



HOUSE OF LORDS

European Union Committee

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9th Report of Session 2014–15

**The UK's opt-in  
Protocol:  
implications of  
the Government's  
approach**

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Evidence is published online at <http://www.parliament.uk/the-uks-opt-in-and-international-agreements> and available for inspection at the Parliamentary Archives (020 7129 3074).

Q in footnotes refers to a question in oral evidence.

## SUMMARY

This report focuses on the Government's approach to the opt-in Protocol, introduced by the Lisbon Treaty, by virtue of which the UK has a right not to participate in EU justice and home affairs (JHA) measures. At issue is whether the opt-in Protocol can be interpreted to mean that it is the content of an EU measure which determines the application of the Protocol, rather than a legal base under the JHA title of the Treaty on the Functioning of the EU (Title V).

We express no view on the desirability or otherwise of the opt-in mechanisms introduced by the Lisbon Treaty. The function of this report is to examine the way in which the Government has sought to interpret those mechanisms.

We examine the Government's interpretation of the expression "pursuant to [Title V]" in the opt-in Protocol, and conclude that it has an accepted legal meaning, namely that a Title V legal base is required before the opt-in can be triggered. As a consequence, we recommend that the Government reconsider its broader interpretation.

We consider the Government's approach to determining the legal base of an EU measure with JHA content. We conclude that the distinction it draws between whole, partial, and incidental JHA measures is misconceived. We again recommend it reconsider its approach.

We consider whether the Government's overall approach to the opt-in Protocol gives rise to legal uncertainty. We draw a distinction between potential and actual legal uncertainty, concluding that the potential of the Government's policy to create legal uncertainty is considerable. We further conclude that the Government's approach risks breaching the EU legal duty of "sincere cooperation".

We then look at how the opt-in Protocol has been interpreted by the EU institutions. The Government believes that the Commission has actively pursued a policy of "legal base shopping", in order to undermine the UK's opt-in rights. In one specific case it provides evidence that lends some support to this allegation, in respect of the former Commission. With this partial exception, however, we conclude that there is no persuasive evidence to suggest that the Commission has circumvented the UK's opt-in rights.

We review the approach of the Court of Justice of the EU (CJEU) to determining the legal base of international agreements and, while recognising the Government's concerns, conclude that there is no evidence to suggest that the CJEU has sought deliberately to undermine the safeguards in the opt-in Protocol. We conclude that it is highly unlikely that the CJEU will change its established approach to determining legal base, including for measures with JHA content. We recommend that the Government review its litigation strategy in the light of this conclusion.

Finally, we recommend that the Government consider the feasibility of an inter-institutional agreement on the scope of Title V.

# The UK's opt-in Protocol: implications of the Government's approach

## CHAPTER 1: INTRODUCTION

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### The scope of the report

1. This report concerns the precedent that is set by the UK seeking to decide unilaterally whether or not it is bound by particular EU legal measures. It considers the Government's interpretation of Protocol (No. 21) to the EU Treaties<sup>1</sup> (the opt-in Protocol), and analyses the judgments of the Court of Justice of the EU (the CJEU) in this area. Finally, it looks at the Government's handling and analysis of the cases that have come or may come before the CJEU. All the evidence before us demonstrates that the Government's interpretation of the opt-in Protocol has been incorrect and that it will remain so.
2. In accordance with our call for evidence we express no view on the desirability or otherwise of the opt-in mechanisms introduced by the Lisbon Treaty. The function of this report is to examine the way in which the Government has sought to interpret those mechanisms. We have therefore confined ourselves to what has happened since the coming into force of the opt-in Protocol in December 2009.
3. We have taken a great deal of detailed evidence from specialists in this field, which we analyse in the body of the report.

### JHA legislation and the UK's opt-in

4. In December 2009, as a consequence of the Lisbon Treaty coming into force, the EU's competence to propose legislation in the fields of asylum, immigration, civil and criminal justice, and police cooperation was consolidated under one 'Title' of the new Treaty on the Functioning of the European Union (TFEU), Title V. Title V formally concerns an "Area of Freedom, Security and Justice", known more commonly as Justice and Home Affairs (JHA).
5. As part of the Lisbon Treaty negotiations the UK and Ireland negotiated a Protocol excluding them from participation in legislation proposed or adopted pursuant to Title V, unless they decided to opt into it. This became Protocol (No. 21) to the EU Treaties, the opt-in Protocol.

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<sup>1</sup> Protocol (No.21) to the EU Treaties is formally entitled: "On the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice".

### When should the opt-in apply?

6. It is plain from the terms of the opt-in Protocol that when the European Commission proposes legislation founded on a legal base<sup>2</sup> (or competence) under Title V of the TFEU, the UK does not participate in it unless it exercises its right to opt into it.<sup>3</sup>
7. Since 2010 the European Union Committee has, however, considered a large number of EU international agreements (used when the EU wants to create legal relations with a non-EU state or international organisation) where the Government has asserted that the opt-in Protocol applies to certain provisions within those agreements, despite the absence of a legal base in Title V. It argues that the opt-in Protocol applies when in its view an EU measure contains JHA content, in addition to when a Title V legal base is formally cited. While recognising the Government's concern to ensure that the safeguards in the opt-in Protocol are respected, the Committee has repeatedly questioned this interpretation of the opt-in Protocol. In 2010,<sup>4</sup> for example, we said in relation to the EU-Republic of Korea Free Trade Agreement: "It is stretching this provision and the terms of the opt-in Protocol to consider that an opt-in exists when the EU exercises its competence under the common commercial policy in respect of mode 4 services".<sup>5</sup>

### Confusion over parliamentary procedures

8. The Government's assertion of its right not to participate in provisions of international agreements and internal EU measures based on their content alone has also led to confusion over the application of Parliament's enhanced scrutiny procedures.<sup>6</sup> These procedures require the Government to take account of the views of Parliament within the three-month window for opting in to proposals with a Title V legal base; the same obligation applies to decisions to opt into Title V legislation once it has been adopted. The procedures include the right of the House of Commons and House of Lords scrutiny committees to call for a debate in advance of an opt-in decision; and, where there is strong parliamentary interest, the Government has undertaken to set aside Government time for such debates on its proposed approach. The examples below demonstrate both the legal uncertainty and the confusion to which the Government's policy in respect of the opt-in Protocol can give rise.

