



House of Commons  
Home Affairs Committee

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# Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision

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**Ninth Report of Session 2013–14**

*Report, together with formal minutes, oral and  
written evidence*

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## Home Affairs Committee

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

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### Committee staff

The current staff of the Committee are Tom Healey (Clerk), Robert Cope (Second Clerk), Eleanor Scarnell (Committee Specialist), Andy Boyd (Senior Committee Assistant), Iwona Hankin (Committee Support Officer) and Alex Paterson (Select Committee Media Officer).

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# 1 Introduction

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1. European integration in the area of justice and home affairs policy has been a core part of the debate on the UK's relationship with the European Union (EU) in recent years. As one witness noted, "it is in these powers that lies the essence of sovereignty".<sup>1</sup> The entry into force of the Lisbon Treaty in 2009 fundamentally changed the EU's power to adopt police and criminal justice (PCJ) measures. Prior to 2009 all Member States had a right of veto over any PCJ proposal, the European Parliament was only consulted, the Commission did not have infringement powers to use against Member States for non-implementation or failure to implement correctly, and the European Court of Justice (ECJ) had no jurisdiction over the interpretation and application of such measures. Now, under the terms of the Lisbon Treaty, the European Parliament has co-decision powers in most cases and Member States' right of veto has been replaced by qualified majority voting in the Council of the European Union (the Council) in most cases. Furthermore, the implementation of new PCJ measures now falls under the jurisdiction of the ECJ, and the Commission has the right to bring infringement proceedings against Member States.

2. The UK and Irish governments negotiated in the Lisbon Treaty the right to opt-in to new PCJ measures on a case-by-case basis, either at the point at which a measure has been proposed, or after it has been adopted. For PCJ measures adopted before the Treaty came into force, Member States were allowed a transition period until 1 December 2014 before they became subject to the ECJ's jurisdiction and the Commission's infringement powers. In addition, the UK Government negotiated the right to opt out of the 130 pre-Lisbon measures to which it was party, and then negotiate to rejoin those it wished to retain. The former Home Secretary, Charles Clarke, told us that the Government negotiated the opt-out as a pragmatic response to the need to gain parliamentary ratification of the Treaty, leaving open the opportunity to return to the issue in the future.<sup>2</sup> Others have argued that it helped the Government to demonstrate that the Lisbon Treaty was substantively different to the failed constitutional treaty that preceded it.<sup>3</sup> Whatever its origins, it is believed that the requirement that the opt-out could only be exercised for all 130 measures *en masse* was insisted on by other Member States to discourage the UK from using it lightly, and to prevent ongoing disruption from the UK opting out of measures on an *ad hoc* basis at different times.

3. The UK had until 31 May 2014 to inform the Council whether it wished to exercise its opt-out. On 15 October 2012, two weeks after the Prime Minister had announced the Government's intention to exercise the opt-out at a press conference in Rio de Janeiro, the Home Secretary told the House the Government's "current thinking" was that it would do so.<sup>4</sup> She also invited parliamentary scrutiny by the relevant select committees of both Houses, including this Committee. We took the view that scrutiny of an opt-out decision

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1 Torquil Dick-Erikson, Written evidence to the House of Lords European Union Committee inquiry into the 2014 JHA opt-in decision

2 Q 250 (Charles Clarke)

3 The unratified Treaty Establishing a Constitution for Europe, European Communities No. 8 (2004) (Cm 6429). See, for example, HC Deb, 15 July 2013, column 824, 2014 JHA Opt-Out Decision.

4 Oral Statement by the Home Secretary, HC Deb, 15 October 2012, column 34, European Justice and Home Affairs Powers

could only take place if it was informed by the Government's proposals for the list of measures it wished to opt back into. We were, therefore, surprised when on 9 July 2013 the Government published a list of 35 measures it wished to negotiate to rejoin (the 'opt-in' measures) with accompanying explanatory memoranda, and announced its intention to hold a vote the following week on the opt-out decision.<sup>5</sup>

4. Following discussions between the Government and the Chairs of the relevant select committees, the terms of the Motion to be debated on 15 July 2013 were revised, and after two divisions the House resolved:

That this House believes that the UK should opt out of all EU police and criminal justice measures adopted before December 2009 and seek to rejoin measures where it is in the national interest to do so and invites the European Scrutiny Committee, the Home Affairs Select Committee and the Justice Select Committee to submit relevant reports before the end of October, before the Government opens formal discussions with the Commission, Council and other Member States, prior to the Government's formal application to rejoin measures in accordance with Article 10(5) of Protocol 36 to the TFEU.

The House of Lords passed a similar resolution on 23 July 2013, inviting scrutiny by its European Union Select Committee on the proposed opt-in package. Accordingly, on 24 July the Prime Minister notified the Presidency of the Council that the UK wished to exercise its opt-out. The Government's intention was to hold informal discussions with the Commission and Member States while the select committees conducted their inquiries, with the expectation of a further vote on the opt-in package itself.<sup>6</sup> Although Parliament has voted to exercise the opt-out, it is not clear what the consequences would be if the opt-in could not be agreed.

5. The Home Office is responsible for 26 of the 35 proposed opt-in measures, and 73 of the 95 opt-out measures. The rest are mainly the responsibility of the Ministry of Justice, though a few fall within the remit of other departments.<sup>7</sup> In the limited time available to the Committee we have chosen to focus our work primarily on the Home Office opt-in measures, and in particular the European Arrest Warrant (EAW). We have also considered measures that are not on the list where we have received evidence on them.

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

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5 Oral Statement by the Home Secretary, HC Deb, 9 July 2013, column 177, Treaty on the Functioning of the EU

6 Home Secretary, HC Deb, 15 July 2013, column 775-6, 2014 JHA Opt-Out Decision

7 HM Revenue and Customs, HM Treasury, the Department for Transport, and the Foreign and Commonwealth Office

## 2 The European Arrest Warrant

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7. The Council Framework Decision for the European Arrest Warrant (EAW) has been in place for over 11 years. Its purpose was to speed up the extradition process between Member States, which had previously been governed by the Council of Europe's 1957 European Convention on Extradition. The EAW replaced the traditional extradition procedures set out in the Convention with a system of surrender based on the principle of mutual recognition and trust in the judicial authorities of Member States, reducing the potential for political involvement in the process.<sup>8</sup> The EAW is arguably the most controversial of the measures proposed in the Government's opt-in package. In this Chapter we consider the case for and against opting back into the Framework Decision, and examine the Government's proposed reforms to the EAW.

### The case for the European Arrest Warrant

8. A key part of the rationale for the EAW was that the free movement of people within the EU required effective extradition arrangements to prevent criminals from evading justice. Various witnesses told us that the EAW had succeeded in increasing the speed and reducing the administrative cost of extraditing EU citizens. The Government's Command Paper states that an extradition under the EAW now takes on average three months, whereas it requires approximately 10 months on average for a non-EU jurisdiction.<sup>9</sup> The Home Secretary and the Director of Public Prosecutions highlighted the example of one of the failed 21 July bombers, Hussain Osman, who was extradited from Italy in less than eight weeks, and was subsequently tried and convicted.<sup>10</sup> The Association of Chief Police Officers (ACPO) cited the case of Jason McKay, who was convicted last year for the manslaughter of his girlfriend, Michelle Creed.<sup>11</sup> He initially went on the run to Poland before handing himself in at Warsaw police station. He was extradited back to the UK and put before a court within four weeks of leaving the country. Earlier this year, one of the UK's most wanted men, Mark Lilley, was arrested and extradited from Spain. He was the 51st fugitive arrested as part of the National Crime Agency's Operation Captura, targeting UK suspects believed to be hiding in Spain, a country which before the advent of the EAW had become a renowned safe haven for British criminals.<sup>12</sup> These examples contrast starkly with the extradition under the previous arrangements of Algerian Rachid Ramda highlighted by former Home Secretary, Charles Clarke.<sup>13</sup> Based in the UK and wanted by the French authorities for his role in the 1995 Paris Metro bombing, his return took 10 years to agree.

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8 HM Government, *Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*, July 2013, Cm 8671, page 94

9 *Ibid.*

10 HC Deb, 15 July 2013, column 779, 2014 JHA Opt-Out Decision; Q 340 (Director of Public Prosecutions)

11 Q 40 (Association of Chief Police Officers)

12 Dr Julian Huppert MP, HC Deb, 15 July 2013, column 809, 2014 JHA Opt-Out Decision; Ev 59 (Justice Across Borders) para 9

13 Q 268 (Charles Clarke)

9. In the opt-out debate on 15 July 2013, the Home Secretary told the House that in the last four years the EAW had been used to extradite from the UK 57 suspects for child sex offences, 86 for rape and 105 for murder. In the same period, 63 suspected child sex offenders, 27 suspected rapists and 44 suspected murderers were extradited back to the UK to face charges.<sup>14</sup> She argued that a number of these suspects would probably never have been extradited without the EAW and in cases where they were extradited, the process would almost certainly have taken longer than under the previous arrangements. This reduction in the length of the extradition process arising from the EAW not only benefits victims by ensuring rapid justice, it also works in favour of those people who consent to their extradition who might otherwise have spent many months in pre-trial detention before being extradited,<sup>15</sup> although it is not clear why other extradition processes could not be curtailed by consent.

10. ACPO told us that the UK also benefits from the EAW because it is an attractive destination for criminals.<sup>16</sup> In London, 28 per cent of people arrested are foreign nationals of which half are from the EU. The vast majority of UK surrenders to other EU countries under the EAW are non-UK citizens—95 per cent of over 4,000 extraditions in the four years to April 2013. In other words, most outward EAWs concern other Member States seeking their own citizens for crimes committed back home. This is not quite the case for extraditions to the UK, where just over half of the 507 people surrendered were British nationals.

11. Furthermore, in recent years there has been a marked increase in the internationalisation of crime, facilitated by changes in technology and EU expansion. For example, Europol has highlighted a “travelling criminal gang phenomenon” whereby groups based in Eastern Europe, particularly Romania and Bulgaria, use low-cost airlines to travel abroad to commit offences, returning before they can be caught.<sup>17</sup> The EAW could play an important role in tackling this new form of crime.

12. Overall, a number of our witnesses supported the UK's continued participation in the EAW.<sup>18</sup> ACPO described it as “an essential weapon”, whilst Europol told us it is “a modern, swift, cheap way of dealing with a serious criminal problem in the UK” and “it has transformed the nature of international police co-operation”.<sup>19</sup>

## The case against the European Arrest Warrant

13. Although the EAW system has streamlined the extradition process, it has a number of flaws, and its benefits have come at a heavy price for people who have experienced severe injustice as a result of the current arrangements. We heard moving evidence from two such individuals. Andrew Symeou was extradited to Greece in July 2009 to face charges in

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14 HC Deb, 15 July 2013, column 779, 2014 JHA Opt-Out Decision

15 Q 170 (Professor Steve Peers, University of Essex)

16 Q 1 (Association of Chief Police Officers)

17 The Times, *Romanians use cheap flights for crime spree*, 4 October 2013, page 1

18 Qq 170 (Professor Steve Peers, University of Essex), 180 (Justice); Ev 57 (Helen Malcolm QC) para 3, Ev 63 (Law Societies of England and Wales and of Scotland) para 8

19 Qq 15 (Association of Chief Police Officers) and 77 and 78 (Europol)

connection with the death of a young man at a nightclub on a Greek island. He was extradited despite evidence that the charges were based on statements extracted by the Greek police through violent intimidation of witnesses who subsequently retracted their statements.<sup>20</sup> He spent 11 months in a Greek jail in appalling conditions before being released on bail. Even then he was prevented from leaving the country until he was cleared by the Greek court in June 2011. He told the Committee: “You cannot imagine what it has done to me and what it has done to my family. It has changed our lives and it is unacceptable”.<sup>21</sup>

14. Garry Mann is a former fireman who was arrested in Portugal during the Euro 2004 football tournament when a riot broke out in a nearby street. Using a temporary fast-track procedure established ahead of Euro 2004 to tackle football hooliganism, he was arrested, tried and convicted in less than 24 hours. He told us how he had been unable to instruct a lawyer, and could not understand or participate in the proceedings due to the poor quality of the translation provided by a woman who subsequently turned out to be a local hairdresser who knew the wife of the judge.<sup>22</sup> The Portuguese authorities told Mr Mann his sentence would not be carried out provided he accepted voluntary deportation, which he did, returning to the UK shortly afterwards. However, in 2009 he was arrested under a EAW and returned to Portugal to serve a two-year sentence. A failure by his lawyers to lodge an appeal in time meant the judge was powerless to prevent his extradition.<sup>23</sup> He spent a year in a Portuguese prison before returning to the UK under a prisoner transfer agreement, where he served another three months in Wandsworth Prison.

15. The experiences of Andrew Symeou and Garry Mann are not unique—a number of British citizens have suffered similar injustices. As the Home Secretary said in the debate on 15 July, “when extradition arrangements are wrong, they can have a detrimental effect on our civil liberties”.<sup>24</sup> The core of the problem is that the EAW is a mutual co-operation instrument that is based on the principle of mutual recognition. This means that if one Member State makes a decision to extradite an individual to face a trial or serve a sentence, that decision must be respected and applied throughout the EU. Difficulties arise, however, because the justice systems of Member States vary significantly in their practice. One aspect of this is the use of EAWs by some countries at an earlier stage than that at which the UK would apply for one. Whereas the UK will not issue a warrant until it is ‘prosecution-ready’, some Member States will seek an EAW for questioning to aid a decision on whether to charge, or long before the relevant court is ready to try the individual concerned.<sup>25</sup> This was the case with Andrew Symeou. Furthermore, once charged, non-nationals are often at a disadvantage in obtaining bail because they are seen as a greater flight risk. Andrew Symeou summed it up: “I was extradited because we are European but I was put in prison because I am British”.<sup>26</sup> These factors can result in prolonged periods of pre-trial detention.

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20 Q 114 (Andrew Symeou)

21 Q 133 (Andrew Symeou)

22 Q 106 (Garry Mann)

23 Q 111 (Garry Mann)

24 HC Deb, 15 July 2013, column 778, 2014 JHA Opt-Out Decision

25 Qq 18 (Association of Chief Police Officers) 339 (Director of Public Prosecutions)

26 Q 128 (Andrew Symeou)



This is particularly concerning given some EU countries have no legal maximum length for such detention.

16. Another way in which justice systems vary is in the proportionality tests applied in different Member States when considering whether to prosecute. Whereas in the UK prosecutors can exercise discretion in determining whether to apply for an EAW, the authorities in Poland, for example, have no such prosecutorial discretion.<sup>27</sup> Furthermore, in Poland sentencing guidelines are such that it is relatively easy to receive a custodial sentence of four months—the minimum threshold at which an EAW may be requested.<sup>28</sup> This means that a large number of warrants are issued for relatively minor offences. Examples have included extraditions to Poland in connection with exceeding a credit card limit, piglet rustling, and the theft of a wheelbarrow, some wardrobe doors, a small teddy bear, and a pudding.<sup>29</sup>

17. Tables 1 and 2 below show the number of warrants issued and received by Member States and the resulting number of surrenders in each case. There are a range of reasons why the issuing of an EAW may not lead to a surrender, including a number of mandatory and optional grounds set out in the EAW Framework Decision. Table 1 and 2 also show the effects of differences in practice between Member States. The UK issued fewer EAWs than Latvia or Estonia in 2011 and secured a surrender rate that was higher than most other countries, arguably as a consequence of the requirement for prosecution-readiness and prosecutorial discretion. In contrast, it was one of the largest recipients of EAWs. This reflects both the practice of countries such as Poland, but also the attractiveness of the UK as a destination. In recent years, the UK and Polish authorities have worked together to reduce the number of EAWs issued by Poland. This has had some success, with a 25 per cent reduction since 2008, though the overall number of warrants, at 775 in 2012, still remains high.<sup>30</sup>

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27 Qq 193 (Wojciech Andrew Zalewski) and 339 (Director of Public Prosecutions)

28 Q 193 (Wojciech Andrew Zalewski)

29 See for example, Council of Europe, EU Document 10975/07, 9 July 2007; Rzeczpospolita, *Too long arm of justice*, 28 April 2013; Mr James Clappison MP, HC Deb, 15 July 2013, column 822, 2014 JHA Opt-Out Decision

30 Ev 69 (Polish Ministry of Justice)

**Table 1: Number of European Arrest Warrants issued by Member States and corresponding surrenders in 2011**

Country	Total number of EAWs issued by a Member State to all other EU countries	Total number of resulting surrenders	Percentage of EAWs issued that lead to a surrender
Poland	3,809	930	24%
Germany	2,138	855	40%
France	912	297	33%
Belgium	600	57	10%
Estonia	531	99	19%
Czech Republic	518	238	46%
Lithuania	420	113	27%
Slovak Republic	350	105	30%
Latvia	210	39	19%
UK	205	99	48%

Source: Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant – Year 2011

**Table 2: Number of European Arrest Warrants received by each Member State and corresponding surrenders in 2011**

Country	Total number of EAWs received by each Member State from all other EU countries	Total number of resulting surrenders	Percentage of EAWs issued that lead to a surrender
Germany	14,034	979	7%
UK	6,760	999	15%
Spain	1,435	889	62%
France	1,102	756	69%
Belgium	602	61	10%
Ireland	384	N/K	-
Czech Republic	302	186	62%
Poland	296	186	63%
Lithuania	122	54	44%

Source: Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant – Year 2011

18. The Government estimates that the unit cost of executing an incoming EAW in the UK is approximately £20,000. This includes costs to the police, the Crown Prosecution Service, court and legal aid costs, as well as detention before extradition.<sup>31</sup> If this is the case, then the estimated cost of implementing the 999 incoming EAWs in 2011 was just under £20 million. In addition to this would have been the cost of the 5,761 EAWs that did not lead to a surrender, but would nevertheless have incurred costs to the justice system.

19. Not only are there differences in the structure of justice systems between Member States, but also standards of justice vary significantly within those systems. Fair Trials International told us: “there is not a sound basis for mutual trust, not least because basic fair trial rights are not protected adequately in many EU countries”.<sup>32</sup> This was one of the underlying problems for both Andrew Symeou and Garry Mann. In the former case it was reflected in the manner in which evidence was collected against him by the Greek police and his subsequent treatment in prison. In the latter case it arose in the form of inadequate arrangements for representation and translation at his trial in Portugal, and because his lawyers lacked sufficient training in how the EAW process operates.<sup>33</sup> The problem is exacerbated by the fact that the EAW is a procedural mechanism that does not require the receiving court to consider a *prima facie* case before executing a warrant.<sup>34</sup> Dominic Raab MP told us the false assumption of common standards across the EU has deeply undermined faith in the EAW system, not only in the UK, but also among other northern European countries.<sup>35</sup>

20. Because of differences in the standards of justice between Member States, many individuals have sought to prevent their extradition on human rights grounds. The Extradition Act 2003 requires the judge at an extradition hearing to discharge the requested person if they are of the view that execution of an EAW would result in a breach of their rights under the European Convention on Human Rights (ECHR) to which all EU Member States are signatories. To date, the main Articles used to challenge an EAW have been 2 (right to life), 3 (prohibition of torture), 6 (right to a fair trial) and 8 (right to respect for private and family life).

21. Although the Government's Command Paper states that a range of safeguards are in place to ensure the protection of fundamental rights, a particular concern for challenges based on the ECHR is that the standard of proof required is considered very high. For example, Fair Trials International told us that in practice “the courts apply principles elaborated by the European Court of Human Rights which impose virtually unachievable evidential and legal hurdles”.<sup>36</sup> In Andrew Symeou's case it was argued that his treatment in a Greek prison would breach his Article 3 rights (under the inhuman or degrading treatment provision). However, the judge concluded that there was no sound evidence that

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31 HM Government, *Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*, July 2013, Cm 8671, page 95

32 Fair Trials International, Written evidence to the House of Lords European Union Committee inquiry into the 2014 JHA opt-in decision, para 12

33 Q 180 (Justice)

34 Q 183 (Liberty)

35 Q 287 (Mr Dominic Raab MP)

36 Ev 58 (Fair Trials International)

he was at risk of being subjected to treatment that would breach Article 3, even though there was evidence that some police do inflict such treatment on those in detention.<sup>37</sup>

## Alternatives to the European Arrest Warrant

22. Prior to the introduction of the EAW, extradition arrangements between EU Member States were governed by the 1957 European Convention on Extradition. 50 countries are signatories to the Convention—the 47 members of the Council of Europe, plus Israel, South Africa and South Korea. If the UK left the EAW the initial default would be to return to the arrangements set out under the Convention. As noted earlier in this Chapter, one of the main concerns with the previous system was the time taken to agree extradition. The Director of Public Prosecutions told us it would likely take much longer to resolve extradition proceedings if the UK reverted to the Convention.<sup>38</sup> Other problems include the fact that some countries did not extradite their own citizens under the old arrangements. The Government's Command Paper notes that some Member States repealed the legislation implementing the 1957 Convention when they introduced the EAW. In the case of Ireland there is no fallback position because it never brought the Convention into force, and the 'backing of warrants' legislation that was used instead has since been repealed.<sup>39</sup>

23. However, as Fair Trials International argued, it is likely that "other Member States will continue to wish to engage in effective extradition arrangements with the UK, whether or not we remain a part of the EAW system".<sup>40</sup> In practice this would mean agreeing new bilateral arrangements on a country-by-country basis, or with the EU, given that it has gained legal personality under the Lisbon Treaty.<sup>41</sup> Dominic Raab MP argued that there had been a significant amount of "scaremongering" of the consequences of leaving the EAW, both in terms of the extent to which new arrangements might lead to delays, and the possibility that criminals might go free. He was optimistic that the UK would be able to negotiate enhanced procedures that sat somewhere between the Convention and the EAW.<sup>42</sup>

24. Former Home Secretary Charles Clarke was sceptical that it would be possible to negotiate new arrangements, noting that one of the reasons why some cases in the past went on for so long was because such bilateral arrangements had not been agreed.<sup>43</sup> Justice Across Borders also told us it did not believe new bilateral or multilateral arrangements outside the EU framework would be as effective.<sup>44</sup> First, any negotiation would be fraught with difficulty and might not be prioritised by other Member States. If discrepancies

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37 Justice, International Commission of Jurists, and the European Criminal Bar Association, *Best Evidence in European Arrest Warrant Cases*, 2009, para 20

38 Q 336 (Director of Public Prosecutions)

39 Ev 66 (Law Societies of England and Wales and of Scotland) para 22

40 Fair Trials International, Written evidence to the House of Lords European Union Committee inquiry into the 2014 JHA opt-in decision, para 6

41 Q 279 (Mr Dominic Raab MP)

42 Q 284 (Mr Dominic Raab MP)

43 Qq 269 and 271 (Charles Clarke)

44 Ev 59 (Justice Across Borders), para 4-9

occurred between implementing legislation, there would be no formal mechanism to resolve them. Second, the nature of negotiation means that the UK might not secure the arrangements that it wants. Other Member States could refuse to co-operate, or might seek concessions in other areas. Third, EU law may anyway prohibit Member States from agreeing individual arrangements with the UK. Finally, even if the UK were to reach bilateral agreements, differences in procedure might be exploited by criminals and potentially turn the UK into a safe haven for people seeking to evade justice (or at least give rise to the perception of it being so). Some argue that an agreement with the UK and the EU as the two contracting parties could alleviate these problems.

## The Government's proposed reforms

25. In her statement to the House on 9 July, the Home Secretary set out a number of measures designed both to reduce the number of EAWs and to improve the operation of the system in the UK.<sup>45</sup> Many of her proposals were a response to the 2011 review of the UK's extradition arrangements conducted by Sir Scott Baker.<sup>46</sup> First, the Government has committed to implement the European Supervision Order (ESO). This sets out rules by which Member States are required to recognise a decision on supervision measures issued by another Member State as an alternative to pre-trial detention. The UK was expected to enshrine the ESO in national law by 1 December 2012, but has yet to do so. It is another measure listed in the Government's opt-in package.<sup>47</sup> Various witnesses supported its implementation.<sup>48</sup> Fair Trials International argued that it could have a huge impact on people arrested abroad, who are often denied bail because they are non-nationals, though this would depend on how it was implemented by each Member State.<sup>49</sup> For example, it could have made a significant difference in the case of Andrew Symeou. ACPO described it as "a good counterbalance to the European Arrest Warrant", and anticipated that its implementation could easily be bolted on to the existing system of managing people on bail.<sup>50</sup> In their joint submission, the Law Societies of England and Wales and of Scotland expected that the ESO could be used for a relatively broad range of offences, particularly given the availability of new technology to monitor suspects under bail conditions.<sup>51</sup>

26. A second key reform is that the Government has amended the Anti-Social Behaviour, Crime and Policing Bill to ensure that an EAW is refused for minor crimes, thereby introducing a proportionality test similar to the one operating in Germany and some other Member States. The majority of our witnesses, including the Director of Public Prosecutions, supported this proposal as a way of reducing the number of EAWs executed

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45 Oral Statement by the Home Secretary, HC Deb, 9 July 2013, column 177, Treaty on the Functioning of the EU

46 A Review of the United Kingdom's Extradition Arrangements (following Written Ministerial Statement by the Secretary of State for the Home Department of 8 September 2010), presented to the Home Secretary on 30 September 2011. We discussed the Baker Review at length in our Report on *The US-UK Extradition Treaty* (HC 644, Session 2010–12)

47 The Ministry of Justice is responsible for this measure

48 Q 192 (Fair Trials International, Justice, and Liberty); Ev 65 (Law Societies of England and Wales and of Scotland) para 15

49 Fair Trials International, Written evidence to the House of Lords European Union Committee inquiry into the 2014 JHA opt-in decision, para 15

50 Qq 22 and 24 (Association of Chief Police Officers)

51 *Op. Cit.*

for countries such as Poland that do not have prosecutorial discretion.<sup>52</sup> However, Dr Hart-Hoenig, a lawyer operating in Germany, told us this change was not likely to influence the decision by judges in other Member States to continue issuing warrants.<sup>53</sup> This means UK courts may continue to process a large number of EAW requests, albeit granting fewer of them.

27. Third, the Government hopes that use of the European Investigation Order (EIO) will reduce the need for EAWs. The EIO will create new evidence-gathering powers that will make it easier for police to investigate suspects living in other Member States. This should reduce the number of arrest warrants that are issued for the purpose only of interviewing suspects.<sup>54</sup> The Law Societies told us they supported this approach.<sup>55</sup> It is still subject to negotiation, though the Government has already decided to opt in to the measure. We note that several of the measures which it will supersede are not included in the Government's opt-in package, which may be relevant if the EIO is not adopted before 1 December 2014 when the opt-out will take effect.

28. A related fourth measure is the Government's plan to amend the Extradition Act 2003 so that people in the UK can only be extradited under the EAW when the requesting Member State has already made a decision to charge and try them.<sup>56</sup> Although recognising that once a charge is made there could still be further delays in the proceedings, this should help reduce the number of incidences where an individual is held in detention for significant periods before their trial. An important caveat to this reform, though, is that it will not apply where a person's presence is required in a jurisdiction in order for decisions on charging and trying to be made. As such, it is difficult to determine what effect this change will have, although the Law Societies argued it would help prevent abuse of the EAW.<sup>57</sup> Andrew Symeou, however, noted the Greek authorities would likely have claimed they were trial-ready when they requested his extradition, even though he subsequently spent 11 months in jail awaiting his trial.<sup>58</sup>

29. Other proposed reforms include changes to the law so that a judge must refuse extradition in cases where part of the alleged conduct took place in the UK, and it is not criminal in the UK. Elsewhere the Government plans to make greater use of prisoner transfer arrangements so that UK citizens convicted abroad can be returned to the UK to serve their sentences. Furthermore, where UK citizens have been convicted in their absence and are the subject of an EAW, the UK authorities will ask for the warrant to be withdrawn and to use the prisoner transfer arrangements instead. In addition, the Home Secretary plans either to allow the temporary transfer of a consenting person so that they can be interviewed by the issuing state's authorities, or to allow them to interview through means

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52 Qq 28 (Association of Chief Police Officers), 171 (Prof Steve Peers, University of Essex), 338 (Director of Public Prosecutions); Ev 58 (Fair Trials International) and Ev 67 (Law Societies of England and Wales and of Scotland) para 25

53 Q 211 (Dr Kai Hart-Hoenig)

54 Q 241 (Dr Kai Hart-Hoenig)

55 Ev 67 (Law Societies of England and Wales and of Scotland) para 29

56 HC Deb, 15 July 2013, column 778, 2014 JHA Opt-Out Decision

57 Ev 68 (Law Societies of England and Wales and of Scotland) para 30

58 Q 141 (Andrew Symeou)

such as video-conferencing in the UK. Although not part of the package of reforms announced by the Home Secretary in July, the Government also plans to allow greater flexibility in the extradition appeals process so that cases may be considered after the deadline set within the EAW process has passed if the person concerned did everything reasonably possible to ensure that notice for appeal was given as soon as it could be given. Fair Trials International welcomed the inclusion of this provision in the Anti-Social Behaviour, Crime and Policing Bill.<sup>59</sup>

30. Overall, we received a range of views on the Government's EAW reform package. The Director of Public Prosecutions and ACPO both voiced their support.<sup>60</sup> Europol described the proposals as "sensible", whilst Professor Steve Peers of the University of Essex said the changes would address a number of problems, although they did not respond directly to human rights concerns.<sup>61</sup> Fair Trials International told us the reforms went in the right direction, but that they could still be strengthened.<sup>62</sup> Although both Andrew Symeou and Garry Mann noted that the package represented "a good start", they remained sceptical that it fully addressed their concerns and said they did not want the UK to opt in.<sup>63</sup> The lawyers who gave oral evidence to us were also unconvinced that the UK should opt back into the EAW even with the new safeguards.<sup>64</sup>

31. Although the Government's proposed reforms were broadly welcomed during the debate on 16 July, a concern raised by some Members was the extent to which any changes made unilaterally by the UK might subsequently be struck down by the European Court of Justice.<sup>65</sup> The Law Societies raised concern as to whether the proportionality measure would be in accordance with the underlying EAW Framework Decision.<sup>66</sup> The fact that some of the changes, such as the proportionality measure, are already operated by some other Member States, may provide some reassurance on this issue. Nevertheless, there would remain some uncertainty on this point if the UK opted back in to the EAW until it was tested.<sup>67</sup>

32. Witnesses suggested that one option for avoiding any potential infringement proceedings would be to amend the Framework Decision itself. Indeed, witnesses identified certain policy areas that would best be responded to by EU-wide agreement rather than the UK acting unilaterally.<sup>68</sup> Fair Trials International and the Law Societies called for the proportionality test to be incorporated as part of the Framework Decision. Other areas highlighted by Fair Trials International included giving the courts greater power to refuse the surrender of individuals on human rights grounds; requiring Member

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59 Ev 58 (Fair Trials International)

60 Qq 29 (Association of Chief Police Officers) and 333 (Director of Public Prosecutions)

61 Qq 77 (Europol) and 171 (Professor Steve Peers)

62 Q 184 (Fair Trials International)

63 Qq 139 (Garry Mann) and 141 (Andrew Symeou)

64 Qq 245 (Wojciech Andrew Zalewski) and 246 (Dr Kai Hart-Hoenig)

65 Mr Dominic Raab MP, HC Deb, 15 July 2013, column 829, 2014 JHA Opt-Out Decision; Mr James Clappison MP, column 843; and Jacob Rees-Mogg MP, column 843

66 Ev 67 (Law Societies of England and Wales and of Scotland) para 26

67 Q 164 (Professor Steve Peers, University of Essex)

68 *Ibid.*; Q 343 (Director of Public Prosecutions)

States to remove an EAW where it has been refused by the executing authority so that the individual concerned does not risk re-arrest whenever they cross an EU border; and the ability to defer extradition where a case is not trial-ready.<sup>69</sup> Elsewhere, Mr Dominic Raab MP and Liberty called for the requirement of an evidential threshold or *prima facie* case before a court could surrender someone under the EAW.<sup>70</sup> This too would require a change to the Framework Decision.

33. The Director General of Europol cautioned against renegotiation of the EAW, arguing that the process would take time and would not necessarily lead to the outcome that the UK desired.<sup>71</sup> Charles Clarke, however, was more optimistic, believing that there was a willingness among Member States to look again at the current arrangements.<sup>72</sup> Fair Trials International pointed to the European Parliament's recent decision to produce an own-initiative report as an indication that the desire to reform the EAW was not restricted to the UK.<sup>73</sup>

34. In the meantime there are further ways in which the UK can contribute to improving the operation of the EAW within the existing Framework Decision. In its recent report on the operation of the EAW, Justice recommended better provision of training for defence lawyers and the creation of a peer-reviewed database of experienced EAW lawyers.<sup>74</sup> It also urged Member States to act quickly to enshrine in national law Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings—a reform that could have made a crucial difference in the case of Garry Mann. Justice and the Law Societies also called for improvements to the Schengen Information System (SIS) to provide a mechanism for rectifying erroneous alerts.<sup>75</sup> For most Member States, the SIS is the primary means by which they are alerted that an EAW is in place. The UK is due to join the successor system—SIS II—at which point it is predicted that there will be a significant increase in the number of EAWs it receives.

35. Finally, we heard evidence that a large number of EAWs received by the UK, particularly from Poland, relate to a breach of an individual's probation in the issuing country.<sup>76</sup> Many of these could be avoided if there was greater co-operation between Member States' probation systems. Indeed, Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition of judgments and probation decisions provides for such co-operation. This measure is not part of the Government's proposed opt-in package. Its Command Paper notes that the Framework Decision has not yet been implemented by the UK and that only seven Member States have done so to date.<sup>77</sup> Arguably though, implementation of the measure would increase once it falls within

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69 Fair Trials International, Written evidence to the House of Lords European Union Committee inquiry into the 2014 JHA opt-in decision, para 9

70 Qq 183 (Liberty) and 289 (Mr Dominic Raab MP)

71 Q 77 (Europol)

72 Q 272 (Charles Clarke)

73 Ev 58 (Fair Trials International)

74 Justice, *European Arrest Warrants – Ensuring an effective defence*, 2012

75 *Ibid.*; Ev 67 (Law Societies of England and Wales and of Scotland) para 28

76 Q 240 (Wojciech Andrew Zalewski); Ev 66 (Law Societies of England and Wales and of Scotland) para 17

77 HM Government, *Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*, July 2013, Cm 8671, page 132



the scope of the European Commission's infringement powers in 2014. Justice, Justice Across Borders and Professor Steve Peers all supported the inclusion of the measure in the opt-in package in their evidence to this Committee.<sup>78</sup> The Ministry of Justice is responsible for this measure, which accordingly, is being scrutinised by our colleagues on the Justice Committee.

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

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

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

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

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78 Qq 154 (Professor Steve Peers, University of Essex) and 175 (Justice); Ev 61 (Justice Across Borders) para 24

### 3 Other measures

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40. In addition to the European Arrest Warrant, the Home Office is the lead department for 25 other police and criminal justice measures which the Government proposes to opt back into. In this Chapter we consider the key elements of the package, its overall coherence, and some of the 73 Home Office measures from which the Government intends to remain opted out. We also examine the potential net effect of the opt-out and proposed opt-ins on the UK's influence in Europe and in terms of achieving a repatriation of powers from the EU.

#### Europol

41. The European Police Office, known as Europol, was established following the Maastricht Treaty, became fully operational in 1999, and has been an EU Agency since 2010.<sup>79</sup> Its role is to support co-operation between national law enforcement authorities to prevent and combat terrorism, and serious and organised crime within the EU, including trafficking in illicit drugs, firearms or human beings, the smuggling of illegal migrants, cybercrime and financial crime. It is based in The Hague in the Netherlands and has 800 staff, around 70 of whom are British nationals, including the organisation's Director General, Rob Wainwright. We note as an aside that the level of British staffing would probably be higher were it not for a peculiar requirement of the Home Office that that UK law enforcement officers resign their position when taking up a post at Europol, rather than allowing a leave of absence.<sup>80</sup> **We recommend that the Home Office reconsider its policy of requiring employees of the UK law enforcement bodies to resign their post before they can work for Europol. It is clearly not an effective way of promoting UK involvement in that body.**

42. Europol is not a police force. Its officers do not have direct powers of arrest. Rather their role at present is to provide support to national law enforcement agencies by gathering, analysing and disseminating information and coordinating operations. Its intelligence work and the services of its operational coordination centre and secure information network, contribute to over 13,500 cross-border investigations each year. The Home Office told us Europol made a valuable contribution in the fight against organised crime.<sup>81</sup> One recent example has been Operation Rescue, led by the UK's Centre for Child Exploitation and Online Protection (CEOP) and involving co-operation with 12 other countries. Europol provided vital intelligence and analytical support to the investigation, including the cracking of a seized copy of a computer server that identified the members of a child sex abuse network. The operation resulted in the safeguarding of at least 230 children worldwide, including 60 in the UK, and the arrest of more than 180 offenders, 121 of whom were arrested in the UK.

43. With approximately 3,600 internationally active organised crime gangs operating across Europe, there is an increasing dependency on cross-border co-operation and

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79 It was originally an international organisation with its own *acquis*, funded directly by its member states.

80 Q 74 (Europol)

81 Ev 56 (Home Office) para 25

intelligence sharing. Rob Wainwright told us the UK had doubled the amount of casework that it put through Europol's information exchange channels in the last two years.<sup>82</sup> It is now the biggest provider of intelligence and the second biggest user of that intelligence.<sup>83</sup> As the Association of Chief Police Officers put it, "we have crime problems that demand modern tools to be able to tackle them [...] European collaboration is right at the heart of an effective response".<sup>84</sup>

44. There are eight PCJ measures which relate to Europol that are within the scope of the opt-out decision. The Government has stated that it plans to opt back into just one, Council Decision 2009/371/JHA, which established the body and provides the mechanism through which it can handle data concerning criminal offences. The Command Paper asserts that "it should not be necessary to rejoin any of the associated measures in order to participate in Europol".<sup>85</sup> This may be the case for the Council Decisions laying down the staff regulations of Europol employees, and designating Europol as the Central Office for combating euro-counterfeiting. Those staff regulations would remain in place, and Europol would continue in that role regardless of a UK decision to opt out. However, ACPO expressed concern that the Government intended not to opt in to the four remaining measures which cover, among other things, the rules on the confidentiality of Europol information and rules governing its relations with partners, including the exchange of personal data and classified information.<sup>86</sup> The Command Paper is silent on the potential effects of not opting back into these Council Decisions, noting only that their implementation had not required any domestic legislation. ACPO told us these measures had been on its "essential" list. As such, it was worried that by opting out the UK may not be able to continue as a full player in its relationship with Europol.<sup>87</sup>

45. Consideration of a UK opt-in to Europol is bound up with the fact that the Lisbon Treaty requires that the Council Decision setting up the body be replaced by a new Regulation, which establishes its structure, operation, field of action and tasks, as well as the procedures for scrutiny of its activities by the European Parliament and national parliaments. A draft Regulation is currently under negotiation. This would merge Europol with the European Police College (CEPOL) to create a single EU Agency of Law Enforcement Co-operation and Training. CEPOL is another PCJ measure included in the opt-in package. Its headquarters are co-located with the College of Policing at Bramshill, though the draft Regulation proposes that they be relocated to The Hague following the merger.

46. The Government has opted out of the draft Regulation whilst it is under negotiation, having raised concern that the new body may have powers to direct national police forces to initiate criminal investigations, and also require the UK to share sensitive intelligence that may compromise its national security. The Home Secretary has described the motive

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82 Q 91 (Europol)

83 Q 32 (Association of Chief Police Officers)

84 *Ibid.*

85 HM Government, *Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*, July 2013, Cm 8671, page 44

86 Q 31 (Association of Chief Police Officers)

87 *Ibid.*

of the Commission here as “nothing more than state-building”.<sup>88</sup> The UK will still take part in the negotiations on the draft Regulation, but it will not have a vote in the decisions that are taken.<sup>89</sup> Provided these concerns are satisfied, the Government’s intention is to opt in to the Regulation after negotiations have concluded and it has been adopted.<sup>90</sup> The Home Secretary was optimistic that this would be the case, noting that early Council discussions suggested the Government’s fears were shared by some of other Member States.<sup>91</sup> On the other hand, Dominic Raab MP assessed the likelihood of the UK opting in as “50:50 at best”.<sup>92</sup> If the Regulation is adopted before 1 December 2014 this will remove both the Europol and CEPOL measures from the scope of the opt-in decision, and the seven other Europol measures from the opt-out. However, Rob Wainwright thought it more likely that negotiations would not conclude before then.<sup>93</sup>

47. If the UK withdrew from Europol, whether as a result of not opting into the current Council Decisions, or the subsequent new Regulation, one option would be for it to maintain a role using the model currently used for Frontex, the EU agency which manages operational co-operation at its external borders. The UK was not allowed to take part in the measure as it is not a member of the Schengen Area. It has, nevertheless, contributed to several joint operations, which are subject to acceptance on a case-by-case basis by the Management Board on which the UK has observer status. Dominic Raab MP argued that this was a proven model of co-operation—the UK is seen as a good partner within Frontex, and the fact that it is not a signed-up member makes relatively little practical difference.<sup>94</sup>

48. However, various witnesses expressed apprehension at the prospect of a diminished role for the UK within Europol. Justice Across Borders argued that there was a “unique advantage” in the UK’s ability to co-operate through established EU mechanisms such as Europol, and that requests for assistance under *ad hoc* arrangements risked not being accorded the same level of priority.<sup>95</sup> ACPO said it was very concerned that associate membership would mean having to put in formal requests for assistance or intelligence rather than having immediate access, resulting in less effective investigation of serious crime.<sup>96</sup> Rob Wainwright described such a situation as “uncharted territory” for the UK, noting that it would lead to arrangements that would be “less effective and more costly for the UK in its fight against crime and terrorism”.<sup>97</sup>

**49. Europol has played an important role in assisting co-operation between Member States in tackling serious and organised crime, and countering terrorism, but as the**

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88 Home Secretary, HC Deb, 15 July 2013, column 782, 2014 JHA Opt-Out Decision

89 Q 133 (Home Secretary) Oral Evidence taken by the Home Affairs Committee, *The Work of the Home Secretary*, HC 235-ii

90 House of Commons Journal (2013-4), 15 July 2013

91 Q 133 (Home Secretary) Oral Evidence taken by the Home Affairs Committee, *The Work of the Home Secretary*, HC 235-ii

92 Q 279 (Mr Dominic Raab MP)

93 Q 71 (Europol)

94 Q 273 (Mr Dominic Raab MP)

95 Ev 59 (Justice Across Borders) para 8

96 Q 32 (Association of Chief Police Officers)

97 Q 76 (Europol)

Home Secretary has recognised its focus may now be “state-building”. The UK is a leading contributor to, and beneficiary of, its work. The Government and the House support the UK’s future participation in the body, subject to certain conditions on the extent of its powers. As such, it seems strange to us that, in the short intervening period between the opt-out and the new Regulation, the Government proposes to create ambiguity over the UK’s relationship with Europol by seeking to opt in to only one of its measures. This would seem to run contrary to the logic of its stated policy.

## Eurojust and Joint Investigation Teams

50. Eurojust is the body responsible for judicial co-operation between Member States. Established in 2002, its role is to encourage and improve the co-ordination of investigations and prosecutions, and to assist in these when requested by a Member State. It is composed of small teams from each Member State, consisting of prosecutors, judges and police officers. Its work includes advising on the requirements of different legal systems; supporting the operation of judicial co-operation arrangements; bringing together national authorities through co-ordination meetings; and providing funding and technical support for Joint Investigation Teams (JITs).<sup>98</sup> These allow police forces and other competent authorities in two or more jurisdictions to establish a team to carry out a criminal investigation in the Member States concerned. The use of JITs reduces the need for lengthy negotiations each time one country wishes to work together with another, as there is a clear framework for their establishment and operation.

51. The workload of Eurojust has grown steadily since its creation. In 2012 it received 1,533 referrals for assistance by Member States. The UK made 80 of those requests—fifth behind France, Sweden, Austria and Italy. It was also the fourth most requested country by Eurojust to provide assistance.<sup>99</sup> Since 2009, the UK has been involved in at least 21 JITs, covering offences including drug trafficking, human trafficking, illegal immigration, fraud, money laundering and cybercrime.

52. In its submission, the Home Office highlights examples of the work of Eurojust and JITs. Eurojust was instrumental in the establishment of a JIT between UK and French judicial and investigative authorities in the wake of the murder of the al-Hilli family from Surrey and cyclist Sylvain Mollier in Annecy, France in 2012. Another recent example has been Eurojust’s role in brokering an agreement between the UK and Lithuania to allow the removal of seven foreign national offenders from the UK. Their extradition had previously been prevented because of a lack of reassurances on conditions in Lithuanian prisons—prior to the involvement of Eurojust there had been a breakdown in the working level relationship between the two countries over the issue.<sup>100</sup> A recent example of a successful JIT has been Operation Golf, a joint operation between the Metropolitan Police and the Romanian National Police focused on the trafficking of children for forced criminality.

