting out common standards to enhance mutual trust in Member States' judicial systems (such as the draft Framework Decision on minimum procedural rights for defendants).
- c) Approximation of legislation. There are a wide variety of criminal justice systems within the EU, affording scope for criminals operating on a multinational basis to exploit the differences between them. Legal texts have been adopted or are being negotiated, particularly in areas such as international trafficking, terrorism and financial crime, to adopt common definitions and harmonise some sanctions.⁹⁹

147. In this section of our report we consider recent developments in judicial co-operation within the EU.

Eurojust

148. The most significant mechanism set up to date to enable practical co-operation between judicial authorities in the EU is Eurojust. This organisation was established in 2002 and comprises senior magistrates, prosecutors, judges and other legal experts seconded one from each of the Member States. Eurojust can give immediate legal advice and assistance to prosecutors, investigators and judges in cross-border cases, for example by advising them where to look for information they need from another EU country. It exists as an independent body with its own legal personality and budget, but has no authority to launch or carry out investigations itself. Eurojust is supported by the European Judicial Network, an informal network of judicial contact points in each Member State.

149. The President of Eurojust, Mike Kennedy, told us of the challenges facing it:

Increasingly, we are finding that there are cases linked to Member States which are not just adjacent to each other in geographical terms but also linked, possibly

⁹⁹ Information in this paragraph is from the European Commission website: http://ec.europa.eu/justice_home/fsj/intro/fsj_intro_en.htm

through the internet, right across the European Union. Because the systems are so different, particularly the four common law countries ... from those based on the Napoleonic Code or other codes ... there are many rubbing points. This is simply in the systems themselves. There is a cultural difference and of course there are linguistic differences and we need to bridge these gaps and these barriers to be able to deal satisfactorily with cases.¹⁰⁰

150. A case study illustrating Eurojust's activities is given in the text box below.¹⁰¹

CASE STUDY: Illegal Immigration—Operation Pachtou

Operation Pachtou was a case which brought together a series of investigations involving four EU Member States and Turkey. Investigations in France and the UK showed that a sophisticated network was moving people from the Kurdish areas of Turkey through Greece into Italy and from there to France and the UK. Eurojust made enquiries which revealed that separate investigations into the same network, which were not so far advanced, were also taking place in Italy, Greece and Turkey. Eurojust arranged a co-ordination meeting in October which was attended by police, investigators, judges and prosecutors from each of the five states involved. A good deal of information was exchanged and the links between the different parts of the network become much clearer. The French and UK representatives were keen to act quickly and make a series of arrests in their countries. However after discussions and agreement to provide further information to the Italian, Greek and Turkish authorities it was agreed that the French and UK agencies would delay any action so that a series of arrests and house and other searches could take place on the same day in all five countries in December. On 14 December the network was dismantled when 82 arrests took place across Europe: in Turkey (3), in Greece (2), in Italy (21), in France (49), and in the UK (7).

This case illustrates benefits that a multinational multi-functional approach through Eurojust can offer. It also demonstrates the point that a case which was initially a bilateral matter introduced by France and the UK can be effectively expanded at Eurojust to involve several other Member States and ensure work is done together to produce a very successful outcome.¹⁰²

151. Both the UK Government and the European Commission were strongly supportive of the work of Eurojust. The former told us that the strengthened co-operation the organisation provides is “absolutely essential to tackling international crime, drugs, terror”.¹⁰³ The latter commented that Eurojust is doing a “very important job”, while emphasising that it is not seeking to gather to itself criminal justice competencies which are currently sensitive to national sovereignty:

100 Q 206

101 Further examples are given in Ev 178–180

102 Ev 180

103 Q 327; see also Ev 129

it is co-ordinating national prosecution efforts. It cannot bring them together in one prosecution effort.¹⁰⁴

152. Several witnesses told us that Eurojust's capacity is limited by some Member States' unwillingness to use it fully. According to the Centre for European Policy Studies:

Eurojust itself says that it has the capability and possibility to go further but it cannot work when no cases are referred to it. ... Apart from the 500 additional cases arising in 2005, it says that it had the capability and capacity to deal with more but it is not able on its own to instigate this work.¹⁰⁵

153. Mike Kennedy, President of Eurojust, told us that "initially we found that countries were reluctant to co-operate with us because they felt that we were an unnecessary link in the chain".¹⁰⁶ But he emphasised that the picture has changed:

As time has gone on and we have been able to demonstrate the added value we can bring by bringing people together ... it has meant that we have been able to build trust and confidence amongst the various specialist investigators particularly.¹⁰⁷

154. SOCA agreed that some countries are more reluctant than others to use Eurojust, and noted that the UK, by contrast, plays a proactive role.¹⁰⁸ The Government has quantified UK involvement in Eurojust operations. In 2005 Eurojust registered 588 cases, of which 39 involved requests from the UK and 82 involved requests to the UK.¹⁰⁹ The UK is among the top five users of Eurojust.¹¹⁰ (The overall total of cases in 2005 included 135 drug trafficking offences, 120 swindling and fraud offences, 92 crimes against property, 48 offences of money laundering and 43 of murder, amongst others).¹¹¹

155. Eurojust has powers to make formal requests to ask Member States to investigate and prosecute, to work with one another and form joint investigation teams, to co-ordinate their activities, and to supply Eurojust with information. However, it cannot impose a penalty if these requests are not complied with, although it can publish details of failures to comply in its annual report. Mr Kennedy stated that the possibility that Eurojust *might* exercise its formal powers had proved enough to make states "react and act appropriately."¹¹²

156. The UK Government judges the powers of Eurojust to be sufficient, and regards the current situation where it can ask national authorities to initiate prosecutions but cannot instruct national authorities to do so, nor carry out prosecutions itself, as striking the "right

104 Q 83

105 Q 14

106 Q 207

107 Q 207

108 Ev 169

109 Ev 177

110 Ev 99

111 Ev 177

112 Q 209

balance”.¹¹³ However the Government emphasised in written evidence that it supports the continued development of Eurojust and the European Judicial Network as facilitators of judicial co-operation between Member States where necessary.¹¹⁴

157. Eurojust provides an excellent example of what can be done to build mutual trust between practitioners and through them Member States in one another’s systems. This kind of contact and practical co-operation is absolutely critical in enhancing trust and co-operation.

Mutual recognition instruments

158. To date, the agreed proposals based on mutual recognition are: the 2002 Framework Decision introducing the European Arrest Warrant (EAW), the 2003 Framework Decision on the execution of orders freezing property or evidence, the 2005 decision to apply mutual recognition to financial penalties, and the 2006 Framework Decision on the mutual recognition of confiscation orders. There are also a number of measures on the negotiating table which are due to be adopted in the near future, including a framework decision on the European Evidence Warrant.

159. We considered the EAW in some detail. It was the first mutual recognition instrument and therefore more is known about its benefits and limitations than any other mutual recognition instrument.

The European Arrest Warrant

160. The European Arrest Warrant came into force in January 2004 and has replaced surrender procedures between Member States of the EU. The warrant is a judicial decision by a court in one Member State to require the arrest and return of a person who is in another Member State. It only applies in cases where the person whose return is sought faces prosecution for a criminal act where the sentence is at least 12 months long, or if they have been sentenced to a prison term of at least four months. It means that Member States can no longer refuse to surrender to another Member State one of their own citizens who is suspected of having committed a serious crime, on the ground that they are nationals.

161. The EAW is based on the principle of mutual recognition of judicial decisions. It applies to a wide range of criminal offences. For 32 specified offences the requirement of dual criminality, i.e. that conduct is a crime in both Member States involved, is abolished if such offences are punishable by a maximum custodial sentence of at least 3 years. These offences, not all of which are harmonised at EU level, include participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography; trafficking in arms, ammunition and explosives; corruption, fraud, money laundering and counterfeiting of money.

162. The EAW has undoubtedly speeded up the surrender process between EU states. Commission statistics for 2005 in respect of 17 Member States show that from 1,526 people arrested, 1,295 were effectively surrendered within 20 to 40 days. The Commission reports

113 Q 327

114 Ev 128

that the average time taken to execute a warrant has fallen from more than 9 months, before the introduction of the EAW, to 43 days following its introduction.¹¹⁵ Its most high-profile UK application so far has been in the extradition of Hussain Osman from Italy to the UK following the terrorist attacks in London in July 2005, which took only 60 days. In the case of suspects consenting to be surrendered (which the Commission reports is a frequent occurrence) the average time has fallen to only 13 days.

163. Senior District Judge and Chief Magistrate for London Tim Workman, who deals with large numbers of extradition requests, told us that, although it is difficult to find an average time for a EAW in the UK because “there really is no norm”,¹¹⁶ the process under the EAW has speeded up by a number of months, and is “much faster”.¹¹⁷ Figures supplied by the Home Office show that in 2005 43 persons were returned to the UK under the EAW and 77 persons surrendered by the UK to other Member States.¹¹⁸

164. The Government welcomes the EAW. The Parliamentary Under-Secretary at the Home Office, Joan Ryan, stated that “we think it is a very, very important measure and I think we have made good progress ... it is a fine example of working together across the European Union”.¹¹⁹

165. The EAW has not been without some practical problems. Its legality has been challenged in a number of national courts. In April 2005 the Polish Constitutional Tribunal found that the EAW contradicted the Polish Constitution’s ban on extraditing Polish nationals. In July 2005 the German Constitutional Court annulled Germany’s law transposing the Framework Decision because it did not adequately protect German citizens’ fundamental rights. The EAW was transposed into UK law through the Extradition Act 2003. Senior District Judge Tim Workman told us that the Act implemented the EAW into UK law with a number of higher standards than were required by the original EU instrument:

The Extradition Act with its bars goes rather further than the Framework Decision in terms of the protection that it provides to the defendant ... Our safeguards are probably at a higher level than those of many other countries.¹²⁰

166. However, the Minister denied that the EAW had been implemented in such a way as to give foreign nationals in the UK more protection than UK citizens abroad:

There are a small number of additional bars to extradition introduced by the Extradition Act 2003 (e.g. extraneous conditions and passage of time) that appear to go beyond the bars set out in the Framework Decision on the EAW. However, these reflect provisions contained in the preamble to the Framework Decision (in paragraph 12) and therefore do not, in our view, go beyond the terms of the Framework Decision. The UK has also explicitly referred in its legislation to human

115 COM (2006) 8 final

116 Q 225

117 Q 224

118 Ev 130

119 Q 324–325

120 Q 238 and 239

rights protections and the Hostage-Taking Convention which other Member States are also bound by even though they are not explicitly referred to in the Framework Decision.¹²¹

167. The EAW has also been criticised on grounds of principle, because it **abolishes the requirement for dual criminality**.

168. The doctrine of 'dual criminality' means that nationals can be extradited to face prosecution or serving a sentence in another Member State only where the offences concerned are offences under the laws of both States. Dual criminality derives from the principle of *nullum crimen sine lege* (no crime without law), which is constitutionally enshrined in a number of Member States. Dual criminality has been a general principle of international extradition law for some time, but found expression in the EU in the 1957 European Convention on Extradition.¹²²

169. The EAW has abolished dual criminality for the 32 major agreed categories of offences. EAWs issued in respect of crimes or alleged crimes on this list have to be executed by the State receiving the warrant irrespective of whether or not the definition of the offence is the same, providing that the offence is serious enough and punishable by at least three years' imprisonment in the Member State that has issued the warrant. The dual criminality requirement remains for all other offences.

170. A number of commentators have argued that is constitutionally unacceptable to execute an enforcement decision relating to an act which is not a crime under the law of the executing state. In negotiations for the European Evidence Warrant, Germany heavily criticised the abolition of dual criminality in respect of six offences, which it argued were poorly defined. Germany negotiated an exemption for five years, during which period courts in that country will examine whether the requirement of dual criminality is met for the offences of terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion or swindling. This examination will only take place if it is necessary to carry out a search or seizure for the execution of the European Evidence Warrant.

171. Under the EAW a UK citizen can be extradited for an act which they commit in the territory of another EU state which is illegal under the law of the other state, but not under UK law. For example, if a UK citizen dressed in Nazi uniform in Germany they could subsequently be surrendered back to Germany from the UK since the act is a criminal offence in Germany and is covered by the racism and xenophobia dual criminality exemption of the EAW.

172. This works both ways. So, for example, another EU national could be surrendered to the UK for having sex with a person under 16 years old in the UK, even though the age of consent might be lower in the country from which they are surrendered. The act would be covered by the rape dual criminality exemption of the EAW.

121 Ev 181

122 Article 2 (1)

173. It is not possible to surrender someone in either of these situations if the act was committed in the territory of the state where the act is not illegal. For example, if an individual in the UK dressed up in Nazi uniform they could not be surrendered to Germany as the Extradition Act 2003 stipulates that ‘no part’ of the act must have taken place in the UK.

174. However, there is a grey area (which applies to criminality more broadly) about which commentators have expressed concern. In cases where it is not legally evident on whose territory the act was committed, the rules of the EAW are not clear-cut. This could be the case with internet publications—an often-cited example is a UK national publishing material on the internet which denies that the Holocaust took place, an offence under Austrian law, where it may be unclear in whose territory the act has occurred. It should be noted, though, that the scale of such cases is pretty small, and we did not receive any evidence that such cases have so far occurred under the EAW.

175. The Government told us that it had supported the EAW, notwithstanding the abolition of dual criminality in respect of the 32 specified offences, because—

We do not accept that we should make judicial co-operation conditional in all circumstances on dual criminality. As a general principle, if people break our laws we should be able to co-operate within the EU to ensure that they do not evade justice.¹²³

176. The application of the EAW in each of the Member States is the subject of a peer review taking place at the moment. The UK was reviewed at the end of 2006 and the Government told us it expects the report on the UK ‘in the very near future’.¹²⁴ It promised to submit the formal version of the report to us “as soon as it is published”.¹²⁵

177. It is too early to give a full assessment of the effectiveness of the EAW. However, we note that the UK Government and law enforcement agencies regard it as having been a major success. In particular, it has had a significant impact in speeding up extradition arrangements between Member States.

178. We believe that there should be no objection to arresting and surrendering a UK national for an act that is a crime in another EU country in whose territory it was committed. We agree with the Government that the abolition of dual criminality for a defined and agreed set of offences is acceptable. Nonetheless, there is continuing anxiety in some quarters about the abolition of dual criminality in respect of the 32 offences; it remains to be seen whether particular cases throw up anomalies or perceived injustices which might undermine public support for the EAW. A number of the categories on the list, such as racketeering or xenophobia, cause us concern. We recommend that both the UK Government and the Commission should monitor the application of the EAW to see whether problems are emerging. It may be that in the light of several years’ experience, some fine-tuning of the EAW system and the list of 32 offences may be desirable. (Under present arrangements, of course, any modifications will themselves require the unanimous approval of Member States. If there were to be a

123 Ev 131

124 Q 323

125 Ev 177

move to first-pillar decision-making on JHA issues, as the Commission wishes, changes to the list of offences would be made under qualified majority voting, which raises the possibility that they might be imposed on individual Member States against their wishes.)

The scope for further mutual recognition measures

179. Mutual recognition has been strongly supported by the UK as an alternative to harmonisation of any substantial parts of criminal justice systems. The Centre for European Policy Studies told us that it was the UK which “very strongly pushed” for its application as a founding principle of the Hague Programme: “it has been very much a UK project”.¹²⁶

180. We asked our witnesses what scope there was for extending mutual recognition as the cornerstone of judicial co-operation. JUSTICE responded that they thought the scope was limited:

The mutual recognition principle ... does not appear to enjoy the full support it once did when the Framework Decision on the EAW ... was adopted in 2002. The Finnish EU Presidency’s press release on the most recent informal JHA ministers’ meeting in Tampere [in September 2006] ... demonstrates this when it speaks of the recent difficulties which the negotiation of mutual recognition instruments posed in the Council. Some experts go so far as saying that the mutual recognition principle as a basis for police and criminal justice co-operation is doomed.¹²⁷

181. The Law Society highlighted some of the negative consequences of mutual recognition. It told us that when the mutual recognition of criminal convictions abroad comes in, a number of UK citizens will find themselves with criminal convictions incurred abroad under very different standards of proof. It gave the example of football hooligans in Portugal:

There were a lot of problems in Portugal in terms of street fighting and pub fighting. A lot of UK citizens would pay for example a 200 euro summary fine to be able to go home. When the mutual recognition of convictions and sharing criminal convictions comes in, those people will have the equivalent to an affray or even a GBH conviction that they were not tried for, they had no legal representation, and which could count as a repeat offence in terms of sentencing and in terms of aggravating circumstances.¹²⁸

182. The UK Government conceded that there are certain limitations to mutual recognition:

126 Q 5

127 Ev 137

128 Q 177

We have recognised certain limitations to the application of the mutual recognition principle and appropriate safeguards have been incorporated into individual instruments addressing issues such as territoriality and double jeopardy.¹²⁹

But it underlined that it sees mutual recognition as the way forward:

The UK has always been a strong proponent of mutual recognition and continues to support mutual recognition.¹³⁰

183. We asked the Government whether it still supported practical co-operation and mutual recognition as a sound basis for European Union co-operation beyond the Hague Programme. The Parliamentary Under-Secretary at the Home Office, Joan Ryan MP, said that the Government is “very encouraged” by what has been achieved by practical co-operation and mutual recognition.