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<sup>2</sup> The legal base is the Treaty provision which gives the EU competence to act. All EU legislation has to be premised on a legal base in the EU Treaties: without one it has no competence to act.

<sup>3</sup> Chapter 2 contains a summary of the most significant JHA legislation, proposed under Title V, which the UK has not opted in to since the Lisbon Treaty came into force.

<sup>4</sup> Letter from Lord Roper, Chairman of the European Union Committee, to Edward Davey MP, Minister of State for Employment Relations, Consumer and Postal Affairs, Department for Business, Innovation and Skills, [27 July 2010](#)

<sup>5</sup> "Mode 4 services" are commitments to admit service professionals from existing members of the World Trade Organisation.

<sup>6</sup> The procedures derive from Written Ministerial Statements made to the House of Lords by Baroness Ashton of Upholland in June 2008 and to the House of Commons by David Lidington MP in January 2011. They are set out in Ministry of Justice and Home Office, *Code of Practice on Scrutiny of Opt-In and Schengen Opt-Out Decisions in Justice and Home Affairs Matters*: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/206475/JHA\\_Code\\_of\\_Practice.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206475/JHA_Code_of_Practice.pdf) [accessed 10 March 2015]



### **Box 1: Framework Agreement allowing Kosovo to participate in EU programmes**

The Government deposited an Explanatory Memorandum on 9 May 2013 concerning Council Decisions to sign and conclude a Framework Agreement between the EU and Kosovo allowing Kosovo to participate in EU funding programmes.<sup>7</sup>

On 8 October 2013 the Government wrote to the Committee saying that, after “significant analysis and consideration involving a number of Departments”, it considered that two of the programmes in which Kosovo would be able to participate, Fiscalis 2020 and Customs 2020, caused “the UK’s JHA opt-in to be triggered, as these programmes are pursuant to Title V TFEU.” The letter continued:

“Unfortunately, the opt-in deadline expired on 22 July 2013 and as such the UK has missed the opportunity to opt-into these measures pre-adoption. However, discussions remain on-going regarding the legal bases of these agreements and we do not expect these proposals to come forward for adoption for some time. We will continue to press for citation of all appropriate legal bases, including the relevant Title V legal bases.

“I regret that this notification that the JHA opt in was triggered comes so late to your Committee. It is an unfortunate circumstance and I wish to assure you that I and my officials will continue to work to ensure that this issue does not arise again.”

If the Government were right that its opt-in applied, our enhanced scrutiny procedures for opt-in decisions would have been circumvented.

It transpired that the Government’s view that the opt-in applied was not shared by other Member States, with the consequence that a Title V legal base was unlikely to be added. In a letter dated 3 April 2014 it said:

“If we do not secure the citation of Title V legal bases, which appears the most likely outcome given the position of other Member States, we will not seek to frustrate the progress of the measures. Instead we will register our objections and also take the position that we regard these as being ‘partial JHA measures’ where we do not consider ourselves bound as part of the EU by the JHA element of the measures. This is not an ideal outcome, but is one that I believe best protects our overall interests both in seeing Kosovo proceed on its EU path and in protecting the UK’s JHA position.”

The Committee asked whether it was legally sustainable for the Government to conclude that it was not bound by certain provisions of an international agreement in the absence of agreement from all Member States. The Government responded in a letter dated 29 May 2014 that in its view the situation did not give rise to legal uncertainty. It would enter a statement in the Council minutes at the time of adoption explaining the UK’s position, which provided sufficient clarity on its position. Negotiations are still continuing.

<sup>7</sup> Proposal for a Council decision on the signing, on behalf of the European Union, of a Framework Agreement between the European Union and Kosovo( on the general principles for the participation of Kosovo in Union programmes, [COM\(2013\) 218](#) and Proposal for a Council decision on the conclusion of a Framework Agreement between the European Union and Kosovo( on the general principles for the participation of Kosovo in Union programmes [COM\(2013\) 219](#)

### Box 2: The Fourth Money Laundering Directive

The Government deposited an Explanatory Memorandum on this proposal,<sup>8</sup> which revises and replaces the Third Money Laundering Directive,<sup>9</sup> on 4 March 2013. The amendments reflect changes made to the international standards on anti-money laundering and counter terrorist financing as set by the Financial Action Task Force.

The legal base for the draft Directive is Article 114 TFEU, the internal market legal base. At no stage in the Explanatory Memorandum or in subsequent correspondence with the Committee had the Government suggested that a Title V legal base was necessary, until a letter of 10 June 2014.

In that letter the Government confirmed that its “policy of close engagement with the Commission, Council Presidency and other Member States” meant that it “would look to support this version of the proposal as a basis for trilogue discussions with the European Parliament.”

But it also explained that it now took the view that one of the predominant purposes of the Directive was co-operation against criminal activity, particularly terrorist financing, which it considered to be JHA co-operation. Despite not having asserted the opt-in, and not opting in, the Government accepted the UK would be bound by the measure if it were to be adopted without a Title V legal base. In terms of Parliamentary scrutiny, the Government said:

“We recognise now that we should therefore have asserted the opt-in at the beginning of negotiations and provided the Committees with an opportunity to give an opinion on whether the UK should opt in, in line with standard practice. We did not do so as we did not identify the content as being JHA in nature at an early stage. I apologise to the Committee that we did not provide you with an opportunity to consider the opt-in in relation to these proposals. We have sought to negotiate the addition of a Title V legal base, or to split out the content into a separate measure with a Title V legal base, to make it clear that this is JHA content. However we can no longer expect to achieve these aims before the proposal is put to Council for a general approach by the end of the Greek Presidency. We will therefore consider ourselves bound by this measure on adoption, despite not opting in, until such a time as the CJEU were to strike down the measure.”

The Committee replied on 18 June: “We cannot believe you are suggesting that the Government intends to challenge in the Court of Justice a measure which the Government has supported throughout its negotiation, solely on the ground that it should not apply to the UK because the Government has not opted in.” It asked for a further explanation.

