



HOUSE OF LORDS

European Union Committee

4th Report of Session 2013–14

The Eurojust Regulation: Should the UK Opt-In?

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The European Union Committee

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Sub-Committee Staff

The current staff of the Sub-Committee are: Mike Thomas (Legal Adviser), Arnold Ridout (Deputy Legal Adviser), Tim Mitchell (Assistant Legal Adviser), Elisa Rubio (Clerk) and Amanda McGrath (Committee Assistant).

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SUMMARY

This report considers the question whether the UK should opt in to the negotiation of the proposed Regulation reforming Eurojust.

The proposal, which was published in July, seeks to reform Eurojust's governance and management, the nature of its powers and to provide for its accountability to the European Parliament and national Parliaments. It was brought forward by the Commission alongside the proposal to create a new European Public Prosecutor's Office (EPPO). Both proposals include provisions weaving the two bodies together. Alongside this report, the Committee has published another report inviting the House to issue a Reasoned Opinion challenging the proposed EPPO on the grounds of subsidiarity.

Under the EU Treaties the UK is entitled, if it chooses, to opt-in to the negotiation of Justice and Home Affairs legislation such as this proposed Regulation reforming Eurojust. In their Explanatory Memorandum, the Government raised a number of concerns with the proposal.

In this report we acknowledge that the interweaving of the two bodies complicates the question of whether the UK should opt in to the negotiation of the Eurojust Regulation but we nonetheless recommend that the Government should opt in—in particular, given the important work undertaken by Eurojust and, in light of the provisions dealing with the proposed EPPO, the need for the UK to participate in the negotiations in order to improve the Regulation.

The Eurojust Regulation: Should the UK Opt-In?

Introduction

1. On 17 July 2013 the European Commission published a proposed Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust) (the Regulation).¹ The Regulation has been brought forward under Title V of the Treaty on the Functioning of the European Union (TFEU) to which the UK's opt-in Protocol applies. By virtue of this Protocol the Regulation will only apply to the UK if the UK Government notify the President of the Council of their intention to opt in within three months of its publication (or opt in after the Regulation has been adopted). The deadline by which the Government must notify the Council of its decision on whether to opt in to this Regulation at this stage is 21 November 2013.
2. The TFEU also foresees the creation of a European Public Prosecutor's Office (EPPO) "from Eurojust" in order to combat crimes affecting the EU's financial interests.² To that end, alongside the Eurojust Regulation and on the same day, the Commission brought forward a Regulation addressing the creation of the EPPO.³ Before a Commission proposal on the EPPO was formulated, the Government's Coalition Agreement ruled out the UK's participation.⁴ Alongside this report, the Committee has published another report inviting the House to issue a Reasoned Opinion challenging the proposed EPPO on the grounds of subsidiarity.
3. In this report we consider whether the Government should opt in to the negotiation of the Eurojust Regulation.⁵ This report has been prepared by the Justice, Institutions and Consumer Protection Sub-Committee, whose Members are listed in the Appendix. It does not consider the merits of the content of the proposed Eurojust Regulation; this will be dealt with by way of routine Parliamentary scrutiny and, where relevant, during the course of our proposed inquiry into the EPPO Regulation which the Committee intends to launch by the end of the year.
4. Unfortunately, as the proposal was published shortly before the House rose for the summer recess, it has not been possible to publish this report and schedule a debate in the House considering the opt-in within the eight week window usually afforded the Committee as agreed with the Government for the discussion of Justice and Home Affairs (JHA) opt-in decisions.⁶

¹ COM(103) 535 final. Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust).

² Article 86(1).

³ COM (2013) 534 final. Regulation on the establishment of the European Public Prosecutor's Office (EPPO).

⁴ See the Coalition agreement, page 19. The European Union Act has made the UK's participation in the EPPO subject to a referendum and an Act of Parliament; Section 6(3) of the European Union Act 2011.

⁵ The members of the Sub-Committee are listed in Appendix 1.