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98 HM Government, *Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*, July 2013, Cm 8671, page 59

99 Eurojust, *Annual Report*, 2012

100 Ev 55 (Home Office) para 19-23

This resulted in the convictions of 80 people and the safeguarding of 28 children from exploitation.<sup>101</sup>

53. The Director of Public Prosecutions told us “we use Eurojust quite heavily”. Access to the various country desks provided a hub of facilities, language skills and legal expertise that facilitated effective cross-border work.<sup>102</sup> ACPO told us JITs allowed for “a very quick, immediate process, so you can get things done far more effectively”, whilst the DPP told us one of the advantages of JITs was that the evidence was more easily admissible in court, and did not require complicated arrangements for transferral from one jurisdiction to another.<sup>103</sup> Open Europe have argued that the UK could still retain these benefits by agreeing bilateral memoranda of understanding with other Member States.<sup>104</sup>

54. There are three Council Decisions relating to Eurojust and a Council Framework Decision on joint investigation teams, which are subject to the opt-out. The Government proposes to opt back into all four measures. In July 2013 the Commission published a draft Regulation on Eurojust that would repeal and replace the three existing Eurojust measures. This retains most of the core functions of Eurojust, but also proposes reforms to its governance and management structure; the powers of national members (the senior prosecutors or police officers that each Member State seconds to Eurojust); parliamentary accountability; and its working arrangements with the proposed European Public Prosecutor's Office (EPPO), which the Government has already committed not to participate in. As with the Europol Regulation, if it is adopted before 1 December 2014 then the three pre-Lisbon Treaty measures will fall out of the Government's opt-in package. The UK will have decided separately whether to opt into the successor Regulation post-adoption, or opt out entirely. The Government has expressed a number of concerns about the draft Regulation to the European Scrutiny Committee, including on the proposal to give national members the power to order investigative measures and authorise the transfer of evidence in urgent cases when timely agreement with the relevant Member State cannot be reached.<sup>105</sup>

## European Criminal Records Information System (ECRIS)

55. The European Criminal Records Information System (ECRIS) allows Member States to obtain details on the previous convictions of EU nationals. The Home Office told us this “allows courts to make the right bail decision, take bad character into account and, on conviction, give sentences which reflect previous offending history”.<sup>106</sup> The Government proposes to opt in to both the PCJ measures that provide for the sharing of information and the means of doing so through ECRIS. It also plans to opt in to the linked PCJ measure which requires Member States to take account of a defendant's previous convictions in

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101 *Ibid.* para 34

102 Q 330 (Director of Public Prosecutions)

103 Qq 48 (Association of Chief Police Officers) and 330 (Director of Public Prosecutions)

104 Open Europe, Dominic Raab MP, *Cooperation Not Control: The Case for Britain Retaining Democratic Control of EU Crime and Policing Policy*

105 Fifteenth Report of the European Scrutiny Committee, *European Public Prosecutor's Office: Reasoned Opinion; Reform of Eurojust; European Anti-Fraud Office*, HC 83-xv

106 Ev 54 (Home Office) para 14

another Member State, which ECRIS supports. In its submission, the Home Office gave the recent example of a Romanian national accused of raping two women. The UK authorities used ECRIS to establish that he had a previous conviction for rape in Romania, which was then used as bad character evidence in his trial. On sentencing, the judge remarked on his previous conviction, before handing down an indeterminate prison sentence with a recommended minimum of 11 years.<sup>107</sup>

56. The Government's Command Paper notes that the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters would be the default legal agreement if the UK did not opt back into these measures. Under these arrangements the UK received very few requests for previous convictions of UK nationals being prosecuted in other Member States, and few conviction notices for UK nationals abroad. Nor did the UK send any notifications to other Member States detailing the convictions of their nationals in the UK. In contrast since May 2012 France, for example, has sent 1,909 notification messages to the UK through ECRIS, and the UK has sent 887 notification messages to France.<sup>108</sup> The Law Societies told us prosecutors found the measures particularly valuable.<sup>109</sup> Open Europe argue, however, that if the UK did not opt into these measures, it could instead agree a memorandum of understanding to continue participation in ECRIS.<sup>110</sup>

## Schengen Information System

57. The second generation Schengen Information System (SIS II) allows Member States to share information on missing people and people subject to a European Arrest Warrant or wanted for judicial purposes, as well as information on stolen vehicles and identity documentation. It went live for other Member States earlier this year, having been beset by delays. The UK, which did not take part in the predecessor system, is preparing to join at the end of 2014. Up to the end of 2012–13 it had cost the UK taxpayer £83 million. The Government's Command Paper expects its lifetime cash costs will be £168 million, though it estimates net benefits worth £624 million in the first 10 years of operation.<sup>111</sup> ACPO told us that, once connected, SIS II would allow the UK border authorities to run checks at the point of entry. Where an alert had been placed on an individual who was wanted or who was using a stolen passport, for example, the system would pick them up as they attempted to enter the country.<sup>112</sup>

58. The Government proposes to opt in to the Council Decision that establishes the legislative basis for SIS II. It does not plan to opt into several measures that it sees either as preparatory, technical, or likely to be superseded before the opt-out will take effect. Justice Across Borders believed there was, nevertheless, an argument based on coherence for

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<sup>107</sup> *Ibid.* para 15

<sup>108</sup> *Ibid.* para 17

<sup>109</sup> Ev 63 (Law Societies of England and Wales and of Scotland) para 8

<sup>110</sup> *Op. Cit.*

<sup>111</sup> HM Government, *Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*, July 2013, Cm 8671, page 27

<sup>112</sup> Qq 57 and 59 (Association of Chief Police Officers)

remaining party to them given that the UK planned to take part in the main Council Decision.<sup>113</sup>

## Naples II

59. The Convention on mutual assistance and co-operation between customs administrations, known as ‘Naples II’, provides for the disclosure of information between customs authorities for the purpose of detecting, preventing, investigating and prosecuting crime.<sup>114</sup> The Convention also allows for special forms of co-operation between customs authorities, including surveillance, covert and joint investigations, and ‘controlled deliveries’, whereby consignments of illicit drugs are kept under surveillance until they reach their final destination. The Home Office cited Operation Almagro as one example of the benefits of Naples II.<sup>115</sup> A joint investigation between the French and the UK border authorities, it uncovered the smuggling of Class A drugs from France using microlight aircraft. The seizure of 63 kilograms of methamphetamine and 6.2 kilograms of cocaine led to the arrest of three British nationals in France. Naples II has also contributed to HM Revenue and Customs investigations into cigarette and alcohol fraud, and an oil laundering operation, which in 2011 prevented an estimated £120 million in lost revenue to the Exchequer.<sup>116</sup>

60. Although HM Revenue and Customs is the lead department for this PCJ measure, it is regularly used by Border Force to share information about drugs smuggling, money laundering and other forms of cross-border crime. The Government’s Command Paper estimates that there are around 2,000 instances of the Convention’s use each year. Professor Steve Peers told us the Convention was “tremendously useful in practice”.<sup>117</sup> However, Open Europe note that there are some aspects of the Convention that have not been used at all since it came into being.<sup>118</sup> The Government believes that if it did not opt back into this measure it would need to negotiate new arrangements with Member States as the existing alternative options for such co-operation are “limited and less comprehensive” than Naples II.<sup>119</sup>

## Measures not in the opt-in package

61. We received evidence on a number of PCJ measures that the Government has proposed not to opt back into. First among these are two Council Acts implementing the EU Mutual Legal Assistance (MLA) Convention 2000. This builds on the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters with the aim of improving the speed and efficiency of co-operation. Examples of the forms of assistance provided by

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113 Ev 61 (Justice Across Borders) para 18

114 HM Government, *Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*, July 2013, Cm 8671, page 145

115 Ev 57 (Home Office) para 36

116 *Ibid.* para 38

117 Q 169 (Professor Steve Peers, University of Essex)

118 *Op. Cit.*

119 HM Government, *Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*, July 2013, Cm 8671, page 145



the 2000 Convention include hearings by video or telephone conference, the temporary transfer of an individual to another Member State where they are being investigated, the establishment of joint investigation teams (discussed above), and the interception of telecommunications.

62. The Government argues that it has already enshrined the 2000 Convention in national law through the Crime (International Co-operation) Act 2003, which it does not intend to repeal. It notes too that Greece, Italy and Ireland have not fully implemented the Convention, and so mutual legal assistance between the UK and those countries is still on the basis of the 1959 Convention. Also, it is likely that the European Investigation Order (EIO) will largely repeal and replace the 2000 Convention when it comes into force.<sup>120</sup> However, Professor Steve Peers, Helen Malcolm QC and the Law Societies noted that negotiations on the EIO have not yet concluded and agreement and implementation is unlikely to happen until after the opt-out would take effect.<sup>121</sup> This would leave a gap during which the 1959 Convention would become the basis for co-operation. Furthermore, the Home Secretary has stated that she plans to make greater use of one aspect of the 2000 Convention, video conferencing, to reduce the need to use a European Arrest Warrant. Professor Peers, told us, “there is an obvious contradiction there”.<sup>122</sup> This inconsistency occurs elsewhere in the Government’s Command Paper—it plans not to opt in to two other PCJ measures on the basis that they have been largely superseded by the EU MLA Convention 2000 and/or will be further superseded by the EIO.<sup>123</sup> Given that the 2000 Convention will remain enshrined in UK law, it is ambiguous on what basis UK co-operation with other Member States would take place before the EIO came into force. The Government believes the effect would be “largely negligible”, though it seems to us that not opting into the 2000 Convention potentially creates unnecessary uncertainty if the intention is still to adopt the EIO anyway.

63. A second area which the Government proposes not to opt back into is the European Judicial Network (EJN). This is meant to encourage judicial co-operation between Member States with contact points in each country who are experts in mutual legal assistance. The Government believes it would be possible to maintain contacts whilst not participating and besides, “practitioners will know the names and numbers of people they need to speak to regularly”.<sup>124</sup> The practitioners we heard from were not convinced by this assertion. Helen Malcolm QC believed the EJN was “a useful network and training tool”.<sup>125</sup> The Law Societies told us that, as EU law develops, lawyers and judges applying it in the UK increasingly need access to adequate training and contacts in other Member States—opting

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120 HM Government, *Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*, July 2013, Cm 8671, page 53-4

121 Q 154 (Professor Steve Peers, University of Essex); Ev 57 (Helen Malcolm QC) and Ev 64 (Law Societies of England and Wales and of Scotland) para 10

122 *Ibid.*

123 Ev 61 (Justice Across Borders) para 17 and 22

124 HM Government, *Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*, July 2013, Cm 8671, page 73-74

125 Ev 57 (Helen Malcolm QC) para 5

out of the EJN “can only be to the detriment of those who find themselves subject to EU law instruments in the domestic courts”.<sup>126</sup>

64. A third area not included in the opt-in package are two Council Decisions designed to allow the reciprocal searching of Member States’ databases of DNA profiles, vehicle registration data and fingerprints. They are known as the Prüm Council Decisions. In the opt-out debate on 15 July the Home Secretary noted that no steps had been taken to date to implement these measures, and this would likely leave the UK open to a fine if it opted in.<sup>127</sup> The Government’s Command Paper further argues that the technical requirements underpinning Prüm are now out-of-date, and were the UK to join, the fact that it has the largest DNA database in Europe would result in it receiving a disproportionate number of requests from other Member States.<sup>128</sup> ACPO and Professor Steve Peers expressed some reservations on the Government’s proposal not to opt in to Prüm, though the latter noted this did not preclude a future agreement for a simpler more cost-effective way of exchanging such information.<sup>129</sup>

65. Elsewhere, Justice Across Borders highlighted a further 20 PCJ measures where the UK’s non-participation would not necessarily lead to operational gaps, but may still cause reputational damage and a loss of influence.<sup>130</sup> These measures are aimed primarily at raising standards across the EU in the areas of terrorism, confiscation of assets, fraud and corruption. Justice Across Borders noted that over the years the UK has been encouraging other Member States, particularly accession countries, to adopt precisely these measures. This is not to say that the Government plans to repeal the relevant legislation. Rather, as the Home Secretary put it in the opt-out debate, “it is not for Europe to impose minimum standards on our police and criminal justice system”.<sup>131</sup>

66. For a large proportion of PCJ measures, not opting back in will have very little effect on the UK. In its analysis, Open Europe determined that 11 measures are of little, if any, use to the UK.<sup>132</sup> They include, for example, a Council Framework Decision on the execution of orders freezing property or evidence, under which the UK has not made any requests and has executed only one request from another Member State since its implementation four years ago. Moreover, the measure will be repealed and replaced by the European Investigation Order. Open Europe identify a further seven PCJ measures that have not been implemented in the UK, including the European Evidence Warrant, which will also be replaced by the EIO. Another 10 measures do not affect the UK at all, primarily because they relate to agreements for EU institutions to share information with non Member States. Not opting into these measures would have no effect on their operation.

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126 Ev 65 (Law Societies of England and Wales and of Scotland) para 12-15

127 Home Secretary, HC Deb, 15 July 2013, column 777, 2014 JHA Opt-Out Decision

128 *Op. Cit.* page 106-7

129 Qq 7 (Association of Chief Police Officers) and 154 (Professor Steve Peers, University of Essex)

130 Ev 61 (Justice Across Borders) para 24

131 Home Secretary, HC Deb, 15 July 2013, column 777, 2014 JHA Opt-Out Decision

132 Open Europe, Dominic Raab MP, *Cooperation Not Control: The Case for Britain Retaining Democratic Control of EU Crime and Policing Policy*

## Jurisdiction of the European Court of Justice

67. A fundamental underlying consideration for all of the measures subject to the Government's opt-in decision is the potential implications of those measures coming under the jurisdiction of the European Court of Justice (ECJ) and the right of the Commission to commence infringement proceedings against the UK for non-implementation. The ECJ's role should be to ensure EU law is applied consistently by Member States. However, some witnesses argued it is an integrationist body like any other European institution, which will seek to expand its powers over time.<sup>133</sup> It is argued that by submitting to the jurisdiction of the ECJ over these measures, the UK would effectively lose political control over their implementation. Indeed, in its evidence to the House of Lords European Union Select Committee, the Government stated that many of the PCJ measures were not written with ECJ jurisdiction in mind. They were often broadly drafted to secure unanimity and may therefore be open to expansive interpretation by the ECJ.<sup>134</sup>

68. By contrast, other witnesses were more sanguine at the prospect of expanding the ECJ's jurisdiction. Fair Trials International, Justice and Professor Steve Peers believed that where EU law had been adopted, there should be an independent European court to ensure the consistent application and clarification of those laws.<sup>135</sup> Approximately two-thirds of Member States have already accepted the jurisdiction of the ECJ on the pre-Lisbon Treaty measures, which has given rise to an average of three or four cases a year. Professor Peers thought it unlikely that this figure would increase significantly as a result of the UK coming under the jurisdiction of the court in this area.<sup>136</sup> Justice noted that infringement proceedings only occur following an assessment by the Commission and a dialogue between it and the Member State concerned. The annual reports of the ECJ show that the UK is typically subject to such proceedings around two or three times a year across the entire body of EU law. Furthermore, Justice took the view that infringement proceedings against the UK were unlikely in relation to the measures contained in the proposed opt-in package.<sup>137</sup>

69. Fair Trials International pointed out that in cases involving criminal law, to date the Court has shown reluctance to interfere with Member States' domestic law.<sup>138</sup> In fact, as noted by the Law Societies, domestic courts already take account of ECJ case law even in relation to measures where the UK is not subject to the Court's jurisdiction.<sup>139</sup> Finally, it is worth noting that the UK already accepts the jurisdiction of the ECJ for PCJ measures it has opted into since the Lisbon Treaty. This includes a Directive on the right to interpretation and translation in criminal proceedings, and a Directive on preventing and combating human trafficking.

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133 Q 283 (Mr Dominic Raab MP); Torquil Dick-Erikson, Written evidence to the House of Lords European Union Committee inquiry into the 2014 JHA opt-in decision

134 13<sup>th</sup> Report of the House of Lords European Union Committee, *EU police and criminal justice measures: the UK's 2014 opt-out decision*, HL Paper 159, para 91

135 Qq 158 (Professor Steve Peers, University of Essex) and 179 (Fair Trials International and Justice)

136 Q 164 (Professor Steve Peers, University of Essex)

137 Q 158 (Justice)

138 Fair Trials International, Written evidence to the House of Lords European Union Committee inquiry into the 2014 JHA opt-in decision, para 19

139 Ev 63 (Law Societies of England and Wales and of Scotland) para 7

## Is there any repatriation of powers?

70. Overall, the majority of our witnesses, including ACPO, Europol, the Serious and Organised Crime Agency, the Director of Public Prosecutions, Justice Across Borders, Helen Malcolm QC and the Law Societies, broadly supported the proposed opt-in package, with some reservations around particular measures discussed earlier in this Chapter.<sup>140</sup> Professor Steve Peers, for example, told us the 35 measures were “by and large almost all the most important ones”.<sup>141</sup> Elsewhere, Justice said they “cover the necessary mechanisms to maintain police and judicial co-operation in almost all areas”.<sup>142</sup>

71. However, support for the package was not unanimous. Dominic Raab MP believed that the Government should use the opportunity of the opt-out to recast the UK's relationship with the EU, stripping away supranational control, but remaining operationally engaged. He argued this could be achieved through memoranda of understanding, binding bilateral arrangements, and increasing use of the Frontex model of co-operation.<sup>143</sup> The UK already uses this approach with the US, New Zealand, Canada and Australia, with good results. As he put it: “What this requires is a bit of elbow grease”.

72. In the opt-out debate on 15 July, the Home Secretary told the House: “we are first and foremost talking about bringing powers back home”.<sup>144</sup> Yet, if the Government does proceed with the opt-in package as proposed, it is not clear that the net effect of the opt-out, opt-in process will be any repatriation of power. ACPO described the process as “a good housekeeping exercise” that had focused its mind on what was most important to keep.<sup>145</sup> Justice told us that by and large the powers that the EU institutions operate are retained in the 35 measures, as those that have been left out mostly relate to existing criminal offences in the UK or measures that are either defunct or not relevant.<sup>146</sup> Indeed, Liberty went further in suggesting that by submitting to the jurisdiction of the ECJ for those measures it did plan to opt in to, the net flow of powers may even be in the other direction.<sup>147</sup>

73. Notwithstanding debate over the net effect of the opt-out and opt-in, some witnesses argued that the process itself was detrimental to the UK's reputation and its ability to influence EU police and criminal justice policy in the future.<sup>148</sup> The Director General of Europol told us the UK had led by example in the development of international police co-operation within Europe for many years: “The idea, therefore, that the captain would

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140 Qq 5 (Association of Chief Police Officers), and 319 (Director of Public Prosecutions); Q 143 (Serious and Organised Crime Agency), Home Affairs Committee, Oral Evidence, *Private investigators: follow-up*, HC 524-ii; Ev 57 (Helen Malcolm QC) para 3, Ev 59 (Justice Across Borders) para 3, and Ev 63 (Law Societies of England and Wales and of Scotland) para 5

141 Q 156 (Professor Steve Peers, University of Essex)

142 Q 175 (Justice)

143 Q 279 (Mr Dominic Raab MP)

144 HC Deb, 15 July 2013, column 770, 2014 JHA Opt-Out Decision

145 Q 33 (Association of Chief Police Officers)

146 Q 188 (Justice)

147 Q 190 (Liberty)

148 Qq 88 (Europol) and 169 (Professor Steve Peers, University of Essex); Ev 63 (Law Societies of England and Wales and of Scotland) para 4

substitute himself from the field of play is an oddity [...] in the broader police community”.<sup>149</sup> Professor Steve Peers said “the mere fact that we are exercising the opt-out at all does some reputational damage”, even if it is partially rectified by the opt-in.<sup>150</sup> Elsewhere, Fair Trials International said that whilst the opt-out measures themselves were not significant, the move itself was being treated as such, “sending a very clear message as to how [the UK] wishes to proceed”.<sup>151</sup>

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

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

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

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

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149 Q 68 (Europol)

150 Q 160 (Professor Steve Peers, University of Essex)

151 Q 189 (Fair Trials International)

## 4 Next steps

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78. Following votes in the House of Commons and House of Lords in favour of the opt-out in July, the Government has begun informal discussions with the Commission and other Member States in advance of the implementation of the opt-out on 1 December 2014. The Government has committed that Parliament will have a say on the proposed final package of opt-in measures, probably towards the end of its negotiations. In this Chapter, we consider these next steps, when any opt-in would take effect, and the potential transitional arrangements that may be required once the opt-out takes effect.

### The opt-in process

79. There are two separate processes for determining whether the UK will be able to rejoin the measures the Government wishes to opt back into. For Schengen measures the Council must determine the UK's re-participation by unanimity. The Government's Command Paper states that neither the Commission nor the Council have powers to impose conditions on a UK opt-in, though in practice any Member State will have a veto.<sup>152</sup> Five measures in the proposed opt-in package would be subject to this procedure, including the measure on SIS II discussed in Chapter 3. For non-Schengen measures, the Lisbon Treaty states that the Commission has up to four months to reach a decision on an application to opt in. The Government believes, however, that there is nothing preventing the Commission from giving an immediate decision if agreement has been reached informally ahead of a formal application. The Council has no formal role in the approval of any opt-in unless negotiations with the Commission become blocked, although this is not to say that Member States may not seek to influence the Commission's decision if they wished to do so. Twenty-one of the Home Office's PCJ measures are non-Schengen measures, as too are the nine measures that are the responsibility of other departments.

80. Whatever the process for considering the opt-in, the Lisbon Treaty states that the EU institutions and the UK "must seek to re-establish the widest possible measure of participation of the UK in the *acquis* of the EU in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence".<sup>153</sup> Professor Steve Peers argued that the UK should expect to be readmitted on the basis of the Government's proposed package, noting that the Commission and the Council would have an underlying legal obligation to do so.<sup>154</sup> However, it is possible that either body may argue for the inclusion of other measures on the basis of practical operability and coherence, potential examples of which we have noted earlier in this Report. Moreover, whatever the rules stipulate, the UK's opt-in negotiations will inevitably have a political dimension, raising uncertainty as to the final outcome.

81. An additional uncertainty remains over the cost implications to the UK of the whole process. The Lisbon Treaty states that the UK will bear the direct financial consequences, if

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<sup>152</sup> HM Government, *Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*, July 2013, Cm 8671, page 5

<sup>153</sup> Article 10(5) of Protocol 36 to The Treaty on the Functioning of the European Union

<sup>154</sup> Q 151 (Professor Steve Peers, University of Essex)

any, incurred as a result of the cessation of its participation in certain measures.<sup>155</sup> In its Command Paper, the Government states that this would be “a high threshold to meet”, and that it would only cover those direct costs incurred as a result of the UK not opting back into a measure. The Law Societies argued, however, that different legal interpretations of the Treaty wording are possible and equally valid. For example, the financial consequences could include not only the costs to EU institutions, but also those arising for Member States that need to institute changes arising from the opt-out of certain measures.<sup>156</sup> The Government’s Command Paper is silent on the level of any such costs, though it is likely that their extent will be inversely related to the size of any opt-in package.

## Transitional arrangements

82. The wording of the Lisbon Treaty states that the UK “may, at any time afterwards, notify the Council of its wish to participate in acts which have ceased to apply to it”.<sup>157</sup> This suggests that the opt-out must take effect before the UK can formally notify that it wishes to rejoin certain measures. During the opt-out debate, the Home Secretary said it was the Government’s intention to “work with the European Commission in order to ensure that the transition period for any measures that we want to opt back into is as smooth as possible”.<sup>158</sup> She acknowledged, though, that because of the way the Treaty had been framed, the Commission was under no obligation to negotiate formally before 1 December 2014.<sup>159</sup>

83. The Home Office, Director of Public Prosecutions and ACPO all told us they expected a seamless process between the implementation of the opt-out and the subsequent opt-in.<sup>160</sup> Professor Peers was optimistic that this would be possible. The deadline for the Government to inform the Council of its intention to exercise the opt-out was 1 May 2014. This means it has done so more than nine months before it was required, therefore giving it more than 15 months to reach agreement. Professor Peers noted that it would likely not be the Government’s fault if an agreement had not been reached by December 2014—rather “it would be some kind of political difficulty that the Council and the Commission have dreamed up”.<sup>161</sup>

84. There is an interest on all sides to reach an agreement which would allow for a seamless process as the alternative would require the implementation of transitional arrangements during the period between the opt-out and the opt-in. Notwithstanding the fact that any such arrangements may themselves require negotiation, ACPO and the Law Societies told us this would also create significant legal uncertainties.<sup>162</sup> Some transitional arrangements will already be required for those measures which the Government proposes not to rejoin.

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155 Article 10(4) of Protocol 36 to The Treaty on the Functioning of the European Union

156 Ev 66 (Law Societies of England and Wales and of Scotland) para 19-20

157 Article 10(5) of Protocol 36 to The Treaty on the Functioning of the European Union

158 HC Deb, 15 July 2013, column 773, 2014 JHA Opt-Out Decision

159 *Ibid.* column 775

160 Qq 36 (Association of Chief Police Officers) and 313 (Director of Public Prosecutions); Q 140 (Home Secretary), Oral Evidence to the Home Affairs Committee, *The work of the Home Secretary*, HC 235-ii

161 Q 153 (Professor Steve Peers, University of Essex)

162 Q 37 (Association of Chief Police Officers); Ev 63 (Law Societies of England and Wales and of Scotland) para 6

As Helen Malcolm QC put it: “There is scope for considerable confusion amongst those on the front line of administering criminal justice, if required to deal at short notice with the unusual position of the UK”. Both she and the Law Societies highlighted the importance of training for police officers, prosecutors, defence practitioners and judges in advance of the opt-out taking effect.<sup>163</sup>

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

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

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

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163 Ev 58 (Helen Malcolm QC) para 11 and Ev 66 (Law Societies of England and Wales and of Scotland) para 20



# Conclusions and recommendations

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## Introduction

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

## The European Arrest Warrant

2. The European Arrest Warrant has significantly reduced the time taken to process an extradition within the EU, and has played an important role in ensuring rapid justice in a number of high-profile and serious cases. The vast majority of warrants received by the UK are for non-UK citizens, reflecting a trend towards the internationalisation of crime. Law enforcement bodies both at a national and European level believe the EAW is an essential weapon in the fight against such crime. (Paragraph 36)
3. However, in its existing form, the EAW is fundamentally flawed. It is based on a system of mutual recognition of legal systems which in reality vary significantly. Some countries may seek extradition simply to expedite their investigations, whereas others do so in pursuit of relatively minor crimes. For these reasons the UK receives disproportionately more warrants than it issues. Not only does this undermine credibility in the system, it is also costly to the taxpayer. Furthermore, the EAW is based on a flawed assumption of mutual trust in the standards of justice in other Member States. As such, it has facilitated miscarriages of justice in a number of cases, irrevocably damaging the lives of those affected. (Paragraph 37)
4. The UK could opt out of the EAW and seek to agree new arrangements with the rest of the EU, though it is uncertain how successful it would be in doing so, and it is not the Government's preferred option. We therefore welcome and support the proposed reform package, which would go some way towards rectifying the problems highlighted. However, there remain further ways in which the EAW can be improved, both within the current Framework Decision, and through its renegotiation. We also note that there remains uncertainty as to whether unilateral reforms by the UK would be acceptable to the Commission in the context of the opt-in negotiations, or whether they would in the future be struck down by the European Court of Justice. (Paragraph 38)
5. The UK's membership of the EAW is the single most controversial aspect of the Government's opt-in package. In this Report we have discussed its pros and cons, but ultimately we believe it is for the House to determine the UK's ongoing membership. Accordingly, we recommend that the EAW be considered separately to the rest of the opt-in package by way of a debate and vote on a discrete motion. If the

House votes in favour of the UK retaining the EAW, we further recommend that the Government seek agreement with other Member States for reform of the Framework Decision itself as part of the opt-in negotiations. If the House votes against the UK retaining the EAW, we recommend that the Government attempt to negotiate an agreement with the EU on an effective successor regime to safeguard the UK's interests. (Paragraph 39)

## Europol

6. We recommend that the Home Office reconsider its policy of requiring employees of the UK law enforcement bodies to resign their post before they can work for Europol. It is clearly not an effective way of promoting UK involvement in that body. (Paragraph 41)
7. Europol has played an important role in assisting co-operation between Member States in tackling serious and organised crime, and countering terrorism, but as the Home Secretary has recognised its focus may now be “state-building”. The UK is a leading contributor to, and beneficiary of, its work. The Government and the House support the UK's future participation in the body, subject to certain conditions on the extent of its powers. As such, it seems strange to us that, in the short intervening period between the opt-out and the new Regulation, the Government proposes to create ambiguity over the UK's relationship with Europol by seeking to opt in to only one of its measures. This would seem to run contrary to the logic of its stated policy. (Paragraph 49)

## The proposed opt-in package

8. The UK has received some benefits from its membership of Europol and Eurojust, operationally through the use of joint investigation teams, and as a result of data-sharing via ECRIS and Naples II. The balance of evidence we received from practitioners supported the UK's continued involvement in these and other measures. This included the law enforcement bodies which use these measures on a day-to-day basis. However, there is also a legitimate argument that the UK could seek to co-operate through alternative arrangements. The issue comes down to a trade-off between the benefits of continued involvement under the current arrangements, combined with the uncertainty associated with submitting to the jurisdiction of the European Court of Justice, versus the uncertainty of negotiating new arrangements, but with the certainty that they would not be subject to supranational control. (Paragraph 74)
9. If the Government proceeds with the opt-in we recommend that it consider including certain other measures, such as the EU Mutual Legal Assistance Convention 2000, the remaining Europol measures and the European Judicial Network, not just for the sake of coherence, but because they are valued by practitioners. We see no merit in excluding measures purely on the basis that they increase the numerical size of the opt-in package. (Paragraph 75)
10. There is a degree of interdependence between a number of the measures, which means there is a logic to their being considered as a single package, with the

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

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

### Next steps

12. The Government has notified the Council of its intention to exercise the opt-out well before the deadline of 1 May 2014. It is vital that it now moves quickly to begin negotiations for any opt-in. However, as with the opt-out decision, we believe there should be a parliamentary mandate for any opt-in package before formal negotiations can commence. We therefore recommend that the Government schedule consideration of the opt-in package on which it proposes to negotiate at the earliest opportunity to provide such a mandate. The Government should also be explicit on what would happen if the proposed opt-in could not be agreed. (Paragraph 85)
13. If the Government secures that mandate, there will remain political and financial uncertainties over the opt-in process. Although it is not possible to predict the outcome of future negotiations with Member States, we believe the Government should seek to gauge the financial implications of its proposals, not least to assist Parliament in informing its decision on the opt-in package. As such, we recommend that the Government undertake and publish such analysis as part of its response to the current parliamentary scrutiny process. (Paragraph 86)
14. To date we have been disappointed with the extent and timeliness of the Government's involvement of Parliament in scrutinising the 2014 opt-out and proposed opt-in. We hope that it will engage more constructively with Parliament for the remainder of this process. (Paragraph 87)

# Formal Minutes

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**Tuesday 29 October 2013**

Members present:

Keith Vaz, in the Chair

Mr James Clappison  
Michael Ellis  
Lorraine Fullbrook  
Dr Julian Huppert

Steve McCabe  
Mark Reckless  
Mr David Winnick

Draft Report (*Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision*), proposed by the Chair, brought up and read.

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

Paragraphs 1 to 10 read and agreed to.

Paragraph 11 read, as follows

Furthermore, in recent years there has been a marked increase in the internationalisation of crime, facilitated by changes in technology and EU expansion. For example, Europol has highlighted a “travelling criminal gang phenomenon” whereby groups based in Eastern Europe, particularly Romania and Bulgaria, use low-cost airlines to travel abroad to commit offences, returning before they can be caught. The EAW could play an important role in tackling this new form of crime.

Amendment proposed, in line 5, at end add ‘, or the UK could simply deal with the problem directly by introducing entry restriction on nationals of such members states and deporting relevant suspects, if such measures were expressly stated to apply notwithstanding the European Communities Act 1972.’—(*Mark Reckless*.)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 2  
Mr James Clappison  
Mark Reckless

Noes, 5  
Michael Ellis  
Lorraine Fullbrook  
Dr Julian Huppert  
Steve McCabe  
Mr David Winnick

Amendment accordingly negatived.

Paragraph agreed to.

Paragraphs 12 to 36 read and agreed to.

Paragraph 37 read, as follows

However, in its existing form, the EAW is fundamentally flawed. It is based on a system of mutual recognition of legal systems which in reality vary significantly. Some countries may seek extradition simply to expedite their investigations, whereas others do so in pursuit of relatively minor crimes. For these reasons the UK receives disproportionately more warrants than it issues. Not only does

this undermine credibility in the system, it is also costly to the taxpayer. Furthermore, the EAW is based on a flawed assumption of mutual trust in the standards of justice in other Member States. As such, it has facilitated miscarriages of justice in a number of cases, irrevocably damaging the lives of those affected.

Amendment proposed, in line 1, to leave out 'fundamentally'.—(*Mr David Winnick.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 3	Noes, 4
Dr Julian Huppert	Mr James Clappison
Steve McCabe	Michael Ellis
Mr David Winnick	Lorraine Fullbrook
	Mark Reckless

Amendment accordingly negatived.

Paragraph agreed to.

Paragraphs 38 to 48 read and agreed to.

Paragraph 49 read, as follows

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

Amendment proposed, in line 3, to leave out from "The UK" to end of paragraph, and add "The UK contributes more to Europol than any other Member State and other EU countries will want to maintain this effective UK support. We recommend therefore that the UK remain opted out of Europol, but adopt the same relationship with it that the UK enjoys with Frontex, so as to ensure effective police co-operation with EU countries without surrendering power to the EU."—(*Mark Reckless.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 2	Noes, 5
Mr James Clappison	Michael Ellis
Mark Reckless	Lorraine Fullbrook
	Dr Julian Huppert
	Steve McCabe
	Mr David Winnick

Amendment accordingly negatived.

Paragraph agreed to.

Paragraphs 50 to 87 read and agreed to.

*Resolved*, That the Report, as amended, be the Ninth 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 (in addition to that ordered to be reported for publishing on 8, 15 and 23 October 2013).

[Adjourned till Wednesday 30 October at 2.30 pm

## Witnesses

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Seventh Report	Olympics Security	HC 531
Eighth Report	The work of the UK Border Agency (April–June 2012)	HC 603
Ninth Report	Drugs: Breaking the Cycle	HC 184-I
Tenth Report	Powers to investigate the Hillsborough disaster: interim Report on the Independent Police Complaints Commission	HC 793
Eleventh Report	Independent Police Complaints Commission	HC 494
Twelfth Report	The draft Anti-social Behaviour Bill: pre-legislative scrutiny	HC 836
Thirteenth Report	Undercover Policing: Interim Report	HC 837
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First Report	Immigration Cap	HC 361
Second Report	Policing: Police and Crime Commissioners	HC 511
Third Report	Firearms Control	HC 447
Fourth Report	The work of the UK Border Agency	HC 587



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Sixth Report	Police Finances	HC 695
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Eighth Report	Forced marriage	HC 880
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Twelfth Report	Home Office – Work of the Permanent Secretary	HC 928
Thirteenth Report	Unauthorised tapping into or hacking of mobile communications	HC 907
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Eighteenth Report	Rules governing enforced removals from the UK	HC 563
Nineteenth Report	Roots of violent radicalisation	HC 1446
Twentieth Report	Extradition	HC 644
Twenty-first Report	Work of the UK Border Agency (August-Dec 2011)	HC 1722

# Oral evidence

## Taken before the Home Affairs Committee

on Tuesday 3 September 2013

Members present:

Keith Vaz (Chair)

Nicola Blackwood  
Mr James Clappison  
Michael Ellis  
Dr Julian Huppert

Steve McCabe  
Mark Reckless  
Chris Ruane  
Mr David Winnick

### Examination of Witnesses

*Witnesses:* **Sir Hugh Orde**, President, ACPO, and **Commander Allan Gibson**, ACPO, gave evidence.

**Q1 Chair:** This is the first session of the Committee in our inquiry into the list of opt-in and opt-out measures for the Justice and Home Affairs agenda of the European Union. As the Committee will know, we have undertaken to the House to produce a report on this by 30 October. Sir Hugh Orde, the President of ACPO, and Commander Allan Gibson, the ACPO lead on extradition and mutual legal assistance, are here to assist the Committee. Thank you, gentlemen, for coming today.

Could I start with you, Commander Gibson? In ACPO's evidence to the House of Lords Joint Committee on the opt-out on 6 February you said that by coming out of these measures the United Kingdom would become a safe haven for Europe's criminals. What did you mean by that?

**Commander Gibson:** I meant it would be the effect of us having less effective measures to fight serious organised crime. As we are already an attractive location, we find in London—where I police—that on average 28% of those we arrest every year are foreign nationals and half of those are from the EU, so 14%. That is a significant number of people. That is with powers available to us today.

We are finding people are fleeing justice into the United Kingdom. By simple logic, if you take away some of the most important powers we have available to us—I am talking about exchange of information, the European arrest warrant, joint investigation teams and so forth—it will become a better place to flee to to avoid justice.

**Q2 Chair:** So looking at the numbers for the moment, you said that 13 European Directives were vital that we opt back into and you said another 16 were very important or important, so that means a total of 29?

**Commander Gibson:** That is correct, yes.

**Q3 Chair:** Is that your shopping list? Would you be happy if it was just 29 or did you expect it to be more, because the Government has announced 35 of course?

**Commander Gibson:** Yes, we took a pragmatic approach; we have prioritised and were very selective in what we put into our list as vital. Some of those are measures that come together, for instance Europol,

we put forward together but the important thing is membership of Europol.

On the desirable list we were again very pragmatic and weren't trying to overegg the pudding by saying these things are important but not critical.

**Q4 Chair:** So that is your minimum list? Your 29 is the minimum you wanted? The Government has given you 35.

**Commander Gibson:** No, the vital ones are the minimum that we want.

**Chair:** The minimum?

**Commander Gibson:** Yes.

**Q5 Chair:** So you are very happy with what has been recommended? You can carry on your fight against international crime by just looking into—

**Commander Gibson:** By and large we feel that we have been listened to and they take the measures that we recommended as a group of 29. The most important ones are in there and the things we said were the most important for the United Kingdom are in that list.

**Q6 Chair:** Are you concerned that we are not opting into the Prüm Council decisions, because those seem to me to be quite important?

**Commander Gibson:** Prüm wasn't one of our vital ones. Prüm is some use but there are issues around Prüm and when we spoke to our counterterrorism specialists they said they were not vital on a day-to-day basis. We had not made the progress and we had not implemented many of those measures in the way that we have with things like the European arrest warrant.

**Q7 Chair:** But it does mean that we can't follow reciprocal arrangements to search the databases of European partners, does it not? That means DNA profiles, vehicle registration data and fingerprints. If you are not in Prüm you can't get access to any of that.

**Commander Gibson:** Underneath that is Europol membership, which is even more important. Full membership of Europol allows you to search their databases directly.

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**Q8 Mark Reckless:** Mr Gibson, you said that we would be a safe haven for criminals if we were to opt out of these EU measures, and you referred to 14% from the EU and 28%, I think, of these potential criminals who are foreign nationals. You imply that what you are stating is a logical deduction, but is it not also logically possible that we could deal with this situation by opting out of the EU and, indeed, the ECHR so we can simply deport these people?

**Commander Gibson:** We have to be able to arrest them and return them to the courts that want to deal with them. The alternatives under the 1957 Convention, first, can you return to them easily? Based on my research, my judgment is we couldn't because of the way the EAW has been implemented in different jurisdictions across Europe, so we simply can't return to the 1957 operating regime as easily as that. Secondly, many of the people that come to this country are committing offences here. We are finding that they continue to offend here; they continue to present a risk to the British public. Between 93% and 96% of the people being moved out of this country under European arrest warrants are foreign nationals. So we need to bear that in mind. These people are here preying on our public.

**Q9 Mark Reckless:** But why can't we simply opt out of the EU, opt out of the ECHR and get rid of these people?

**Mr Winnick:** Stop the world.

**Mark Reckless:** As the majority of our constituents would wish.

**Commander Gibson:** Because the alternatives are far less effective.

**Q10 Mr Winnick:** So, gentlemen, if you had your way and it is for the Government to decide or Parliament to decide on this issue, insofar as you had your own policies accepted, you would like the European arrest warrant to stay as it is, am I right?

**Sir Hugh Orde:** We absolutely see the European arrest warrant at the top of our list, as we said in our evidence to the House of Lords. We do recognise, of course, there are some issues that are rightly of public concern around proportionality and certainly around people being held in custody for long periods of time in other jurisdictions awaiting trial and then sometimes being acquitted. There are a number of high profile cases in both those categories. Ideally we would see the solution to proportionality being one that was being applied EU-wide. I think pragmatically we would see—and would strongly support—a Government initiative to have a proportionality clause applied here so we are not spending a lot of time arresting people who, frankly, when they go back to their jurisdiction will not be receiving substantial sentences. There is a cost to the purse in so doing. So that is how we would see it. In broad terms, we would see the benefits of staying in as vastly outweighing the small number of individual cases, important though they are.

**Q11 Mr Winnick:** So you would not consider it in any way a priority, despite the shortcomings that you have mentioned and that obviously have been well

aired on the Floor of the House of Commons, for the European arrest warrant to be changed?

**Sir Hugh Orde:** That would be a matter for Government. We see the need to have that facility available to arrest people, put them in front of the courts and remove them to the country where they are fleeing from as quickly as we can because—as my colleague rightly identified—a burglar from France will probably be burgling communities in this country if he is wanted over there.

**Q12 Mr Winnick:** On average it takes, I understand, approximately three months to extradite someone under the European arrest warrant. That is the position, is it?

**Sir Hugh Orde:** That is it, indeed.

**Q13 Mr Winnick:** A part 2 extradition—that is, an extradition to non-EU country—takes approximately 10 months.

**Sir Hugh Orde:** Indeed.

**Mr Winnick:** So clearly there is an advantage as far as European arrest warrants are concerned.

**Sir Hugh Orde:** Yes, and it is a common system that cuts the cost of bureaucracy substantially and that is also important.

**Q14 Mr Winnick:** Let me put this point to you. Much has been made by the Home Secretary and others, valid or otherwise, that whatever advantages there may be in dealing with criminality through the European Arrest Warrant there are relatively minor cases that become subject, which otherwise would not be dealt with in the same way.

**Sir Hugh Orde:** Are you talking about less serious offences that are subject to arrest?

**Mr Winnick:** Yes.

**Sir Hugh Orde:** Yes, indeed, and there are many cases that have been well aired, the famous Polish wheelbarrow thief springs instantly to mind. Those are cases where we say proportionality calls would deal with that. Of course the Governments are looking to sign up to the information system stuff, which we do see—I think jointly—as vital. Therefore Border Agency staff may very quickly under SIS II—the Schengen Information System II network—pick these people up, but it could be within the scope of an agreement on proportionality to advise the requesting country that this person is in the UK jurisdiction but we do not intend to arrest because it is a very minor offence.

**Q15 Mr Winnick:** Sir Hugh, final question, do you consider the European arrest warrant to be an effective weapon against criminality with all its difficulties and faults and weaknesses? But overall, has it been—I will put it in the past tense if you like—an effective weapon against criminality?

**Sir Hugh Orde:** Yes, the leadership of the service would see it as an essential weapon.

**Q16 Michael Ellis:** The Home Secretary is effectively supporting your position and you are supporting hers in as much as she wants to continue the European arrest warrant but make some remedial

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changes to those aspects of it that were clearly dysfunctional. There were some—and there still are until these changes take place—dysfunctional aspects to the European arrest warrant, are there not? For example, I would like to pinpoint three particular areas of the European arrest warrant that have brought considerable criticism on its operation. One is proportionality. The whole issue that someone can be extradited for the theft of a wheelbarrow from Poland is entirely disproportionate to the gravamen of the alleged offence. It is disproportionate in costs, it is disproportionate in penalty and it brings the system into disrepute, would you agree with that?

**Sir Hugh Orde:** Yes, I would agree but of course at the other end of the spectrum there are extremely serious criminals who are brought under control by the same—

**Michael Ellis:** Of course.

**Sir Hugh Orde:** So your point on proportionality is extremely well made and we would agree with you.

**Q17 Michael Ellis:** Good. So you agree with me on proportionality. Where the Home Secretary has indicated that she would make amendments or cause the situation to differ so that this aspect, this problem would no longer subsist, you agree with that?

**Sir Hugh Orde:** Yes.

**Q18 Michael Ellis:** The other point is—which has been a bone of contention—that at the moment with the European arrest warrant extraditions can take place before the country requesting extradition has even decided to charge an individual. That is my understanding. Commander Gibson, is that right?

**Commander Gibson:** We do not use the warrant that way; we only use the warrant for British requests when we are prosecution ready.

**Q19 Michael Ellis:** When you are prosecution ready? Is that the same as—

**Commander Gibson:** When we are ready to charge.

**Q20 Michael Ellis:** Have there been people extradited before the requesting country has made a decision about whether to charge or not?

**Commander Gibson:** Different systems operate in different ways.

**Q21 Michael Ellis:** I understand one of the mooted changes will be so that cannot happen any more. Presumably from what you say, Commander, you would be happy with that?

**Commander Gibson:** This is a matter for Government. Our prize is to retain the European arrest warrant. As to the details of how it operates we are content to—

**Q22 Michael Ellis:** You are content. What about the issue of bail pending proceedings? Do you have any views on that? Please correct me if I am wrong, but is it the case that people can apply for bail now pending the proceedings or can they not?

**Commander Gibson:** There is only one court in country that deals with this, Westminster Court. The circumstances depend on the individual cases.

Leading towards this is the European supervision order, which the UK has signed up to but has not yet implemented—it is one of the measures for us to opt back into. We think it is a good counterbalance to the European arrest warrant because it provides for people to come back to their country to have bail supervision while they are awaiting trial in a foreign jurisdiction.

**Q23 Michael Ellis:** So in other words, with these mooted changes and improvements, those aspects of the European arrest warrant that are dysfunctional or have been dysfunctional, if the mischief that effectively concerns them now could be corrected you will still have the European arrest warrant, you will still be able to use it, it will still be the precious tool that you need but it will be improved?

**Commander Gibson:** Yes.

**Q24 Nicola Blackwood:** I just wanted to pick up on that point about the European supervision order. I think in her oral statement on 9 July the Home Secretary stated her intention to implement that supervision order. I just wondered what discussions you might have had with the Home Office about how that might work in practice because obviously while having the European arrest warrant lightens your load, having the European supervision order might add a little bit of weight to your load.

**Sir Hugh Orde:** If it is part of the quid pro quo, as Mr Ellis has identified, of keeping the European arrest warrant I am sure it is manageable. I personally have not had any detailed conversation: I don't know if you have, Allan. Of course the UK is not the only country that is yet to implement this system, but we would strongly support it, and I do think it goes some way to balancing this issue of people spending a long time in custody in foreign places awaiting trial when they could be effectively managed here. We are used to managing people on bail so it wouldn't be a new bureaucratic system. I am sure we could bolt this on to the existing system for people who are on bail and subject to conditions.

**Nicola Blackwood:** Okay, thank you very much.

**Q25 Chris Ruane:** I was fascinated by the case of the famous Polish wheelbarrow thief.

**Sir Hugh Orde:** I understand you are visiting Poland shortly, Chairman.

**Chris Ruane:** I would advise you not to take a wheelbarrow. You gave us an example of a request from another country to the UK for the arrest of a wheelbarrow thief as disproportionate. I think I would agree with that. Do we have any records of the number of disproportionate requests from countries across the EU, across the world, and have any UK police forces had their requests for British criminals refused by foreign police forces because it has been disproportionate?

**Commander Gibson:** Not for that reason, no. We don't have—

**Chris Ruane:** Sorry, not for what reason?

**Commander Gibson:** If the warrant is not valid then it might be sent back but we don't apply for warrant in trivial cases.

**Q26 Chris Ruane:** Have there been any refusals?

**Commander Gibson:** Not for trivial cases.

**Chris Ruane:** Who judges the triviality?

**Commander Gibson:** At the moment some countries have an in-country test, for instance. What we are doing in the United Kingdom seems to be practised in other countries, that is one of the reasons why the Government looked at it.

**Q27 Chris Ruane:** So we have never made a trivial request?

**Commander Gibson:** We don't make trivial requests. We don't do it.

**Q28 Chair:** You are thinking of the German model?

**Commander Gibson:** Yes, I am.

**Chair:** We want to base our legislation on the German model.

**Commander Gibson:** Precisely.

**Chair:** Because at the moment there is no forum bar, so to speak.

**Commander Gibson:** No.

**Chair:** If it goes before a judge here it is just issued?

**Commander Gibson:** Yes, exactly.

**Q29 Chair:** So the four suggestions made by the Home Secretary are going to be put in four different pieces of legislation. Is there a concern that what has been proposed will be complicated? It is not one piece of legislation that you can go to, it is four different pieces of legislation that will need to be amended.

**Commander Gibson:** I am not familiar with the detail of how that is being done. It does sound complicated, but what we want to keep is the European arrest warrant. If there is a price to be paid, we may have to pay it.

**Q30 Chair:** You will pay any price, bear any burden in order to ensure—

**Commander Gibson:** Within reason, Chair.

**Q31 Dr Huppert:** If we can move on from the European arrest warrant. I think the Home Secretary has at last accepted the case to Europol. Firstly, could you just outline your perspective on the consequences if the UK were to leave Europol and try to establish some sort of alternative arrangement?

**Sir Hugh Orde:** In broad terms—I am sure Allan will be happy to fill in the detail, Dr Huppert—it is the essential place through which information is exchanged. It is one of those measures that by membership gives you the right of access, which we see as critical. Indeed the United Kingdom, and SOCA in particular, are one of the most substantial users of that mechanism so we would see it as vital, which is why we would certainly raise—or we will be raising—a slight concern that while there is, without question, a desire to join Europol, four measures that we saw on our list as essential are not listed in the Government's list, which are all in essence supporting the basic principle. So, yes, my worry would be without those other bits we may not be full players at the table, and that would cause a real concern with my members.

**Q32 Dr Huppert:** That was going to be the next thing, and I will let Commander Gibson comment as well in a second, but on that particular issue about the missing ones, can you see any good reason not to opt in to all of those? Would it not make sense to be in Europol or out of Europol rather than half in Europol?

**Sir Hugh Orde:** Our professional judgment is that it makes sense to be full members of both Europol and Eurojust. Of course, things like joint intelligence teams are a consequence of membership of these. It gives you a right and indeed funding in terms of joint inquiries, joint investigations. So we would see it as very important and I would worry that if we are not there because we have not signed up in totality there may be some impact—I don't know what it would be yet—on how quickly we could access information. At the moment our access is fast-time. There are other agencies, other countries do sit in on these organisations but they are sort of second tier. So while America may be there it does not have the same rights, quite properly, that full members have.

**Commander Gibson:** I think the importance of fast-time immediate access to criminal intelligence when dealing with the crime problems we have today cannot be underestimated. I am very concerned about associate membership, having to put formal requests in for checks to be undertaken rather than have your own staff do it in real time. I think that will lead to less effective kidnap investigations, drug trafficking investigations; major crime will suffer in consequence.