The Government replied on 4 December, confirming that “once the measure has been adopted, the Government will consider whether or not we wish to challenge the legal basis of the measure before the Court of Justice”. It is therefore clear that the Government is considering challenging the legal basis of a measure it strongly supports solely to preserve its position on the application of Title V.

<sup>8</sup> Proposal for a Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, [COM\(2013\) 45](#)

<sup>9</sup> Directive 2005/60/EC of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing: ([OJ L 309](#), 25 November 2005)

9. To avoid uncertainty we have taken the view that the enhanced scrutiny procedures apply only to proposals that cite a Title V legal base, indicating the agreement of all the Member States, rather than where the Government unilaterally asserts the application of the opt-in Protocol.

### Reason for the inquiry

10. To date, the Government has often opted in to a proposal after it has asserted that the opt-in applies in the absence of a Title V legal base. This lessens the risk of legal uncertainty as, either way, the Government accepts that it is bound by the proposal. Greater legal uncertainty arises, however, when the Government asserts the opt-in applies and then claims that it is not opting in. On 3 June 2014, the Rt. Hon. Theresa May MP (Home Secretary) and the Rt. Hon. Chris Grayling MP (Lord Chancellor and Secretary of State for Justice) wrote to the Committee to set out a revised position on what the legal consequences of this would be.<sup>10</sup> The letter informed us that:
- The opt-in was triggered by the inclusion in a proposal of any JHA content, rather than by the legal base that the Commission had chosen for the proposal.
  - Although the opt-in Protocol was clear that it applied in respect of measures ‘pursuant to’ Title V, this did not “explicitly restrict the ambit of the Protocol to measures which cite a Title V legal base”.
  - Nevertheless, the Government would push for the addition of a Title V legal base in EU negotiations when it considered a measure had JHA content.
  - However, the Government recognised that “the principle of validity” meant that EU legislation must be assumed to be valid unless or until it was annulled by the CJEU. Accordingly the UK would be bound by a JHA measure without a Title V legal base once it was adopted.
  - This principle of validity, however, only applied where JHA policy was the whole purpose of a measure or was one of the two main purposes. It did not apply where JHA policy was not one of the main purposes, in other words where it was ancillary.
  - For proposals with a JHA content but where no Title V legal base was cited, the Government would make an opt-in decision within three months of the publication of the proposal. It would also give Parliament an opportunity to offer an opinion on whether the Government should opt in, in line with the enhanced scrutiny procedures.
  - The Government would consider bringing challenges before the CJEU where it believed there was JHA content but that this was not reflected in the choice of legal base for the adopted text.
  - Because of the difficulties inherent in identifying JHA content, there might be occasions where the Government failed to recognise JHA

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<sup>10</sup> Letter to the Chairman from the Rt. Hon. Teresa May MP, Home Secretary and the Rt. Hon. Chris Grayling MP, Secretary of State for Justice, [3 June 2014](#)

content in a proposal at the outset. In such circumstances, where the Government was successful in adding a Title V legal base, it was committed to going through the opt-in process post-adoption.

11. The reasoning underpinning the Ministers' letter prompted us to hold a short inquiry into the Government's approach to the opt-in Protocol, in particular in relation to international agreements: we wanted to seek the views of legal experts on a disagreement that had up to this point largely been confined to the UK Government and Parliament. Chapters 3 and 4 assess the strength of the Government's legal arguments in the light of the expert evidence received. Chapter 5 looks at the consequences of the Government's opt-in policy on EU legal principles of legal certainty and sincere cooperation.
12. We were also prompted by a series of recent judgments from the CJEU, which appeared to us to question the Government's opt-in policy. We wanted to seek the views of legal experts on these cases too. A summary of each of these judgments is set out in Chapter 7 of this report. Three of the cases concern unsuccessful legal challenges by the Government against international agreements where it considered that a Title V legal base should have been used.<sup>11</sup> In two further cases the Council had added a Title V legal base to the Commission's proposal, but the Commission successfully challenged the adopted legislation to have the Title V legal base removed.<sup>12</sup> The most recent case was decided on 18 December 2014.<sup>13</sup>
13. Chapters 6, 7 and 8 assess the basis for the Government's concerns that the safeguards in the opt-in Protocol are being circumvented, and the strength of its litigation strategy to prevent further circumvention.
14. The final chapter considers when the three-month opt-in period should start when the Council adds a Title V legal base in the course of negotiations.
15. Although the inquiry terms of reference focused on the opt-in and EU international agreements, the evidence we took, and the conclusions we draw, relate in many instances as much to the opt-in and internal EU measures. It became clear, however, that determining whether an international agreement should have a Title V legal base was a more complex exercise.
16. In reaching our conclusions we have been aided by the views of academic EU lawyers, the Law Societies of England and Wales and Scotland, and the European Commission. We are most grateful to all those who took the time and trouble to give us their views. The list of witnesses is contained in Appendix 2 of the report.
17. **We make this report to the House for debate.**

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<sup>11</sup> C-431/11 *UK v Council*; C-656/11 *UK v Council*; C-81/13 *UK v Council*

<sup>12</sup> C-43/12 *Commission v European Parliament and Council*; C-377/12 *Commission v Council*

<sup>13</sup> C-81/13 *UK v Council*

### The Government's cooperation with the inquiry

18. The inquiry was launched on 28 July 2014. The call for evidence closed on 30 September without the Government's evidence being received. Our staff pressed Government officials for a date by which the Government would submit its evidence. At the end of October, they were told that Ministers were still considering the impact of the *Philippines* judgment<sup>14</sup> on UK opt-in policy (delivered on 11 June 2014), and that until those considerations had concluded it was unlikely the Government would be providing written evidence.
19. This prompted a letter from our Chairman, dated 30 October, asking the Government to submit evidence and requesting Ministers to appear before the Committee on 10 December. No response to that letter was received. The Chairman sent a follow-up letter on 27 November.
20. On 11 December the Home Secretary and Secretary of State for Justice replied to our letters, enclosing the Government's written evidence. They explained that the delay was a result of the complexity of the *Philippines* judgment:
- “The Government is of course absolutely committed to co-operating with any Parliamentary inquiries. Unfortunately, in this instance, the Government has been unable to provide evidence more quickly. This is because we have been considering some complex legal issues related to the outcome of recent judgments of the European Court of Justice. We have therefore been unable to provide written evidence that we felt adequately addressed the questions raised in the call for evidence for this inquiry. The Government is still considering some aspects of the impact of the *Philippines* judgment.”<sup>15</sup>
21. **Four months elapsed from the launch of the inquiry before the Home and Justice Secretaries submitted written evidence and confirmed their readiness to attend to give oral evidence. Until December the cooperation from their departments was such that we contemplated having to report without the benefit of government evidence. Seven months was an excessive amount of time to consider the judgment of the CJEU in the *Philippines* case. The complexity of that judgment in no way justified the Government's failure to cooperate with a select committee inquiry. We urge future Governments to ensure such practice does not reoccur.**

