



House of Commons  
Justice Committee

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# Justice issues in Europe

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**Seventh Report of Session 2009–10**

*Report, together with formal minutes*

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## The Justice Committee

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

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### Committee staff

The current staff of the Committee are Fergus Reid (Clerk); Dr Sarah Thatcher (Second Clerk); Gemma Buckland (Committee Specialist); Hannah Stewart (Committee Legal Specialist); Ana Ferreira (Senior Committee Assistant); Sonia Draper (Committee Assistant); Henry Ayi-Hyde (Committee Support Assistant); and Jessica Bridges-Palmer (Committee Media Officer).

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## Summary

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Ten years after the entry into force of the Amsterdam Treaty, the creation of an area of freedom, security and justice for the citizens of member states of the European Union is still very much “work in progress”. The development of a new five-year programme for justice and home affairs—known as the “Stockholm programme”—enables us to take stock of what has been achieved. Criminal justice measures have not been adopted at the pace of initiatives in other aspects of justice policy, including civil law. The focus has been on increasing co-operation in bringing those convicted or suspected of criminal activity to justice more effectively, by establishing common measures, such as the European arrest warrant, that can operate across the core components of criminal justice and prosecution processes of member states. This is done on the basis of mutual trust; recognising that member states will comply with rules and decisions in each others’ jurisdictions as it is generally in their interest to do so.

We also look at future challenges for the UK Government as the Stockholm programme is implemented, particularly in the light of the entry into force of the Treaty of Lisbon. The Treaty makes fundamental changes to decision-making in criminal law by introducing new voting arrangements; the UK opt-in protocol; and transition towards such law being within the jurisdiction of the European Court of Justice. This opens the door to the Commission taking infringement proceedings against member states for failing to implement agreed measures. We conclude that the complexity of arrangements which may now ensue gives rise to potential challenges for the programme’s implementation.

We concentrate on matters relating to the establishment of mutual trust as the cornerstone of judicial co-operation and the extent to which it is possible to strike a balance between this and the fundamental rights of EU citizens—in particular UK citizens. The issues include the right to privacy (data protection and, conversely, the potential benefits of information sharing), procedural rights in criminal proceedings and the rights of victims. The Government’s track record on implementing mutual recognition instruments is commendable but not perfect. There remain some gaps, for example, on some rights of victims. In our view, the balance between getting utility from technology, while protecting privacy in the sharing of data between law enforcement agencies, is not currently right. We urge the Government to be more candid with UK citizens about the kind of data protection safeguards it is seeking from the EU in relation to their privacy.

We welcome the introduction of a legal framework on minimum procedural guarantees for suspects and defendants and support the renewed enthusiasm that member states, including the UK, have demonstrated in devising the first of these new measures. Nevertheless, we believe that there are real risks that other accompanying measures will be more difficult to agree, or that their implementation will be hindered for practical, and financial, reasons. We fear that there will continue for some time to be disparities in the standards of protection afforded to EU citizens in the delivery of justice. While the entry into force of the Lisbon Treaty has the potential to ameliorate some of these issues, EU accession to the European Convention on Human Rights, permitted by the Lisbon Treaty, is likely to take time to negotiate. In addition, the enhanced jurisdiction of the European

Court of Justice will not fully apply until 2014.

We support the UK Government's broad preference for practical, evidence-based measures, rather than new legislation. However, the extent to which it will be possible to maintain this approach in the post-Lisbon era remains to be seen. We consider the possible implications for existing instruments of the UK's opt-in protocol which enables the Government to choose whether to participate in each proposed justice measure. For example, it may be necessary to amend the European arrest warrant, the use of which is predicted to increase by 250% in the next two years, if non-legislative attempts to curb its disproportionate use by some member states are unsuccessful. The implications of the UK now choosing not to opt-in to an amendment to a measure to which it previously agreed remain unclear.

Some of the measures in the Stockholm programme, including e-justice projects, have considerable cost implications for member states. The Government has said that its participation in specific EU projects depends on the costs of participation and the likely added value that would be achieved. However, the complexity of the measures in question makes it difficult to determine cost-benefit implications with any certainty. We therefore question how the Government will control the costs of implementing the Stockholm programme.

# 1 Introduction

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## The Committee's inquiry

1. On 2 April 2009, we announced a wide-ranging inquiry into justice issues in Europe with a particular focus on developments and the implications for the 2.2 million British citizens living in other member states and 2.12 million people living in the UK who were born in another member state. The inquiry, timed to coincide with the development of a new five-year programme for justice and home affairs known as the “Stockholm programme”, enabled us to take stock of progress to date and look at key upcoming priorities and challenges for the UK Government as the programme is implemented. The entry into force of the Treaty of Lisbon on 1 December 2009 in the midst of our deliberations has allowed us to consider the programme in the context of other changes in decision-making and in the EU institutional landscape in the justice field.

2. The House of Lords European Union Committee considered the implications of the Lisbon Treaty in considerable depth in its report, *The Treaty of Lisbon: an impact assessment*, in March 2008, which includes a substantial section on the impact of the “controversial changes” in the area of justice, freedom and security.<sup>1</sup> The House of Lords EU Sub-Committee F has also examined the home affairs provisions in the draft Stockholm programme. Individual EU proposals in this field will be subject to full scrutiny by the relevant sub-committees of the Lords Committee and the House of Commons European Scrutiny Committee. During the course of the inquiry we received 16 memoranda and took oral evidence on seven occasions, including from the Director General of Justice, Freedom and Security at the European Commission while visiting Brussels on 7 December 2009. On that day we also held informal meetings with the European Data Protection Supervisor, and representatives from the Law Society Brussels Office, the Swedish representation to the EU, and the Legal Affairs and Constitutional Affairs Committees of the European Parliament.

## Ten years since Tampere

3. The 1997 Treaty of Amsterdam, which entered into force in 1999, created an EU area of freedom, security and justice. The first five-year policy framework for activity in these fields, “the Tampere programme”, was agreed in the same year and sought to build such an area, for example, by providing better access to justice; mutual recognition of judicial decisions; and greater convergence in civil law. The second such initiative, “the Hague programme”, ran until December 2009 and was aimed at: enhancing fundamental rights and citizenship; fighting against terrorism; developing a common immigration policy; management of external borders and a common visa policy; developing a common asylum area; enhancing privacy and security in sharing information; developing a strategy to tackle organised crime at EU level, for example through Europol and Eurojust; and promoting effective access to civil and criminal justice.

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<sup>1</sup> House of Lords European Union Committee, Tenth Report of Session 2007–08, *The Treaty of Lisbon: an impact assessment*, HL Paper 62-1

4. The reasons and objectives behind the creation of an area of freedom, security and justice have been a matter of debate from the time of negotiations over the Treaty of Amsterdam. In evidence to the House of Lords EU Committee leading to its report, *The Treaty of Lisbon: an impact assessment*, some witnesses said that co-operation in the fields of asylum, immigration, civil and criminal law and policing was not undertaken as an aim in itself but was necessary to, as well as being the result of, the development of the internal market, which resulted in free movement and the creation of a “common space”.<sup>2</sup> In the criminal sphere, it has been claimed that cooperation at EU level was necessary to ensure that individuals did not escape prosecution simply by exercising their right to free movement across the European Union member states.<sup>3</sup>

5. The area of freedom, security and justice is still very much a “work in progress”.<sup>4</sup> In devising the priorities for the next five-year programme, known as the Stockholm programme, member states and the European Commission have had the opportunity to focus on what has been achieved and shape the direction of future activity in this area. The Government was broadly supportive of the Stockholm programme during its negotiation. It set out its response to the Commission’s initial proposals<sup>5</sup> in September 2009.<sup>6</sup>

6. Much of the policy and legislation in the field of justice relies on mutual trust, i.e. that member states usually comply with rules and decisions because it is in generally in their self-interest and trust the other states to do the same. Although the concept of mutual trust is “relatively simple” to grasp, it is difficult to achieve in practice.<sup>7</sup> There are fundamental differences between common law systems and those prevalent in most EU member states and differences in the role of judges.<sup>8</sup> The main thrust of developments to date has been towards increasing member states’ co-operation on bringing to justice more effectively those convicted or suspected of criminal activity by recognising and comparing differing practice across the core components of criminal justice and prosecution processes.<sup>9</sup> For example, Eurojust and the European judicial networks create opportunities for legal co-operation and co-ordination of international investigations and prosecution across the EU. Member states have also agreed several mutual recognition instruments. While these have been implemented with varying degrees of success, alternative approaches to aligning practices, for example by harmonising laws, are undoubtedly more complex and more politically contentious and thus far harder to put into practice. Witnesses drew our attention to the success of the European arrest warrant and the exchange of criminal

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2 House of Lords European Union Committee, Tenth Report of Session 2007–08, *The Treaty of Lisbon: an impact assessment*, HL Paper 62-I, para 6.5

3 *Ibid.*

4 Ev 90

5 European Commission, *Communication from the Commission to the European Parliament and the Council: an area of freedom, security and justice serving the citizen*, June 2009, COM:2009:0262

6 Ministry of Justice, *UK written comments on the European Commission’s Communication on the Stockholm programme*, September 2009

7 Q 171 [Mr Kennedy]

8 Qq 74, 78-90 [Professor Peers], Q 88 [Mr Faull]

9 Q 171 [Mr Kennedy]

records across jurisdictions.<sup>10</sup> The concept of mutual recognition and some of the resulting cooperation instruments are discussed further below.

7. One of the notable shortcomings of the Hague programme was the failure to agree measures to protect the fundamental rights of suspects and defendants who find themselves caught up in these strengthened processes. Mr Jonathan Faull, Director General of Justice and Home Affairs at the European Commission, made it clear that some degree of slippage was inevitable due to: “subsequent events and shifting priorities and the difficulty in making headway in some of these areas.”<sup>11</sup> For example, he explained that the differences between legal systems have become more complex as the European Union has grown and these would undoubtedly continue to complicate policy-making in this area; an incremental approach was therefore necessary. In addition, the implementation of the programme may have encountered difficulties as it had presumed the existence of a European constitution.<sup>12</sup>

### **The Stockholm programme**

8. The Stockholm programme, subtitled “*an open and secure Europe serving and protecting the citizen*”, was adopted by the European Parliament in December 2009. The key proposals are summarised in box 1.

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10 Q 171 [Mr Kennedy], Ev 68, 90

11 Q 88 [Mr Faull]

12 *Treaty establishing a Constitution for Europe*, CIG 87/04

### ***Box 1—Summary of justice priorities for 2010-2014***

#### ***Promoting citizenship and fundamental rights***

- Producing a proposal on the accession of the EU to the European Convention on Human Rights as a matter of urgency
- Providing practice support and advice to ensure that existing legislation is properly applied to tackle potential discrimination
- Devising a strategy to ensure that an integrated and coordinated approach is provided to victims of crime, if necessary by creating one comprehensive legal instrument on the protection of victims
- Implementing the “road map” for strengthening procedural rights of suspected and accused persons in criminal proceedings as quickly as possible
- Establishing a comprehensive data protection scheme, following an evaluation of existing instruments, taking into account technological developments, the need to improve compliance and the need to raise public awareness of data protection issues

#### ***A Europe of law and justice***

- Integrating e-justice into all areas of civil, criminal and administrative law to ensure better access to justice and strengthened cooperation between administrative and judicial authorities.
- Adopting instruments that are more “user-friendly”
- Offering special protection measures to victims of crime or witnesses
- Setting up a comprehensive system for obtaining evidence in cases with a cross-border dimension
- Exploring the results of the evaluation of the European arrest warrant
- Examining whether the existing level of approximation between member states is sufficient and considering whether there is a need to establish common definitions and penalties

#### ***A Europe that protects***

- Adopting and implementing an EU information management strategy that includes a strong data protection regime
- Extending the use of, and cooperation between, EU law enforcement institutions

### *Improving the quality of legislation and its implementation*

- Paying increased attention to the full and effective implementation, enforcement and evaluation of existing instruments
- Responding faster to the needs of citizens and practitioners where appropriate, for example, by sharing best practice, producing guidance and networking, rather than resorting to legislation
- Preparing impact assessments to identify the level of need for, and financial implications of, new legislative initiatives
- Conducting a horizontal review of existing instruments to improve consistency and consolidate legislation where appropriate
- Undertaking objective and impartial evaluation of the implementation of policies, including follow-up evaluation, beginning with judicial cooperation in criminal matters

9. We have concentrated our attention on matters related to the establishment of mutual trust as the cornerstone of judicial co-operation and the extent to which it is possible to strike a balance between this and the fundamental rights of EU citizens—in particular UK citizens—including the right to privacy (data protection) and procedural rights. In doing so we have considered key themes which emanate from the evaluation of the Hague programme and the subsequent negotiations on the content of the Stockholm programme including:

- The need to strike balances between proportionality, the rights of suspects and the accused in criminal proceedings, and the enforcement of security at EU and national level through mutual co-operation.
- The balance between basic principles of justice and fairness for victims and the rights of suspects and defendants rights and levels of awareness of those rights
- The cost-benefits of activity to create an area of freedom, security and justice
- The extent of monitoring and evaluation and the relative lack of enforcement.

We also recognise that the economic situation is bound to have an impact on the political environment which will underpin activity in this field over the next 5 years.

10. In exploring these themes we focus on those criminal justice issues of most concern to our witnesses. As Mr Faull noted, progress to date has been more significant in some aspects of civil law.<sup>13</sup> The key proposals we consider include development of the e-justice portal; improved support to crime victims; the introduction of a legal framework on minimum procedural guarantees for suspects and defendants; and a strategy to ensure that

information exchanged between criminal justice agencies is reliable and of high quality. The Government particularly welcomes the commitments to particular criminal justice measures: implementing the “road map” on criminal procedural rights; development of an information model; adoption of a child protection agenda; and establishment of mechanisms for collecting information on convictions.<sup>14</sup> It also supports proposals to improve the evaluation and implementation of existing instruments through the sharing of best practice.<sup>15</sup>

11. The Stockholm programme was developed in ‘Lisbon neutral’ terms but in the event the Lisbon Treaty entered into force at the time the programme was agreed. An action plan, providing a clearer indication of precise measures for implementation under the Stockholm programme is expected to be agreed by June.