⁶ On 20 January 2011 the Rt Hon David Liddington MP, the Minister for Europe, made a written statement to Parliament in which he promised to honour the current arrangements governing enhanced Parliamentary scrutiny of Justice and Home Affairs (JHA) opt-in decisions (see HL Deb 20 January 2011

However, there is sufficient time for a report from this Committee considering the opt-in question to be published and for the House to debate it before the 21 November deadline expires.⁷

5. This report does not conclude our scrutiny of this proposal.

Eurojust

6. Eurojust was established in 2002⁸ as part of the European Council's programme agreed in Tampere to create an area of freedom, security and justice within the EU.⁹ It is an official agency of the EU and is situated in The Hague. In 2008 the EU Member States agreed a Decision to strengthen its role.¹⁰ The Commission is currently undertaking a review of the operation of the legislation governing Eurojust's operation.
7. Eurojust is the EU's judicial cooperation unit. It is comprised of national prosecutors,¹¹ magistrates or police officers from each Member State. Its purpose is to assist Member States by coordinating investigations and prosecutions in criminal matters in the Member States; in particular, by facilitating requests for mutual legal assistance (MLA) and extradition, and by supporting the exchange of information between national authorities engaged in investigating transnational crime. Eurojust acts after requests from the relevant individual Member State authorities but, under the current legislation governing its operation, it does not enjoy any powers to initiate or investigate criminal behaviour of its own volition.
8. In certain circumstances, acting either as a College or through an individual national member, Eurojust can ask the relevant Member State authorities to undertake an investigation but the Member State authorities are not obliged to do anything.¹² If the Member State refuses Eurojust's request, they must give reasons for their inaction unless doing so would harm national security interests.
9. The Member States agreed provisions in the 2009 Lisbon Treaty explicitly recognising the importance of Eurojust's mission and included provisions

Col WS 20-22). The undertakings commit the Government to taking into account the views of this Committee on whether the UK should opt in to a proposal and, where those views are expressed in the form of a report to the House, to making time for that report to be debated, and if necessary, voted on before the opt-in deadline. In June these undertakings were formally published in a Code of Practice and are available on the Home Office's JHA opt-in web page:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206475/JHA_Code_of_Practice.pdf

⁷ See paragraph one.

⁸ Council Decision 2002/187/JHA.

⁹ Paragraph 46 of the Tampere European Council Conclusions.

¹⁰ Council Decision 2009/426/JHA. The negotiation of the legislation governing Eurojust initially proved difficult but following the terrorist attacks in the USA on 11 September 2001 the negotiations gained new momentum and the Member States agreed the legislation to establish Eurojust in February 2002; although Eurojust had been operating for the previous 12 months on a provisional basis as pro-Eurojust.

¹¹ Eurojust is often described as having a hybrid nature because, despite the fact that it is one of the EU's official agencies, under the two Decisions establishing Eurojust the national members derive their powers from national law. The current legislation requires the individual Member States to ensure its national officials seconded to Eurojust have the requisite powers so far as possible under national law.

¹² In relation to the crimes covered by Eurojust's jurisdiction it can ask the Member State authorities to: (i) undertake an investigation or prosecution; (ii) accept that one of them is in a better position to undertake an investigation or prosecution; (iii) coordinate the relevant Member State authorities; (iv) set up a Joint Investigation Team; (v) provide it with any necessary information.

requiring the EU's institutions to pass legislation in the form of Regulations to “determine Eurojust’s structure, operation, field of action and tasks”. In addition, the Treaty calls for any Regulation to involve the European Parliament and national parliaments “in the evaluation of Eurojust’s activities”.¹³

10. The proposed Regulation attempts to fulfil the Member States’ aims as expressed in the relevant provisions of the Lisbon Treaty.

What does the proposed Regulation do?

11. The proposed Regulation essentially retains Eurojust’s key roles and functions but it does include new provisions reforming the agency’s governance and management structure, in particular its interaction with the proposed EPPO, and provisions which augment the existing powers of its national members. In addition, as required by the Lisbon Treaty, the proposal also includes new provisions addressing Eurojust’s accountability to the European and national parliaments. The detail of each of these matters is set out below.