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<sup>14</sup> Case C-377/12 concerned the legal basis for a Framework Agreement on Partnership and Cooperation between the EU and the Philippines. It is explained at paras 150–155 (of this report).

<sup>15</sup> Letter from the Home Secretary and Justice Secretary to the Chairman of the European Union Committee, 11 December 2014

## CHAPTER 2: THE OPT-IN PROTOCOL IN CONTENT AND PRACTICE

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### Title V

22. Prior to the entry into force of the Lisbon Treaty, legislation in the area of criminal justice and police cooperation was adopted through intergovernmental procedures: proposed by the Commission or one or more Member States and agreed by unanimity in the Council, so with each Member State having a right of veto. The European Parliament only had to be consulted. The CJEU had jurisdiction only where a Member State had given its consent to that jurisdiction (the UK did not give its consent), and JHA legislation in the form of Framework Decisions could not have direct effect.
23. The competences of the EU institutions in the JHA field were substantially revised with the entry into force of the Lisbon Treaty. Member States agreed that, with some exceptions, legislation adopted pursuant to Title V would be agreed by the ordinary legislative procedure (the post-Lisbon term for co-decision). This means that the Council acts by qualified majority and the European Parliament has equal co-legislative powers, so that legislation cannot come into force without its consent. Legislation adopted under Title V now falls automatically within the jurisdiction of the CJEU and can have direct effect.

### The opt-in Protocol

24. The UK's loss of a right of veto has been replaced by an opt-in Protocol which, as already described, allows the UK not to participate in JHA legislation.
25. The evidence we received has focused in large part on the exact terms in which the Protocol is drafted, in particular the meaning to be given to the expression "pursuant to". We therefore set out the relevant provisions below.

#### *Recitals: settling UK and Irish questions*

26. A recital to the Protocol explains that it is intended to "settle certain questions relating to the United Kingdom and Ireland".

#### *Article 1: the UK and Ireland do not participate in JHA legislation*

27. Article 1 of the Protocol provides that the UK:
 

"shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union."

#### *Article 2: the safeguards that flow from non-participation*

28. As a consequence, Article 2 establishes that:
 

"no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom"



or Ireland; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States; and no such provision, measure or decision shall in any way affect the Community or Union *acquis* nor form part of Union law as they apply to the United Kingdom or Ireland.”

*Articles 3 and 4: the right to opt into JHA legislation pre- and post-adoption*

29. Article 3 and 4 provide for the UK or Ireland to notify the Council that it wishes to participate in the negotiations either “within three months after a proposal or initiative has been presented to the Council pursuant to Title V” (of the TFEU) or “any time after its adoption by the Council pursuant to Title V”.

**The position of Denmark**

30. Under Protocol (No.22) “On the Position of Denmark,” Denmark has opted out of all Title V legislation without any mechanism for opting in. There is, though, a provision<sup>16</sup> in Denmark’s Protocol allowing it to abandon the opt-out altogether, and a further provision<sup>17</sup> allowing it to adopt the opt-in safeguards enjoyed by the UK and Ireland. The second option is being put to the Danish people in a referendum planned for no later than March 2016.

**The Government’s application of the opt-in Protocol, 2011–2014**

31. The Government reports each year to Parliament on the application of the opt-in and Schengen Protocols. We set out below an overview for the years 2010–14, and highlight significant proposals (with Title V legal bases) to which the Government decided not to opt in. We add a caveat, however: the Government’s figures include proposals which lack a Title V legal base, but where it has unilaterally asserted that the opt-in Protocol applies.

*2011*

32. The Government reported<sup>18</sup> that it had taken 17 decisions on UK participation in EU JHA legislative proposals (two of these, however, were proposals without a Title V legal base). In total it had opted in to nine proposals under the JHA opt-in Protocol (including two which did not have a Title V legal base). The Government decided to not opt in to eight proposals. These included:
- A draft Directive on the right of access to a lawyer in criminal proceedings.<sup>19</sup>

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<sup>16</sup> Article 7 of Protocol (No 22)

<sup>17</sup> Article 8 of Protocol (No 22)

<sup>18</sup> Ministry of Justice and Home Office, *Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) (“the Treaties”) in Relation to EU Justice and Home Affairs (JHA) matters (1 December 2010–30 November 2011)*, Cm 8265, January 2012: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/238238/8265.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238238/8265.pdf) [accessed 11 February 2015]

<sup>19</sup> Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, [COM\(2011\) 326](#)

- Draft Directives on the minimum standards on procedures in Member States for granting and withdrawing international protection,<sup>20</sup> and the laying down of minimum standards for the reception of asylum seekers.<sup>21</sup>

### 2012

33. The Government reported<sup>22</sup> that it had taken 35 decisions on UK participation in EU JHA legislative proposals (nine of these, however, were proposals without a Title V legal base). In total it had opted in to 24 proposals under the JHA opt-in Protocol (including eight which did not have a Title V legal base). The Government decided not to opt in to eight proposals. These included:

- Proposals for a Regulation on the Justice Funding Programme 2014–20<sup>23</sup> and a Regulation for an Internal Security Fund on police cooperation.<sup>24</sup> This was due to concerns over value for money.
- A draft Directive on the freezing and confiscation of proceeds of crime in the European Union.<sup>25</sup> This was due to concerns that the proposal posed risks to the UK's domestic non-conviction based confiscation regime.