**12. We are beginning to see progress in the development of a more comprehensive system of cooperation in the administration of justice between member states, although the Hague programme undoubtedly underachieved its declared objectives. While we consider the Stockholm programme to be less ambitious, and more realistic than its predecessors, which we welcome, the complexity of arrangements under the Lisbon Treaty potentially gives rise to new challenges for the programme’s implementation.**

## The Lisbon Treaty

13. From the entry into force of the Maastricht Treaty, or the Treaty of the European Union as it is officially known, in 1993 until the Lisbon Treaty came into effect on 1 December 2009, the European Union legally consisted of three pillars. The first pillar, known as European Communities, covered the economic, social and environmental policies which provided the foundation of the EU and operated primarily on the basis of “ordinary legislative procedure”, i.e. co-decision between the European Parliament and the Council of Ministers (also known as the Council of the European Union)<sup>16</sup> and qualified majority voting within the Council.<sup>17</sup>

14. Unlike the first pillar, the second and third pillars, which dealt with Common Foreign and Security Policy and Justice and Home Affairs respectively, were intergovernmental in nature and agreement was by unanimity. The Maastricht Treaty thus introduced member state co-operation in justice and home affairs matters for the first time. Measures adopted within the framework of justice and home affairs required unanimity in the Council of Ministers, and the European Parliament provided only a limited consultative role. The Treaty of Amsterdam moved immigration and asylum measures, border controls and the

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14 Qq 245-246

15 Ministry of Justice, *UK written comments on the European Commission’s Communication on the Stockholm programme*, September 2009

16 Co-decision is based on the principle of parity and means that neither institution (European Parliament or Council) may adopt legislation without the other’s assent. An explanation of the full procedure can be found at <http://europa.eu>

17 A qualified majority is the number of votes required in the Council of Ministers for a decision to be adopted. Decisions will need the support of 55% of Member States (currently 15 out of 27 EU countries) representing a minimum of 65% of the EU’s population. A fuller explanation can be found at <http://europa.eu>

areas of civil and family law from the third pillar to the first pillar. The third pillar was then renamed “Police and Judicial Cooperation in Criminal Matters”.

15. The Treaty of Lisbon effectively unites the pillars and brings police and judicial cooperation in criminal matters into the general structure of the European Union. In summary, the European Council (composed of the leaders of the member states) becomes a formal EU institution, driving forward the activities of the EU and defining its political goals. Almost all justice and home affairs will now be determined by the ordinary legislative procedure described above, subject to transitional and, in the case of the UK, opt-in arrangements.<sup>18</sup> Third pillar proposals which were not adopted by 30 November 2009 must be proposed again from scratch under the new procedure, whereby new measures will take the form of regulations and directives, subject to the normal effect of EU law. Policing and criminal law will gradually come within the normal jurisdiction of the European Court of Justice, enabling in particular, references on the validity and interpretation of EU measures in this area from all courts and tribunals in all member states, and the power of the Commission to sue member states for infringement of such laws. We discuss some of the implications of these changes in more detail below.

### *The UK opt-in protocol*

16. During the settlement of the Amsterdam Treaty in 1997, the UK negotiated “opt-ins” to allow it to decide on an individual basis whether to participate in specific proposals under the first pillar. An opt-out was not required for proposals under the third pillar because the need for unanimity meant the UK could refuse to agree to a proposal thereby ensuring it was not passed. Under the Treaty of Lisbon, the UK—and Ireland—secured a more extensive opt-in arrangement<sup>19</sup> which gives Government the right to choose whether to opt in to each proposed measure in the field of freedom, security and justice.

### *The emergency brake*

17. The Treaty also introduces the option for any member state to pull an ‘emergency brake’ for some of these matters, where it considers that the draft legislation “would affect fundamental aspects of its criminal justice system”.<sup>20</sup> Valsamis Mitsilegas, Professor of Law at Queen Mary University of London, explained that this will enable member states to ensure that they do not take part in a particular measure, while allowing those in favour to proceed with its adoption.<sup>21</sup> For some potential provisions, for example, the European public prosecutor, the UK (and other member states) will thus have what Lord Bach, Parliamentary Under Secretary of State for Justice, described as a “double lock” where there is a requirement for both unanimity and opt-in.<sup>22</sup> The emergency brake procedure is not, however, available, for the areas of judicial co-operation that come under Article 82(1) i.e.

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18 There are an number of exceptions to the move to ordinary legislative voting including family law: cooperation between law enforcement authorities, which will continue to be decided by unanimity unless the Council, after consultation with the European Parliament, unanimously agrees to consider the proposal under the ordinary legislative procedure. Anti-terrorism legislation also requires unanimity without a role for the European Parliament.

19 Q 88 [Mr Faull]. See protocol no 21 accompanying the Lisbon Treaty

20 Articles 82(3) and 83(3) of the Lisbon Treaty

21 Ev 107

22 Q 4

measures which facilitate mutual recognition of judgments; prevent and settle conflicts of jurisdiction; support the training of the judiciary and its staff; and, facilitate cooperation between judicial authorities on criminal proceedings and enforcement of decisions.<sup>23</sup>

### *The Court of Justice*

18. The Court of Justice is required to ensure the equal application of EU law across member states, as well as being responsible for interpreting that law. Under the pre-Lisbon arrangements the Court, which was then known as the Court of Justice of the European Communities, had only a limited jurisdiction over third pillar measures. The entry into force of the Treaty of Lisbon brings the whole area of justice and home affairs under the general jurisdiction of the Court, subject to transitional arrangements. To date, 14 member states, including France, Germany and Italy, have accepted the jurisdiction of the Court, 12 of which allow any national court to refer a question to the European Court for a ruling. The UK has not yet accepted jurisdiction and under the Treaty the Government has a period of five years to consider whether it wishes to accept the jurisdiction of the Court of Justice. If the UK has not done so by the end of this period it will have to opt-out of the whole cross-border justice system altogether.<sup>24</sup>

19. Professor Steve Peers explained that the extended remit of the Court of Justice has two key implications.<sup>25</sup> First, that the European Court of Justice now has jurisdiction over all member states' national courts and tribunals. For example, a member of the judiciary in any court in any member state, hearing a first instance criminal proceeding or an action against the police, could send a question to the Court of Justice. For instance, if somebody was trying to resist the execution of a European arrest warrant their defence counsel could argue that the national implementation of the *Framework decision on the European arrest warrant* is somehow defective and therefore that the arrest warrant could not be executed. Prosecutors have also sought to use the court, for example by reference to the *Framework decision on the rights of victims in criminal proceedings* to toughen up national law in favour of victims.<sup>26</sup> Secondly, the Commission now has the option to sue member states in the European Court of Justice for infringing EU criminal law legislation adopted after the entry into force of the Treaty; similar proceedings will be possible for pre-Lisbon legislation after five years, unless it is amended in which case the Court's jurisdiction will automatically apply.

### *The Charter of Fundamental Freedoms and the accession for the EU to the Convention on Human Rights*

20. The Lisbon Treaty strengthens the protection of human rights in EU in two ways. The entry into force of the EU Charter of Fundamental Rights makes EU law subject to the fundamental rights and freedoms guaranteed in the Charter. In addition the Treaty

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23 HL Paper (Session 2007–08) 62-I, para 6.45

24 Q 125 [Mrs Mole]; See Article 10 in protocol 36 of the Lisbon Treaty

25 Qq 56-57

26 Q 60

provides for the EU to join the European Convention on Human Rights corporately so that all EU institutions and laws would be subject to the ECHR.

### The impact of the incorporation of justice and home affairs into the European Union's remit

21. A key aspect of our inquiry has been the question of whether legislation or policy-making in this area will be easier under the post-Lisbon regime. The 2007 Home Affairs Committee report *Justice and Home Affairs issues at European Union level* outlined alleged difficulties in policy-making arising from the split of justice and home affairs between the first and third pillars, including:

- lack of efficiency (the difficulty of taking decisions requiring the unanimous agreement of 27 countries);
- poor quality of proposals (which are arguably watered down to accommodate individual member states' requirements, resulting in the setting of very low common standards);
- the democratic deficit (with the directly elected European Parliament having a very limited say in sensitive matters impacting upon fundamental rights);
- limited judicial protection (with limits imposed by the Treaties on the jurisdiction of the Court of Justice)
- the creation of a Europe 'à la carte' (with countries picking and choosing which parts of EU law they will participate in); and
- 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.<sup>27</sup>

22. The changes in decision-making processes have received both support and criticism. JUSTICE, a UK-based human rights organisation, has said that the merging of the pillars will increase the likelihood of proposals being approved.<sup>28</sup> The Law Society of England and Wales has agreed, and said that that qualified majority voting would speed up the legislative process and lead to greater scrutiny of legislation, improved transparency and a higher level of democratic accountability.<sup>29</sup> It has also been suggested that this would mean that it was less likely legislation would be reduced to the "lowest common denominator" which was an alleged flaw in the requirement for unanimity.<sup>30</sup> However, Mr Faull adopted

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27 Home Affairs Committee, Third Report of Session 2006–07, *Justice and home affairs issues at European Union level*, HC 76-I

28 HL Paper (Session 2007–08) 62-I, para 6.22

29 *Ibid.*

30 *Ibid.*

a more cautious view: “those who say Lisbon will make things easier are [...] underestimating the complex arrangements to which it gives rise”.<sup>31</sup>

### **Implications for the UK**

23. Concerns have been raised that the introduction of qualified majority voting into criminal law would produce particular difficulties for the UK and Ireland with their common law systems, the vast majority of member states using a civil law system based on the Napoleonic Code.<sup>32</sup> The loss of the UK’s veto in this area was therefore a cause for concern as, without the opt-in protocol, the UK’s negotiating stance may be weakened and it may become bound by decisions with which it did not agree.

24. Nevertheless it is generally agreed that the position regarding UK participation in the area of freedom, security and justice has become more, rather than less, flexible under the new arrangements. It remains unclear, however, what the implications would be if the UK chose not to opt-in to an amendment to a proposal it had previously opted-in to if it disagreed with the change.<sup>33</sup> What needs clarification is what happens when an amending measure, to which the UK objects, is brought forward to an original measure which the UK had previously accepted. The options now are:

- the UK accepts the amending measure;
- the UK opts out of the amending measure but not the original measure
- the UK is ejected from the original measure where it is rendered “inoperable” (described as a “high test”) for other member states, or the EU as a whole, by the UK’s non-participation in the amending or amended measure
- as above, with the UK bearing the costs of financial consequences of its opt-out (decided by qualified majority voting in Council).

### **The “UK way”**

25. At a European Commission conference on 29 January 2010 the Parliamentary Under-Secretary of State for the Home Office, Meg Hillier, claimed that the Government “punches above its weight” in justice and home affairs at EU level and explained that they are firm enthusiasts of activity in this field.<sup>34</sup> Lord Bach supported this view and cited the UK’s contribution to negotiations on the content of the Stockholm programme as an example.<sup>35</sup> Other witnesses drew our attention to the extent of the UK’s participation in terms of its use of EU authorities and instruments. For example, the UK has made significant use of Eurojust: it has referred more cases than any other EU jurisdiction and member states have

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31 Q 88

32 Qq 52, 88

33 Q 63 [Professor Peers], Ev 107-108 [Professor Mitsilegas]

34 European Commission representation in the UK and Centre of European Law, King’s College London conference, *Explaining the Stockholm programme: changes and novelties on immigration and criminal justice cooperation and importance for the United Kingdom*, 29 January 2010

35 Q 232

made more requests to the UK for assistance than any other jurisdiction.<sup>36</sup> Representatives from the UK also occupy key positions in both EU criminal justice agencies, including Mr Rob Wainwright as Director of Europol and Mr Aled Williams as President of Eurojust, and EU networks, including Rt Hon Lord Justice Thomas as president of the European Network of Councils for the Judiciary and Judge Victor Hall as Secretary General to the European Judicial Training Network.

26. Lord Bach was positive about the entry into force of the Lisbon Treaty, recognising the need to move the justice agenda forward and describing the effect of the safeguards that the UK has negotiated to protect British interests as “thoroughly satisfactory.”<sup>37</sup> He described to us the broad principles which will govern the UK’s decision to opt-in to future proposals: “We start with a positive frame of mind, which is that we will want to agree where we can agree.”<sup>38</sup> In his view, the level of migration between member states means that it is in the interest of all member states to participate in as many justice measures as possible.<sup>39</sup> However, we heard that there were clear caveats to this approach: Government would be much more likely to support sensible, practical, evidence-based decisions than policies that would be incompatible with the legal system or economy—regardless of their benefits—or that would affect British interests adversely.<sup>40</sup> The Government is assisted in its decision-making by the advice given by the European Scrutiny Committees.

27. While the Government has broadly welcomed the proposals in the Stockholm programme, it has taken a similarly cautious approach when it comes to specific measures.<sup>41</sup> It has adopted a general view that activity in the area of justice, freedom and security should be tailored to solving real problems that are identified at EU level.<sup>42</sup> Lord Bach believed that EU activity could at times be overly ambitious with “great pronouncements and great attempts at legislation” sometimes in the absence of an evidence-base to support it.<sup>43</sup> He therefore advocated a “look before you legislate” approach.<sup>44</sup> Mr Faull supported the view that much can be achieved through the gradual building up of mutual trust which does not necessarily require legislation.<sup>45</sup> We heard that maintaining an emphasis on practical evidence-based measures has been a struggle within the confines of the Council in the past.<sup>46</sup> Under the Lisbon Treaty member states have the power to make proposals for legislation if a quarter of them support it. The EU Committee stated that this may raise problems in terms of evidence-based policy-making:

Not all proposals in the area of FSJ [freedom, security and justice], whether they emanate from member states or the Commission, are supported by the statistical and

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36 Qq 188-189 [Mr Kennedy]

37 Qq 2-3

38 Q 4

39 Q 232

40 Qq 4, 232

41 Q 49 [Lord Bach]

42 Ev 93

43 Q 244

44 Q 43

45 Q 89

46 Q 50 [Lord Bach]

other evidence critical for assessing the need for proposed legislation, and especially its compliance with the subsidiarity principle. The problem is greater with member states' initiatives: while the Commission always provides an explanatory memorandum and sometimes provides an impact assessment, member states rarely provide either.<sup>47</sup>

We discuss the likely impact of this in chapter 3.

28. There are some shortcomings inherent in the Government's "wait and see" approach in terms of the extent to which the shape of proposals can be influenced in a timely way. If Government does not opt-in to initial discussions it cannot expect to have much influence over the final proposal. However, in the negotiation of some civil law measures,<sup>48</sup> the Government has successfully used an alternative approach to simply opting-out. Professor Peers described this as "opting-out, hovering on the sidelines, making suggestions as to what changes might be made so that [the UK] could then opt in".<sup>49</sup> However, while it may have worked in the past, Professor Peers considers this a "risky" option as it has largely relied on goodwill from other member states which he argued must be "continually earned".

**29. We welcome the Government's approach in favouring evidence-based practical measures and adopting a "look before you legislate" perspective and we are encouraged that this perspective has been reflected in the Stockholm programme. We hope that it will be possible for Government and the Commission to continue to pursue these ideals now that there is no longer a requirement for unanimity and that groups of member states are able to introduce their own initiatives.**

### *Implications for implementation and enforcement*

30. We heard that the UK's decision to continue to opt-out of the jurisdiction of the European Court of Justice following the entry into force of the Lisbon Treaty has two main implications for UK citizens.