The other thing about our membership of Europol, we are leading players in Europol. We have provided some of the heads of Europol, the current head. We are the biggest provider of intelligence to the European intelligence system that underpins it. We are the second biggest user of that intelligence. That growth is exponential. We are, along with Spain, one of the major hubs around drug trafficking in Europe and so we have crime problems that demand modern tools to be able to tackle them. International collaboration, European collaboration is right at the heart of an effective response.

**Q33 Dr Huppert:** I hear a strong call from both of you for full Europol membership, including those other ones. Can I just ask a more general question? This whole astonishingly complex process of opting out and then opting back in to bits of it, bearing in mind those bits we are not opting back into are fairly irrelevant anyway, it has presumably taken up quite a lot of time and effort from the two of you, and presumably a number of other staff, as well as Home Office officials, lawyers and so forth. Do you reckon it has all been worth it? Would there be any disadvantages from your perspective if we were to decide just to stay in the whole thing?

**Sir Hugh Orde:** Technically no. We were consulted, quite properly, or asked for our view and, mindful of the Government's view of the relationship with Europe, we took it very seriously. What we looked at is what we saw as vital, what we saw as very important and, frankly, some things that made no difference at all because the world has moved on. So in terms of a good housekeeping exercise, Dr Huppert,

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it enabled us to focus our minds on what was absolutely crucial so Government was fully informed of our view of the essential bits that we really did need to keep citizens safe in this country and those that we did not. Of course it takes time, a lot of Commander Gibson's time far more than mine and the Metropolitan Police who contributed to this piece of work in particular. But we would see that as a very good investment. Looking at the list of 35, with a small number of differences around the margin, which I am sure could be negotiated around, we are in a place that we can say with confidence the public of this country are safe, notwithstanding the politics that flies—I am delighted to say—above my head.

Of course some of these third pillar measures are not a matter for the police. There are a lot of things that, quite rightly, the Ministry of Justice, Border Agency, SOCA and others would have a view on. I know they are giving evidence, Chairman, so you will be able to hear direct from them on those matters. We felt it would not be appropriate for police to give a view on things other than effective investigations.

**Q34 Dr Huppert:** So it has basically been an extensive housekeeping exercise and you have preserved the most important valuables while you were cleaning the house up?

**Sir Hugh Orde:** It has been a major piece of work. There is a benefit to that, I am now far more knowledgeable, I can tell you, on third pillar measures and, worryingly, first and second than I was before.

**Q35 Chair:** We were going to ask you to give your evidence in French but we are glad we did not.

**Sir Hugh Orde:** I am delighted for both you and me that you did not, Chairman.

**Q36 Steve McCabe:** Can I just ask, what practical arrangements have you made to make sure that we are not caught cold in the event of a major extradition request either to or from this country during the period that we have opted out and have not yet been able to opt back in?

**Commander Gibson:** I am not aware that we are going to have a gap. I understand this is going to be a seamless process.

**Chris Ruane:** We have heard that before.

**Q37 Steve McCabe:** Can I ask what you base that on?

**Commander Gibson:** I am only basing it on what I am advised. My contacts in the Home Office say that that is the way it would work. We do not anticipate having a gap. I come back to the fact if we have to resort to the 1957 convention on extradition we are not certain it will operate in the way it used to operate because of the jurisdiction difficulties that some countries have named the European arrest warrant in their statute, and if you are not part of the European Arrest Warrant it will not work for you.

**Q38 Steve McCabe:** I don't want to put words in your mouth but am I right to assume that the police are saying that they are relying on the assurances of Home Office officials that there will be no gap

between the opt-out and the opt back in as far as our ability to issue or receive extradition requests?

**Commander Gibson:** We do not understand how it would work and it is absolutely critical that we do. If there is going to be a gap, we would need to be fully involved and fully understand what the risks were.

**Q39 Chair:** But at the moment you do not have a definitive statement on this, you just have contacts. We all have contacts with the Home Office, but you would like a piece of paper that sets out very clearly that even though the Prime Minister has given his intention to opt-out he has not opted out as yet until Parliament has finished its scrutiny, but when that happens there is no gap, it is seamless?

**Commander Gibson:** That is my understanding of the way it should work and if it is contrary to that we are not aware of that.

**Q40 Chris Ruane:** Could you give us some practical examples of cases of the effective use of the European arrest warrant, for criminals that we want to bring back to this country and for criminals that have been requested to be sent back to other countries?

**Commander Gibson:** I am going to give you a case from when I was on call in London. In December last year, I was working in the serious and organised crime area—I am currently in professional standards—a gentleman called Jason McKay murdered his girlfriend by means of strangulation on 3 February last year. On 10 February last year he walked into the police HQ at Warsaw and said, "I've killed my wife". The SOCA liaison officer was despatched to police HQ in Warsaw.

**Mr Winnick:** That is the capital of Poland, not my borough.

**Commander Gibson:** Yes. Prima facie evidence of his admission was taken by the SOCA officer. On that basis we got the statement back to the United Kingdom, we obtained a European arrest warrant, one day later we had the warrant and we had it approved by the court. We took it back to Warsaw and he was extradited on 11 February and two weeks later on 23 February he was before a UK court.

**Q41 Chris Ruane:** So from beginning to end it was two weeks.

**Commander Gibson:** Two weeks.

**Chris Ruane:** So that is effective use.

**Commander Gibson:** Yes.

**Q42 Mr Clappison:** Would it have been impossible for that person to be extradited under the previous arrangements?

**Commander Gibson:** No, it wouldn't have been, but it would have been a long process. If he had been a Polish national, they would have not extradited him back to the United Kingdom.

**Q43 Mr Clappison:** What would have happened if he had done the same thing in Sydney?

**Commander Gibson:** It would be an extradition under part 2 of the Extradition Act and it would have been a much longer process. We are talking—

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**Q44 Mr Clappison:** If he had done the same thing in Toronto?

**Commander Gibson:** Same again.

**Mr Clappison:** New York?

**Commander Gibson:** Yes, these are part 2 countries.

**Q45 Mark Reckless:** With all these examples you are talking about extradition, whereas if it were not for the various EU and ECHR constraints on our operation were you as the police or the Home Secretary presented with evidence that someone was a threat to the interest of this country, we could otherwise simply deport them.

**Commander Gibson:** We are using that against foreign national offenders in London quite effectively, using every opportunity. If we can deport them, we will, but obviously with some of them we don't have the prima facie evidence that they have committed a crime. We would arrest them if we could.

**Q46 Mark Reckless:** But we have 28% of—I am not sure if arrests was the figure you were giving at an earlier stage in the process—foreign nationals. Surely one way of reducing crime would be to get rid of a lot of that 28% by deporting a lot of the people involved without these constraints?

**Commander Gibson:** There are more difficulties around EU states, of course.

**Mark Reckless:** Indeed, my point.

**Commander Gibson:** Indeed. But you can't deport EU nationals in the way that you are talking about.

**Q47 Mark Reckless:** Because of the EU Regulation. Whereas you are saying the logical deduction is we must be part of all these things or we can't do it. I am saying there is actually another logical possibility. Can I take you on to the point you made about UK and Spain, drug interception and being keen on access? The Committee visited Portugal and an organisation there called the Maritime Analysis Operation Centre, MAOC. We learnt it had been established as a bilateral or multilateral co-operation, particularly the UK-Spain relationship had been very important and the European Commission had very kindly provided some financing for that and it was working well, but then it was told it could only continue to have that financing if it was subsumed into Europol. So various other partners, such as the US, who were previously involved in that are now no longer involved and can only be observers, and it was intercepting dozens of ships a year with drugs and now barely any. What do you say to that?

**Commander Gibson:** I am saying that there are many instances of joint investigation teams dealing with drug trafficking that are highly effective. For the example you quote I could quote others that show the effectiveness of European co-operation.

**Q48 Mark Reckless:** But surely the requirement that it can only happen in Europol—similarly when we went to Turkey and Greece, we found effective co-operation on the border, but then because Turkey is not part of Europol there can't be any information exchange and there is no effective working.

**Commander Gibson:** Can I explain the difference? The difference with joint investigation teams is that you don't have to issue letters of request. If you want something done in that foreign jurisdiction you have teams brought together with officers from the jurisdictions themselves and so you have three or four countries working together. If you are having something done in that country you use an officer from that country, there are no letters of request needed and it is a very quick, immediate process, so you can get things done far more effectively.

**Q49 Mark Reckless:** Mr Gibson, you said the big prize for ACPO was staying in the European arrest warrant and the key issue was that senior officers should be at the top table. Is this not about the ego of top senior police officers rather than effective policing?

**Commander Gibson:** No, we have argued this on public safety right from day one.

**Sir Hugh Orde:** Chairman, as I said in my explanation, why we took this request so seriously was to look, mindful of the Government position or some of the parties' views on Europe, at what we saw as essential to keep citizens of this country safe. No more and no less. I can assure you it is absolutely nothing to do with the ego of chief officers, it is absolutely the fact how we keep citizens in this country safe and indeed citizens in other parts of Europe where we have an obligation to bring back to this country and lock up those who are fugitives from justice here.

**Q50 Mark Reckless:** So you are saying all of it is essential and without it you will not be able to keep us safe?

**Sir Hugh Orde:** As we said, if I can just remind you, when I started, Mr Reckless, that there were a number of measures, 12 in all, which we saw as vital.

**Commander Gibson:** Thirteen.

**Sir Hugh Orde:** Thirteen, I do apologise. We see 16 as very important and, if one benchmarks our list against the current Government's list, there is a huge area of agreement. As I have pointed out already, there are four issues around Europol, not the principle, but around some of the detail that I think will need to be worked through to make sure that we do have people contributing and, as my colleague describes, giving a huge amount of intelligence to fellow officers across Europe and vice versa. We need to make sure we are not excluded from that or we get some huge bureaucracy because we are not signed up to the detail. There are some others that don't feature on the Government list, which we do see for pragmatic reasons—and if it helps, Chairman, I will send you that list.

**Chair:** If you could.

**Sir Hugh Orde:** It broadly covers, for example, movement of controlled substances for evidence. At the moment we can move class A drugs from country A to country B without huge difficulty because there is an agreement. If we stepped out of that, there may be some difficulty in sharing evidence. Those issues are minor at one level, but important from a practical police point of view, which is why we put them in the

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“what we would like to have” option. You are right, they will not stop policing, they will not stop co-operation, they are just likely to make it far more bureaucratic and time-consuming and there is a common cause, I think, that more time spent on the streets protecting citizens here is time well spent not tied up in red tape.

**Chair:** Thank you, Sir Hugh. James Clappison.

**Mr Clappison:** I think my question has already been answered.

**Q51 Chair:** Can I just ask you, Commander Gibson, you talked about the number of foreign nationals who have been arrested, 35% of those arrested in London are foreign nationals and a third of them had convictions abroad? What was that figure you gave us?

**Commander Gibson:** 28%. The figures at the point in time taken was 28% in the Met in London and half of those were European nationals.

**Q52 Chair:** Yes, but I am giving you the figures for the numbers who have convictions abroad already, it is 35%. Do you have a better figure than that?

**Commander Gibson:** That is the figure I quoted in the paper rather than I gave in oral evidence.

**Q53 Chair:** No, that is fine. But of those 8% are already wanted in their own home countries?

**Commander Gibson:** We did a couple of pilots, one in Harrow in North London and, I think, one in east London where we did more detailed checks that we normally do on people coming into the custody block and that is what we found from the two pilots.

**Q54 Chair:** No, I understand that. But what that shows is that the system isn't working that well. The willingness is there, obviously you need these powers, but if we are finding that a third of the people who are arrested in London already have convictions abroad and 8%, even though it was a pilot in Harrow, have convictions in their home countries, and they are entering the country at the moment, it means that the system really isn't as robust as it should be.

**Commander Gibson:** That is why we need the SIS. SIS II will allow us to link up to police national computers and be able to do the checks at the point of entry into the United Kingdom. What was happening is that we didn't have access to the European equivalent of the police national computers in real time so people were being processed through our custody suites and not being checked. It would require a check through SOCA, so that is the reason why—

**Chair:** Sure, but you don't have that yet.

**Commander Gibson:** No, we don't have that and that is the reason—

**Q55 Chair:** At the moment it has cost £39 million and you still don't have access to it.

**Commander Gibson:** Late 2014 I think is the go live date for SIS II.

**Q56 Chair:** You are confident that will be met. The other point that you mentioned, the concern we have

had that there was an article in the *Telegraph* about this, about an increase in so-called easyJet crime. This is not casting aspersions on anyone who travels on easyJet because I am sure everyone in this room does at some stage, but people who arrive in the morning from Europe, commit their crimes and then before they are tracked they get back on the flight and they go back home. There is no way we can stop that: even if you opt in to all these arrangements that is still going to continue, isn't it? If you don't have passport checks on arrival.

**Commander Gibson:** I am not familiar with what has been referred to by that journalist.

**Chair:** No, but you do understand the scenario. The scenario is people can arrive from any part of the European Union, they can commit their crime in London, they can pop off down to Stansted, Luton or Heathrow and get back home without anyone doing anything about it because we don't have checks when people leave the country.

**Commander Gibson:** Leave the country, but we do have them when they come into the country.

**Chair:** Yes, but when they leave you don't know, do you?

**Commander Gibson:** No, I would agree with that. That is a matter perhaps for the UK Border Agency because I don't police people leaving the country.

**Q57 Chair:** No, but the point is even if you opted into all these arrangements, it still wouldn't mean you could stop criminals leaving the country?

**Sir Hugh Orde:** The point is, Chairman, it is not perfect. We would see these as very important in terms of citizens in this country. As I say, SIS II, I think, provides a huge benefit to the Border Agency and no doubt they will give you their evidence, but it does give us that instant fast-time access to prevent people coming in. Of course there are ways one can stop people from the EU coming into this country if they had serious convictions.

**Q58 Michael Ellis:** On that point, Sir Hugh, the Chairman asked you in his first question about this. There has been more than one case, there was a case in Northampton Crown Court recently, we are supposed to know from the country of origin if a person ought not to be permitted entry into the United Kingdom because their presence would not be conducive to the public good. Now, is that a system that is working as far as the other countries? I am hearing of cases of convicted criminals, who committed serious offences in their home countries but then have flown into this country, and their home countries have not told us that they have been released from a long prison sentence, perhaps for a serious offence, and then they have committed the same offence, or allegedly committed the same offence, in this country. So is there something there that we need to look at?

**Sir Hugh Orde:** Certainly SIS II will give us far more information than we currently have. The ACPO Criminal Records Office does a huge amount of work checking those who are arrested now, and that is a success story. About 5,000 checks per month are now carried out through that once they have been arrested.



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**Michael Ellis:** But once they have been arrested here they have already done something.

**Sir Hugh Orde:** But, of course, that does give us all the other information that is critical to keeping them locked up, because we now have the evidence that gives us the power to oppose bail and so on. But, no, the system is not perfect, you are absolutely right.

**Q59 Chair:** That deals with Mr Ellis' question. Of course the system is not perfect, nothing is perfect in the world, Sir Hugh, apart from ACPO, I am sure.

**Sir Hugh Orde:** Mr Reckless may have a view on that.

**Chair:** What Mr Ellis is asking is once Schengen II is up and running, if you have a serious criminal entering the UK you will know when they arrive? Will you? Because when Mr Miranda arrived from Berlin we knew he was coming, we could stop him under schedule 7 and we could interview him. So will we be able to know when people who are bad people enter the United Kingdom if we sign up to Schengen II?

**Commander Gibson:** It is an alert system so what it does is it tells you that someone has put something on the system to alert somebody about the movement of a vehicle, of a person, of stolen property. What it isn't—

**Chair:** Before arrival?

**Commander Gibson:** Yes, so if you try to enter the United Kingdom with a stolen passport or you are a person who is wanted, as you go through the checks will be done on you and you will be identified.

**Chair:** Excellent.

**Commander Gibson:** But what it doesn't do is to say that you may not be wanted but you may be a bad person and you can still get into the United Kingdom. We have had lots of cases where people who have served lengthy custodial sentences in other European nations have entered the United Kingdom. They are allowed to enter. There is no prohibition on them.

**Q60 Chair:** Yes, just the final points. We have the head of Europol giving evidence so we will see him shortly. Sir Hugh, I am sorry I did not congratulate you right at the start on your re-election unanimously, our favourite form of democracy. You were unanimously re-elected president of ACPO. Have you managed to get your meeting with the Home Secretary on the important issue of police and crime commissioners? For the record, I know that you feel you have been misquoted by this Committee in something you said to the BBC about PCCs. Do you want to just put that right for the record?

**Sir Hugh Orde:** The meeting with the Home Secretary is on Thursday.

**Chair:** Excellent.

**Sir Hugh Orde:** I and two of my vice presidents are seeing the Home Secretary on a number of issues, including police and crime commissioners, yes.

**Q61 Chair:** In terms of your views on PCCs at the moment, and ACPO's view, with so many of the chief constables—

**Sir Hugh Orde:** You will have to remind me which particular misquote you are talking about, Chairman.

**Chair:** I can't remember, but have you been misquoted several times by the BBC?

**Sir Hugh Orde:** For clarity, the view of ACPO has always been the same and entirely consistent on this point, which is that how we are held to account is a matter for Government and not the service. That is how a democratic police service operates. We are held to account by whatever method the Government of the day see is appropriate. That is what is happening. Frankly, across the country at the moment there are some interesting issues but in the routine of policing chief constables and police and crime commissioners are getting on with keeping the citizens safe.

**Q62 Chair:** Before Mr Ruane mentions South Wales, which I am sure he is, can I just ask one issue about serving officers going to Europol. You have both spoken very highly about Europol and, as I said, the Director is about to give evidence to us. Why is it that British officers have to resign their positions before they take up a role in Europol and therefore they then can't go back? Whereas other countries that I have visited in Europe—or you have—they are able to second people over there in order to do their job, they come back and then they resume their work. What is ACPO's view on that?

**Commander Gibson:** I am not sure of the accuracy of that statement, Chair, because I think the Metropolitan Police have a seconded officer in Europol.

**Chair:** So they are seconded, they do not have to resign? We will know in a minute.

**Commander Gibson:** It is not my area of expertise but I thought that was the case.

**Chair:** Sir Hugh?

**Sir Hugh Orde:** I have no idea. If you need clarity I will happily research it and get back to you, Chairman.

**Chair:** It is all right, we have the Director and he will tell us.

**Sir Hugh Orde:** I am sure he is far better informed than I am.

**Chair:** If you all don't know then it is an issue that we will certainly raise with him.

**Q63 Chris Ruane:** When I questioned the Secretary of State for Wales on the issue of accountability of Welsh PCCs or the lack of accountability, he said it was the Home Affairs Select Committee whose job it was to have this accountability. I don't think that was written in law but what is your understanding?

**Sir Hugh Orde:** I am very clear, police and crime commissioners hold the chief constable to account for the totality of policing, not just policing in its broadest sense. So the chief constable in Gwent will be held to account for whatever he or she does subject to the appointment in terms of policing, be it at a national or a local level. The police and crime commissioner is held to account by the police and crime panel. That is my understanding of the law and, of course, that is not a matter for us.

**Chris Ruane:** Not the Home Affairs Select Committee?

**Sir Hugh Orde:** I am unsighted on the Home Affairs Select Committee's particular role.

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**Q64 Chris Ruane:** Finally, do you think those panels are doing a good job in providing oversights on PCCs?

**Chair:** Not the 43 of them, just generally.

**Sir Hugh Orde:** It is not for me to comment on really. What we are clear on is that the chief constable is held to account by the police and crime commissioner and that is where our responsibility begins and ends, making sure that works. Of course, there are bound to be tensions within that relationship and so there should be. It should not be a cosy relationship. But by and large the chief constables are getting on keeping citizens safe and police and crime commissioners are getting on and holding them to account.

**Q65 Mark Reckless:** Sir Hugh, you seem today to have a self-denying ordinance on this issue of PCC accountability and whether you should comment. I am pleased you say it is a matter for Parliament to determine the accountability. But were you not quoted as saying that you were very unhappy with what was happening with all these PCCs sacking all these chief constables and the panel not intervening—

**Sir Hugh Orde:** I was misquoted.

**Mark Reckless:**—and you were going to deal with it by seeing the Home Secretary? Is that all wrong and you were misquoted?

**Sir Hugh Orde:** No, I raised a legitimate concern that as currently structured there is no process of arbitration in the current legislation. I think it is quite

legitimate to raise that issue with the Home Secretary, which we will do on Thursday. I am certainly not going to pre-empt that conversation.

**Q66 Mark Reckless:** But that is because Parliament determined that the PCCs should have the power to dismiss chief constables.

**Sir Hugh Orde:** It is wider than that. Of course, in reality the complexity of the relationship is around what is operational and what is non-operational. There is a grey area where many of those debates take place. It just seems to me sensible that on occasions where there is an agreement to disagree that a third view may be quite helpful, firstly in maintaining confidence in both institutions and, secondly, in allowing some sort of flux to allow these things to take place. It is entirely an area where I think we have the right to raise that issue.

**Q67 Mark Reckless:** Which is a view contrary to what Parliament has determined should be the mechanism of accountability?

**Sir Hugh Orde:** Parliament has spoken on a number of things and that is where we are.

**Chair:** Anyway, the Committee will be looking at this whole area later this year. I am sure you will be giving evidence to us on that occasion when we review PCCs 12 months on. But for the purposes of today, Commander Gibson, Sir Hugh, thank you very much for coming in to give evidence and we look forward to receiving that list if you could send it to us.

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### Examination of Witness

*Witness:* **Rob Wainwright**, Director, Europol, gave evidence.

**Q68 Chair:** Mr Wainwright, thank you very much for coming to give evidence to us again on this issue. Can I begin by congratulating you on behalf of the whole Committee on your reappointment as Director? I think it is until 2017. Is it difficult being a British head of an agency, an organisation like Europol at a time when the Government is reviewing its relationship as far as the Justice and Home Affairs agenda is concerned, especially as Europol is central to some of the deliberations that we are having at the moment?

**Rob Wainwright:** I have noticed in the general environment some murmurings, if I can describe it in that way, among the law enforcement community around Europe about this because, frankly, they find it a very unusual position to be in. The UK has led by example the development of the international police co-operation environment in Europe for so many years. They are used to the UK being the team captain, if you like, and scoring most of the goals. The idea, therefore, that the captain would substitute himself from the field of play is an oddity, I think, in the broader police community.

Having said that, the UK's reputation is high enough and for the moment that reputation is enough for there not to be any significant change, and that includes in relation to how I feel about it and how I am still perceived by my stakeholders.

**Q69 Chair:** The Government says that they will opt in to Europol 2 but will not opt in to Europol at the moment. Does that mean that you and the British Government cannot influence the debate as far as the future direction of Europol is concerned?

**Rob Wainwright:** No, it doesn't mean that. My interpretation of the Government's position is a bit more positive than that in the sense that they have declared firmly that they wish to remain part of the current legislative framework for Europol. That is an important point to make. As for the future, the Europol Regulation that will come into force within the next one to two years, the Government has expressed an intention to opt in once the final text of that agreement has been finalised, providing two issues in particular meet with their satisfaction. So to a certain extent I think it is still a positive expression, and during the negotiation of that Regulation I still would expect the UK to be influential in the debate.

**Q70 Chair:** But it is not the same as being signed up and there in order to influence the strategy, is it?

**Rob Wainwright:** No, it is not and it is a fair point to make because, as I said, the UK risks, I think, diminishing its well won influence in this area by choosing not to, in this particular case, lead the debate. I think it might make a difference therefore to how some aspects of the Regulation are finalised.

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**Q71 Steve McCabe:** Mr Wainwright, as I understand it there are eight Europol-related measures that the Government plans to opt out of and the intention at the moment is only to opt back in to the decision which establishes the body. Do you foresee that there could be any problems with that? Is there any prospect that there will be an insistence that the Government has to opt in to all of the Europol measures?

**Rob Wainwright:** I think the UK Government has obviously come to some legal opinion on that, that it doesn't need to and that it will be covered by the Europol Regulation. I tend to agree with that legal judgment, and I expect therefore that the Europol Regulation will indeed be designed to replace all of those measures. Having said that, I think the key risk is a risk of a gap in terms of the transitional measures if the opt-out in particular takes effect before the new Regulation enters into force. I don't think it is likely the new Regulation will enter into force before December 2014 so there is likely to be a gap and, if there are not sufficient transitional measures in the meantime, then those accompanying eight measures would leave a gap, frankly, in terms of UK capability to carry out its work against international organised crime and terrorism. So I think it is particularly important for the UK Government Home Office officials, supported of course by Commission and Council officials, that we have the right legal understanding of this and that we make sure that we cover that gap through transitional measures.

**Q72 Steve McCabe:** How long do you think this gap could be and what have you been able to do to indicate to the Home Office your concerns about this possibility?

**Rob Wainwright:** I am in almost regular contact with Home Office officials, I have also discussed the wider issue with the Home Secretary on two or three occasions so I think they do understand this and I will continue to help them as much as possible to try and cover this gap. I think it is principally an issue, however, between the UK and other member states and the Commission. But I will certainly make sure that I help them as much as possible.

How long? Difficult to say, the European Parliament as part of the legislative procedure is trying to speed things up right now to get the Regulation on the books as soon as possible. As I said, I don't think it will come in time by the end of 2014. We could be looking at a gap of one year, maybe two years, but I couldn't predict with any great certainty.

**Q73 Steve McCabe:** Two years where Britain might not be able to play its full role in the team, to use your analogy earlier, to deal with issues like major crime and terrorism?

**Rob Wainwright:** Let us be clear about what the issue is here. Even if transitional measures are finalised and even if the UK decides maybe to have an alternative arrangement in the future with Europol by not opting into the Regulation, then Europol's participation and capability to fight organised crime will anyway be diminished for more than two years. This will be for the foreseeable future. So I think this is a very important issue in terms of how the UK is currently

involved in fighting organised crime especially, and what is at stake here is a significant part of that capability and the prospect that that capability will be diminished if it does not choose to opt-in to the new Regulation or if, as you say, there are no sufficient transitional measures also put in place.

**Steve McCabe:** Thank you.

**Q74 Chair:** Can you just clear up this point I put to Sir Hugh Orde and Commander Gibson about officers from the UK having to resign from the police force here in order to take up their positions in Europol? Is that correct?

**Rob Wainwright:** It is correct and it is unclear to me, Chairman, what the reasons are for that. I have never fully understood whether or not they are legal issues connected with the provisions of the police pension system or whether or not it is a matter of policy in the cases of certain chief constables. There have been exceptions over the years but they are few and far between. To give you an illustration, of the 60 or 70 British nationals that are currently working at Europol, albeit not all of them police officers, we have just one serving police officer that is working on a seconded basis to Europol. Many, many other police officers have been required to resign to take up their position in Europol, for that matter that includes me as the Director. I was required to resign from the Serious Organised Crime Agency before I took up that position. It is a position that is almost unique in Europe. There are one or two other countries that have a similar policy but this is the worst example of it. I think as your question to Sir Hugh earlier intimated, it is not necessarily in the best interests of the UK police community.

**Q75 Chair:** Indeed I think that Commander Gibson and Sir Hugh did not realise that was the case, to be fair to them. Clearly it is important to allow our officers to be able to serve in international organisations and then come back again. Presumably as far as Interpol is concerned they can do that, is that right, or do they have give up their positions there?

**Rob Wainwright:** I think it is a more common practice in Interpol. I think you are right, what is behind this? It is in the interests of the police service, in particular, for their officers to have the widest possible experience, particularly in these modern times where fighting international serious crime is very much about the international environment and getting this experience. At Europol we deliberately follow a policy of what we call rotation where we rotate our officers from all countries very regularly to make sure therefore that we allow the member states to accumulate the maximum amount of experience among their police staff.

**Q76 Chris Ruane:** Continuing on from what my colleague Steve McCabe was asking, the Government has said that it will not opt in to the new Regulation on Europol if it gives the body powers to direct national law enforcement agencies to initiate investigations or share data that conflicts with national security. Could the UK continue to participate in Europol if it did not opt into the Regulation?

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**Rob Wainwright:** In terms of the first part of that question, frankly I don't think it is likely. I don't expect either of these powers as they are described to feature in the final text, certainly not if you consider how the early Council discussions are going, certainly not in terms of the way in which they have been expressed by the UK Government in terms of their fears. I go further than that—I don't think it is also a reasonable interpretation that even the original text can really be seen in that light. Let us understand the intention here. The intention is not to create a new Europol with new executive powers, with any powers to direct any member states to do anything.

Now, clearly the text has been interpreted in that way by the UK Government. They have some sympathy, I have found, with other member states and as a result I expect the final text to change. Both of these conditions, therefore, are likely to satisfy the UK Government: we shall see. If they don't, as to the second part of your question, then we are in uncharted territory. We are in the position when we would have a country that is still a member state of the European Union but choosing not to be a full member of Europol and there are no other parallels for that. It would require a new political agreement in Council to determine the limits and rights that the UK would be permitted to have in that case by being somehow a half member of Europol.

Many mitigating measures would be available that would certainly compensate the UK from no longer being a full member, but without a doubt it would lead to a reduced role and without a doubt it would lead to arrangements that would be less effective and more costly for the UK in its fight against crime and terrorism.

**Q77 Mr Winnick:** As an enthusiast obviously of the European arrest warrant, do you think the proposed changes, which obviously you are familiar with, Mr Wainwright, will weaken the fight against criminality including terrorism?

**Rob Wainwright:** The changes proposed by the Home Secretary, do you mean?

**Mr Winnick:** Yes.

**Rob Wainwright:** I think the weaknesses of the European arrest warrant are well known, they are as well known as the many strengths that I am an advocate of.

**Mr Winnick:** Shared by you?

**Rob Wainwright:** Shared by me very much. I am an advocate of the European arrest warrant, it has transformed the nature of the international police co-operation for the last ten years but at the same time there are parts of it, particularly in regard to proportionality, that impair the full effectiveness of that warrant. I think that those weaknesses are shared in many other parts of Europe.

Therefore within that context the proposals made by the Home Secretary are sensible and particularly so as they aim at trying to provide some solutions to these problems at a national level. I would certainly caution against any attempt to try and solve these problems at the European level. If you open up the legislative box in the European Parliament and with other Council member states there are 101 other ideas waiting in the

wings to influence how the new arrest warrant might be changed and we might never get a second version of the warrant on to the statute book. So it is a sensible approach proposed by the Home Secretary.

Of course, I would also support her view, the Government's primary view in this case, that for the moment the UK must remain a member of the European arrest warrant.

**Q78 Mr Winnick:** Why?

**Rob Wainwright:** Because it provides a particular capability that is unique. In particular in allowing UK forces to track down British criminals overseas but principally because it provides for the quickest, cheapest form of fast-tracking extradition from the streets of the UK of some very serious criminals—4,000 in the last four years—that would otherwise have walked the streets of the UK as serious criminal suspects at least for a lot longer, if not for the foreseeable future. The police community has found, therefore, for the first time that we have a modern, swift, cheap way of dealing with a serious criminal problem in the United Kingdom. That is a view I think is commonly shared by other countries in Europe.

**Q79 Mr Winnick:** If Britain was no longer a member of the EU, it would obviously not be involved with Europol, with the arrangements Europol has made?

**Rob Wainwright:** If it ceased to become a member of the EU, then I assume the UK would seek to conclude a co-operation agreement with Europol in the same way as we currently have with the likes of Norway and Switzerland.

**Q80 Mr Winnick:** Would that be as effective?

**Rob Wainwright:** No.

**Q81 Michael Ellis:** Mr Wainwright, can I just look at the European arrest warrant and its defects? Were you in the room when I raised these matters with the police officers that were in here?

**Rob Wainwright:** I do not think so, no, sorry.

**Q82 Michael Ellis:** Proportionality is a serious defect, is it not, at the moment in the European arrest warrant as it currently stands? So the fact that in our other extradition arrangements there is usually some proviso that extradition would not be contemplated where the sentence would reasonably be expected to be less than 12 months' imprisonment, that does not apply in the current European arrest warrant arrangements so that, in theory, even if one was going to receive a £50 fine one could be extradited for it. That is an absurd situation, is it not?

**Rob Wainwright:** As I said earlier, I think there is a serious issue in regard to proportionality of the arrest warrant.

**Q83 Michael Ellis:** You do not want to go as far as to say it is absurd but you—

**Rob Wainwright:** Not least because I am not part of the legislative process that was responsible for that.

**Q84 Michael Ellis:** You agree that it is a controversial situation?

**Rob Wainwright:** Absolutely, yes.

**Q85 Michael Ellis:** Do you think, therefore, that the Home Secretary's moves to bring some rationality into the proportionality issue are sensible?

**Rob Wainwright:** Yes.

**Q86 Michael Ellis:** The issue of extradition before charge: is it the case, and please correct me if I am wrong, that under the current arrangements a person can be extradited before the prosecuting authorities in the requesting country have decided whether to charge the person or not?

**Rob Wainwright:** I am afraid I do not know.

**Michael Ellis:** You do not know.

**Rob Wainwright:** I should clarify that Europol is not involved on a day-to-day basis with the functioning of the arrest warrant.

**Michael Ellis:** No.

**Rob Wainwright:** So when I speak I speak with my wider experience of the European police community and my previous experience of being a member of the Serious Organised Crime Agency in the UK where I was involved in the day-to-day handling of the arrest warrant. But in terms of the way in which it operates, and particularly in terms of some of the legal provisions, then I should hesitate to give you a clearer answer because I might—

**Q87 Michael Ellis:** Right. I will not pursue that as it is not your area. Effectively, the decisions that the Home Secretary has announced, you are supporting those? You are supportive of her? You have described them as sensible and you are supporting those measures?

**Rob Wainwright:** In terms of the arrest warrant, yes. In terms of the broader decision on the opt-out I might have a different view.

**Q88 Michael Ellis:** Let us look at the opt-in package and the transitional arrangements, if I may. Are there any measures that you are aware of that Her Majesty's Government is not proposing to opt back into that you think it should?

**Rob Wainwright:** I think there are some wider points here, which is that if you are going to opt in or opt out on a selective basis, then the Government knows, of course, that you take some general risks, not least that you allow criminals to exploit what suddenly become arbitrary differences between different countries in Europe. The risk that the UK becomes more attractive to criminals who might see it as a safe haven applies, at least in theory. There is also the risk that I intimated earlier, which is the UK's standing before the international police community and with other member states. The UK Government, for example, as part of this decision is deciding to opt out of the framework decision on terrorism for some very good technical reasons that were in this case that we have implemented the necessary provisions in domestic law. Nonetheless, it is an odd piece of symbolism on the part of the United Kingdom that it decides to withdraw itself from an international political agreement and measure on terrorism, and so I think there are some wider issues that the Government

should be aware of. Having said that, if for political reasons a decision is taken to define a list, a more selective list, then the 35 certainly are, I think, in my view the most important 35. There are one or two others that I might quibble with, but I think the list looks—

**Q89 Michael Ellis:** The thrust of your concerns would be met by the 35 opt-ins that the Home Office have referred to?

**Rob Wainwright:** Let me put it this way. I think that the greatest value of the whole package of 135 measures, the greatest value expressed in terms of UK police benefits, are mostly served by those 35.

**Q90 Michael Ellis:** What are the transitional arrangements? Do you think that there are any risks involved about the transitional arrangements if there is a failure to agree for the opt-in? Are there going to be any gaps between the changing of the arrangements that will create difficulties?

**Rob Wainwright:** As I said, in the case of Europol there will be a gap, according to my expectations, because the new Europol Regulation will not be ready in time. As for the wider packages, similar risks apply, so this is a very important part of the process that the UK Government makes sure that the transitional arrangements are in place and agreed in time with the European Commission. As I understand it, the UK Government officials are well aware of that and are working on it with some priority.

**Q91 Nicola Blackwood:** I just wanted to pick you up on a couple of comments that you made. You mentioned the fact that there are theoretical risks to not opting into the whole package if some states have some opt-ins that are different from other states. Surely it is your job and the job of the ACPO representatives who we just saw to give advice as to what the practical risks are, not the theoretical risks. Now, ACPO were very clear that their preferences are to opt back into the European arrest warrant and the information sharing opt-ins, and so we know exactly what they think their practical priorities are. I am not quite so sure what your practical priorities are. You have said that the 35 are a good start but you want all of them. Do you think that it is the information sharing and the European arrest warrant as well or would you have other practical preferences?

**Rob Wainwright:** No, I agree with ACPO's view and I have given similar evidence to other inquiries in the House of Lords, for example, and given the same consistent view before UK Ministers whom I have met, including the Home Secretary in this case. I would agree that information sharing is probably the most important and if you put that in the context of Europol we see that the UK has double the amount of casework that it is putting through Europol's information exchange channels over the last two years almost. It shows, therefore, that the appetite and the requirement among the UK police community to share information, co-ordinate international operations across Europe, is increasing quite significantly and that is creating a greater dependency on some of these police co-operation measures in Europe that the UK

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police community have. But all of those and the most significant of those are covered in the 35 measures that the Government have announced.

**Q92 Nicola Blackwood:** Yes. Given that the Home Secretary has indicated that she is intending to opt back into the information sharing measures and to the European arrest warrant with the amendments that have been put down on the Antisocial Behaviour Bill, do you see any practical risks that are likely to emerge from the proposals that she has put forward?

**Rob Wainwright:** None that are significant.

**Q93 Chair:** Mr Wainwright, you are also president of the cyber centre, the new cyber centre that has been established. Were you disappointed that the UK Government was not prepared to help fund that centre?

**Rob Wainwright:** Of course I was disappointed because the view taken by the UK—and other member states, I have to say, not just the UK—gave us a bit of a false start in that we had very high political expectations to establish a European Cybercrime Centre with no budget at all. It meant that I had to divert resources from other parts of my organisation. I do not complain and I am only saying this in response to your question because I understand the conditions of budget austerity that affect all police and other public sector bodies at the moment, so we just get on with it. But it has nonetheless made it difficult for us.

**Q94 Chair:** As you know, we have just published our report on e-crime; well, you may not know this. The Committee has been looking at e-crime for a year and we put out the figure that 15 countries had chosen the United Kingdom as their main target for cybercrime. Can cybercrime be fought on just a UK basis or is this now so international that bodies such as Europol and Interpol and, indeed, your Cybercrime Centre are essential to deal with this?

**Rob Wainwright:** We are finding from our experience that most forms of organised crime now are inherently transnational in nature. Cybercrime is the best example, of course. It requires, therefore, very effective use of available international police co-operation mechanisms, which is why, of course, Ministers in Europe decided to establish something at Europol and invest with us the responsibilities that we have now, in particular to exchange information in real time about the principal criminal threats operating online and to act as an operational co-ordination centre so that we can go after the most significant criminal targets in an effective way. I can say that we are in the final stages of concluding a major operation against internet-related crime involving 16 countries in which the UK played a very, very important and leading part. This is just coming to an end at the moment, and we hope to publish in the coming weeks, a significant operation, almost a landmark operation, against the ability of the police to penetrate in particular the dark areas of the internet. It shows, therefore, the virtues of the ability of international co-operation mechanisms, therefore, to turn up the pressure and the volume against some of these

criminals who until now, frankly, have operated with impunity on the internet.

**Q95 Chair:** Of course, members of the Committee have visited Europol so we have seen what you are doing on terrorism. There is no equivalent in this country to what you all are doing in Europol as far as terrorist organisations are concerned. There seems to be a constant monitoring of information there. When you get that information, it is passed to the Metropolitan Police or GCHQ? Where would it go?

**Rob Wainwright:** Primarily, the Met Police and we have an officer as part of the UK liaison bureau that is from the counterterrorist command of the Metropolitan Police and he acts on behalf of the CT community as a whole, including the Security Service, of course.

**Q96 Chair:** Did you give us the figure that there were 3,600 organised crime criminal gangs operating in the European Union?

**Rob Wainwright:** That is right. According to our estimate, there are 3,600 internationally active organised crime gangs, and this is already quite a high threshold that we are applying. All of these, therefore, are capable of operating in multiple jurisdictions, very often in multiple criminal sectors, and I think it says something about the changing nature of organised crime.

If I may say, in terms of the unique value of Europol in this case, the UK would risk losing our ability in particular to track the movements of those criminal groups and to hold the unique databases that we have in Europe. However good SOCA's databases are, however good NCA will be, they do not have what we have, which is intelligence collected on a pan-European basis, which allows us to identify criminal connections between multiple countries at any one time and then allows us to co-ordinate the kind of operation that I have just been talking about.

**Q97 Chair:** Were you disappointed that the Government is not opting into the Prüm Directive to enable countries to be able to access databases?

**Rob Wainwright:** Well, I think that is a much more narrow area of police co-operation. I think the Prüm—

**Q98 Chair:** Do you think we ought to go into Prüm?

**Rob Wainwright:** It would bring benefits. In my opinion the benefits to the UK are not as essential as they are in the case of other instruments such as the European arrest warrant.

**Q99 Chair:** Just to be clear at the end of your evidence, you are happy with the 35 that the Government has decided to opt into. Would you have preferred them to have opted into all the others as well in the fight against international crime? Because we were told that some of those directives and some of those measures are actually obsolete.

**Rob Wainwright:** Given that the UK was already a participant of all 135, then the decision to opt out of some of them runs the risk of having some negative consequences, again at least in theory, of encouraging criminals in certain ways and sending a false message

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to the UK's partners in Europe. Having said that, the UK in opting into 35 has made very clear what its intentions are and that it is still, of course, remaining steadfast in its fight against crime and terrorism. If I had to choose the most important 35, then these would be those.

**Q100 Chair:** Finally, how would it leave you as the British head of Europol if the two criteria set down by the Home Secretary were not met and, therefore, Britain decided not to opt into Europol 2? Would you be able to continue in your post as head of Europol?

**Rob Wainwright:** In legal terms, yes, because the requirement among the staff regulations is to be an EU national. In political terms, it would make my

position very difficult, but that is a factor that should play no part in the consideration of the Government.

**Q101 Chair:** Mr Wainwright, thank you very much for coming to give evidence to the Committee today. It has been extremely helpful. If there is any other information that you think you could be able to send us that would help us with our inquiry—we have a very short timescale; we have to report to the House by 30th October—we would be grateful to receive it. As part of our inquiry into international crime and terrorism, the Committee will be coming to visit Europol over the next 12 months.

**Rob Wainwright:** You will be very welcome. Thank you, Mr Chairman.

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**Tuesday 10 September 2013**

Members present:

Mr James Clappison (Chair)

Michael Ellis  
Dr Julian Huppert  
Steve McCabe  
Bridget Phillipson

Mark Reckless  
Chris Ruane  
Mr David Winnick

*In the absence of the Chair, Mr Clappison took the Chair.*

### Examination of Witnesses

*Witnesses:* **Garry Mann** and **Andrew Symeou**, gave evidence.

**Q102 Chair:** We are now moving on to a different subject, the European arrest warrant. Mr Mann and Mr Symeou, each of you have very direct experience of the European arrest warrant, so I think we would be grateful if you could give us a brief explanation of that experience and tell us what the current position of your case is. If we could start with Mr Mann.

**Garry Mann:** Good afternoon. First of all, I don't know if anyone knows my case or remembers my case, but I was arrested in Portugal during the Football Euro 2004. I was arrested under a temporary Portuguese legislation, which is basically arrested and tried within 48 hours. I was arrested coming out of a bar at 3.30 in the morning. There had been riots there that night; they had finished at 1 o'clock. I was arrested, then I was beaten on the floor. Then I was taken and charged at 10 to 4, with no solicitor, no lawyer, no translator, and so all I knew was this was a public order offence. We were then kept in a room and then kept in a cell where all 12 of us—there were 12 arrested at the time—were, like, if you had looked at the wall you were hitting the back of the head, if you closed your eyes. Basically, after that I was then sent to trial within 48 hours, and then one hour before the trial in the morning I saw a lawyer.

**Q103 Chair:** Can I just interrupt at that point? Up to that point had you had the benefit of a translator at all? Were the questions being directed to you in English or not?

**Garry Mann:** Nothing. I had got to one hour before the trial in the morning waiting and I saw my lawyer—still had not seen a translator anywhere. No one had translated anything of the charges when I was in the prison, when I was charged. Then an hour before I was due in court, I saw a lawyer for five minutes. I told him that I had done nothing, and he said, "Look, do you want to say voluntary deportation?" and I said, "Look, I just want to get out of here. You know what I mean, I just don't trust anything that is going on here." Still no translator. I got to the court; 11 o'clock it started in the morning. Then—

**Q104 Chair:** Can I ask you, before that, had the questioning of you been in English or Portuguese?

**Garry Mann:** The what question?

**Chair:** Had the police questioned you at all?

**Garry Mann:** During that time the police had not questioned me. They did not say anything. They just told me it was some kind of public order offence.

**Q105 Chair:** Did they give you any detail or any indication of what the allegations against you were?

**Garry Mann:** No, nothing. No.

**Q106 Chair:** So you had had no chance to comment on it?

**Garry Mann:** No. Of course, then I saw my lawyer and told him and he only spoke broken English. Then we went into court and there were 12 of us English. There was one Portuguese, one Russian, and we had one interpreter. She just sat at the front, like in front of me there, and just took some notes and did not translate anything, not one word. All 12 of us were just trying to talk to her and she was just too busy writing. She quit, saying that she could not handle it. She was a hairdresser, we found out later, and this is truth, it's not fiction. She was a local hairdresser that they plucked from the air, basically, that knew the wife of the judge. That is how bad it was.

Then they gave us another translator. This translator again was at the front. She was a little bit better and she would try to say something and pass it down the line of 12, but we did not understand what was going on at all.

**Q107 Chair:** Did you have the chance to give evidence yourself?

**Garry Mann:** No. They asked me what I thought in broken English, but again the judge and the lawyer did not speak much English.

**Q108 Chair:** At that stage, did you know what the charge was that you were facing?

**Garry Mann:** No. I never knew the charge that I was facing until 30 minutes before I was convicted at 11.30 that night, because it carried on from 11 in the morning. So 11.30 at night, because they only had 48 hours to convict, and then they had to release me.

**Q109 Chair:** Can you tell us briefly what happened after that?

**Garry Mann:** In the court?

**Chair:** Well, and after the court. You said you were convicted.



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**Garry Mann:** I was convicted. I had no translator, but I asked for witnesses. I saw two in the court, but I had another seven witnesses but they weren't there at the time. They said there was no time to call any witnesses. I said I would like CCTV; no time to call CCTV. So I never had any time for that. But then, yes, I was convicted and I was then put into a detention centre. The judge there said I should be imprisoned in the UK, so I was waiting to go to the UK. Then I was in a detention centre for three days. The Foreign Office then said, "You are being deported voluntarily. You are not spending the two years because there is no transfer system." You cannot just transfer someone from Portugal. The British refuse. So the Foreign Office then said that basically anything under three years you are voluntarily deported. So I agreed. I signed it in front of the Foreign Office, voluntary deportation. I went back to England where I was rearrested for a banning order. To cut a long story short, they arrested me for a banning order. Judge Day then found that my rights to a fair trial had been abused. I had no—

**Chair:** In Portugal, yes.

**Garry Mann:** Yes, in court in Uxbridge, a two-day court. A British police officer who was in the court gave evidence for three hours stating that he did not understand. This man and these people could not understand any of that court case. So Judge Day then said, no, they had violated all my human rights to a fair trial. They had all been broken, translators, no evidence, so he said, "No banning order" and he said that you cannot take into account the Portuguese—

**Q110 Chair:** The upshot here was that you were extradited to Portugal?

**Garry Mann:** Yes, because that was in 2005 when I had done that. I went back to work as a fire fighter, which I have done for 31 years. Five years later, after the 2004 arrest, I was then arrested on a European arrest warrant. I had Europol knock on the door at 8 o'clock in the morning. I was taking my kids to school and he said, "We are arresting you under the European arrest warrant." I said, "What for? I have already been to a British court. I was voluntarily deported. The British Metropolitan Police and the Foreign Office said so." "No, you are being"—and I went straight on blue lights to Westminster, appeared before a judge. Basically, I was bailed. Then I came back and I lost that court case because basically all the judge wanted to do through the rules was put a stamp on it and say, "Look, I have everything from Portugal. This is all I need. I do not need evidence from you, your defence", and he rubberstamped it.