Government and management structure

12. The proposed Regulation includes provisions reforming Eurojust’s management and governance structure.¹⁴ The Commission states that the aim behind this aspect of the proposal is to improve Eurojust’s governance by “clearly distinguishing between two compositions of the College, depending on whether it exercises operational or management functions”.¹⁵ To that end, the proposal creates an Executive Board whose functions will be preparation of the College’s management decisions and some administrative tasks.¹⁶ The Executive Board is designed to support the administration and overall management of Eurojust whilst retaining Eurojust’s current model under which the College of national members headed by a President will oversee Eurojust’s management and operational responsibilities. The Executive Board will be made up of the President and Vice-President of Eurojust plus a representative of the Commission and one other Member of Eurojust’s College.¹⁷
13. The proposal also includes provisions interweaving Eurojust with the proposed EPPO at an operational and managerial level. The Regulation says that Eurojust shall maintain a “special relationship” with the EPPO and that the President of Eurojust should meet regularly with the EPPO in order to discuss “issues of common concern”.¹⁸ Under the present draft Eurojust is obliged to treat any request for support from the EPPO as if the request has been received from a national authority.¹⁹
14. In addition, as the phrase “special relationship” implies, the two institutions’ management structures are also interwoven. The EPPO will receive agendas

¹³ Article 85 (TFEU).

¹⁴ See Sections III, IV and V of the proposal.

¹⁵ Page 5 of the Commission’s Explanatory Memorandum.

¹⁶ Article 16.

¹⁷ Article 16(4).

¹⁸ Article 41(1).

¹⁹ Article 41(2).

of Eurojust’s Executive Board and College meetings;²⁰ can participate, but not vote, in meetings; and can issue written opinions to the Executive Board and College which must be addressed by them without delay.²¹

Powers of national members

15. The current legislation governing Eurojust allows each individual Member State a discretion to decide which powers to confer on its national members. The discretion is defined in reference to the powers the individual would ordinarily enjoy under national law.²² Each Member State can decide not to confer a power on its national member where to do so would be contrary to a fundamental aspect of that state’s legal system.²³
16. In contrast, the proposed Regulation *obliges* the Member States to confer on their national members certain specific powers and, as currently drafted, removes the individual Member State’s discretion.²⁴ These include the power: (i) to facilitate the issuing and execution of any MLA request; (ii) to contact directly and exchange information with any national competent authority of the Member State; (iii) to contact directly and exchange information with any competent international authority; (iv) to participate in Joint Investigation Teams (JITs);²⁵ (v) to order investigative measures; and (vi) to authorise controlled deliveries.²⁶ In relation to powers (iv) and (v) the national member must also be authorised to take these measures in “urgent cases”.

Accountability to European and National Parliaments

17. As required by the Lisbon Treaty, the proposal includes provisions governing European and national parliamentary oversight of Eurojust’s work.²⁷ The proposal obliges Eurojust to transmit its annual report to the European Parliament (EP) and national parliaments and obliges the President of Eurojust to appear before the EP at their request.

The UK’s 2014 opt-out decision

18. Under Protocol 36 of the EU Treaties, the Government must decide whether or not the UK should continue to be bound by around 130 EU police and criminal justice measures which were adopted before the Treaty of Lisbon entered into force in December 2009 or whether it should opt out of them all. The Government must make their decision before 31 May 2014. The Government decided to exercise the block opt-out in July and, subject to the

²⁰ Article 16(7).

²¹ Articles 16(8) and 41(8).

²² For example, see Article 9a of Decision 2009/426/JHA.

²³ For example Article 9e(b).

²⁴ See Article 8.

²⁵ Joint Investigation Teams are set up to carry out criminal investigations in one or more of the participating Member States. (See Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams.)

²⁶ For example, the technique of a controlled delivery is used when a consignment of illicit drugs is detected and allowed to go forward under the control and surveillance of law enforcement officers in order to secure evidence against the organizers of illicit drug traffic.