31. First, UK courts are responsible for interpreting EU law and cannot resort to the Court except for basic advice. This has had limited impact in the field of justice to date as the Court had no jurisdiction in this area previously. As such there have been few mechanisms for the enforcement of legislation which has operated on the basis of mutual trust. Yet, we also heard that standards, for example in terms of adherence to the principles of data protection or the safeguards afforded to suspects under the European arrest warrant, vary considerably (as we discuss further in chapter 3). For instance, if the UK courts were able to refer complex questions to the European Court of Justice regarding the operation of the European arrest warrant, they could receive greater clarification on issues around proportionality.<sup>50</sup> Mrs Nuala Mole, Director of the AIRE Centre<sup>51</sup>, explained that decisions

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47 HL Paper (Session 2007–08) 62-I, para 6.72

48 See Q 233 [Lord Bach] and Q 54 [Professor Peers]

49 Q 55

50 Q 126 [Ms Blackstock]

51 A charity which provides advice on individual rights in Europe. See [www.airecentre.org](http://www.airecentre.org)

of the European Court which interpret European legislation are binding on all member states, including the UK and expressed her disappointment that the UK was not taking the opportunity to allow its expert lawyers, who tend to have greater experience than their equivalents in some other member states, to present clear cases to the Court.<sup>52</sup> The potential implications of this are discussed in chapter 2.

32. Secondly, the UK Government cannot be held to account for failure to implement EU legislation except by resort to the Court by other member states, which is a very rare occurrence.<sup>53</sup> While this limits judicial control over the UK (as it cannot be sued by the Commission) it potentially has considerable implications for UK citizens. For example, Victim Support has drawn our attention to the failure of the Government to implement, or fully transpose, a number of articles in the *Framework decision on the standing of victims in criminal proceedings*.<sup>54</sup> According to Professor Peers there have been some references to the Court of Justice on this framework decision, where it is the prosecution that has been trying to use it, in the interests of victims of crime, to toughen up national law from the prosecution's point of view.<sup>55</sup>

33. We were told that Government has also adopted a “wait and see” position on whether it will opt-in to the jurisdiction of the Court within the five-year timeframe, to take the opportunity to observe how the Stockholm programme influences the direction of EU measures and the repeal or replacement of existing measures.<sup>56</sup> One potential motivation for the Government in not favouring resort to legislation under the Stockholm programme is that it would open the measure to the jurisdiction of the Court of Justice. Therefore, if the UK subsequently opts-in to this jurisdiction, the Commission would be able to sue the Government if it has failed to implement effectively.<sup>57</sup> The House of Lords Committee concluded that the new rules on the Court's jurisdiction are clearer than the previous position; however, they may have issues for national sovereignty, particularly for the UK and its common law system.<sup>58</sup>

**34. Some of the practical consequences of the Lisbon Treaty and the opt-in arrangements that the UK has negotiated remain matters of contention.**

### ***Mutual recognition vs. approximation of legislation***

35. The Stockholm programme and the Lisbon Treaty are both clear that mutual recognition is at the heart of what the EU is trying to achieve in the area of freedom, security and justice.<sup>59</sup> The latter enshrines the principle of mutual recognition for the first

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52 Qq 125-6, 134 [Mrs Mole]

53 Q 134 [Ms Mole]. See also Ev 75

54 Ev 113-114. See also chapter 3.

55 Q 60

56 Q 242 [Lord Bach]

57 See Q65 [Professor Peers]

58 HL Paper (Session 2007–08) 62-I, para 6.88

59 Q 88 [Mr Faul]

time in the area of judicial cooperation in criminal matters.<sup>60</sup> The Government strongly supports this development.<sup>61</sup>

36. Article 83 of the Lisbon Treaty gives the European Commission the capacity to introduce minimum standards—for example on the admissibility of evidence, victims’ rights and procedural rights—and clearly identifies several crimes for which sanctions could be devised at EU level for the prevention of “mass criminality”, including trafficking in human beings, sexual exploitation of women and children and illicit drug trafficking. According to the Commission, such harmonisation of legislation may be needed (for example, to avoid criminals using differences between national legislation in different member states to operate from one EU country in directing activities in others) to give EU citizens a common sense of justice; and to facilitate mutual recognition.<sup>62</sup> This builds on the existing approach to approximation of legislation whereby all member states must have in their law the availability of a sentence. Mr Faull was clear that the European Commission did not wish to harmonise criminal law for the sake of it, and in any case would find it difficult to do so.<sup>63</sup> Professor Peers described the setting of general rules—for instance, the introduction of a minimum level for maximum sentences—as a “light-handed approach” to harmonisation which he did not see as problematic in terms of the variation which exists in national criminal procedures across member states.<sup>64</sup>

37. The Government recognises that there may be “benefit in a degree of approximation of substantive law” in relation to some serious crimes, particularly cross-border crimes, but told us that it would consider any such proposals “very carefully and on a case by case basis”.<sup>65</sup> The Government would have “serious reservations” about moves to align member states’ laws and regulations without three safeguards, ensuring that: they remain within the competence of the EU; are necessary and appropriate; and respect traditions in areas such as prosecutorial and judicial discretion (for example in relation to criminal sanctions).<sup>66</sup> Lord Bach stressed: “we are not going to have a harmonised code of criminal law throughout Europe.”<sup>67</sup>

**38. While the UK Government may wish to see greater emphasis on joint action and best practice rather than legislation, the proposals in the Stockholm programme and the Lisbon Treaty together give rise to the potential for a significant body of new law.**

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60 See Article 82(1) of the Lisbon Treaty

61 Ev 94

62 See <http://europa.eu/> information on freedom, security and justice.

63 Q 88

64 Q 78

65 Ev 94

66 *Ibid.*

67 Q 238

## 2 The opt-in protocol and revisions to existing mutual recognition instruments

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39. The European Council has requested the European Commission to set a timetable for transforming third pillar instruments to a new legal basis following the entry into force of the Treaty of Lisbon.<sup>68</sup> We have considered the challenges that may be encountered during this process, particularly in the light of the “look before you legislate” approach that the Government has adopted to future proposals.

### The European arrest warrant

40. The European arrest warrant aims to facilitate the rapid execution of decisions by judicial authorities of member states to require the arrest and return of a person for trial or to serve a sentence, when they have fled to, or are resident in, other member states. It is the best known instrument which encompasses the principle of mutual recognition of judicial decisions. It has been in operation in the UK since 1 January 2004 and has been used extensively across the EU.

41. The effects of the European arrest warrant on the UK are well documented. They are illustrated by increases in the volume of extraditions to, and from, the UK and significant reductions in the time taken to effect these transfers.<sup>69</sup> Mr Mike Kennedy of the Crown Prosecution Service, and founding president of Eurojust, told us that the warrant had been the “most effective mutual recognition tool introduced” and its impact was “greatly simplifying and speeding up extradition within the EU since its introduction in January 2004”.<sup>70</sup> The Ministry of Justice wrote that the European arrest warrant had:

- transformed extradition arrangements between EU member states
- played an important role in the UK’s fight against international and trans-national criminality
- prevented countries from refusing to surrender fugitives
- reduced the time taken to surrender fugitives from an average of 18 months under previous extradition arrangements to around 50 days, and
- enabled the UK to extradite over 1000 fugitives to other EU member states (since introduction) and, in 2008, nearly 100 wanted persons were surrendered back to the UK to face criminal proceedings.<sup>71</sup>

42. Nevertheless, Mr Faull pointed out that developing the mutual trust necessary to enable and allow such trans-national legal instruments to work, and to be improved, is no easy

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68 Council of the European Union, *The Stockholm programme: an open and secure Europe serving and protecting the citizens*, December 2009, para 1.2.10

69 HC (Session 2006–07) 76-I; Q 14 [Lord Bach]

70 Ev 55

71 Ev 90

task: "...mutual recognition requires mutual confidence, which is not always a given".<sup>72</sup> Mutual trust may be undermined if, for example, the threshold for the use of an instrument has been set, or interpreted as, too low given its expense and administrative burden. The European arrest warrant has exposed some of the difficulties of adopting common procedures within very different systems and highlighted limitations in taking a mutual recognition approach to legislation in this area. We heard from Fair Trials International in particular, that there are a number of difficulties with the instrument, which were described to us as "significant".<sup>73</sup> Mr Jago Russell, the Director of Fair Trials International, explained: "it seems to me that if you are going to recognise, in a "no questions asked" way, decisions of other courts you also have to have confidence that those courts in those countries are indeed respecting basic rights."<sup>74</sup> Some of the difficulties that have arisen with regards respect for individual rights are illustrated in case studies in box 2.

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72 Q 88 [Mr Faul] ]

73 Ev 59

74 Q 161

## ***Box 2—Fair Trials International case studies***

### ***Mr Symeou***

In 2007, while Mr Symeou, a university student, was on holiday with friends in Zante, Greece, another young Briton was assaulted and fell off an unguarded stage in a night-club, tragically dying two days later from his head injury. Andrew insists he was not even in the club at the time and many witnesses have since confirmed this. He was not sought for questioning, and knew nothing about the incident when he flew home at the end of his holiday. A year later, he was served with a European arrest warrant seeking his extradition to Greece to stand trial for murder. During the course of his legal challenge it emerged that the warrant is based on flawed evidence, much of it extracted through the brutal mistreatment of two witnesses who have since retracted their (word-for-word identical) statements. In addition to being concerned about Mr Symeou's fate FTI considers that if the Greek authorities had acted legally and diligently, the true assailant could be brought to justice.

### ***Mr Mendy***

At the age of 18, Mr Mendy went on holiday to Spain with two friends. While there, all three were arrested in connection with counterfeit euros. Mr Mendy himself had no counterfeit currency on him or in his belongings when arrested and has no idea how the notes came to be on his two friends and in their rented apartment—in total, the police found 100 euros in two notes of 50. The boys were held three nights, then appeared in court and had a hearing lasting less than an hour, at the end of which they were told they were free to leave but might receive a letter from the authorities later. They returned to the UK and heard no more about it until 4 years later when, as Mr Mendy was studying in his room at university, officers from the Serious Organised Crime Agency arrested him on a European arrest warrant. He was extradited to Spain and held on remand in a maximum security prison in Madrid. Other inmates told him he might be in prison for up to two years waiting for a trial. Under immense pressure and fearing for his future, he decided to plead guilty, even though several grounds of defence were available and he would have preferred to fight the case on home ground, on bail, and with a good lawyer he could communicate with in English. None of this was possible, and he ended up spending 9 weeks in prison before coming home to commence his university career, his future blighted by a criminal record. This is an example of how warrants can be issued in a disproportionate way, wasteful of costs and having an unduly harsh effect on individuals' personal lives.

### ***Messrs Hill***

In 1997 the Human Rights Committee of the United Nations reported that brothers Michael and Brian Hill had been denied a fair trial in Spain, following their arrest in 1985, and were entitled to a remedy “entailing compensation” as a result. Spain failed to comply with this ruling and subsequently issued a European arrest warrant seeking the brothers' extradition to Spain. In October 2005, Michael Hill was arrested in Portugal and extradited

to Spain where he served 7 months for breach of parole conditions. The brothers had already served three years in prison in Spain. Fair Trials International considers that this is a clear abuse of process and suggests that courts of executing states should be empowered to refuse extradition in such cases, rather than perpetuating the injustice of the original trial.

### Ms X

In 1989, British citizen Ms X (anonymity requested) was arrested in France on suspicion of drug-related offences and held in custody. Her trial took place later in 1989. The court acquitted her of all charges, finding she had been set up by her then partner. She returned to the UK but, unbeknown to her, the case was appealed by the French prosecution. She was not notified and the appeal went ahead without her knowledge in 1990. No lawyer represented her and the Appeal Court overturned the original verdict and sentenced her to 7 years' imprisonment. She was not informed. In April 2005, a European arrest warrant was issued by the French authorities for Ms X to be returned to serve her sentence. Unaware of this, in 2008 she travelled to Spain where she was arrested and taken into custody pending extradition to France. Ms X refused to consent and spent a month in custody waiting for an extradition hearing. Eventually the Spanish court refused to extradite her, given that nineteen years had passed since the alleged offences. Ms X was released and flew home to the UK—only to be re-arrested on the same warrant by the British police at Gatwick airport. The City of Westminster Magistrates' Court refused the extradition in April 2009 given the passage of time. This could happen again and again, until France removes Ms X's warrant from the EU-wide system. Ms X is virtually a prisoner in her own country, as any trip abroad could result in her arrest. She wishes to visit her sick and elderly father in Spain but cannot risk it for the sake of her family.<sup>75</sup>

43. The use of European arrest warrants for minor offences, which would be seen within the UK legal system as a disproportionate measure, raises the problems Mr Russell described for the UK (and other member states) both on human rights grounds and in terms of the costs to their legal systems.<sup>76</sup> In many member states, including for example Poland, the prosecutor is constitutionally obliged, under the applicable codes of criminal procedure, to take action when there is an allegation that an offence has been committed. There is no equivalent to the prosecutor test which, in the UK, ensures that the case is in the public interest and that there is a realistic prospect of conviction.<sup>77</sup> We heard several examples of cases where inter-country surrender of persons had been requested for offences that would be considered minor in the UK, for example, stealing ten chickens, a mobile phone or even a bowl of cherries.<sup>78</sup> The Ministry of Justice was unable to provide us with an estimate of the cost to the UK of administering European arrest warrants<sup>79</sup> but,

75 Ev 60ff

76 Q 161 [Mr Russell]

77 Qq 163-165

78 Qq 162,165

79 Ev 103

according to Mr Russell, an Irish judge has estimated the average cost per case in Ireland to be 25,500 Euro.<sup>80</sup>

44. The Government acknowledged that there were difficulties with the administration of the European arrest warrant, particularly related to proportionality, and supported the view that the use of the European arrest warrant should be restricted to serious cases.<sup>81</sup> It drew our attention to a report in 2008 on a review of the operation of the instrument which made recommendations to individual member states and to the preparatory bodies of the Council<sup>82</sup> that were adopted by the Council in June 2009 (discussed further below).<sup>83</sup>

45. We heard that the Government had not conducted a formal review of the Extradition Act 2003 but believed that the provisions work well.<sup>84</sup> Some less formal scrutiny took place during the consideration of the *Policing and Crime Act 2009*, which made provision for the UK to begin sending and receiving data, including alerts which request the arrest of a person for extradition purposes, via the Schengen Information System II [SIS 2] and to defer extradition in particular instances. The use of the European arrest warrant has increased year on year,<sup>85</sup> but, as we noted above, the Government was unable to provide us with indicative costs for their enforcement, citing the many factors involved in making the decision and the various parts of the criminal justice system engaged in the process.<sup>86</sup> We heard that Government did not foresee any increase in demand for European arrest warrants<sup>87</sup> but we have since been told that there is likely to be a 250% rise in cases as a result of the UK's connection to SIS 2 from April 2011.<sup>88</sup> We understand that the Home Office is responsible for preparations to deal with this rise but there will be undoubtedly considerable implications for the Crown Prosecution Service, which approves applications for warrants; Westminster magistrates court, which administers European arrest warrants; and the National Offender Management Service, which is responsible for detaining suspects prior to their surrender.