### 2013

34. The Government reported<sup>26</sup> that it had taken 21 decisions on UK participation in EU JHA legislative proposals (six of these, however, were proposals without a Title V legal base). In total it had opted in to 13 proposals under the JHA opt-in Protocol (including five which did not have a Title V legal base). The Government decided not to opt in to eight proposals. These included:

- A draft Directive on the protection of the Euro and other currencies against counterfeiting.<sup>27</sup> This was due to concerns that the proposal would have little impact, that the UK's enforcement was satisfactory,

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<sup>20</sup> Proposal for a Directive on common procedures for granting and withdrawing international protection status (Recast), [COM\(2011\) 319](#)

<sup>21</sup> Proposal for a Directive laying down standards for the reception of asylum seekers (Recast), [COM\(2011\) 320](#)

<sup>22</sup> Ministry of Justice and Home Office, *Third Annual Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) ("the Treaties") in Relation to EU Justice and Home Affairs (JHA) matters (1 December 2011–30 November 2012)*: Cm 8541, April 2013: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/235967/8541.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235967/8541.pdf) [accessed 11 February 2015]

<sup>23</sup> Proposal for a Regulation establishing for the period 2014 to 2020 the Justice Programme, [COM\(2011\) 759](#)

<sup>24</sup> Proposal for a Regulation establishing as part of the Internal Security Fund, the instrument for financial support for external borders and visa, [COM\(2011\) 750](#)

<sup>25</sup> Proposal for a Directive on the freezing and confiscation of proceeds of crime in the European Union, [COM\(2012\) 85](#)

<sup>26</sup> Ministry of Justice and Home Office, *Fourth Annual Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) ("the Treaties") in Relation to EU Justice and Home Affairs (JHA) matters (1 December 2012–30 November 2013)*: Cm 8772, January 2014: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/274625/fourth-annual-report-teu.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274625/fourth-annual-report-teu.pdf) [accessed 11 February 2015]

<sup>27</sup> Proposal for a Directive on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, [COM\(2013\) 42](#)



and that it would require new legislation on minimum penalties and jurisdiction over counterfeiting offences committed by UK nationals overseas.

- A proposal for a new Europol Regulation.<sup>28</sup> The Government had concerns over the increased obligation to provide data and the risk of operational interference with national enforcement agencies.
- A proposal for a new Eurojust Regulation.<sup>29</sup> The Government had concerns over extending the mandatory powers of Eurojust National Members and the interaction between Eurojust and the European Public Prosecutor's Office (EPPO).
- A draft Regulation establishing the EPPO.<sup>30</sup> The decision not to participate in the EPPO was contained in the Coalition Agreement.

### 2014

35. The Government reported<sup>31</sup> that it had taken 33 decisions on UK participation in EU JHA legislative proposals (19 of these, however, were proposals without a Title V legal base). In total the UK opted in to 21 proposals under the JHA opt-in Protocol (including 13 which did not have a Title V legal base). The Government decided not to opt in to 10 proposals. Key decisions included the decision not to opt in to three EU criminal procedural rights proposals:

- A draft Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings.<sup>32</sup> The Government did not believe the case had been made for EU action in this area.
- A draft Directive on procedural safeguards for children suspected or accused in criminal proceedings.<sup>33</sup> The Government did not believe the proposal would improve on the support and protection of young people in the UK under existing legislation.
- A draft Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant

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<sup>28</sup> Proposal for a Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA, [COM\(2013\) 173](#)

<sup>29</sup> Proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust), [COM\(2013\) 535](#)

<sup>30</sup> Proposal for a Regulation on the establishment of the European Public Prosecutor's Office, [COM\(2013\) 534](#)

<sup>31</sup> Ministry of Justice and Home Office, *Fifth Annual Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) ("the Treaties") in Relation to EU Justice and Home Affairs (JHA) matters (1 December 2013–30 November 2014)*: Cm 9006, February 2015: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/401463/46831\\_Cm\\_9006\\_accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401463/46831_Cm_9006_accessible.pdf) [accessed 11 February 2015]

<sup>32</sup> Proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, [COM\(2013\) 821](#)

<sup>33</sup> Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings, [COM\(2013\) 822](#)

proceedings.<sup>34</sup> The Government considered that the rules on legal aid were most appropriately determined by Member States themselves rather than at EU level.

36. **The Government's annual opt-in reports demonstrate that the opt-in Protocol has provided the UK with a very effective safeguard against participating in legislation with a legal base in Title V, particularly internal EU legislation, when it does not consider it to be in the national interest to do so.**
37. **The inclusion of legislation in annual opt-in reports which does not have a Title V legal base is misleading. Members of Parliament, or the public, seeking to understand the extent of the UK's opt-in rights on the basis of these reports, would be likely to conclude that they are far wider than, in reality, they are. We recommend that the Government include only legislation with a Title V legal base in future annual opt-in reports, or that it makes clear where it has asserted that the opt-in Protocol applies to legislation without such a legal base.**

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<sup>34</sup> Proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, [COM\(2013\) 824](#)

### **CHAPTER 3: THE MEANING TO BE GIVEN TO “PURSUANT TO” IN ARTICLES 1 AND 2 OF THE OPT-IN PROTOCOL**

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#### **The Government's view**