**Q111 Chair:** What happened to you after that? Did you have to go back to Portugal?

**Garry Mann:** What happened after that is—which is one of the things that I have seen that you are trying to amend as well—that when they gave me the extradition and said, "You are going," I had seven days to appeal. My lawyers missed the seven days because it finished at 4.30, and they thought they had to get it in the next day at 9 o'clock. They missed it by a day. Because of missing it by a day I had no further appeals, so all my evidence, the evidence of

the police officer, the evidence of Judge Day that had come forward, it was all thrown out.

I went to a judicial review twice. On the judicial review Judge Moses said, and I will quote, "I cannot leave this application without remarking about the inability of this court to rectify what appears to be a serious injustice to Mr Mann." Lord Justice Moses knew but could not do anything about it. He said, "My hands are tied because you have missed your appeal and because I have all this evidence in front of me now from lots of people, including the Foreign Office, that says that you did not have a fair trial." He said, "But you missed your appeal and we cannot go back." Because my lawyers missed it by one day, through no fault of my own I was never allowed to appeal. So then by judicial review they just threw it out of court. I then served two years. I was then taken by Europol from my house. Sorry, I went to Heathrow, met Europol. I went from there to—

**Chair:** Portugal?

**Garry Mann:**—a Portuguese prison.

**Q112 Chair:** How long did you spend in a Portuguese prison?

**Garry Mann:** I was convicted for two years but I spent one year there. Even though Fair Trials and my MP, Hugh Robertson, and other politicians tried to help me, it took one year for me to get transferred back to England. I was then transferred back to England after one year. The thing that really annoys me is that when I got back I was given another six months on top of the one year I had done under good behaviour, because on the transfer embargo when you get someone transferred you have to do half your remaining sentence. So I had one year left. They gave me another six months, three months in Wandsworth—

**Q113 Chair:** So you spent 18 months altogether in prison?

**Garry Mann:** I did one year and three months in prison and then another three months on curfew at my home address and on probation. That is a half year more than anyone else would serve with good behaviour when given a sentence of 2 years.

**Q114 Chair:** Thank you very much for that. Perhaps we could turn now to Mr Symeou and he could tell us about his experience.

**Andrew Symeou:** Firstly, thank you for the opportunity to speak before you. I was wrongly accused of attacking a young holidaymaker on a Greek island in 2007. This was due to a group of police officers in Greece who abused their authority. The evidence that was assembled against me has recently been criticised by the Coroner in Cardiff who stated that the statements in Greece were not worth the paper that they were written on. They beat up people. They beat up two of my friends into signing something in Greek that they did not understand, which said that I was there and it was me who struck the punch. This person who fell over then subsequently died. The rest of the statements that were assembled against me were complete lies. The same witnesses came back to the UK and made statements

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to the British authorities that told the truth. I did not fit the description of the actual perpetrator and I could prove my innocence. I took this before a Magistrates' Court, who had no power in preventing the extradition.

**Q115 Chair:** Sorry, the Magistrates' Court, was this in Greece or in this country?

**Andrew Symeou:** No, this was in London.

**Chair:** This was in London.

**Andrew Symeou:** I was in London when I was arrested.

**Q116 Chair:** You were in London when you were arrested. So what you are telling us is as a result of things that had happened earlier in Greece, and then you had come back to this country?

**Andrew Symeou:** Yes. I was in London at the time and I was arrested. I appealed the extradition and the district judge had no power. They were unable to prevent my extradition, even though I could prove my innocence. We then appealed the decision and went to a higher court.

**Q117 Chair:** Can I just take it back, because you are telling us now what had happened in London.

**Andrew Symeou:** Sure.

**Chair:** Back in Greece, were you seen by the police and interviewed at all there?

**Andrew Symeou:** No, not at all.

**Q118 Chair:** Were any allegations put to you?

**Andrew Symeou:** No. I went on a holiday with a group of friends but there were two other friends who were on a different package. They remained on the island for an extra four days because we did not book the same holiday. In that period, there were a collage of photographs taken by a photographer on a different night and one of them was of me. It was just a complete wrong identification. They went to all the hotels on the island. The manager of the hotel obviously recognised my photograph and told the police that my two friends were still there.

**Q119 Chair:** So you had not been seen by the police at all in Greece?

**Andrew Symeou:** Not at all.

**Q120 Chair:** This event had taken place. You were not arrested by police or seen by them—

**Andrew Symeou:** No.

**Chair:**—and you came back to this country after completing your holiday?

**Andrew Symeou:** Yes, exactly.

**Q121 Chair:** It was when you were back in this country that you were then arrested under the European arrest warrant?

**Andrew Symeou:** The picture was just of my face with my eyes closed. You could not tell it was me.

**Q122 Chair:** No. But you were then arrested in this country under the European arrest warrant?

**Andrew Symeou:** Yes.

**Q123 Chair:** Can you tell us what happened then, please?

**Andrew Symeou:** Like I said previously, we appealed the extradition and we retrieved the case file from Greece. I got a lawyer in Greece who went to the public prosecutor magistrate in Zakynthos and they obtained the case file against me. That is when we discovered that the witnesses who did see this attack, their statements were word for word identical and all claiming that 100% it was me. I mean it was physically impossible. It was those same witnesses who came back to the UK and then made subsequent statements to the south Wales police, which said that one of them saw it and was not 100% sure if it was the person in the photograph.<sup>1</sup>

**Q124 Chair:** This was all in this country?

**Andrew Symeou:** This was all in this country.

**Q125 Chair:** You were then subject to the extradition proceedings?

**Andrew Symeou:** Exactly. When seeing all the evidence together you can see that there was clearly an abuse of process on behalf of the Greek police, yet authorities in Britain had no power. They could not prevent the extradition.

**Q126 Chair:** You were then extradited back to Greece. Can you tell us what happened to you in Greece?

**Andrew Symeou:** I was extradited back to the abusers, back to the same police officers in Zakynthos. When I got to Greece I was—

**Q127 Chair:** How long after the original event was this, the extradition? How long was it after the incident that had taken place, your holiday, and so on?

**Andrew Symeou:** Since I had gone on the holiday it was two years later. I was not arrested for a whole year. I don't know why, because their one-sided, manufactured investigation only took them four days. I was arrested in 2008 and I appealed the extradition, which took a year, and I was extradited in 2009.

**Q128 Chair:** What happened after you had been extradited in 2009, when you got back to Greece?

**Andrew Symeou:** We landed in Greece. I was taken to many different police stations and police cells, and I sat before the investigating magistrate in Zakynthos. That was my only chance to make a statement. Nevertheless, they put me in prison on remand because I was not a Greek citizen. So I was extradited because we are European but I was put in prison because I am British, which does not really make sense.

**Q129 Chair:** No. How long did you spend in prison?

<sup>1</sup> Note by witness: Furthermore, Greek authorities had lied in their statements, stating that they had CCTV evidence showing me attacking the young man. In actual fact, the CCTV would have proved my innocence. When finally getting to trial three years later, Greek authorities hid the CCTV footage. If British authorities were able to investigate the matter, this would have been investigated prior to my extradition and detention in Greece.

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**Andrew Symeou:** Overall, I was there for 11 months.<sup>2</sup>

**Q130 Chair:** Eleven months. Members of this Committee have seen Greek detention facilities, so I imagine it was not entirely pleasant.

**Andrew Symeou:** I have stories that you could not imagine.<sup>3</sup>

**Q131 Chair:** What happened at the end of the 11 months?

**Andrew Symeou:** At the end of the 11 months, I was told that I was going to trial. The Greek authorities had failed to summon any witnesses, which I think you would all agree is quite a standard procedure when coming up to a homicide trial. I turned up and I asked that they release me on bail. In the end, I think that they admitted they were wrong and they did release me on bail and I stayed on bail for another year, but I thought it would only be a few months. I was on bail for another year living at a residence. A family member owns a property in Greece that I could stay at, but again, this whole passage of time—

**Q132 Chair:** At the end of that time, what happened to the charges against you?

**Andrew Symeou:** I finally went to trial, and I was acquitted of all charges on the evidence that I had from the very beginning that I was showing to a court in Britain. So I went through all of that effectively for no reason.

**Q133 Chair:** You spent 11 months in detention in Greece and then a further year on bail there involuntarily?

**Andrew Symeou:** You cannot imagine what it has done to me and what it has done to my family. It has changed our lives and it is unacceptable.<sup>4</sup>

**Chair:** Thank you. I think Mr Michael Ellis has a question for you now.

**Q134 Michael Ellis:** Gentlemen, it is clear to me that you have both suffered appalling injustice. Mr Symeou, I have been made aware of your case. Who is your Member of Parliament?

**Andrew Symeou:** Nick de Bois.

**Q135 Michael Ellis:** Yes. I think Mr de Bois has spoken in Parliament before on your behalf and I am certainly aware of your case.

As it currently stands, the European arrest warrant is seriously defective in my view. What do you both think could be done differently? First of all, how could the

UK authorities have handled the allegations against you differently if we were starting from a clean slate? Could you give some consideration to that, Mr Mann?

**Garry Mann:** I think what kept coming up in the cases for me was this flagrant breach of Article 6. Basically, the Crown prosecution just keep finding there has been no flagrant breach of Article 6; there has been no flagrant breach. Every time I went to court it was the same. In the Magistrates' Court and even when I got to the High Court the judge said, "I cannot do anything about this because I do not have the law to do anything about it with." But the flagrant breaches, as I have told you, everything that happened to me—no translator, no lawyer, could not get defence witnesses—they did not see that as a flagrant breach. What is a flagrant breach? That is the problem with it. The bar is set too high, because everyone then comes up with, "It has to be a real flagrant breach," and then to stop someone being extradited they were saying to me, "Well, you are not going back to be tortured or going to get the death penalty."

**Q136 Michael Ellis:** Anything short of execution or torture is not a flagrant enough breach?

**Garry Mann:** Is not a flagrant breach.

**Q137 Michael Ellis:** Right. So you think the bar is set too high?

**Garry Mann:** Yes, and the judge, Judge Workman in the Magistrates' Court, he should have the power to look to see if there has been a denial of justice, which there was in my case. Once you have seen the evidence—and I had a police officer and the judge before who said, "Look, these have all been broken"—the judge should have had the power to say no to the European arrest warrant, but he just does not have the power. He just rubberstamps it.

**Q138 Michael Ellis:** Mr Symeou?

**Andrew Symeou:** I was a 19-year-old student. I had never been in trouble with the law before in my life. To show a British court this overwhelming evidence of my innocence and then to be extradited is crazy. I think it is quite simple: just don't extradite people who are able to prove their innocence.

**Q139 Dr Huppert:** Mr Symeou and Mr Mann, you have clearly had some awful experiences and been treated in an incredibly unjust way, and that is what we are trying to fix. Mr Mann, many of us would agree that human rights considerations should be taken very seriously and pervade our justice sense. I would agree with you completely on that. You will be aware that the Government has proposed some reforms to the European arrest warrant. Mr Symeou, there was an entire paragraph or two entirely dedicated to you. Do you think that the changes that have been proposed would prevent future situations like you described from happening?

**Garry Mann:** No. I think they are a good start. But if you look at the cases of both of us, they were presented or sometimes at the Magistrates' Court I was not allowed to present a defence. Basically, it is like, "Let's rubberstamp this. We believe everything the Portuguese authorities have said in their transcript. Let's just move

<sup>2</sup> Note by witness: The Greek authorities had stated that they were trial ready, but I didn't get to trial for two years. Unable to leave the country and get on with my life.

<sup>3</sup> Note by witness: To be the youngest person in a foreign maximum security prison, especially one as notoriously violent as Korydallos, was traumatic. It's changed my life in ways that I never thought it could. Even to this day, I don't feel like myself anymore. It should never have happened. I have lost too many years. All my friends are in full time employment and I am still trying to settle back into life.

<sup>4</sup> Note by witness: My family couldn't work for years, my dad lost his interior architectural firm because of it. If it wasn't for the support we had, then it could have ruined us. Not everyone has the support that we do.

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on because we don't have the power to look at the evidence." But I am trying to say, no, you should be looking at the evidence and the judge should have the power to say, "Look at this, this man, all his human rights here. His rights to a fair trial were just thrown out the window, so how can we send this man to another country?" when a judge in this country also, two-day trial, said, "Look at these. They have broken all the rules of Article 6, so no."

**Q140 Dr Huppert:** Your call would be to make sure that judges are empowered to use Article 6? You clearly cannot expect them to run a full trial?

**Garry Mann:** No, but they can—

**Dr Huppert:** They could look at the Article 6 rights.

**Garry Mann:** Yes, and they can look at the evidence. Why can't they look at the evidence? Because you can look at the evidence and if I have evidence from, say, a police constable, which I had, that this whole trial he never understood a word of it. I could not understand it if he cannot understand it. Why couldn't he look at that and go, "This man has not had a fair trial. He has had no translator. The lawyer never turned up, no defence"?"

**Q141 Dr Huppert:** I at least would agree that the Article 6 rights should be looked at. Mr Symeou, you are specifically named. Do you think that the Home Secretary is right to say that her proposals would address your problem?

**Andrew Symeou:** I agree with Garry that it is a good start but I don't think it is enough. For example, I read that they were looking at—sorry, I have lost my words.

**Chair:** Take your time.

**Andrew Symeou:** Sorry. They were looking at only extraditing you when they are trial ready. But authorities like the Greek authorities would probably claim that they are trial ready, because they claimed that they were trial ready when I was extradited. But they weren't at all, which is why it took two years to come to trial, and one of those years I had to spend in a Greek prison.

**Q142 Dr Huppert:** You are right that we have to understand exactly what is meant by "trial ready", and I would hope that if the Greek authorities were breaking the limits of that we would notice that and respond. It would be interesting to have other suggestions from you in writing if that is okay.

**Andrew Symeou:** Yes, of course.

**Q143 Dr Huppert:** To step back from the principle—and clearly it has worked awfully for both of you—I have to say it seems to me there is a whole series of problems in each of these. It is not just to do with the European arrest warrant. It sounds like there were a number of instances about whether the Foreign Office misled you and so forth. Would you agree that there is a need for some sort of mechanism, that there clearly are people who commit crimes in Portugal, in Greece, who should go back to face justice, that we have to make sure there is an efficient way to make sure that that does happen as well?

**Garry Mann:** Of course, but on the other hand what you have to do, you have to make sure that the trial that these

people are supposed to have had was conducted fairly and justly.

**Dr Huppert:** Absolutely.

**Garry Mann:** As soon as you see the evidence that the trial wasn't done in a just way, you should have the right then to say, "We are not sending our citizen back to the country."

**Chair:** Thank you. I think that point has been made very persuasively.

**Q144 Mark Reckless:** Do you think there is any realistic prospect that, on any reasonable timescale, the standards of justice in Portugal or in Greece would be standards that we would consider satisfactory in this country?

**Garry Mann:** It is going to take a few years. It is going to take people not like me and Andrew, because we are just small people and our advice is not heard. It is being heard today, which is good, but it is people like yourself that then have to take it to the European courts and say, "Look, these countries are not obeying the rules of Article 6 or they are not obeying the rules of the 2003 Article 6 or 1 and 2", and we should be saying to them, "Look, you cannot be ordering these people to be extradited under a European arrest warrant under those circumstances." Yes, of course, there are going to be people that are going to be extradited. If they have had a fair trial. If it has been just. If you can see that everything has been followed to the letter of the law, not from their point of view but from our point of view. One of the things you are saying is if there is a lawyer in another country, someone who could help in that country. If I had had a lawyer in Portugal who could speak fluent English for a start-off it would have been helpful.

But once I got back to England it was a case of none of these judges had the power to do anything. The countries, Portugal and Greece, they just do whatever they want to do at the time to get a conviction and that is the sad thing about this. I think Andrew would agree.

**Q145 Chris Ruane:** Yours are two high-profile and quite emotive cases and you have been to hell and back. When they attracted press interest—and I am assuming that there has been press interest locally or nationally—did many people contact you and say, "I have been through the same"? The experience that you have been through, how widespread do you think it is?

**Andrew Symeou:** I have been in contact with victims of the same kind of corruption in Greece, but I have only ever met people who have gone through something similar to me through Fair Trials International, the charity.<sup>5</sup>

**Q146 Chris Ruane:** How many UK citizens do you know of that have been extradited unfairly?

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<sup>5</sup> Note by witness: If you are asking how widespread the problem is, the answer is that it is a national problem. All British people are subject to the European arrest warrant, which I am assuming, includes everyone else in this room and all of our families. The idea of being extradited to another European state on the basis of fabricated evidence is an abstract idea, before it happens to you, or a family member of course. Why should we keep our guard down, vulnerable to an abuse of process on behalf of authorities who can be proven to work in the same way Britain did a century ago?

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**Andrew Symeou:** I think this might be a question for somebody else. I don't think I am the right person to ask.

**Garry Mann:** Through Fair Trials we have been in discussion with lots of people that have been treated unfairly.

**Q147 Chris Ruane:** British nationals?

**Garry Mann:** Yes, Deborah Dark I think her name was; lots of girls. We have all met, and you have seen the stories from these other people and you think, "Yes, that's it" Everyone will tell you the same, and that is where they got the evidence from. Some of it was made up. To put you down, the evidence they got. Everyone is going, "Where did they get that from? Why were we even found guilty in the first place?" Not about when they got to court and tried to then stop the European arrest warrant. It was before then. I was with the 12 other people in court. They had the same thing done. But all the people we have met, and we have had people who have emailed over or got in touch with us and said, "Yes, this is crazy." We have had nothing but support from FTI but also everyone around the country.

**Chair:** Thank you. I think Mr Reckless might have one final very short question.

**Q148 Mark Reckless:** I want to put the same question to Mr Symeou and then I have a final question. I want to ask Mr Symeou whether you have any more confidence than Garry has for the Portuguese situation, that Greek justice would become of an acceptable standard for this country.

**Andrew Symeou:** I have no confidence in the Greek justice system, to be honest. They are notorious for their delays. For example, I was denied bail for the second time and the document quite literally said that I was guilty, to the point where it said I would naturally deny the charge and it basically said, "This would not be happening if you did not punch people in the head." This is all based on a one-sided, very flawed investigation, so I cannot say I have any confidence.<sup>6</sup>

**Q149 Mark Reckless:** I personally am quite influenced by both the cases and what has happened to you. Parliament as a whole has voted to exercise what is called the block opt-out from all of these EU justice measures. However, there is proposed to be an upcoming vote where Parliament will be able to choose if it wants to opt back into measures, including the European arrest warrant. How would you like MPs to vote?

**Garry Mann:** The answer from me is "no" because I know what you are trying to do. You are trying to pick the ones that we want to go into, but picking them is very difficult. We opt out. In my view, we should not be letting any British citizens go into another country if the proof is there that they were innocent. At the moment, people are coming back from being arrested, convicted, some in absentia, which is crazy, and then coming back and then just being sent on their way. Basically, just sign a bit of paper. It cannot be that way. I don't think we should let any of our British citizens go to another jail in another country unless there is proof from both sides, not just a transcript from Greece or Portugal saying, "This man has killed this man."

**Q150 Mark Reckless:** Mr Symeou, do you agree?

**Andrew Symeou:** I do agree with what Garry is saying.

**Chair:** Thank you. Gentlemen, can I thank you both very much for coming along and giving evidence to the Committee? It has been very helpful. I think we all understand these have been very painful experiences for you, but we are very grateful to you and what you have told us has been of great help. Thank you very much.

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<sup>6</sup> Note by witness: There is no way on Earth that the Greek justice system is, or will become an acceptable standard for this country. If what happened to me, happened to a person with no family or financial support, they would be serving a life sentence for something that they didn't do. With no money, there are no defence witnesses, we had to raise funds to pay for witnesses to fly to Greece and defend my innocence.

### Examination of Witness

*Witness:* **Professor Steve Peers**, EU Justice and Law, University of Essex, gave evidence.

**Q151 Chair:** Professor, thank you very much for joining us this afternoon. Some of us have had experience of hearing your evidence in other contexts in the European Scrutiny Committee, and I know you have given evidence on other occasions as well. We are very grateful to you for coming along today. Can I begin by asking you about the opt-in process and where we are with it at the moment? Do you think the Government should be confident that the Commission and Council will be willing to let the UK opt in to those measures that it has chosen out of the ones that it has opted out of?

**Professor Peers:** In principle, the Commission and the Council, as I read the rules, have an obligation to let us opt back in provided that the criteria in the protocol 36 are satisfied, which is that there is no serious effect on practical operability and there is respect of the coherence of the different parts of the pre-Lisbon

measures. I think the Government's list of 35 measures to opt in does satisfy those criteria so, therefore, they ought to let us in. I am not necessarily confident, though, that the Commission and Council will see it that way, but they ought to see it that way. As I say, they have an underlying legal obligation.

**Q152 Chair:** Because that was the way these matters were all negotiated back in 2007, prior to the accession of the Treaty of Lisbon?

**Professor Peers:** How do you mean exactly?

**Chair:** This process was negotiated before the Treaty of Lisbon. It was always foreseen that there would be the opt-out and possible opt-ins afterwards.

**Professor Peers:** Yes, during the Treaty of Lisbon negotiations this clause of the protocol was added. It obviously assumes that the pre-Lisbon measures are divisible, otherwise it would not make sense to have a

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clause about opting back into some of them in the first place. Obviously they are divisible, subject to these criteria of coherence and practical operability. As I said, I think the Government's list of 35 measures meets those criteria. There are ways in which if it had taken different decisions, for example, there are two different measures on the criminal records information system, we have to opt back into both of them. We cannot just choose one, so it is either both of them or none of them. But as the Government says it wants to opt into both of them, for instance, those criteria of practical operability and coherence I think are met. That is just one example but it is the sort of idea.

**Q153 Chair:** Thank you. How likely do you think it is that the Government will be able to negotiate the opt-in in time, so that transitional arrangements are not necessary when the opt-out comes into force?

**Professor Peers:** There might be a slightly awkward issue with the transitional arrangements, because 1 December 2014 is a Saturday. I don't know if it is possible for the Council and Commission to officially adopt decisions on a weekend. If they cannot adopt them until 3 December you certainly have an awkward position with the people who are detained on the basis of a European arrest warrant, assuming the Government's plan to opt back in goes through, because on what basis are we then detaining them over that weekend? Of course, any detention has to be in accordance with the law. Equally, people detained in other member states on the basis of arrest warrants we have issued, what is their position over that weekend? I think there is a slightly awkward issue there.

Will the Government succeed in time? Again, it ought to because it has made its decision quite early. It has officially notified the opt-out this summer. It has this provisional list of 35 measures that is not yet confirmed, but a provisional list that it has informed everyone of back in July. I do not know when they plan to confirm that list but from today there is nearly 15 months to go. You can surely have informal discussions on the basis of that list anyway. The Council and the Commission can begin thinking about their response to our application, on the basis of what is probably going to be more or less the final list of measures we try to opt back into. There certainly ought to be enough time. I would say it would not be the Government's fault if there is no decision in time by December next year. It would be some kind of political difficulty that the Council and the Commission have dreamed up.

**Chair:** Thank you very much. That is very helpful.

**Q154 Dr Huppert:** If I remember correctly, you suggested a list to the House of Lords Scrutiny Committee, which had 44 powers that you thought we should opt back into. Which ones are missing?

**Professor Peers:** Some of those are the Europol implementing measures. I had assumed that we had to opt into the whole list of them, but the Government's explanatory memorandum says, "No, we don't need to opt into the implementing measures, just into the Europol decision. The implementing measures are necessarily part of it." In which case I would say why were they listed at all as a part of that list of 130 measures? That is part of it.

Also I had assumed we ought to opt back into the Prüm decisions on exchange of information, those two decisions. The Government gives the explanation that it probably costs too much, in terms of the benefits that we would receive, and that in the near future there might be some simpler or less costly way to exchange that sort of information. Perhaps that justifies its non-application to opt back in.

I had also suggested that they ought to opt back into the framework decision on probation and parole, and that is not on the list. I do think it probably ought to be on the list. That partly connects to issues about the European arrest warrant, which we will come to later. Equally, the mutual assistance convention and its protocol, I think when I gave the House of Lords that list I was probably assuming that would not really be valid any more by 2014. Now it is clear that it will be for about two years afterwards, but the Government is not seeking to opt back into the convention, even though, according to the Home Secretary, it seeks to rely on some things in the convention as a way of reducing the number of European arrest warrants that we execute. I think there is an obvious contradiction there. If we are going to rely on video conferencing, for instance, which is regulated in detail in that mutual assistance convention, we ought to opt back into the mutual assistance convention. There is a Council of Europe Treaty that also provides for video conferencing. There are 10 member states that have not ratified it, so if we want to avoid executing European arrest warrants for them and have video conferencing instead where we can, we ought to go back into the mutual assistance convention during that two-year period before it is replaced.

**Q155 Dr Huppert:** It certainly seems you make a strong case that these would be things that would facilitate other things that the Government is trying to achieve.

**Professor Peers:** Yes.

**Dr Huppert:** This Committee will have to make certain recommendations. Would you want us to suggest that your full list should be the supporting one?

**Professor Peers:** Probably, yes. I would have to go back to that list, but the two things that I thought were obviously missing were the framework decision on probation and parole and the mutual assistance convention and its protocol.

**Dr Huppert:** If you want to reflect on it and write to us with the ones that you do think should be back in and the reasons, that would be very helpful.

**Professor Peers:** Sure.

**Q156 Dr Huppert:** Whether it is your list of 44 or the 35 that the Government is proposing, there has been a debate about how much repatriation that will have. Do you think that would be a substantial difference or if the Government had decided not to opt out in the first place?

**Professor Peers:** I think these 35 are by and large almost all of the most important ones. The only three really significant measures that are missing are the Prüm decisions—there are two of them—the mutual assistance convention and its protocol and the framework decision on probation and parole. Apart from those, I think the Government is opting back into

anything of any great significance. My answer simply would be, no, on the whole, with those exceptions. The Government is not significantly repatriating powers.

**Q157 Dr Huppert:** In fact, the only powers we seem to be repatriating are powers not to share information with other people?

**Professor Peers:** Yes, Prüm, not to share and to receive information, that is about the information primarily, about the sharing information. The framework decision on probation and parole is about recognition obviously of probation and parole orders, and the mutual assistance convention is about a sharing of evidence.

**Q158 Mr Winnick:** Professor Peers, I have just been looking—well, I looked previously—at your work: consultant for the European Parliament, European Commission, Foreign and Commonwealth Office, House of Lords Select Committee. Really impressive, genuinely so. What I basically want to ask you, Professor, is this. As far as the cause of justice is concerned, do you feel that the decision that is being taken by the Government is on the right course?

**Professor Peers:** In principle, I think if we have EU law adopted the Court of Justice ought to have its ordinary jurisdiction over it. According to the rules, it necessarily comes with our decision to opt back in or to apply to opt back into this list of 35 measures, and so I can only welcome the fact that, in principle, the Court of Justice would have its jurisdiction. Having said that, of course there are always going to be some judgments I disagree with. When it comes to the European arrest warrant, on the whole the Court of Justice has evaded opportunities to clarify whether there is a human rights exception and, if so, how it would work in relation to the European arrest warrant.

**Q159 Mr Winnick:** Other colleagues will be asking you about the European arrest warrant, but if I can put it this way: do you think it will leave our position intact or do you think it would lower or not the reputation of this country as far as justice is concerned?

**Professor Peers:** Do you mean if we opted out completely?

**Mr Winnick:** Yes.

**Professor Peers:** I think if we opted out completely it would have some impact on the reputation of this country.

**Q160 Mr Winnick:** As far as the measures proposed, do you think that will have a negative effect on the reputation of the UK?

**Professor Peers:** Given that the Government proposes to opt back into the large majority of the most significant ones, I think that would largely reduce the impact of any reputational damage, which is a phrase that the Government uses in its Command Paper. I think the mere fact we are exercising the opt-out at all does some reputational damage, but then to a certain extent it is fixed—not wholly but partly—by opting back in.

**Q161 Mr Winnick:** The last question is, would you rather the position stayed as it is?

**Professor Peers:** Would I rather that we not opt out at all?

**Mr Winnick:** Yes, exactly.

**Professor Peers:** It is a done deal, of course. It is a fait accompli. But I think it would have been better not to opt out at all.

**Mr Winnick:** Thank you very much, Professor.

**Q162 Chair:** I am going to come to Mr Reckless in a minute but I think Mr Winnick was putting a global point to you about this country's reputation. Of course, what one views as this country's reputation in the European Union is one thing, but the country's reputation as a place where justice is done and attempts to be done—and we have had our mistakes in the past—our general reputation for justice, was built up before we became members of the European Union, wasn't it?

**Professor Peers:** I thought he was asking me a slightly different question about our reliability as a negotiating partner, but our reputation—

**Chair:** Possibly. But British justice does not depend upon the European Union.

**Professor Peers:**—as a justice system is a different question. I do not think that is damaged by opting out.

**Q163 Mr Winnick:** No one has suggested that British justice has come about because of the EU.

**Professor Peers:** No.

**Mr Winnick:** But, Chair, I think the professor understood the question I was putting.

**Q164 Chair:** There is a separate point as far as the European Court of Justice is concerned. Do you accept that there is quite a big difference in the position if we opt back into these measures, as far as the European Court of Justice is concerned? Before now the measures concerned were not subject to the European Court of Justice, whereas now, if we opt back into them, they will be subject to the European Court of Justice. Do you see that as a significant development?

**Professor Peers:** Of course, when you say they were not subject to the Court of Justice's jurisdiction, that means for the UK. A number of member states did accept the court's jurisdiction. I think it is a significant difference but I would not overstate it. The Court of Justice has been receiving from the two-thirds of member states, which have accepted its jurisdiction, on average three or four cases a year on these measures. I don't know why that would necessarily be hugely different, simply because the UK and some smaller member states would all be also accepting the Court of Justice's jurisdiction for the first time next December. I don't think that would necessarily be profound. What would be different is that aspects of our Extradition Act, for instance, or other measures implementing the EU's pre-Lisbon measures, could possibly be interpreted in a different way or even possibly ruled invalid because of a contradiction with the EU's measures, which the Court of Justice finds, either because one of our courts sends a question to the Court of Justice and that is the answer we get back or because the Commission sues the UK. That is a possibility, yes.

**Q165 Chair:** Some people have seen in the past a tendency towards federalising in the case of the European Court of Justice. Other people do not but some people do, and it also has a reputation for activism

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as and when it chooses to become active. Do you think that is possible here?

**Professor Peers:** It is possible, but I don't know if this is the right forum or rather that the pre-Lisbon third pillar measures are the sort of area where these issues of federalism and activism get worked out. The bigger concern I have is whether or not human rights are sufficiently protected in the interpretation and application of the law in this area. If the Court of Justice said the European arrest warrant is invalid or part of it on human rights grounds, would you say that is activist or federalist? It is a bit hard to classify what we are talking about almost. From different perspectives that is a court striking down a legislative act. On the other hand, for the critics of the European arrest warrant that might be seen as a great triumph not exactly as an act of centralisation or activism. I find that a bit hard to classify what we are talking about.

**Q166 Mark Reckless:** Professor Peers, what impact do you think the treatment of Mr Mann and Mr Symeou has had on the reputation of British justice?

**Professor Peers:** Of course, the main source of the miscarriages of justice that they faced was in Greece and Portugal, and the UK courts felt they had to go along with the European arrest warrants that were issued. That exacerbated the problems that they had faced. It is not so much the UK courts. It is a question of whether it was wise to draft the European arrest warrant the way that it was and to draft any Extradition Act in the way that it was, and perhaps there are some questions about how the British courts interpreted it and whether or not there is already in the Act a broader possibility of refusing surrender on human rights grounds. But primarily the problems go back to our own legislation and the original EU source.

**Q167 Mark Reckless:** Speaking about source, Professor, your biography we have says your research interests include EU justice and home affairs, EU internal market, EU social law, and that you have worked as a consultant for both the European Parliament and the European Commission. Can I ask broadly what degree of funding you have received from these institutions?

**Professor Peers:** Obviously, my main source of income is working as a professor at the University of Essex. The funding that I have received: I have worked as a sub-consultant on impact assessment on three or four occasions for European Commission impact assessments and I am usually brought in as giving human rights advice. On each of those occasions I have been paid for about two or three days' work. Over the course of about five years for the European Parliament I have written about three or four studies and perhaps briefing notes, and been paid for a couple of days' work each time. It might add up to between 1% and 2% of my income over the last five years.

**Mr Winnick:** Nothing criminal about that.

**Q168 Mark Reckless:** Does the University of Essex receive any additional funding from these EU sources?

**Professor Peers:** Do you mean in direct connection with myself or—

**Mark Reckless:** Directly or indirectly from EU sources.

**Professor Peers:** Not in direct connection with myself, no. Obviously, like every other post-secondary institution, we apply for research money that the European Commission administers, and I have been involved in applying. I have not myself been successful via the university, but I am sure that many of my colleagues in other fields have been successful, as have universities across the European Union.

**Q169 Dr Huppert:** The Committee is very grateful for your expertise in these matters. I see the fact that you have studied in these areas as a positive rather than a negative.

What do you think would be the effect on the perspectives for British justice if through, for example, opting out of all of these procedures we were not able, either to take people who had committed very serious crimes overseas, to get them out to face justice, or indeed to bring people back from other countries, from the south of Spain, for example, to face justice here if we were unable to form joint investigation teams to look into cases? What do you think would be the effects then on British justice?

**Professor Peers:** If we did not opt back into anything at all, Britain would come to be seen as a kind of Brazil of Europe, without the nicer weather. A place that you would flee to or move assets to, and it would be somewhat difficult to then get you back to a country that wished to try you or enforce a sentence or wish to get hold of your assets. Of course it would not be impossible, because there are Council of Europe conventions that we are party to, but it would be more difficult than it would be otherwise. It would be slow and more difficult, and some people would either not be brought back to this country to face trial after a much longer delay or vice versa. For instance to face trial but other examples as well, such as recognition of fines after criminal convictions where we have not applied the Council of Europe convention in that area. We would have to either sign up to it or negotiate about actual treaties, all of which would take time and be difficult and not as effective as what has been agreed. There is one example in the Government's Command Paper of the Naples II Convention, leading to a haul of over a tonne of cocaine and being used 2,000 times a year by customs officials. That alone at the very least we should opt back into. It does seem to be tremendously useful in practice.

**Q170 Steve McCabe:** Can I ask you to sum up what you think the benefits to this country have been of the European arrest warrant?

**Professor Peers:** It is not entirely beneficial because there are people who have suffered miscarriages of justice. Of course they might have suffered them anyway under the prior regime because, remember, the prior regime, the Council of Europe extradition convention, does not ban extradition of citizens—we did extradite our own citizens before in fewer numbers—and it did not require prima facie evidence. So it is possible that even under the prior system a British judge might have said, "I cannot review the evidence that you give me that Greece and Portugal



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have violated your rights. I am sorry, I have to accept the extradition request.” It could have happened. Miscarriages of justice could happen. Of course, if you go back prior to 2003 there were allegations about particular extraditions being suspect or being miscarriages of justice. There were many cause célèbre that went on before. These sorts of things unfortunately could have happened anyway.

I think the net effect is clear—and the Government gives some statistics in its Command Paper—that a lot more people are extradited both to and from the United Kingdom. From the statistics the Commission has given, this is a much quicker process. It certainly benefits people who consent to their extradition. For them it was a much longer process. It was many months, cut down to half a month I think now if you consent to your extradition. There would be many months usually spent in jail before you were extradited. I think it is definitely beneficial but there are a lot of improvements that could be made.

**Q171 Chair:** Can I ask you on that point do you think the Home Secretary’s planned changes are going to help in this regard?

**Professor Peers:** I had a quick look at the amendments that have been made to the Anti-social Behaviour Bill

and it does look like they will address a number of problems. Not all the problems. They do not directly address human rights issues, in the sense of where someone alleges there has been a breach of a fair trial in the other country. But in proportionality that is good.

**Q172 Chair:** Do you think they address the issue of proportionality? You think that is addressed?

**Professor Peers:** Yes, the drafting on proportionality seems to be a very open clause. It does look quite useful. *[Interruption.]*

**Q173 Chair:** I am very sorry, Professor Peers, I think we all have to go and vote. I think we have just about finished with your evidence unless anyone has burning questions. I would like to express the gratitude of the Committee for your coming along today. It has been very helpful indeed.

**Professor Peers:** Thanks very much.

**Chair:** Thank you very much.

*Sitting suspended for a Division in the House.*

*On resuming—*

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### Examination of Witnesses

*In the absence of the Chair, Dr Julian Huppert took the Chair.*

*Witnesses:* **Jodie Blackstock**, JUSTICE, **Libby McVeigh**, Fair Trials International, **Isabella Sankey**, Liberty, gave evidence.

**Q174 Chair:** Thank you very much. We are now quorate so we are able to begin. If I can call our three witnesses to the dais we will be able to start. Firstly, thank you all for coming and apologies for the delay. Before I get you to introduce yourselves with your name and where you are from, can I just declare an interest that I used to be on the National Council of Liberty. If we can start on my left with Jodie Blackstock?

**Jodie Blackstock:** Thank you very much for the opportunity to appear before the Committee. I know it has been a long day for you so I will try to be brief in the answers that I give. I am the director of criminal and EU justice policy at JUSTICE, which is a law reform and human rights organisation.

**Isabella Sankey:** Thank you very much, Chair. My name is Isabella Sankey. I am the policy director at Liberty, the National Council for Civil Liberties.

**Libby McVeigh:** Hello, thank you for giving us the opportunity to participate. My name is Libby McVeigh and I am head of law reform at Fair Trials International, which is a defence rights organisation based here in London.

**Q175 Chair:** Thank you. Since we are running rather late, if I can encourage colleagues to ask short questions and to get short but complete answers. That would be very helpful. To start off with, if I can ask does the Government have its list of 35 JHA measures to opt back into about right? Jodie, your turn.

**Jodie Blackstock:** From JUSTICE’s perspective, we would largely concur with what Professor Peers said to you earlier. The measures included in the 35 do largely reflect the measures that are the most operational. They cover the necessary mechanisms to maintain the police and judicial co-operation in almost all areas. What does not seem to be included, looking thematically through the list of measures, are those which establish criminal offences and sanctions and penalties. Looking at the Command Paper, the reason for that appears to be we have implemented these domestically and, therefore, we do not lose anything by not being part of them at an EU level, because they were about adopting national law and we have done that. From that perspective, we maintain our relationships with the ability to fight crime and to investigate crime through the measures there. We would welcome the instruments on the list. Obviously our position thus far has been that we would prefer not to have an opt-out. We think it doesn’t send a helpful message to the rest of Europe that, in the interests of fighting crime and improving standards by creating new penalties, you can pick and choose as to whether you take the jurisdiction of the Court.

In terms of what is missing, again I would agree with Professor Peers. There are two measures and one in particular that is of concern to us, which is the framework decision on the alternatives to custodial sentences, the probation measure. That instrument is a helpful measure in our view. Certainly, when we look at concerns about prison conditions across Europe and

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raising standards by alternatives to custodial sentencing, the UK has a very strong community punishment programme and we ought to be supporting the move towards community sentencing across Europe by being engaged in that measure.

**Q176 Chair:** Thank you very much. Ms Sankey, what is your position on this?

**Isabella Sankey:** Thank you, Chair. I should start by saying that Liberty does not take a policy position on European integration, per se. We are a membership organisation and there will be those among our members who are keen on further economic, social and cultural integration and those who are not, so we reflect the three main political parties in that respect. Our mission is as a domestic human rights campaign to ensure and safeguard the rights of people principally here in the UK. As a result of that, we have long expressed concerns about a number of the criminal justice and judicial co-operation measures that have been agreed at EU level. We think that the pioneers of European integration set about constructing a framework for law enforcement, investigation and prosecution without building in incredibly important safeguards to prevent against arbitrariness in justice and arrest. I think the evidence you heard earlier this afternoon from Andrew Symeou and Garry Mann really reflect the scale of human suffering that has been brought about as a result.

In terms of the measures that the Government has indicated they will opt back into, there are many that cause us continuing grave concerns, not least the European arrest warrant and the injustice that results, notwithstanding the reforms that have been proposed recently by the Home Secretary, but also a number of other measures that allow for the sharing of very sensitive information: DNA records, fingerprints, photographs and past criminal conviction information. Recent judgments against the UK, both in the Strasbourg court and domestically, demonstrate that our authorities are yet to understand their human rights obligations to safeguard and respect the private lives of UK citizens. That does not fill us with confidence about the extent to which they will be sharing information with their European counterparts that they should not be sharing.

**Q177 Chair:** Thank you very much. Ms McVeigh?

**Libby McVeigh:** Thank you, Chair. Fair trials is a defence rights organisation that designs its policy based on the problems that our casework indicates to us. The only concern that we have had in relation to the opt-out decision has been relating to the European arrest warrant. Our view is that the UK should not opt into the EAW in its current form without seeking to introduce stronger safeguards at the domestic level, and without being reassured of a willingness at the EU level to consider a form of the framework decision. I am sure we will get to the specifics of the reforms in due course but, given that we feel confident that both the Government and Brussels are moving in the right direction in this regard, we no longer have the concerns that we did have regarding opt in to the EAW.

**Q178 Chair:** Thank you very much. We will pick up the EAW specifically in a moment. Just before that, could I ask a slightly broader question? Some members of this Committee are quite concerned about the role of the European Court of Justice infringement proceedings. There are different perspectives on this. Do you think the UK has anything to fear from the change in jurisdiction there?

**Isabella Sankey:** I think the UK Government should be clear with Parliamentarians and the public on the implications of submitting to the jurisdiction of the ECJ on these measures that it chooses to opt back into. Terms like “an activist court” and those kinds of very subjective terms are unhelpful. I think any system of law, whether it is supranational or national in its focus to be sustained, maintained and to have credibility, is going to require the independent application of laws. So submitting to a court’s jurisdiction, if you choose to do that you need to then abide by the judgments of that court. It is no use further down the line accusing that court of being too interventionist. I think it is very important to be clear at the outset the jurisdiction that we would be submitting to if we opt into the EAW and other measures, and also submit to the court’s jurisdiction that we would be required to do.

**Q179 Chair:** You are comfortable with submitting to that jurisdiction?

**Isabella Sankey:** We are not comfortable with opting into a number of these measures, therefore, we would not be comfortable with also the enforcement that goes alongside that.

**Libby McVeigh:** Fair Trials believes in the rule of law, and our position is that we welcome the idea that the CJEU would have jurisdiction over a whole range of EU-wide measures. If you have a legislature that is passing legislation, it is necessary to have an independent court to ensure the consistent application and clarification of those laws. We do not think that there is value in these comments about judicial activism. Our position is that we would hope that the court could be more activist in certain areas, particularly in relation to protection of fundamental rights. Certainly, from our reading of the case law, the court does have a tendency to be deferential to member states’ interests in a lot of these areas.

**Jodie Blackstock:** We largely agree with Fair Trials International’s position. It is also important to be realistic about when the Court is engaged. In the sense of the infraction proceedings, which the Home Secretary pointed to in announcing the list of the 35 measures, that will only occur once the Commission has reviewed implementation of the measure. There will be a dialogue between the member state and the Commission as to whether in fact that measure has been implemented correctly or not. Other mechanisms can be used, different wording can be used. It will not be an automatic trigger where the UK finds itself before the Court of Justice. If we look at the annual report of the Court of Justice, the UK appears there on infraction proceedings perhaps two or three times a year so this is not going to produce a volume of litigation that the UK ought to be concerned about.

Certainly our review of the measures that are on this list of 35 is such that we have implemented these measures

correctly. It is unlikely that the Commission will be seeking infringement proceedings against the UK in any event, but we concur with the Fair Trials position, which is that we welcome the jurisdiction of the Court of Justice. It is a court that exists to interpret EU law in a uniform manner across the EU. Going forwards, it will have the power to use the EU Charter of Fundamental Rights to raise standards across the EU. That is something we should welcome. When we are expressing frustrations about the way the European arrest warrant operates in practice, that Court is the court that is capable of expressing ways of improving the instrument through its fair trials and its human rights mechanism. We should welcome it.

**Q180 Mr Winnick:** Due to a conspiracy, those who would strongly disagree with you are not here at present, but we organised that accordingly.

I believe you heard the evidence of two witnesses who gave their experience—very negative experiences to say the least—of the European arrest warrant. You were in the room, I believe, the three of you. I suppose you could argue, well, whatever good any measure is there are some who will suffer consequences that are far from good. But can I ask you this question, do you think overall it serves the cause of justice for the European arrest warrant to continue as it is at the moment, before the measures that are to be taken by the Home Secretary? Ms Blackstock?

**Jodie Blackstock:** Since the inception of the European arrest warrant, we have expressed that it has flaws. Certainly, we would have wanted to see procedural safeguards in place, protecting the fair trial process across the EU, before that instrument was brought into force, but the reality is, without the European arrest warrant we still have an extradition process. Those people who cross borders between EU member states will still be embroiled in criminal activity. There has to be a measure by which that criminal activity can be processed. By and large, the European arrest warrant shortens the procedure. It entitles a person to legal representation. It has a judicial process before a court. Those things have to be welcomed and, by and large, we do support the European arrest warrant in comparison to the prior extradition procedure that we had under the European Convention.

There is a report that we prepared that I have given to your clerk. Following two years of reviewing the European arrest warrant in practice, which we published last August. We list there a number of flaws in it, many of which are picked up in the amendments that we may come on to in a moment. One of the fundamental problems is training. Training defence lawyers in understanding how the process operates and being able to represent their client in both jurisdictions, issuing and executing states. That requires a lawyer in both countries with expertise in both countries' law. In the case of Garry Mann in particular, one of the fundamental problems is that he was let down by his lawyers in both countries. Had he had adequate representation in Portugal and in the UK, his arguments would have been before the court and he may well have been in a different situation.

**Q181 Mr Winnick:** Is it lawyers here or lawyers in both countries?

**Jodie Blackstock:** In both countries.

**Mr Winnick:** Including Britain?

**Jodie Blackstock:** Yes, they missed the appeal deadline and therefore his arguments, his evidence, could not be brought before the court. That was not a problem with the process. It was a problem with the training. So there are a number of aspects that are wrong in the procedure.

**Q182 Mr Winnick:** Let down by lawyers. Ms Sankey, championing civil liberties as always, are you in favour of the European arrest warrant as it is?

**Isabella Sankey:** Not as it currently is, Mr Winnick. I should probably say here that Liberty disagrees with JUSTICE on this point, and I should be clear about that I think.

**Q183 Mr Winnick:** If I can take over the role of the Chair for a second—a temporary Chair—we are running out of time, and we are very keen to finish. If I am correct, I think the Chair has in mind about half past five, so if you could keep it brief.

**Isabella Sankey:** I will be brief. I will keep it very brief. In our view, it is not a question just of training and problems with implementation. There are profound problems with the legal mechanisms and the law that we have. As a result it is very blunt. It allows for automatic surrender, and the very important component of judicial discretion has all but been wiped out of these very important decisions. Even if you have Rolls Royce justice systems across the EU—which I think we can all agree we don't—extradition is still a trauma in and of itself, which is why you need basic procedural safeguards, like prima facie case, like a dual criminality requirement to ensure that you do not see cases like Garry Mann's and Andrew Symeou's. Before we have those procedural safeguards put back in place we think it would be very unwise for the UK to continue to be part of this automatic system of surrender.

**Q184 Mr Winnick:** Thank you. Do you have anything to add? Do you agree or disagree with your two colleagues?

**Libby McVeigh:** I would say Fair Trials would sit somewhere in the middle, in that in its current form we do not believe that the EAW serves the interests of justice. I think the evidence of Andrew and Garry earlier—two of our clients—speaks very clearly as to why that is. However, we do think that reforms can be made domestically and at the EU level to address the concerns we have. We think that the reforms that have been proposed by the Home Secretary do go in the right direction and take us a certain way forward in meeting our concerns. We do not think that they are perfect. We would hope that they may be strengthened and we think that there are gaps to be filled, particularly in relation to the protection of fundamental rights.

**Q185 Mr Winnick:** Ms Blackstock's view that in the two cases we heard today, the witnesses who gave very articulate evidence about their misfortunes abroad, would you agree it was the lawyers at fault?