184. The EAW was frequently cited by our witnesses as an example of an effective mutual recognition instrument. However, in one respect it is untypical—it is hitherto the only mutual recognition instrument which has been agreed and implemented relatively quickly. The necessary unanimity amongst Member States was secured because the political will was there to push the measure through. Jonathan Faull of the European Commission explained why:

It is no coincidence that the European Arrest Warrant was adopted very shortly after the terrorist attacks in Washington and New York on September 11 2001. It is the only example, frankly, of legislation of that importance which was enacted relatively quickly and a lot of people believed that without 9/11 it would not have been adopted that quickly. Some cynics have gone so far as to say that we might still be talking about it today.¹³¹

185. Other mutual recognition instruments have been held up indefinitely in institutional deadlocks. For example, the **European Evidence Warrant (EEW)**, envisaged as the natural accompaniment to the EAW, has been far harder to reach agreement on. The EEW is intended to replace mutual legal assistance in the same way that the EAW has replaced extradition, and to facilitate the movement of evidence to accompany suspects.

186. A number of concerns have been expressed about the EEW as it is currently drafted. The Law Society told us that the instrument is balanced in favour of the law enforcement perspective and gave the example of its provisions on admissible evidence:

The way it has been adopted ... is that objects, data and other items found at the scene when the evidence warrant is being executed can also be included and also statements can be taken from witnesses or individuals at the scene. We have had strong concerns about that in terms of protection of self-incrimination in terms of what that evidence will be used for.¹³²

129 Ev 130–31

130 Ev 131

131 Q 67

132 Q 180

187. Concern over abolition of dual criminality has also been raised in relation to the EEW. The European Scrutiny Committee has commented:

The doctrine of dual criminality is more than a mere technicality, as it gives the United Kingdom citizen (or any other person within the jurisdiction) a guarantee that he will not be pursued by police and prosecution authorities for conduct which is lawful in this country. In our view, the proposal too lightly discards this guarantee.¹³³

188. Fair Trials Abroad has criticised the EEW on the grounds of variable implementation, citing Germany, which has negotiated “the right to double-check evidence requests for six types of crime, including terrorism and race-related crimes and refused to forward evidence where the charges would not attract criminal sanctions in Germany”.¹³⁴

189. The EEW has faced greater resistance from Member States than the EAW. Although a General Approach to the measure was agreed in September 2006, the Framework Decision is still stuck in Council Working Groups and awaiting adoption by the Council.

190. The implementation of the EAW demonstrates that sufficient political will can drive agreement in the field of mutual recognition, even against institutional challenges. The EAW was passed and implemented despite the alleged problems with reaching agreement in the third pillar. However, given the special circumstances of its inception, in the aftermath of 9/11—and at a time when unanimity was required from only 15 Member States rather than the present 27—we conclude that the EAW is not typical of a third pillar measure and that it is likely to be much more difficult to reach agreement on other mutual recognition instruments.

191. The European Evidence Warrant provides an interesting comparison to the EAW. Without the same degree of political pressure under which the EAW was passed, this important measure has fallen foul of difficulties in getting agreement under unanimity.

192. The difficulties in passing mutual recognition instruments may not reflect a failure of the core principle of mutual recognition. It may simply be that the current procedures do not allow progress to be made if there is little desire amongst Member States to make progress, or if there are significant failings in the proposals. It should not be assumed that these hurdles to agreement are necessarily a bad thing, or that removing them would produce better and more satisfactory outcomes.

Harmonisation

193. An alternative to mutual recognition is the harmonisation—sometimes called ‘approximation’—of more extensive aspects of Member States’ criminal justice systems, including criminal definitions and sanctions. We asked witnesses whether they saw advantages or disadvantages in more extensive harmonisation.

¹³³ European Scrutiny Committee, Ninth Report of Session 2005-06 (HC 34-ix), published 18 November 2005, pp. 11–12

194. Mike Kennedy, President of Eurojust, told us that if laws were fully harmonised in Member States it would be easier for EU investigators and prosecutors to co-operate with one another:

If you take as an example a police officer visiting a witness, taking a statements as to what he or she saw at the scene of a crime and what he or she did linked into the crime. In other countries, a statement perhaps would be taken by a police officer or investigating judge, which would be simply the details of what this person said. There would not be a declaration. If everybody across the European Union had to make what we call section 9 statements, it would make life a lot easier for all the prosecutors in the common law countries.¹³⁵

195. Other witnesses argued that wholesale harmonisation would be both impractical and undesirable. For example, SOCA commented:

In the context of serious crime cases, there is nothing to suggest that there would be benefits from harmonisation that cannot be obtained via practical co-operation/mutual recognition.¹³⁶

196. The UK Government noted that “harmonisation would almost certainly require major changes to our domestic arrangements”.¹³⁷ It added that:

The Government does not believe that there should be wholesale harmonisation of law and procedures at EU level and that any harmonisation must be justifiable under Articles 29 and 31 of the Treaty on European Union.¹³⁸

197. There appear to be no current plans by either the Commission or any Member States to propose harmonisation on a large scale. The Centre for European Policy Studies told us that “as far as can be seen, there are no European efforts to harmonise entire ‘criminal justice systems’”.¹³⁹

198. However, Open Europe disagreed, stating that “the EU Commission has ... begun putting forward proposals for the full scale harmonisation of Member States’ criminal law at quite an alarming rate.”¹⁴⁰

199. When we discussed approximation of legislation with Jonathan Faull of the European Commission, he told us that the Commission, and other EU institutions, only propose harmonisation in exceptional cases, and that “when we embark on the necessary but exceptional approximation of substantive notions of criminal law we do so in a way which respects and preserves national traditions”.¹⁴¹

135 Q 243–244

136 Ev 170

137 Ev 131

138 Ev 131

139 Ev 103

140 Ev 159

141 Q 80

200. We agree with the UK Government, and a wide number of practitioners, that there is no case for a full-scale harmonisation of European criminal justice or legal systems. There would be very significant difficulties, if not impossibilities, in trying to marry nearly 30 different systems. We have seen no evidence that the Commission, or Member States, desire “full scale” harmonisation.

201. Mutual recognition and harmonisation are not mutually exclusive approaches. It is often argued that for mutual recognition to be truly effective, at least **some common standards** may be necessary, to ensure that Member States can have the required high degree of trust in the justice systems of other Member States. The Centre for European Policy Studies told us:

The biggest problem of mutual recognition is the fact that in the end what it does is excite distrust, because ... you do not have a sense of confidence that if you hand over one of your citizens you know what will happen to that individual and can be confident that he will be tried in accordance with a set of rules which have been commonly agreed for offences which society here accepts ought to be regarded as offences.¹⁴²

202. The Commission took a similar view, commenting that—

There are two reasons why mutual recognition is still an aspiration rather than a reality. One is relevant differences (and only relevant ones), and, secondly, there is still a lot of mutual trust to be built up between legal practitioners, between judges, between lawyers, and above all between the publics of our Member States so that they feel that they get as fair a trial abroad as they do at home.¹⁴³

203. The UK Government supports the view that “mutual recognition is founded on mutual trust and confidence in other Member States’ criminal justice systems”.¹⁴⁴

204. Many of our witnesses argued that, in order for mutual trust and therefore mutual recognition to be effective some common minimum standards are needed to iron out some of the inconsistencies between different systems. It was argued in particular that there needs to be common definitions of a number of concepts on which mutual recognition rests, particularly those in cross-border cases. This has already happened in a number of areas: for example, the agreed list of 32 offences in the EAW. Witnesses emphasised a number of other areas in which some common agreement is still needed. The Criminal Bar Association told us:

we recognise that some problems would be more readily resolved by harmonising rules that produce conflicts or tensions ... for example, problems associated with *ne bis in idem*; or determining the appropriate trial venue for those accused of cross-border crime, or even, in the longer term, more sensitive matters of public policy such as the minimum age of criminal responsibility.¹⁴⁵

142 Q 31

143 Q 77

144 Ev 131

145 Ev 108

205. The Director of Open Europe, Neil O'Brien, agreed that there are real challenges for judicial co-operation arising from the current lack of common definitions and procedures:

EU lawmakers will be faced with a dilemma. Either they accept that their citizens will be prosecuted for offences which are not recognised under UK law, or they will have to look to standardise large numbers of offences across the EU.¹⁴⁶

However, he disagreed that looking for common standards in a limited number of areas provides a solution. He argued that this would lead to 'competence creep', and would be 'simply the first step in a gradual process of harmonisation'.¹⁴⁷

206. The UK Government expressed caution over claims that common standards in criminal law are always necessary to achieve mutual recognition:

The Government accepts that it may be necessary to establish some minimum standards in limited specific areas of the criminal law in order to enhance the effectiveness of mutual recognition, but these should not be regarded as a precondition for effective mutual recognition.¹⁴⁸

207. We think it logical that for mutual recognition in the field of judicial co-operation to be effective, and for Member States to trust each other, some degree of common standards in tightly limited areas may be desirable. Nonetheless, we caution that even in the case of proposals for common standards no proposal should be considered without powerful evidence of the scale and nature of the problem to be tackled, and the gains to be delivered by any such proposal.

EU procedural rights

208. The balance between law enforcement measures and protection of defence rights was a recurring theme in our evidence. Many of the measures promoted at EU level in the JHA field in recent years have focussed on the need to protect the citizen against crime and terrorist attack, by enhancing co-operation between police, prosecutors and judicial authorities. It is probably fair to say that, overall, there has been less focus on ways of safeguarding or enhancing the defence rights of individuals suspected of or charged with criminal offences. However, one major initiative in this direction has been a proposed Framework Decision aimed at setting common standards by agreeing "certain procedural rights in criminal proceedings".

Is action needed?

209. Are common standards in this area needed? We sought concrete examples of where UK citizens have suffered infringements of their rights in other EU countries and the scale of the issue, to assess the need for EU action. The campaigning organisation Fair Trials Abroad described to us some examples of cases of alleged mistreatment of UK citizens in

146 Ev 158

147 Ev 158

148 Ev 132

other EU countries. These case studies are set out in the written evidence.¹⁴⁹ One of the case studies involved a UK citizen currently being held under ‘temporary arrest’ in Poland. Fair Trials Abroad claim that he has been deprived of proper legal representation, not provided with adequate translation and interpretation facilities, asked to sign papers only provided in Polish (which he does not understand) and not given access to details of the case against him. The other case study involved a British citizen charged in Denmark with attempted rape. Fair Trials Abroad claim that he was questioned while suffering from a serious head wound; not given access to legal representation when questioned; not informed as to his legal rights; not allowed to read through the written texts of statements he had allegedly made; and not given proper interpretation facilities or legal support. On the face of it these cases (and others which are set out in Fair Trials Abroad’s memorandum) would certainly seem to suggest that there is a need for more robust common standards across the EU.

210. Other witnesses also argued that lack of safeguards has real implications for EU and UK citizens:

If you have a situation where the rule of law is not fully respected, or lack of fair trial rights, then obviously that will act as a disincentive to UK citizens, for example, who wish to work and travel in those Member States, as others have discovered to their cost when travelling and working outside the EU.¹⁵⁰

Yes, certainly in the UK you would have a duty solicitor provided upon arrest in terms of the European Arrest Warrant, but what happens when that person is surrendered to Bulgaria or Romania? Do they have guaranteed access to a lawyer and free legal representation in that Member State?¹⁵¹

211. We asked the police how necessary they considered minimum rights to be in accompanying the European Arrest Warrant. Bill Hughes, Director of SOCA, welcomed bringing procedural standards across the EU into line with high UK standards:

it would be useful, I think, if across Europe there were some common stand around procedural matters about something along the lines of what we expect in this country from the Police and Criminal Evidence Act, those types of caveats that apply to anybody held in custody in the UK.¹⁵²

212. We asked the Government what level of protection is currently provided to UK citizens in other EU criminal justice systems, and whether it is sufficient. The Minister told us that the main support for citizens abroad is through FCO consulates.¹⁵³ The consulates can gain access to the citizen and make provision for their welfare, but can not provide any continued support in criminal proceedings. They can put citizens in touch with non-governmental organisations such as Prisoners Abroad and can provide a list of local lawyers, but do not provide any financial assistance to a UK citizen wishing to fight their

149 Ev 181–183

150 Q 165 (JUSTICE)

151 Q 165 (The Law Society)

152 Q 144

153 Ev 176

case abroad. These consular services are not available to non-UK nationals, even those who have been lawfully resident in the UK for many years.

213. The Government told us that there is some provision for legal aid abroad through two schemes.¹⁵⁴ However, it seems that both this provision is only applicable to civil, commercial or administrative cases, and are not therefore relevant to criminal ones.

214. According to Prisoners Abroad, the charity to which the consular services refer UK citizens,¹⁵⁵ in February 2007 it was in touch with 318 British nationals in prisons in other EU countries. Of the breakdown by country, two of the top three countries with the highest number of UK nationals are EU countries (Spain and France).¹⁵⁶ According to Fair Trials Abroad's latest annual report, for 2004–05, it had 356 new cases referred to it in 12 months (including EU nationals detained abroad in EU and outside EU).

The Framework Decision

215. The Hague Programme, to which Member States unanimously signed up, stated that:

The further realisation of mutual recognition as the cornerstone of judicial co-operation implies the development of equivalent standards for procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions.¹⁵⁷

216. In Spring 2004 the Commission proposed a measure designed to set some common minimum rights for defendants across the EU—the '**draft framework decision on certain procedural rights in criminal proceedings**'. The rights contained in this original draft included the right to legal assistance, the right to interpretation and translation and the right to communicate with consular authorities.

217. Jonathan Faull, Director-General of JHA at the Commission, told us why the measure is necessary:

We are, and I will be very frank with you, having great difficulty in persuading the Council of Ministers that robust legislation is needed to create a minimum set of common procedural guarantees for suspects and defendants across the EU. The answer we are sometimes given by those who do not see the need for such legislation is, "But we all have the European Convention on Human Rights. We all have the EU's Charter of Fundamental Rights. We have a lot of common rules already, We are all democracies, after all, and we all respect the rule of law. What more could you possibly want?", the answer to which is that we do not have some of the more detailed rules which would go a long way towards reassuring people. It is nowhere written down that Europeans have the right to a translator to explain what is going on when arrested in a foreign country. Normally it happens. Again, most of our

154 Ev 176. *The European Legal Aid Directive and the European Agreement for the Transmission of Applications for Legal Aid*.