38. In its written evidence, the Government said that Articles 1 and 2 of the opt-in Protocol:
- “Are not restricted to provisions in agreements concluded under a Title V legal base, but to those adopted or concluded ‘pursuant to’ Title V. This is a broader test which, in the Government’s view, extends to any provision in an international agreement that contains content where the EU competence for negotiating, signature and conclusion of that agreement flows from Title V of the Treaty on the Functioning of the European Union or TFEU, that is, JHA content”.<sup>35</sup>
39. As a consequence, the Government stated that any agreement “which includes relevant JHA content triggers the opt-in”,<sup>36</sup> whether or not a Title V legal base is cited. The Government explained that this content might range from specific obligations to implement certain measures, including possibly criminal sanctions or civil law measures, to specific requirements on the police or other law enforcement services to co-operate in the prevention, detection and investigation of criminal offences, to requirements on the UK in relation to immigration rules.
40. In the Government’s view the opt-in Protocol formed an integral part of the fundamental structure of the EU Treaties, and gave express rights to the UK and Ireland which could not be undermined by secondary sources of EU law, such as Regulations, Directives and Decisions, including those on negotiating mandates, and on the signature and conclusion of international agreements entered into by the EU.<sup>37</sup>
41. In practice, this meant that where, in the case of international agreements, the Decisions containing negotiating mandates, or on signature and conclusion of that agreement, did not cite a JHA legal base, the Government would consider whether a measure contained JHA content, and if it did, the Government would assert that the opt-in applied and then decide whether or not to opt in, within the three-month period set out in the Protocol. The Government would seek the citation of a JHA legal base to make it clear that the measure contains JHA content.<sup>38</sup>
42. We questioned the Home and Justice Secretaries about the Government’s interpretation in evidence. Both commented that the CJEU had not ruled on the interpretation of “pursuant to” in the opt-in Protocol. Until it did, the meaning was unclear and the Government was entitled to maintain its interpretation: “The question that we are discussing today is whether the words ‘pursuant to’ entitle us to take the view that we have, and unless and

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<sup>35</sup> Written evidence from the Home Office and Ministry of Justice, para 5 ([OIA0009](#))

<sup>36</sup> *Ibid.*

<sup>37</sup> Written evidence from the Home Office and Ministry of Justice, para 7 ([OIA0009](#))

<sup>38</sup> Written evidence from the Home Office and Ministry of Justice, para 8 ([OIA0009](#))

until we get such a view, which as I say generates a political discussion, I see no likelihood of the Government changing their position.”<sup>39</sup>

43. We asked the Ministers whether the Government’s interpretation of “pursuant to” would have implications for the interpretation of the term in the other 98<sup>40</sup> places it is used in the EU Treaties. The Justice Secretary said that this “might be the case”, but that it would not be a problem for the UK: “My issue, as Secretary of State for this Government, is looking after the interests of the United Kingdom.”<sup>41</sup> John Ward, Deputy Director, EU & International Team, in the Legal Adviser’s Branch of the Home Office, said that “pursuant to” had to be read in the specific context of the opt-in Protocol: “Protocol 21, we say, is different because of the particularly sensitive nature of justice and home affairs matters. But it is clear, looking at the context of the rest of the treaty, that it is fully recognised that justice and home affairs matters are difficult and sensitive, which helps to interpret Protocol 21.”<sup>42</sup> The Home Secretary agreed, saying you had to look at the specific context within which “pursuant to” was used; it was not possible to give it one meaning throughout the Treaties.<sup>43</sup>

### The European Commission’s view

44. In its written evidence the Commission said that “pursuant to” meant “that the measure in question must have a provision in Title V of Part Three of the Treaty as its legal basis.”<sup>44</sup> The opt-in Protocol drew:

“A logical connection between not taking part in the adoption of a measure and not being bound by it (Article 2 of the Protocol describes the one as the ‘consequence’ of the other). Yet, the Government’s position implies that the United Kingdom, after having taken part in the adoption of a measure, may subsequently consider itself not to be bound by some of its provisions.”

45. In more general terms, the Commission stated that the correct legal base was necessary to determine whether and to what extent the EU had competence to conclude an international agreement, as well as the internal EU procedures for conclusion. Citing the Opinion of Advocate General Kokott, the Commission concluded that “the legal base also paves the way for application of the UK and Ireland’s opt-out rights.”<sup>45</sup>

### The views of expert witnesses

#### Overview

46. We invited a wide range of expert witnesses to contribute to our inquiry, and in particular asked them whether they thought the Government’s

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<sup>39</sup> [Q 45](#) (Chris Grayling MP)

<sup>40</sup> See para 52 of this report

<sup>41</sup> [Q 45](#)

<sup>42</sup> *Ibid.*

<sup>43</sup> [Q 46](#)

<sup>44</sup> Written evidence from the European Commission, para 5 ([OIA0010](#))

<sup>45</sup> *Ibid.* The Commission’s evidence cites the Opinion of Advocate General Kokott in Case C-81/13 at paragraph 41.

interpretation of “pursuant to” was legally reasonable. None did. Professor Steve Peers of the University of Essex said there were “overwhelming reasons” to conclude that the Government’s interpretation was “unconvincing”.<sup>46</sup> Professor Damian Chalmers, Professor of European Law at the London School of Economics, concluded that the Government’s interpretation was “particularly challenging”.<sup>47</sup> Professor Gavin Barrett, Professor of European Constitutional and Economic Law at University College Dublin, thought it a “singularly unlikely interpretation”.<sup>48</sup>

47. The only partial exception was Dr Anna Bradshaw, Member of the Law Society of England and Wales’ EU Committee, who said initially that the Government’s reading of “pursuant to” was “certainly a possible interpretation”,<sup>49</sup> but who later concluded that “‘pursuant to’ should be interpreted as requiring a legal basis.”<sup>50</sup>

### *The principle of conferral*

48. Professor Marise Cremona, Professor of European Law, European University Institute, Florence, thought the Government approach was “misconceived, legally speaking”.<sup>51</sup> Echoing the views of the Commission, she said:

“The legal basis is the power-conferring basis of a measure. It is important precisely because of the principle of conferral, the EU only having powers that have been conferred on it by provision in the treaties, so the legal basis is the source of the EU’s power. ‘Adopted pursuant to Title V’ of Part 3 of the TFEU refers precisely, it seems to me, to the legal basis, to the source of the power pursuant to which the EU can act. So, in my view, ‘pursuant to’ cannot be a synonym for ‘relevant’ or ‘related to’.”<sup>52</sup>

### *The ordinary meaning of “pursuant to”*

49. Prof Peers said that the expression “pursuant to” had an obvious legal meaning: it required a direct link with a parent measure. If the drafters of the Protocol had intended the broad notion of the words advocated by the Government, they would have made it clear with different wording.<sup>53</sup>
50. Two witnesses looked at how “pursuant to” was expressed in other EU language versions of the opt-in Protocol (all of which have equal legal status as aids to interpretation). Prof Cremona thought that the French version, *en application de ce titre*, and the Italian version, *a norma di detto titolo*, “clearly expressed the concept of being based on or adopted according to that title”,<sup>54</sup> and were therefore inconsistent with the Government’s interpretation. Prof