²⁷ Article 55.

conditions set out in the Protocol, it has signalled its intention to seek to rejoin 35²⁸ of the measures.²⁹

19. The two Council Decisions currently in force governing Eurojust fall within the 130 police and criminal justice measures subject to the 2014 decision and the Government have decided to elect to opt back in to them. If the Government decide to opt in to the negotiation of the proposed Regulation which seeks to replace them (and it takes effect before December 2014) the legislation currently governing Eurojust will no longer fall within the scope of the Government's 2014 decision.

The Government's view of the Regulation

20. The Government submitted an Explanatory Memorandum (EM) on this Regulation to the Committee in August, in which they raised a number of concerns. Those of relevance to the question whether the Government should opt in to the negotiation of this proposed Regulation are set out below.

General concerns

21. The Government consider that the current legislation on Eurojust represents a "positive model of cross-border co-operation" and they repeated their intention, in the context of the Protocol 36 block opt-out discussion, to opt back in to the existing legislation governing Eurojust.³⁰ The Government's main areas of concern in relation to this proposal of relevance to the opt-in were as follows:
 - Its ramifications for fundamental rights;³¹
 - The changes to Eurojust's governance and management structure;³² and
 - The nature of the extended powers given to national members.³³
22. In relation to the current legislation governing Eurojust, the Government pointed out that this new proposal has been published by the Commission before the ongoing evaluation of the current Decisions dealing with Eurojust has been completed. The Government told the Committee that they anticipated that the Commission will publish its conclusions next year.³⁴

²⁸ See Command Paper 8671.

²⁹ The Justice, Institutions and Consumer Protection Sub-Committee and the Home Affairs, Health and Education Sub-Committee undertook a joint inquiry into the Government's approach to the Protocol 36 block opt-out decision. See the subsequent report: European Union Committee, *EU police and criminal justice measures: the UK's 2014 opt-out decision* (13th Report, Session 2012-13, HL paper 159). In light of the Government's publication in July of the measures that it intends to seek to reenter the two Sub-Committees issued a Call for Evidence in July and took evidence from the Home Secretary and the Justice Secretary in October. The subsequent follow-up report will be published on 31 October 2013.

³⁰ Paragraph 22 of the EM.

³¹ Paragraphs 14–17 of the EM.

³² Paragraphs 24–27 of the EM.

³³ Paragraphs 19 on Subsidiarity, and 28–30 of the EM.

³⁴ Paragraph 20 of the EM.

Subsidiarity

23. The Government raised subsidiarity concerns about the proposal. They acknowledged that because Eurojust already exists it could be argued that the subsidiarity argument is already met, but in their view, they questioned the necessity of the requirement that Member States must confer certain specific powers on the national members of Eurojust (see paragraphs 15–16).
24. At its meeting on 11 September the Committee considered the question whether the Government’s subsidiarity concerns merited a Reasoned Opinion from the House. It was the Committee’s view that they did not.

Fundamental Rights

25. The Government argued that the Regulation engages a number of Fundamental Rights protected by the EU’s Charter and they pointed out that interference with these rights can only be justified by law if it is necessary and proportionate.³⁵ They singled out for concern the provisions in the proposal governing the exchange of data by Eurojust and suggested that these provisions risked interfering with Charter rights.³⁶ The Government acknowledged that any assessment of the possible interference with these rights is difficult at present because the draft EU Data Protection Directive and Regulation are currently in the process of being negotiated.³⁷
26. The Government also noted that, despite the fact that Recital eight of the proposal states that the Regulation respects Fundamental Rights, there is no provision in the current draft that compels Eurojust and its national members to carry out their activities in all instances in full respect of the Charter’s rights.