**46. We would welcome clarification from the Ministry of Justice on the action it is taking to deal with the predicted 250% rise in arrests pursuant to European arrest warrants in terms of the implications for the Crown Prosecution Service, Her Majesty's Courts Service and the National Offender Management Service and how it plans to meet the costs to the Department as a whole.**

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80 Q 161 [Mr Russell]

81 Q 16

82 Preparatory work for the Council is carried out by several bodies, each of which holds a specific rank in the order of importance: Coreper is at the top, and at the bottom are the numerous working parties; in the middle are the committees with responsibility for specific areas.

83 Qq 16-17 [Lord Bach, Ms Gibbons]

84 Q 256 [Lord Bach]

85 Q 88 [Mr Faull]; Ev 103

86 Q 258 [Ms Gibbons]; Ev 103

87 Q 265 [Ms Gibbons]

88 Ev 106

### Revising the European arrest warrant

47. The Law Society considered there to be an urgent need for the introduction of a proportionality test for the issuance of European arrest warrants.<sup>89</sup> The Council has agreed that the issue of proportionality should be prioritised and there is general agreement amongst member states on the most appropriate means of doing so. The follow up to the evaluation report, discussed above, stated that “legislative action is undoubtedly the most binding manner to obtain a change in the way the European arrest warrant functions and therefore, at least in some cases, probably also the most effective course of action. There are, however, also potential drawbacks to legislative action [...] [and it] should be followed only if it is unavoidable in order to remedy important problems”.<sup>90</sup> Mr Faull drew similar conclusions.<sup>91</sup>

48. The Government shared the view that renegotiation of the *Framework decision on the European arrest warrant* should not be the default solution to problems with its implementation.<sup>92</sup> It is thus seeking to deal with these issues proactively by developing a shared understanding of best practice through the Justice and Home Affairs Council and with the Commission.<sup>93</sup> While legislation was an option considered with other member states in the June 2009 Justice and Home Affairs Council, most member states accepted that there were other solutions that could be used, such as bilateral discussions, with the aim of developing a shared understanding of when it is appropriate to use the instrument.<sup>94</sup>

49. Mr Russell explained why there may be resistance to resorting to legislation: “there is major concern in many EU member states, including the UK, and the Commission, on the question of re-opening the framework decision on the European arrest warrant [...] [that] the whole thing will unravel [...] I can see from a political point of view that there could be problems”.<sup>95</sup> For example, if there is a review of the European arrest warrant the new rules on the European Court of Justice’s jurisdiction would apply with immediate effect. On the other hand, Mrs Mole pointed out that the issue of proportionality is compounded by the Government’s decision not to opt in to the jurisdiction of the Court of Justice because it denies the Westminster magistrates court the ability to raise questions about the execution of warrants in any cases.<sup>96</sup>

**50. It is unfortunate that the successful use of the European arrest warrant, and the reduced time taken to process intra-EU extraditions, has been overshadowed by perceived injustices in individual cases. We welcome the conclusions of the evaluation of the warrant, adopted by the Council in June 2009, and the subsequent progress that**

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89 Ev 83

90 Council of the European Union, *Follow-up to the final report on the fourth round of mutual evaluations: the practical application of the European arrest warrant and corresponding surrender procedures between member states*, 7 December 2009

91 Q 93

92 Q 260 [Ms Gibbons]

93 *Ibid.*

94 Qq 259-262 [Ms Gibbons]. For example, see Q 181 [Mr Kennedy] Eurojust, despite having no formal role beyond advice in difficult cases, organised a useful bilateral meeting between justice departments in Poland and the UK on these issues.

95 Q 162

96 Q 165

has been made. However, we believe that the time it takes to review and reform such instruments undermines the mutual trust approach. Legislation should be used only as a last resort to resolving the issues over proportionality and we hope that the current approach bears fruit before the predicted growth in demand for European arrest warrants takes place.

### *The threshold for inoperability*

51. While the Commission and member states may be reluctant to amend the framework decision as a means of resolving the proportionality issue, it may become necessary if other measures fail. Professor Mitsilegas, of Queen Mary University of London, believed that the UK opt-in would fuel momentum to re-open debates on aspects of law and policy either when framework decisions are translated into regulations and directives, which may result in amendment to existing agreements, or when new accompanying measures are agreed.<sup>97</sup> He raised questions, for example, about whether the UK could continue to participate in the European arrest warrant if it did not opt-in to a new directive on defence rights which underpins the principles of mutual recognition in the warrant.<sup>98</sup>

52. As we have noted, the application of the opt-in protocol extends to processes by which amendments to existing measures are negotiated. If the UK decides not to participate in an amending measure and the Council decides that this lack of involvement renders the measure inoperable for other member states it can “eject” the UK from the original measure. Professor Peers illustrated his interpretation of the level of this threshold using the analogy of a car:

would you say your car was inoperable just because there is an odd noise which you cannot explain, there is something awkward about it, or would you say it is only inoperable if it gets to the point where it is judged unroadworthy or, indeed, it just does not function at all because you cannot get it to start and there are no brakes or steering or something really essential that you need for a car to work?<sup>99</sup>

He therefore supported the conclusions of the House of Lords EU Committee in its report, *The Treaty of Lisbon: an impact assessment*, that this threshold was a high one, related to technical inoperability. The Government also considered that the threshold was high.<sup>100</sup> We heard that this works in its favour as long as it wishes to remain participating in existing measures. However, Professor Peers pointed out that the European Commission, European Parliament, some member states and/or a different UK government may have different views as to the level of the threshold.<sup>101</sup>

53. If it can be demonstrated that member states suffer financial loss stemming directly from the UK’s failure to participate (and the consequent inoperability of the measure), the UK could potentially bear financial consequences, a scenario that Mr Edwin Kilby, head of

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97 Ev 107

98 *Ibid*, para 7.

99 Q 62

100 Ev 106; Q 236 [Mr Kilby]

101 Q 63

European policy at the Ministry of Justice, considered highly unlikely.<sup>102</sup> Professor Peers explained that there is already significant divergence in the implementation of aspects of existing measures which has not led to a breakdown in their operation.<sup>103</sup> However, Mrs Mole believed that it is “not out of the question” that a state may take another state to the Court of Justice, for example, if there was a very serious breakdown of the function of cross-border criminal justice mechanisms.<sup>104</sup>

**54. We are encouraged that neither the Minister, nor any of our witnesses, were able to provide a convincing example of a situation in which an existing measure would be rendered inoperable as a result of the UK’s decision not to participate. Nevertheless, we are concerned that the term “inoperable” is not defined in the protocol and that guidance is not available on its interpretation.**

### The European evidence warrant

55. The European evidence warrant, adopted as a Council framework decision in December 2008, is intended to replace mutual legal assistance procedures and further improve judicial co-operation by applying the principle of mutual recognition to a judicial decision for the purpose of obtaining objects, documents and data for use in criminal legal proceedings in different member states. Provisions to give effect to the UK’s obligations to implement the framework decision are included in the *Policing and Crime Act 2009*. Until the European evidence warrant is fully implemented—and this process is expected to take up to two years—the new measure will run in parallel with the mutual legal assistance procedures under the 1959 Council of Europe Convention and the 2000 *EU Convention on mutual legal assistance*.

56. This instrument took some time to negotiate, being first introduced in November 2003, and the legislation that was finally adopted contained many exceptions to general principles, resulting in concern that it may not operate effectively. Mr Kennedy told us that he did not believe that the arrangements under the framework decision are as powerful as agreements for mutual legal assistance under the Conventions described above, although he also felt that these were too ad hoc.<sup>105</sup> Practitioners have suggested to the European Commission that the system under the framework decision is cumbersome and difficult and not conducive to the best possible administration of justice (i.e. ensuring that it is relatively easy to obtain evidence located in one country where it is needed for a particular case).<sup>106</sup>

57. Reflecting these concerns, the Stockholm programme provides for the European evidence warrant to be revised and a new measure adopted. Mr Kennedy could see benefits in standardising the process for gathering evidence, but believed that it would be difficult to develop a comprehensive European evidence warrant, citing differences in the rules of

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102 Q 234; see also Ev 106

103 Q 63

104 Q 134

105 Q 182

106 Q 94 [Mr Faulk]

admissibility of evidence across member states.<sup>107</sup> Changes to rules on the admissibility of evidence could potentially give rise to more interference with the UK system.

58. In principle, the Government is supportive of further attempts to improve judicial cooperation amongst member states but thought that this must be done through an instrument that will “demonstrably add real value” to mutual legal assistance.<sup>108</sup> It has suggested to the Commission that a more effective system should: require executing authorities to set out a timeframe within which a request will be executed (but avoid a ‘one size fits all’ approach being taken to deadlines that could actually hamper wider judicial cooperation); make proper provision for central authorities; include proportionality as a ground of refusal; and make the instrument available to the defence.<sup>109</sup> We discussed the need for proportionality to be considered in adopting such a measure. Mr Faull agreed that it might be necessary to include this on the face of legislation and pointed out that the issue of proportionality arises at two levels: first, legislation must be in proportion to the objective it sets out to achieve and, secondly, there must be proportionality in how it is applied and interpreted.<sup>110</sup>

59. Nevertheless, there are currently two parallel initiatives which may provide the basis for a new measure.<sup>111</sup> The first, a green paper on the gathering and admission of evidence, was issued by the European Commission in 2009 to enable consultation and detailed investigation before new legislation is proposed.<sup>112</sup> In addition, it is anticipated that a member state initiative, led by Belgium, will propose the introduction of a “European investigation order”.<sup>113</sup>

**60. While the Government may wish the EU to adopt a “look before you legislate” approach, the ability of member states to present their own initiatives may pre-empt more considered approaches by the European Commission. We agree with the Government that, if the European evidence warrant is revised or replaced, lessons should be learned from the operation of the European arrest warrant by incorporating safeguards into the legislation to minimise the potential for disproportionate use.**

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107 Qq 182, 185

108 Ministry of Justice, *UK written comments on the European Commission’s Communication on the Stockholm programme*, September 2009

109 *Ibid.*

110 Q 100

111 Q 65 [Professor Peers]

112 Q 97 [Ms Hahn, Mr Faull]

113 Q 267 [Ms Gibbons] Once such an initiative is launched UK Parliament has 8 weeks to decide whether the UK Government should opt-in and if the Government decides not to opt-in immediately it has 3 months to do so.

### 3 Safeguarding fundamental rights

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61. EU-level activity under the Stockholm programme is likely further to increase the powers of police and justice agencies in seeking to apply the principle of mutual recognition at all stages of criminal procedure. In her first hearing before the relevant Committees of the European Parliament, Viviane Reding, the European Commissioner for justice, fundamental rights and citizenship, stated: “In the last decade, justice has been neglected in favour of security, but the Lisbon Treaty now allows a balance to be struck”.<sup>114</sup>

62. With respect to the rights of suspects and defendants, Fair Trials International suggested to us that what is needed is more than a re-balancing exercise and argued that there must be no “trade off” between fundamental rights and the need to fight crime: “These rights are not variables, to be weighed in the balance with other policy considerations. They are universal rights, which should now be restored to the centre of criminal justice policy”.<sup>115</sup> As highlighted above, research shows large discrepancies between member states in their implementation of fair trial rights under the European Convention on Human Rights.<sup>116</sup> Fair Trials International explained that such discrepancies tend to be greater for non-nationals: “in practice it can often be more difficult for non-nationals than nationals to receive a fair trial”; they cite several case studies (see box 2), which highlight what it describes as the ‘human costs’ of existing mutual cooperation measures, including the European arrest warrant, as a result of the issuance of unreasonable or improper extradition requests, and the lack of arrangements to protect minimum procedural rights in each of the areas of priority indicated in the “road map”.<sup>117</sup> The Magistrates’ Association agreed that “defendants and other court users must be given every opportunity to ensure they fully understand all the proceedings and decisions made at every stage of the criminal justice process.”<sup>118</sup>

63. The Hague programme endorsed an ambitious plan to agree measures to afford citizens, who become embroiled in criminal justice processes, common minimum procedural rights:

The further realisation of mutual recognition as the cornerstone of judicial cooperation 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. In this context, the draft framework decision on certain procedural rights in criminal proceedings throughout the European Union should be adopted by the end of 2005.

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<sup>114</sup> European Parliament press release, *Summary of hearing of Viviane Reding—Justice, fundamental rights and citizenship*, 12 January 2010

<sup>115</sup> Ev 62

<sup>116</sup> Article 6 of the European Convention on Human Rights states ‘The right for the accused to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require’

<sup>117</sup> Ev 60-61

<sup>118</sup> Ev 86

However, this did not come to fruition: six countries opposed the agreement to the proposal, Malta, the Czech Republic, Ireland, Cyprus, Slovakia and the UK. Lord Bach defended this decision:

we, with some other countries, were not prepared to accept the decision on procedural safeguards and pulled out of it [...] We thought that what was being proposed there was too ambitious for its own good and was trying to address, all at once, in a single all-encompassing instrument, a wide range of fundamental procedural guarantees, and the framework decision would have ended up replicating, or did end up replicating not exactly ECHR rights, and we thought there was a real risk of widely diverging interpretations between the European Court of Justice, on the one hand, and the Strasbourg Court [European Court of Human Rights]. Our problem was with the approach.<sup>119</sup>

### The “road map” on procedural rights

64. The Swedish Presidency prioritised the resumption of negotiations on procedural rights and published a *Roadmap with a view to fostering the protection of suspected and accused persons in criminal proceedings* (the “road map”) in the form of a note presented to the Justice and Home Affairs Council on 1 July 2009.<sup>120</sup> The Swedish Minister of Justice has explained the reasoning behind the Presidency’s focus on this issue:

If we cannot make more progress in this area, we risk distorting our collaboration so that measures that guarantee the legal security of the individual are not given sufficient scope.<sup>121</sup>

The “road map” replicates the priority rights in the original proposal, but advocates a right-by-right approach to agreeing the measures described in box 3.