**Libby McVeigh:** I think Ms Blackstock was referring specifically to Garry Mann's case not to Andrew

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Symeou's case. I think Mr Mann's case is a complicated one but I would disagree that it was all down to the lawyers.

**Q186 Mr Winnick:** Some of it?

**Libby McVeigh:** I think there were mistakes made by lawyers in both jurisdictions, but I think the mistake made by the lawyer in terms of missing the appeal deadline in this country is one that to a certain extent is met by the proposed reform relating to flexibility on the appeal deadline that has been proposed in the Anti-social Behaviour, Crime and Policing Bill. So I do not share exactly that view. I think that there are definitely fundamental rights issues in both cases.

**Mr Winnick:** In order to try and meet our deadline I think we ought to have Mr McCabe.

**Chair:** Thank you. Yes, Steve McCabe.

**Q187 Steve McCabe:** I will be nice and brief, Chair, but let me just ask you if the UK succeeds in opting back into these 35 measures that have been proposed, will the opt-out have succeeded in repatriating powers to this country?

**Isabella Sankey:** It is a very interesting question and I do not think there is a straightforward answer. As the Home Office documents make clear, with some measures that are being opted out of, domestic law, either pre-existing domestic law or domestic law as it now is, already implements what is required. In a sense we have repatriated power in that we have it in our domestic law and we are not required to have it there anymore but, in effect, there will not be much change. Submitting to the jurisdiction of the court in this area will mean that powers have been sent back in the other direction, and I think it is very important in the report that this Committee writes to make absolutely clear the areas in which we will be submitting to greater jurisdiction of a supranational body and where we won't be. I think to a large extent there has been some muddying of the waters in some of the political messaging around the opt-out.

**Q188 Steve McCabe:** Is that a view shared by all three?

**Jodie Blackstock:** JUSTICE would probably be more succinct in saying it does not appear that we repatriate much in the list that we have. By and large, the powers that the EU institutions and bodies operate are retained in the 35 measures. We welcome that because these are bodies, such as Europol and Eurojust, that are very important. There are information sharing systems that are useful to UK interests that are on that list, such as the transfer of convictions, for example. Those are powers in the context of prosecuting crime that will continue to be held across Europe. They are not repatriated at all. In the sense of what might be repatriated on the list, I cannot see anything in particular there. I may well have missed something, but the majority of these measures that are not on the '35' list relate to existing criminal offences in this country and obsolete measures that we were not using anyway, so powers were not sent to the EU in any event.

**Q189 Steve McCabe:** Is that your view?

**Libby McVeigh:** As an organisation that adopts neither a pro nor anti EU position—and we can only speak from the position of law—certainly the opt-out will see the UK subject to 100 fewer measures and from our conversations in Brussels this is a move that is not being treated as insignificant. While the measures themselves may not be viewed as significant, the actual move is being treated as such and the UK is clearly sending a very clear message as to how it wishes to proceed.

**Q190 Steve McCabe:** I want to try to draw that distinction. I do not doubt that the UK would be subject to fewer measures, but I was wondering does that mean that they have repatriated power. That was really the point.

**Isabella Sankey:** What is interesting about the 35 measures that have been opted back into is that they are perhaps the most coercive, so the ones that place obligations on our enforcement to share information, the ones that allow UK citizens to be parcelled off to a foreign jurisdiction without what we would say are basic safeguards. As Ms Blackstock said, a lot of the measures that we are opting out of to a certain extent seem obsolete or they are already exist in law. The ones we are opting back into are perhaps those more coercive ones that have much more impact on UK based individuals. On top of that, the jurisdiction of the court will now apply in relation to determining whether the UK has complied with those obligations, so on balance perhaps repatriating powers in the other direction.

**Q191 Steve McCabe:** Thank you. One more, Chair? I think Ms Blackstock touched on this. I just wonder about some of the opt-in measures. You mentioned Eurojust. We have European Criminal Records Information System, the Schengen information system. How operationally interdependent are these with other opt-in measures. Is it possible to segment it in quite the way that some people have suggested?

**Jodie Blackstock:** I suppose I could talk about that but you would be better speaking to a law enforcement operator. I think Steve Peers gave helpful evidence on that in that he thought the list from a coherence point of view, which is what the Commission is looking for in terms of packages of measures, that would be acceptable.

In my view, all the Schengen measures largely have to come together. It would be difficult to separate those. They are integrated in terms of how the system operates. Equally measures on exchanging of criminal records, there are three of those. They are all on the list together and it would be difficult to take them separately. When it comes to looking at things like the European arrest warrant as compared to taking account of criminal records, they do entirely different things and there would not be any problem with taking the European arrest warrant and not taking the records information system, for example. Certainly the 35 are not fully integrated. They do not stand and fall together. What they do do is provide mutual recognition. Pretty much all of them are mutual recognition instruments that, as Ms Sankey suggested, deal with treatment of individuals and individual's data rather than the creation of offences, per se.

**Chair:** Brief comments if you would not mind.

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**Isabella Sankey:** Very briefly, I would echo what Ms Blackstock said that we are not best placed to talk about the operational interdependence. I also agree that it is clear because some of them deal with very different things, previous criminal convictions versus a pending prosecution that many of them will be divisible, as I think I said in answer to my first question. Our very real concern is that before we start sharing past criminal record conviction information, which will probably include cautions as a result of how our databases are currently constructed, DNA and so on, the UK looks to put its own house in order about the extent to which excessive amounts of information are held by law enforcement.

When the Police National Database went online—I think back in 2011—it was reported that a quarter of the UK population are on there. It includes information about suspects, soft information, conviction information, caution information and also information about vulnerable witnesses and victims. It is our very real fear that the more this type of information is shared beyond our borders, without appropriate safeguards, you will see very counterproductive results.

**Libby McVeigh:** I have nothing further.

**Q192 Chair:** Thank you. One very quick question from me, and if you cannot answer it in a sentence please feel free to write. Do you think the European supervision order will mitigate some of the concerns about the European arrest warrant?

**Libby McVeigh:** In brief, we are delighted to see that this is being opted into. We think it goes a long way to

addressing certain of the concerns. I think it could have had a great impact in Andrew Symeou's case in avoiding his pre-trial detention. I do not think it addresses all of the issues, and I think its impact depends on other member states agreeing to implement it and doing so in individual cases. I think that is something that will take time.

**Isabella Sankey:** I wholeheartedly agree with that analysis of the European supervision order. I would echo the fact that in Andrew Symeou's case it would not necessarily have made all the difference. If British judges are not able to look behind a request such as that, where there has clearly been abuses of process, you are not going to find yourself in a much better situation. It is another sort of centralising measure to deal with an awkward situation but I do not think it will be the answer.

**Jodie Blackstock:** It is disappointing it comes nine months late as an announcement. We should have implemented it in December. It has the potential to make a big difference to pre-trial detention. It is a complex measure and we will have to wait and see how the UK seeks to implement it and how the member states interpret it as well. It may be one for the Court of Justice to assist us in finding a uniform interpretation.

**Chair:** Thank you all very much. I am sorry for keeping you waiting, and thank you for giving us the ethical problem of what to do when Justice and Liberty disagree. Thank you all very much.

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## Wednesday 11 September 2013

Members present:

Keith Vaz (Chair)

Mr James Clappison  
Michael Ellis  
Lorraine Fullbrook  
Dr Julian Huppert  
Steve McCabe

Bridget Phillipson  
Mark Reckless  
Chris Ruane  
Mr David Winnick

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### Examination of Witnesses

*Witnesses:* **Kai Hart-Hoenig**, German lawyer, and **Wojciech Andrew Zalewski**, Barrister, gave evidence.

**Q193 Chair:** This is the resumed hearing of the Committee's inquiry into the European arrest warrant opt-out. We have given the Home Secretary and Parliament an undertaking that we will have our report ready for the consideration of the House by the end of October. Our witnesses today are Mr Zalewski and Dr Hart-Hoenig. Thank you very much for coming.

If I could start with you, Mr Zalewski. Why is it that Poland has such a bad record in terms of the number of European arrest warrants that it has issued? I do not mean bad in that they have done something wrong, but in terms of the sheer volume of cases that come from Poland. Why is that the case?

**Wojciech Andrew Zalewski:** Mr Chairman, as always these things are perhaps more complex than meets the eye. It would be difficult to ascribe any particular one factor or some simplistic answer to the whole thing, but I have at least four factors jotted down here that may be of interest.

**Chair:** If you could discuss them as briefly as possible, I would be most grateful.

**Wojciech Andrew Zalewski:** Absolutely. First is the actual function of the judicial authority and how it operates. I will just extremely briefly quote Lady Hale, and this is a recent judgment that was delivered by the Supreme Court, last year. This is the case of PH, HH and F-K that was decided on 20 June 2012 by the Supreme Court and there is a telling paragraph.

**Chair:** Is it a long paragraph?

**Wojciech Andrew Zalewski:** No, just a sentence.

**Chris Ruane:** Is it telling?

**Wojciech Andrew Zalewski:** Yes. I am most grateful, sir. This is Lady Hale, at 45, "Furthermore, we can take notice of the fact that no prosecutorial discretion is exercised by the Polish authorities when deciding whether or not to apply for the issue of an EAW, no matter how comparatively minor the offences, how much time has elapsed since they were committed and how respectable the life which the offender has led since then."

**Q194 Chair:** Lady Hale points to the fact that there is a problem in terms of the process in the Polish judicial system that has led to such a large number of European arrest warrant requests?

**Wojciech Andrew Zalewski:** Yes. In a nutshell that is what is said, so I would agree.

**Q195 Chair:** Excellent, and the other three nutshells?

**Wojciech Andrew Zalewski:** The other three nutshells, if I can put it that way, are sort of systemic differences. Our judiciary in this country are incredibly good at trying to give effect to something, which may at times appear extremely alien in terms of ethos.

**Q196 Chair:** Yes. So, they are very helpful?

**Wojciech Andrew Zalewski:** Yes.

**Q197 Chair:** When somebody asks for a request, they just grant the request?

**Wojciech Andrew Zalewski:** Absolutely.

**Q198 Chair:** What is the third factor?

**Wojciech Andrew Zalewski:** What I was going to say is there is a literal interpretation of law in Poland. We have over 300 rules of interpretation of a statute, for example, and it all depends on grammar—

**Q199 Chair:** So it is the interpretation of the law in Poland?

**Wojciech Andrew Zalewski:** Yes.

**Q200 Chair:** What is the third factor?

**Wojciech Andrew Zalewski:** The third factor is the sentencing guidelines in Poland are at variance to what we expect in this country. It is very easy to get a custodial sentence over four months, for example.

**Q201 Chair:** Right. For minor offences?

**Wojciech Andrew Zalewski:** For minor offences.

**Q202 Chair:** Give me one example? We have heard about the wheelbarrow.

**Wojciech Andrew Zalewski:** Theft of a bike.

**Q203 Chris Ruane:** What about a wheelbarrow?

**Wojciech Andrew Zalewski:** Well, yes, it could be.

**Q204 Chair:** The theft of a bike in Poland will give you a sentence of four months in prison?

**Wojciech Andrew Zalewski:** Yes, it could do. It could do.

**Q205 Chair:** For a first offence? It could do?

**Wojciech Andrew Zalewski:** As I say, everything is prescribed in statute and there is absolutely no movement in terms of discretion or anything.

**Q206 Chair:** What is the fourth factor?

**Wojciech Andrew Zalewski:** The fourth factor, which is more to do with this jurisdiction rather than the Polish jurisdiction, is the whole Schengen idea and how it operates. Of course, as you know, Chairman, we have not been part of this Schengen information system, and also the fact that everybody can now travel with just ID cards, which is a great thing. A judge in Poland could not say, "You cannot leave the jurisdiction, you have to surrender your passport", because an ID card is absolutely essential to exist.

**Q207 Chair:** Sure. What you are saying is that if this European arrest warrant is kept, and the Government wants to keep the European arrest warrant with a number of changes to legislation, this will still be a problem, because we have not changed either the sentencing guidelines or Polish statute or the attitude of the judges in Poland, which is to deal with strict interpretation. That is not going to change, so even if there are changes made here, it will make no difference?

**Wojciech Andrew Zalewski:** If I may just say that judges in Poland are doing their level best as well, but they are constrained.

**Q208 Chair:** No, I know that. Sorry, could you just answer my question? What is the answer?

**Wojciech Andrew Zalewski:** Yes, I would say that there are fundamental problems that need to be addressed.

**Q209 Chair:** Which will not change?

**Wojciech Andrew Zalewski:** Which will not change.

**Q210 Chair:** Dr Hoenig, in Germany, you have a proportionality test, of which the Home Secretary is a great fan. We will come on to it more a bit later. In terms of the number of warrants that have been issued in Germany, do you have similar information to give this Committee about the number of arrest warrants? We will come on to proportionality later and other members of the Committee will ask about this, but do you have any figures about where Germany is in the league table of asking for European arrest warrants?

**Kai Hart-Hoenig:** No, but because Germany is very fond of issuing arrest warrants also at the national level, I guess it will be a great deal of arrest warrants.

**Q211 Chair:** Are you telling this Committee that the United Kingdom changing our position on the European arrest warrant and putting in a proportionality test will not affect the German judges' decisions to issue these warrants since they are so fond of them?

**Kai Hart-Hoenig:** Yes.

**Q212 Mr Winnick:** The question of the European arrest warrant is a very controversial issue, if not in Germany and Poland, certainly in Britain. In Britain we have more controversy over membership of the European Union itself. The argument in favour, as obviously you know, is that the arrest warrant is a very important instrument in dealing with criminality

across Europe. Critics say otherwise. What is your view?

**Chair:** Dr Zalewski?

**Wojciech Andrew Zalewski:** No, it is just plain Mr.

**Chair:** I am sure you will be a doctor at the end of the session.

**Wojciech Andrew Zalewski:** I hope so. I like history and I think history is quite informative, particularly in this case. What we have here, essentially—and I stand to be corrected by Dr Hart-Hoenig here, who is probably much better at this than myself, but we have the impetus to actually put this through—is the 9/11 attacks and the whole criminality cross-border of a scale that was at the opposite end of the spectrum to minor offences. I take it that the Commission—the Commission gets very bad press sometimes—has produced a list of offences, a negative list of offences, which basically said, "You will not issue EAW for XYZ". But that list, I understand, was then overturned politically and now we have 32 offences—I hope I am right—on the actual list, which are the top end offences for which no dual criminality test is required. Then we have a whole host of offences that still satisfy the four months, for example, on a conviction case, which fall below that. Sorry to be long-winded. As a tool it is very useful, but once you think about the Schengen area and the rationale of why it was implemented, because there were no borders in the Schengen area—

**Q213 Mr Winnick:** I think it is really a yes or no on this one. Do you think that if the arrest warrant is changed according to what the Home Secretary has in mind, and if Parliament so approves, that it will harm or not the fight against criminality in Europe? Difficult?

**Wojciech Andrew Zalewski:** I think that is probably too difficult for me to answer, but in principle I think it had to be done because if one is thinking in terms of one big jurisdiction, as a sort of Schengen area, then one needs to have a mechanism—I hope Dr Hoenig agrees—that actually does what the European arrest warrant is supposed to be doing. Transnational borders do not exist and one has to have a mechanism by which one pursues certain individuals and brings them to book. Where we stand in this country, so far as that is concerned, perhaps needs to be looked at very carefully.

**Q214 Mr Winnick:** Your fellow witness told the Chair that Germany uses the European arrest warrant quite a lot. Do you think that if it was changed in the manner in which the British Government has in mind—the same question I put to your fellow witness—it would undermine in any way the fight against crime?

**Kai Hart-Hoenig:** I believe fighting crime effectively in the long run needs to heed the rule of law and the current concept of the European arrest warrant in many respects infringes the rule of law, so in the long run the capability to be a tool to fight criminality will fade away. What I know from UK—I will not try to interfere in your home turf—is that there are improvements of a certain system but the essential question should be whether the concept needs a

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remedy. I guess it needs a comprehensive remedy. Why? Because the idea of mutual recognition based on mutual trust needs to be set right. The point is that there is no mutual trust. Therefore I do not trust, for example, the Romanian or—sorry—Polish system. Insofar it is needed to reconstruct the framework decision and the concept in a way that these are building up trust, because we cannot rely on trust currently because of the absence of common standards.

**Q215 Chris Ruane:** On this issue of commonality, what are the costs? If a Polish citizen steals a bike for £100 and then comes over here, the whole bureaucracy to get him back there may cost thousands, tens of thousands of pounds. Is there no proportionality that could be introduced? It does not show Poland in a good light if you are trying to take Polish citizens who have stolen wheelbarrows and drag them back to your own country. Is there nothing that you can do on the Polish side to screen those and say, “This is reasonable, this is not reasonable”? A simple measure?

**Wojciech Andrew Zalewski:** As an English barrister, I find great difficulty in commenting on that in full. It would be a great thing to do, but one needs to understand that this is a post-totalitarian era for places like Poland. They only just managed to start existing in 1997 when the new constitution was brought in. Things like judicial authority or anything in terms of judicial function, as we understand it, which has certain aspects to it, is completely alien. The system did not trust an official, there was no room for manoeuvre, and that is how it is set up still, I am afraid.

**Q216 Chair:** You do not see that is going to change in the near future?

**Wojciech Andrew Zalewski:** No, I think there are moves. Obviously the judiciary cannot do it themselves. There needs to be a political movement in that direction.

**Q217 Dr Huppert:** Dr Hart-Hoenig, can I come back to understand a bit more about the proportionality test in Germany? It would be helpful to understand how it works for outgoing warrants but also to hear a word on your take on how that is fitted in with the wider European frameworks. Essentially what I am asking is, could we do the same thing?

**Kai Hart-Hoenig:** The proportionality test is a requirement for issuing an arrest warrant at the national level. Usually, at first an arrest warrant is issued at the national level and then it is just translated into a European one. But as to proportionality we are also so far not as good as I would like it to be because, for example, a sentence without probation must not be expected. It needs not to be one and so the prerequisite for being proportionate is also very low. But putting it the other way round, if it is a proportionality test on incoming requests, we are only looking at whether it is grossly disproportionate. We are not substituting the judgment of the foreign judge but if we believe it is grossly disproportionate—I already mentioned some examples—then we would say no.

**Q218 Dr Huppert:** I suspect we are using the terms in and out in the opposite sense, whether the request is coming in or the person is coming in.

**Kai Hart-Hoenig:** Yes. But the proportionality test operates in both directions.

**Q219 Dr Huppert:** But in terms of other states asking you, you have the proportionality test, and that looks only for gross disproportionality. How is that defined and have you had comment from other European countries about that? Have they resisted your introduction of that proportionality test?

**Kai Hart-Hoenig:** Altogether not, because it is a right under our constitution so all judges, for decades, are trained in looking at proportionality and it is now also enshrined in our International Legal Assistance Act and it is also an element of the European public order now.

**Q220 Dr Huppert:** Are there any other countries that take a similar approach in terms of requests coming in and people going out, looking at a proportionality test? Are you aware of other countries that do that? Are there any barriers that would stop them?

**Kai Hart-Hoenig:** I would say you have to distinguish theory and practice. It is completely different. If you are looking at the practices of different higher regional courts, it is also completely different. Some are just taking a formalistic approach, doing more or less nothing about proportionality, others are taking it quite seriously. There is no appeal just because the blue heaven is above the higher regional courts, unless it is the Constitutional Court, but such cases are rare.

**Q221 Dr Huppert:** Would you suggest that we follow the German model for this and should proportionality tests be conducted by the issuing state or the receiving state?

**Kai Hart-Hoenig:** My suggestion is to include specific provisions, not a general rule as to proportionality. For example, it should not be possible to request the enforcement of a sentence that is not longer than, say, one or two years. If it is just a matter of discretion, I am really concerned the practice will just continue.

**Q222 Chair:** Yes, but you have told the Committee already that even if we change to a proportionality test, it would not affect Germany, because Germany would still be requesting because they are very fond—

**Kai Hart-Hoenig:** That is right. There will be no impact if it is just about a general rule.

**Q223 Mr Clappison:** Thank you very much. It has been extremely helpful listening to your answers and, listening to some of the questions, I have to say I am tempted to the conclusion that people who support the European Union on these matters are prepared to throw civil liberties out of the window and just let the EU juggernaut steamroller justice in all the individual nation states. Listening to what you have said, wouldn't it be simpler if we just had individual agreements between different nation states in Europe, as between the United Kingdom and Poland or Germany, and we could build up the mutual trust that



you have talked about rather than having a one-size-fits-all solution dictated by the European Union?

**Wojciech Andrew Zalewski:** At times like this I wish I was a politician, but I am not. Yes, absolutely. In a sense one could argue that is the case, but of course one needs to be fair in the sense that, for example, the Schengen information system, which I understand the Government is putting in, I think in October of next year, is well overdue.

**Chair:** Yes, Mr Zalewski, we know about the Schengen information system, Mr Clappison has put to you this point—

**Wojciech Andrew Zalewski:** As an English lawyer, I must agree with him.

**Q224 Chair:** You agree with him?

**Wojciech Andrew Zalewski:** Yes.

**Q225 Chair:** You think it is better to bilaterally negotiate with the 27 countries? Dr Hart-Hoenig?

**Kai Hart-Hoenig:** Either yes, or it is about creating a European Union of different speeds and so, as it is discussed, as with the currency, maybe there are a couple of member states where I have more or less trust and there are others where there is none. It could be multilateral, but it is premature to have the one-size-fits-all solution.

**Q226 Mr Clappison:** One other point on this. Where people subject to an arrest warrant are concerned at their potential treatment after they have been extradited, to what extent can they use the European Convention on Human Rights to prevent their extradition? We took some evidence yesterday from people who, after the alleged offences had taken place, had returned to this country and then they had been extradited. They were very worried as a result of what had happened to them at the time of the alleged commission of the offences: the way in which they had been investigated, the way they had been dealt with, the lack of interpretation, the lack of justice, the lack of opportunity to put their own case. They then come back to this country and later on are extradited back.

**Kai Hart-Hoenig:** This convention is a very good convention. However, in Germany, it does not have a constitutional status. It is considered as something like a federal law or just a convention, but the Constitutional Court has found a way to construe our fundamental rights in the light of the convention. The point is if you use the convention to remedy an arrest warrant before the European Court of Human Rights you have to go the ladder up exhausting all available remedies, that takes you years, so in this regard you can just ignore it in general.

**Q227 Michael Ellis:** Gentlemen, listening to you I am reminded of the old saying by William Blackstone, I think in the 1760s, “It is better that 10 guilty persons escape than one innocent suffer”. You have heard of that?

**Kai Hart-Hoenig:** Of course. It is very famous, worldwide I guess.

**Michael Ellis:** The reality is that part of the defect in the European arrest warrant system is that it seems to

disregard that principle, inasmuch as when you apply a one-size-fits-all protocol, human scenarios do not tend to fit that protocol. We get manifest injustices like those this Committee has heard about and that clearly is of great concern to those who are interested in civil liberties. But, do you think that the proposed reforms will have some beneficial effect on that? For example, isn't the issue of proportionality rare? My understanding is that the United Kingdom has that proportionality test with other countries already, the United States for example. So we do not extradite people to the United States unless the likely sentence is 12 months or more. Wouldn't it be quite simple to have a system whereby unless the gravamen of the offence is one likely to be met by that type of sentence in this country, it simply is not worth sending them?

**Chair:** Dr Hart-Hoenig, would you like to answer that question? Do you know what the question is?

**Kai Hart-Hoenig:** Yes, of course. A general proportionality test requirement will change nothing. The problem with the presumption of innocence is that what is required is a strong suspicion; it is a very dynamic, blurred phenomenon. At the very beginning of an investigation, the requirements for strong suspicion are close to nil, but close to bringing charges they are very high. That means that the requirements under the same criterion are low at the very beginning. That means you often see arrest warrants issued when it is just the police minutes and a certain idea of the case does exist. So what is needed is, for example—I guess it is your system—that extradition is only allowed if it is at the pre-charge stage.

**Michael Ellis:** Past the pre-charge?

**Kai Hart-Hoenig:** Or even past pre-charge, because otherwise you have this wide area where it is far from clear how robust, how lasting the evidence is.

**Wojciech Andrew Zalewski:** I was just going to say two things. One thing is I think extradition may be easier to live with if it was just to do with the 32 really major offences and that the rest would be taken care of in some other way. That might be a good way of dealing with it. But also there may be a greater co-operation, for example, insofar as the lower end of the scale is concerned, between the probation systems in Europe, which is completely missing. Another force that has been taken out of the equation is the politician, which I think might be a good thing, one, because politicians can actually be accountable and, two, hold the balance of something, or make sure that something is in check. All that has been taken away.

**Q228 Chair:** Are you suggesting that at the end of the day the Home Secretary should make these decisions?

**Wojciech Andrew Zalewski:** No, but she is part of the equation, which may be balancing the system out.

**Q229 Michael Ellis:** In some cases there is a political dimension?

**Wojciech Andrew Zalewski:** No, absolutely, but what I am saying is I would loathe a system where the judiciary was being pushed to make political decisions, if that were the case.

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**Q230 Michael Ellis:** A couple of the remedies that have also been spoken of to improve the system that currently exists with European arrest warrants is to permit the issuance of bail for those people, pending proceedings. If they are going to be extradited to Poland or wherever and potentially spend months or even a year or two in jail pending proceedings, that clearly can lead to a manifest injustice. If they are permitted to be on bail or if bail is at least possible then that may reduce the injustice if they later go on to be acquitted. Would you support that?

**Kai Hart-Hoenig:** Only if this bail is granted on the home turf, or it is the type of bail that means they can return until the proceedings take place, because if they are deprived of all the social environment, the damage is done.

**Michael Ellis:** Yes, I accept that. Thank you very much gentlemen.

**Wojciech Andrew Zalewski:** I would second that.

**Q231 Dr Huppert:** I wanted to follow up from Mr Clappison's question. He was advocating the creation of some 351 bilateral treaties to deal with as an alternative to the European arrest warrant. Do you think that there is any reason to be certain that such bilateral treaties or return to the pre-existing Council of Europe approach would necessarily be better from a civil liberties perspective than a European arrest warrant, if reformed as the Home Secretary has suggested and perhaps with a proportionality test?

**Kai Hart-Hoenig:** Provided the parties are sharing common standards in a substantial way.

**Wojciech Andrew Zalewski:** I agree.

**Q232 Bridget Phillipson:** Regardless of the means by which you would extradite or otherwise, is part of the issue the lack of speed in proceedings in some member states? What we heard yesterday was the length of time it can take for cases to come to court, and I have seen that in constituency cases where it can take two or three years. There is very little the British Government can do because if that process applies equally to Spanish citizens in Spain, a British citizen is not being disadvantaged by that length of time, but clearly they are because it requires them to reside in another country pending the outcome. What more can be done to speed up proceedings in some member states?

**Kai Hart-Hoenig:** You are speaking about the regular proceedings not the extradition proceedings?

**Bridget Phillipson:** Yes. It appears to be connected as well to the length of time it can take for the legal process to—

**Kai Hart-Hoenig:** I am only doing white collar crime and tax-related crime. If you have a very complex cross-border case it just takes years and there is more or less no chance to obviate these problems. So it is just because of presumption of innocence, again. You have to have a bail-out system in place that works and that will keep the person who has to be seen still innocent in his regular, natural environment. It is the only solution.

**Wojciech Andrew Zalewski:** I agree. I don't think I can add any more. It is a fundamental, universal point.

**Q233 Bridget Phillipson:** In some of the cases I have seen, it can take two or three years for a case to come to court and in that time you are prevented from returning to your home country. It seems like a—

**Kai Hart-Hoenig:** Investigations in white collar crime proceedings sometimes take many years. The longest case I had took more than seven years, just the investigation.

**Q234 Bridget Phillipson:** Do you think there is a role for training? To what extent could that be improved in member states in exercising the European arrest warrant?

**Kai Hart-Hoenig:** Who needs to be trained? The German officers are well trained; the prosecutors specialise in extradition issues. Who needs to be trained are lawyers because they don't have the UK legal aid system. They have just no idea and they have no time to start working on it. So, if someone needs to be trained, then it is the lawyers.

**Q235 Bridget Phillipson:** Would you like to add anything?

**Wojciech Andrew Zalewski:** As Dr Hart-Hoenig has just said, we do have a legal aid system and we are extremely lucky to have one, but equally, as my head of chambers has always said, the primary duty is to the Legal Aid Board in the running of those cases, particularly the appeal cases. One has that at the forefront of one's mind and sometimes one has to say to the client, "I'm sorry, you have no merit in your case" and that's that. But luckily we do have quite a few lawyers who are very good at extradition, and of course there is the dedicated extradition unit here.

**Q236 Bridget Phillipson:** Is there, therefore, any solution to that, because that is unlikely to change? Would training lead to any improvements, given that we are not going to alter the fact that we have a legal aid system but some member states do not?

**Kai Hart-Hoenig:** There is a huge difference in legal aid systems. In Germany you can earn a maximum of €6,000 in the period of investigation—not per day, for the whole period. If it takes seven years, it is also only €6,000. If you have a long-lasting extradition case, no lawyer can afford doing it on a legal aid basis. That means the lawyers who are working on an hourly fee basis, as I do, need clients that can afford it. Most clients cannot afford it, just if it is a petty offence, and colleagues who are only working on a legal fee basis cannot afford to be trained to know this very complex extradition law. That is how it stands.

**Q237 Lorraine Fullbrook:** Could I ask a supplementary to that? As well as lawyers, is there not a case for training the police in member states, as well, when they actually make arrests for, if you like, spurious cases, traffic offences for example? Is there not a case for police training too?

**Kai Hart-Hoenig:** But the police, at least in Germany, have nothing to do with extradition matters. It will be only prosecutors.

**Q238 Lorraine Fullbrook:** But what about charging in the first place, though?

**Kai Hart-Hoenig:** We don't have that system, sorry. From the very beginning, from the inception of the case, even if the police starts it, actually and legally it is controlled and supervised by prosecutors.

**Q239 Lorraine Fullbrook:** Is that the same in Poland?

**Wojciech Andrew Zalewski:** I am not a Polish lawyer. I can only comment from my experience of Polish cases in the UK. I think that the system has been borrowed from Germany, the way Poland is operating in terms of law and stuff like that. I would probably say that it is very likely that Poland is operating on the same principle, and also there is no legal aid. We take things for granted, for example we have a lawyer in a police station in a cell and so on; nothing like that happens in Poland. A lot of judges have expressed concerns with regard to that. So there is a huge difference jurisdictionally, particularly insofar as this country is concerned and other states in Europe, such as Poland and eastern Europe, central Europe.

**Q240 Chris Ruane:** In the evidence we took yesterday from British subjects who have been extradited, to Portugal and Greece and from the evidence we have heard from you today, things are not working well, things can be improved. What actions could the British Government take to improve the procedure in the UK and what actions could it take to improve procedures at a European level?

**Kai Hart-Hoenig:** I am not an expert to advise on what the UK should do. I guess if it is about your law, and given the majority of this stuff, I do not rely on principles, a principle-based approach, I would like to have crystal clear criteria. For example, you mentioned Greece. You can get 10 years imprisonment for just one small portion of cocaine, very small, as a consumer, and so what is needed are clear criteria about on what requirements you are going to surrender and where not. What is now in Measure C, part 1, which passed the European Parliament yesterday, means you need to have dual representation. We have requested that for a long while, and maybe now—it is not yet implemented—we will see how it will work out practically in all the countries.

**Wojciech Andrew Zalewski:** I was just going to say a couple of things. One thing is that perhaps other agencies can co-operate. We have a lot of cases that probation in Poland are recalling and issuing extradition orders for, which are very minor offences, for somebody who perhaps did not get in touch with the probation or left and got a job here and so on. Even judicial authority as a concept is a thick concept and has a very wide meaning. Then probation in various member states can co-operate with each other so that perhaps EAWs are not issued for, say, breach of probation. I had somebody who ran a case in the first tier immigration tribunal for not being invited back into the UK, who had a letter from probation in Poland saying that he is perfectly at liberty to go to the UK and work there as long as he kept in touch with them. I think if there was more co-operation on a basic level, outside of the 32 offences, between the

probation systems then a whole host of EAWs could be avoided at a stroke.

**Q241 Chris Ruane:** Finally, will the European Investigation Order and the European Supervision Order reduce the level of demand for arrest warrants?

**Kai Hart-Hoenig:** I fret about this. This will not really be of a significant impact because it is just about minimising all the measures that are provided for in this instrument. The supervision order is something that leads in Germany to the suspension of the execution of an arrest warrant but the arrest warrants are usually based on grounds of risk of absconding, so there will be no relief in this regard. As to investigation, that could improve the situation, given the Polish cases, because it is often just about interviewing suspects but the Polish authorities are issuing arrest warrants. In this regard, maybe an improvement will happen.

**Q242 Chair:** I am going to ask you both a final question. You are both very distinguished lawyers, you know this subject matter very well, and you have looked at the Home Secretary's list. You know the task that we have been set, along with the Justice Committee and the European Scrutiny Committee, to prepare a report for Parliament, so this is serious stuff. A lot of Members of Parliament are going to be reading our report and making their decision as to how they are going to vote on the basis of what this Committee says. I want a brief answer from both of you. Having looked at the list of 100 measures, including the 35 measures that the Home Secretary wants to opt in, do you think we should support this list—it is your opinion I am seeking—or are there still problems with the 35 that we are going to opt into, including the European arrest warrant? Mr Zalewski?

**Wojciech Andrew Zalewski:** It is very kind of you to describe me as such. To be honest, I find it difficult to come to a definitive view, but the European arrest warrant is definitely an area that needs to be examined in some detail. With regard to—

**Q243 Chair:** So, you are not happy with opting back in, even with the four safeguards that the Home Secretary told the House about?

**Kai Hart-Hoenig:** The European arrest warrant concept is still rather an idea—the first piece of legislation in the framework of mutual recognition based on mutual trust—made operational than an instrument which satisfies all requirements under the rule of law. Just changing this European arrest warrant system pragmatically may lead to improvements. But I believe, only a comprehensive review and re-negotiation of the flawed framework decision will remedy all shortcomings of the European arrest warrant system.

**Q244 Chair:** You are sounding like a typical lawyer. I know you have divided loyalties, and England will be playing Poland on 15 October, but do you think that we should opt into the European arrest warrant as currently drafted, with the changes that have been elegantly proposed by Theresa May? A yes or a no would be helpful.

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**Wojciech Andrew Zalewski:** It is very difficult. More work needs to be done, I think.

**Q245 Chair:** More work? So, no, at the moment?

**Wojciech Andrew Zalewski:** Not at the moment.

**Q246 Chair:** Dr Hart-Hoenig, can you be clearer?

**Kai Hart-Hoenig:** It is better with these safeguards than without, but I would not vote for opting in.

**Q247 Chair:** You would not?

**Kai Hart-Hoenig:** Yes.

**Q248 Chair:** Thank you very much, you have been both extremely helpful. We are now going to hear from the Cabinet Minister who negotiated the opt-out, Charles Clarke. You are welcome to stay in the body of the hall if you do not have to rush back to court, but thank you very much for your extremely helpful evidence.

**Wojciech Andrew Zalewski:** Extremely grateful for being invited, thank you.

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### Examination of Witness

*Witness:* **Rt Hon Charles Clarke**, former Home Secretary, gave evidence.

**Q249 Chair:** Mr Clarke, welcome back to the Home Affairs Select Committee.

**Charles Clarke:** Thank you very much, Mr Vaz. It is very nice to see you again.

**Chair:** We are most grateful to you for coming here. The context of this is that the Home Secretary, one of your successors, has asked this Committee to look at the measures that she is proposing to opt in and opt out of and she has asked us to deliberate to prepare a report for Parliament by 30 October, along with the Justice Select Committee and the European Scrutiny Committee. We have asked you here because you were the Home Secretary who enabled us to have this discussion, because you negotiated the opt-out. If I could start by asking you, why did you do that?

**Charles Clarke:** The sequence of events is not quite as you describe, Mr Chairman. I finished as Home Secretary in May 2006 and the European Council under Angela Merkel, the German presidency, decided in June 2007 that it was going to set about the process of establishing a further renegotiation of the Lisbon Treaty. That followed the Declaration of Berlin on 25 March 2007. Following the European Council, the intergovernmental conference started in July 2007 and the treaty was then signed in Lisbon on 13 December 2007 and, as we know, came into force in December 2009. So I was aware of the run-up to the conversation but I was not in office at the time of the process when the British Government was deciding its view.

**Q250 Chair:** Did you support the view that we should opt out?

**Charles Clarke:** I did not actually, no. I felt that the opt-out was suggested by those who were more anti-European in the Government, and there were some at senior levels in the Government, because they wanted to keep open the possibility of not being as engaged in the justice and home affairs pillar as we in fact subsequently agreed to do. I think the reason was entirely political. It was not about justice and home affairs, law and order; it was not about how to best deal with the threats from international crime and so on. It was because of the political difficulties, which you as a former Minister for Europe are more than familiar with, of getting issues of this kind through both Houses of this Parliament. Having the opt-out in place gave the possibility that people could say if we do not like it we could return to it. But I do not believe

there was, even at the time it was carried through, any view that an opt-out was a worthwhile thing to do, still less do I think there would have been any intention—

**Q251 Chair:** You would have preferred for us not to have opted out and you certainly do not like the idea that we are opting out of any measures. In an interview with Justice Across Borders on 22 January you said that opting out and then attempting to opt back into 35 measures will universally weaken our ability to fight crime and is a terrible idea, whereas Yvette Cooper—I am not saying you should agree with everything she says—says that it is good to opt out of some of these measures because they are obsolete, they do not exist any more.

**Charles Clarke:** I think that the opt-out was a terrible mistake by this Government and I think the Labour Party—

**Chair:** By your Government?

**Charles Clarke:** By the current Government, by the current Coalition Government. I think that the Labour Party should have taken the position of opposing the opt-out from the very beginning. I think there are no benefits in the opt-out for preventing crime. The biggest threats we face—serious and organised crime, drug dealing, people trafficking, illegal migration, fraud, internet crime, terrorism—are all international, all of them require close co-operation between police and security organisations and close co-operation between justice organisations, for example, in the form of the European arrest warrant to bring people to justice. I believe that the best way to fight this international crime is to strengthen international co-operation rather than to weaken it. I believe that the reasons why this Government has decided to do this are entirely political in relation to the attitude to the European Union and not at all about law enforcement. That view has been strengthened by the announcement by the Home Secretary of the decision to seek to opt back into 35 measures, including the European arrest warrant, which I think gives very little even potential benefit at all for those who think there is some benefit in opting out.

**Q252 Chair:** You have looked at the list and you think 35 is not enough. Obviously you do not want to opt out in the first place, but if we were going to opt

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back in, since your Government gave us the chance of opting out, you would like to go back to all 135?

**Charles Clarke:** I think, and I know this from a number of conversations, that the Commission would agree, and many in the European Union would agree, that 133 is far too many. You can get to a position of, say, 35, 40, 50, and you can do that perfectly well by agreement. I do not think you need to go through this opt-out process in order to get there.

**Chair:** That is very helpful, thank you.

**Q253 Dr Huppert:** Thank you Chair, and welcome, Mr Clarke. I read in the *EDP* that you are moving to Cambridge, so I look forward to—

**Charles Clarke:** I am going to be one of your constituents. I am afraid that I think I am unlikely to vote for you, but it is not because I do not regard you as an excellent Member of Parliament.

**Q254 Dr Huppert:** Thank you very much for that praise—may it appear in literature. It is very good to hear your comments about the problems with the opt-out in the first place, and I do agree that it would have been helpful had those on the Labour Front Bench said that we should not opt out in the first place. It felt very lonely for those of us who were arguing that, but we are where we are.

Do you think that the effort that has been taken, from a police perspective, a parliamentary perspective, a Government's perspective, from all the officials who have worked on it and the negotiations that will happen in Europe in order to deliver an opt-out and opt-in, would have been worth it at all?

**Charles Clarke:** In no respect whatsoever. I see no gain and massive potential risk. I didn't respond to part of the Chairman's earlier question about the risks involved. I think it is not at all clear that we will be able to opt in in the way that is proposed by the Government. It is quite likely there will be egg on the face in a very substantial way for this whole process. The fact there is required to be a parliamentary vote in both Houses also means that if there is any doubt about the actual implementation of the opt back into the 35, there is a serious possibility of the Government being defeated in one or both Houses, in which case the whole issue would have been a total disaster. As it is, it simply would have been a waste of time with no value whatsoever.

**Q255 Mr Clappison:** May I say to you, Mr Clarke, welcome back, as somebody who was on the Committee when you used to come and give evidence to it. You were always very frank and very honest when you were giving evidence before, and left nobody in doubt as to your position. You also had at one point to take responsibility for something that was not your fault at all, frankly, if I remember the circumstances correctly. Can I take you back to the background to the decisions that were taken? Were you the Home Secretary at the time of the constitutional treaty proposals, which were the predecessor of the Treaty of Lisbon?

**Charles Clarke:** Yes.

**Q256 Mr Clappison:** The United Kingdom's membership of the constitutional treaty was subject to a referendum promise. Is that correct?

**Charles Clarke:** Yes, it was.

**Q257 Mr Clappison:** At that time, the constitutional treaty proposed that the United Kingdom would be part of the justice and home affairs chapter of that treaty. That is correct, isn't it?

**Charles Clarke:** Yes, it is.

**Q258 Mr Clappison:** One of the reasons that was given for saying that the subsequent Treaty of Lisbon was different from the constitutional treaty was that the United Kingdom was not part of the justice and home affairs chapter of the Treaty of Lisbon.

**Charles Clarke:** That is one of the reasons that was given, yes.

**Q259 Mr Winnick:** Just like old times. You have said, in effect, in reply to the Chair, that this is really political. Therefore, would it be right, regardless of the technicalities—we are examining a number of witnesses who are very proficient, to say the least, in European law and aspects of the European Union—that the attitude one takes politically, as politicians, over opting out or opting in depends to a very large extent on one's attitude to continued membership of the EU?

**Charles Clarke:** I think that is true, but there is an interesting qualification, which has surprised me. Another classic political issue, upon which you in your own life have been very active on in the discussion, is on the security liberty, the crime prevention argument. I am surprised that this issue has been dominated by the politics of in or out of the EU, as you suggest, rightly in my opinion, and less preoccupied with the effectiveness or otherwise of policing and justice measures to co-ordinate to contest international crime. That is also a political issue that has often been there. I think your analysis is completely correct, that the dominant question has been in or out of the EU.

**Q260 Mr Winnick:** Do you think to a large extent the present Government are doing this to appease, if that is the appropriate word, the anti-European element, be it in the Government party of the moment or generally in the country where, as you will admit no doubt, there is a good deal of hostility to continued membership of the EU?

**Charles Clarke:** I do believe that is the case. I do believe this particular decision was not thought through, and there are many people who have not understood the consequences of this. The consequences will be reduced if we do succeed in opting back into those 35 measures, which is the bulk of measures that are in our interest. There are others that it would be beneficial to come back in, but the key 35 are there, including the European arrest warrant. But if anything went wrong with that process, I think there are very serious consequences indeed. I chaired a session held by a think-tank about the implications for the Irish relationship, for example, where a former Irish ambassador to this country made

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very powerful and strong remarks about the dangers for security in Northern Ireland of this issue going wrong in some respect. People have not thought it through. They have just gone to the knee-jerk politics rather than considered it fully.

**Q261 Mr Winnick:** Two further brief questions. Clearly then, it is your view that opting out, be it the European arrest warrant or other aspects, would undermine the fight against criminality in Europe?

**Charles Clarke:** Absolutely and very strongly. As I say, the secular trend, which I observed very closely both as Police Minister in the late '90s and then as Home Secretary, is of the increasing internationalisation of crime syndicates that are organising, for example, people trafficking, for example, drug dealing, and they impact directly on our streets. It used to be the case, for example, that 75% of the heroin in this country came up through Kosovo. The question of how you contest that and deal with that is an extremely important issue, including terrorism issues as well, and that requires the police to co-operate very effectively. It also requires judicial co-operation, as in the European arrest warrant, to bring people to trial in the most effective way.

**Q262 Mr Winnick:** Mr Clarke, you are a very senior former politician and you have certainly not given up politics. You have emphasised the political aspects and I have asked you questions on that. My last one, and you have spoken about it in answer to my question, is about the Government part. Would it be unfair to say, to a very large extent, that you represent on this issue, if nothing else, the Blairite view of the Labour Party towards the EU?

**Charles Clarke:** I reject the word Blairite. I always have. Indeed, I went so far as to write an article in the *New Statesman*. I think it was not an effective and accurate definition of somebody's political position. But I certainly would not claim to represent a majority view and I certainly would claim to be more pro-European, if I can put it like that, within the Labour Party than is the current centre opinion within the Labour Party, and I regret that. I think, in fact, our future comes from more co-operation not less. But the arguments around this are not only about the European Union. They are also about the extent to which we co-operate internationally in fighting crime, not only in the European Union. Obviously, it is a very important component, but it is wider than simply the EU.

**Mr Winnick:** That is a very frank and honest answer. Thank you very much.

**Q263 Michael Ellis:** Mr Clarke, you have made some political points in your evidence so far. You confirm, of course, that it was Labour that gave this country the option of opting out in the first place, was it not? So you are complaining now, are you, that you do not like it that that exercise that your Government gave is now being undertaken?

**Charles Clarke:** It is not required that it be undertaken. The opt-out is an option, and the Labour Party gave the option in the negotiation for the treaty. That was an option that is open to the Government

now and open to any Government up to five years. It was not a requirement, indeed a suggestion, of the last Labour Government that anybody should actually take up that option.

**Q264 Michael Ellis:** You have been rather dismissive, suggesting that it must all be about politics that this opt-out be even considered in the first place. But surely you would have to accept—you went some way towards doing that just now, in an answer to Mr Winnick—that there are some Labour voters who are also sceptical about Europe and its powers and the way that those powers have developed. Would you accept that?

**Charles Clarke:** Of course.

**Q265 Michael Ellis:** Effectively, you are a personal player in the game, if I can put it that way, in that you are the person who was Home Secretary when these powers were negotiated, and you do not like the idea that they now be resiled from. Is that the problem?

**Charles Clarke:** I do not think that is an accurate description at all. I was a personal player in the game. I was a pro-European member of the Labour Government and I was in the Cabinet at the time of the referendum, which Mr Clappison asked about earlier on. I did not think that we should have had a referendum at that time but I lost that particular argument. We should not have put that forward, in my view. I have a set of views about this.

But the central question for this discussion is not about the pro or anti EU point. It is about what is the implication for fighting crime and reducing crime for the people of this country, and I think that should be the top consideration. So just to be absolutely clear, if I were clear that opting out of a number of these measures would improve this country's ability to fight crime, I would favour it despite my generally pro-European stance. My regret is that the debate has taken place, such as it has been, on a relatively narrow political basis, pro or anti EU, rather than on law and order.

**Q266 Michael Ellis:** I understand that, so can I come to that point? I presume you would accept that innocent people are also entitled to justice?

**Charles Clarke:** I do, funnily enough.

**Q267 Michael Ellis:** Of course. I make that point because you have spoken hitherto, in answer to the questions from my colleagues, about justice being effective by those who have done wrong being punished for what they have done. I do not think anyone in this room would disagree with that, but also a balance has to be drawn, does it not? This is always the political question that has to be dealt with. A balance has to be drawn between that and achieving the ends of justice, without being unjust to innocent people. I do not accept that there are serious, fundamental flaws within the system as it currently exists that have led to manifest injustice for innocent people.

**Charles Clarke:** You can only be referring to the discussion about some aspects of the European arrest

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warrant having been used in a disproportionate way by some countries.

**Michael Ellis:** I am.

**Charles Clarke:** That particular, narrow question is a fair point, and I think it is true. It is one that is accepted by many people throughout the European Union, including by the Commissioner concerned, Madame Reding. I think there is a general consensus—I have talked to a lot of people about this—of a readiness to make reform to try to reduce what I will call the disproportionate use of the European arrest warrant that some countries have engaged in. If that was your banner, I would be behind you. I think it is a correct thing to do. But that is not in fact the banner that this opt-out is being fought behind. The banner is, “Let’s chuck out the European arrest warrant and everything about it”. If you invite me to tell you a story about, I will, but I will leave it to one side.