Structure and governance of Eurojust

27. In relation to the proposed reforms to Eurojust’s structure and governance, the Government noted that the proposal does not follow the agreed common model for EU agencies under which an agency should be managed by a Management Board with a Director.³⁸ Instead, the proposal creates an Executive Board designed to support the administration and overall management of Eurojust (see paragraph 12).
28. As for the interweaving of Eurojust and the EPPO, the Government told the Committee that the implications of the “special relationship” with the EPPO will have to be fully examined by the Government during the proposal’s

³⁵ Article 7 on respect for private and family life; Article 8 on the protection of personal data; Article 17 on the right to property; Article 42 on the right to access documents; Article 48 on the presumption of innocence; and Article 50 on the right not to be punished twice for the same criminal offence.

³⁶ See Chapter IV of the proposed Regulation.

³⁷ These proposals are being considered by the Home Affairs, Health and Education Sub-Committee and are currently retained under scrutiny.

³⁸ In order to respond to emerging individual policy needs the EU’s 30 or more agencies were all set up on a case-by-case basis and had been operating in quite diverse conditions. In 2012 the EU addressed this problem by agreeing a comprehensive set of guiding principles, a “common approach”, with the aim of making the EU’s agencies, more coherent, effective and accountable. This new framework was the result of analysis by an EU working group of the agencies’ governance, functioning and oversight, and was based on a number of reports and studies, including a comprehensive external evaluation. For further information see: http://europa.eu/about-eu/agencies/regulatory_agencies_bodies/index_en.htm

negotiation. Their EM also highlighted a number of concerns with the proposal in this regard,³⁹ including amongst others:

- The EPPO’s power to request Eurojust action;
 - The EPPO’s ability to attend Eurojust meetings;
 - The requirement that Eurojust treat any request from the EPPO as if it has come from a national authority;
 - The exchange of information including personal data between Eurojust and the EPPO; and
 - The use by the EPPO of elements of Eurojust’s administration and infrastructure.
29. In relation to the final concern the Government noted that no reciprocal arrangements allowing Eurojust’s President to avail him or herself of the EPPO’s facilities are proposed and they questioned this disparity.

Powers of national members

30. The proposed Regulation *obliges* the Member States to confer on their national members certain specific powers and removes the discretion currently afforded Member States to decide which powers to confer on its national members (see paragraphs 15–16). The Government questioned why the powers of national members have to be amended in this way and argued that the current regime is working well. They also argued that some of the proposed mandatory powers for national members, for example, the power to order investigative measures or controlled deliveries, are inconsistent with the English and Welsh common law systems and with the criminal justice arrangements in Scotland. The Government recognised that these mandatory powers will need further analysis with regard to their potential impact on rights protected by the Charter.⁴⁰

Accountability to European and National Parliaments

31. The Government told the Committee that these provisions are “in line” with the common approach to EU agencies agreed by the Government but they intend to seek assurances that sensitive information will be protected.

Government’s letter dated 21 October 2013

32. On 21 October the Government told the Committee that they did not intend to opt in to the negotiations of the proposal. For the reasons discussed in paragraphs 22–30 of this report the Government have concluded that, as currently drafted, the proposal raises “substantial implications for criminal justice system arrangements within the UK”. The Government have undertaken to reconsider their position once an agreed text emerges.⁴¹

³⁹ Paragraph 37 of the EM.

⁴⁰ In particular Articles 48 and 50.

⁴¹ See letter dated 21 October 2013 from James Brokenshire MP in Appendix 2.

Should the Government opt-in to the negotiations of the proposed Eurojust Regulation?