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119 Q 7

120 Ev 74

121 Swedish Presidency speech, *Presentation to the Committee on Civil Liberties (LIBE)* by Minister of Justice Beatrice Ask, 4 September 2009

**Box 3 – The “road map” measures (in order of consideration)**

- a) Translation and interpretation: The suspected or accused person must be able to understand what is happening and to make him/herself understood. A suspected or accused person who does not speak or understand the language that is used in the proceedings will need an interpreter and translation of essential procedural documents. Particular attention should also be paid to the needs of suspected or accused persons with hearing impediments.
- b) Information on rights and information about the charges: A person that is suspected or accused of a crime should get information on his/her basic rights orally or, where appropriate, in writing, e.g. by way of a Letter of Rights. Furthermore, that person should also receive information promptly about the nature and cause of the accusation against him or her. A person who has been charged should be entitled, at the appropriate time, to the information necessary for the preparation of his or her defence, it being understood that this should not prejudice the due course of the criminal proceedings.
- c) Legal advice and legal aid: The right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure effective access to the aforementioned right to legal advice.
- d) Communication with relatives, employers and consular authorities: A suspected or accused person who is deprived of his or her liberty shall be promptly informed of the right to have at least one person, such as a relative or employer, informed of the deprivation of liberty, it being understood that this should not prejudice the due course of the criminal proceedings. In addition, a suspected or accused person who is deprived of his or her liberty in a state other than his or her own shall be informed of the right to have the competent consular authorities informed of the deprivation of liberty.
- e) Special safeguards for suspected or accused persons who are vulnerable: In order to safeguard the fairness of the proceedings, it is important that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition.
- f) Green paper on pre-trial detention: The time that a person can spend in detention before being tried in court and during the court proceedings varies considerably between the member states. Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice the judicial cooperation between the member states and do not represent the values for which the European Union stands. Appropriate measures in this context should be examined in a green paper.

65. The Government was supportive of strengthening the procedural rights of suspects and defendants under the Stockholm programme, describing it as an area of “fundamental concern”.<sup>122</sup> However, it considered the need to do so as predominantly an issue affecting UK citizens who are resident or travelling in other member states as the UK already provides high standards of procedural rights, for example, in standards of detention and access to legal aid.<sup>123</sup>

66. The Government sees the “road map” as a good example of a cautious and pragmatic approach to EU policy-making. Lord Bach described it as a “British way of dealing with progress.”<sup>124</sup> However, while the “road map” was welcomed in principle by our witnesses, including the Law Society, JUSTICE and Fair Trials International, some raised concerns about adopting a step-by-step approach.<sup>125</sup> Negotiations on the “road map” were not initially part of Stockholm programme per se but a separate and self-contained process. JUSTICE and the Law Society feared that there would be no obligation upon member states to continue to act in this area following the Swedish Presidency.<sup>126</sup> The commitment is now enshrined in the programme itself,<sup>127</sup> but there remain no guarantees that it will be implemented in its entirety as the failure of previous negotiations under the Hague programme demonstrates. Mr Russell of Fair Trials International expressed his hopes that the new co-decision powers of the European Parliament will assist in encouraging member states to agree legislation on fundamental rights.<sup>128</sup>

### *Speed of implementation*

67. It is clear that addressing the current imbalance in rights observances across the EU is a priority for Government and for the European Council which has called for “swift implementation” of the measures agreed in the “road map”.<sup>129</sup> Efforts to generate a proposal on the first procedural right (interpretation and translation) were certainly speedy. Agreement on the framework decision was reached, in principle, at the Justice and Home Affairs Council on 23 October 2009, but there was insufficient time to consult the European Parliament prior to the entry into force of the Lisbon Treaty. The proposal was subsequently re-introduced on 15 December 2009 by a group of member states exercising their right of initiative for a directive, the first use of this power to make a proposal for justice legislation under Article 82(2)(b) of the Lisbon Treaty.<sup>130</sup> Nevertheless, assuming it is now agreed relatively quickly,<sup>131</sup> implementation may be hindered for practical reasons,

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122 Q 8 [Lord Bach]

123 Qq 12, 33 [Lord Bach]

124 Q 6

125 Ev 74 [JUSTICE], Ev 80-81 [Law Society], Ev 61-62 [Fair Trials International]

126 Ev 74 [JUSTICE]; Ev 81 [Law Society]

127 Stockholm programme, para 2.4

128 Q 129

129 Stockholm programme, para 2.4; Ev 93 [Ministry of Justice], Q 8 [Lord Bach]

130 Council of the European Union, *Initiative for a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings*, 15 December 2009; the UK is not party to this initiative

131 This may be complicated by the Commission issuing its own proposal on 9 March 2010

for example, the lack of qualified interpreters or technological infrastructure to support interpretation, including by videoconference.<sup>132</sup>

68. While we understand that work has already begun on devising a proposal for information on rights and charges,<sup>133</sup> we heard that other measures, for example that on legal aid (measure C), may prove more difficult to agree. Fair Trials International thought that existing rules governing legal aid for individuals are unclear and vary between states, in particular the ability to resort to legal aid to support legal representation is often limited.<sup>134</sup> Research commissioned by the Ministry of Justice, from the University of York, found that whereas continental systems tend to have higher judicial and court costs, the adversarial nature of the criminal courts in England and Wales, and other common law countries, dictates the level and nature of the criminal legal aid system to a large extent as more representation is needed in court.<sup>135</sup>

69. The current budget for legal aid in the UK is £2.1bn per year.<sup>136</sup> Lord Bach accepted that this budget will always inevitably need to be higher than other member states with inquisitorial legal systems, but insisted that the existing system of legal aid was “generous”, even when compared with other common law countries such as Australia and New Zealand.<sup>137</sup> This can be partly explained by higher rates of recorded crime, higher case volumes and higher average costs per case in the UK.<sup>138</sup> The Government has already made it clear to the JHA Council that it could not agree to anything which could increase its current obligations to provide legal aid arising under Article 6(3)(c) of the ECHR and hence raise its legal aid expenditure.<sup>139</sup>

70. Furthermore, JUSTICE sounded a note of concern that the green paper on the right to review grounds for detention before a trial (measure F) could take some years to emerge—as a result of the consecutive consideration of measures proposed—let alone a tangible proposal.<sup>140</sup> The Minister did not deny that some of these matters were unlikely to be resolved swiftly and acknowledged that difficult cases would continue to arise in the meantime.<sup>141</sup>

71. The potential for delays in implementing the “road map” raises questions about the likelihood of a continued imbalance of EU policy-making in favour of prosecution for some years to come. We heard that this may be ameliorated both by such existing safeguards as the offer of consular assistance from embassies and the implementation of mutual recognition instruments. Some instruments may help prevent the differential treatment of non-nationals; for example, it is hoped that the European supervision order

132 Ev 86 [Magistrates’ Association]; Ev 73 [JUSTICE]; Ev 82 [Law Society]

133 Q 8 [Lord Bach]

134 Ev 60

135 Ministry of Justice, *International comparison of publicly funded legal services and justice systems*, October 2009

136 Q 32 [Lord Bach]

137 Qq 33-34

138 Ministry of Justice, *International comparison of publicly funded legal services and justice systems*, October 2009

139 Q 35 [Lord Bach]

140 Ev 74

141 Q 9

will negate the need to resort to custodial remands to prevent absconding.<sup>142</sup> Other instruments should afford citizens greater protection of some fundamental rights, for example, the *Framework decision on trials in absentia* enhances the rights of defendants by clarifying the criteria for determining when they have been adequately notified about their trial.<sup>143</sup> Technological developments, such as video-conferencing, may also assist.<sup>144</sup>

**72. We are encouraged by progress made in implementing the “road map” thus far, notwithstanding the delays caused by the introduction of the Lisbon Treaty. Some countries have given a strong signal that this is a priority by introducing the directive on interpretation and translation as a member state initiative. We consider it wise to begin with the easiest elements and to approach these with a renewed sense of optimism, but it is also important not to be complacent about the potential for setbacks. Very practical difficulties related to language may be more easily resolved with equally pragmatic solutions but other issues will undoubtedly be more complex to resolve. We fear that the current pace of progress may not be sustained and therefore have concerns about the implications of the continued imbalances in the system for UK citizens. As the number of European arrest warrants is predicted to rise, there is a real risk that many more citizens will experience the dire consequences of the lack of adequate safeguards afforded to them when they find themselves caught up in cross-European judicial processes.**

### **Other mechanisms to improve compliance**

73. The “road map” will effectively enhance rights that already exist in the Convention on Human Rights, but as is apparent from the disparities explained above, the presence of rights for EU citizens is no guarantee that they will be adhered to in practice; as we noted above, cases are subject to considerable delays at the European Court of Human Rights (see chapter 5). Once the EU itself accedes to the European Convention on Human Rights it will be subject to the adjudication mechanisms of the Council of Europe and the jurisdiction of the European Court of Human Rights, although in our meetings in Brussels we heard that this was likely to take some time. The Court of Justice will also apply the Convention in its interpretation of questions about the meaning of EU law and to inform its interpretation of the Charter. Ms Jodie Blackstock, senior legal officer at JUSTICE, pointed out that, in any case, the EU Charter of Fundamental Rights does not expand upon the Convention rights but lists them in one place along with the obligations to consider human rights issues under the Treaty on the European Union and the related jurisprudence that has developed.<sup>145</sup>

74. On 18 February 2010, Commissioner Reding set out her priorities for developing fundamental rights policy, stating: “The Charter will be the compass for all European Union policies. It will be the base for rigorous impact assessments on fundamental rights concerning all new legislative proposals.” She also pledged to “use all the tools available

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142 Q 8 [Lord Bach]

143 Ev 92; Q 8 [Lord Bach]

144 Q 8 [Lord Bach]

145 Q 130

under the Treaty to ensure compliance with the Charter of national legislation that transposes EU law” and to “apply a “zero tolerance policy on violations of the Charter.”<sup>146</sup>

75. The Law Society called for provision to be made in legislation for the evaluation and monitoring of compliance mechanisms for procedural rights<sup>147</sup> as recommended by the Home Affairs Committee in its 2007 report *Justice and Home Affairs issues at European Union level*.<sup>148</sup> **Monitoring of compliance with existing procedural rights will be all the more necessary if the “road map” measures take a long time to agree.**

### **Potential for divergent jurisprudence**

76. The main reason that the Government was unable to accept the European Commission’s original proposal for a framework decision on procedural rights in criminal proceedings was because it considered there to be a “real risk” of confusion arising from the potential for European Court of Human Rights jurisprudence to be compromised by diverging interpretations of EU definitions of human rights by the European Court of Justice.<sup>149</sup> The Government thus saw the original single instrument as “too ambitious” and welcomed the step-by-step approach championed by Sweden, believing that such an approach would help resolve any conflicts.<sup>150</sup>

77. The extent to which this tension will be resolved by taking the “road map” approach has been the subject of concern. The introductory text to the resolution on the “road map” states that any new EU legislative acts in this field<sup>151</sup> should be consistent with the minimum standards set out by the Convention, as interpreted by the European Court of Human Rights.<sup>152</sup> The European Scrutiny Committee considered the draft resolution on 14 October and advised the Government that it “potentially creates a new tier of procedural rights”.<sup>153</sup> That Committee also questioned the value of the interpretation of the relationship between ECHR and EU law outlined in the preamble to the resolution and “strongly” recommend it be amended. Nevertheless, the final adopted text remains essentially the same:

Furthermore, the Convention, as interpreted by the European Court of Human Rights, is an important foundation for member states to have trust in each other’s criminal justice systems and to strengthen such trust. At the same time, there is room for further action of the European Union to ensure full implementation and respect

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146 Europa Speech/10/33, *Towards a European area of fundamental rights: the EU’s Charter of Fundamental Rights and accession to the European Convention on Human Rights, Interlaken*, 18 February 2010

147 Ev 80

148 HC (Session 2006–07) 76-I, para 229

149 Q 7 [Lord Bach]

150 *Ibid.*

151 Action under the “road map” is not confined to legislation.

152 Resolution of the Council of 30 November 2009 on a *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, 2009/C 295/01

153 European Scrutiny Committee, Twenty-Ninth Report of Session 2008–09, *Documents considered by the Committee on 14 October 2009*, HC 19-xxviii; The Committee also addressed this issue in relation to the Draft Council framework decision on interpretation and translation rights in criminal proceedings which it considered on the same day. It concluded that “the proposal should not create an alternative hierarchy of human rights standards beyond those of the ECHR—to do as much would undermine the ECHR and cause legal uncertainty”.

of Convention standards, and<sup>154</sup>, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards."<sup>155</sup>

78. The preparation of the *Proposal for a framework decision on interpretation and translation rights in criminal proceedings* illustrates that it is possible to consolidate the Convention and European Court of Human Rights case law into proposals in consultation and cooperation with the Council of Europe. The Council of Europe has commented that some provisions of the framework decision lay down standards surpassing those of the ECHR but that this “does not raise a problem in terms of their compatibility with the ECHR, since its Article 53 explicitly provides for such an eventuality. However...it is important that such higher standards are clearly indicated.”<sup>156</sup>

79. In a written submission JUSTICE explained to us how the proposal enhances existing rights under the Convention:

On 8 July the Commission presented a proposal for a Council framework decision on the right to interpretation and translation in criminal proceedings (the proposal). The explanatory memorandum sets out clearly the need for action in this area and the developments of case law before the European Court of Human Rights which clarifies that the right to interpretation and translation provided in Articles 5 and 6 of the European Convention on Human Rights should be provided free of charge, to pre-trial proceedings and of competent quality. The proposal seeks to enhance these developments with practical detail. Article 2 confirms that the right to interpretation attaches to investigative as well as judicial proceedings, including police questioning and the provision of advice by the suspect’s lawyer. In a somewhat circular fashion Article 3(2) provides ‘[t]he essential documents to be translated shall include the detention order depriving the person of his liberty, the charge/indictment, essential documentary evidence and the judgment.’ Article 4 confirms that the state shall cover the costs of the service. Article 5 is headed ‘Quality of the interpretation and translation’ and requires the service be provided in such a way as to ensure that the suspect is fully able to exercise his rights, and that the profession is trained in ensuring this is the case.<sup>157</sup>

The European Scrutiny Committee maintains that this may result in “legal uncertainty”.<sup>158</sup>

80. During our meetings in Brussels similar concerns were raised about the entry into force of the EU Charter of Fundamental Rights. We heard two different assumptions about the potential implications of this. On the one hand that Court of Justice rulings may fall short of standards set in European Court of Human Rights jurisprudence, and on the other, that such rulings may be in excess of them. While this potential for divergence undoubtedly gives rise to challenges for both courts, our witnesses did not believe that there would be problems of conflict of case law. Professor Peers told us:

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154 Replaced “as well as”.