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<sup>46</sup> [Q 1](#)

<sup>47</sup> [Q 34](#)

<sup>48</sup> [Q 1](#)

<sup>49</sup> [Q 12](#)

<sup>50</sup> [Q 13](#)

<sup>51</sup> [Q 23](#)

<sup>52</sup> *Ibid.*

<sup>53</sup> [Q 1](#)

<sup>54</sup> [Q 23](#)

Chalmers found the German version (*nach dem Dritten Teil Titel V*) the most helpful in construing the correct meaning: “I do not see *nach* as ‘flowing from’ at all; I see it as ‘according to’ or ‘in accordance with’ particular procedures, and that is how it has been used in case law by the Court of Justice.”<sup>55</sup>

51. Prof Cremona referred to a recent case<sup>56</sup> in which the CJEU decided that the expression “agreements [that] *relate* exclusively to the Common Foreign and Security Policy” meant a legal base in the Common Foreign and Security Policy was required.<sup>57</sup> She commented: “It is in a different context, of course, but even where the word is ‘relate’ and not ‘pursuant to’ the court is using the legal basis test as a test of the procedural rules to apply, the reason for that being, among others, legal certainty.”<sup>58</sup>

*Use of “pursuant to” elsewhere in the EU Treaties and Protocols*

52. Prof Barrett noted that “pursuant to” appeared in 99 places in the EU Treaties, Protocols and Declarations.<sup>59</sup> Prof Chalmers thought it appeared 100 times.<sup>60</sup> Prof Chalmers expected “some consistency when the same term is used throughout the treaty”.<sup>61</sup> If there were no such consistency, the consequences for the UK would not necessarily be welcome:

“If you look at where ‘pursuant’ is used in some cases, the provision does not make sense if you give it the interpretation accorded by the Government ... I would refer in particular to Article 60 on services, which allows states to liberalise services more beyond EU legislation ... There is a similar problem of repetition in Article 169 on consumer protection. I think the British Government would have to explain the implications, some of which I do not think they would like as they are normally used to enlarge EU competencies, for other parts of the treaty.”<sup>62</sup>

53. Prof Peers also thought the Government’s interpretation was “one they might regret”: there might be other circumstances in which the words “pursuant to” “ought to be interpreted more narrowly from the UK Government’s point of view”.<sup>63</sup>

*Unilateral interpretation of a Protocol*

54. Prof Cremona said that the opt-in Protocol had to be “capable of objective determination”.<sup>64</sup> It was not simply a matter of the individual judgment of a Member State:

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<sup>55</sup> [Q 32](#)

<sup>56</sup> Case C-658/11

<sup>57</sup> [Q 23](#)

<sup>58</sup> *Ibid.*

<sup>59</sup> [Q 1](#)

<sup>60</sup> [Q 32](#)

<sup>61</sup> [Q 33](#)

<sup>62</sup> [Q 32](#)

<sup>63</sup> [Q 1](#)

<sup>64</sup> [Q 23](#)

“The protocol ... is not a unilateral declaration by the United Kingdom and Ireland. It is not a matter for their interpretation alone, but needs to be interpreted as a matter of EU law and on which the court has ultimate authority. The letter [of 3 June] seems to regard the application of the protocol as, ultimately, a matter of UK prerogative and I think this is fundamentally misconstruing the legal status of the protocol.”<sup>65</sup>

55. Dr Bradshaw agreed that the opt-in Protocol did not merit “a separate layer of interpretation”,<sup>66</sup> while Prof Chalmers said that the Government’s interpretation of the opt-in Protocol afforded it a primacy over other provisions of the Treaties and Protocols that lacked any evidential basis at all.<sup>67</sup>

*Support for the Government’s interpretation*

56. None of the witnesses was able to identify an academic lawyer, Member State or EU institution that shared the Government’s interpretation of “pursuant to”. Prof Barrett, was “not aware of anyone other than the Government taking this view”.<sup>68</sup> He said that Ireland had “never publicly pronounced on this issue”, but that it had “never once attempted to opt into any measure on the basis of such an interpretation”.<sup>69</sup>
57. It may also be, as Prof Barrett said, that the Government’s policy is not being taken very seriously, and so has “not attracted an awful lot of attention”.<sup>70</sup> Prof Peers made the point more starkly: “There is so little support for the Government’s position that I do not think anyone seriously believes it.”<sup>71</sup>
58. **None of the written or oral evidence we received in the course of this inquiry supported, or referred to others supporting, the Government’s interpretation of “pursuant to”.**
59. **We note in particular that Ireland, which would seem to stand to gain the most were the UK’s interpretation to be right, does not follow the UK’s practice of asserting the application of the opt-in Protocol in the absence of a Title V legal base.**
60. **We conclude that the phrase “pursuant to” has an accepted legal meaning, namely that a Title V legal base is required before the opt-in can be triggered. A link to a legal base is also necessary to define the source of the EU’s power to act, and this is consistent with the principle of conferral. We agree that the opt-in Protocol, as with any Protocol to the EU Treaties or Treaty Article, has to be viewed objectively, rather than subjectively.**
61. **The Government’s interpretation leads to anomalous consequences that further undermine its argument. It automatically renders the**

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<sup>65</sup> [Q 25](#)

<sup>66</sup> [Q 12](#)

<sup>67</sup> [Q 32](#); and written evidence from Professor Chalmers, paras 4–7 ([OIA0001](#))

<sup>68</sup> [Q 1](#)

<sup>69</sup> *Ibid.*

<sup>70</sup> [Q 7](#)

<sup>71</sup> *Ibid.*

**position of Ireland and Denmark legally uncertain—are they presumed not to participate in a measure if the UK has asserted that it has JHA content? It is striking that the very broad interpretation of “pursuant to”, on which the Government seeks a ruling from the CJEU, would give the EU wide powers to increase its competence in other fields. There is a potential irony to this to which the next Government should pay particular heed.**