Evidence from previous inquiries undertaken in 2013

33. Aside from the contentious provisions governing Eurojust's interaction with the EPPO, this proposal gives effect to the requirements in the Lisbon Treaty designed to clarify the current rules applying to Eurojust's operation. The evidence the Committee took during its recent inquiries into fraud on the EU's finances⁴² and the Protocol 36 block opt-out pointed overwhelmingly to the importance of the work undertaken by Eurojust.
34. During the course of the Protocol 36 inquiry many of the witnesses said that they considered Eurojust to be a useful agency. Michèle Coninx the current President of Eurojust said that if the UK left it would be unable to benefit from Eurojust's services, including the judicial coordination meetings, judicial cooperation agreements with third countries, office facilities, the facilitation of mutual legal assistance requests, the acceleration and execution of European Arrest Warrants and the funding and establishment of Joint Investigation Teams.⁴³
35. Kier Starmer QC, the Director of Public Prosecutions in the UK, said that the UK's involvement in Eurojust provided many benefits with the coordination meetings being the most important. He also considered Eurojust to be good value for money, costing the UK a relatively modest £360,000 per annum. Costs would be much greater if the UK were to rely upon a network of bilateral liaison magistrates in each country instead of the centralised liaison facilities made available in The Hague. He also provided some examples of where Eurojust had been of practical benefit to the Crown Prosecution Service. The Rt. Hon. Frank Mulholland QC, The Lord Advocate, also considered Eurojust to be very beneficial in terms of encouraging a coordinated approach to cross-border investigations, among other things, and he said that he would be concerned if the UK left Eurojust.⁴⁴
36. On the other hand, Dominic Raab MP contrasted the large increases in Eurojust's budget over the years with its performance and suggested it could benefit from more evaluation of its operations. While UKIP accepted that it was of some utility, it also suggested that its advice function could be provided by international law firms on a private basis. The Rt. Hon. Theresa May MP, the Home Secretary, told us it was difficult to indicate Eurojust's degree of effectiveness based upon the casework data that was available for 2011 and 2012.⁴⁵
37. In relation to Eurojust and the other crime fighting agencies covered by the 2014 decision, the report concluded that: "We ... consider that there are compelling reasons of national interest for the United Kingdom to remain full participants in most of the measures and agencies referred to in [the opt-

⁴² The Committee's report into fraud on the EU's finances touched on Eurojust's role and its interaction with OLAF and Europol, the other EU crime fighting agencies: European Union Committee, *The Fight Against Fraud on the EU's Finances* (12th Report of Session 2012-13, HL Paper 158), paragraphs 89-93.

⁴³ See paragraph 196.

⁴⁴ See paragraph 197.

⁴⁵ See paragraph 198.

out report]. As to the remainder we have identified no persuasive reason for the United Kingdom to withdraw from them”.⁴⁶

The Committee’s conclusions

38. The Committee agrees with those witnesses who welcomed and valued Eurojust’s work. Furthermore, we note that in electing to opt back into the current legislation governing Eurojust once the block opt-out takes effect next year, the Government also recognise Eurojust’s importance.
39. The Government told us in their EM that this proposal retains many of Eurojust’s core functions.⁴⁷ Were it not for the provisions governing Eurojust’s interaction with the EPPO the argument in favour of the UK opting in to its negotiations would be clear and the Committee would have no hesitation in recommending that the UK opt-in. Even though the proposal is subject to Qualified Majority Voting we would anticipate that the UK Government’s key issues with the proposed text as set out in the EM, and which we recognise as valid concerns, could be dealt with during the proposal’s negotiation. However, the Eurojust proposal has not been brought forward in a vacuum and the Government’s policy towards the associated EPPO proposal is one of clear non-participation.
40. As we have noted, the proposed Eurojust Regulation includes significant provisions which interweave the two institutions both corporately and operationally. Viewed in the context of the Government’s policy of non-participation, this might point towards the UK electing not to participate in the negotiation of the Eurojust Regulation. However, we would caution against this stance. Given the radical nature of the proposed EPPO and the controversial subject matter, we would anticipate that other Member States will oppose it and therefore the UK will not be alone in its opposition.
41. Indeed, the Treaty anticipates this very eventuality and, if at least nine Member States wish to pursue the EPPO, the Treaty allows for a new attempt to create the EPPO to be brought forward under special enhanced cooperation provisions in the Treaty.⁴⁸ It is our view that the non-participation in the EPPO by other Member States in addition to the UK will inevitably mean that the contentious aspects of this proposal dealing with the reform of Eurojust which address the interweaving of the two institutions will be the subject of negotiations in the Council. We consider that the UK ought not to miss out on these negotiations. If the UK Government decide not to opt in to this Regulation they will not be at the table for the important discussions addressing the position of those states wishing to cooperate within Eurojust but who chose not to participate in the EPPO. We would not advocate such a course of action.
42. Further, in the context of Protocol 36, it seems to us that there is the possibility that, having decided to opt back in to the existing legislation governing Eurojust, the UK will be left behind once the other Member States agree this proposal. We noted in paragraph 37 above that the Government say that they value the work of Eurojust. In the Protocol 36 report this Committee said that there were “compelling reasons of national interest for

⁴⁶ See paragraph 208.