155 Resolution of the Council of 30 November 2009 on a *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, 2009/C 295/01, para 2

156 HC (Session 2008–09) 19-xxviii, para 13.16

157 Ev 74-75

158 HC (Session 2008–09) 19-xxviii, para 13.2

I do not think it is fundamentally problematic anyway to be setting standards which are above the ECHR, given that they are a minimum standard and given that it is obviously open to member states, and therefore presumably the European Union as a whole, to set standards which are above the minimum standards in the ECHR as far as criminal law is concerned.<sup>159</sup>

81. Mr Faull, Mrs Mole and Ms Blackstock explained that it has become increasingly common for the Court of Justice to consider the case law of the ECHR, which has tended to result in more comprehensive application of rights than those which are guaranteed under ECHR.<sup>160</sup> In doing so the Court has operated on the principle that: “in interpreting a piece of community legislation it must take into account, and not divert or depart from, the jurisprudence of the Strasbourg Court but must nevertheless give a Community meaning to Community provisions”.<sup>161</sup> Therefore, while there has been speculation over the risk of divergent jurisprudence, this threat has not actually materialised. Mrs Mole argued that while there was always a risk of the European Court of Justice inadvertently providing a level of right lower than that provided by the ECHR, in her view the “probability is zero” that this would occur in practice.<sup>162</sup> Mr Faull agreed that there was no guarantee that divergence would not occur in the future but he considered that the EU’s accession to the ECHR would make this “quite a lot less likely”, as the ECJ would then be applying the Convention fully and would use its interpretation of the Convention to inform its interpretation of the Charter.<sup>163</sup>

### *Sharing best practice*

82. JUSTICE noted that there was no best practice guidance accompanying the proposal on interpretation and translation in criminal proceedings and drew our attention to recommendations in a report prepared for the Directorate General Interpretation which could provide a basis for such guidance.<sup>164</sup> For example, the report advocated a curriculum in legal interpretation and a system of accreditation, certification and registration for legal interpreters.<sup>165</sup> The Magistrates’ Association has produced a guidance note and checklist for its members on using interpreters in court proceedings.<sup>166</sup>

**83. The Commission should develop best practice guidance to accompany each of the proposals created under the “road map”. In the first instance such guidance should be produced to complement the forthcoming directive on interpretation and translation in criminal proceedings, drawing on existing good practice in other member states, for example, the guidance note and checklist devised by the Magistrates’ Association.**

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159 Q 72

160 Qq 110, 130, 134 [Mr Faull, Ms Blackstock, Mrs Mole]. Ms Blackstock explained that the Court of Justice already “looks to Strasbourg” in its consideration of issues with a human rights angle, citing the case of *Kadi vs. Council and Commission* (C402/05) as an example.

161 Q 134 [Mrs Mole]

162 Q 141 [Mrs Mole]

163 Qq 110-111

164 Ev 75; See European Commission, *Reflection forum on multilingualism and interpreter training final report*, 2009

165 *Ibid.*

166 Ev 86

## Enhanced support to victims of crime

84. Strengthening the rights of victims was a priority identified in the Stockholm programme. The European Council calls for the European Commission to examine the possibility of creating a single comprehensive legal instrument on the protection of victims, by joining together the instruments that are already in force, including the 2004 *Directive on compensation to crime victims* and the 2001 *Framework decision on the standing of victims in criminal proceedings*.<sup>167</sup> The Commission reported last year on implementation of the framework decision and concluded:

The implementation of this framework decision is not satisfactory. The national legislation sent to the Commission contains numerous omissions. Moreover, it largely reflects existing practice prior to adoption of the framework decision. The aim of harmonising legislation in this field has not been achieved owing to the wide disparity in national laws. Many provisions have been implemented by way of non-binding guidelines, charters and recommendations. The Commission cannot assess whether these are adhered to in practice.<sup>168</sup>

The Commission subsequently commenced a wide-ranging impact assessment to consider what legislative and practical measures should be taken in 2011 to improve the position of victims during the entire judicial process. This could comprise: compensation; protection; assistance; special provisions for vulnerable victims, particularly child victims; and support for the activities of victim support organisations. In her first hearing before the relevant European parliamentary committees, Commissioner Reding reflected the importance that the Commission wishes to place on these issues and asserted that the EU must begin to pay more than “lip service” to the protection of victims.<sup>169</sup>

85. According to the Government, the framework decision has provided a “starting point for a significant set of reforms to the way victims are supported and kept informed about their case”,<sup>170</sup> including a code of practice for victims of crime, No Witness, No Justice and the introduction of Victim Support Plus.<sup>171</sup> We heard that this has resulted in significant improvements in victim satisfaction with the criminal justice system; from 75% satisfaction in 2005/06, to 82% in December 2008.<sup>172</sup>

86. Victim Support gave us its view on the UK Government’s track record in implementing the provisions of existing instruments. It agreed that the UK, particularly England and Wales, had a “relatively strong track record” in implementing the 2001 *Framework decision on the standing of victims in criminal proceedings* but identified areas for improvement, particularly the implementation of outstanding articles in framework decision, including: Articles 4 (Right to receive information); 5 (Communication safeguards); 8 (Right to

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167 Stockholm programme, para 2.3.4

168 COM (2009) 166, *Report from the Commission pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings*, 2001/220/JHA

169 European Parliament press release, *Summary of hearing of Viviane Reding—Justice, fundamental rights and citizenship*, 12 January 2010

170 Ev 91

171 Ev 112 [Victim Support]

172 Ev 91

protection); 9 (Right to compensation in the course of criminal proceedings); 10 (Penal mediation in the course of criminal proceedings); 11 (Victims resident in another member state); 12 (Cooperation between member states); and 14 (Training for personnel involved in proceedings or otherwise in contact with victims).<sup>173</sup>

87. The Stockholm programme identified particular groups of victims for attention, including victims of: gender based violence; child exploitation; trafficking; terrorism; and “cyber crime”. The NSPCC was supportive of child-specific provisions for young victims of crime.<sup>174</sup> However, Victim Support has found that, where universal services are not in place for all victims, this impacts disproportionately on vulnerable victims and “urge[s] caution” in identifying priority groups of victims.<sup>175</sup> Victim Support raised concerns about adopting a “two-tier” approach to victim policy in the EU, particularly in member states where infrastructure for supporting victims is not already established. The Government believed that there should be a focus on child protection and information on previous relevant convictions.<sup>176</sup>

88. The 2004 directive provided that where an EU citizen was a victim of crime in another member state they could apply for their own country’s compensation scheme. We heard that, across the EU, there has been low take-up of compensation under the directive, which Victim Support attributed primarily to a lack of awareness of the existence of such provision.<sup>177</sup> Other reasons for its underuse, identified in the Commission’s report, included perceived language barriers and the absence of a central source of information on the entitlements of victims. Victim Support called for victims to be made fully aware of the enhanced opportunity to seek compensation under the 2004 directive.<sup>178</sup>

89. The Law Society raised concerns about the extent to which victims’ rights may be balanced with the rights of defendants in any new measures:

It will be important to resist any attempts, albeit not explicitly referred to, to introduce a system of victim’s rights in which prosecutorial discretion to discontinue a case or downgrade a criminal charge would be subject to the victim’s input or consent or that of the victim’s advisor; or to introduce protective measures to afford victim anonymity that do not adequately protect the right of a defendant to challenge their evidence.<sup>179</sup>

**90. We welcome the proposed consolidation of instruments to promote the rights of victims of crime. The existence of compensation schemes could be promoted relatively easily through the forthcoming e-justice portal—which will function as a point of access to information on justice matters across the EU—with appropriate signposting from domestic agencies that come into contact with victims from other member states. We**

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173 Ev 113-114

174 Ev 111

175 Ev 115

176 Q 49 [Ms Gibbons]

177 Ev 115

178 *Ibid.*

179 Ev 85

**seek clarification from the Government as to when it intends fully to transpose the outstanding articles of the framework decision on the rights of victims in criminal proceedings.**

## 4 Information management and data protection

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91. Over the last 10 years there has been significant growth in the collection, storage and sharing of information in Europe and between Europe and the rest of the world for law enforcement purposes, assisted by many technological developments.<sup>180</sup> The Ministry of Justice identified significant benefits of greater information exchange including, more effective and more efficient action to combat terrorism and crime, quicker and safer travel and immigration procedures, and better experiences for citizens living, working, studying or doing business abroad.<sup>181</sup> Existing instruments which enable the movement of personal data in the area of criminal justice at EU level include automated sharing of DNA files; access to criminal records and mutual recognition of convictions and the European arrest warrant.

92. The European Data Protection Supervisor, Peter Hustinx, whom we met on our visit to Brussels, told us that he believed that, while the post-Lisbon decision-making processes might speed up the passage of data protection legislation, it might also result in greater compromise. We felt it was important to consider with our witnesses whether existing legislation and the Stockholm programme proposals strike the right balance between data protection and data management and utility from technology and the protection of privacy. Commissioner Reding has stated her belief that the EU “cannot expect citizens to trust Europe if we are not serious in defending the right to privacy”.<sup>182</sup>

### *Existing legislation*

93. The *European data protection directive*, agreed in October 1995, set out basic principles of data protection, for example, the right to access and the right of correction, rectification and deletion if data are erroneous or the date for their lawful use has expired.<sup>183</sup> Under the directive, each member state must set up its own data protection authority to monitor adherence to these principles; in the UK this function is performed by the Information Commissioner. The directive did not originally cover criminal law and will not automatically apply to justice issues despite the Lisbon Treaty having come into force. The 2008 *Framework decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters*, which, as its title suggests, does apply specifically apply to justice, is restricted to police and judicial data exchanged between authorities and systems in member states and at the EU level.

94. We have encountered two broad issues arising from the existing legislation. First, the directive is thought to be out of date; some witnesses considered that the entry into force of the Lisbon Treaty provided an opportunity for a review to bring the directive “into the 21<sup>st</sup>

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180 Q 103 [Mr Fauli]

181 Ev 93

182 Europa speech/10/16, *The challenges ahead for the European Union*, keynote speech at the Data protection day, 28 January 2010

183 Directive 95/46/EC

century”.<sup>184</sup> Secondly, EU data protection law for justice is deemed inadequate.<sup>185</sup> For example, while the European Data Protection Supervisor has welcomed the adoption of the framework decision, which must be implemented by member states by 27 November 2010, he saw it “only as a first step”. He has declared that “unfortunately, the level of data protection achieved in the final text is not fully satisfactory”, highlighting in particular that it does not apply to member state domestic data and explicitly excludes such exchanges as the transfer of passenger name records data to US authorities.<sup>186</sup>

95. The UK Information Commissioner, Christopher Graham, agreed that there is no comprehensive data protection law which covers justice issues, describing the approach to data protection in this area as “tinkering at the edges”, with specific provisions being introduced at the level of an organisation or for a specific database.<sup>187</sup> While he also sees the framework decision as an improvement he regarded it as an “ad hoc solution” and “complex, opaque and ineffective.”<sup>188</sup> He told us this contributes to “significant divergence in the standards of data protection in the area of justice and law enforcement across Europe, as well as a degree of confusion as to which standard applies” in any given instance.<sup>189</sup> The Information Commissioner is also concerned that where new legislation is introduced: “on too many occasions the proposed surveillance, information sharing or data collection led solution does not actually address an identified problem and have been introduced on the basis of ‘something must be done’”.<sup>190</sup>

96. There is no single authority for supervising data protection safeguards in this area. The nature of the supervision of compliance with data protection rules is dependent upon which pillar each EU law enforcement agency came under prior to the Lisbon Treaty. With the exception of Eurojust, those agencies that came within the third pillar, for example Europol<sup>191</sup> which handles criminal intelligence, have their own data protection authority on which the UK Information Commissioner is represented. In the case of Eurojust officers from data protection authorities across Europe are not directly involved; its supervisory structure consists of three representatives drawn from judicial nominations—which *could* include national data protection commissioners or their representatives—from each member state.<sup>192</sup> Agencies that came within the first pillar, for example Eurodac, a database of fingerprints of applicants for asylum and illegal immigrants, are supervised directly by the European Data Protection Supervisor.

97. The Ministry of Justice agreed that existing supervisory systems are piecemeal but suggested that this did not mean they were inadequate.<sup>193</sup> Mr Faull told us that he saw the

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184 Q 192 [Mr Graham], Qq211,217 [Mr Michael]

185 For example, see Ev 82 [Law Society]

186 European Data Protection Supervisor press release, *EDPS sees adoption of Data Protection Framework for police and judicial cooperation only as a first step*, 28 November 2008

187 Q 192 [Mr Graham]

188 *Ibid.*

189 Ev 66

190 *Ibid.*

191 Europol is supervised by Europol Joint Supervisory Body.

192 The UK is not currently one of the three.

193 Q 272 [Mr Denham]

Information Commissioner's Office, and national data protection offices in other member states, as a sufficient mechanism for the enforcement of European data protection initiatives.<sup>194</sup> He therefore believed that the EU has a "well-functioning" institutional system to protect citizens' personal data. This assumes that the existence of data protection initiatives and authorities for supervising data management alone results in a consistent and reliable system of adequate safeguards. Yet, Professor Juliet Lodge, Director of the Jean Monnet European Centre of Excellence, University of Leeds, told us that the effectiveness of data protection authorities varied greatly.<sup>195</sup> Clearly more needs to be done to embed higher and more consistent standards. The Information Commissioner's Office called for a merger of supervisory systems for data protection at European level.<sup>196</sup> The Government explained that it had clarified this position with the Information Commissioner and understood this to refer to the possibility of more coordinated supervision rather than the creation of a single system.<sup>197</sup>

98. Under the above arrangements, EU law enforcement agencies are not currently governed by the *Data protection act 1998* or data protection laws of other EU countries. An individual must therefore apply for access to information held about them to each of the European law enforcement agencies. It is therefore unclear to EU citizens where they should go to rectify problems with adherence to the rules established in the framework decision.<sup>198</sup>

### **A new strategic approach**

99. Data protection is an area of particular priority in the Stockholm programme which proposes the introduction of a strategy to protect data within the EU and an information management strategy. However, the Information Commissioner has expressed to us his deep-seated concerns, both in written and oral evidence, that the programme does not adequately address the shortcomings of existing legislation. In particular he believes that the Commission is misguided in its focus on ensuring the "best possible flow of data within European-wide networks" and proposes that policy in this area should be aiming for better law enforcement across Europe instead.<sup>199</sup>

100. The Information Commissioner argued that it would be better to revise the 1995 directive.<sup>200</sup> This received some support from our witnesses. For example, the editor of Privacy laws and business international newsletter, Mr James Michael, agreed that the entry into force of the Lisbon Treaty provided an opportunity to create a single set of data protection rules that applied to all EU activities.<sup>201</sup> We see that there is merit in this approach.