155 The FCO guide to UK nationals in prison abroad (*In Prison Abroad*, www.fco.gov.uk/travel) specifically refers citizens to the charity 'Prisoners Abroad'

156 Figures calculated from February 2007 breakdown by country on the 'Prisoners Abroad' website.

157 *The Hague Programme 2005/C 53/01*, p 13

countries provide this and we are all democracies, it is true, but it is not written down anywhere and it would, it seems to us, be a considerable factor of reassurance for European citizens to know that certain minimum rights are guaranteed across the EU, whatever Member States we find ourselves in, those rights being written down in a form which everybody can read and understand in their own language.¹⁵⁸

218. The draft measure was initially welcomed by Member States, including the UK, but as time went by increasing opposition was expressed to the proposals. As a result, substantial revisions were made to the text of the draft Framework Decision, with a view to addressing concerns such as ensuring compatibility with the European Convention on Human Rights (ECHR) (to avoid having two parallel human-rights regimes in Europe) and gaining exceptions for national provisions such as pre-charge detention. Notwithstanding these changes, a small group of Member States remained dissatisfied with the draft, and this group, which included the UK,¹⁵⁹ put forward in April 2006 a counter-proposal for a non-binding Political Resolution coupled with practical measures instead of a legislative instrument.¹⁶⁰

219. The Council of Ministers is currently considering these two options, the original Framework Decision and the non-binding Resolution. The former is intended “to facilitate judicial co-operation in criminal matters, and in particular mutual recognition, and to safeguard the fairness of proceedings”. The draft, in its latest form (produced by the current holders of the EU Presidency, Germany, in January 2007), focuses on five specific rights of persons subject to criminal proceedings: to information, legal assistance, legal assistance free of charge, interpretation and translation of documents.¹⁶¹ The non-binding Political Resolution backed by the UK sets out practical action to promote fairness in criminal proceedings, with particular reference to compliance with the ECHR, and access to free legal aid and to an interpreter.¹⁶²

220. The Home Office told us why the UK is now opposed to the draft Framework Decision:

We believe Europe already has enough legislation in this area in the form of ECHR and the related jurisprudence. The real need is to enhance compliance with the ECHR across the EU, and that is what measures proposed in a draft Resolution, proposed as an alternative to a Framework Decision on criminal procedural rights, sets out a range of practical measures based on recognised good practice Member States could take, mainly related to access to legal assistance and to interpreters.¹⁶³

221. The level of procedural rights for defendants in the UK is high. A regularly revised code of practice on the Police and Criminal Evidence Act (PACE) 1984 provides explicit guidelines for the police over treatment of detainees. These include strict guidelines on the

158 Q 77

159 Together with Cyprus, the Czech Republic, Ireland, Malta and Slovakia.

160 See House of Lords European Union Committee, Second Report of 2006–07, *Breaking the deadlock: what future for EU procedural rights?* (HL 20), para 3

161 *Ibid.*, paras 8–9

162 *Ibid.*, paras 21–22

163 Ev 129

exercise of stop and search powers,¹⁶⁴ a statutory requirement on police to record all searches and provide the detainee with a copy,¹⁶⁵ and guidelines on the detention, treatment and questioning of detainees.¹⁶⁶ The UK also has an independent body to monitor police, the Independent Police Complaints Commission (IPCC), which has a statutory duty to oversee the whole of the police complaints system and powers to investigate all complaints against the police. On one of the key issues which the draft Framework Decision on procedural rights intends to address, the provision of legal assistance free of charge, a recent Commission-sponsored study demonstrated that the UK has by far the highest budget for criminal legal aid of any EU Member State.¹⁶⁷

222. The House of Lords European Union Committee reported in January 2007 on the state of play with the alternative proposals. They noted that both the draft Framework Decision and the draft Resolution remained under discussion in a Council Working Group, with about nine or ten Member States in favour of the Framework Decision and about six opposed. Unanimity would be required for either proposal to be agreed. The Committee commented that “it is difficult to envisage how the deadlock can be broken”.¹⁶⁸ They expressed their view that the Framework Decision in its current form had been so watered down as to outline a “disappointing” basic level of rights, and therefore “we see little value in agreeing the instrument as currently drafted”.¹⁶⁹ They also criticised the alternative Resolution for omitting from its proposed list of practical measures the recording of police interviews; as well as noting that its implementation would be optional for each Member State, and therefore citizens would have no guarantee that they would be entitled to the stipulated procedural rights.¹⁷⁰

223. The Lords Committee urged Ministers to revive their efforts to secure a binding Framework Decision. They stated that—

The Government are rightly proud of the high standards of procedural rights which are generally observed across the United Kingdom and suggest that practical measures could help all Member States meet the requirements of the ECHR. It is precisely because of the high standards in this country that we consider that British citizens have the most to gain from this proposal. British citizens may travel to countries where police interviews are not recorded and where access to interpretation is not freely available. Furthermore, they are unlikely to be familiar with the rights available to them in other Member States.¹⁷¹

164 Police and Criminal Evidence Act (1984) 2005 Guidance Code A

165 Ibid, Code A Section 4

166 Ibid, Code C

167 142, 238,919 euro total budget (as of 2005). Cyprus has a recorded figure of 207, 576, 557, but the report authors state “we doubt that this figure is accurate”. Taru Spronken and Marelle Attinger, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union* (2005), p 81

168 House of Lords European Union Committee, Second Report of 2006-07, *Breaking the deadlock: what future for EU procedural rights?* (HL 20), paras 25–27

169 Ibid., para 33

170 Ibid., para 55

171 Ibid., para 35

224. Germany has signalled that the Framework Decision is a priority for its EU Presidency. It has emphasised that it would like to reach agreement on the current text by unanimity, and has stepped up negotiations to this end.

225. EU JHA Commissioner Franco Frattini made clear in a recent speech that the Commission and various Member States are already considering pursuing the aims of the Framework Decision through the special procedure known as “enhanced co-operation” if unanimity cannot be achieved:

The Commission firmly believes that a Framework Decision should be adopted unanimously by all 27 Member States so as to offer complete protection for citizens throughout the European Union territory. However, if one or two Member States will not accept a Framework Decision, whatever the content, and however hard others try to achieve a compromise, the only solution may be to do so without them.¹⁷²

226. The process of “enhanced co-operation” means that eight or more Member States may go ahead with a measure, as long the Council unanimously authorises them to do this. Member States who do not participate retain the choice to join the agreement later on.

227. EU negotiators have privately suggested that two or three of those six Member States currently opposed may sign up to the Framework Decision when it comes to a vote. The remaining Member States which support the alternative non-binding Resolution, and the UK and Ireland in particular, have expressed strong opposition to the Framework Decision. It therefore looks very unlikely that the Decision will be agreed under the current unanimity requirements. Equally, the large number of Member States, and the Commission, which support a binding instrument, are unlikely to accept a non-binding instrument in its stead. It therefore seems that the deadlock on unanimous agreement will remain, and that a number of Member States may therefore go ahead with “enhanced co-operation”. (We consider the implications of this in section 4 of this report.)

228. On the basis of evidence we have received, particularly from Fair Trials Abroad, there are reasonable grounds for concern about the absence of procedural safeguards for UK citizens in some other EU Member States. However, it is difficult to quantify the problem, or to know whether the injustices that result from a lack of binding common procedures are sufficient to justify radical change. We note that the level of procedural rights provided for defendants in the UK is high and that any EU-wide binding agreement must also offer high standards.

229. There is a real risk that setting common standards in EU criminal procedures might set up an alternative rights regime in Europe, operating in parallel with the ECHR, and opening the prospect of conflicting litigation at the European Court of Justice and the European Court of Human Rights. We support the UK Government’s view that the starting point, which would benefit both UK citizens in other Member States and the citizens of those States, should be to use existing mechanisms to ensure that the rights enshrined in the ECHR are uniformly observed across the EU. Detailed and independent monitoring of the extent of rights abuses in Member States is a

172 Frattini speech to Berlin conference, February 2007

precondition for taking remedial action against offending States. We recommend that the UK Government puts proposals before the Council of Ministers for a system of such monitoring to be established, with central EU funding, and for it to consider the best means by which sanctions could be brought against Member States which fail to comply with the ECHR in procedural matters. This should be done in full liaison with the relevant organs of the Council of Europe, which has responsibility for overseeing the working of the ECHR.

230. With regard to the choice which currently confronts the Council of Ministers, between a watered down draft Framework Decision and a non-binding Resolution, we do not feel that either in its current form is an attractive proposition. Some of the contents of the Resolution are worthwhile, but we would wish to see it strengthened by inclusion of tape recording of police interviews as a right. Unfortunately, a non-binding Resolution, of its nature, cannot be used as a lever to produce improvements in the rights situation in the States most likely to cause problems.

231. There is also a danger that if, as looks very possible, most other EU countries press ahead with an equivalent to a Framework Decision, but binding only on themselves, then as happened with the Prüm Treaty the UK will miss the chance to influence negotiations when they matter, and may have little option later but to sign up to an agreement that has already been negotiated. We therefore urge the Government to reconsider its current support for a Resolution and give renewed consideration to the proposals in the Framework Decision.

Borders and migration

Migration

232. We now turn to consider migration policy. Both economic and illegal migration now come under the first pillar, forming part of Title IV. Decisions on illegal migration are taken by qualified majority voting and co-decision with the European Parliament, whereas those on economic migration require the unanimous approval of the Council of Ministers and the EP has merely a consultative role. The UK retains the right to opt-in to migration and asylum measures under Title IV. To date it has in principle opted into measures on asylum and illegal migration, but not into measures on economic migration. During our inquiry we focused particularly on EU-wide action in the field of **illegal migration and border controls**. Earlier in this report, at paragraphs 27 to 37, we set out some statistical background information on migration. We also treated issues of UK immigration control in great detail in our report on this subject published in July 2006.¹⁷³

Illegal migration—Commission priorities

233. In July 2006 the Commission put forward a paper outlining its policy priorities in the fight against illegal migration.¹⁷⁴ In line with the Commission's overall evaluation of the

173 Home Affairs Committee, Fifth Report of Session 2005–06, *Immigration Control* (HC 775–I), published on 23 July 2006

174 Commission Communication, *Policy priorities in the fight against illegal immigration of third country nationals*

Hague Programme in July 2006, these priorities focused on consolidation and implementation of agreed initiatives, rather than further proposals. The Commission paper reaffirmed the commitment of Member States to the multi-strand approach which they signed up to in the “Global Approach to Migration”, supported by and agreed under the UK Presidency in 2005. The multi-strand approach aims comprehensively to address a number of precipitating factors in illegal migration, including co-operation with countries of transit and origin, securing of external borders, tackling illegal employment, and promoting effective returns agreements.

234. We asked Jonathan Faull, as spokesman for the Commission, what JHA Commissioner Franco Frattini’s ambitions in the area of illegal migration were. Mr Faull said that, long term, Mr Frattini’s ambition is “that the drama and tragedy of illegal immigration into the EU ... should stop”. In the short term, Mr Frattini’s ambitions are to implement the Global Approach to Migration, helping the Maltese, Italians and Spanish patrol the Mediterranean (particularly through Frontex), and cracking down on illegal employment.¹⁷⁵

235. The Government told us that it supports the measures put forward by the Commission in its paper:

The UK recognises that there must be a concerted effort from all Member States in fighting illegal immigration and supports the Commission’s approach in this area, particularly towards more effective use of funding through Frontex and greater use of technology at borders.¹⁷⁶

236. The Government also emphasised that it sees particular value in practical co-operation in the illegal immigration agenda, and gave examples of concrete operations:

Concrete operations in which expertise and support are exchanged are extremely effective ways of bringing about rapid and tangible improvements. For example:

—A bilateral study visit between the UK National Document Forgery Unit and Bulgarian Border Police led to a project to set up an equivalent unit in Bulgaria to strengthen their border control through increased capacity to detect forged documents.

—Acting as junior partner with the Danish on an EU Twinning Project with Turkey in order to develop their Asylum and Migration systems—including a sponsored study tour to the UK and Ireland to share experience on a wide raft of operational and policy areas, and training seminars on areas such as human resources/organisational issues and expulsion.¹⁷⁷

237. One issue which has been the subject of some debate within the EU is whether there should be any change to the existing, rather anomalous situation, whereby although illegal and economic migration are both part of the first pillar, in Title IV, they are subject to different voting procedures. As mentioned in paragraph 232 above, illegal migration is

175 Q 87

176 Ev 133

177 Ev 129

subject to qualified majority voting in the Council of Ministers and co-decision with the European Parliament, whereas decisions in relation to economic migration have to be taken unanimously, with the EP having only a consultative role.

238. Jonathan Faull, speaking on behalf of the European Commission, told us that:

we are in the rather odd position at the moment that most of illegal immigration and asylum issues are dealt with under the First Pillar while legal migration, economic migration issues are dealt with under unanimity rules. That for a start strikes us as rather odd, dealing with two facets of the same phenomenon in such different ways. It does not strike everyone as odd, obviously, but we do feel rather hamstrung in our ability to deal with migration as an international phenomenon given that legal dichotomy.¹⁷⁸

239. The European Policy Centre emphasised that the Hague Programme, which all Member States signed up to, “explicitly prioritises a balanced approach to migration management and acknowledges that effective combat of illegal immigration requires the creation of clear and coherent channels for legal migration”.¹⁷⁹ It noted that currently links between the two types of migration are not occurring in any substantial way.

240. Home Office officials acknowledged that this relationship is the subject of a live debate at the EU level:

There have been a number of Member States who argue that there are clear linkages between illegal and legal migration and some Member States have sought to use those trade-offs with countries in order to manage migration into their countries.¹⁸⁰

241. The Parliamentary Under-Secretary at the Home Office, Joan Ryan, told us that the Government has plans to propose a move of “legal migration from one pillar to another or vice versa”—by which we assume she meant that the Government rejects any suggestion of a shift in voting procedures to do away with the requirement for unanimity in relation to legal migration.¹⁸¹ Likewise she indicated that the Government had no plans to use legal migration routes to disincentivise illegal migration.

242. We believe that the relationship between legal and illegal migration is a complex one which merits further debate. To the extent that there is an economic need for migration, legal migration will always be the preferred approach and the justification for tackling illegal migration. What is less clear is whether the EU has the capacity to take a common approach to legal migration, given the very different pressures and needs of individual Member States. At the same time, the EU has not yet shown the capacity to develop an effective common approach to illegal migration (although it is improving). Our view is that the development of effective action on illegal migration remains the priority and the case for developing an EU approach to legal migration is less clear. However, the UK needs to recognise that the decisions of other EU states on

178 Q 86

179 Ev 119

180 Q 343

181 Q 343

legal migration have direct implications for the level of legal migration to this country, given the right of movement within the EU. There is room for debate as to whether, in the future, it may be in the UK's interest to accept a stronger common EU approach to legal migration. Members of the Committee hold different views as to whether it might ever be acceptable to agree to this.

Borders

243. EU co-operation on borders is largely governed by the Schengen acquis. As we have noted earlier, the UK does not participate fully in Schengen—it does take part in the majority of measures on police co-operation, but not in the measures on border controls. Concerns regarding loss of sovereignty have led to the UK not abolishing its border controls with the other EU Member States.

244. Many of the recent developments in the area of border controls have only involved Member States which participate in the immigration measures in the Schengen acquis. These are known as ‘Schengen-building measures’ and include the adoption of a standard Schengen borders code, development of the Visa Information System and the Second Generation Schengen Information System (SIS II) and the proposal for a standard code on Schengen visas.

245. As a result of the UK's decision not to opt in to the Schengen provisions on borders, none of these measures has a direct impact on the UK. However, the Government told us that despite this, effective control of the external borders of the European Union is a UK priority: “we take a close interest as we believe a strong Schengen border is in our interests as is a strong UK border in the interests of the EU as a whole”.¹⁸²

246. We looked at the effectiveness of current action on external EU borders through the EU Borders Agency, Frontex. We also considered the UK position with regard to Schengen.

Frontex

247. The Hague Programme focuses heavily on the external dimension of illegal migration, in particular security at the external borders of the EU. In 2005 a European Borders Agency, Frontex, was set up to manage co-operation between the Member States at the external borders. It became operational in 2006, with its headquarters in Warsaw.

248. Frontex's remit is to assist in all cross-border co-operation which Member States wish to carry out. Frontex can carry out risk analyses, gather, instruct and deploy experts, and launch joint operations. It divides its operational budget between air borders, sea borders, land borders and returns. It focuses on five common illegal entry routes into the EU, three through the Mediterranean, one via the Balkans and one through the Eastern borders via Russia and the Ukraine. During its first year of operations, 2006, Frontex carried out 16

joint operations based on risk analysis. The activities covered all border areas, whether they were implemented at the sea, land border or at airports.¹⁸³

249. Frontex has been the subject of some controversy during its initial period. This has centered around the fact that it has been called upon to conduct a number of emergency operations in the Mediterranean, picking up illegal migrants from makeshift boats and contributing to their processing and return. These emergency operations have, in some cases, distracted Frontex resources away from other operations.

250. A number of Member States have also expressed dissatisfaction that Frontex has not been given the level of financing and equipment promised. The European Policy Centre commented that under-resourcing and ongoing difficulties with staff recruitment to the Frontex offices in Warsaw have resulted in a situation “which compromises its ability to react rapidly to crises”.¹⁸⁴

251. We visited Warsaw in February 2007 to find out more about the effectiveness of Frontex’s operations and its organisational challenges. The agency’s Executive Director, Ilkka Laitinen, emphasised to us that Frontex cannot replace Member States in patrolling borders, but its role is to set up and co-ordinate operations, and then monitor and evaluate them. The three factors necessary for the success of the agency were appropriate financial resources, staff resources, and the willingness of Member States to co-operate with each other.

252. Although Frontex continues to face some substantial challenges, it has been demonstrably effective in a number of areas already:

- a) Operations. Operation HERA in the Canary Islands in autumn 2006 significantly reduced the number of boatloads of illegal migrants from Africa. Frontex calculated that during the first two months of that operation there were 5,000 and 8,000 migrants recorded respectively. However, once word of the operation reached the African mainland this had a significant effect. In the first two weeks of October only one boat of illegal migrants arrived, containing 52 people.
- b) Returns agreements. Frontex has negotiated working arrangements with Morocco, Libya, Senegal and Mauritania, which allow the agency to divert boats in waters controlled by those countries. Frontex has already turned away 4,000 people in boats under this agreement.