⁴⁷ Paragraph 3 of the Government’s EM.

⁴⁸ Article 86 TFEU.

the United Kingdom to remain full participants” in Eurojust. However, we cannot foresee a situation whereby in practical terms the UK would be allowed to remain a full participating member of Eurojust operating under defunct or superseded legislation which they have decided to opt back in to whilst the other participating Member States cooperate under this new proposal once it is agreed. In this context the Committee believes that there is a clear danger that opting out of these negotiations due to the aspects that relate to the EPPO could constitute the first step on the road to the UK’s non-participation in Eurojust.

43. Overall, we conclude that these are important negotiations that, regardless of the EPPO proposal, will shape Eurojust’s future important work and the Committee strongly suggests that this is a process to which the UK Government ought to be party.
44. **The Committee recommends that the UK opt in to the negotiations of the proposed Eurojust Regulation.**

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

The Members of the Sub-Committee that conducted this inquiry were:

Lord Anderson of Swansea
 Lord Blair of Boughton
 Baroness Corston (Chairman)
 Lord Dykes
 Baroness Eccles of Moulton
 Viscount Eccles
 Lord Elystan-Morgan
 Lord Hodgson of Astley Abbotts
 Baroness Liddell of Coatdyke
 Baroness O'Loan
 Lord Rowlands
 Lord Stoneham of Droxford

Declarations of Interest

Lord Hodgson of Astley Abbotts
Trustee Fair Trials International

The following Members of the European Union Select Committee attended the meeting at which the report was approved:

Lord Boswell of Aynho (Chairman)
 Lord Bowness
 Lord Carter of Coles
 Baroness Corston
 Lord Dear
 Baroness Eccles of Moulton
 Lord Foulkes of Cumnock
 Lord Hannay of Chiswick
 Lord Harrison
 Lord Maclennan of Rogart
 Lord Marlesford
 Baroness O'Cathain
 Baroness Parminter
 The Earl of Sandwich
 Baroness Scott of Needham Market
 Lord Tomlinson
 Lord Tugendhat

During consideration of the report, the following Member declared an interest:

Lord Bowness
Solicitor—Non-practising
Notary public—Non-practising

A full list of Members' interests can be found in the Register of Lords Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>

APPENDIX 2: LETTER DATED 21 OCTOBER 2013 FROM JAMES BROKESHIRE MP TO LORD BOSWELL OF AYNHO, CHAIRMAN OF THE EUROPEAN UNION COMMITTEE

Draft Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust) 12566/13

I am writing to inform you of the Government's proposed position on the opt-in decision triggered by the European Commission's draft Regulation to reform Eurojust.

Pending the views of Parliament, the Government's view is that the UK should not opt in to the new Eurojust proposal at the outset of negotiations (i.e. pre-adoption) but should actively consider opting in post-adoption following a thorough review of the final agreed text. As always Parliament will be consulted on any post-adoption opt-in decision.

The new Eurojust proposal would have substantial implications for criminal justice system arrangements within the UK, not least as a result of the extension of the powers of Eurojust National Members and due to the proposal to create a "special relationship" between Eurojust and the Commission's parallel proposal to establish a European Public Prosecutor's Office (EPPO).

The Government does value our participation in the current Eurojust arrangements, where Eurojust's role in respect of the UK is about support and co-ordination in cross border cases. That is why we have said we will seek to rejoin the current Eurojust measures as part of the 2014 decision. But the new proposal would have significant implications for the UK's systems of law that we judge mean we should not opt in to it at the start of negotiations.