**Chair:** Are you done, Mr Ellis?

**Michael Ellis:** I think I am.

**Chair:** One final question.

**Q268 Mark Reckless:** Let us hear the story.

**Chair:** Is it a long story, Mr Clarke?

**Charles Clarke:** I can make it particularly short for you.

**Chair:** Excellent.

**Charles Clarke:** There was a long case of a man who was accused of placing a bomb on the Metro in Paris, and he could not be extradited from this country to Paris to face trial. As Home Secretary, I had to deal with the Minister of the Interior, Monsieur Sarkozy, to discuss the question of how we could get this done. The only way it could be done would be if the French Government had come to the British court and say in court that the individual would get a fair trial in France, which the French Governments, traditionally, had always refused to do because they thought it was beneath their dignity to go to another country to say, “We do have fair trials in France”. This case had gone on for literally a decade, and eventually I persuaded the French Minister to send somebody to the court in order to make that case, which he did. The man was then extradited and then had a fair trial.

My point about this little story is that that process, on a suspected terrorist, had gone for over 10 years and did not have any process, precisely because we did not have a European arrest warrant or anything of that kind.

**Q269 Chair:** But isn’t the answer, which has been put by those who are concerned about the European arrest warrant, to negotiate those bilateral treaties with individual countries? If we had such an agreement with France, the bomber would then have been able to go. It just means a little bit of hard work, but you can get all those agreements in place, can’t you?

**Charles Clarke:** One of the terrible misjustices that occurred when I was Home Secretary was if you went to the extraditions unit in the Home Office at that time, you had a large number of cases that were just hanging around for literally years and years and years because such agreements had not been agreed, including with countries within the European Union.

**Q270 Chair:** But they can be, if the countries want to do it?

**Charles Clarke:** If they want to, but that is why the European arrest warrant, which was signed when I was Home Secretary, was such an important advance. Of course, the classic case is the one you are more than familiar with, of the suspected bomber, a fortnight after 7/7, who was arrested in Rome under that process, or you have the whole of the Costa del Crime process, where we had all of those—

**Q271 Chair:** So your view is that it will take too long to get these treaties negotiated?

**Charles Clarke:** Much too long, and it will not happen.

**Q272 Steve McCabe:** I wanted to ask about Mr Ellis’s concerns about the European arrest warrant. Do you think that the proposal for the European Supervision Order would go quite a long way to addressing some of his concerns, without the need to opt out and take the risk that you have been referring to?

**Charles Clarke:** I think it certainly does, and there was a time when I was worried the Government was not going to work with the European Supervision Order. I am delighted it has, and I completely agree with your analysis. It does go some way towards dealing with it. I also believe it illustrates what I said in answer to an earlier question, that there is a willingness within the European system to relook at some of these questions to try to deal with some of the problems that there have been.

**Q273 Mark Reckless:** Mr Clarke, you were saying earlier that you foresaw a risk of a proposal to opt back into a package of measures being defeated in one or both Houses of Parliament. Could you explain a little more what considerations might apply and why you think that?

**Charles Clarke:** My greatest worry is that opt-ins will not be agreed in the European Union. They have to be agreed by unanimity, as you know, and any European Government can simply sabotage any of the opting back in, for whatever reason. Unfortunately, one of the worst aspects of the European Union is the horse trading that goes on on all kinds of issues. We do not know what prices will arise. For example, the Spanish could say, “We will not agree to all this happening unless you do X or Y or Z on Gibraltar”, or whatever it may happen to be. I think that is a very serious problem. The reason I made the case then about the House is, if you take the two Houses, the House of Lords has had a very good Select Committee report, which I am sure you will match and go past in the quality of your report. If you look at the political make-up of the Lords, I do not think it is at all clear-cut that the Lords would agree to a motion to opt out if the opt-ins are not back there again. There are many Liberals in the Lords who have said to me that they will not vote with the Government on this question. As far as the Commons is concerned, I think there is even a question as to whether the Liberals in the Commons would vote with the Government if we did not succeed in getting the opt-ins back on the process

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that we have. I think it is very likely the Labour Party in the Commons would vote against the Government unless the opt-ins had been secured. If the opt-ins are secured, which is obviously what the Home Secretary hopes will happen, then there is a good chance of it being agreed in both Houses. But if the opt-ins are not secured, or if there is a time factor or a delay, or a renegotiation takes place or whatever that takes us past the times that we are talking about, I think there is a real risk to the Government in both Houses.

**Q274 Mark Reckless:** You have identified one set of risks there. Just slightly on the other side, I know some people in the Labour Party, and indeed in the Liberal Democrats, have said they would like us to opt back into more measures, and there are some in particular they think we should opt back into that which the Government is not proposing. There is also the issue with the European arrest warrant, and we have just heard from two very prominent European lawyers how they would advise us to vote against opting back into the EAW as the Home Secretary's changes are insufficient, in their view. Will there be some opposition, potentially, from people who feel the measures do not go far enough?

**Charles Clarke:** I am no longer in active politics so I can't make the judgment, but that is the kind of classic debate that you have. We are in a situation where, if we had stayed opted in to the whole lot, had not opted out, there would have been very little disbenefit to the UK and we could have achieved the changes that are needed, for example, in the European arrest warrant by negotiation, as I have said, in that process. I do not think the argument, at the end of the day, is going to be should we have more in or not than the 35? That may be an argument—you are closer to the Government than I am—but I would be very surprised if the Government was going to go beyond the 35 in this position. I think that will be the political choice that it will gel around as we get nearer to those decisions.

**Q275 Mark Reckless:** To summarise, you do not believe that the Prime Minister can rely on Ed Miliband to necessarily help him vote these things—

**Charles Clarke:** Well, I don't see why he should, in any case. I would certainly argue that the Labour Party should have voted against opting out. I think it would have been better to do that, and there is every chance that that will go forward. We will see what happens. Other colleagues here are closer to Ed Miliband than I am. But certainly the assumption that there will not be a problem about the voting when it finally comes around needs a good deal of close examination.

**Q276 Mark Reckless:** Just finally, Mr Clarke, on the structure of the opt-out, can you shed any light on

why the Labour Government at the time did not seek a Danish style arrangement for these measures and instead went for this either/or block opt-out? Was it intended that that opt-out would never be exercised?

**Charles Clarke:** I am certain it was intended the opt-out would not be exercised. Whether that was the reason for the form that was chosen—I think it probably is the reason, but I could not say that authoritatively because, as I said to the Chairman at the beginning, I was not there right at that point when those issues were being decided. But I am absolutely certain there was no view anywhere in the Labour Government that we should be opting out further down the line.

**Mark Reckless:** Yes. I know you speak with significant authority, having only left the Home Office barely a year before that happened. Thank you.

**Q277 Chair:** Mr Clarke, your evidence has been extremely helpful, and we will consider what you have had to say.

**Charles Clarke:** Thank you for inviting me.

**Q278 Chair:** Just one final point. How do we remove from existing EU law an agreement that we made with our partners, that is those measures that can be regarded as being obsolete? A number of colleagues, including the shadow Home Secretary in responding to the Home Secretary, when looking at the list, which is what we are concerned with today, said some of these measures are obsolete but they are still there. How do we get rid of those measures that no longer apply?

**Charles Clarke:** Firstly, she is completely right. Secondly, we have that problem in UK law. That is why we have all the codification processes that go on the whole time. I may not have the title of the body right. Is the Law Commission the body that looks at codifying our law? We have redundant law as well. Thirdly, the way to do it is to have a serious discussion with the Commissioner concerned and the Commission about making the changes. I have had that conversation with the Commissioner and I believe that were there a serious discussion between a number of countries—and in this case there would be a number of countries, both on the particular of the European arrest warrant and on the general point that you make precisely, accurately, that a number of the measures are entirely redundant at the moment—they would come forward with a proposal to do that. That would be the intelligent way to proceed, in my opinion.

**Chair:** Mr Clarke, we are most grateful. Thank you very much.



### Examination of Witness

*Witness: Dominic Raab MP, gave evidence.*

**Q279 Chair:** Mr Raab, thank you very much for coming to give evidence to this Committee. We have heard a number of conflicting voices about the list—we call it the Home Secretary's list—of measures that she has decided to opt out of and opt back into. Having looked at the list, are you happy with the list that has been given to Parliament?

**Dominic Raab:** I think the 35 certainly cover areas of crime and policing co-operation where we want operational co-operation, things like the exchange of criminal records, the one about taking into account prior convictions in new prosecutions, JITs, the joint investigation teams. All of these, to my mind, are sensible areas of European co-operation, but I think rather than purely the formulation of lists, the question underlying this decision is whether we should submit to the Commission, and the ECJ's control as the price of that co-operation.

Aside from the mere drawing up of lists, what I have argued from the outset is that the Government and the UK should use this moment, use the Lisbon opt-out, to recast our underlying relationship, where we strip away that supranational control but we stay operationally engaged. We could use the Frontex model. We could use MOUs or binding bilateral arrangements. The EU has legal capacity; we could do this with them so that we were not engaged in multiple bilateral negotiations.

The point I would also make is the development of a bespoke relationship—Europol and Eurojust—is going to happen. If you look at their creeping assumption of supranational powers that are already happening, and then you look at the two new regulations in the pipeline and the prospects of us opting into those—and I would put them at 50:50 at best—I suspect we are going to end up having a bespoke relationship with them, anyway, where we want to engage and co-operate on a practical level but we do not want that overarching, supranational control. In which case, why not have a sensible conversation now? What better juncture than now to have that wider strategic conversation?

**Q280 Chair:** I am not really clear. Do you think that we should accept what she has said? You have come here because you are an expert, you are not just a Member of the House like the rest of us; you clearly know the subject extremely well. I understand your second point about the European Court, and we will be exploring that later. Mr Clappison will explore it with you. Do you think that we should accept this list and vote it through the House?

**Dominic Raab:** How can you divorce those two questions? That is my problem with this. I think those 35 areas are good, practical areas, but how can you divorce whether we co-operate with joint investigation teams from whether there is ECJ and European Commission control over that?

**Q281 Chair:** Yes. Do you accept the argument that has been put forward by some, that as far as the other items are concerned—I think 100 other items—some of those are obsolete, and therefore there is no point

in opting into those? I accept your point about the European Court, looking at it as an intellectual discussion.

**Dominic Raab:** We should not have bad law on the statute book, whether it is British or European.

**Q282 Chair:** So you are happy for them to go, the others that we looked at?

**Dominic Raab:** Absolutely. The question is whether there are too many, not too few, plus the wider underlying point.

**Chair:** We will come on to European arrest warrant slightly later.

**Q283 Mr Clappison:** Do you regard it as being significant that whereas under the previous arrangements for these measures we were party to them under the previous justice and home affairs chapter, under the new arrangements, under the new law and the Treaty of Lisbon, we would be subject to the European Court of Justice?

**Dominic Raab:** Do I regard it as significant?

**Mr Clappison:** Yes.

**Dominic Raab:** I think it is very significant, for all of the measures. Whether it is the ECJ or the Commission, they are integrationist bodies at the EU level, so they are going to look to expand their powers over time. If you look at the ECJ in particular, the Metock case in 2008 on asylum and the Pupino case in 2005 on criminal procedure are good examples. I am out of touch with all the latest case law, but there is some excellent evidence from Martin Howe QC to the House of Lords Committee and I basically agree with all of that, which warns about the judicial legislation from the Luxembourg court.

**Q284 Mark Reckless:** What do you think would be the practical impact of opting out of the European arrest warrant on day to day co-operation?

**Dominic Raab:** The practical effect? I think on the benefit side you would have fewer miscarriages of justice, and I believe you have already interviewed some of the victims. I have a constituent myself, Colin Dines, who is just going through this process. He is almost certainly likely to have the warrant dropped, but I should say not before he had suffered a stroke under the pressure. I can vouch that this man, as well as I could for any man or woman, is innocent. He is a retired judge of impeccable standing, and has been really put through the mill. So we will see less of those kind of miscarriages of justice.

On the downside, there has been a lot of scaremongering. The worst case scenario is that we would get a bit more delay in securing fugitives back, but that would seem to me to be months not years. I do not think you would have a single dangerous criminal who would go free, because we could, of course, apply the underlying Council of Europe conventions. What is interesting in the Government's command paper is it recognises this, that we are talking about delay, not about bad people going free. I am trying to give you the pros and the cons. I do think there are pros and cons. But the Council of

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Europe conventions, if we did opt out of European arrest warrant, would be the starting point. You would presumably try to negotiate some enhanced procedures somewhere between that and the EAW.

**Q285 Mark Reckless:** The Metropolitan Police drew our attention to the fact that over a quarter of people that they were arresting in London were now foreign nationals, and over half of those were EU citizens. They seemed to think that it followed from that that we must have the European arrest warrant in order to expedite extradition. Could deportation have a use in that scenario rather than going through extradition, expedited or otherwise?

**Dominic Raab:** It is a very good point. Let us face it, what we really care about when we talk about miscarriages of justice is our own citizens. Do not get me wrong, I do not want to see rough justice for anyone but we, as a Government and as a Parliament, have a particular responsibility to make sure we are not extraditing our own nationals.

Deportation and the ability to deport foreign nationals back to other European countries, and of course, non-EU countries, have been made increasingly more difficult because of fetters under various dimensions, human rights law of course, but particularly under the EU citizenship directive, which came into force at exactly the same time as the European arrest warrant and has narrowed and narrowed the grounds for deportation, again because of the interpretations of the Luxembourg court. So, if you compare the data, for example, of Jamaica, Australia, America, we rely increasingly on extradition and the EAW because our scope for allowing deportation of foreign nationals has been so whittled away. I think that is a strategic, legal mistake.

**Q286 Mark Reckless:** Finally from me, do you see any scope for deeper co-operation with some countries, both within and outside the EU, on these type of issues, if we could restore confidence in the system that people would not be treated unjustly, as we saw from the two people subject to the European arrest warrant from Greece and Portugal in terrible circumstances before this Committee yesterday?

**Dominic Raab:** Do you mean should we cherry-pick the countries that we have enhanced co-operation with? Is that your question?

**Q287 Mark Reckless:** Is there a danger that a lack of confidence in, for instance, the Greek and Portuguese systems may seep into a wider concern about extradition and judicial co-operation more generally?

**Dominic Raab:** I think it has already happened. The most astonishing omission from the Baker review, the independent review into extradition, was the evidence from our most senior extradition judge, Lord Justice Thomas. He says that it has already become unworkable and that northern European countries feel a deep lack of faith in it. This is Britain's most senior extradition judge and he said that the system has become unworkable. It is precisely because we have this assumption of common standards and yet it is clearly not the case, whether it is lousy jails in Greece

or a defunct, slow or incompetent judicial system in Italy, Spain, Portugal or wherever it may be.

**Q288 Mark Reckless:** So would an exercise of the opt-out by not going back into these measures lead to a system where there was better practical co-operation, at least with those countries that have high standards in these matters?

**Dominic Raab:** I think you would always have the option then on a bilateral basis to work out on a selective basis who does meet the standards that we expect for our nationals. Equally, not just on the extradition side, depending on the wider renegotiation of Britain's JHA relationship, you would look at the deportation side of things too.

**Q289 Lorraine Fullbrook:** Based on everything you have said, do you believe that the planned legislative changes proposed by the Home Office will improve the operation of the European arrest warrant as conducted in the UK?

**Dominic Raab:** I think they would help mitigate the bluntness of the European arrest warrant, and there are two aspects that I have looked at particularly. One is the proportionality bar and the second is the bar for cases that are not trial ready. That is my own experience with Colin Dines and I think of some of the witnesses that you have had before you already.

On the detail of it, I have sought legal advice on how robust they would be because they are quite detailed amendments. I am going to wait until I have received that to take a firm view on their adequacy, but I think even if we are confident they will do what it says on the tin, there are still two problems. One is the problem of a lack of an evidential threshold and whether or not there is some compromise between the EAW box-ticking exercise and the prima facie test that we used to have. Secondly, there is the question of ECJ jurisdiction over extradition of our nationals. The latter is quite a serious point. We have set up a Supreme Court in this country and yet we continually subordinate it, whether it is to Strasbourg or to Luxembourg. This is on decisions relating to the freedom of British nationals. I think it goes to the heart of the British justice system.

**Q290 Dr Huppert:** Can I turn to Eurojust and your take on the benefits to the UK of involvement with Eurojust and the things surrounding it? I think you describe it as a category 1 measure that the UK benefits from. Can you say a bit more about that?

**Dominic Raab:** I worked in The Hague for three years when I was at the Foreign Office and one of my jobs was liaising with Europol and Eurojust. I can certainly see operational advantages in a college of co-operating national prosecutors, whether it is sharing information, saying who is the right person to pick up the phone when you need to expedite a case or to find out more about it, general co-ordination of work, the kind of practical co-operation we have talked about. I think on the downside Eurojust is already acquiring supranational powers to demand information from UK prosecutors, and the new Eurojust regulation will strengthen those powers. They will also force the UK to co-operate with the new European prosecutor and

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give the Commission power over the direction of Eurojust.

**Dr Huppert:** But you—

**Dominic Raab:** Just a second. On the new board, the executive board, there is going to be a seat for the Commission, so again you have this creeping supranational power by stealth. This is all new and it comes in the new regulation. I think the question is at what point does Eurojust go through these stepping stones from being a really sensible college of co-operating authorities, which I saw and I am a fan of, to something more along the lines of that half step to the European Public Prosecutor.

**Q291 Dr Huppert:** Obviously future changes will be things that Britain can be involved in or not. When it comes to things like joint investigation teams, I think you say the UK benefits from joint investigation teams. Is that still correct?

**Dominic Raab:** Yes, I think we benefit from it, but when we opt back in, the question is whether we want the nature of that co-operation to be subject to Commission jurisdiction and ECJ jurisdiction. There is a carve-out for ECJ jurisdiction over JITs at the moment. For example, I would not want to see the European Court of Justice having the last word on the balance of operational powers that we give to foreign officers on British soil. But again, once you give jurisdiction to the ECJ, the risk is it will whittle down that safeguard and I think that is something to look at. But you are right, it is an area where we should be in favour of practical operational co-operation, but not political control. That is the distinction I have drawn.

**Q292 Dr Huppert:** When it comes to cross-border criminal records checks, I think the House of Lords report that you are supportive of those continuing?

**Dominic Raab:** Yes.

**Q293 Dr Huppert:** Do you share a concern that if we were not to go ahead with all of these, either you would have to set up some other multilateral thing, which would be hard to negotiate with everyone else, or you would require a vast number of bilateral agreements?

**Dominic Raab:** No, I tried to make that point earlier. First of all, there is already a model for operational co-operation without the political control, and it is Frontex. If you ask the Executive Director of Frontex is Britain a good partner, she has said very clearly it makes very little difference that we are not formally signed up to it as a formal member. There is no difference between our operational co-operation. That is a good model. It is already happening. Why not expand that? I think because the EU has legal capacity in this area we could avoid negotiating with 26, 27 other countries, although we might want to do that in certain areas, for the reasons that Mr Reckless has highlighted.

What this really requires is a bit of elbow grease. All these people putting insurmountable obstacles into forging this kind of bespoke relationship are ignoring the fact that our non-EU co-operation with the US, New Zealand, Canada, Australia is brilliant, an equally as good as most of our European co-operation.

That all relies on those mechanisms and those procedures.

**Q294 Dr Huppert:** I had not realised you were such a fan of the US-UK extradition treaty, but I suspect you meant “with some reservations”.

**Dominic Raab:** No, I have made it very clear I am not such a fan of the UK-US extradition treaty. I have made the case for reform in that area as well.

**Dr Huppert:** Indeed, yes.

**Dominic Raab:** But unlike you guys I would not duck the issue whether it is dogmatically with the EU or dogmatically with the US. I would look at the nature of the co-operation underlying it and I would be in favour of good law enforcement co-operation, but I would not just throw aside the interests of British citizens or the wider political control that we have a duty to our constituents to retain and exercise.

**Dr Huppert:** I think all of us are trying to argue for the interests of our constituents and how to make sure that they are safe and secure and free.

**Q295 Chair:** Just for the record, we take a very sceptical view of the extradition treaty, as you know. You have given evidence to us before. We do think it needs to be changed. You mentioned Frontex. When the Committee was in Greece a few years ago looking at the Greek-Turkish border, which is the border that allows so many illegal migrants to come into the EU, we were specifically told as far as Frontex was concerned that because we were not part of Frontex, we could not be part of the RABIT forces that seek to police that area. Are you quite confident that we can still be a part of organisations, not be formally joined to them but still co-operate?

**Dominic Raab:** Don't take my word for it. I am quoting the Executive Director of Frontex and I cite her in my pamphlet, which I will shamelessly plug but only for the purposes of giving—

**Chair:** Is it free?

**Dominic Raab:** I can give you this copy—only for the purposes of giving a short answer. There is a section here on Frontex and the fact is that by staying out of it, according to the leader of that organisation, our operational co-operation is as good, if not better, than many formal members.

**Q296 Michael Ellis:** Mr Raab, first of all, can I congratulate you on the level of expertise you have reached in this area? Can I ask you about the opt-in decision in itself? What do you think would be the best arrangements for the House to undertake to approve the opt-in measures? Should it consider each separately, which would clearly be a very long, tortuous process, considering how many there are and each division takes approximately 15 minutes, or should it consider all of them together or in blocks or something in between?

**Dominic Raab:** I am not wedded to any particular answer to this. I think there are pros and cons. You would get perhaps more proper, substantive scrutiny measure by measure but, as you say, it would be quite a cumbersome approach. I think on balance I would say vote on the package, mainly because it would allow us to deal with the underlying questions of

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jurisdictional and Commission control, which I mentioned. I think we have to view this as a package, but I do not have strong views on it.

**Q297 Michael Ellis:** You are relaxed about that?

**Dominic Raab:** I am relaxed about that.

**Q298 Chair:** You do not think that there is a case for taking out the measure concerning the European arrest warrant, because that is the one that has caused most concern? I understand your principle about the European Court, but in terms of the practicalities witnesses even today have told us of their real concern about the way in which the European arrest warrant operates. You do not think that there is a case for just taking that out and taking the rest as a package?

**Dominic Raab:** You mean if I do not get my broader strategic approach that we—

**Chair:** Exactly.

**Dominic Raab:** I think there is a case for that, yes. Again, I have tried to preserve my position to a degree because I want to be fair and look properly at the substance and take legal advice on the safeguards, but I think probably in any event it will leave a lingering doubt and a question relating to the evidential threshold and, as I said, ECJ control, so I think there probably is a case for that.

**Q299 Chair:** I assume you are against the idea of a European prosecutor?

**Dominic Raab:** Absolutely.

**Q300 Mr Winnick:** Is there anything European that you are not against?

**Dominic Raab:** Yes. I am glad you asked that because I started my life as a competition lawyer in Brussels, my professional life, and I think competition law is a very good example of an area where you want to have cross-border supranational control. There are lots of question marks about the supranational competition

authorities, but that is an area where you do want it. Crime and policing, law enforcement? I suspect it is the least worthy candidate for that creeping supranational control, but not for ideological reasons.

**Mr Winnick:** Good job I asked the question.

**Q301 Chair:** Just to clarify things, on the European arrest warrant you have looked at the Home Secretary's four principles, the things she wants to change, and you are not satisfied that the proportionality test that is operated in Germany is going to meet the objections that people have?

**Dominic Raab:** No, what I said was I wanted to look and take legal advice on the adequacy of them before I came to a firm judgment on the European arrest warrant side of things. I have to say the proportionality one is not the one I worry about. The big problem with the European arrest warrant, contrary to the way it has been conveyed and portrayed, is not the piffling cases. It is the serious cases. My constituent, Colin Dines, is accused of fraud. That is a serious case. Andrew Symeou was accused of murder or something serious. All of the cases, Deborah Dark, Edmond Arapi and the others that you have had before you were serious cases. The proportionality bar is not the one that I am looking at most. It is the trial ready bar. Even then, even if those were adequate, even if they came back and they were very robust, I think there is a question about whether we need an evidential threshold and, even then, who do you want having the last word on it? I want to wait and look at it properly, I want to be fair to the Government but I do have serious reservations about the EAW.

**Chair:** Mr Raab, on behalf of the Committee, thank you very much for coming here. I would be grateful if you would leave your pamphlet on the way out so we can properly examine it.

**Steve McCabe:** We will all be fighting over it.

**Chair:** Thank you very much indeed.

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### Examination of Witness

*Witness:* **Keir Starmer**, QC, outgoing Director of Public Prosecutions, gave evidence.

**Q302 Chair:** Mr Starmer, welcome back. This is your valedictory appearance before the Home Affairs Select Committee. I am afraid we did not sign a card for you or bring any balloons, but it is five years since you took up this job. To me you look exactly the same as the first time you appeared before us. Before we finish, we are going to ask you about a number of things concerning the way in which the CPS is going to develop or you would like to see it develop.

**Keir Starmer:** Very well.

**Chair:** I would like to start with a couple of issues that are in the public domain at the moment and specifically concern you. You and your organisation, not you personally but the organisation, has had severe criticism this morning from barristers acting for Michael Le Vell that the case against him should never have been brought because of a lack of evidence, a lack of detail and the damage to reputation that has been caused by the prosecution. Alisdair

Williamson said it was prosecuted without a single bit of corroborative evidence. Would you like to respond to this very serious criticism?

**Keir Starmer:** Yes. A proper assessment of the evidence was taken in the case. The decision to proceed was the right decision. There is a safeguard within our system and that is at the end of the prosecution case in court it is not only open to the judge, it is the duty of the judge to stop the case if there is no case to answer. That did not happen in this case and, therefore, there was a case to answer. That case was answered and the jury took some time to consider their verdict, so it was a perfectly properly brought case. It is not a case on which there was no evidence. Had it been, it would have been stopped halfway after testing of the evidence. It is true that the test of a prosecutor is a realistic prospect of conviction and the test for the jury is whether the case is proven beyond reasonable doubt, having heard all the

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witnesses. But the fact that a decision is taken to start a case and does not end up in a conviction does not mean that it was improperly brought. I think it is very important that we reaffirm that. The idea that if a case results in an acquittal it should not have been brought is wrong.

**Q303 Chair:** You are not going to review any of the issues around it, as has been said in the press today?

**Keir Starmer:** Because the case proceeded beyond the prosecution case, any decision not to have brought it would be to say that, although there is a case to answer here we are not going to prosecute. I do not seriously think anybody is suggesting that is a position we should adopt.

**Q304 Chair:** Yes. I know colleagues would like to come in on this. Eleanor Laws, your QC prosecuting, said to the jury, "You may think this is about some kind of celebrity witch hunt". That was a very odd thing for her to say, wasn't it?

**Keir Starmer:** I am not going to comment on her closing speech. That is a matter for her in the trial that she is conducting. I can be absolutely clear the test for bringing a prosecution is the code test in the Code for Crown prosecutors. The question is whether there is sufficient evidence and whether it is in the public interest to prosecute. I am satisfied that test was properly applied in that case and I expect it to be properly applied in any case, whoever the suspect is.

**Q305 Chair:** Finally on this from me, do you think that sexual abuse suspects should be granted anonymity like their victims, as has been called for as a result of this case? The issue is the huge publicity for people, celebrities, those who are known in the press who feel their reputation has been damaged even after they have been acquitted and the former defendant in this particular case said anonymity should be granted. Are you proposing to look at that again or are you quite happy with the situation?

**Keir Starmer:** I understand those concerns, but the arguments are well rehearsed. In many cases, the fact that a suspect or a person once charged is named leads other victims to come forward. We have a number of examples of cases where, having named somebody once they are charged, other victims have come forward and that has enabled a case to be built. I do understand the anxiety. I think a judgment call has to be made. My own view is that naming on charge is appropriate, particularly in a country where we have open justice.

**Q306 Chair:** You would do it all again? You are very satisfied everything was properly conducted? You would bring the prosecution again?

**Keir Starmer:** This was a properly brought prosecution according to the proper test. It would have been wrong not to have taken a case where there was a case to answer, and that is this case.

**Chair:** Thank you. We have some quick questions from colleagues.

**Q307 Mark Reckless:** Mr Starmer, you seem to be putting through, at least to me, what seems to be quite

a novel proposition. You say if the defence fail to put forward there is no case to answer, and the judge does not determine there is no case to answer at the halfway stage, then it must be the case that the CPS acted properly in bringing that prosecution.

**Keir Starmer:** Not that it must be the case, but it is impossible to argue that there is no evidence or that there was no case because if that was the situation it would be the duty of the judge to stop the case. All I am saying is that really blocks the argument that this was a case where there was no evidence. The case was presented and it was open to the judge to say if there is not the right evidence it will not proceed. That is the only point I am making. I am not saying that is the test of everything, but in—

**Q308 Mark Reckless:** Mr Starmer, you were making a very different point when you spoke of no evidence, whereas you stated before, quite correctly, that the test was sufficient evidence for a realistic prospect of conviction. Whether or not the judge decides there is no evidence, how is that determinative of whether there is sufficient evidence for a realistic prospect of conviction?

**Keir Starmer:** The test for the judge is whether there is a case to answer. It is not the same test of whether there is a realistic prospect of conviction, but it is not far removed. The judge has the advantage of having heard the prosecution case and seen it tested. My simple proposition is that in a case where the prosecution's evidence has been heard and the judge has not removed the case from the jury, it is self-evident there is a case to answer. If anybody is suggesting that in a case of serious sexual allegations the Crown Prosecution Service should form the view that there is a case to answer but the proceedings should not be brought, then I think there is a debate to be had. It is an example of our system at work. We bring a case based on a realistic prospect of conviction. We convict on the basis of beyond reasonable doubt after the evidence has been heard.

**Chair:** We do not want to spend too much time on this, but I know Mr Clappison and Mr Ellis want to come in.

**Q309 Mr Clappison:** I am only familiar with the case from newspapers and I have not taken great interest in it, but is it the case that it was always the decision of the prosecution to prosecute all the way through or not?

**Keir Starmer:** No, there was an earlier decision that there was insufficient evidence. That was then reviewed.

**Q310 Mr Clappison:** Who took that decision?

**Keir Starmer:** The decision on review was taken by Alison Levitt QC, my principal legal adviser.

**Q311 Mr Clappison:** Sorry, but who took the initial decision that there was not enough evidence?

**Keir Starmer:** The team in CPS Northwest. It was a case that was determined by the CPS Northwest team. When it came to be reviewed, it was reviewed by the principal legal adviser, Alison Levitt QC. She reviewed it and came to the view that there was a

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realistic prospect of conviction. In those circumstances, the case proceeded.

**Q312 Mr Clappison:** Was the evidence that she saw the same evidence that was seen by the initial reviewer or the initial decision taker, or was there more evidence?

**Keir Starmer:** It was the same evidence plus some new evidence.

**Q313 Mr Clappison:** Was the new evidence from the same source as the old evidence?

**Keir Starmer:** I would rather check that if I am going to be asked detailed questions about it.

**Q314 Chair:** The evidence would have been presented to the court anyway?

**Keir Starmer:** It was presented to the court, yes.

**Q315 Michael Ellis:** Mr Starmer, do you think there is a general pressure to prosecute people who are in the public eye that falls on to the CPS because those cases attract media attention and not proceeding makes it look in the eyes of some that the CPS would just be looking to protect famous people? In other words, do you think there is a natural human pressure that is added to by those making these decisions if they are people in the public eye and that on this one we ought to prosecute and let the judge decide to throw it out at half-time if he does not think there is enough evidence or let the jury decide to acquit and let the ball rest with them?

**Keir Starmer:** No, I do not think there is any pressure and I think if you look at recent cases you will see examples of cases where we have decided to prosecute and cases where we have decided not to prosecute so-called high profile individuals. I think it does my staff a bit of a disservice to suggest that they are not properly applying the code for Crown prosecutors, because they are.

**Q316 Michael Ellis:** I would not want to imply that that is the case, but it would not be outside the realms of possibility that those involved in making decisions like that are under more pressure for a non-routine case than for a routine case. Do you know off the top of your head how many cases are thrown out at half-time by judges? How many CPS cases tend to be thrown out at halftime?

**Keir Starmer:** Again, off the top of my head I can't give you a figure. I will certainly give you a figure.

**Chair:** Would you write to us with that?

**Keir Starmer:** I will.

**Q317 Michael Ellis:** Could we have an approximate indication?

**Keir Starmer:** Just staying with sexual offending, what is clear is that the conviction rate for sexual offending, and in particular rape, has gone up year on year for the last two years and more people are now pleading guilty than have ever pleaded guilty before. That signifies to me that we are making the right decisions and building strong cases. I am very happy to provide any further statistics that the Committee wants—

**Chair:** If you could write to us, that would be very helpful.

**Keir Starmer:**—across whichever offences you want me to.

**Michael Ellis:** Yes, I think the remarks certainly do not necessarily apply just to one type of offending or allegations. This is a general point.

**Q318 Mr Winnick:** Mr Starmer, are you aware that there is a feeling among some politicians, at least, that they should be very wary indeed of interfering in any way with the judicial process, and that the long-established separation between Parliament and the judicial process is a very good one and should continue?

**Keir Starmer:** Yes, I am, and I would agree with that.

**Q319 Chair:** Good. Let us move on to the European arrest warrant. We will deal with other matters colleagues want to raise at the end. Does the Government have this right? You have seen the measures: 135, opting out of 100, opting in of 35. You gave evidence to the Lords Committee. You said that if we were to opt out and not opt back in this would lead to an uncertain, cumbersome and fragmented approach to cross-border prosecutions. Are you happy now?

**Keir Starmer:** Broadly, yes. My concern, and it was a real concern, was about, broadly speaking, Eurojust, joint investigation teams, mutual recognition of EU convictions, European arrest warrants and some of the provisions around asset-freezing and confiscation. They were my main concerns and, broadly speaking, all of the important provisions there have been opted back into. Assuming that is successfully negotiated, the concern I had last time I gave evidence on this issue has been lessened.

**Q320 Chair:** Those that they have left out, that the Home Secretary has left out—since we are going to debate this and discuss this now, there are no other measures that you think we might as well opt back into at this stage?

**Keir Starmer:** I am speaking only from a prosecutorial point of view.

**Chair:** Yes, of course.

**Keir Starmer:** I know ACPO gave evidence where I think they identified four mainly relating to Europol that they were concerned about. From a prosecutorial point of view, our view is that the remaining measures are not key to prosecutors and/or in any event will be overtaken by incoming post-Lisbon provisions. I would not want to put before the Committee a particular provision that I think should be added to the list from a prosecutorial point of view.

**Q321 Chair:** Yes. You also mentioned, when you were asked about this, that the CPS, and you as DPP, had not been consulted formally about this list before it was agreed by the Government. Were you subsequently consulted?

**Keir Starmer:** We were able to contribute our views to the Home Office and to the MOJ and I had a private meeting with the Home Secretary and Justice Secretary to set out my concerns. I certainly feel that

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as I sit here now I have had the opportunity to make my concerns clear.

**Q322 Chair:** And the concerns have been met?

**Keir Starmer:** The concerns that I set have been met, assuming that we successfully negotiate through and do opt back into the measures in question.

**Q323 Chair:** Yes, thank you. Sorry, there is one question. A witness gave evidence to us yesterday, Professor Peers. Obviously, you have not seen the transcript and I am sure you do not spend your time glued to the internet to see what the Home Affairs Select Committee is doing.

**Keir Starmer:** I do look at some of your proceedings. No, I do, particularly in preparing for this, but I have to confess that yesterday was a rather busy day for one or two reasons and I missed it.

**Chair:** Of course. I have to admit I was not here for it because the Prime Minister was appearing before the Liaison Committee, so this is a transcript that I have read. Professor Peers, who is a noted expert on these subjects who gave evidence to us yesterday, said that there is going to be a weekend where Britain will opt out and then opt back in again. He is very worried about this weekend because he feels that the European arrest warrants that have been issued will then fall and people we are expecting to return to the UK will not return and they will all have to be reissued again. Do you know about this missing weekend?

**Keir Starmer:** I don't, but I would be concerned if there was any real gap between the existing provisions and opting back into the 35. My successor will have to think very carefully about what we put in place to make sure that there are no unintended problems.

**Q324 Chair:** That would have been the perfect thing to consult you on, rather than a private meeting where you have expressed concerns to Ministers, surely, a proper round-table meeting with all concerned. When the opt-out is done, before the opt-in comes back, what is the law? Nobody knows, and nobody can give us the answer.

**Keir Starmer:** No, and I have not been party to any discussions about that, but I would be concerned obviously if there is a gap that leads to any difficulty.

**Chair:** So more work will need to be done on that for sure.

**Keir Starmer:** Yes, I agree.

**Q325 Michael Ellis:** I would like to ask you about the SOCA list on the issue before we come to the opt-in and opt-out situation.

**Chair:** Mr Ellis, could we do that at the end and could we just do—

**Michael Ellis:** I am quite happy to leave that until the end.

**Chair:** Thank you.

**Q326 Michael Ellis:** As far as the involvement, what I want to then ask you about as far as the opt-ins are concerned is what involvement the CPS have had in drawing up the opt-in list. Have you had any involvement, any input?

**Keir Starmer:** As I say, I was asked by the Home Secretary and the Justice Secretary to set out my view and any concerns I had, and I did that. More generally, our team has been feeding in our observations to the Home Office and the MOJ. So, in that way—

**Q327 Michael Ellis:** You are happy that there has been adequate liaison between you and your officers and the Government as far as an opportunity to inform the Government's decision-making in this regard?

**Keir Starmer:** I feel I have been given a proper opportunity to make my concerns known and, whether because of that or despite that, the 35 provisions that we are opting back into cover most of the concerns that I had.

**Chair:** Thank you. We will come to the other matters later.

**Q328 Dr Huppert:** You just said the 35 measures cover most of the concerns you had. Can you be quite clear, firstly, about which ones you would like to see added?

**Keir Starmer:** I am not putting before the Committee any measures that I specifically would want added. From a prosecutorial point of view, they are either not key, in the sense that we can continue to work efficiently with our partners in any event, or incoming post-Lisbon measures will cover the same territory. As I say, my real concern was Eurojust, JITs, EU convictions, EAWs and the provisions about assets. They were very real concerns, but as things stand they are on the opt-in list.

**Q329 Dr Huppert:** But you would be alarmed if any of them fell off, presumably?

**Keir Starmer:** Yes. The concern I expressed last time would then obviously return.

**Q330 Dr Huppert:** We have had a lot of discussion about the European arrest warrant, but can you just say a bit more about Eurojust and the joint investigation teams and give us a flavour of the consequence if we did not have them and, indeed, the successes that we have had as a result of them?

**Keir Starmer:** We use Eurojust quite heavily. They have a number of benefits from a prosecutorial point of view. First and foremost, we get access to all the other desks, the 26 other desks. There is a hub with facilities, language skills, legal expertise and so on to do effective cross-border work. We can have multi-jurisdictional meetings, so if there is an investigation going on in more than one country a decision has to be made as to where it is pursued. We can co-ordinate arrests and searches and if that is not co-ordinated it does not work very well, and it is a neutral ground for resolution of issues. Eurojust is of great benefit to us as prosecutors and we would have been concerned if it went.

Allied to that, of course, there are some very good examples of JITs doing very good work, particularly in drugs and trafficking kind of cases. One of the great benefits is that if a JIT carries out an investigation the evidence is more easily admissible in this jurisdiction than if there is no JIT and we have to go through the other arrangements for getting evidence from one

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jurisdiction to another. There are a number of very real benefits and we use Eurojust on a daily basis.

**Q331 Dr Huppert:** Mr Raab suggested that one could resolve these things by having a looser voluntary co-operation type scheme. I think you heard his evidence and I do not want to misquote him, not having any transcript yet. Do you think that is a realistic prospect?

**Keir Starmer:** No, I do not. I think Eurojust works very well and the co-operation increases every year. I do not see any advantage in withdrawing from Eurojust to set up other arrangements. I think it is a very effective way of proceeding.

**Q332 Dr Huppert:** Do you think it would be fair to say that if we were to withdraw from Eurojust and related measures that would make it harder for you to prosecute people who have committed serious crimes in the UK or elsewhere?

**Keir Starmer:** Yes. We regularly work with Eurojust and JITs on cross-border crimes in Europe.

**Q333 Mr Winnick:** On the European arrest warrant, we have heard conflicting evidence, as is to be expected, obviously; those for, those against, and perhaps to some extent those who stand in the middle. Do you think yourself that what the Government is proposing to do will undermine the fight against criminality in Europe?

**Keir Starmer:** Can I just be clear? Do you mean the steps that the Home Secretary is taking on proportionality, pre-trial detention and dual criminality?

**Mr Winnick:** Yes.

**Keir Starmer:** My starting point on this is that they are problems that need to be addressed, I would agree with that, but they are not problems caused by the EAW. If you take proportionality, it was not the EAW framework that introduced that problem. It was there before. If you go back to the older arrangements, there were no proportionality issues, no provisions.. The problem of proportionality needs to be addressed and I am supportive of what the Home Secretary is trying to do, but it is wrong to assume that that is a problem caused by the EAW. That is a problem that pre-existed the EAW and will be there—if we opt out of the EAW and go back to the old arrangements, we will have precisely the same problem. So I am supportive, of course, of the work that is being done here.

**Q334 Mr Winnick:** Were you consulted on this particular aspect?

**Keir Starmer:** We have been consulted on these provisions and I have seen the drafts of various ways of dealing with it.

**Q335 Mr Winnick:** You have seen the drafts. I am just trying to see if that can be considered consultation. Were you consulted before there were drafts or anything on your general view, in view of your position?

**Keir Starmer:** The issue came up in my conversations with the Home Secretary and the Justice Secretary, but our team has been feeding in on this for some time.

We were part of a team that went to Poland in 2008 and 2010 to talk to our counterparts to see whether there wasn't something we could do about what appeared to be a number of disproportionate cases where Poland was seeking the extradition of people back to Poland. This is something that we have been working on for some time because, quite apart from anything else, the resources that are needed to put into the large number of cases that fall into that category are sometimes quite considerable. It is a problem that has been on the table for a long time. I support any steps that deal with it, but in fact it is not an EAW problem.

**Q336 Mr Winnick:** The argument was put by colleagues to Charles Clarke, which I think you heard, that there could be individual treaties, extradition treaties, that there is really no necessity for the European arrest warrant, it is too cumbersome and it has caused too much injustice and the rest of it. What is your response to that, Mr Starmer?

**Keir Starmer:** I am really concerned about that. Firstly, there is an unresolved legal issue as to whether you could resurrect the old arrangements or strike new arrangements or whether those still within the provisions would be bound to seek some different kind of arrangement with the UK. That needs to be resolved.

Assuming for a moment that it might be possible to fall back on the old arrangements, we need to remind ourselves of the problems of those arrangements. First and foremost, it took much longer to resolve extradition proceedings. These days, on our figures, we usually get somebody back to this country within about one to three months of our request in very serious cases. That took years in the past. Secondly, a number of countries under the old arrangements would not extradite their own nationals. I think nine countries would not extradite their own nationals, which meant if we were wanting a national of another country back we could not get them and we then had to take the sometimes difficult decision as to whether we would export our evidence to the other country to see whether it was possible to prosecute in those countries. That was not very satisfactory.

I do have real concerns about falling back on the old arrangements even if that is permissible. Those delays and those difficulties were there at a time when the number of extraditions was far fewer. It will creak if we go back to that with the sort of numbers we are talking about now.

**Q337 Mr Winnick:** Recognising some of the injustice that people have suffered—we had two witnesses yesterday—overall would you say, therefore, that the European arrest warrant has served a positive purpose in dealing with criminality and overcoming some of the previous problems?

**Keir Starmer:** Yes, I would.

**Q338 Chair:** But it is in need of reform?

**Keir Starmer:** I am supportive of the proportionality reform. Anything that can be done on pre-trial detention—I understand that concern. I think again the Home Secretary has some proposals there. I would be



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supportive of that, and possibly some work on dual criminality, although that is slightly more complicated. But I would agree that they are problems that need to be dealt with if possible, but not by withdrawing from the EAW.

**Q339 Chair:** You told the Committee you went to Poland. Poland was one of those countries where judges apply for the European arrest warrant on what we would regard as minor offences and we have had evidence today from a Polish British barrister who says they will just issue these warrants and there is nothing we can do about it. The reforms do not stop that happening, do they?

**Keir Starmer:** No. I think there are a number of possible reasons for that. The guidance I have given to my prosecutors is to exercise discretion on whether or not they are going to apply for a European arrest warrant, so we have built in a filter before we do it. It is different in Poland because the prosecutor does not have the discretion that we have here. It is a different legal system and the judge is seized of the investigation at a much earlier stage. Therefore, in many respects the individual is asked to go back to court at a stage that we would consider still to be an investigative stage, but the system is different. That is what we were discussing with our colleagues in Poland. I do not think it is just a question of their not scrutinising in the same way. It is a different legal system.

**Chair:** It is a fundamental issue, yes.

**Q340 Mr Clappison:** Director, we have heard what you have to say about this. Somebody listening to your evidence today would be tempted to think that you have almost gone as far as to say it be impossible to do extradition without the European Union.

**Keir Starmer:** I would not say it would be impossible but what I said was we need to remind ourselves of how the arrangements worked pre the EAW. It took a long time to get people back to this country and some countries did not extradite non-nationals. If there is a serious offence committed in this country and somebody goes to another country, then I think the citizens of this country would be pretty concerned if we could not get them back.

**Mr Clappison:** I appreciate that.

**Keir Starmer:** The best example is the 21/7 bombing case where we got Hussein back in 56 days from Italy. If we were still waiting to get him back and embroiled in negotiations and legal argument in Italy, people would be saying to us, "What on earth is going wrong?" But we got him back in 56 days and tried him and convicted him.

**Q341 Mr Clappison:** You heard it was conceded by Dominic Raab in the evidence he gave to the Committee that it might take a bit longer but it could still happen?

**Keir Starmer:** I am not saying it is impossible.

**Q342 Mr Clappison:** We have managed to have extradition arrangements with—I will pick a country at random, Australia and Canada. How long does it

take to get somebody back from Australia who has committed an offence?

**Keir Starmer:** It takes longer than under the EAW. I am not saying it is impossible but I am saying it is a choice. Do you want people back speedily for serious offences like the 21/7 bombing or do you want it to be a longer process? Do you want to extradite back to this country nationals of other countries who have committed or are alleged to have committed serious offences or do you want your prosecutor here to have to pass the file to that country to see whether they can't bring a prosecution? For my part, I know what answers I would give to that. I would go so far as to say I think most people would say if there is a serious allegation against an individual we would rather have them back to be tried for a serious offence speedily, whether or not they happen to be a national of another country.

**Q343 Lorraine Fullbrook:** I would like to pick up on the reforms of the European arrest warrant that the Chairman mentioned. Do you think the planned legislative changes proposed by the Home Office will improve the operation of the European arrest warrant in the UK?

**Keir Starmer:** I think it is a little bit difficult to predict but I hope so. If there is some flexibility at an early stage for law enforcers as to what might be called trivial or disproportionate cases and if the court finally can look at it, I can see that that may help. It is a problem that has to be dealt with and I am supportive of those provisions. Time will tell whether they make the necessary difference. I hope they will, but if not, we will have to go back and try again in some other way. It may be that in the long run the better alternative is a pan-European change, but that inevitably is much more difficult and likely to take much longer.

**Q344 Lorraine Fullbrook:** On the issue of proportionality in consideration of arrest warrants, do you think the planned changes will address that?

**Keir Starmer:** Well, I hope so. On the face of it, the proposal is to give the court power not to order extradition if it would be disproportionate, so that blocks that case. My own view is there ought to be a discretion in addition to that slightly further up the line. In other words, if as a prosecutor you could predict that this is a case that the court is going to rule is disproportionate, then it would make sense for the prosecutor here to have some discretion to say we are not going to waste time and money getting it to the court for the court to do the obvious thing and that is to knock it out. I think that is a question of discussion and negotiation as we proceed with these measures. Our collective task is to try to make them work.

**Q345 Lorraine Fullbrook:** Could I follow up about the Polish arrest warrant, which is something that has vexed this Committee somewhat as to the amount issued by Poland. Is there anything you can update the Committee on about the work that the Crown Prosecution Service has been doing with the Home Office regarding the number of European arrest warrants issued by Poland?