253. We asked the Government for its assessment of Frontex’s importance to the UK. The Parliamentary Under-Secretary at the Home Office, Joan Ryan MP, told us that she considers Frontex border operations to have an important deterrent effect on illegal migration.¹⁸⁵ Effective control of the southern maritime borders is of very great importance to the UK as well as the southern EU states:

183 Frontex *Annual Report 2006*, p 11

184 Ev 120

185 Q 335

when they [illegal migrants] manage to enter the EU through the southern maritime border, they work their way up through the EU and that entry, therefore, affects the northern Member States as well as those on that border.¹⁸⁶

254. The Commission and a number of Member States are keen to guarantee more resources to Frontex, and discussions are underway about possible extensions to its remit. These discussions are likely to be influenced by the outcomes of two reviews of the agency in 2007.¹⁸⁷ Future options included Frontex taking a role in co-ordinating border operations in third countries, or in evaluating the operation of Member States' border guards. It may also have a role in co-ordinating large EU-wide databases such as the Schengen Information System or Visa Information System. Jonathan Faull, Director-General for JHA at the Commission, told us that:

I think it [Frontex] has a considerable role to play in risk analysis and in operational co-ordination of the national border guards so that they can more effectively help each other in times of difficulty.¹⁸⁸

255. We asked the Government whether it would like to see Frontex playing a larger role in border controls. The Minister told us that the UK is very supportive of Frontex's work: "early indications in terms of the work of Frontex are that there is much good work that they can be doing".¹⁸⁹

256. However, she sounded a note of caution, arguing that Frontex, and the Member States which use the agency, must ensure that its work is focused on outcomes rather than only on activities.¹⁹⁰

257. The UK is not a full member of Frontex. The agency was deemed to be a Schengen-building measure, therefore integral to the Schengen acquis on borders. As such the UK can apply to participate, and a unanimous decision is taken by the full Schengen Member States whether to allow it to. The UK did so apply, but the Schengen states refused the application, a judgment which the UK is currently challenging in the European Court of Justice. The Minister told us that a decision is not expected in the case for 12 to 18 months.¹⁹¹

258. Frontex told us that there are two key consequences for the UK of not being a full participant. The first is not having a formal vote on the Frontex management board. This may not be of huge consequence: Executive Director Ilkka Laitinen told us that the only votes taken to date by the management board have been on the appointment of the executive and deputy executive directors. The second consequence is not being able to host Frontex operations on UK territory. This caused some difficulty in 2006 in a Frontex joint operation targeting six airports across the EU. Heathrow was due to be one of the six, but was disallowed.

186 Q 332

187 *Frontex Annual Report* in March 2007, and a formal Commission evaluation later in 2007

188 Q 92

189 Q 337

190 Q 337

191 Q 338

259. The Minister told us that the UK sought a vote on the board because “it would increase our influence if we were able to vote and it would increase our ability to affect at a decision-making stage exactly what it is Frontex is doing”.¹⁹²

260. She confirmed that until the UK is a full member of Frontex, no operations will be allowed to take place on UK territory, although she added that the UK is not currently seeking any such operations.¹⁹³

261. Frontex is a young organisation which has already carried out valuable work in securing the external borders of the EU. The agency has much untapped potential if it were to be properly resourced and staffed for the future. To this end the Government should encourage Member States to contribute the promised equipment and encourage the Commission to ensure sufficient funds to attract the right staff. We caution, however, that Frontex is not a panacea to problems of illegal migration, nor are emergency operations its *raison d'être*. Increased resourcing should not generate the expectation that Frontex can provide a much increased ‘returns’ service.

262. We support the Government’s bid for the UK to become a full member of Frontex. The lack of a vote on the management board may not be a serious disadvantage, but the inability of Frontex to undertake operations on UK territory is a matter of serious concern. We therefore encourage the Government to take every step open to it to reverse this situation.

Schengen ‘pick and mix’—is the UK position tenable?

263. As we have seen in paragraph 46 above, the UK has a special position with regard to the Schengen acquis. It does not participate in the Schengen agreement on borders but has applied, unsuccessfully, to opt-in to a number of ‘Schengen-building’ measures, such as Frontex.

264. On the one hand, this position is enviable. The UK can to a certain degree pick and choose measures which are advantageous, whilst giving up little to no national control over its own borders.

265. On the other hand, this situation in which the UK can gain more than it gives up is beginning to generate some negative results. The full Schengen members must unanimously approve any application for UK participation in any Schengen-building measures. In the recent past, the UK has been barred from participating in Frontex and, as the Minister said, is encountering great difficulty gaining support for its application for access to Article 96 data.¹⁹⁴ In addition UK police representatives told us that they want access to the proposed Visa Information System (VIS) but that the Council Legal Service has denied it:

192 Q 331

193 Q 339

194 Q 346

The UK has asked for access to the data for security and crime prevention purposes. The Council Legal Service has argued that the proposal is a first pillar Schengen-building measure and that therefore the UK should not be allowed to participate.¹⁹⁵

266. As the new Schengen Information System (SIS II) and the new Visa Information System come online, and more Member States are integrated into the Schengen framework, the amount of immigration and border data exchanged via the system is set to increase. The UK's exclusion may well be more and more keenly felt, particularly if other Schengen states become more frustrated with the UK having one foot in each camp.

267. We asked the police whether they thought, as experienced practitioners, that public protection and national security issues might be enhanced if the UK were fully part of Schengen rather than occupying our current 'halfway house' arrangements. ACPO and SOCA told us that, although they understood that issues around sovereignty and national borders made this a very difficult political question, as practitioners they thought public protection would be enhanced if we participated fully in Schengen.¹⁹⁶

268. ACPO and SOCA questioned whether the choice to be a full member of Schengen or not was as stark as abandoning border controls and gaining access to more information on the one hand, or hanging on to border controls but having to find workarounds in accessing information on the other. Chief Constable Paul Kernaghan of ACPO said that this was a "false choice". He asked whether the UK was wholly convinced that its domestic border arrangements were better than those in Schengen:

Equally, I would have to say, as low key as I can, are we satisfied that our domestic border security is superior at this point in time to alternative options, I simply make that point. If we are saying there is a British gold standard and then there are these other people who perhaps are not just as good, that might be a valid choice. I would simply say and I am sure this Committee has heard evidence in the past which maybe says it is not such a stark choice.¹⁹⁷

269. We asked the Government whether the UK's 'pick-and-mix' attitude towards Schengen is frustrating other Member States and whether the UK position is tenable. The minister told us that the UK has "very good relationships" with other Member States. She emphasised that on any issue there are Member States which have "individual legal systems, individual policies and politics that mean [they] cannot, and will not, sign up to everything across the board".¹⁹⁸ She gave the example of Poland's recent derogation from the Framework Decision on Transfer of Prisoners and the German exemptions on dual criminality for six types of crime in the European Evidence Warrant.

270. We agree with the Minister that different Member States sign up to measures in varying degrees and that this is part of the natural give-and-take at the EU. It could be argued that the UK position is qualitatively different because it has a wide variety of opt-in arrangements across the whole Schengen system. The UK may continue to be in

195 Ev 92

196 Q 153

197 Q 154

198 Q 347

the uncomfortable position of being excluded from important measures as a consequence of its selective participation. Nonetheless, the good reasons which led the UK to choose not to opt in to Schengen remain in force: in particular, the UK's unusual geographical position arising from its island status, long sea borders, and lack of land borders (other than with the Irish Republic, which has also chosen not to opt in to Schengen). We believe that on balance the UK is right to remain outside the Schengen border-control regime. We recommend that the UK Government should continue to explain to other EU countries why this is the case, while stressing the benefits of fuller co-operation on all other aspects of Schengen. The Government should also treat as its top priority the need to enforce immigration controls effectively within the UK; we made detailed recommendations as to how this can best be done in our report on *Immigration Control* published in 2006.¹⁹⁹

Safeguarding data

Sharing data to fight crime effectively

271. All witnesses emphasised the need to share data effectively across the EU to fight trans-national crime. With the strong possibility that the 'principle of availability' will shortly be effectively adopted through incorporation of the Prüm Treaty in the EU's legal framework (see paragraph 143 above), an increasing amount of data is being shared across the EU. Witnesses told us that these increases in data availability increased the need for robust data protection arrangements. We took evidence on arrangements for data protection to balance data sharing.

Inside the EU—the need for better protection

272. Good data protection provisions exist in the UK at a national level with the Data Protection Act. At the EU level the Data Protection Directive, which preceded the UK Act, provides a similarly comprehensive level of data protection in the first pillar. However, there is currently no corresponding data protection provision in the third pillar, which leaves a significant gap, especially given the sensitive nature of much third pillar information. Witnesses identified a need for better data protection alongside increasing data availability. Professor Steve Peers, of the University of Essex, suggested that the principle of availability would involve a really "profound change".²⁰⁰ He warned that although police forces would in theory have limited access to one another's databases, the reality might be different:

You would certainly hope that every police force in the EU would restrict itself to only searching for very important information where it has legitimate reasons to search. But I suspect there is a risk that in some cases some uncontrolled fishing expeditions will take place. That is the risk from the data protection point of view.²⁰¹

¹⁹⁹ Home Affairs Committee, Fifth Report of Session 2005–06, *Immigration Control* (HC 775–I), published on 23 July 2006; the Government's Reply was published on 18 September 2006 as Cm 6910.

²⁰⁰ Q 253

²⁰¹ Q 253

273. It is apparent that the same tensions between security and rights which we explored earlier also arise from the data protection perspective. We asked David Smith, the UK's Deputy Information Commissioner, whether the nature of security challenges meant that the UK should be prioritising data sharing over data protection. He disagreed:

In simple terms, no. We are protecting a whole range of different rights. There is the right to the protection of your life but there is also ... the right to protection of your private life. There is no doubt that, in some areas, in the interests of preventing terrorism we have to give up some aspects of protection of our private life and our privacy. That is understandable but we do not have to give it up completely. There is a balance to be struck.²⁰²

274. However, Mr Smith also pointed out that having robust data protection provisions would in some cases enable more, not less, important data to be shared:

The Data Protection Directive in the first pillar was not just introduced to protect privacy; it was introduced as part of developing the single market to enable to flow of personal information ... by saying "we have common data protection standards, so no one can put up data protection barriers to the flow of information". Essentially, it is the same thing we are trying to do in the third pillar.²⁰³

275. We asked witnesses whether there has been a balanced impact study comparing the advantages of one with the risks of the other. Officials from the then Department for Constitutional Affairs (DCA) (now the Ministry of Justice), who hold cross-Government responsibility for data protection, told us that this was a "very important question" and that the Government had held extensive consultation with stakeholders, including those representing the data subject, in discussions about data protection measures in the third pillar.²⁰⁴

Existing provisions in the third pillar

276. There are specific data protection measures built into a number of third pillar agreements and bodies. For example, Europol has a joint supervisory body composed of national representatives, who have the duty of ensuring that rights of the individual are not violated by the storage, processing and utilisation of the data held by Europol. Mr Michel Quille, Deputy Director of Europol, told us that his organisation has the "highest standard of data protection".²⁰⁵ The Schengen Convention, the Prüm Treaty, the Europol Convention and Schengen-building measures have their own data protection regimes.

277. We asked witnesses whether, given the number of individual data protection regimes, there was a need for an overarching third pillar data protection measure to match the Data Protection Directive in the first pillar. Witnesses argued that there remains an urgent need for a data protection framework in the third pillar. Belinda Lewis from the DCA told us

202 Q 273

203 Q 274

204 Q 270

205 Q 161

that an overarching measure would prevent reinventing the wheel and set minimum standards:

We would expect [a framework decision] to add value by avoiding working groups from reinventing the wheel every time data protection was discussed. If we have a sensible, more detailed minimum standard to which people can refer, then we would not need to start negotiating more basic data protection provisions in third pillar dossiers.²⁰⁶

278. David Smith, the Deputy Information Commissioner, also argued that the proliferation of different protection regimes in the third pillar is confusing and that clarity is needed for practitioners:

We are keen that the regulation is, as far as possible, clear, simple and consistent, so that police forces and others who have to follow it know what they have to do. When you have a proliferation of different measures—different ones applying to Europol, different ones to Eurojust it becomes extremely complicated. That is one of the reasons why we favour a framework decision for the third pillar, to give one overall standard which is hopefully clear, simple and easy to follow.²⁰⁷

The draft Data Protection Framework Decision (DPFD)

279. In October 2005 the Commission put forward a proposal for a Framework Decision on the protection of personal data processed in the course of activities of police and judicial co-operation under the third pillar.²⁰⁸ The framework decision would apply to all agreements and information systems in the third pillar, both current and future, although specific information systems and bodies would continue to have their own bespoke data protection provisions built in.

280. Agreement has not been reached on the framework decision, and a number of witnesses held it up as another example of a rights-protecting measure which has become bogged down in the EU negotiating process.²⁰⁹ JUSTICE told us that “the UK, among other Member States, is withholding support of significant elements of the Commission proposal while, at the same time, pushing for the adoption of the draft information exchange instruments”.²¹⁰

281. During the course of our inquiry agreement was reached to incorporate the Prüm Treaty into the legal framework of the EU. Professor Steve Peers warned against adopting the data protection provisions in the Prüm Treaty instead of the broader Framework Decision:

I think they [the data protection provisions in Prüm] are insufficient as compared to the Data Protection Framework Decision ... If I may name the areas: particularly the

206 Q 272

207 Q 272

208 COM (2005) 475 Final

209 For example, JUSTICE Ev 135 and The Law Society Q 172

210 Ev 135

powers of supervisory authorities are dealt with in the DPF and not in the Treaty of Prüm; the issue of further processing of data is dealt with in the framework decision and not in the Treaty of Prüm; equally, the transfer of data to non-EU states is dealt with quite strongly in the original proposal for a framework decision and quite weakly in the Treaty of Prüm.²¹¹

282. However, Professor Peers also warned that the original framework decision would not necessarily provide sufficient protection either, as it would be likely to be watered down through the EU negotiating process:

I am sure it is technically possible that the framework decision could set a higher level of protection than the worst-case scenario, but I think something close to the worst-case scenario is more likely than something close to the best-case scenario.²¹²

283. After agreement had been reached at the February 2007 JHA Council to incorporate the Prüm Treaty into the EU framework, the Government reiterated its support for the DPF. The Parliamentary Under-Secretary at the Home Office, Joan Ryan MP, told us:

I think the data protection framework decision ... is very important and we need that to come forward in the same way we have the Directive for the first pillar issues. Of course every policy that comes forward has within it its own data protection procedures ... but I think that signals the importance of having the framework decision, so we can, as policies develop, horizontally apply data protection rather than having to negotiate it in each single, individual way forward.²¹³

284. It is not yet clear what precise impact the incorporation of the Prüm Treaty will have on the draft Framework Decision. However, following a period of stagnation, the Framework Decision is back under active negotiation. On 4 May 2007 the European Parliament's rapporteur on the Decision noted that Germany had produced a revised proposal which "made it possible to overcome the deadlock within the Council" and "to reach political agreement".²¹⁴

285. We consider that in the area of data protection there is evidence of insufficient political appetite for protective measures as compared to law enforcement ones. We note the Minister's expression of continuing Government support for the Data Protection Framework Decision. However, if proposals for a Framework Decision were to be superseded by the data protection provisions in the Prüm Treaty, we would have serious concerns as to whether these were adequate. We note the lack of EU-wide consultation over the contents of the Prüm Treaty, arising from its origins as an agreement between a small group of Member States which did not include the UK. We recommend that the Government should continue to support the principle of making provision for data protection in the EU third pillar through a Framework Decision.

211 Q 255

212 Q 256

213 Q 348

214 PR/665822EN.doc p33

Data sharing between the EU and third countries

286. We now consider two particular recent developments which have caused concern, in which personal data of UK and EU citizens have been made available to the United States: the Passenger Name Record agreement and the SWIFT agreement.

287. In the aftermath of the terrorist attacks on 11 September 2001, the US Congress passed a law requiring air carriers operating passenger flights to or from the United States to make Passenger Name Record (PNR) information available to the then Customs Service. PNRs contain a range of personal data about airline passengers, which can include sensitive data about race, political opinion, health or sex life of the individual.

288. In May 2004 the EU signed an agreement with the United States to allow the US authorities access to the airline PNRs of EU Member States. This allows US Customs to receive a wide range of personal data of passengers of European airlines flying to or via the US, including credit card numbers and dietary requirements. The agreement was made under the first pillar (as it concerned commercial airlines) but was then the subject of an European Court of Justice ruling which declared it was a third pillar competence as the ultimate purpose of the data sharing was for anti-terrorism measures. The first pillar agreement, concluded on the basis that the US has an adequate level of data protection, has now been replaced by a third pillar agreement between the EU and the US, signed in autumn 2006.