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194 Q 108

195 Q 220

196 Ev 66

197 Q 272 [Mr Denham]

198 Q 216 [Mr Michael]

199 Q 192 [Mr Graham]

200 Q 199

201 Qq 211, 217

101. As we noted above the Government has displayed considerable reluctance to renegotiate matters which have already been agreed, either under the first pillar (e.g. the directive) or the third pillar (e.g. the framework). The Government set out its support for, and perspectives on, the key elements of a European information and data protection strategy in its written evidence to us.<sup>202</sup> It claimed to have “led the way” in pressing the EU to evaluate existing information exchange agreements and to design an information exchange and data protection strategy to steer the direction of future proposals.<sup>203</sup> Its own evaluation of existing proposals, and the potential for a comprehensive EU data protection law, is that there are already extensive common data protection arrangements in place to protect individuals where member states share data.<sup>204</sup> Therefore, while the Ministry of Justice acknowledged that there may be a need to review the legislation which is currently in place, the Government would need convincing that there were substantial gaps and difficulties in the present provisions.<sup>205</sup> The Government again expressed a preference for practical measures to ensure a strong data protection regime, for example, using privacy impact assessments—which the Information Commissioner supported<sup>206</sup>—rather than “rush[ing] ahead” with a single data protection law and getting it wrong.<sup>207</sup> Responses to a recent European Commission consultation on the 1995 directive called for stronger and more consistent data protection legislation across the Union.<sup>208</sup>

**102. We urge the Ministry of Justice and the Information Commissioner to work towards a resolution of the current divergence in views on existing EU data protection legislation for the field of justice. We welcome the European Commission’s consultation on the 1995 Data protection directive. If the directive is revised, the opportunity should be taken bring all EU law enforcement agencies under the aegis of the European Data Protection Supervisor for data protection purposes.**

### ***The European e-justice programme***

103. The e-justice portal, a website that initially will function as a point of access to information on justice matters across the EU, and in each member state, is primarily for EU citizens, legal practitioners and businesses. It was expected to be launched in December 2009 but has been delayed. The first phase will include information on national and community law and procedures and will provide a link between insolvency, land and business registers in a number of member states. Further functions, for example access to criminal records and other information managed by member states in the administration of justice, are likely to be added in due course.<sup>209</sup>

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202 Ev 93

203 *Ibid.*

204 Q 42 [Ms Gibbons]

205 Q 271 [Mr Denham]

206 Ev 66

207 Qq 42, 44 [Ms Gibbons, Lord Bach]

208 Europa speech/10/16, *The challenges ahead for the European Union*, keynote speech at the Data protection day, 28 January 2010

209 See Justice and Home Affairs Council *Multi-annual European e-justice action plan 2009-2013*, 2009/C 75/01

104. The Government believes the e-justice portal potentially offers a means of both providing information and facilitating ways of accessing judicial systems.<sup>210</sup> On the other hand, it considers that EU e-justice projects must be cost effective, proportional and reduce duplication by ensuring that such projects take proper account of other IT work being undertaken in the justice field so that new measures and systems are compatible.<sup>211</sup>

105. The e-justice portal seeks to enhance fundamental rights, for example, by providing access to information and potentially enabling video-conferencing to be used to overcome practical problems, such as the lack of interpreters for all EU languages.<sup>212</sup> The Law Society raised a number of concerns about its capacity to do so, for example, in terms of the entitlement to be present at all hearings in person; the potential for watering down rights to interpretation and translation, e.g. through the use of e-translation; respecting the right to privacy; and the availability of information on means of redress; and the shortfalls of mechanical translation.<sup>213</sup>

106. More broadly, the extent to which data on individuals are now shared, in particular for law enforcement purposes, has been the subject of concern by many civil liberties organisations, some of which consider that data are not being retained or processed lawfully. Mr Faull said that this was a matter of public concern, particularly as data about citizens who may be innocent are being stored and retained for future use.<sup>214</sup> Mrs Mole pointed out that under Article 8 of the European Convention on Human Rights every incident of collection, retention or dissemination of private data about an individual must be justified.<sup>215</sup> Mr Russell raised concerns about the accuracy of data being held and the relative absence of remedies for individuals who encounter errors in the data held.<sup>216</sup> The European Data Protection Supervisor has called for access to complaints procedures.<sup>217</sup>

**107. The Government should make every effort to publicise the e-justice portal. This is particularly important for victims, who should be able to gain access via the police and Victim Support, and for suspects, who should be notified by the police.**

### ***The security of data transfer and privacy through technology***

108. The volume of EU decisions which require or facilitate greater movement of data about individuals suspected of offences is likely to continue to increase under the Stockholm programme and greater emphasis will be placed on the use of information and communication technologies, including automated data transfer. As more and more data is collected and shared electronically, the risks that data are either inaccurate or held insecurely increases as data protection safeguards are diminished. We explored the

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210 Ev 94

211 Ev 97

212 Justice and Home Affairs Council *Multi-annual European e-justice action plan 2009-2013*, 2009/C 75/01, para 24

213 Ev 82

214 Qq 103-104

215 Q 155

216 Q 153

217 European Data Protection Supervisor, *Opinion on the communication from the Commission to the European Parliament and the Council on an area of freedom, security and justice serving the citizen*, 2009/C 276/02

question of balance between privacy and security and how it can be achieved in practice with several of our witnesses. According to the Information Commissioner, the UK has been characterised as adopting an unnecessarily pragmatic approach to negotiations on data protection, with insufficient recognition of the need for privacy, but the Commissioner considered that it is “unhelpful to hide behind the need for privacy”.<sup>218</sup> Mr Stephen McCartney, Head of data protection promotion, Information Commissioner’s Office, explained that some member states approach data protection in a “codified manner” but in his experience these were philosophical, rather than practical, differences.<sup>219</sup>

109. Nevertheless, there are some genuine concerns that the balance between getting utility from technology while protecting privacy is not currently right. Professor Lodge directed an EU research programme on “balancing security and liberty”<sup>220</sup> and concluded from the research that “questions of automated data transfer raise serious issues about the technology itself, data management, and the impact of [information and communication technologies] on the way we are governed.”<sup>221</sup> On the basis of this research she has focused her concerns about the use of these technologies on the weakness inherent in the technologies themselves rather than the motivations of those using the data. She has described such technologies as “unacceptably vulnerable to hostile incursions” and has suggested that as a result, before any system to exchange information is set up, the design of the technology must start from the premise of “baking in security” as the primary goal.<sup>222</sup>

110. Professor Lodge and Mr Michael emphasised the relative merits of information technology in facilitating stronger safeguards for holding and transferring personal data. Mr Michael suggested that technological devices which encrypt data may be more effective in protecting the privacy of communications than data protection legislation.<sup>223</sup> Professor Lodge told us that while it is possible to “bake-in” high data protection standards to new systems, data protection safeguards can also be compromised by technology. For example, data degrades over time relative to upgrades in software and technology, and by the outsourcing of data management, a practice which she believed was increasing in the EU.<sup>224</sup> She explained that data protection standards can become unravelled as data are moved between law enforcement agencies: “the data mining, data slicing and regeneration of new data which then becomes the property of a third company, who knows where, is a huge danger and citizens do not realise how dangerous it potentially is.”<sup>225</sup>

111. Government has advocated “privacy by design” where “new proposals incorporate from the start the idea of data protection: what the data will be used for and why” as a key

218 Qq 193-194

219 Q 195

220 Professor Lodge was director of the University of Leeds’ contribution to the ‘Challenge’ research programme on balancing security and liberty, funded by the EU’s Sixth Framework programme and involving over 20 universities across Europe.

221 Professor Juliet Lodge *Inter-operability and Accountability in the EU*, University of Leeds, July 2007

222 *Ibid.* To establish a right to privacy as first principle and ensure that it is very difficult for data to be looked at by anyone else without prior consent.

223 Q 225

224 Q 207

225 Qq 209, 230

part of an information management strategy.<sup>226</sup> This accords with the views of both the European Data Protection Supervisor<sup>227</sup> and the European Commission.<sup>228</sup> However, Professor Lodge did not believe that security and privacy concerns were sufficiently high on the list of objectives for those who commission, or develop, systems to exchange information.<sup>229</sup>

**112. While we support the need for clear statements of purpose on data protection, what happens in practice is more important. Technology undoubtedly offers tremendous opportunities for both transferring data quickly and building in safeguards for privacy. Nevertheless data protection standards can be compromised by technology as well as by regulation. Although the Government advocates “privacy by design”, we were surprised to learn that utility is given far greater weight than the incorporation of fundamental security measures in the development of some EU information management systems. We urge the Government to be more conscious of this in its discussions regarding developments in e-justice.**

### *The proliferation of data sharing*

113. Professor Lodge has argued that while it is laudable to establish principles for data protection, they are hard to police, to control and to make accountable:

the proliferation of fuzzy public-private cooperation and arrangements also means that audit trails and management codes on data handling, access, verification, authentication, storage and transmission open the door to greater insecurity as well as inadequate controls to ensure the accountability at a public political level for what happens to data that citizens provide.<sup>230</sup>

Her research questioned the plausibility of claims made regarding the robustness of such systems against fraud by their developers and raised doubts about the way in which politicians extol the virtues of technological applications to the public: “MPs and MEPs must be the custodians and guardians of liberty, accountability, responsibility, trust and security” in relation to automated information exchange.<sup>231</sup>

114. There is also the potential for data to be used for purposes other than those for which they were originally collected. For example, in the home affairs field, the European Union Committee drew attention to this problem in its comments on a proposal for widening access to a central database of fingerprints of asylum seekers and illegal immigrants

226 Q 42 [Ms Gibbons]

227 Opinion of the European Data Protection Supervisor, *Opinion on the communication from the Commission to the European Parliament and the Council on an area of freedom, security and justice serving the citizen*, 2009/C 276/02

228 See Europa speech/10/16, *The challenges ahead for the European Union keynote speech at the Data protection day*, 28 January 2010

229 Q 224

230 Professor Juliet Lodge, *Inter-operability and Accountability in the EU*, University of Leeds, July 2007

231 *Ibid.*

(Eurodac). The Committee questioned whether it was justifiable to use a database for purposes other than for those which it was originally intended.<sup>232</sup>

115. The Ministry of Justice believes that there is scope for loosening limitations on the UK's ability to use information obtained in relation to EU nationals for any purpose other than the criminal proceedings for which they have been requested, for example, to enable the sharing of criminal records information to protect children and vulnerable adults through employment vetting and barring.<sup>233</sup> The NSPCC raised specific concerns about the lack of provision to ensure that information on convicted child sex offenders could be exchanged between member states and called for the *Framework decision on sexual abuse, sexual exploitation of children and child abuse images* to be revised to include provisions which could contribute to resolving this problem.<sup>234</sup> Despite its importance, the requirement for unanimity prevented the adoption of an earlier *Framework decision on the recognition of prohibitions arising from convictions for sex offences against children*.<sup>235</sup>

### *The European Criminal Records Information System*

116. Professor Lodge raised concerns about how data are categorised in centralised data systems.<sup>236</sup> The European Criminal Records Information System (ECRIS), established in April 2009, enables member states to access information from the criminal records database of each individual state. In structuring the system this way, rather than creating a new centralised EU database, it was envisaged that the storage and exchange of personal data would be kept to a minimum. Each country is responsible for, and controls, its own databases and the way they interconnect with those in other member states. The safe functioning of the system requires data protection laws in each state to accord with EU standards and the efficient functioning of each national data protection authority.

**117. We are concerned that people caught up in EU criminal justice processes often do not know when information about them is being used or stored, or how it will be shared. We support the Commission's calls for a public awareness campaign to ensure that EU citizens are more fully aware of what happens to the data they provide and where it goes to. The Government must also have a role in this; for example, by being clear to the public about the kind of data protection safeguards it is seeking from the EU with respect to the privacy of UK citizens. The performance of the EU in this regard should be subject to the closest scrutiny by national parliaments in conjunction with the European Parliament and national and European data protection authorities.**

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232 House of Lords European Union Committee, Fortieth Report of Session 2005–06, *Behind Closed Doors: the meeting of the G6 Interior Ministers at Heiligendamm*, HL Paper 221, para 25

233 Ev 91

234 Ev 109

235 HL Paper (Session 2007–08) 62-I, para 6.17

236 Q 207

## 5 Cost and benefits for UK citizens

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### The potential proliferation of costs

118. Many commentators consider it likely that there will be a proliferation in the volume of legislation passed in the area of criminal justice following the entry into force of the Lisbon Treaty.<sup>237</sup> We asked the Government about the extent to which costs will be a factor influencing the capacity of the member states to implement measures to place citizens “at the heart of the EU”; particularly when economic circumstances have reduced public expenditure across Europe. Lord Bach acknowledged the importance of this issue. On the “road map” measures, he suggested that the UK is “highly unlikely to incur any costs let alone significant costs”—following the implementation of the Stockholm programme—because the UK legal system already fulfils, and in some cases exceeds, its European Convention on Human Rights obligations (for example through legal aid provision and the notification of rights to suspects and defendants).<sup>238</sup> However, the costs of free-of-charge interpretation and translation of an appropriate quality in pre-trial proceedings may be a new cost falling on the public purse. The Government has not provided an estimate of the costs of the first draft of the directive, but we understand that, in the UK, a range of video-conferencing facilities are already in place which could be used to facilitate cross-border interpretation.<sup>239</sup>

**119. The Government does not seem clear about how it will control costs if the UK opts in to “road map” measures that create obligations on the Government to provide costly services implementing new rights and protections. As more information is made available to EU citizens, so they will be more aware of their rights when they are suspected of committing an offence.**

120. Our witnesses suggested that there were many measures in the Stockholm programme, and the Lisbon Treaty, that had cost implications. The Government is clear that its participation in specific projects at EU level depends on the costs of participation and the likely savings, or added value, that would be achieved.<sup>240</sup> The Ministry of Justice acknowledged that, while the costs involved in European projects can sometimes be significant, these may be off-set to some extent by the savings; although the complexity of the measures in question makes it difficult to determine cost-benefit implications with any certainty.<sup>241</sup>

121. The Government stated that it was unable to cost the entire Stockholm programme but explained that cost-benefit analysis will be conducted measure-by-measure as they are proposed.<sup>242</sup> We were assured by officials that financial costs are factored in to Government decisions on participation, and that such considerations form part of the scrutiny

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237 HL Paper (Session 2007–08) 62-I, para 6.27

238 Q 247 [Lord Bach]

239 Q 247 [Lord Bach], Ev 105-106

240 Ev 105

241 Q 258 [Ms Gibbons]

242 Q 250 [Mr Kilby]

undertaken by the European Scrutiny Committees of both Houses.<sup>243</sup> However, when we asked for illustrations of the potential financial impact of various mutual recognition instruments and other mechanisms which were due for implementation (for example, the European supervision order and the e-justice portal) as well as those that have been in operation for some time (including the European arrest warrant) the Department was not able to provide them.<sup>244</sup>