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**Keir Starmer:** I am not sure I can go beyond saying that we are involved in the discussions as to what the answers are, but I am very happy if there is anything more to that to write to the Committee and let you know.

**Lorraine Fullbrook:** Thank you.

**Q346 Mark Reckless:** You took some umbrage earlier when Mr Ellis suggested Crown prosecutors might not always apply the code properly. Did your team in the north-west apply the code properly initially in the Le Vell case?

**Keir Starmer:** Yes.

**Q347 Mark Reckless:** How come it was then overturned following a review?

**Keir Starmer:** When you review a case it is inevitable that you take a fresh look. There was some further evidence and the view taken on the relook was that there was a realistic prospect of a conviction. We have just introduced, quite rightly, a victim's right to review. This is a right of victims to ask the Crown Prosecution Service to look again at a decision. We can't run that regime on the assumption that if, on an honest and open review, a different decision is taken it necessarily means the first decision was wrong.

**Q348 Mark Reckless:** With a victim right to review, is there also a celebrity requirement to review?

**Keir Starmer:** No. It is a victim—

**Q349 Mark Reckless:** So why in this case was a decision taken to review and then overturn that decision for Michael Le Vell?

**Keir Starmer:** The scheme that is now in place was put in place in June of this year. That is a right of review. That means a victim whose case is not being proceeded with has a right to ask the CPS to review the decision and does not have to put a reason on the table or go through any formal procedure. We will then review the decision and we have been doing that for three or four months now. Before that, which would be this case—

**Q350 Mark Reckless:** I was not really asking you about that point. How many decisions do you get that are not reviewed when it is just an ordinary member of the public who may not be in the public eye, yet in this case when a decision was taken not to prosecute in the north-west it was reviewed and overturned in a celebrity case?

**Keir Starmer:** This arose because a complaint was made and that complaint procedure has been running for a year.

**Q351 Mark Reckless:** Is it not the case that complaints are more likely in celebrity than non-celebrity cases?

**Keir Starmer:** No, there are lots of complaints about all sorts of cases.

**Q352 Mark Reckless:** Mr Starmer, were I concerned that you had acted criminally in the course of your office, should I take that to the police or leave it to the Bar Standards Board?

**Keir Starmer:** You should take it to the police.

**Q353 Mark Reckless:** So why in the recent case in terms of gender-selective abortion was the fact that there is a professional regulator—in that case the GMC—a reason for not prosecuting a case where you had a reasonable prospect of conviction?

**Keir Starmer:** I agreed last week that we would put a more detailed set of reasons into the public domain setting that out, which I intend to do in the very near future.

**Mark Reckless:** Please do.

**Keir Starmer:** My strong preference would be to put that out in detail before dealing with it piecemeal.

**Q354 Mark Reckless:** Perhaps you can just answer me one question of principle. Do you think it is in the public interest to deter gender-selective abortion?

**Keir Starmer:** That is a very general question.

**Mark Reckless:** Can you answer it?

**Keir Starmer:** In this particular case, one has to bear in mind that the legislation does not in terms specifically prohibit gender-selective termination.

**Q355 Mark Reckless:** So you do not want to deter it?

**Keir Starmer:** No, of course there is a public interest in upholding the criminal law and gender-selective abortion would be prosecuted in the right cases.

**Q356 Mark Reckless:** But not in this case?

**Keir Starmer:** Well, that is why the detailed reasoning is important because the facts are critically important, the basis upon which the prosecution could be brought and the detailed reasons as to public interest. I do not want to frustrate you, but I do think that having agreed to put fuller reasons in the public domain—

**Q357 Chair:** The reason why Mr Reckless has raised it is that it was raised at Prime Minister's Questions today and there is a feeling that the CPS has not taken appropriate action because the policy is not clear. Irrespective of the public interest, can you tell this Committee today there is no question but that if somebody decides to gender select that would be unlawful, you would prosecute? What is the current position?

**Keir Starmer:** Just two or three things. What I agreed to do last week was to put detailed reasons into the public domain so that individuals could better understand our decision. I have been working on that and I hope to do that in the very near future. That will then set out in detail what the facts of the particular case were and why a decision was taken not to prosecute.

**Q358 Chair:** Leave aside that case because we do not know the case and we understand you have to make decisions on the basis of the facts of each case, but as a matter of policy is it unlawful for a medical professional to say, "I will perform this abortion because this child is a girl"?

**Keir Starmer:** If that is the only reason, it is unlawful.

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**Q359 Chair:** It is. How many cases like that have you prosecuted?

**Keir Starmer:** I do not think we have had any to consider apart from—

**Chair:** None at all, ever?

**Keir Starmer:** As far as I know, none. I do not think we have had to consider any other cases.

**Q360 Chair:** But in these cases that you have considered, you go back to the practitioner, do you? Do you investigate? Who investigates?

**Keir Starmer:** The police investigate it.

**Q361 Chair:** The police investigate it. Have you had any police reports on any cases? We just want to know how widespread this is.

**Keir Starmer:** I will double check this for the Committee but as far as I know, certainly in the last five years, we have not had any of these cases investigated and passed to us to take a decision on prosecution apart from these.

**Q362 Chair:** That is very helpful. When do you think this policy will come out? As we know, you are about to—

**Keir Starmer:** No, it is not a policy, it is detailed reasons. I hope to get it out in the next day or two, which is the only reason, Mr Reckless, that I am—

**Chair:** That is very helpful.

**Keir Starmer:** I am so close to being able to provide you with a much fuller answer that I would rather do that.

**Q363 Chair:** Once you have put it into the public domain, just in case we miss it, would you write to us and tell us about this, because it is obviously of great concern?

**Keir Starmer:** Yes, of course.

**Q364 Chair:** What you are telling this Committee is that if anyone gender selects you will prosecute?

**Keir Starmer:** It is an offence to authorise a termination or carry out a termination unless two medical practitioners genuinely and in good faith certify that the risk to the mental or physical health of the patient is greater by continuation than by termination. That is the test. The statute says nothing about gender or handicap or anything else.

**Q365 Chair:** Is that the problem? Should it, because that would be a matter for Parliament?

**Keir Starmer:** One of the things I am going to deal with, hopefully tomorrow or the next day but as soon as I can, is the fact that there is not very clear guidance here.

**Chair:** Well, there is not clear law according to what you are saying.

**Keir Starmer:** If the only reason is gender and it has nothing to do with a risk to health, then in those circumstances it may well be an offence because the doctor would not in good faith be able to form the appropriate view. The test is whether the doctor in good faith formed the view that is set out in the legislation.

**Q366 Chair:** You will make this all clear?

**Keir Starmer:** I understand the concern and I understand—

**Chair:** You understand the concern?

**Keir Starmer:** I understand the concern and I understand the debate. It is for that reason that I think I do need to set it out in detail and I will send it to the Committee. I will send it, Mr Reckless, to you straight away when it is there, but I intend to deal with it and set out in clarity and detail what the position is and why the decision was taken in that particular instance.

**Q367 Mark Reckless:** I am sorry, Mr Starmer, this has nothing to do with the decision you made in this case, because the CPS judgment was there was sufficient evidence for a realistic prospect of conviction under the law, yet you determined it was not in the public interest. Why?

**Keir Starmer:** That is what I am going to set out in the fuller statement so everybody can see it in the context of the facts of the particular case. I think the difficulty is that unless the full facts are there, there is concern about the decision arrived at. It is to answer that question that I will issue, as I say sooner rather than later, I am hoping—

**Chair:** Mr Ellis, could you hold yourself, please? Order, Mr Ellis, order. Mr Reckless is asking a question. Would you please let him ask his question?

**Q368 Mark Reckless:** Are you concerned that the impact of the decision you made not to prosecute in this case is that there will be a greater amount of gender-selective abortion and are you proud to have that as your legacy?

**Keir Starmer:** I would obviously be concerned if that were a consequence. I think when the reasons are set out in detail, people will understand that that is unlikely to be the case.

**Chair:** Thank you. Dr Huppert has a question on cyber-crime.

**Q369 Dr Huppert:** We heard yesterday from the Information Commissioner about a range of issues to do with blagging and it became quite clear, I think, that SOCA do not take computer-related issues, data-related issues very seriously. I have had comments from a number of other people about the Computer Misuse Act and the Data Protection Act. Does the CPS take these issues seriously enough?

**Keir Starmer:** Yes, we do. I have to confess I really have not kept up with the proceedings. If there was any evidence on this yesterday I—

**Dr Huppert:** It is a general question rather than a specific one.

**Chair:** It is not specifically about other issues.

**Keir Starmer:** I just have not seen yesterday's evidence.

**Q370 Dr Huppert:** You are convinced that the Crown Prosecution Service takes offences under the Computer Misuse Act and Data Protection Act seriously enough; it aims for serious enough prosecutions and rates these in the way that they ought

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to be considered, because some of these are very serious crimes?

**Keir Starmer:** Yes.

**Q371 Michael Ellis:** I am entitled, of course, to a comeback. Mr Reckless mentioned my name before he went on about the other matter and we are very close to a Division, so I am very keen to deal with a couple of issues. The first is we must have absolute transparency in this Committee and I want to make sure that we cover a couple of issues that have not yet been covered. The first thing is I want to make it clear for my part—and I prosecuted many cases as a barrister before I was a Member of Parliament—that I do not think that every time the Crown Prosecution Service loses a case that they have made the wrong decision to pursue a prosecution. I want to make that very clear.

**Keir Starmer:** Good.

**Michael Ellis:** Clearly, there can nevertheless be pressure on any well-meaning individual in a case that has become a cause célèbre. Do you accept that that is at least a feasible prospect? It is not necessarily an improper decision or a decision made improperly to prosecute or not to prosecute, but there can be an increase in pressure one way or the other if a case has become a cause célèbre. Do you have any safeguards to protect your own staff from cases that might get more than the usual amount of public attention?

**Chair:** Like not letting them read the newspapers?

**Keir Starmer:** The whole point of the code for Crown prosecutors and the whole learning of the Crown Prosecution Service is to act with independence and integrity, and that means that you do not take pressure into account. I can happily say that at no stage in my tenure has anybody ever sought to put pressure on me in relation to any of the cases that I have had to consider.

**Q372 Michael Ellis:** I would not have thought they would on you, but I am thinking of your more junior staff, your regional staff, staff in regional offices, and so on.

**Keir Starmer:** Yes. So far as that is concerned, there are safeguards about the quality of our decision making that are in place on a routine basis. Every quarter we dip-sample cases to ensure the quality is right, so that throws up random cases. Cases that are particularly high profile, sensitive or difficult are subject to very often a case management panel within the CPS where senior members of staff look at it, and of course the principal legal adviser or I are consulted on a number of these cases or we might go to external counsel. There are all sorts of checks and balances, but I do want to resist this notion that cases are pursued because of pressure. In fairness to my staff, they faithfully apply the code and arrive at a decision. They may well be criticised for it and held to account for it; so am I and that is absolutely right. But the fact that we give our reasons, which is something I have been very keen on in my term of office, go out and explain ourselves, answer questions about our decisions, if necessary put further reasons forward so that we can be even more transparent, is all designed to show our workings.

**Q373 Michael Ellis:** Yes, quite right, and I agree with that. Can I move on and ask you about the so-called SOCA list? I am not going to ask you to divulge anything, but I want to ask you something as a matter of general principle, which is that knowing what you know about the criminal justice system, do you think it is in the interests of justice for alleged offences, where there are some, or suspicions, effectively to sit around for seven years and for nothing to happen with them? Do you think that might be tantamount to an abuse of process caused by delay?

**Keir Starmer:** It depends on the circumstances but as a general proposition it is not right.

**Q374 Michael Ellis:** Yes. When you say it depends on the circumstances, if prosecuting authorities, to give an example, do not know all the facts and there is that sort of delay, then clearly there is no issue there. There is no fault there, or there may not be any fault. But clearly where there is or may be some fact, then a delay of that order is not conscionable, is it?

**Keir Starmer:** It is hard to deal with in the abstract but the case law is pretty clear. Delay is a basis for an abuse of process argument. The court, if such argument arises, will look at the reasons for delay and if it thinks that it is the failure of the prosecution to act properly, that counts against the prosecution in the abuse of process argument. Courts will then stop a case if appropriate.

**Chair:** Thank you. Mr Ellis, a final question.

**Michael Ellis:** No, that is it from me, thank you.

**Q375 Chair:** Mr Starmer, in response to inquiries at the end of last weekend you said that the Crown Prosecution Service was reviewing evidence in regards to Millipede of police officers who may have accessed databases for private investigators. Is that correct? Are you involved in any way in any of the aftermath of Millipede? Have you asked for any review of any kind?

**Keir Starmer:** I have not been involved. Can I write to the Committee and just clarify the proper position and put it to you in a letter?

**Q376 Chair:** Would you do that? But in respect of any of the activities concerning Millipede, is the CPS involved? Are you currently considering any proceedings?

**Keir Starmer:** I think I would rather put that in a letter, if I may.

**Q377 Chair:** Certainly. Very finally, you are off now. Your predecessors have gone back to the bar, some have become judges. I will not ask what you are going to do next, but what do you think your legacy is for the Crown Prosecution Service, which you have served so well over the last five years? What we have seen is greater transparency and we have seen your Crown prosecutors on television much more explaining decisions, as you said. You are very much alive, but on your tombstone what would you like it being said of you as Director of Public Prosecutions?

**Mr Winnick:** He may not have a tombstone.

**Keir Starmer:** Well, I do think it is for others to decide the legacy of DPPs rather than the DPPs themselves.

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What I hope I have worked hard at is being much more transparent, being prepared to say upfront how we will approach a problem by issuing guidance on difficult matters like assisted suicide, social media and child sexual abuse, so being clear upfront about how we address this problem. Going on from that, we are showing our workings by being prepared to give reasons for what we do and allowing people to see for themselves what the decision is and to judge us and hold us accountable. I have often said I can't be held to account if people do not know why I have made the decision that I have made. Then I hope I have also introduced another element, which is a willingness in the Crown Prosecution Service to look again at issues or decisions if there is any reason for concern about those decisions.

I would have to add that I would want to pay tribute to my staff. In the period I have been in post, we have taken savings of 27.5% to our budget. Notwithstanding that, the conviction rates have been upheld and on the performance indicators we have improved. I am not saying everything is perfect, far from it, but to have done as much as we have done

in the most challenging circumstances that the Crown Prosecution Service has ever been through in its history is a tribute to the staff.

**Q378 Chair:** Yes. We get no more stories about files not arriving at court on time or getting lost. These have all disappeared in the last five years.

**Keir Starmer:** We will soon be in the position where the digital file is the main currency and the concept of losing the file will be an ancient concept associated only with paper.

**Q379 Chair:** On behalf of this Committee, thank you, first of all, for your co-operation with us. Whenever we have asked you to appear, whenever we have asked you for information, you have been very forthcoming, very clear. You have been an excellent DPP and, on behalf of the Committee, I wish you the very best for the future.

**Keir Starmer:** Thank you very much indeed.

**Chair:** Thank you. That concludes this inquiry.

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# Written evidence

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## Written evidence submitted by the Home Office [JHA 00]

### GOVERNMENT RESPONSE TO HOME AFFAIRS SELECT COMMITTEE CALL FOR EVIDENCE

Thank you for your ongoing interest in the 2014 opt-out decision.

Please find the Government's written evidence attached to this letter. I apologise for the slight delay in providing this. I thought it would be helpful to provide some further information, in addition to the Explanatory Memoranda contained in Command Paper 8671, concerning some of the high profile measures included in the set of 35 measures we will seek to rejoin. I hope this will help to inform your consideration of this matter further and is useful in preparing your report.

I look forward to appearing before your Committee on 15 October to give further evidence on this matter and other Home Office business.

I am copying this letter to the Justice Secretary, the Rt. Hon. Chris Grayling; the Chairman of the European Scrutiny Committee, Mr William Cash MP; the Chairman of the Justice Select Committee, the Rt. Hon. Alan Beith; the Chairman of the House of Lords European Union Committee, Lord Boswell; and Deborah Maggs, Home Office Departmental Scrutiny Coordinator.

*The Rt Hon Theresa May MP*  
3 October 2013

### GOVERNMENT'S RESPONSE TO HOME AFFAIRS SELECT COMMITTEE CALL FOR EVIDENCE: 2014 JHA BLOCK OPT-OUT: HOME OFFICE MEASURES

1. The Government is committed to rejoining those measures where it is in the national interest do so. As I said in my Statement on 9 July, as people have become more mobile in recent years, so too has crime. We are seeking to rejoin those measures that underpin cooperation in the fight against organised crime and protect the British public.

2. While detailed analysis of each individual measure is included in the five Explanatory Memoranda contained in Command Paper 8671, I have set out more of the Government's reasoning for wishing to rejoin a number of the more high profile measures where the Home Office has lead responsibility. These are the European Arrest Warrant (EAW), the European Criminal Records Information System (ECRIS), Eurojust, Europol and Joint Investigation Teams (JITs). Although not the responsibility of the Home Office, I have also provided further information on Naples II: the Justice Select Committee is focusing on the measures for which the Ministry of Justice has responsibility and, as such, this measure would not otherwise be included in the Government's evidence.

#### EAW

3. The EAW is perhaps the most high profile measure within the scope of the 2014 decision. Law enforcement partners have made it clear that the EAW is a vital tool in combating cross-border crime and keeping our streets safe. In their evidence to the House of Lords European Union Committee Inquiry, the Association of Chief Police Officers (ACPO) were clear about the value of the EAW in terms of safeguarding the British public and in evidence to your Committee on 3 September, Sir Hugh Orde stated that the EAW is "at the top of our list" and "an essential weapon" in the fight against crime. Keir Starmer, the Director of Public Prosecutions, was also clear that the EAW is a hugely beneficial instrument. Between April 2009 and April 2013, 5,184 people were arrested under an EAW in England and Wales, and 4,005 were surrendered to another EU country. Of those surrendered 181, or 3.5% of those arrested, were British nationals. Over the same period, 507 people were surrendered to the UK from another EU country, 277 being British nationals.

4. The extradition of Hussain Osman shows the effectiveness of the EAW. Osman was swiftly surrendered by Italy to the UK and convicted of his involvement in the failed 21 July 2005 bombings in London. On 29 July 2005 the Metropolitan Police sought and obtained a warrant for the arrest of Osman and additionally sought an EAW, which was transmitted to the Italian authorities on the same day. He was arrested that day and was returned to the UK on 22 September 2005 and charged.

5. Another example is the case of Jeremy Forest, the Sussex schoolteacher who abducted a pupil to France in September 2012. On 25 September an EAW was issued for his return to the UK and, in October, he consented to his return to the UK and was surrendered under an EAW on 10 October. He was charged with child abduction by Sussex Police later the same evening. He was found guilty in June 2013 and jailed for five and a half years.

6. As these cases show, the EAW can, and does, facilitate swift access to justice—returning serious criminals to the UK is possible within weeks. By contrast, return under other arrangements can take months or, in many cases, years.

7. In terms of surrender from the UK to another country, it takes approximately three months to extradite someone under an EAW. A Part 2 extradition (ie extradition to non-EU countries) takes approximately ten months but can, and often does, take considerably longer. The swift return of Hussain Osman to the UK can be contrasted with the protracted extraditions of terrorist suspects including Abu Hamza, Babar Ahmad, Syed Ahsan, Khaled Al Fawwaz and Adel Abdul Bary to the US.

8. Before the EAW, a number of Member States did not allow the extradition of their own nationals. We know that many of Member States have constitutional bars to the surrender of nationals, and the following countries made reservations to the 1957 Council of Europe Convention on Extradition (ECE) making clear that they will not extradite their own nationals under that system: Bulgaria; Croatia; Cyprus; Estonia; France; Germany; Hungary; Lithuania; Luxemburg; Netherlands; Poland; Portugal; and Romania. Even those Member States who did not make reservations to the ECE could still refuse to extradite their own nationals. Under previous arrangements, there were numerous instances—particularly in the 1980s between France and Italy—of alleged terrorist offenders going unpunished because of the constitutional bars on the surrender of nationals. Under the EAW, however, Member States are precluded from refusing the surrender of their own nationals in prosecution cases because it is a system of judicial surrender, rather than extradition.

9. The case of David Heiss, a German national who murdered British student Matthew Pyke on 19 September 2008, is one such example. Heiss developed an obsessive infatuation with Pyke's girlfriend, Joanna Witton, and travelled to Nottingham both in June and August 2008 to meet Witton and Pyke in person. During his last visit to the UK, on the morning of 19 September 2008, Heiss proceeded to kill Matthew Pyke after stabbing him 86 times. An EAW was issued on 25 September 2008. Heiss was arrested at his home in Limburg on 27 October 2008. He was surrendered to the UK on 25 November 2008. Heiss, who denied the murder charge and said he was acting in self defence, was found guilty at Nottingham Crown Court, and on 5 May 2009 he was sentenced to a minimum of 18 years in prison.

10. Tomasz Marczykowski is a Polish national who was returned from Poland to the UK in March 2010 to face trial for sexual activity with a child. Marczykowski pled guilty at his trial and was sentenced to four years under the Sexual Offences Act 2003, handed a seven year Sexual Offences Prevention Order, and was placed on the sex offenders register indefinitely.

11. Under the ECE it is very likely that these, and many other dangerous criminals, would not have been returned to the UK to face justice. Since 2009, over 100 people have been returned to the UK from countries that did not extradite their own nationals under the previous extradition systems. Given many Member States have constitutional bars to the extradition of their nationals it is highly unlikely that they would agree to the surrender of their own nationals under any alternative bilateral arrangements that were put in place.

12. Operation Captura shows the role of the EAW in the fight against serious organised crime. This operation was launched in Spain in 2006 and is a joint initiative between Crimestoppers, SOCA and the Spanish Police to target fugitives from British justice who are believed to be resident in Spain. To date, the details of 65 individuals have been circulated. 53 of those have since been arrested. In July this year, convicted drug trafficker Mark Lilley, from Warrington, was arrested in Malaga. He had been on the run since 2000 when he skipped bail during his trial. He was sentenced to 23 years in his absence for masterminding a large-scale drug operation and firearms offences. Lilley was surrendered by Spain to the UK on 5 August and is now detained at Her Majesty's Prison Belmarsh.

13. While the Government recognises the operational importance of the EAW, we have been clear that there are problems with its operation. In October 2012 I raised particular concerns about the disproportionate use of the EAW for trivial offences, the lengthy pre-trial detention of some British citizens overseas and the use of the EAW for actions that are not considered to be crimes in the UK. The Government has addressed these concerns by proposing amendments to the Extradition Act 2003, which were introduced through the Anti-Social Behaviour, Crime and Policing Bill on 10 July. These reforms build on the recommendations made by Sir Scott Baker in his review of the UK's extradition arrangements, the practices of other EU Member States and the fundamental rights and legal principles that are enshrined in EU law. As I said in my Statement on 9 July, cooperation on cross-border crime is vital, but we must also safeguard the rights of British citizens, and the changes that we propose will do that.

#### ECRIS

14. ECRIS allows Member States to obtain details of the previous convictions of EU nationals. This allows courts to make the right bail decision, take bad character into account and, on conviction, give sentences which reflect previous offending history. This type of exchange makes our streets safer.

15. For example, in the case of "GA", a Romanian national who was accused of raping a prostitute and a vulnerable female adult, previous conviction information revealed that he had a conviction for rape in Romania. An application to use the previous conviction as bad character evidence was accepted. On being sentenced to an indeterminate prison sentence with a recommendation that he served at least 11 years in jail the judge remarked on his previous conviction and the similarity of this offence to the Romanian one. Without ECRIS, UK authorities would have been unaware of GA's offending history. The sentence reflected the previous offending, and there is evidence to suggest that the previous offending was significant in securing the conviction.

16. Another example of the benefit of this type of exchange is the case of a UK national, “W”, who was convicted in France for importing pictures of minors presenting an indecent character with a view to circulating, and possession of an indecent image of a minor. W was sentenced to one year and six months’ imprisonment, of which one year has been suspended. W had no previous UK record and, without criminal record exchange, UK authorities would not have known of W or his previous conviction. Knowing that he had a conviction for child sex offences allowed him to be placed on the UK Sex Offenders Register and so become subject to monitoring in the UK.

17. Before EU criminal records exchange, information relating to previous convictions was not shared between Member States to the same extent. Under the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters, the UK did not send any notifications to other Member States detailing convictions of their nationals in the UK, nor did we send any requests to other Member States for the previous convictions of their nationals being prosecuted in the UK. We received very few requests for the previous convictions of UK nationals being prosecuted in another Member State and relatively few conviction notifications for UK nationals. By contrast, since May 2012 France alone has sent 1909 notification messages<sup>1</sup> to the UK and the UK has sent 887 notification messages to France.

18. As ACPO said in their evidence to the House of Lords European Union Committee Inquiry, “[t]he exchange of criminal antecedent information is a critical part of ensuring justice is done and that the public are protected from harmful people”.

#### EUROJUST

19. The case of the murders in Annecy in France in early September 2012 demonstrates the value of Eurojust. Following slow progress in the first week of the case, proactive involvement by the UK and French National Desks at Eurojust helped drive progress in the case. Within a week of Eurojust’s involvement, a two day meeting on site in Annecy was held between judicial and investigative authorities of the UK and France which led to the creation of a JIT. Issues relating to the functioning of the JIT were negotiated and agreed, including secondments of officers from UK to France and vice versa. The UK and French National Desks at Eurojust were instrumental in chairing the meeting and clarifying the legal and procedural options in each country. The existence of the JIT meant that information could be shared between states in real time, and that a direct dialogue—including regularly via Eurojust—could overcome potential misunderstandings arising from diverse legal procedures.

20. This case demonstrates the value of Eurojust’s role in supporting cooperation and coordination amongst competent authorities in cases of serious cross-border crime. This helped support progress that led to an arrest in England on 24 June 2013 of a person for “conspiracy to murder”.

21. Although JITs are established under a separate EU instrument, Eurojust currently administers a JIT funding project. Eurojust has awarded a total of €165,156.25 in funding for the Annecy JIT. As of 6 June 2013, Eurojust had awarded a total of €1,823,379 in funding for JITs involving the UK since December 2009.

22. Eurojust also provides practical support by organising coordination meetings. This involves bringing representatives together from Member States (or any other countries involved) early on in the process of investigating or prosecuting a particular case to agree how the relevant parties will work together and to exchange information. For example, the removal of foreign national offenders to Lithuania had been virtually halted following the ruling earlier this year in the *Campbell* EAW case<sup>2</sup> that conditions in Lithuanian prisons would breach Article 3 of the European Convention on Human Rights, rights of surrendered detainees. The Lithuanian government offered to detain prisoners in a named prison (Kaunas) and a number of test cases were listed in England & Wales to determine whether the new arrangements were Article 3 compliant. The Crown Prosecution Service (CPS) had struggled to obtain information needed from Lithuania in relation to the test cases. Of particular concern was an apparent refusal by Lithuania to allow a defence expert to inspect Kaunas prison. Lithuania was frustrated about what they saw as repeated and unnecessary requests for information and working level relationships were becoming strained.

23. In order to broker a solution, the UK desk at Eurojust requested a coordination meeting with Lithuania in early June 2013 and, working closely with the Lithuanian desk at Eurojust, was able to arrange a meeting with the relevant officials in Lithuania. As a result of the meeting, defence expert access to the prison was allowed and more robust assurances were provided about the use of Kaunas prison. Additionally, Lithuania agreed to provide further evidence about pre-trial detention conditions. On 9 August 2013 the Senior District Judge in the Westminster Magistrates’ Court ordered the extradition of the seven individuals who featured in the test case, with leave to appeal. Some issues remain to be resolved about the use of Kaunas prison but ongoing dialogue is taking place with UK desk support.

24. The Director of Public Prosecutions, Keir Starmer QC, said, in evidence to the House of Lords European Union Committee Inquiry, that there are a “number of examples of very positive outcomes where we have been able to progress serious cases in this country using Eurojust, ranging from rape trials, drug importation and animal rights extremists”.

<sup>1</sup> Notification messages include both new convictions and changes to previously transmitted convictions.

<sup>2</sup> [http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/SummaryJudgments/Documents/j\\_sj\\_160113/j\\_sj\\_Lithuania-v-Liam-Campbell\\_160113.html](http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/SummaryJudgments/Documents/j_sj_160113/j_sj_Lithuania-v-Liam-Campbell_160113.html)



## EUROPOL

25. Europol makes a valuable contribution to the UK in tackling the fight against organised crime, other forms of serious crime and terrorism. Europol has provided operational support to EU law enforcement agencies and JITs and provides tactical and strategic analyses to cross-border operations delivering tangible and quantitative outcomes.

26. One example is Operation Rescue, an operation led by the UK's Centre for Child Exploitation and Online Protection (CEOP), which involved cooperation between the UK and Australia, Belgium, Canada, Greece, Iceland, Italy, the Netherlands, New Zealand, Poland, Romania, Spain, and the United States.

27. Europol provided the following support to this operation:

- Cracked the security features on a seized copy of the server enabling them to rebuild the forum offline and forensically interrogate;
- Distribution of 4202 operational intelligence reports to 25 EU Member States and eight other countries which identified links between this network and those featured in multiple other investigations; and
- Analysis of the computer server and the identification of the members of the child sex abuse network. This facilitated operational action by police authorities in multiple jurisdictions and led to the arrests of suspects and the safeguarding of children.

The operation resulted in the following:

- At least 230 children safeguarded worldwide, 60 of whom were in the UK—the highest number of children safeguarded ever achieved from this type of investigation;
- At least 184 offenders arrested worldwide, 121 of who were arrested in the UK.

28. Another investigation targeting a network facilitating illegal migration into the UK involved collaboration between France, Portugal and the UK, supported by Eurojust and Europol. This resulted in 12 arrests on a named day of action, six of which were in France and six in Portugal. Simultaneous house searches in France and Portugal resulted in the seizure of documents, money, bank statements, mobile phones and other supporting evidence. There was also one arrest in the UK and four additional arrests in France.

29. Another example is Operation SEAGRAPE. In July 2012 information from French and Belgian police was passed to Europol about a people smuggling gang based at a camp near Dunkirk. Analysis by Europol identified a series of British phone numbers and British bank accounts which were regularly in use by the smuggling gang leaders in France and Belgium. These details were then passed to the former UK Border Agency (UKBA) who linked these numbers to 37 UK residents, all of whom were linked to this smuggling gang. Further support from Europol enabled French, Belgian and British officers to plan a coordinated joint day of action across all three countries in February this year. Both Europol and Eurojust supported operational teams across the UK, France and Belgium, which resulted in a total of 36 arrests, 20 of which were made in the UK by UKBA officers. This is an example of how the UK has engaged with Europol and other Member States to target an organised crime group, arrest its leaders and seriously disrupt its activities.

## JOINT INVESTIGATION TEAMS

30. JITs combat cross-border crime by allowing investigations to be conducted in a coordinated manner between Member States. Our consultation with law enforcement partners has made it clear that this is a valuable tool for cooperation at the EU level; some of the benefits of JITs have already been highlighted in the Eurojust and Europol sections above.

31. Operation Sherston, a JIT between the UK and Netherlands, led to the conviction of British national John Patrick Sweeney for murders in the UK and the Netherlands. Evidence linked Sweeney, who was already serving a sentence for attempting to murder Delia Balmer, to the murders of Melissa Halstead, an American national whose dismembered body was discovered in a canal in Rotterdam, and Paula Fields, a UK national whose dismembered body was discovered in the Regent's Canal, King's Cross.

32. In 2008 a Dutch Cold Case Review investigation was launched into the murder of Melissa Halstead and, in 2009, police cooperation was initially established between the Dutch Cold Case team and the Metropolitan Police. Following a number of meetings a JIT, facilitated by Eurojust, was established. In 2011 Sweeney was charged and convicted of both murders in the UK. Dutch representatives were present throughout the proceedings. Neither case would have been able to be prosecuted without cooperation of this kind.

33. Another example of a successful JIT is Operation Fry. A JIT with the Netherlands targeted the abuse of Free Movement through sham marriages. To date this has led to 122 arrests, with 77 convictions, with sentences totalling 101 years. It has also allowed us to initiate action to remove non EEA beneficiaries of such sham marriages from the UK.

34. Another is Operation Golf, a JIT between the Metropolitan Police and the Romanian National Police focussing on human trafficking for forced criminality. This operation resulted in the convictions of 80 individuals involved in the network. This represents the first convictions in the UK for trafficking a child for

exploitation through forced criminality. Additionally, 28 children were safeguarded from trafficking and exploitation and/or neglect by the network.

## NAPLES II

35. The Naples II Convention strengthens our borders by enabling a range of operational cooperation between the relevant agencies in EU Member States to combat criminal customs offences. It allows for the exchange of information before, during and after customs offences take place. Examples of cooperation include “controlled deliveries” where illicit consignments are followed to their destination instead of being seized at the first opportunity, requests for surveillance by another Member State, and JITs.

36. An example of activity under Naples II is Operation Almagro. This was a joint operation between French and UK border officials which uncovered regular smuggling of Class A drugs from France to the UK, using micro light aircraft. 63kg of methamphetamine and 6.2kg of cocaine were seized, with a total value of approximately £1 million. Three British nationals were arrested in France and are awaiting sentencing.

37. In 2011 information shared between the UK and law enforcement agencies in France and Germany under the Naples II Convention resulted in the seizure 1.2 tonnes of cocaine (the biggest cocaine seizure in the UK to date) and the arrest of an international drug smuggling gang.

38. Information sharing, surveillance and controlled deliveries under Naples II also assisted a number of successful HMRC investigations into cigarette and alcohol fraud, and an oil laundering operation in 2011. These successes prevented over £120 million in potential revenue losses to the UK Exchequer.

*Home Office  
October 2013*

### Written evidence submitted by Helen Malcolm QC [JHA 01]

1. My name is Helen Malcolm QC. I am Vice Chair of the Bar Council’s EU Law Committee and Chair of its Criminal Law Subcommittee. I am also the UK’s representative on the Criminal Law Committee of the CCBE (Council for the Combined Bars of Europe). I am an extradition and fraud specialist with nearly 30 years’ experience of transnational crime, extradition and mutual assistance.

2. I submit these comments in my personal capacity.

*Do you agree that it is in the national interest for the UK to seek to rejoin any or all of those measures falling within the Home Office’s remit which the Government has indicated that it will seek to rejoin?*

3. I have no doubt that it is in the UK’s interest to seek to rejoin all the measures which the Government has identified. In particular, it is of absolutely vital importance to rejoin the European Arrest Warrant, for all the reasons that I have already set out in evidence to the House of Lords EU Committee Enquiry, and further at the seminar arranged by that Committee on 26th June 2013.

4. In addition, it would be useful to opt back into the Framework Decision on the mutual recognition of probation and alternative sanctions. That would (1) show consistency with the desire to opt into the FD on custodial measures; (2) would send the right message, promoting non custodial measures where possible/appropriate; and (3) it is in fact more important from a rehabilitation point of view that defendants serve non custodial sentences in their home countries, than custodial.

5. The European Judicial Network is also a useful network and training tool. We should opt back in.

6. As to the Convention on Mutual Assistance in Criminal Matters, the argument for not opting in is that it will be replaced by the European Investigation Order- but that is not yet in force. If the EIO is not ready for use then (arguably) the UK may fall back on the 1959 Mutual Assistance Convention—but that carries all the same problems as falling back onto the 1957 European Convention on Extradition that I have already given evidence about. Further, it was replaced because it was perceived to need improvement.

*Do you have any comments on the analysis of policy implications and fundamental rights provided in the Home Office’s Explanatory Memoranda?*

7. This is potentially a vast question; but it is very difficult to answer without any information as to the evidence used to reach the various judgements. As an example, para 233 contains the following comment re the EJM:

“Practical experience has shown that the contacts are not always the right people to speak to; often the contact points have a coordinating role. We judge that practitioners will know the names and numbers of people they need to speak to regularly.”

8. What does the reference to “practical experience” mean? Whose experience? On what basis do you “judge”?

9. In relation to the EAW at para 80, it is said that:

“Particular concerns have been raised about the disproportionate use of the EAW for trivial offences, the lengthy pre-trial detention of some British citizens overseas and the use of the EAW for actions that are not considered to be crimes in the UK.”

10. Whilst it is correct as a general comment that such concerns have been raised, often that has been in the (Euro-sceptic) Press. Without any evidence in the Command Paper as to the person(s) raising the concerns and their experience, and without evidence of the number of instances actually found, it is difficult for anyone reading the paper to form a balanced view.

*Do you consider any other factors should be taken into account in deciding whether the UK should seek to rejoin each measure?*

11. At this stage, the most important issue is the speed with which decisions can be taken. Whatever decision the Government reaches about opting back in to individual measures, it is of the utmost importance that it is implemented fast. Time is running very short already and it will be absolutely vital to ensure that the transitional provisions are agreed, in place, and (most importantly) widely publicised both in this country and in the other Member States if we want to try and minimise damage to the efficient administration of justice. There is scope for considerable confusion amongst those on the front line of administering criminal justice, if required to deal at short notice with the unusual position of the UK. Police officers, judges and others in the Member States, as well as in the UK, will require training and information about the new measures and how they will apply; and also how they will interact with measures the UK may have chosen not to opt back into.

12. I would be happy to make myself available to give oral evidence if that would be of any assistance to the Committee.

*Helen Malcolm QC*

*September 2013*

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#### **Written evidence submitted by Fair Trails International [JHA 02]**

##### **THE UK'S 2014 OPT-OUT DECISION (PROTOCOL 36)**

I write further to the call for evidence circulated by the House of Commons Home Affairs Committee. Fair Trials International (“FTI”) welcomed the opportunity to participate in the Home Affairs Committee oral evidence session on 10 September 2013, and is pleased to comment further in writing on the United Kingdom’s opt-out decision under Protocol 36 of the Treaty on the Functioning of the European Union.

Please find attached a copy of the written evidence previously submitted to the House of Lords Select Committee on European Union in the context of its initial inquiry into the UK’s 2014 Opt-out Decision.<sup>3</sup> This continues to reflect our position. As evidenced by our previous briefing, FTI’s primary focus throughout the debates on the opt-out decision has been on the operation of the European Arrest Warrant (“EAW”). Given our experience of numerous cases of injustice under the EAW, we could not support an opt-in to the EAW without a prior commitment to reform of the EAW at both the domestic and EU levels.

FTI has raised concerns regarding the disproportionate and premature use of the EAW system, which in turn have resulted in people being extradited for minor crimes and being subjected to prolonged periods of pre-trial detention. Further, our casework has demonstrated the failure of the EAW regime to ensure adequate protection of the fundamental rights of those whose swift removal from one Member State to another it effects.

Government has stated in its Command Paper that the EAW Framework Decision- implicitly- allows refusal of EAWs on human rights grounds, as provided for under UK law, suggesting that opting into the EAW raises no concerns from a human rights perspective. However, whilst it may be true that the EAW scheme implicitly allows refusal of an EAW on human rights grounds, this has proved to be of limited practical use: in practice, the courts apply principles elaborated by the European Court of Human Rights which impose virtually unachievable evidential and legal hurdles. FTI believes that the current approach to human rights protection needs redefining at both EU and national level so as to provide more realistic tests. As such, FTI has long called for reform of both the EAW Framework Decision and the UK Extradition Act with the objective of addressing the identified flaws.

We were, of course, encouraged by the Home Secretary’s announcement that the Government would, in line with our recommendations, use the 2014 opt-out decision as an opportunity to raise the need for reform with the EU institutions and other Member States. While this has not yet produced concrete commitments to reform at the EU level, we greatly welcome the steps which the Government has now taken to seek reforms to the Extradition Act 2003, particularly the proportionality assessment, the mechanisms through which premature extradition might be avoided and the amendments to the appeal process. These go a long way towards addressing our concerns and justifying the decision to opt back in to the EAW Framework Decision. Our view is that certain of the proposed amendments to the Extradition Act 2003 could go further, particularly to ensure the adequate protection of fundamental rights, and we hope that the Government will be receptive to the

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<sup>3</sup> Not printed here.

amendments which we hope are tabled in Parliament during the progress of the Ant i-social Behaviour, Crime and Policing (“ASBCP”) Bill. We are producing a briefing on these amendments and will happily provide the Committee with a copy in due course. We also welcome the Home Secretary’s announcement that the Government will opt in to, and seek to implement, the Framework Decision on the European Supervision Order, which FTI has consistently called for as a means of avoiding the pre-trial detention of some of those extradited under the EAW.

However, we also note that improvements to the EAW scheme are, to some extent, dependent on reforms to the EAW Framework Decision. We therefore maintain that the Government should seek a commitment from the EU Institutions and Member States to reform of the EU legislation. In this regard, we have been encouraged to see that the European Parliament has decided to produce a legislative initiative report, and wait to see whether it proposes reforms capable of addressing the major flaws in the EAW’s operation and whether the Member States support its recommendations.

*Libby McVeigh, Head of Law Reform, Fair Trials International*

*September 2013*

### Written evidence submitted by Justice Across Borders [JHA 03]

#### JUSTICE ACROSS BORDERS

1. Justice Across Borders is an NGO founded in November 2012 to support British citizens who have been victims of serious crime in other EU countries. In particular, we have campaigned for the maximum involvement of the United Kingdom in EU police and justice measures, since we believe that these work overwhelmingly to the benefit of British victims of crime.

2. Our submission to the House of Commons Home Affairs Committee is based on material already submitted to the House of Lords Inquiry. The response to Question 2 in this submission reproduces the same arguments and analysis as our submission of 11 September 2013 to that Inquiry.

*Question 1: Do you agree that it is in the national interest for the UK to seek to rejoin any or all of those measures falling within the Home Office’s remit which the Government has indicated that it will seek to rejoin?*

3. We welcome the Government’s decision to seek to rejoin the 35 measures specified in Command Paper 8671, although—as we argue below—we believe that there is a good case for adding to this list.

4. We wish to focus on one particular argument in favour of rejoining measures such as the European Arrest Warrant. We do not believe that new bilateral or multilateral arrangements outside the European Union would be nearly as effective.

5. As we pointed out in our submission to the House of Lords EU Committee of 21 December 2012, negotiation and implementation of bilateral and ad hoc arrangements are fraught with difficulty. Other States may not accord these priority, resulting in significant operational delays. Individual legislation may not be fast-tracked or implemented against a deadline like EU legislation. Discrepancies between implementing legislation may arise, with no mechanism to rectify them.

6. Second, such agreements might not be negotiated on the terms the UK wants, or at all. International engagement is a bargain whether it is done inside or outside the framework of European police cooperation. Just because you work outside the European framework does not mean you get all or even anything of what you want. In fact, you might get less because you have less influence. Other states could refuse to negotiate or cooperate just as we could, or ask us to pay a price on other issues.

7. Third, Member States might be constrained in concluding individual arrangements by EU law. Post-Lisbon, Union competence has been extended in the field of JHA, including the fields covered by the pre-Lisbon instruments. As a matter of EU law, there might now be a limit to which individual Member States can negotiate terms by themselves, particularly if this was to be inconsistent with the EU acquis in the relevant field.

8. Fourth, there is a real risk that requests for assistance under ad hoc arrangements will go to the “bottom of the pile”. If the UK is not committed to cooperation with its EU partners under established Europe-wide mechanisms, there is a risk that other EU partners will not accord our cooperation any priority. Evidence from senior UK law enforcement officials has consistently reinforced that there is unique advantage in the UK’s ability to cooperate through established EU mechanisms such as Europol and Eurojust.

9. Fifth, however tight or efficient the bilateral or ad hoc arrangements, they result in differences in procedures which criminals exploit. The history of our extradition arrangements with Spain since 1978 is an object lesson. There were no extradition arrangements between the two countries between 1978 and 1985. Arrangements were resumed in 1985 but operated weakly until 2001. Spain became a renowned safe haven for British criminals. Since application of the EAW, the UK has secured the return of 49 of 65 of the top UK fugitives from Spain. An ad hoc approach would open up the possibility of the UK becoming a “Costa del Crime” of EU nationals and other Member States becoming a “Costa del Crime” for British nationals.

Question 2: *Do you have any comments on the analysis of policy implications and fundamental rights provided in the Home Office's Explanatory Memoranda?*

The Command Paper: A Narrow Approach

10. In our view, Command Paper 8671 adopts too narrow an approach to the 133 measures. It is based on a single line of analysis: "Can we get away with not being a party to this measure?" The idea that a State with the standing of the UK is a party to an international instrument because of what other countries commit themselves to do, or because of what it might do for the rule of law in Europe, is completely absent. Since the driving force for the Government in opting out of the measures is fear of the CJEU's jurisdiction, we would have expected more analysis of the perceived risks in respect of each measure. But this case is not made out.

Other Measures which should be on the list

11. There appears to be a misconception that the 133 measures fall into two broad categories: the 35 on the Government's list, and defunct or obsolete measures, with only a small number in between. The Command Paper shows this is not true. While the list of 35 represents those with the strongest case for inclusion, there is a good case for including a large number of other measures, for the following reasons:

- (a) Coherence.
- (b) The risk of an operational gap.
- (c) Reputational risk to the UK and Benefit to the EU by raising standards.

Coherence

12. This issue mainly arises in respect of Europol and to a lesser extent Schengen measures. While the Government has included in the list of 35 Council Decision 2009/371/JHA establishing the European Police Office (Europol), it has not included:

- (19) *Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees.*
- (21) *Council Decision of 2 December 1999 amending the Council Act of 3 December 1998.*
- (64) *Council Decision 2005/511/JHA of 12 July 2005 on protecting the euro against counterfeiting, by designating Europol as the Central Office for combating euro-counterfeiting.*
- (104) *Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information.*
- (105) *Council Decision 2009/935/JHA of 30 November 2009 determining the list of third countries with which Europol shall conclude agreements.*
- (106) *Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files.*
- (108) *Council Decision 2009/968/JHA of 30 November 2009 adopting the rules of confidentiality of Europol information.*

13. The Command Paper rejects the case for being party to these measures on the basis that no UK legislative measures have been required for their implementation. We suggest that this reasoning is flawed. Being party to these measures gives the UK's authority for Europol to act, and to be associated with other parties, in accordance with these measures. If the UK is to continue to be fully part of Europol, even pending the adoption of a further Europol Decision, it ought for reasons of both coherence and authority to remain party to these instruments.

14. We have argued in paragraph 16 above that it is not sufficient to leave such questions to "transitional measures". First, this could create legal uncertainty. Second, it could raise doubts about what Parliament was actually approving. If measures do not feature in the Government's list, there is at least a presumption that they will cease to apply on 1st December 2014 and not be reintroduced through "the back door" of transitional measures. If measures are to continue to apply, if only for a short period pending entry into force of another measure, it is better to include them in the list with Parliament's clear approval.

15. The same applies to a lesser extent to the following Schengen measures, under each of which we have briefly stated why we believe the UK should remain a party. There is no suggestion that the CJEU poses a risk to the UK in respect of any of them.

- (111) *Accession Protocols.*
- (122) *Council Decision 2004/849/EC of 25 October 2004 relating to Switzerland.*
- (132) *Council Decision 2008/149/EC of 28 January 2008 relating to Switzerland.*

16. The reason given for not being party to these measures is that the new level of participation would be set out in the Council Decision on the opt-back in. As stated in our previous paragraph, the procedure of not including measures in the list and of re-applying them through other Decisions or through the transitional measures carries risk of misunderstanding.

(112) *SCH/Com-ex (93) 14 on improving practical judicial cooperation for combating drug trafficking.*

17. The reason given for not being party is that, in respect of EU Member States, this measure has been largely superseded by the EU MLA Convention and will be superseded by the European Investigation Order (EIO), and otherwise through the 1959 Council of Europe Convention (and its Protocols) or the separate agreement implementing parts of the MLA Convention with Iceland and Norway. But the UK does not propose to opt back into the MLA Convention; not all Member States will be party to the EIO; and the Council of Europe Convention does not fill all the gaps.