289. A great deal of concern has been expressed about the PNR agreement. It provided the US with potentially very sensitive personal data of millions of EU citizens, with limited control over how the data would subsequently be used. Our witnesses disagreed over the adequacy of data protection provisions in the agreement. Officials from the DCA told us that the Commission had considered the data protection safeguards annexed to the PNR agreement to be sufficient. These set out what the US was allowed to use the data for, who they could share it with and how long they could retain it.²¹⁵ However, Professor Steve Peers cast doubt on the provisions:

The PNR agreement ... gives a number of important data protection safeguards, [but] there are doubts about how well it is implemented ... and it does not set much restriction on the further transfer of the data to other countries or other agencies within the United States.²¹⁶

290. One of the MEPs who submitted evidence to us, Baroness Ludford, criticised Member States' lack of consistency in being reluctant on the one hand to share information with Europol and Eurojust, whilst at the same time having "no problem in exchanging data with the US, such as data related to air passengers (PNR) or banking information on the SWIFT network".²¹⁷

291. We asked the Government whether the handing over of personal data of UK citizens to the US through Passenger Name Records demonstrated a "level of casualness". The

215 Q 289

216 Q 290

217 Ev 144

Minister, Ms Ryan, responded, “I do not know that I would call it ‘casualness’ ... but I think it does flag up issues that need to be addressed and I think it is important that they are addressed”. When asked what could be done at a national level to protect UK citizens against their data being shared in an unjustified way, Ms Ryan replied that the Government would push for good evaluation and use this to inform future plans because “these issues are going to become more, not less, important”. Although Ms Ryan agreed that creating a good pan-EU data protection framework was “very important”, she also emphasised the need for data sharing, commenting that the “exchange of passenger name records is very important”.²¹⁸

292. In a further case in 2006, the non-profit Belgian international banking co-operative network Society for Worldwide Interbank Financial Telecommunication (SWIFT) shared sensitive EU banking records with the US Treasury Department. SWIFT received a subpoena from the US in the wake of 9/11 ordering it to allow the US access to search for evidence of terrorism-related activities. SWIFT allowed the US access to its data on international financial transfers without informing the EU authorities. EU Working Party 29, a national data-privacy supervisors committee ruled in November 2006 that the access to private transactions granted to the US was illegal.

293. SWIFT declared in a statement on its website that US access was only granted “for a limited set of data and for the exclusive purpose of terrorism investigations and for no other purpose”.²¹⁹ It added that the US was not able to search freely, but could only see data responsive to specific, targeted searches. However, the UK’s Deputy Information Commissioner, David Smith, raised with us the question of “whether the US access is proportionate; that is, whether they wanted far too much information about people who have no connection with the United States”. The civil liberties organisation Statewatch recently reported on its website that it had “received complaints from people with online UK banking accounts informing them that from 14 May 2007 details of all financial transfers by them through SWIFT will be passed to US authorities for the purposes of money-laundering, terrorism and crime in general. They are asked to agree or not—and if not they cannot transfer money”.²²⁰

294. We asked our witnesses whether the UK accepts lower data protection arrangements with third countries than with fellow EU Member States. Belinda Lewis of the DCA agreed that the UK does accept lower standards:

You asked about third countries and whether we accept lower standards of data protection there. In short, we do. Really we have to in order to maintain the proper flow of business. We share data with countries who would not be considered to provide adequate data protection for purposes such as extradition, also deportation, also to aid things like murder inquiries of UK citizens.²²¹

295. Professor Steve Peers agreed:

218 Q 348–49

219 www.swift.com/index.cfm?item_id=60275

220 www.statewatch.org *EU-US data protection PNR-SWIFT*

221 Q 289

We really should be digging our heels in and setting a reasonable standard as to what we consider adequate data protection with other countries. ... We have to think of wrong identification and all sorts of other issues that might arise.²²²

296. David Smith, the Deputy Information Commissioner, emphasised that these data protection problems are international and made a plea for some unified action: “we need some international harmonisation”.²²³

297. We asked the Government what could be done to ensure that EU systems are more robust in dealing with data sharing with third countries. Ms Ryan emphasised the importance of the draft Framework Decision on Data Protection, but did not specify how this agreement would impact on agreements with third countries, but said that a future situation similar to the Passenger Name Record agreement was “an area that the EU should hopefully be able to avoid”.²²⁴ She agreed that getting a powerful EU framework in place to block private sector or EU organisations sharing data with a third country with inadequate data protection was important:

I think it is crucial in ensuring that data that is exchanged is properly used and that the people to whom the data relates can be confident that they are protected.²²⁵

298. Current debate on the most recent draft of the Framework Decision on data protection in the third pillar has picked up on the problems of data protection with third countries in such cases as PNR and SWIFT. The European Parliament’s rapporteur on the Framework Decision said, in May 2007, that “in view of the current discussions concerning the exchange of data with third countries, particularly on Swift and the PNR agreement, it is necessary to adopt at European level minimum standards of data protection for these exchanges. ... such an exchange will be efficient and useful only if we establish a high level of data protection”.²²⁶ The latest draft of the Framework Decision on data protection provides for a joint supervisory authority to be set up to “combine the national supervisory authorities and the European Data Protection Supervisor”.²²⁷ The European Parliament’s rapporteur also recommended that “the joint supervisory authority created in the framework decision should be able to advise the Council, so as to ensure an appropriate level of transfer of data to a third country in the light of national law and international agreements”.²²⁸

299. Both the Passenger Name Record and SWIFT cases give cause for serious concern. We consider that the casual use of data about millions of EU citizens, without adequate safeguards to protect privacy, is an issue of much greater significance than many of the other EU-related matters put to the UK Government and Parliament for consideration.

222 Q 290

223 Q 291

224 Q 438

225 Q 351

226 PR/665822EN.doc p35

227 Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (7315/2007–C6-0115/2007-2005-0202(CNS)) Amendment 7 Recital 18a (new)

228 Ibid, p 35

We recommend that the Government and the European Commission should prioritise the question of provision of personal information to countries outside the EU as an issue of the greatest practical concern to its citizens. We repeat our earlier recommendation that the Government should seek urgent agreement on a comprehensive EU-wide data protection framework in the third pillar and ensure that specific minimum standards ensuring adequate data protection are agreed for data exchange with third countries. We also recommend that the Government should give due consideration to the proposal of the European Parliament rapporteur that the joint supervisory authority advise the Council to ensure an appropriate level of data transfer with third countries.

4 Institutional Questions

300. In our inquiry we were interested in two key questions in the debate over how Justice and Home Affairs at the European Union should be progressed:

- a) Is there a case for further measures at the EU level (and how effective are current EU measures)?
- b) Are the mechanisms through which JHA measures are drawn up and enacted effective?

301. We have addressed the first question in section 3 of this report. In this section we shall address the second question.

302. Some of our witnesses pointed out that Member States had identified political priorities, and committed themselves to enact consequential measures, in the Hague Programme. They argued that Member States have therefore agreed what they want to achieve in JHA and now need to ensure that EU institutions and systems are equipped to achieve these aims in the best way. Florian Geyer from the Centre for European Policy Studies told us “If we are sure where and how we want to go we should find the proper tools to do it”.²²⁹

303. In the absence of the Constitutional Treaty, the Commission and many EU observers have argued that an institutional ‘stalemate’ has been reached, particularly in JHA. In its paper on the mid-term review of the Hague Programme in 2006, the Commission commented that good-quality and timely decisions are increasingly hard to reach in the third pillar. It said that a number of measures are bogged down indefinitely in the decision-making mechanisms, and that where agreement is reached, it is often on the basis of the ‘lowest common denominator’. The Commission also criticised what they regarded as the insufficient role played by the European Parliament in respect of third pillar measures, and the limited role of the Court of Justice. (We set out details of the pillar structure and its implications in paragraphs 41 and 44-52 above.)

The debate about third-pillar decision-making

304. It is argued that problems with the current arrangements for JHA decision-making fall into four categories: treaty limitations, stalled and poor quality decisions, lack of implementation and a democratic deficit. We deal with each in turn.

305. The current **treaties** provide for an EU of no more than 27 Member States. Since this ceiling has now been reached, the treaties either need to be amended, or enlargement must stop. In addition, the Nice Treaty provides for a slimmed-down Commission in 2009. This will have consequences for the decision-making process. Some institutional change is therefore mandatory by 2009, and in advance of further enlargement.

306. It is frequently claimed that third-pillar procedures lead to **stalled measures and poor quality compromises**. Earlier in this report we have given detailed consideration to two third-pillar measures where agreement has not yet been reached: the draft Framework Decision on procedural rights in criminal proceedings, and the draft Framework Decision on data protection. There are a significant number of other measures on which agreement has eventually been reached, but which arguably have been ‘watered down’ to take account of individual Member States’ objections and special interests.²³⁰

307. Many witnesses claimed that the quality of JHA measures has become seriously compromised as a result of third pillar procedure. SOCA told us that “decision making can be slow and on occasions lead to application of the lowest common denominator approach”.²³¹ Baroness Ludford MEP cited as examples Commission proposals on cross-border investigation and prosecution, on information exchange between law enforcement authorities, on tackling race hate crime, and on procedural rights.

308. Jonathan Faull of the European Commission gave the example (which we have considered earlier in the report, at paragraphs 185 to 189) of the European Evidence Warrant, which he said “took years to enact and when it was finally enacted earlier this year it was legislation with many exceptions, exemptions and derogations for Member States”.²³²

309. A further problem with third pillar arrangements, according to some of our witnesses, was that even when a proposal has been agreed, **Member States often fail to implement measures properly**. The Centre for European Policy Studies told us:

It can be observed that Member States’ implementing activities are generally rather slow and reluctant in spite of earlier agreements on binding deadlines or invigorated declarations on the urge and necessity of certain measures. This observation can be made in relation to nearly every single third pillar action taken by the Council in the last years.²³³

However, Eurojust commented that, although implementation may be poor under the third pillar, it would not necessarily be better under the first pillar:

230 See, e.g., Q 164

231 Ev 170

232 Q 67

233 Ev 100–101

if decisions are to be made by qualified majority voting, one wonders if the quality and consistency of the implementation into national law will be so good in those Member States who were in the minority when such decision are made.²³⁴

310. Finally, the Commission has argued that the limited role of the European Parliament in the third pillar consultation process represents a **democratic deficit**.²³⁵ Under third pillar procedures, the EP has a consultative role only, whereas under first pillar procedures it has the right of co-decision with the Council of Ministers and thus effectively has a veto on measures.

Reasons for the problems

311. The Commission has attributed the poor quality of decision making in the third pillar to the **requirement for unanimity**²³⁶ between the Member States. It argues that this requirement is much more of an impediment now that the EU contains 27 Member States. The Criminal Bar Association (England and Wales) made a similar point:

Enlargement of the EU to 25 Member States (soon to be 27) has reduced the likelihood of reaching unanimity in relation to third pillar measures. On many files, notably the proposal on procedural safeguards, this has already resulted in progress becoming snail-like or non-existent.²³⁷

The numerous exemptions to the European Evidence Warrant, and failure yet to reach agreement on the Framework Decisions on data protection and procedural rights, would seem to support the argument that the requirement for unanimity is a significant factor in impeding effective decision-making.

312. The UK Government, however, has told us that it does not consider the unanimity requirement in itself to be a bar to good decision-making. It argues that proper evaluation prior to adoption will improve the quality of decisions:

The JHA Council has achieved results of real substance and shown that unanimity need be no bar to fast and decisive action ... The EU should be focussing on implementation... Decision-making could be made more effective by ensuring that new proposals are properly evaluated before being published.²³⁸

313. The Government and other witnesses cited the European Arrest Warrant as an example of how major, good-quality measures can be agreed unanimously, if the political will exists to do so.²³⁹ (We discuss the EAW earlier in this report, at paragraphs 160 to 178.) The counter-argument to this would be that the EAW was agreed to in very unusual circumstances (the immediate aftermath of 9/11), and was agreed to by an EU of only 15 Member States.

234 Ev 118

235 Com(2006) 331 final, p12

236 Ibid.

237 Ev 112

238 Ev 132

239 Ev 132

314. An interesting comparison to the EAW is provided by the Data Retention Directive, driven through the Council by the then UK Home Secretary Charles Clarke in 2005. This measure was passed in the wake of the terrorist attacks in London in July 2005. The UK Government chose to propose the measure under the first pillar rather than the third, and was able to secure agreement relatively rapidly. It is interesting that, when faced with a measure for which speed is desired, the Government chose to use the first pillar.

315. The likelihood that some Member States will poorly implement third pillar measures is increased by the fact that they face **no sanctions or adverse consequences** if they fail to implement what they have signed up to. The Commission has no powers to bring infringement proceedings against Member States in respect of third pillar measures.²⁴⁰ The Law Society (England and Wales) told us that:

The current lack of enforcement power in relation to Member States' implementation of framework decisions tends to make a mockery of implementation deadlines and again limits the effectiveness of coherent action.²⁴¹

Likewise, Open Europe commented that the Commission can tell Member States they are in violation of framework decisions but that "Member States are free to ignore these matters".²⁴²

316. Some witnesses suggested that agreement can be hard to reach because the measure being proposed attempts to do too much. Open Europe, for instance, stated "the problem is not necessarily the system but the proposals being put forward: they are too ambitious".²⁴³

Is QMV the answer?

317. The Commission argues that many of the difficulties which beset current decision-making on criminal law could be tackled by transferring it from the third pillar to the first pillar.²⁴⁴ That would enable decisions to be taken by qualified majority voting (QMV) rather than through unanimity. It would also give the European Parliament a co-decision role rather than simply a consultation role. (Please see paragraphs 41 and 44-52 above for fuller details of the pillar structure.)

318. We consider in paragraphs 329 to 340 below the modalities of how a transfer between pillars might be achieved. In this section we review whether such a transfer would be beneficial from the point of view of the UK's interests.

319. On the one hand, there is no doubt that first pillar procedures would increase both the speed of decision-making and the likelihood of measures of real significance being approved.

240 Q 70 (Faull)

241 Ev 141

242 Q 43

243 Q 38

244 Com(2006) 331 final, p13-4

320. On the other hand, the implications of such a transfer for what is frequently referred to as ‘national sovereignty’, both for the UK and other Member States, would be considerable.

321. On this latter point, we heard a variety of views. Some of our witnesses argued that there would be no real diminution in Member States’ influence. Jonathan Faull, Director-General for Freedom, Security and Justice at the Commission, argued that “people would not necessarily have to give up things they hold dear. They would have to make perhaps a greater effort to persuade the others why it is necessary to do so”. He noted that “even with the unanimity system we have at the moment, it is rare, very rare in fact, for one Member State alone to be isolated on a particular issue.”²⁴⁵

322. The Law Society commented that on first-pillar decisions, “the way the politics pans out is not sidelining or alienating one Member State on a particular issue, so it is a lot more built up on consensus and rarely ever goes to a crucial vote”.²⁴⁶ Other witnesses argued that the UK would effectively not lose its national ‘veto’ if JHA were transferred to the first pillar, because it would be likely to retain the right to opt in which it enjoys in Title IV of the EC Treaty.²⁴⁷

323. However, the Parliamentary Under-Secretary at the Home Office, Joan Ryan MP, expressed concern that QMV could mean that measures were passed even in the face of strong opposition from individual Member States:

If you go to QMV for some of these issues ... and some countries feel that they are being ridden roughshod over, I think that would be very damaging to the EU.²⁴⁸

324. Despite the opt-in, some concerns were expressed that the UK would still be in a weaker negotiating position under QMV because it would have to opt-in to measures early on, or, if it chose not to opt-in, it would have a weakened voice:

the opt-in arrangement clearly would not give the UK as much control as a veto. Member States have three months to opt-in to a new measure once it has been proposed. If, as the legislation is drafted, the UK or Ireland do not like the way it turns out, it is not possible to opt back out again.²⁴⁹

325. It is also the case that, under QMV, the Government would have an option to invoke Section 2.2 of the European Communities Act to implement agreed EU measures in the UK through secondary legislation.

326. One further consideration is that under existing third pillar arrangements, the UK’s interests may be damaged if other Member States insist on their right to block proposals which the UK supports. An interesting illustration of the issues involved is given by a recent third-pillar proposal on the transfer of prisoners between Member States. Under the measure, supported by the UK, EU nationals convicted in another Member State would be

²⁴⁵ Q 68

²⁴⁶ Q 182

²⁴⁷ See, for example, Q 102 (Michael Cashman MEP)

²⁴⁸ Q 358

²⁴⁹ Ev 155

transferred, within a certain time limit, to their state of nationality to serve their sentence. A Commission proposal on the subject was held up for some time in Council negotiations, with Poland expressing particularly strong objections. This measure might therefore seem to be a good example of UK priorities being exasperated by the unanimous voting procedure under the third pillar.