You will also be aware of the Government's longstanding position in the Coalition Agreement that we will not participate in the establishment of the EPPO.

Powers of Eurojust National Members

The draft Eurojust Regulation would extend the mandatory powers of Eurojust National Members. In doing so, it would remove the discretion afforded by the current Council Decisions for Member States not to apply certain powers to their National Members where to do so would be contrary to fundamental aspects of their criminal justice systems. The UK currently exercises this discretion by not granting its National Member powers to order investigative measures, for example. However, the new proposal would extend the mandatory powers of National Members and remove any discretion. In particular, Articles 8(2) and 8(3) would require National Members to be given the power to order investigative measures (such as orders for search warrants, production orders, directed surveillance, intrusive surveillance, or property interference) and authorise and co-ordinate controlled deliveries either "in agreement" with competent authorities or without prior agreement in urgent cases. Additionally, Article 8(1) would require all National Members to be given the powers to issue and execute mutual legal assistance or mutual recognition requests themselves. This mandatory set of powers would cut across the separation of powers between police and prosecutors in England, Wales and Northern Ireland. For example, the UK National Member is a prosecutor (and we believe a prosecutor is best suited to the role), but the responsibility for ordering investigative measures (including making an application to court) and authorising and coordinating controlled deliveries is the

responsibility of law enforcement officials. The proposed new mandatory powers for Eurojust National Members would also conflict with the role of the Lord Advocate in Scotland, who has the sole ultimate responsibility for determining investigative action in Scotland. This would be undermined by the proposed powers in urgent cases. Moreover, such powers would conflict with the principle that operational decisions are best made as close to the operational level as possible.

Relationship with the EPPO

Article 86 of the Treaty on the Functioning of the European Union (TFEU) describes the EPPO being established “from Eurojust”. The Commission have interpreted this by creating operational, management and administrative links between the two bodies. This includes the following:

- The ability of the EPPO to request Eurojust or its competent National Members to use their powers under Union or national law regarding acts of investigation that may fall outside the EPPO’s scope of competence and/or to support the transmission of EPPO requests or decisions for Mutual Legal Assistance;
- The ability for the EPPO to attend Eurojust College and Executive Board meetings;
- Eurojust treating any requests for support from the EPPO as if they had been received from a national competent authority;
- Exchanging information, including personal data;
- Automatic cross-checking of data held by Eurojust and the EPPO;
- A role for Eurojust in “facilitating agreement” between the EPPO and Member States that participate in the EPPO over the EPPO’s competence on “ancillary offences” –i.e. offences linked to offences against the EU’s financial interests; and
- Use by the EPPO of elements of Eurojust’s administration and infrastructure.
- Given our longstanding position not to participate in the establishment of an EPPO, the Government believes that participating in the Eurojust proposal at the outset of negotiations would, given the proposed interrelationship between the two bodies, risk undermining our decision not to participate in the EPPO. We cannot, at this time, know how this relationship will be defined at the end of negotiations and we would want to be sure that we would not fall under obligations in respect of the EPPO, such as to exchange data, as a consequence of participating in Eurojust.

Wider priorities

Irrespective of whether or not the UK opts in to the new Eurojust Regulation, we will take an active part in the negotiations to protect the national interest, as we will also on the EPPO. In addition to the abovementioned concerns, we will also want to continue to challenge the Commission’s evidence base and justification for bringing forward the Eurojust proposal at this time. Furthermore, we will want to oppose any changes that would have the effect of reducing the influence of Member State representatives over the functioning of Eurojust, such as through

the creation of an Executive Board, as contemplated in the Commission's proposal, and seek confirmation that the opinions of Eurojust acting as a College are non-binding on Member States.

I am copying this letter to Bill Cash, Chairman of the Commons European Scrutiny Committee; Jake Vaughan, Clerk to the Lords Committee; Sarah Davies, Clerk to the Commons Committee; Paul Hardy, Legal Adviser to the Commons Committee; Les Saunders, Cabinet Office and to Deborah Maggs, Departmental Scrutiny Co-ordinator.