(114) *SCH/Com-ex (98) 26 def setting up a Standing Committee on the evaluation and implementation of Schengen.*

(116) *SCH/Com-ex (99) 6 on the Schengen acquis relating to telecommunications.*

(127) *Commission Decision 2007/171/EC of 16 March 2007 laying down the network requirements for SIS II.*

(129) *Council Decision 2008/173/EC of 18 February 2008 on the tests of the second generation SIS.*

18. While we accept that it may be technically possible to continue cooperation related to these instruments without being party to them, the Command Paper acknowledges the interest which the UK has in them, not least through participation in relevant committees and sub-groups or the establishment of technical standards. So there is an argument based on coherence for remaining party to them.

The risk of an operational gap

19. We consider that the Command Paper analysis shows the risk of an operational gap in respect of the following measures:

(2) *Joint Action 96/277/JHA of 22 April 1996 concerning a framework for the exchange of liaison magistrates.*

20. The Command Paper states “We judge that non-participation in the network may diminish the ability of the UK to coordinate complex investigations and prosecutions in international cases involving Spain, Italy and France.”

(25) *Council Act of 29 May 2000 establishing the Convention on Mutual Legal Assistance in criminal matters between the Member States of the European Union.*

(32) *Council Act of 16 October 2001 establishing the Protocol to the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union.*

21. At paragraph 120 of the Command Paper, the Government acknowledges that there will be gaps. Its judgment in the case of Denmark that “overall the Government expects the 1959 Council of Europe Convention and its Additional Protocols to be a viable alternative for the majority of forms of MLA” is not convincing. The coverage of interception of communications and banking information in paragraph 121 is similarly weak. Why jeopardise such an important area of cooperation for no good reason?

(30) *Council Decision 2001/419/JHA of 28 May 2001 on the transmission of samples of controlled substances*

22. At paragraph 142, the Government states: “We judge that the ability to share information and potentially samples for the purposes of securing a prosecution would not be compromised by a decision not to participate in this measure as that is likely to be covered by the EIO”. In our view, this assurance should be stronger.

(66) *Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences*

23. Paragraph 137 states: “Continuing to share information is therefore important both operationally and in reputational terms”. It adds in paragraph 139 that “in most instances information would be exchanged regardless of UK participation in this measure, especially where it was deemed to be operationally important”. But that indicates a potential gap. Leaving this to “administrative means” (paragraph 140) is not as solid a basis as the measure.

(88) *Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions*

24. Although the UK has not implemented this Decision, we believe that it would be useful in allowing EU citizens, including British citizens, subject to sanctions such as supervision orders, to move freely between EU Member States.

### Reputational Risk to the UK and Benefit to the EU by raising standards

25. There remain a series of measures which, if the UK is not party to them, may not leave operational gaps but may cause reputational damage to the UK and loss of influence. We have included in this section those measures which clearly benefit other Member States and the EU as a whole by raising standards. By not affirming these measures, the UK is abandoning one of the main avenues for building the rule of law in these important areas. These include terrorism, confiscation of assets, fraud and corruption where for many years the UK has encouraged other EU Member States and accession countries to adopt precisely these measures.

26. The titles of the measures are self-explanatory of their scope and therefore of the argument:

(4) *Joint Action 96/698/JHA on cooperation between customs authorities and business organizations in combating drug trafficking.*

(5) *Joint Action 96/699/JHA concerning the exchange of information on the chemical profiling of drugs to facilitate improved cooperation between Member States in combating illicit drug trafficking.*

(17) *Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds of crime.*

(18) *Council Framework Decision 2001/500/JHA of 26 June 2001 on the same subject.*

(54) *Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking.*

(58) *Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.*

(33) *Council Decision 2001/887/JHA of 6 December 2001 on the protection of the euro against counterfeiting.*

(39) (87) *Council Framework Decisions 2002/475/JHA of 13 June 2002 and 2008/919/JHA of 28 November 2008 on combating terrorism.*

(43) *Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence*

(45) *Council Decision 2002/996/JHA of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism.*

(84) *Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime.*

(98) *Council Decision 2009/902/JHA of 30 November 2009 setting up a European Crime Prevention Network.*

(9) (49) *Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of Member States, and its application to Gibraltar.*

(47) *Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector.*

(29) *Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment.*

(1) (8) (12) *Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, and the Council Acts drawing up the First and Second Protocols.*

*Jeremy Hill, Trustee, Justice Across Borders*

*Thais Portilho-Shrimpton, Director, Justice Across Borders  
September 2013*

Jeremy Hill was Assistant Legal Adviser in the Foreign and Commonwealth Office (FCO) dealing with extradition and mutual legal assistance between 1982 and 1987. He was Legal Adviser to the British Embassy in Germany between 1987 and 1990, dealing (among other things) with judicial cooperation, including cases of terrorism such as the Lockerbie Inquiry. He was Counsellor in the Attorney General's Office between 1991 and 1994 specialising in international and EU law. He was Counsellor for Justice and Home Affairs and Legal Adviser in the UK Representation in Brussels between 1995 and 1998, and took part in negotiations in the early pre-Lisbon JHA instruments. He was Head of the Southern European Department in the FCO between 1999 and 2001, then Ambassador to Lithuania from 2001 to 2003, and Ambassador to Bulgaria from 2004 to 2007, where JHA featured prominently in the EU accession process. He also supervised operational police and judicial cooperation from the Embassy with these two countries. He left the FCO in November 2007 but continues to work on a wide variety of international projects. He is an Associate Director of the Centre for Political and Diplomatic Studies and for 2013–14 is a Visiting Scholar at the University of Ulster working on issues of the past in Northern Ireland. He is a member of the Executive Committee of Westminster Liberal Democrats. He is a co-founder and trustee of Justice Across Borders.

Thais Portilho-Shrimpton is Director of Justice Across Borders, which she founded with Jeremy Hill, Lord Taverne and Peter Wilding in November 2012. She has been a journalist for seven years, two of them as an all-round (and crime) reporter at Brazilian national newspaper O Dia, based in Rio de Janeiro. She moved to the UK in 2007 and worked at local newspapers in south London, at Newsquest Ltd, until 2011. She contributed

to a range of publications including the Guardian, Independent on Sunday, New Statesman, Daily Telegraph and CNN International. She managed the Hacked Off campaign, and took part in the negotiations of the Leveson Inquiry's Terms of Reference, as well as the drafting of amendments to proposed changes to CFAs for defamation and privacy cases in the Legal Aid, Sentencing and Punishment of Offenders Bill. She advised academics developing proposals for new models of regulation of the press throughout the inquiry. She was at Hacked Off from its inception until October 2012.

#### Written evidence submitted by the Law Societies of England and Wales and of Scotland [JHA 04]

1. The Law Society of England and Wales is the independent professional body, established for solicitors in England and Wales in 1825, that works globally to support and represent its 166,000 members, promoting the highest professional standards and the rule of law.

2. The Law Society of Scotland is the professional body of the Scottish solicitors' profession. Not only does it act in the interests of its solicitor members, but it also has a clear responsibility to work in the public interest. That is why it actively engages and seeks to assist in the legislative and public policy decision making processes.

3. The Law Societies welcome this opportunity to provide evidence to the Home Affairs Select Committee of the House of Commons on the Government's plans to opt out of EU police and criminal justice (PCJ) measures concluded prior to the Treaty of Lisbon.

*Do you agree that it is in the national interest for the UK to seek to rejoin any or all of those measures falling within the Home Office's remit which the Government has indicated that it will seek to rejoin?*

4. Yes. The Law Societies do not support the exercise of the opt-out. We start from the premise that systems need to be in place to facilitate effective cross-border co-operation in criminal justice matters between Member States and provide for corresponding procedural rights for suspects and victims. Exercising the opt-out is likely to cause significant difficulties for cross-border criminal investigations and to increase the complexity of advising suspects and victims. It may also give rise to significant unnecessary costs (at a time when many reductions, not least in the field of legal aid, are being made to domestic criminal justice funding). The opt-out could also diminish the ability of the UK to influence future developments in this field of law at EU-level.

5. The Law Societies welcome that the Government has recognised the value of 35 of the EU PCJ measures. These measures generally correspond to those that the Law Societies identified as of particular value to legal practice in the UK in cross-border cases (though below we highlight further measures that could be added). The Law Societies are also willing to provide additional input on the measures if this would assist policymakers.

6. It remains the case that we do not view any of the measures as harmful. This includes the European Arrest Warrant (EAW) Framework Decision<sup>4</sup> which, while it could be improved, offers a better system than was in place before. The Law Societies are concerned that it may not be possible for the UK to opt back in to all of the measures that are proposed in the forthcoming negotiations and that this is an inherent risk in exercising the opt-out. Any transitional period is likely to give rise to significant legal uncertainty.

7. As the Law Societies have previously explained to the House of Lords' EU Select Committee, accepting the jurisdiction of the Court of Justice of the European Union (CJEU) for such measures is unlikely to pose any practical difficulties for the UK,<sup>5</sup> and the UK has chosen to accept the CJEU's jurisdiction for PCJ measures opted into following the Treaty of Lisbon and all other areas of EU law. If EU law is to function, then there must be a court able to provide interpretation on its meaning (through preliminary rulings to national courts) and to consider whether the EU institutions or Member States have infringed that law. Domestic courts already take account of CJEU case-law, even in relation to measures where the UK is not yet subject to the CJEU's jurisdiction.<sup>6</sup>

Measures on the list

8. If the opt-out is exercised, the Law Societies welcome the provisional list of the 35 PCJ measures that the Government intends to request to rejoin.<sup>7</sup> The following measures on the list are viewed as particularly valuable:

— *Framework Decision on the EAW*

The Law Societies believe that the EAW is extremely important. It could be improved but offers a better and more efficient system than previous arrangements.<sup>8</sup>

<sup>4</sup> Council Framework Decision 2002/348/JHA on the European arrest warrant and surrender procedures between Member States.

<sup>5</sup> Bar Council of England and Wales; Law Society of England and Wales—Supplementary written evidence to the House of Lords' EU Select Committee's original inquiry.

<sup>6</sup> *Assange (Appellant) v The Swedish Prosecution Authority (Respondent)*, [2012] UKSC 22.

<sup>7</sup> Command Paper 8671—9 July 2013, Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union, pages 8 to 12.

<sup>8</sup> See further our consideration of the EAW from paragraph 21 onwards.



- *Framework Decision on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty*<sup>9</sup>  
This provides for a prisoner transfer scheme, which the Law Societies view as helpful in enabling nationals to serve sentences in their own Member States.
- *Framework Decision on taking account of convictions in the Member States of the EU in the course of new criminal proceedings*,<sup>10</sup> *Framework Decision on the organisation and content of the exchange of information extracted from the criminal record between Member States*,<sup>11</sup> *Framework Decision on the establishment of the European Criminal Records Information System (ECRIS)*,<sup>12</sup> and *Framework Decision on joint investigation teams*.<sup>13</sup>  
Prosecutors regard these measures as particularly valuable.
- *Framework Decision enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial*<sup>14</sup>  
This measure can improve the procedural rights of the accused, for example, in EAW cases.
- *Framework Decision on the application of mutual recognition to decisions on supervision measures as an alternative to provisional detention (the European Supervision Order (ESO))*<sup>15</sup>  
This will be beneficial to many defendants resident in a Member State other than where they are due to stand trial. (While being a measure overseen by the Ministry of Justice, we note that the ESO has been referred to in oral evidence to the committee and therefore raise some points in this paper.)
- The various information and data sharing measures, and data protection measures. *In particular, the Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters* is important from the perspective of data protection.<sup>16</sup>
- The existing Eurojust and Europol measures (not all of which are on the list).

Measures within the remit of the Home Office omitted from the list

9. As a general point, there are groups of instruments which clearly go together (for example, the present measures relating to Eurojust and to Europol, not all of which are included in the current list); however, such measures are in a continual state of change, as measures are amended or new measures proposed.

Convention on mutual assistance in criminal matters

10. The Law Societies note that negotiations concerning the European Investigation Order (EIO) have not concluded and it is not yet clear when this will take place.<sup>17</sup> Once concluded, there is likely to be an implementation period for Member States, perhaps of two or three years.<sup>18</sup> It may therefore be helpful to request to opt back into the measures currently in use that the EIO is intended to supersede, eg the *Convention on mutual assistance in criminal matters between the Member States of the EU* (the EU MLA Convention 2000).<sup>19</sup>

11. The Command Paper states that "...if the EIO is not adopted and entered into force before 1 December 2014 and the Government did not opt back in to the EU MLA Convention 2000, we believe that most forms of cooperation would continue on the basis of the *1959 Council of Europe Convention on Mutual Assistance in Criminal Matters* (and its Protocols). Indeed, as not all Member States have implemented EU MLA Convention 2000 the impact on our MLA relations with those States would be largely negligible".<sup>20</sup> We understand from the Command Paper that, in June 2013, only Greece, Italy and Ireland had not fully

<sup>9</sup> Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union.

<sup>10</sup> Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

<sup>11</sup> Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States.

<sup>12</sup> Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA.

<sup>13</sup> Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams.

<sup>14</sup> Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

<sup>15</sup> Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

<sup>16</sup> Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters.

<sup>17</sup> Proposal for a Directive regarding the European Investigation Order in criminal matters, 29 April 2010, 9145/10, 2010/0817 (COD).

<sup>18</sup> This is not clear in the latest published text from the negotiations. See Article 31 on transposition in the latest *Comparative table* of drafting: <http://register.consilium.europa.eu/pdf/en/13/st07/st07805.en13.pdf>

<sup>19</sup> Council Act of 29 May 2000 establishing the Convention on mutual assistance in criminal matters between the Member States of the EU.

<sup>20</sup> Command Paper 8671, op. cit., page 80.

implemented the EU MLA Convention 2000.<sup>21</sup> The Law Society of England and Wales would raise the general concern that there is a risk that it may not be straightforward for some Member States to revert to Council of Europe Conventions in the case that these have been superseded domestically. The 1959 Convention is also narrower in scope than the EU MLA Convention 2000.<sup>22</sup> We therefore think that it would be helpful for the UK to apply to re-join the EU MLA Convention 2000.

#### European judicial network

12. The Law Societies believe that the UK should seek to opt back into the European Judicial Network (EJN) instrument relating to criminal matters.<sup>23</sup> This aims to promote cross-border judicial co-operation in criminal matters. One of the key difficulties for legal practitioners when encountering EU PCJ instruments is a lack of training and awareness. Legal practitioners are also reliant on judges having sufficient training, in order that any relevant EU law is applied fairly and accurately in the case of their client. In addition, many practising solicitors are part-time judges, who could in principle also benefit from the EJN in the latter capacity.

13. It is vitally important that, as EU law develops, lawyers and judges applying EU law in the UK have access to adequate training and are able to access contacts in other Member States. It is for this reason that the Law Societies are also concerned that the UK has not yet opted in to the *Regulation establishing for the period 2014 to 2020 the Justice Programme*,<sup>24</sup> which aims to encourage a more consistent application of EU legislation in the field of judicial cooperation in civil and criminal matters.<sup>25</sup>

14. While the explanatory memorandum in the Command Paper detailing the *Council Decision on the European Judicial Network* correctly sets out the nature of the organisation, we are concerned that some of the underlying value of entities such as the EJN is being overlooked in the analysis. From a practitioner perspective, more rather than less training and contact with colleagues from other Member States is needed to ensure a greater knowledge of the EU instruments in this field and how to apply them.

15. If the UK does not continue to play an active role in bodies such as the EJN, this can only be to the detriment of those who find themselves subject to EU law instruments in the domestic courts. While some informal contact and networking would of course continue, the Law Societies doubt that all the relevant UK judges/practitioners required to apply EU law in criminal matters "...know the names and numbers of people they need to speak to regularly".<sup>26</sup> This depends on how much experience and training they have had of EU measures. While practitioners established in applying EU law may well have good contacts, this does not apply to all.

16. The Law Societies also believe that any assessment of the value of the EJN and the UK's involvement should also take into account the interconnection between civil and criminal matters.<sup>27</sup> The Government's assessment of EU civil judicial co-operation, as part of the Review of the Balance of Competences between the UK and the EU, is also relevant to the decision whether or not to stay within the EJN instrument.<sup>28</sup>

#### *Do you have any comments on the analysis of policy implications and fundamental rights provided in the Home Office's Explanatory Memoranda?*

14. The Law Societies appreciate that a significant effort has been made to explain each of the measures in the explanatory memorandums. As a general comment, the Law Societies believe that it is also important to consider the impact of the instruments in practical terms. Many of the measures are intrinsically linked and may all come into play during the course of an EU-wide investigation and prosecution, for example: the use of data sharing measures to detect a crime, or the whereabouts of a suspect; the involvement of a liaison magistrate; the obtaining of an EAW; the setting up of a joint investigation team, etc. The more measures that are opted back into (excluding those that are obsolete), the less difficulty that is likely to arise from the UK not being subject to a measure which could be useful for an important cross-border investigation/prosecution.

15. We also raise the example of the ESO (a measure under the remit of the Ministry of Justice) on the basis of its link to the debate concerning the EAW. If the ESO is made available this would benefit many accused, including those subject to an EAW, and their family members who would be able to spend a pre-trial period

<sup>21</sup> *Ibid*, page 53. (We are not aware of the status of Croatia, which joined the EU on 1 July 2013.)

<sup>22</sup> CELS Working Paper Series, Opting out of EU Criminal law: What is actually involved? Alicia Hinarejos, J.R. Spencer and Steve Peers, paragraphs 65, 78 and appendix no. 25.

<sup>23</sup> Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network.

<sup>24</sup> Proposal for a Regulation establishing for the period 2014 to 2020 the Justice Programme (COM(2011) 759 final, 2011/0369 (COD)).

<sup>25</sup> Review of the Balance of Competences between the United Kingdom and the European Union, Civil Judicial Co-operation. Written response by the Law Society of England and Wales, August 2013, pages 18 to 19: <http://www.lawsociety.org.uk/representation/policy-discussion/documents/balance-of-competences-review-civil-judicial-cooperation/>

<sup>26</sup> Command Paper 8671, *op. cit.*, page 74.

<sup>27</sup> For example, an assault under criminal law and a civil action for assault can apply to the same circumstances. In the same way, there are levels of criminal and civil judicial co-operation.

<sup>28</sup> Review of the Balance of Competences, Civil Judicial Co-operation:

- Written response of the Law Society of England and Wales: <http://www.lawsociety.org.uk/representation/policy-discussion/documents/balance-of-competences-review-civil-judicial-cooperation/>

- Written response of the Law Society of Scotland:

[https://www.lawscot.org.uk/media/649594/lawref%20\\_civil\\_judicial\\_cooperation.pdf](https://www.lawscot.org.uk/media/649594/lawref%20_civil_judicial_cooperation.pdf)

together in their Member State of residency prior to the defendant facing trial elsewhere. We anticipate that the ESO could be used for a relatively broad range of offences, particularly given the availability of new technology to monitor suspects under bail conditions, etc.

16. As Fair Trials International has noted, “the ESO lays down rules according to which one Member State must recognise a decision on supervision measures issued by another Member State as an alternative to pre-trial detention. This could have a huge impact on people arrested abroad, who are often denied bail simply because they are non-nationals. Unless the ESO is implemented into UK law, it will not be available to the many British citizens who may spend months or years in foreign prisons awaiting trial away from home, often in horrendous conditions”.<sup>29</sup>

17. A review of extradition arrangements in the UK produced for the Home Office (otherwise known as the ‘Scott Baker Review’) also highlighted the potential value of the *Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions*.<sup>30</sup> While this measure is also within the remit of the Ministry of Justice, as the report explains, this would enable other Member States to “[transfer] probation or non-custodial measures to the United Kingdom for execution rather than issuing a European arrest warrant for a sentence imposed in default...”, thus potentially reducing the number of EAWs issued.<sup>31</sup> (This measure is not included on the current list.)

*Do you consider any other factors should be taken into account in deciding whether the UK should seek to rejoin each measure?*

Potential cost of opt-out

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

19. The Command Paper explains that “the Government considers this to be a high threshold to meet; it would only cover those direct costs incurred as a result of the UK not opting back into a measure”.<sup>32</sup> However, the Law Societies take the view that different legal interpretations of the treaty wording are possible and equally valid; including the possibility of a lower threshold being applied (and more costs therefore arising for the UK). For example, we understand that it is possible that the financial consequences could incorporate not only costs to the EU institutions but also the costs to the other Member States of instituting changes, which could be substantial. The Law Societies encourage the Government to carry out a thorough impact assessment taking account of the different possible interpretations of Article 10(4).

20. In addition, the costs of exercising the block opt out may include not only the costs imposed by the Council but also any domestic costs (including those of any transitional arrangements) and, if the UK is unsuccessful in rejoining the measures that it wishes to, the costs of putting into place alternative arrangements (where this proves possible). In particular, practitioners believe that costs relating to extradition are likely to increase. Moreover, both prosecutors and defence practitioners involved in cross-border cases (from the UK and in other Member States) would require training to understand which measures the UK is still subject to, any transitional measures and any new framework. The Law Societies anticipate that significant legal uncertainty is likely to arise, to the detriment of all parties.

European Arrest Warrant

21. The Law Societies support the Government’s proposal to request to opt back into the EAW Framework Decision and agree with its analysis that “the European Arrest Warrant has been successful in streamlining extradition processes and returning serious criminals”.<sup>33</sup> We would add that, in general, the EAW has also benefitted the accused because extradition proceedings are more efficient and pre-trial detention periods tend to be significantly shorter than under the previous *1957 Council of Europe Convention on Extradition* (or ECE).

22. The Command Paper explains that “if the UK were to decide not to participate in this measure, we believe the UK would revert to the ECE and its additional Protocols. All Member States have ratified the ECE. Some barriers to extradition exist under the ECE that do not exist under the EAW, including the nationality of those sought and the statute of limitations (where the extradition offence would be time-barred under the law of the requested state). In order to remove these barriers work would need to be taken bilaterally, but there is no guarantee this would be possible where Constitutional barriers exist”.<sup>34</sup> The Law Society of England and

<sup>29</sup> Fair Trials International—Written evidence to the House of Lords’ EU Select Committee’s original inquiry.

<sup>30</sup> Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

<sup>31</sup> A Review of the United Kingdom’s Extradition Arrangements (Following Written Ministerial Statement by the Secretary of State for the Home Department of 8 September 2010). Presented to the Home Secretary on 30 September 2011, paragraph 11.22. (This is also referred to as the ‘Scott Baker Review’.)

<sup>32</sup> Command Paper 8671, op. cit., page 4.

<sup>33</sup> *Ibid*, page 94.

<sup>34</sup> *Ibid*, page 95.

Wales is not convinced that an approach of reverting back to the ECE would work. Firstly, there is a risk that in some Member States the ECE would not be able to apply due to superseding legislation.<sup>35</sup> Secondly, some Member States never brought the ECE into force, eg Ireland in relation to the UK. The ‘backing of warrants’ legislation, which was used instead, has also been repealed. In the case of Ireland, the UK would require a bilateral arrangement.

#### Changes proposed

23. The Law Societies note that the changes proposed to the Extradition Act 2003 with regards to the EAW are intended “...to strengthen further the operation of the EAW...”.<sup>36</sup> While we do not express a view on the accuracy of the Government’s assessment, the proposals to amend domestic law are clearly intended to be compatible with the UK’s continued participation in the EAW regime.

24. We set out initial comments on the reforms proposed below:

- (i) *Amend the Anti-Social Behaviour, Crime and Policing Bill to ensure that an EAW could be refused for minor crimes.*

25. The Law Societies have previously called for the introduction of a principle of proportionality in the application of the EAW. In principle, we support measures contributing to the application of such a principle and note its incorporation in the amendments to the Anti-Social Behaviour, Crime and Policing Bill.<sup>37</sup>

26. However, we do have some concerns regarding legal certainty and whether this proposal would be in accordance with the underlying Framework Decision.<sup>38</sup> As the Law Society of England and Wales stated in its response to the Government’s review of extradition arrangements in 2011, “there are clearly shortcomings in the EAW scheme, such as the lack of a proportionality test, which cannot be addressed by UK implementing legislation alone but only by amendments to the EAW scheme itself”.<sup>39</sup>

27. The Law Society of England and Wales has further taken the view that “to the extent that legislative amendments to the EAW scheme are considered necessary, these should, as a matter of principle, be adopted at EU level and not by individual Member States”.<sup>40</sup> While domestic improvements are therefore welcome, the Law Societies believe that it is crucial that the UK engages with its European partners to change certain aspects of the application of the EAW (particularly in view of the possibility that the EAW Framework Decision could in the future be replaced by another instrument). We are aware that the Government has made some efforts in this regard already and encourage it to continue.<sup>41</sup>

#### Further practical measures

28. As has been previously stated: “Whilst the Law Society continues to call for a proportionality test to be introduced, the UK’s continued participation in the EAW scheme should not be jeopardised by proportionality concerns... there may be other ways to address the absence of a proportionality test and other shortcomings identified in the operation of the regime. To this extent the Law Society would welcome urgent consideration, at both Member State and EU levels, of practical rather than legislative measures that could be adopted to address the problems caused by differing Member State practices in relation to de minimis thresholds for prosecutions and requests; not limited to producing a Handbook of good practice and sharing information on national practices. Specifically in relation to the predicted increase in EAWs as a result of the UK’s connection to the SIS II the Law Society urges urgent consideration of the human rights and data protection issues raised by potential errors in alerts, and calls for the introduction of a mechanism for rectifying erroneous alerts.”<sup>42</sup>

- (ii) *Work with other States to enforce their fines and ensure that in future, where possible, a European Investigation Order is used instead of a European Arrest Warrant.*

29. The Law Societies support this approach. We were pleased that a proportionality principle was included in the proposal for a *Directive regarding the European Investigation Order in criminal matters*. We note that negotiations concerning that instrument have not yet been concluded.

<sup>35</sup> The UK’s 2014 Opt-out Decision (Protocol 36), Response of the Bar Council of England and Wales, written evidence to the House of Lords’ EU Select Committee’s original inquiry, paragraph 56.

<sup>36</sup> Anti-Social Behaviour, Crime and Policing Bill, Written evidence from the Home Office, Rt Hon Damian Green MP, 12 July 2013.

<sup>37</sup> Anti-social Behaviour, Crime and Policing Bill (HC Bill 93), as amended 17 July 2013.

<sup>38</sup> For example, in the recent *Radu* case, the CJEU gave a narrow ruling and declined to follow the Advocate-General’s opinion, which recommended that in EAW cases consideration should be given to whether detention is proportionate. (See *Ministerul Public—Parcheul de pe lângă Curtea de Apel Constanța v Ciprian Vasile Radu*, Case C-396/11.)

<sup>39</sup> Law Society of England and Wales Response to the Home Office Extradition Review, March 2011, page 9: [http://www.parliament.uk/documents/joint-committees/human-rights/Law\\_Society\\_Response\\_to\\_Home\\_Office\\_Review\\_of\\_Extradition.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/Law_Society_Response_to_Home_Office_Review_of_Extradition.pdf)

<sup>40</sup> *Ibid*, page 11.

<sup>41</sup> The Civil Liberties, Justice and Home Affairs Committee of the European Parliament has decided to prepare an own-initiative report, ‘Review of the European Arrest Warrant’, and has appointed Baroness Sarah Ludford MEP as its rapporteur. This report is potentially very important as it will be produced as the negotiations on the successor to the Stockholm Programme on Justice and Home Affairs commence for the period 2015–2019.

<sup>42</sup> Law Society response to Extradition Review, op. cit., page 11.

- (iii) *Amend the Extradition Act 2003 to ensure that people in the UK can only be extradited under the EAW when the requesting Member State has already made a decision to charge and try them, unless that person's presence is required in that jurisdiction for those decisions to be made.*

30. In principle, the Law Societies note that this could be a helpful approach and clearly aims to prevent abuse of the EAW.

- (iv) *Implement the European Supervision Order.*

31. The Law Societies fully support this proposal and believe that it will make a significant difference for many British defendants eligible for bail awaiting trial in another Member State.

- (v) *Amend our law to make clear that in cases where part of the conduct took place in the UK, and is not criminal in the UK, the judge must refuse extradition for that conduct.*

32. In principle, the Law Societies believe that this might be a helpful approach. It may be useful to consider whether corresponding amendments could, at a later stage, also be made to the EAW Framework Decision or alternative future EU instrument in the interests of legal certainty.

- (vi) *Ensure that people who consent to extradition do not lose their right not to be prosecuted for other offences, reducing costs and delays. Propose that the Prisoner Transfer Framework Decision should be used to its fullest extent so that UK citizens extradited and convicted can be returned to serve their sentence in the UK.*

33. In principle, the Law Societies are supportive of this proposal. We also support the use of the Prisoner Transfer Framework Decision.

- (vii) *Where a UK national has been convicted and sentenced in another Member State, for example in their absence, and is now the subject of a EAW, the Government will ask, with their permission, for the EAW to be withdrawn and will use the Prisoner Transfer Agreements instead.*

34. The Law Societies fully support this proposal.

- (viii) *To prevent other extraditions occurring at all, there is the intention either to allow the temporary transfer of a consenting person so that they can be interviewed by the issuing Member State's authorities or to allow them to do this through means such as video-conferencing whilst in the UK.*

35. The Law Societies fully support this proposal.

#### Procedural rights roadmap

36. As the Law Society of England and Wales has previously stated, it "...is hopeful that the protection of defence rights in the operation of the EAW scheme will be further strengthened by the existing and pending instruments adopted in furtherance of the 'Roadmap'. The Law Society has called on the EU to introduce binding minimum procedural rights throughout the EU for suspects and defendants at all stages of the criminal process from investigation onwards..."<sup>43</sup>

37. For example, the soon-to-be-approved *Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest*,<sup>44</sup> to which the UK has not yet opted in, provides not only for the right of access to a lawyer in the executing Member State, but also the right to appoint a lawyer (and help to facilitate this) in the issuing Member State. While not a full right to dual representation, this is a significant step forward and the Law Societies would urge the Government to opt in to this Directive.

38. The Law Societies wish to highlight the importance of the following statement in the Scott Baker Review: "We note that the Joint Committee on Human Rights recommended that the United Kingdom Government should 'take the lead in ensuring there is equal protection of rights, in practice as well as in law, across the EU'. We recommend that the UK Government work with the European Union and other Member States through the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings and other measures to improve standards."<sup>45 46</sup>

#### Access to justice

39. Another important element is access to justice. The Law Society of England and Wales has previously highlighted that "anecdotal evidence suggests that the introduction of means testing in the Magistrates' Courts effectively denies access to legal aid for defendants in extradition proceedings, where the time taken to process applications exceeds the length of those proceedings".<sup>47</sup> The Scott Baker Review has since called for the

<sup>43</sup> Law Society response to Extradition Review, op. cit., page 9.

<sup>44</sup> Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest [First reading]—Approval of the final compromise text (10190/13, 2011/0154 (COD)): <http://register.consilium.europa.eu/pdf/en/13/st10/st10190.en13.pdf>

<sup>45</sup> The Scott Baker Review, op. cit., paragraph 1.14.

<sup>46</sup> A further example of the wish to improve procedural rights across the UK's jurisdictions, and be seen to do so, is reflected in the Criminal Justice (Scotland) Bill currently before the Scottish Parliament. This specifically provides for the rights of suspects in Chapters 4 and 5.

<sup>47</sup> Law Society response to Extradition Review, op. cit., page 2.

reintroduction of non means-tested legal aid for extradition proceedings in England or an alternative solution.<sup>48</sup> As suggested by Fair Trials International, the abolition of means testing for legal aid in extradition cases could be included in amendments to the Anti-Social Behaviour, Crime and Policing Bill.<sup>49</sup>

### Written evidence submitted by the Polish Ministry of Justice [JHA 05]

#### INFORMATION ON THE STEPS TAKEN BY POLAND IN RELATION TO PROPORTIONALITY OF THE EUROPEAN ARREST WARRANT SYSTEM

1. The government of Poland has carried out numerous actions aiming to improve the functioning of the EAW system both as “soft law” initiatives and legislative changes.

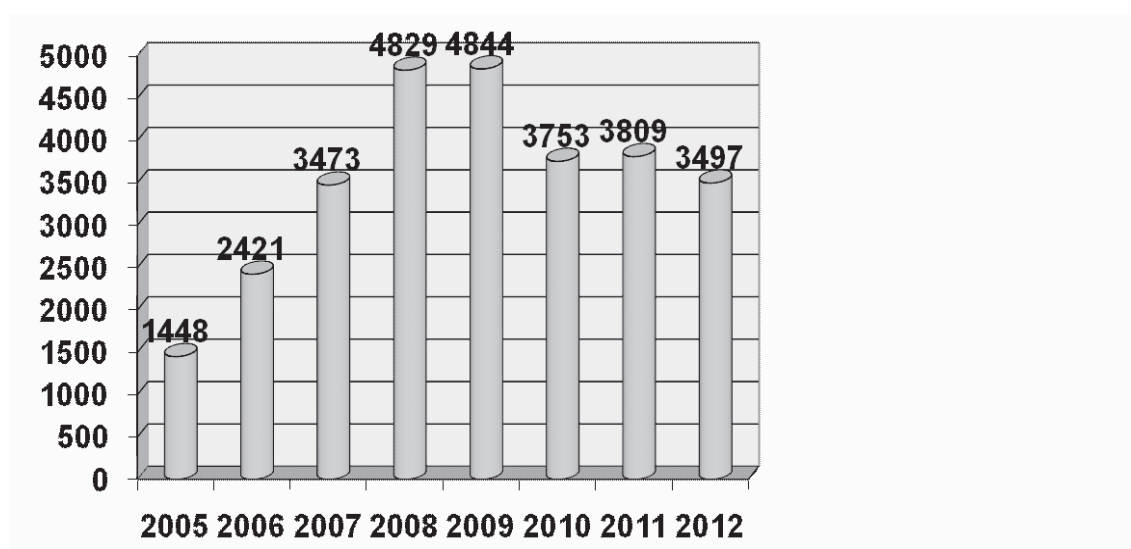
2. The former involve seeking to encourage judges to exercise a proportionality check when issuing an EAW, while maintaining the constitutional independence of courts. The Ministry of Justice has organised numerous trainings and courses for judges and public prosecutors bringing to their attention other possible instruments of international cooperation, which are less intrusive than the EAW and should be employed instead, if they are sufficient to achieve the purpose of proceedings. The Ministry has disseminated the Handbook on issuing an EAW and is promoting its application. There have also been several bilateral meetings between Polish and British justice officials which sought to improve the cooperation on a practical level.

3. All these efforts are bearing fruit. The number of EAWs issued from Poland both to the UK and as a whole has dropped in the recent years by as much as 25% (see attached graphs).

4. While this progress can be recognised as a success, the Ministry of Justice is also carrying out more concrete legislative changes to capitalise on it. A sizable reform of the criminal procedure introducing a shift toward a contradictory system should lead to less arrests as a whole with the prosecution and defence having more leeway to agree on other measures. Furthermore, the amended article 607b of the Criminal Procedure Code will address expressly the principle of proportionality. Henceforth, the issue of an EAW will only be possible if it is “in the interests of justice”. This means that the courts will no longer feel obliged to issue an EAW in every case under the principle of legality. Accordingly, the courts will have to ascertain on a case-by-case basis whether the issue of an EAW is not, among others, disproportionate and would not involve excessive costs and effort in relation to the expected benefit. This should further reduce the number of EAW’s issued, in particular in so-called “minor cases”.

Graph 1.1

TOTAL NUMBER OF EAWs ISSUED BY POLAND

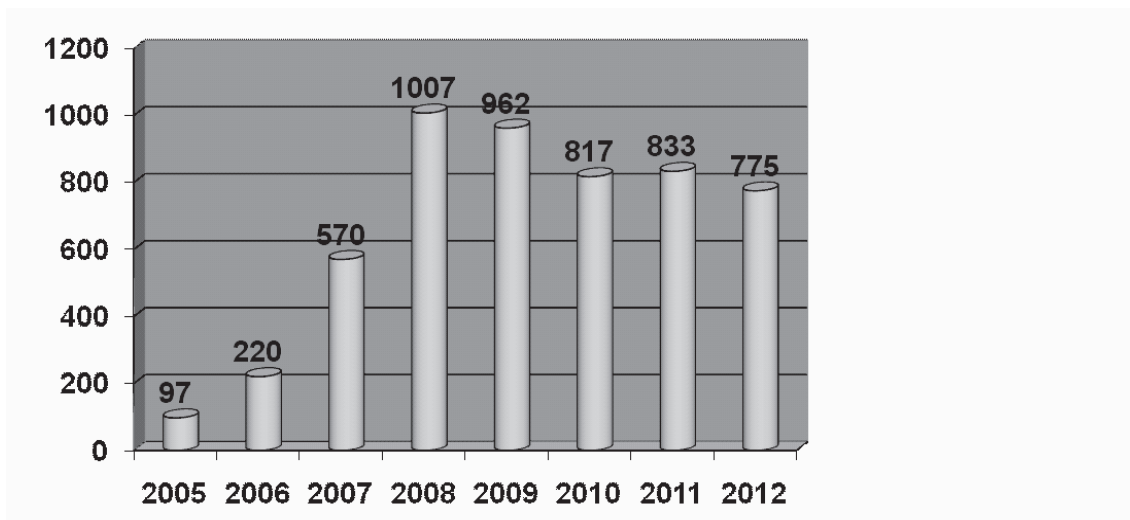


<sup>48</sup> The Scott Baker Review, op. cit., paragraphs 1.37–1.39.

<sup>49</sup> Anti-Social Behaviour, Crime and Policing Bill, Written evidence from Fair Trials International, 2 July 2013.

Graph 1.2

## NUMBER OF EAWS ISSUED FROM POLAND TO THE UK



Polish Ministry of Justice

October 2013

### Written evidence submitted by Europol [JHA 06]

#### 1. Introduction

1. The Europol Director, Rob Wainwright, gave evidence to the Committee on 3 September 2013 in the context of this inquiry. The present report is intended to complement his oral statements.

2. Although the future Europol Regulation is outside the scope of the opt-out decision and therefore the scope of this inquiry, it is important to state from the outset that, now that the block opt-out decision has been taken, opting in to the Europol Regulation is by far the most important decision facing the Government, from a Europol perspective. It is of course important that the UK will seek to rejoin the *Council Decision 2009/371/JHA establishing the European Police Office (Europol)* (hereafter referred to as the Europol Council Decision (ECD)), Europol's founding act. However, this measure will cease to apply upon the entry into force of the Europol Regulation.

3. Europol therefore welcomes the Government's announcement of its intention to opt in to the Regulation, provided its key concerns with the draft are addressed. This sends a positive signal to law enforcement partners throughout the EU and demonstrates the UK's long-term commitment to EU police cooperation and its most important support and coordination mechanism.

2. Do you agree that it is in the national interest for the UK to seek to rejoin any or all of those measures falling within the Home Office's remit which the Government has indicated that it will seek to rejoin?

4. It is not for Europol to suggest what is in the national interest of the UK. It is understood that Parliament must take a wide range of factors into consideration when coming to its conclusions in this regard.

5. Within the field of Europol's competence, however, it is possible to observe some clear operational and strategic benefits for the UK in seeking to rejoin the ECD and other Justice and Home Affairs (JHA) measures.

6. Broadly speaking, the list of measures which the Government will seek to rejoin reflects the most important JHA measures. This is not to say that the other measures are without value: collectively they make an important contribution to harmonising legislation and law enforcement practices across the EU, and to streamlining the practical cooperation procedures which investigators must follow. Europol's EU-wide strategic analysis has shown that organised criminals tend to exploit arbitrary differences between jurisdictions. Collectively, the JHA *acquis* have sought to create a level playing field for law enforcement and judicial authorities, thereby reducing opportunities for criminals.

7. From a Europol perspective, the most important aspect of the Government's July 2013 announcement was that it will seek to rejoin the ECD. Europol welcomes this decision, which shows that the ECD is viewed as one of the key JHA measures and sends a clear message about how strongly the UK values Europol's work in the fight against international crime and terrorism.

8. The UK is one of the most active and committed members of Europol, sharing large amounts of criminal intelligence and cooperating in hundreds of cross-border investigations of organised criminal and terrorist groups each year.

9. In 2012 the UK initiated 1,523 cases via the Europol network, representing a 38% increase compared to 2011 (when 1,102 cases were initiated).

10. The UK is extracting significant value from Europol's unique intelligence capabilities. The services provided by Europol are important elements of the UK's approach to combating organised crime and terrorism.

11. The decision to opt out would make it more difficult for UK agencies to investigate crimes with a cross-border element. It would mean the disruption of the flow of information between the UK and Europol partners and the possible withdrawal of the UK Liaison Officers from Europol headquarters.

12. If this flow of information between Europol and the UK were to be disrupted, investigative opportunities would be missed, creating the possibility of serious crimes being committed in the UK which could otherwise have been prevented.

13. The UK law enforcement community would also face a reduced influence in the agency, with the resulting negative impact on operational coordination with European partners.

3. *Do you have any comments on the analysis of policy implications and fundamental rights provided in the Home Office's Explanatory Memoranda?*

### 3.1 General observations

14. Throughout the Government's assessment of the policy implications of the opt-out, it expresses the intention to remain compliant with the majority of these measures, meaning that there is no operational impact in the short term. In the longer term, however, the opt-out will remove the legal certainty about the UK's legislation and activities upon which other Member States have so far relied.

15. Whatever the reality of British practice in this field in the future, the formal exclusion of the UK from these measures is bound to create a perception among law enforcement practitioners—and indeed criminals—that the UK is outside the zone of cooperation in the specific areas covered by such measures, be it counter-terrorism, psychoactive substances or counterfeit currency.

16. There is also a risk that, in the longer term, the UK's ability to influence and participate in law enforcement cooperation will be diminished by its position as an observer rather than a partner (or indeed leader, as it has often been in the past).

### 3.2 Observations on JHA measures related to the implementation of the Europol Council Decision

17. As noted above, the Government has expressed its intention to rejoin the ECD. Several other JHA measures are of direct relevance to the functioning of Europol, and can be considered as implementing measures for the founding act itself. In its explanatory memorandum (Command Paper 8671), the Government asserts "that it should not be necessary to rejoin any of the associated measures in order to participate in Europol."

18. Should the Government confirm its stated intention to opt in to the Europol Regulation, our understanding is that the Regulation will replace not only the ECD but also associated measures such as those on confidentiality and the analysis work files (AWFs). Should the Government decide not to opt in to the Regulation, the question of coherence would no longer be relevant because, in any case, the ECD would become obsolete upon the entry into force of the Regulation.

19. However, it is now almost certain that the Europol Regulation will not enter into force before December 2014, when the UK opt-out will take effect. This means that, even if the UK does choose to join the Europol Regulation, there will be a legislative "gap" in transition between the opt out, when the UK will continue to be part of the ECD but not the various implementing measures, and the entry into force of the Regulation, which is designed to replace those measures as well as the ECD itself.

20. Focusing on membership of Europol based on the ECD, the Government's assertion that the associated measures are unnecessary seems difficult to establish with any legal certainty. It is true, however, that most of these measures create legal obligations for Europol rather than for the Member States, meaning that the risk of opting out of them seems limited.

21. The only such measure for which applicability to the UK would have to be considered more carefully is *Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol*. This is the only "implementing measure" which contains new aspects not found in the ECD itself, including the establishment of the Europol Security Committee. It also entails obligations for Member States, in particular to adhere to the use of the agreed classification levels, to ensure protection of the information and to provide information about security breaches.

22. It remains unclear what the legal basis would be for the UK to be part of the Europol Security Committee, if the UK has opted out of the Council Decision establishing that Committee.



23. There is no precedent for such questions. It is therefore important that such issues are carefully addressed when the UK does seek to rejoin the ECD, at which point the UK and the Commission will be required to arrange for transitional measures, which must then be approved by Council. Such measures could, for example, contain a reference to the applicability of the “associated measures”. It must be hoped that there is willingness on the part of the Government, the EU institutions and the other EU Member States to navigate a workable solution.

### 3.3 Observations on other JHA measures

24. Certain issues have been identified which, while not of crucial importance, merit consideration and remedial action through the transitional measures to be agreed with the EU when the UK seeks to rejoin certain JHA measures.

25. The Government will not rejoin the *Council Act of 29 May 2000 establishing the Convention on mutual assistance in criminal matters between the Member States of the European Union* on the grounds that Joint Investigation Teams (JITs) can be set-up under *Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams*, which the UK will seek to rejoin. However, the JIT Decision of 13 June 2002 only has temporary validity, and will cease to have effect when the 2000 Convention on Mutual Assistance in Criminal matters is ratified by all Member States. This suggests that rejoining the Council Act of 29 May 2000 would be necessary in order to safeguard the UK’s future use of JITs.

26. The Government argues that *Council Decision 2001/887/JHA of 6 December 2001 on the protection of the euro against counterfeiting* has virtually no impact for the UK. However, from the perspective of Europol and indeed the other EU Member States, it contains an obligation to inform Europol of the outcome of analysis performed on counterfeit coins. This obligation would no longer exist for the UK if it opted out of this measure. Of course, this would not prevent the UK from providing such analyses to Europol, but there will no longer be an explicit obligation to provide this from the UK. This is one among several examples (eg *Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances* and related measures) where the current measures provide legal certainty as well as useful information to practitioners across the EU. While the Government’s Command Paper expresses the intention to remain compliant with such measures, even in the absence of an obligation to do so, in the longer term this is likely to result in less awareness elsewhere in the EU about legislation and enforcement practices in the UK. Such knowledge can of course be useful to Europol and other Member States, both for individual cross-border investigations and for strategic analysis of threats and trends.

27. The Government will not rejoin *Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences*. This decision requires each Member State to designate a specialised service which will have access to information concerning criminal investigations on terrorist offences conducted by its law enforcement authorities. This decision also provides that any such information (eg suspects’ personal data, the activity under investigation, the type of offence) is transmitted to Europol. It goes without saying that Europol’s ability to assist Member States in preventing and fighting crimes very much relies on the timely provision of information by Member States. Some reassurance can be found in the Government’s policy assessment which states that “In most instances information would be exchanged regardless of UK participation in this measure, especially where it was deemed to be operationally important.” However, as mentioned above in respect of psychoactive substances and Euro counterfeiting, opting out of this measure reduces clarity and certainty for practitioners and may also create undesirable perceptions of the UK’s ability and willingness to cooperate with other Member States and EU bodies in the field of counter-terrorism.

28. A technical clarification is also called for in relation to the Government’s policy assessment of this measure, which states that information classified above “restricted” level cannot be exchanged with Europol. This is incorrect. It is currently true that Europol’s Secure Information Exchange Network Application (SIENA) is only accredited up to “restricted” level, but this does not prevent information being shared by other means (which happens regularly). Furthermore, work is underway to raise the accreditation level of SIENA to “confidential” within the next three years, which will significantly increase the proportion of British counter-terrorism intelligence capable of being electronically transmitted to Europol.

29. The UK will not seek to rejoin the *Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees* or the *Council Decision of 2 December 1999 amending the Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees, with regard to the establishment of remuneration, pensions and other financial entitlements in euro*. The majority of Europol’s staff moved from a specific staff regime under the Europol Convention to the general EU staff regime in 2010, following the entry into force of the ECD. Both of these measures refer to the pre-ECD staff regime. Although there will soon no longer be any *active* staff under the regime covered by these measures, pensions and other benefits will still be paid to former employees for many years to come. The UK opt-out may therefore cause some legal uncertainty in terms of decision-making processes and financial obligations.

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4. *Do you consider any other factors should be taken into account in deciding whether the UK should seek to rejoin each measure?*

30. Judging from the parliamentary debates and various reports which have been published on this issue, there seems to be wide recognition of the globalising trends which are affecting organised crime and terrorism, and of the need for UK law enforcement agencies to cooperate effectively with their counterparts in other countries. Discussions have focused instead on the relative merits of different cooperation mechanisms of the past, present and possible future (including treaties and memoranda of understanding, for example).

31. Within the EU law enforcement community, there is equally wide recognition of the operational results which can be achieved by making use of Europol's services. Other key JHA measures, such as Joint Investigation Teams and the European Arrest Warrant, offer welcome procedural streamlining which allows investigators to cooperate efficiently across borders, something which is particularly welcome in the face of austerity measures affecting policing in most Member States at a time when more investigations than ever before have an international dimension. Similarly, Europol's legal framework and technical infrastructure, combined with access to a wide community of liaison officers under one roof, offers a unique package in terms of both efficiency and effectiveness from a national perspective.

Europol

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