327. Agreement was reached, however, at the JHA Council in February 2007, on the basis of a compromise whereby Poland was given a five-year derogation from implementation. We asked the Government whether the concessions required from the UK (and other states) to achieve agreement had resulted in a satisfactory measure. Ms Ryan told us that the Government was satisfied with the agreement:

It is certainly the case that we would have preferred that Poland signed up in the same way that other Member States had ... but overall, given the strength of their objections, we reached a good agreement.²⁵⁰

Future options for JHA decision-making

328. EU leaders signed up to the ‘Berlin Declaration’ on 25 March 2007. The Declaration did not explicitly refer to institutional change, or to the form this might take, but did include a shared commitment to “place the EU on a renewed common basis” before the European Parliament elections in 2009. It is clear that the current German Presidency will press for a further commitment to institutional change, and it is likely that negotiations on the nature of this change will begin in earnest at the forthcoming JHA Council (12–13 June 2007) and European Council (21–22 June 2007). We considered what forms this might take.

329. The Constitutional Treaty proposed a transfer of JHA from the third to the first pillar. In the light of the present impasse in achieving ratification of the Treaty by all Member States, and in answer to the issues it has raised with third-pillar procedures, the Commission has proposed implementing Articles 42 of the Treaty on European Union (TEU) and 67 of the Treaty on European Community (TEC): the so-called ‘*passerelle*’ or **bridging clauses**.²⁵¹ These articles provide a legal basis on which all third pillar JHA activity could be transferred into the first pillar, bringing it under qualified majority voting (QMV) and co-decision with the European Parliament. Under the *passerelle* clauses the UK would enjoy the same right to opt in to all the transferred areas, as it currently enjoys in all other first pillar areas.

330. The *passerelle* clauses would effect part of what was provided for in the Constitutional Treaty, which would have abolished the pillar structure. However, the Treaty also contained a number of negotiated safeguards which would not be provided if the *passerelle* clauses were to be implemented. These safeguards included a so-called ‘emergency brake’ which applied to criminal law and procedure. The ‘emergency brake’ would have allowed any Member State who judged that EU action threatened fundamental domestic legal principle to appeal to the European Council. An additional safeguard at national level for EU proposals for criminal law was provided by the ‘subsidiarity principle’. This is a general

250 Q 312

251 In its Communication of July 2006 *Implementing the Hague Programme—the way forward*

principle of European Community law which stipulates that the Community can only act when it can be demonstrated that results cannot be better achieved by Member States acting alone. The Constitutional Treaty provided that, in JHA issues, if a quarter of national parliaments consider a proposal to breach the subsidiarity principle, the Commission must reconsider the proposal. Article 1.11 (3) of the Treaty states:

Any national Parliament or any chamber of a national Parliament may, within six weeks from the date of transmission of a draft European legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity [i.e. that legislative action should be taken at the appropriate level].

331. At the time of writing this report, views amongst Member States regarding the *passerelle* proposal are divided. It is understood that the current holder of the Presidency, Germany, is strongly opposed to the measure, largely on the grounds that it would amount to ‘cherry-picking’ individual clauses of the Constitutional Treaty, and thus render it less likely that the Treaty as a whole will ever be brought into effect, which would be Germany’s preferred outcome.

332. The UK Government has been studiously non-committal about its position in relation to the *passerelle* proposal, despite pressure from parliamentarians to reveal its hand. The Parliamentary Under-Secretary at the Home Office, Joan Ryan MP, told us that she would not agree that the proposal was “dead”, insisting that the UK did not like to rule out discussion on any proposal, in the spirit of European ‘partnership’. She noted that UK support for the Constitutional Treaty had been dependent on the safeguards, such as the emergency brake, which had been negotiated into it, and which the *passerelle* proposal lacked.²⁵²

333. There has been no agreement between Member States to bring forward a firm proposal on implementation of the *passerelle* clauses, and the discussion seems at least temporarily to have lapsed. Ms Ryan told us in February 2007 that:

The discussion around the *passerelle* and Article 42 is finished ... I do not think there is any prospect that the *passerelle* is going to reappear on the agenda under the German Presidency.²⁵³

334. An alternative solution to institutional problems would be to bring forward a **revised proposal for a Constitutional Treaty**, or a ‘mini-treaty’. It remains to be seen whether the German Presidency will bring forward any such proposal.

335. In the absence of institutional reform, two options are open to Member States who are dissatisfied with current procedures for decision-making in the third pillar: so-called ‘enhanced co-operation’, or proceeding by way of inter-governmental treaty (as happened with the Prüm Treaty).

252 Q 360

253 Q 362–4

336. As we have mentioned in paragraphs 225-26 above, the current Treaty on European Union provides for a situation in which a number of Member States, but not all, want to agree a joint measure. They can do this by **'enhanced co-operation'**, which means that eight or more Member States may go ahead with a measure, as long the Council unanimously authorises them to do this. Member States who do not participate retain the choice to join the agreement later on. Florian Geyer of the Centre for European Policy Studies told us that enhanced co-operation is envisaged by the treaties as a "last resort".²⁵⁴ It would take place within the formal framework of the EU, and therefore be subject to scrutiny by the European Parliament.

337. The incorporation of the Schengen acquis into EC/EU law provides the most prominent example of 'enhanced co-operation' to date. And as we have seen, Germany and other Members States may decide to pursue this option if progress on agreeing a Framework Decision on procedural rights remains stalled.

338. A major disadvantage of 'enhanced co-operation' is that although non-participating Member States are offered the choice whether to join the agreement later on, in reality they may have little influence in shaping an agreement or legislation when it has already been 'pre-designed' and tested by the participating states. This would seem to be a very unsatisfactory method of making policy.

339. Even less satisfactory than 'enhanced co-operation', which at least operates within the usual institutional checks and scrutiny provided by the EU framework, is **policy-making by inter-governmental treaty**. Such agreements are concluded directly between Member States' governments, outside the EU framework and therefore outside the competence of the European Parliament or European Court of Justice. The best example of inter-governmental treaty to date is the Prüm Treaty which (as we have seen in paragraphs 138-39 above) was agreed in secret in 2006 by seven Member States to provide for enhanced cross-border co-operation in policing. The Council decided in February 2007 to adopt Prüm into the EU's legal framework.

340. Despite what has happened with the Prüm Treaty, the UK Government does not accept that there is a trend towards either 'enhanced co-operation' or use of inter-governmental treaty as a means of circumventing the perceived constraints of third pillar decision-making. The Home Office told us that:

Bi-lateral and multi-lateral agreements between EU Member States outside EU structures are not new (for example the Schengen agreements date back to 1985) so it is not clear that there is a recent trend towards such arrangements. The Government is open to consideration of ways to improve decision making but there is no evidence to suggest that mechanisms that have been in place for many years are suddenly causing Member States to seek alternative ways of co-operating.

The Prüm Treaty is an example of a group of Member States seeking to improve their ability to co-operate even further. There is no indication that Prüm or other bi-lateral or multi-lateral agreements represent a move to EU fragmentation. Indeed the

stated intention of the Prüm signatories is to offer it up as the basis for an EU measure once it has been implemented and tested by the signatories.

The Government believes that the ability to continue to reach agreement on practical co-operation measures outside EU structures provides necessary and valuable flexibility to supplement EU measures. It does not mean that EU structures are being bypassed or that the EU is fragmenting.²⁵⁵

Institutional changes: conclusions

341. We are aware that EU Member States are currently discussing how to revise decision-making procedures in the wake of the failure of the proposed EU constitution to win support in a number of Member States. The Constitutional Treaty proposed significant changes to decision-making in JHA issues. The most controversial would have made elements of criminal law subject to qualified majority voting in the Council of Ministers. The implications of this for the UK would be significant. If elements of criminal law and procedure were to be brought under QMV then, at least in principle, the Government could be outvoted in the Council. In this case both the Government and Parliament would be required to pass legislation on issues of particular principle and sensitivity which neither the Government nor Parliament had desired.

342. At present a number of Directives which have been agreed under the first pillar have been implemented in UK law by secondary legislation. It would be even more unacceptable for EU measures on criminal justice to be introduced without primary legislation, as happens with some existing EU measures under QMV. We also note that any future changes to the list of 32 offences in relation to which both the European Arrest Warrant and the proposed European Evidence Warrant are applicable would be approved under QMV, and thus might be imposed on individual Member States which opposed the changes.

343. Throughout this report we have looked at a range of current initiatives at EU level. The evidence we have seen does not persuade us that, as things stand at present, there are sufficient benefits in terms of tackling crime, either here in the UK or across the EU, to justify such a major transfer of power away from individual Member States as would be entailed by a switch of criminal law from the third to the first pillar. It is true that the level of real risk to UK interests can be overstated. The UK has sufficient power and influence to ensure that it would rarely, if ever, be outvoted or required to accept something against its interests. But the constitutional principle cannot be lightly set aside. The examples of the European Arrest Warrant and the recent measure on transfer of prisoners suggest that it is by no means impossible for good decision-making to take place within third-pillar procedures.

344. Having said this, we believe that the UK Government must also recognise that an equally strong risk to our effective sovereignty may be posed by a proliferation of informal decision-making structures such as those devised by the participants in the Prüm treaty. It is highly regrettable that the UK did not participate in the Prüm process from the start. Similar informal arrangements within small groups of Member States

may produce *de facto* changes over which we have less influence than we would through the mechanisms of QMV. This is one reason why the UK should not absent itself again from such informal discussions.

345. We recommend that the UK Government should make clear to its EU partners that at present the case for moving criminal law matters from the third pillar has not been made. There is room for debate as to whether, in the future, it may be in the UK's interests to accept such a change. Members of our Committee hold different views as to whether it might ever be acceptable to agree to this. It is indisputable that such a change would be of great significance. The UK Government should not agree to any such proposal without full and specific parliamentary consideration of the issue.

5 Parliamentary scrutiny: serving the UK interest

346. Our decision to hold this inquiry was prompted in part by concern about the working of the current system of UK parliamentary scrutiny of EU decision-making in the JHA field. The system has undoubted strengths, but also some weakness arising from the split of responsibilities between departmental select committees in the House of Commons and committees with a specific EU-related remit in both Houses.

347. The principal engine of scrutiny of EU matters in the Commons is the European Scrutiny Committee (ESC). The core function of the ESC is 'sifting' EU documents including draft regulations, directives and decisions, Commission proposals, and papers generated by the Council of Ministers. If the ESC decides that a document is of legal or political significance, it reports on it to the House, and may recommend that it be debated, either in one of the three European Standing Committees, or (in rare cases) on the floor of the House. The ESC sifts through about 1,000 documents a year. A resolution of the House (the 'scrutiny reserve resolution', dating in its present form from 1998) constrains Ministers from giving agreement at European level to legislative proposals which the ESC has not cleared, or which the ESC has recommended for debate but on which the House has not yet come to a resolution.

348. The House of Lords European Union Committee, operating through a series of sub-committees, also examines EU documents. Its approach is intended to complement rather than duplicate that of the Commons ESC. The Lords Committee selects a much smaller number of documents for more intensive scrutiny, and publishes reports on these.

349. Both the ESC and the Lords Committee conduct admirably thorough review of EU documents and produce high-quality reports. The sifting function of the ESC is valuable in identifying those documents which stand most in need of further parliamentary debate.

350. However, a significant weakness in the system is that this process of scrutiny has over many years been carried on almost in isolation from other aspects of Parliament's work, in particular the work of scrutinising Government policy carried out in the Commons by the 18 departmental select committees (DSCs). As a consequence, it can be argued that DSCs have frequently failed to engage with significant policy proposals at EU level within their department's remit—or have done so at too late a stage in the policy process when

decisions have effectively already been taken. We can cite as an example the frustration expressed by our predecessor Committee in its report on the Extradition Bill in 2002, when it recorded its concern about aspects of the European Arrest Warrant proposal, but noted that the scope for changes was limited because the UK Government had already committed itself.²⁵⁶ The Committee's frustration could have been much mitigated if the Government had pro-actively sought to consult Parliament, including the relevant DSCs, at an early stage in the process. It is arguable that DSCs have also not always been sufficiently active in maintaining links with their counterparts in the European Parliament.

351. The ESC has the power to seek from DSCs, and certain other specified committees, their opinions on any EU document (and to impose a deadline for response to such requests); but in practice this power is very rarely exercised.²⁵⁷ For instance, only one such request has been directed at the Home Affairs Committee in the past five years.

352. A report published in April 2005 by the Select Committee on Modernisation of the House presented a package of proposals for improving Parliament's scrutiny of EU issues.²⁵⁸ These included:

- That a Joint Committee of both Houses be appointed to take evidence from Commissioners and Government Ministers, with MEPs having rights of attendance;
- That the number of European Standing Committees be increased from three to five;
- That the Government give the ESC an earlier notice of important proposals being considered by the Commission; and
- That in such cases the ESC should forward a copy of the proposal to the relevant DSC for information as a matter of routine.

353. Despite the fact that this package of proposals was published nearly two years ago, the Government has not yet enabled the House to have an opportunity of debating or deciding on any of the proposals. **We regret the absence of opportunity for debate on the Modernisation Committee's report, and urge the Government's business managers to find time for a debate in the near future.**

354. **We consider it is desirable for the House and its committees to take concrete steps to bridge the current divide in EU scrutiny between the document-focused work of ESC and the policy-based work of DSCs (which too often ignores developments at European level). We note that the ESC itself has recently begun to extend its activities beyond its traditional (and of course very valuable) sifting role, by carrying out some thematically-based inquiries. We welcome this development.**

355. **We believe this should be complemented by greater efforts to 'mainstream' EU scrutiny by engaging DSCs more fully in the process of examining key EU proposals.**

256 Home Affairs Committee, First Report of Session 2002–03, *Extradition Bill* (HC 138), summary (second para), and paras 28–31

257 The power is conferred by House of Commons Standing Order No. 143 (11).

258 Select Committee on Modernisation of the House of Commons, Second Report of Session 2004–05, *Scrutiny of European Business* (HC 465–I)

We therefore invite the European Scrutiny Committee to consider making more frequent use of its existing power to request opinions from DSCs on significant issues.

356. We recommend that the Home Office should undertake to consult us directly when major EU developments in the JHA field are at a formative stage. We request the Home Office to supply us with a quarterly report on progress with JHA developments—with an emphasis on proposals on which the UK Government has not yet reached its final settled position.

357. On the specific issue of the future of Europol, we noted earlier in this report that the Commission's December 2006 proposal contains no mention of scrutiny of Europol by national parliaments. We repeat here our recommendation that the UK Government should not give its approval to any changes in the status of Europol unless provision is made for a scrutiny role for national parliaments in conjunction with the European Parliament.

358. We have taken such steps as are open to us as an individual committee to mainstream EU business within our programme. This inquiry is a contribution to that process. In addition, we have sought to establish contacts with the main European institutions and with our fellow parliamentarians in other Member States. The next four paragraphs repeat the summary of these activities we set out in our most recent annual report.²⁵⁹

359. In November 2005, to mark the UK presidency of the EU, we hosted a conference at Westminster of representatives of equivalent committees in the EU's national parliaments, and of the European Parliament. The theme of the conference was 'terrorism and community relations', which had been the subject of the Committee's report published six months earlier. For the benefit of delegates to the conference, we commissioned a translation of the report into French. Keynote speeches were given by the European Justice Commissioner (Franco Frattini), the then Home Secretary (Rt Hon Charles Clarke MP) and the Lord Chancellor (Lord Falconer).

360. In addition to the visit to Brussels in November 2006 by the whole Committee (see paragraph 363 below), the Chairman and other Members have several times attended in a representative capacity meetings in Brussels of our 'sister committee' of the European Parliament: the Committee on Civil Liberties, Justice and Home Affairs (usually known for short as 'LIBE'). In October 2006 the Chairman gave a short presentation to LIBE on migration policy. In addition, in May 2006 the Chairman attended a "Parliamentary Meeting on the Future of Europe" in Brussels, organised jointly by the European Parliament and the Austrian Parliament, acting as rapporteur of a working group on JHA issues.

361. We have also held (in December 2006) a joint meeting with the European Scrutiny Committee to take evidence from Ministers on the implications of Bulgaria and Romania's accession to the EU; and received a joint briefing on EU issues in Brussels from the office of

259 Home Affairs Committee, First Report of Session 2006–07, *Work of the Committee in 2005–06* (HC 296), published 20 February 2007, paras 33 and 34

the UK Permanent Representative for ourselves and Sub-Committee F (Home Affairs) of the House of Lords European Union Committee.