122. It appears to be particularly difficult to ascertain the cost implications of transferring elements of the administration of justice to other member states, to inform impact assessments prior to the introduction of measures that rely on mutual recognition. For example, the *Framework decision on the mutual recognition of financial penalties* allows fines, compensation and court costs imposed in criminal proceedings in one member state to be transferred and enforced in another. Thus, fines may be collected in the UK based on judgments against UK nationals—who subsequently return to the UK—by courts in other member states.<sup>245</sup> Yet, no information is collected about financial penalties imposed by other member states and thus the Government is unable to estimate the revenue foregone as a result of delays in implementation, nor to monitor the success of the measure in terms of percentage of fines collected.<sup>246</sup> It is equally difficult to make such assessments after implementation.<sup>247</sup>

123. E-justice (use of technology in innovative ways with the justice field) is one of the areas where implementation often requires considerable financial input, although the application of technology to justice systems can potentially result in savings in Court costs and legal aid by speeding up the processes involved. For example, the European Commission has accumulated emerging evidence of savings made in Norway<sup>248</sup> and Austria, in piloting e-justice tools. Norway has estimated it saves 785 Euros in travel time each time a video-conference takes place and Austria calculated overall savings of 80,000 Euros per year during the early stages of implementation of video-conferencing facilities. Mr Faull described the initial investment in the e-Portal of two million Euros as a “modest start”.<sup>249</sup> The Justice secretary has commented on the costs of e-justice:

There is no compulsion for member states to be involved in individual European e-justice projects and the decision about whether or not we will fund participation in particular projects will be made by the appropriate budget holding department on a case by case.<sup>250</sup>

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243 Q 255 [Ms Gibbons]

244 Ev 103-104

245 Qq 18-20

246 See also Ev 104 on the potential impact of the Prisoner transfer agreement on the number of EU nationals detained in British prisons

247 Q 20 [Ms Gibbons]

248 While Norway is not a member of the EU it is a member of the European Economic Area, Schengen and the European Judicial Network

249 Q 91

250 HC Deb, 24 March 2009, col 304 [Commons written answer]

**We agree with the Government’s proposal that comprehensive analysis of current EU funding streams should be undertaken, to ensure that they are used effectively to support the e-justice strategy.**

124. There may also be budgetary implications arising from the growth in the remit of the Court of Justice.<sup>251</sup> For example, the capacity of the European Court of Human Rights at Strasbourg is limited: it currently has around 108,000 cases in front of it. The average time taken from lodging to hearing on this basis is 6 years. In the event 95% of cases are not continued.<sup>252</sup> However, once the EU Charter of Fundamental Rights enters into force there is the potential for EU citizens to receive much faster and more effective justice if human rights cases are taken to the Court of Justice—which has recently introduced a system of speedy referrals—in relation to obligations under the Charter.<sup>253</sup>

**125. We accept that costing the entire Stockholm programme is very difficult, but we are surprised that the Government has been unable to give us at least an indication of the cost implications of key measures contained within it.**

**126. We believe that, while the cost of these e-justice technologies may inhibit speedy progress, the Commission should seek to consolidate funding for e-justice projects in order to ensure that the best can be made of innovative technology in the interests of all member states and their citizens.**

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251 HL Paper (Session 2007–08) 62-I, paras 6.90-6.95

252 Q 134 [Ms Blackstock]

253 Qq 134, 141 [Ms Blackstock, Mrs Mole]

# Conclusions and recommendations

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## The Committee's inquiry

1. We are beginning to see progress in the development of a more comprehensive system of cooperation in the administration of justice between member states, although the Hague programme undoubtedly underachieved its declared objectives. While we consider the Stockholm programme to be less ambitious, and more realistic than its predecessors, which we welcome, the complexity of arrangements under the Lisbon Treaty potentially gives rise to new challenges for the programme's implementation. (Paragraph 12)
2. We welcome the Government's approach in favouring evidence-based practical measures and adopting a "look before you legislate" perspective and we are encouraged that this perspective has been reflected in the Stockholm programme. We hope that it will be possible for Government and the Commission to continue to pursue these ideals now that there is no longer a requirement for unanimity and that groups of member states are able to introduce their own initiatives. (Paragraph 29)
3. Some of the practical consequences of the Lisbon Treaty and the opt-in arrangements that the UK has negotiated remain matters of contention. (Paragraph 34)
4. While the UK Government may wish to see greater emphasis on joint action and best practice rather than legislation, the proposals in the Stockholm programme and the Lisbon Treaty together give rise to the potential for a significant body of new law. (Paragraph 38)

## The opt-in protocol and revisions to existing mutual recognition instruments

5. We would welcome clarification from the Ministry of Justice on the action it is taking to deal with the predicted 250% rise in arrests pursuant to European arrest warrants in terms of the implications for the Crown Prosecution Service, Her Majesty's Courts Service and the National Offender Management Service and how it plans to meet the costs to the Department as a whole. (Paragraph 46)
6. It is unfortunate that the successful use of the European arrest warrant, and the reduced time taken to process intra-EU extraditions, has been overshadowed by perceived injustices in individual cases. We welcome the conclusions of the evaluation of the warrant, adopted by the Council in June 2009, and the subsequent progress that has been made. However, we believe that the time it takes to review and reform such instruments undermines the mutual trust approach. Legislation should be used only as a last resort to resolving the issues over proportionality and we hope that the current approach bears fruit before the predicted growth in demand for European arrest warrants takes place. (Paragraph 50)

7. We are encouraged that neither the Minister, nor any of our witnesses, were able to provide a convincing example of a situation in which an existing measure would be rendered inoperable as a result of the UK's decision not to participate. Nevertheless, we are concerned that the term "inoperable" is not defined in the protocol and that guidance is not available on its interpretation. (Paragraph 54)
8. While the Government may wish the EU to adopt a "look before you legislate" approach, the ability of member states to present their own initiatives may pre-empt more considered approaches by the European Commission. We agree with the Government that, if the European evidence warrant is revised or replaced, lessons should be learned from the operation of the European arrest warrant by incorporating safeguards into the legislation to minimise the potential for disproportionate use. (Paragraph 60)
9. We are encouraged by progress made in implementing the "road map" thus far, notwithstanding the delays caused by the introduction of the Lisbon Treaty. Some countries have given a strong signal that this is a priority by introducing the directive on interpretation and translation as a member state initiative. We consider it wise to begin with the easiest elements and to approach these with a renewed sense of optimism, but it is also important not to be complacent about the potential for setbacks. Very practical difficulties related to language may be more easily resolved with equally pragmatic solutions but other issues will undoubtedly be more complex to resolve. We fear that the current pace of progress may not be sustained and therefore have concerns about the implications of the continued imbalances in the system for UK citizens. As the number of European arrest warrants is predicted to rise, there is a real risk that many more citizens will experience the dire consequences of the lack of adequate safeguards afforded to them when they find themselves caught up in cross-European judicial processes. (Paragraph 72)
10. Monitoring of compliance with existing procedural rights will be all the more necessary if the "road map" measures take a long time to agree. (Paragraph 75)
11. The Commission should develop best practice guidance to accompany each of the proposals created under the "road map". In the first instance such guidance should be produced to complement the forthcoming directive on interpretation and translation in criminal proceedings, drawing on existing good practice in other member states, for example, the guidance note and checklist devised by the Magistrates' Association. (Paragraph 83)
12. We welcome the proposed consolidation of instruments to promote the rights of victims of crime. The existence of compensation schemes could be promoted relatively easily through the forthcoming e-justice portal—which will function as a point of access to information on justice matters across the EU—with appropriate signposting from domestic agencies that come into contact with victims from other member states. We seek clarification from the Government as to when it intends fully to transpose the outstanding articles of the framework decision on the rights of victims in criminal proceedings. (Paragraph 90)

## Safeguarding fundamental rights

13. We urge the Ministry of Justice and the Information Commissioner to work towards a resolution of the current divergence in views on existing EU data protection legislation for the field of justice. We welcome the European Commission's consultation on the 1995 Data protection directive. If the directive is revised, the opportunity should be taken bring all EU law enforcement agencies under the aegis of the European Data Protection Supervisor for data protection purposes. (Paragraph 102)
14. The Government should make every effort to publicise the e-justice portal. This is particularly important for victims, who should be able to gain access via the police and Victim Support, and for suspects, who should be notified by the police. (Paragraph 107)
15. While we support the need for clear statements of purpose on data protection, what happens in practice is more important. Technology undoubtedly offers tremendous opportunities for both transferring data quickly and building in safeguards for privacy. Nevertheless data protection standards can be compromised by technology as well as by regulation. Although the Government advocates "privacy by design", we were surprised to learn that utility is given far greater weight than the incorporation of fundamental security measures in the development of some EU information management systems. We urge the Government to be more conscious of this in its discussions regarding developments in e-justice. (Paragraph 112)
16. We are concerned that people caught up in EU criminal justice processes often do not know when information about them is being used or stored, or how it will be shared. We support the Commission's calls for a public awareness campaign to ensure that EU citizens are more fully aware of what happens to the data they provide and where it goes to. The Government must also have a role in this; for example, by being clear to the public about the kind of data protection safeguards it is seeking from the EU with respect to the privacy of UK citizens. The performance of the EU in this regard should be subject to the closest scrutiny by national parliaments in conjunction with the European Parliament and national and European data protection authorities. (Paragraph 117)

## Cost and benefits for UK citizens

17. The Government does not seem clear about how it will control costs if the UK opts in to "road map" measures that create obligations on the Government to provide costly services implementing new rights and protections. As more information is made available to EU citizens, so they will be more aware of their rights when they are suspected of committing an offence. (Paragraph 119)
18. We agree with the Government's proposal that comprehensive analysis of current EU funding streams should be undertaken, to ensure that they are used effectively to support the e-justice strategy. (Paragraph 123)

19. We accept that costing the entire Stockholm programme is very difficult, but we are surprised that the Government has been unable to give us at least an indication of the cost implications of key measures contained within it. (Paragraph 125)
20. We believe that, while the cost of these e-justice technologies may inhibit speedy progress, the Commission should seek to consolidate funding for e-justice projects in order to ensure that the best can be made of innovative technology in the interests of all member states and their citizens. (Paragraph 126)

# Formal Minutes

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**Tuesday 23 March 2010**

Members present:

Rt Hon Sir Alan Beith, in the Chair

Mr David Heath

Rt Hon Alun Michael

Jessica Morden

Mr Andrew Turner

Dr Alan Whitehead

Draft Report *Justice Issues in Europe*, proposed by the Chair, brought up and read.

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

Paragraphs 1 to 126 read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the Seventh Report of the Committee to the House.

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

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

Written evidence was ordered to be reported to the House for printing with the Report together with written evidence reported and ordered to be published on 8 December and 19 January.

[The Committee adjourned

## Witnesses

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### Tuesday 3 November 2009

Page

**Lord Bach**, a Member of the House of Lords, Parliamentary Under-Secretary of State and **Edwin Kilby**, Head of European Policy, Ministry of Justice, and **Emma Gibbons**, Head of EU Section, Home Office

Ev 1

### Tuesday 10 November 2009

**Professor Steve Peers**, University of Essex

Ev 10

### Monday 7 December 2009

**Jonathan Faull**, Director-General and **Claudia Hahn**, Assistant to Director-General, European Commission Directorate-General for Justice, Freedom and Security

Ev 18

### Tuesday 8 December 2009

**Jodie Blackstock**, Senior Legal Officer (EU), JUSTICE, **Jago Russell**, Chief Executive, Fair Trials International, and **Nuala Mole**, Director, AIRE Centre

Ev 25

### Tuesday 5 January 2010

**Mike Kennedy CBE**, Chief Operating Officer, CPS and former President of Eurojust

Ev 34

### Tuesday 19 January 2010

**Professor Juliet Lodge**, Director of the Jean Monnet European Centre of Excellence, University of Leeds, and **James Michael**, Editor, Privacy Laws and Business International Newsletter

Ev 42

### Tuesday 2 March 2010

**Lord Bach**, a Member of the House of Lords, Parliamentary Under-Secretary of State, **Daniel Denman**, Assistant Director, Information and Human Rights Team, Legal Directorate and **Edwin Kilby**, Head of European Policy, Ministry of Justice, and **Emma Gibbons**, Head of EU Section, Home Office

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## List of written evidence

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1	Crown Prosecution Service	Ev 54
2	European Commission	Ev 58
3	Fair Trials International	Ev 59
4	Information Commissioner's Office	Ev 65
5	Judiciary of England and Wales	Ev 67
6	JUSTICE	Ev 70, 73, 75
7	Law Society of England and Wales	Ev 78
8	Magistrates Association Judicial Policy and Practice Committee	Ev 86
9	Ministry of Justice	Ev 88, 102, 106
10	Professor Valsamis Mitsilegas	Ev 107
11	NSPCC	Ev 109, 111
12	Victim Support	Ev 112

## Reports from the Justice Committee since Session 2008–09

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

### Session 2009–10

First Report	Cutting crime: the case for justice reinvestment	HC 94 ( <i>Cm 7819</i> )
Second Report	Work of the Committee in 2008-09	HC 233 ( <i>n/a</i> )
Third Report	Appointment of HM CPS Chief Inspector	HC 244
Fourth Report	Appointment of HM Chief Inspector of Prisons	HC 354
Fifth Report	Constitutional processes following a general election	HC 396
Sixth Report	Draft Civil Law Reform Bill: pre-legislative scrutiny	HC 300
Eight Report	Crown Dependencies	HC 56

### Session 2008–09

First Report	Crown Dependencies: evidence taken	HC 67 ( <i>HC 323</i> )
Second Report	Coroners and Justice Bill	HC 185 ( <i>HC 322</i> )
Third Report	The work of the Information Commissioner: appointment of a new Commissioner	HC 146 ( <i>HC 424</i> )
Fourth Report	Work of the Committee in 2007–08	HC 321 ( <i>n/a</i> )
Fifth Report	Devolution: a decade on	HC 529 ( <i>Cm 7687</i> )
Sixth Report	Sentencing guidelines and Parliament: building a bridge	HC 715 ( <i>Cm 7716</i> )
Seventh Report	Constitutional reform and renewal: Parliamentary Standards Bill	HC 791 ( <i>HC 1017</i> )
Eight Report	Family legal aid reform	HC 714 ( <i>HC 1018, and HC 161, Session 2009–10</i> )
Ninth Report	The Crown Prosecution Service: gatekeeper of the criminal justice system	HC 186 ( <i>HC 244, Session 2009–10</i> )
Tenth Report	Draft sentencing guideline: overarching principles—sentencing youths	HC 497 ( <i>n/a</i> )
Eleventh Report	Constitutional reform and renewal	HC 923 ( <i>HC 1017</i> )
Twelfth Report	Role of the prison officer	HC 361 ( <i>Cm 7783</i> )