362. We have collaborated with the ESC and Lords Sub-Committee F in setting up regular meetings of the Chairmen and Clerks of the three committees to co-ordinate our scrutiny of EU JHA issues.

363. In November 2006 we spent two days in Brussels meeting a range of representatives of the Commission and others. We sat in on a meeting of the LIBE Committee. We also held two oral evidence sessions, one with representatives of the European Commission and one with British MEPs.

364. At the session with MEPs we explored how effective they consider themselves to be in scrutinising EU initiatives on behalf of the UK, rather than from the perspective of EU political groupings. Timothy Kirkhope MEP said that MEPs were aware of the perception that they were “remote and removed” over in Brussels rather than in the UK. Jean Lambert MEP agreed with this analysis:

Quite often at the European Parliament level a lot of people do not know that there is a job being done despite the best efforts of many of us to get that information out there.²⁶⁰

365. Mr Kirkhope said that MEPs often work closely with UK political parties on issues which are “patently in the interests of Britain” but said that MEPs “work in an extra dimension to national parliaments” and therefore had in mind both UK interests and the European dimension. Jean Lambert MEP emphasised that that the role of British Members of the European Parliament was not always to consider the British interest, and told us that this makes it all the more important for national parliaments to get involved early:

Our job is to look at how this works not just for the UK but also for elsewhere and there is a balance sometimes to be found in that. Sometimes we will consider that we do want to defend a British interest. At other times maybe there are other things that we think outweigh that the involvement of our national parliaments at that point, further upstream, is really important, not when we have made the decision and you are then implementing it.²⁶¹

366. The MEPs from whom we took evidence were agreed that the effectiveness of the UK Parliament, and other national parliaments, in scrutinising EU affairs could be improved. Graham Watson MEP told us:

It is clear that allowing for unanimity voting in the Council in theory allows national parliaments to commit their government to a certain negotiating mandate, which can ultimately be defended via the use of their veto powers. In reality most national parliaments do not possess the ability to scrutinise the actions of their governments prior to the adoption of acts in Council.²⁶²

260 Q 109

261 Q 109

262 Ev 172

367. Timothy Kirkhope MEP said “I think the big problem we have ... is that there is not enough parliamentary scrutiny *per se* in national terms.”²⁶³ Michael Cashman MEP told us “I do think that there is a greater role for national parliaments to engage in the scrutiny process at an earlier opportunity.”²⁶⁴

368. We agree with these comments by our colleagues from the European Parliament. Our exchange with MEPs during the course of this inquiry was very valuable. Whilst it might not be necessary to institute formal joint scrutiny with MEPs, we will attempt to maintain a high level of informal dialogue with British MEPs on key issues, using the services of the UK National Parliament Office in Brussels.

369. We will do our best to increase the quality and quantity of our scrutiny of the European dimension to Home Office decision-making. In particular, we propose to discuss with colleagues on the ESC, Lords Sub-Committee F and the LIBE Committee how we can build on recent encouraging contacts so as to create mechanisms for regular contact and liaison.

263 Q 108

264 Ibid.

Conclusions and recommendations

Our approach in the inquiry

1. What we have aimed to do is to look at selected issues from the perspective of the actual challenges faced by EU countries, particularly those of cross-border crime and border control. We have then attempted to assess the current and future effectiveness of EU action in meeting those challenges. Throughout our evidence sessions, we consistently asked our witnesses “How big is the problem? What’s the evidence that action x, y or z is necessary?” (Paragraph 6)
2. One consistent theme emerging from the responses has been that policy-makers often lack sufficient information about the practical problems which action at EU level ought to be aimed at tackling. In our view, policy initiatives at EU level should only be pursued if there is a solid evidence-base that they are likely to make a real practical difference to the effectiveness with which the common challenges facing EU Member States in the JHA field can be tackled. If what is being contemplated is a change to the decision-making processes of the EU itself—such as abandoning the current requirement that decisions on policing, legal migration and judicial co-operation on criminal matters should be made on the basis of unanimity amongst Member States—it is all the more important that a proper case should be made out for the practical benefits to be brought by such changes. (Paragraph 7)
3. Throughout this report, therefore, we have tried to set the current debates about policy and institutional change against the test of problem-based and evidence-based action. However, we recognise also the danger that if action is not taken in certain areas through the central EU institutions, groups of individual Member States may collaborate amongst themselves in ad hoc arrangements, which then become adopted formally by the EU, as is in process of happening with the Prüm Treaty. We recognise that future UK governments may have to weigh the disadvantages of engaging with initiatives they deem to be insufficiently evidence-based against those of being excluded from key negotiations on what may ultimately be adopted as EU policy. (Paragraph 8)
4. A key question for our inquiry has been whether these alleged difficulties with the current arrangements are significantly affecting the ability of the UK and the EU to tackle crime and manage migration. A subsidiary question is whether failure to tackle these difficulties is driving, and will drive, some EU Member States to make their own arrangements for co-operation outside the formal structures of the Union. (Paragraph 50)

Policing co-operation across the EU

5. We welcome the Government’s assurance that it will give consideration to setting up some central mechanism for co-ordinating liaison between UK police and their counterparts in other EU states on crime other than serious organised crime. It is clear from the comments made to us by police representatives that the absence of such a mechanism causes difficulties. We are therefore surprised that prior to our

evidence session on 9 January it appears that the Government was not aware of ACPO's and SOCA's concerns in this regard—which in turn suggests a failure of liaison between the Government and its senior police advisers. (Paragraph 77)

6. We believe that the creation of Europol has been a positive development in facilitating police co-operation, particularly by building confidence and knowledge between Member States. We do not believe Europol has yet achieved its full potential. A significant aspect of this is a lack of full trust and co-operation between Member States. Although the UK is fully engaged with the work of the agency, its work appears to be hampered by the varying degrees of co-operation it receives from other Member States. It is disappointing that the Commission has not done more to address the evident reluctance of some Member States to supply their national Europol liaison officers with needed information. We recommend that the UK Government should take such steps as are open to it to encourage all Member States to co-operate fully with Europol. We recommend that the Commission should consider practical ways to promote Member States' confidence in Europol and encourage better data-sharing; and also that it should draw public attention to the failure of some individual Member States fully to co-operate with Europol. (Paragraph 99)
7. The Commission's recent proposal further to extend the powers of Europol will require careful examination by the UK Government. In the light of the evidence we have received from UK police, it does not appear to us that there is a pressing need for a further extension of powers on top of the significant extension recently approved. (Paragraph 100)
8. We are also concerned that the Commission's proposal contains no reference to scrutiny of Europol by national parliaments. In this respect it marks a step backwards from the proposals in the Constitutional Treaty. We recommend that the UK Government should not give its approval to any changes in the status of Europol unless provision is made for a scrutiny role for national parliaments in conjunction with the European Parliament. (Paragraph 101)
9. We support the UK Government in its efforts to persuade the relevant EU institutions and other Member States that enabling UK police to access Article 96 data would be in the best interests both of the UK and the EU at large. It is not acceptable that crime-fighting should be hindered simply in an attempt to force the UK to take a different attitude towards participation in the Schengen border-control regime. (Paragraph 109)

Addressing deficiencies in data exchange

10. The EU Council Decision in 2005 on exchange of information about criminal records provides a good example of both the value of action and the limitations of decision-making at European level. On the positive side, the decision redressed a real deficiency in the practice of Member States, including the UK, and prompted them to set up more effective systems for exchanging information. We consider that this is a significant step forward and to be welcomed. (Paragraph 122)

11. However, it has also become clear that the Council Decision itself was only a ‘half-way house’, which replicates some of the weaknesses of the original 1959 Convention, in particular the lack of specificity about the format and content of the information exchanged. We also note that some EU countries are being more vigorous than others in implementing the 2005 decision. This is therefore to be regarded as unfinished business. We recommend that the UK Government should pursue energetically in all relevant EU forums the objective of strengthening the 2005 decision by imposing requirements on Member States to supply full and usable information in a common format on convictions by other States’ nationals. (Paragraph 123)
12. We look forward to the results of the Home Secretary’s review of information on criminality, and urge that this should address in particular the current deficiency whereby police are not notified when an individual convicted abroad is released from custody or re-enters this country. (Paragraph 124)
13. We congratulate ACPO on drawing our attention, and thereby that of the wider public, to the highly unsatisfactory situation that had obtained in the UK prior to the 2005 decision, with information about overseas convictions being received by the Home Office and allowed to moulder on shelves rather than being made available to the police and the courts. We note the findings of the internal Home Office report, which reveal disfunctionality and poor performance within the Department; but we welcome the action that has been taken to tackle the deficiencies revealed in the report. (Paragraph 125)
14. We fully support the Government’s wish to sign up without delay to the pilot project on interoperability of criminal records data. It is very regrettable that the UK missed the opportunity to be one of the original pilot participants, and thus influence the project from the start. The fact that the UK has, in its own interests, opted out of certain EU initiatives (the single currency, the borders part of the Schengen Convention) makes it all the more important that it should be an effective player in all the other areas. (Paragraph 129)
15. We believe that adopting the principle of availability has great potential to speed up and improve the quality of information shared between law enforcement agencies. Given the premium placed on good information-sharing by police practitioners, this will be an important development. However, there is a danger that if it is not implemented with sufficiently rigorous safeguards, in particular robust data-protection arrangements, the principle risks the dissemination of personal data of UK citizens without sufficient control over the subsequent use of that data. We recommend that the Government should insist that an appropriate impact assessment by an independent body be commissioned at EU level on the potential use of data under the principle before the principle is adopted (in whatever form that takes) and that the Opinion of the European Data Protection Supervisor be fully taken into account in so doing. We also recommend that appropriate monitoring arrangements are set up by the national information commissioners to pick up any abuse of the systems. We recommend that particular attention be paid to the admissibility of evidence obtained under the principle of availability, in particular if such evidence has been obtained by coercive measures. (Paragraph 137)

The Prüm Treaty

16. The proposed transposition of the Prüm Treaty into the legal framework of the EU raises serious questions. In the case of Prüm, just as in the case of the pilot project on interoperability of criminal records (see paragraphs 126 to 129 above), the UK has missed out on an opportunity to influence a major European multi-country project from the start. Even more importantly, Prüm sets a worrying precedent whereby a small group of Member States may reach an agreement amongst themselves which then is presented to *the wider* EU almost as a *fait accompli*. Thus it raises the danger of a ‘two-track Europe’ developing. We deal with these issues of principle in section 4 of this report. We also note with alarm that if the draft Framework Decision implementing the principle of availability is superseded by the Prüm Treaty then the original design of an instrument introducing radical change to EU data-sharing will have been carried out outside the democratic processes of the EU. (Paragraph 144)
17. Notwithstanding these concerns, we consider that the provisions within Prüm for more effective police co-operation are, in themselves, welcome. We support the UK Government’s decision to sign up to those provisions, and welcome the fact that it has secured agreement to drop Article 18. (Paragraph 145)

Judicial co-operation: mutual recognition instruments and harmonisation

18. Eurojust provides an excellent example of what can be done to build mutual trust between practitioners and through them Member States in one another’s systems. This kind of contact and practical co-operation is absolutely critical in enhancing trust and co-operation. (Paragraph 157)
19. We believe that there should be no objection to arresting and surrendering a UK national for an act that is a crime in another EU country in whose territory it was committed. We agree with the Government that the abolition of dual criminality for a defined and agreed set of offences is acceptable. Nonetheless, there is continuing anxiety in some quarters about the abolition of dual criminality in respect of the 32 offences; it remains to be seen whether particular cases throw up anomalies or perceived injustices which might undermine public support for the EAW. A number of the categories on the list, such as racketeering or xenophobia, cause us concern. We recommend that both the UK Government and the Commission should monitor the application of the EAW to see whether problems are emerging. It may be that in the light of several years’ experience, some fine-tuning of the EAW system and the list of 32 offences may be desirable. (Under present arrangements, of course, any modifications will themselves require the unanimous approval of Member States. If there were to be a move to first-pillar decision-making on JHA issues, as the Commission wishes, changes to the list of offences would be made under qualified majority voting, which raises the possibility that they might be imposed on individual Member States against their wishes.) (Paragraph 178)
20. The implementation of the EAW demonstrates that sufficient political will can drive agreement in the field of mutual recognition, even against institutional challenges. The EAW was passed and implemented despite the alleged problems with reaching agreement in the third pillar. However, given the special circumstances of its

inception, in the aftermath of 9/11—and at a time when unanimity was required from only 15 Member States rather than the present 27—we conclude that the EAW is not typical of a third pillar measure and that it is likely to be much more difficult to reach agreement on other mutual recognition instruments. (Paragraph 190)

21. The European Evidence Warrant provides an interesting comparison to the EAW. Without the same degree of political pressure under which the EAW was passed, this important measure has fallen foul of difficulties in getting agreement under unanimity. (Paragraph 191)
22. The difficulties in passing mutual recognition instruments may not reflect a failure of the core principle of mutual recognition. It may simply be that the current procedures do not allow progress to be made if there is little desire amongst Member States to make progress, or if there are significant failings in the proposals. It should not be assumed that these hurdles to agreement are necessarily a bad thing, or that removing them would produce better and more satisfactory outcomes. (Paragraph 192)
23. We agree with the UK Government, and a wide number of practitioners, that there is no case for a full-scale harmonisation of European criminal justice or legal systems. There would be very significant difficulties, if not impossibilities, in trying to marry nearly 30 different systems. We have seen no evidence that the Commission, or Member States, desire “full scale” harmonisation. (Paragraph 200)
24. We think it logical that for mutual recognition in the field of judicial co-operation to be effective, and for Member States to trust each other, some degree of common standards in tightly limited areas may be desirable. Nonetheless, we caution that even in the case of proposals for common standards no proposal should be considered without powerful evidence of the scale and nature of the problem to be tackled, and the gains to be delivered by any such proposal. (Paragraph 207)

EU procedural rights

25. On the basis of evidence we have received, particularly from Fair Trials Abroad, there are reasonable grounds for concern about the absence of procedural safeguards for UK citizens in some other EU Member States. However, it is difficult to quantify the problem, or to know whether the injustices that result from a lack of binding common procedures are sufficient to justify radical change. We note that the level of procedural rights provided for defendants in the UK is high and that any EU-wide binding agreement must also offer high standards. (Paragraph 228)
26. There is a real risk that setting common standards in EU criminal procedures might set up an alternative rights regime in Europe, operating in parallel with the ECHR, and opening the prospect of conflicting litigation at the European Court of Justice and the European Court of Human Rights. We support the UK Government’s view that the starting point, which would benefit both UK citizens in other Member States and the citizens of those States, should be to use existing mechanisms to ensure that the rights enshrined in the ECHR are uniformly observed across the EU. Detailed and independent monitoring of the extent of rights abuses in Member States is a precondition for taking remedial action against offending States. We recommend

that the UK Government puts proposals before the Council of Ministers for a system of such monitoring to be established, with central EU funding, and for it to consider the best means by which sanctions could be brought against Member States which fail to comply with the ECHR in procedural matters. This should be done in full liaison with the relevant organs of the Council of Europe, which has responsibility for overseeing the working of the ECHR. (Paragraph 229)

27. With regard to the choice which currently confronts the Council of Ministers, between a watered down draft Framework Decision and a non-binding Resolution, we do not feel that either in its current form is an attractive proposition. Some of the contents of the Resolution are worthwhile, but we would wish to see it strengthened by inclusion of tape recording of police interviews as a right. Unfortunately, a non-binding Resolution, of its nature, cannot be used as a lever to produce improvements in the rights situation in the States most likely to cause problems. (Paragraph 230)
28. There is also a danger that if, as looks very possible, most other EU countries press ahead with an equivalent to a Framework Decision, but binding only on themselves, then as happened with the Prüm Treaty the UK will miss the chance to influence negotiations when they matter, and may have little option later but to sign up to an agreement that has already been negotiated. We therefore urge the Government to reconsider its current support for a Resolution and give renewed consideration to the proposals in the Framework Decision. (Paragraph 231)

Borders and migration

29. We believe that the relationship between legal and illegal migration is a complex one which merits further debate. To the extent that there is an economic need for migration, legal migration will always be the preferred approach and the justification for tackling illegal migration. What is less clear is whether the EU has the capacity to take a common approach to legal migration, given the very different pressures and needs of individual Member States. At the same time, the EU has not yet shown the capacity to develop an effective common approach to illegal migration (although it is improving). Our view is that the development of effective action on illegal migration remains the priority and the case for developing an EU approach to legal migration is less clear. However, the UK needs to recognise that the decisions of other EU states on legal migration have direct implications for the level of legal migration to this country, given the right of movement within the EU. There is room for debate as to whether, in the future, it may be in the UK's interest to accept a stronger common EU approach to legal migration. Members of the Committee hold different views as to whether it might ever be acceptable to agree to this. (Paragraph 242)
30. Frontex is a young organisation which has already carried out valuable work in securing the external borders of the EU. The agency has much untapped potential if it were to be properly resourced and staffed for the future. To this end the Government should encourage Member States to contribute the promised equipment and encourage the Commission to ensure sufficient funds to attract the right staff. We caution, however, that Frontex is not a panacea to problems of illegal migration, nor are emergency operations its *raison d'être*. Increased resourcing

should not generate the expectation that Frontex can provide a much increased 'returns' service. (Paragraph 261)

31. We support the Government's bid for the UK to become a full member of Frontex. The lack of a vote on the management board may not be a serious disadvantage, but the inability of Frontex to undertake operations on UK territory is a matter of serious concern. We therefore encourage the Government to take every step open to it to reverse this situation. (Paragraph 262)
32. We agree with the Minister that different Member States sign up to measures in varying degrees and that this is part of the natural give-and-take at the EU. It could be argued that the UK position is qualitatively different because it has a wide variety of opt-in arrangements across the whole Schengen system. The UK may continue to be in the uncomfortable position of being excluded from important measures as a consequence of its selective participation. Nonetheless, the good reasons which led the UK to choose not to opt in to Schengen remain in force: in particular, the UK's unusual geographical position arising from its island status, long sea borders, and lack of land borders (other than with the Irish Republic, which has also chosen not to opt in to Schengen). We believe that on balance the UK is right to remain outside the Schengen border-control regime. We recommend that the UK Government should continue to explain to other EU countries why this is the case, while stressing the benefits of fuller co-operation on all other aspects of Schengen. The Government should also treat as its top priority the need to enforce immigration controls effectively within the UK; we made detailed recommendations as to how this can best be done in our report on Immigration Control published in 2006. (Paragraph 270)

Data protection

33. We consider that in the area of data protection there is evidence of insufficient political appetite for protective measures as compared to law enforcement ones. We note the Minister's expression of continuing Government support for the Data Protection Framework Decision. However, if proposals for a Framework Decision were to be superseded by the data protection provisions in the Prüm Treaty, we would have serious concerns as to whether these were adequate. We note the lack of EU-wide consultation over the contents of the Prüm Treaty, arising from its origins as an agreement between a small group of Member States which did not include the UK. We recommend that the Government should continue to support the principle of making provision for data protection in the EU third pillar through a Framework Decision. (Paragraph 285)
34. Both the Passenger Name Record and SWIFT cases give cause for serious concern. We consider that the casual use of data about millions of EU citizens, without adequate safeguards to protect privacy, is an issue of much greater significance than many of the other EU-related matters put to the UK Government and Parliament for consideration. We recommend that the Government and the European Commission should prioritise the question of provision of personal information to countries outside the EU as an issue of the greatest practical concern to its citizens. We repeat our earlier recommendation that the Government should seek urgent agreement on

a comprehensive EU-wide data protection framework in the third pillar and ensure that specific minimum standards ensuring adequate data protection are agreed for data exchange with third countries. We also recommend that the Government should give due consideration to the proposal of the European Parliament rapporteur that the joint supervisory authority advise the Council to ensure an appropriate level of data transfer with third countries. (Paragraph 299)

Institutional changes

35. We are aware that EU Member States are currently discussing how to revise decision-making procedures in the wake of the failure of the proposed EU constitution to win support in a number of Member States. The Constitutional Treaty proposed significant changes to decision-making in JHA issues. The most controversial would have made elements of criminal law subject to qualified majority voting in the Council of Ministers. The implications of this for the UK would be significant. If elements of criminal law and procedure were to be brought under QMV then, at least in principle, the Government could be outvoted in the Council. In this case both the Government and Parliament would be required to pass legislation on issues of particular principle and sensitivity which neither the Government nor Parliament had desired. (Paragraph 341)
36. At present a number of Directives which have been agreed under the first pillar have been implemented in UK law by secondary legislation. It would be even more unacceptable for EU measures on criminal justice to be introduced without primary legislation, as happens with some existing EU measures under QMV. We also note that any future changes to the list of 32 offences in relation to which both the European Arrest Warrant and the proposed European Evidence Warrant are applicable would be approved under QMV, and thus might be imposed on individual Member States which opposed the changes. (Paragraph 342)
37. Throughout this report we have looked at a range of current initiatives at EU level. The evidence we have seen does not persuade us that, as things stand at present, there are sufficient benefits in terms of tackling crime, either here in the UK or across the EU, to justify such a major transfer of power away from individual Member States as would be entailed by a switch of criminal law from the third to the first pillar. It is true that the level of real risk to UK interests can be overstated. The UK has sufficient power and influence to ensure that it would rarely, if ever, be outvoted or required to accept something against its interests. But the constitutional principle cannot be lightly set aside. The examples of the European Arrest Warrant and the recent measure on transfer of prisoners suggest that it is by no means impossible for good decision-making to take place within third-pillar procedures. (Paragraph 343)
38. Having said this, we believe that the UK Government must also recognise that an equally strong risk to our effective sovereignty may be posed by a proliferation of informal decision-making structures such as those devised by the participants in the Prüm treaty. It is highly regrettable that the UK did not participate in the Prüm process from the start. Similar informal arrangements within small groups of Member States may produce de facto changes over which we have less influence than

we would through the mechanisms of QMV. This is one reason why the UK should not absent itself again from such informal discussions. (Paragraph 344)

39. We recommend that the UK Government should make clear to its EU partners that at present the case for moving criminal law matters from the third pillar has not been made. There is room for debate as to whether, in the future, it may be in the UK's interests to accept such a change. Members of our Committee hold different views as to whether it might ever be acceptable to agree to this. It is indisputable that such a change would be of great significance. The UK Government should not agree to any such proposal without full and specific parliamentary consideration of the issue. (Paragraph 345)

Parliamentary scrutiny of EU business

40. We regret the absence of opportunity for debate on the Modernisation Committee's report, and *urge the Government's business managers* to find time for a debate in the near future. (Paragraph 353)
41. We consider it is desirable for the House and its committees to take concrete steps to bridge the current divide in EU scrutiny between the document-focused work of ESC and the policy-based work of DSCs (which too often ignores developments at European level). We note that the ESC itself has recently begun to extend its activities beyond its traditional (and of course very valuable) sifting role, by carrying out some thematically-based inquiries. We welcome this development. (Paragraph 354)
42. We believe this should be complemented by greater efforts to 'mainstream' EU scrutiny by engaging DSCs more fully in the process of examining key EU proposals. We therefore invite the European Scrutiny Committee to consider making more frequent use of its existing power to request opinions from DSCs on significant issues. (Paragraph 355)
43. We recommend that the Home Office should undertake to consult us directly when major EU developments in the JHA field are at a formative stage. We request the Home Office to supply us with a quarterly report on progress with JHA developments—with an emphasis on proposals on which the UK Government has not yet reached its final settled position. (Paragraph 356)
44. On the specific issue of the future of Europol, we noted earlier in this report that the Commission's December 2006 proposal contains no mention of scrutiny of Europol by national parliaments. We repeat here our recommendation that the UK Government should not give its approval to any changes in the status of Europol unless provision is made for a scrutiny role for national parliaments in conjunction with the European Parliament. (Paragraph 357)
45. We have taken such steps as are open to us as an individual committee to mainstream EU business within our programme. (Paragraph 358)
46. We agree with these comments by our colleagues from the European Parliament. Our exchange with MEPs during the course of this inquiry was very valuable. Whilst it might not be necessary to institute formal joint scrutiny with MEPs, we will

attempt to maintain a high level of informal dialogue with British MEPs on key issues, using the services of the UK National Parliament Office in Brussels. (Paragraph 368)

47. We will do our best to increase the quality and quantity of our scrutiny of the European dimension to Home Office decision-making. In particular, we propose to discuss with colleagues on the ESC, Lords Sub-Committee F and the LIBE Committee how we can build on recent encouraging contacts so as to create mechanisms for regular contact and liaison. (Paragraph 369)

Annex: Terms of Reference of the inquiry as agreed by the Committee on 31 October 2006

The Committee decided that its inquiry should focus on the following specific matters:

The current state of progress in developing practical co-operation between member states in the JHA field, and future options in this area.

- What benefits have accrued so far from practical co-operation between law enforcement and judicial authorities? What are the lessons of practical co-operation for European policy and legislation, and how effective is Eurojust in spreading best practice?
- In which areas does the UK government want to advance more practical co-operation measures? What benefits does the government see from practical co-operation over legislative solutions?
- What should be the role of Europol, Interpol and Eurojust in facilitating practical co-operation?

The current state of progress in mutual recognition, including the development of minimum standards, across the EU, and whether further steps in this direction are desirable.

- In which areas is mutual recognition currently employed (for example recognition of judicial judgements in other member states)?
- How has the principle, including minimum standards and protocols, worked in these areas? Is it an effective approach, including in terms of cost?
- What are the limitations of mutual recognition as a cornerstone of co-operation, for example in cases such as the European Arrest Warrant where there are controversies over dual criminality? What have been the successes, and how might these be built on?
- What is the UK government's position on mutual recognition as opposed to practical co-operation?

The current state of progress in and appetite for harmonising criminal justice systems across the EU, and whether further steps in this direction are desirable.

- How do proposals for harmonisation of criminal law across member states substantially differ from mutual recognition?
- What are the implications for the UK in harmonising criminal law and systems?
- Would particular areas benefit from harmonisation on issues such as migration, serious crime cases and terrorism, rather than practical co-operation or mutual recognition?

The process of decision-making on JHA issues at EU level: in particular, the extent to which current difficulties in reaching agreement derive from ‘third pillar’ voting procedure and might be remedied by implementation of the passerelle clauses in previous treaties.

- What implications might use of the passerelle have for the UK’s legal and judicial systems? What alternative action might improve decision-making? How can transparency and accountability at European level best be extended?

How significant is the recent trend towards internal agreements between groups of member states outside the framework of the EU, for instance the Schengen countries, or the Prum convention? To what extent is this due to unanimity or difficulties in decision making? What are the implications for the UK and for EU fragmentation?

What are the current developments in the area of common border controls and visa arrangements? What implications does the proposed new policy on illegal migration have for the UK and our role in the EU? Will the proposed changes to the short-stay visa arrangements in relation to the eastern neighbours of the EU open up new channels for illegal migration further westward in the EU? What are the implications of enlargement for JHA issues, including the impact of labour migration and confidence in new member states’ justice systems?

Formal minutes

Thursday 24 May 2007

Members present:

Mr John Denham, in the Chair

Ms Karen Buck
Gwyn Prosser
Bob Russell

Martin Salter
Mr David Winnick

Draft Report (Justice and Home Affairs Issues at European Union Level), proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 369 read and agreed to.

Summary agreed to.

Annex agreed to.

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

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

Ordered, That the provisions of Standing Order No. 134 (Select committees (reports)) be applied to the Report.

[Adjourned till Thursday 7 June at Ten o'clock.]

List of witnesses

Tuesday 21 November 2006	<i>Page</i>
Professor Dr Elspeth Guild and Mr Florian Geyer , Centre for European Policy Studies (CEPS), and Mr Neil O'Brien and Mr Paul Stephenson , Open Europe	Ev 1
Tuesday 28 November 2006	
Mr Jonathan Faull and Mr Luigi Soreca , European Commission	Ev 16
Mr Timothy Kirkhope MEP , Mr Michael Cashman MEP , Mr Graham Watson MEP , and Ms Jean Lambert MEP	Ev 26
Tuesday 9 January 2007	
Chief Constable Paul Kernaghan CBE, QPM and Superintendent Mike Flynn , Association of Chief Police Officers of England, Wales and Northern Ireland (ACPO), Mr Michael Quille , European Police Office (Europol), and Mr Bill Hughes and Mr Rob Wainwright , Serious Organised Crime Agency (SOCA)	Ev 36
Tuesday 23 January 2007	
Mr Mike Kennedy , Eurojust and Mr Tim Workman , Senior District Judge and Chief Magistrate (England and Wales)	Ev 57
Mr David Smith and Mr Lee Taylor , Office of the Information Commissioner, Professor Steve Peers , Independent Academic Expert in EU Justice and Home Affairs, and Ms Belinda Lewis , Ms Harriet Nowell-Smith and Mr Peter Thompson , Department for Constitutional Affairs	Ev 64
Tuesday 20 February 2007	
Joan Ryan MP , Parliamentary Under-Secretary of State, Mr Peter Storr , Mr Christophe Prince and Ms Emma Gibbons , Home Office	Ev 75

List of written evidence

	<i>Page</i>
1 Association of Chief Police Officers of England, Wales and Northern Ireland	Ev 92
2 Centre for European Policy Studies	Ev 98
3 Criminal Bar Association of the Bar Council of England and Wales	Ev 106
4 Eurojust	Ev 115
5 European Policy Centre	Ev 119
6 Fair Trials Abroad	Ev 121: Ev 181
7 Home Office	Ev 126: Ev 128: Ev 175: Ev 180
8 JUSTICE	Ev 134: Ev 138
9 Law Society	Ev 139
10 Baroness Sarah Ludford MEP	Ev 142
11 Mayor of London	Ev 145
12 Dr Valsamis Mitsilegas	Ev 146
13 National Society for the Prevention of Cruelty to Children	Ev 150
14 Open Europe	Ev 154: Ev 157
15 Professor Steve Peers, University of Essex	Ev 160
16 Refugee Council, the Scottish Refugee Council and the Welsh Refugee Council	Ev 163
17 Serious Organised Crime Agency	Ev 168
18 Graham Watson MEP	Ev 170
19 Dr Helen Xanthaki and Dr Constantin Stefanou	Ev 173

List of unprinted written evidence

Additional papers have been received from the following and have been reported to the House but to save printing costs they have not been printed and copies have been placed in the House of Commons Library where they may be inspected by Members. Other copies are in the Parliamentary Archives and are available to the public for inspection. Requests for inspection should be addressed to the Parliamentary Archives, Houses of Parliament, London SW1A 0PW (tel 020 7219 3074). Hours of inspection are from 9.30 am to 5.00 pm on Mondays to Fridays.

Revenue and Customs Prosecutions Office

Reports from the Home Affairs Committee

The following reports have been produced by the Committee since the start of the 2002–03 Session. Government Responses to the Committee's reports are published as Special Reports from the Committee or as Command Papers by the Government. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2006–07

First Report	Work of the Committee in 2005–06	HC 296
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Session 2005–06

First Report	Draft Corporate Manslaughter Bill (First Joint Report with Work and Pensions Committee)	HC 540 (Cm 6755)
Second Report	Draft Sentencing Guideline: Robbery	HC 947
Third Report	Draft Sentencing Guidelines— <i>Overarching Principles: Domestic Violence and Breach of a Protective Order</i>	HC 1231
Fourth Report	Terrorism Detention Powers	HC 910 (Cm 6906)
Fifth Report	Immigration Control	HC 947 (Cm 6910)
Sixth Report	Draft Sentencing Guideline: Sexual Offences Act 2003	HC 1582
First Special Report	Memorandum from the Home Office: Progress in implementing accepted Committee recommendations 2001–05	HC 1007

The following reports were produced by the Committee in the previous Parliament.

Session 2004–05

First Report	Rehabilitation of Prisoners	HC 193 (Cm 6486)
Second Report	Work of the Committee in 2004	HC 280
Third Report	Home Office Target-Setting 2004	HC 320 (Cm 6592)
Fourth Report	Police Reform	HC 370 (Cm 6600)
Fifth Report	Anti-Social Behaviour	HC 80 (Cm 6588)
Sixth Report	Terrorism and Community Relations	HC 165 (Cm 6593)

Session 2003–04

First Report	Asylum and Immigration (Treatment of Claimants, etc.) Bill	HC 109 (Cm 6132)
Second Report	Asylum Applications	HC 218 (Cm 6166)
Third Report	The Work of the Home Affairs Committee in 2003	HC 345
Fourth Report	Identity Cards	HC 130 (Cm 6359)
Fifth Report	Draft Sentencing Guidelines 1 and 2	HC 1207 (HC 371)

Session 2002–03

First Report	Extradition Bill	HC 138 (HC 475)
Second Report	Criminal Justice Bill	HC 83 (Cm 5787)
Third Report	The Work of the Home Affairs Committee in 2002	HC 336
Fourth Report	Asylum Removals	HC 654 (HC 1006)
Fifth Report	Sexual Offences Bill	HC 639 (Cm 5986)