62. **It follows that we are unpersuaded by the Government’s interpretation of “pursuant to”. We found the argument that “pursuant to” in the opt-in Protocol should be singled out for different interpretation from elsewhere in the Treaties equally unconvincing.**
63. **We recommend that the Government reconsider its interpretation of “pursuant to”.**



## **CHAPTER 4: DETERMINING THE LEGAL BASE OF AN EU MEASURE WITH JHA CONTENT**

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64. The question of how to determine the correct legal base of EU measures has long been tussled over by EU Member States and institutions, the legal base being the source of the EU's power to act.
65. As a consequence, as far back as 1990, the CJEU defined a test for determining legal base that it has applied ever since. The test was set out in the Commission's written evidence,<sup>72</sup> which we summarise as follows:
- The legal base of a measure depends on the predominant purpose, which can be objectively assessed by looking at the stated aim and content.
  - If a measure has several purposes, none of which is incidental to the other (more often the case in international agreements), a legal base for each objective is required, provided that the decision-making procedures under each legal basis are compatible with each other.
  - An incidental objective does not require a legal base.
66. There is no disagreement between the Government and our expert witnesses that this is the correct approach to determining legal base.<sup>73</sup> At issue is whether this approach should be varied for determining whether JHA legal bases are necessary under Title V TFEU.

### **The Government's views**

67. The Government's written evidence divided measures with JHA content into three categories:
- If an international agreement pursued solely a JHA purpose, which it described as a "whole JHA measure", the normal legal base rules would require just a JHA legal base for the relevant Decision containing the negotiating mandate or on signature or conclusion.<sup>74</sup>
  - If an international agreement pursued both a JHA and another objective with neither being incidental, what the Government called "a partial JHA measure", two legal bases would be needed for the relevant Decision—a JHA legal base and a legal base corresponding to the other objective.
  - If an international agreement pursued two objectives, a JHA objective and a non-JHA objective, with the JHA objective being incidental to the non-JHA objective, an "incidental JHA measure", then under the normal legal base rules the relevant Decision would only require the legal base that corresponded to the non-JHA objective.

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<sup>72</sup> Written evidence from the European Commission, paras 7 and 8 ([OIA0010](#))

<sup>73</sup> See, for example, the written evidence from the Home Office and Ministry of Justice, paras 11 and 12 ([OIA0009](#))

<sup>74</sup> Written evidence from the Home Office and Ministry of Justice, paras 13–20 ([OIA0009](#))

68. The Government advanced two possible arguments as to why the UK would not be bound by the JHA content of an incidental JHA measure. First, the absence of a JHA legal base would not, under the normal legal base rules, render the measure invalidly adopted (because there is no need to cite a legal base for incidental matters). But, according to the Government, “the UK is nevertheless, by virtue of Protocol 21, not bound by the JHA provisions of the international agreement in so far as the agreement binds the EU.”<sup>75</sup>
69. Second, the normal legal base rules should not apply to JHA matters:
- “This is because the existing legal base rules were established before the full implications of Protocol 21, as a matter of primary law governing the special position of the UK and Ireland, had been addressed in the case law of the CJEU. The special position of the UK and Ireland is recognised by the fact that the UK only participates in the police and criminal justice cooperation elements of the Schengen *acquis* ... As a result, the citation of a JHA legal base in relation to incidental JHA content is required and a separate Decision can be adopted. The splitting of the Decisions helps clarify the situation and the citation of a JHA legal base puts the operation of the opt-in beyond doubt.”
70. In sum, the Government argued that it was legally bound by whole and partial JHA measures, unless they were successfully challenged by the CJEU, but not by incidental JHA measures.
71. Both Ministers cited public support for the Government’s interpretation of the opt-in Protocol, saying its interpretation was consistent with what “this country [the UK] thought it had signed up to” when the Protocol was drafted.<sup>76</sup> The Home Secretary said that “most people ... would assume” that the intention of the opt-in Protocol was “that on any matter that related to justice and home affairs, that ability to determine whether to be part of that should rest with the UK.”<sup>77</sup>

### The views of the Commission

72. The Commission concluded that neither the advent of the opt-in Protocol nor the fact that an EU measure was thought by the UK to contain JHA content affected the established case-law on the determination of legal base, as had been recently confirmed by the CJEU:

“To determine whether a measure constitutes a measure ‘pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union’ regard must be had to its legal basis. Whether a measure must have a provision in Title V of Part Three of the Treaty as its legal basis must, in turn, be determined by reference to established case-law that focuses on objective factors. This interpretation of Protocol No 21 is consistent with its wording, promotes legal certainty and foreseeability in its application, and helps ensuring that no Member State or institution can circumvent its provisions. Furthermore, this interpretation of

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<sup>75</sup> Written evidence from the Home Office and Ministry of Justice, para 15 ([OIA0009](#))

<sup>76</sup> [Q 43](#) (Chris Grayling MP)

<sup>77</sup> [Q 43](#)

Protocol No 21 is borne out by the judgment of 18 December 2014 in Case C-81/13 *United Kingdom v Council*.<sup>78</sup>

### The views of the expert witnesses

73. None of the expert witnesses thought the Government's analysis was consistent with either the opt-in Protocol or the rules established by the CJEU for determination of the legal base of a measure. They agreed that an incidental JHA provision did not change the legal base of a measure. This meant that, unless the legal base fell under Title V and the UK had opted out, it was bound by the entirety of the measure.

74. Prof Chalmers said that the Government approach was "unconvincing in the extreme".<sup>79</sup> Prof Peers said:

"I think the whole logic of that reasoning is flawed from the outset, because the Court of Justice has always said that, for ancillary provisions of EU legislation and international treaties, you look to the predominant purpose of the legislation for the international treaty. The legal base is determined by the predominant purpose, not by the secondary purpose, and any ancillary provisions which are marginal are ignored when determining the legal base. Once you start using the word 'ancillary', it necessarily leads you to that case law. If an international treaty or an EU legislative measure has an ancillary JHA purpose, that must mean that its main purpose is something else and that must mean that the legal base of the treaty or legislation is that something else, and it is not JHA at all. Therefore the Title V protocol cannot be invoked: it is irrelevant."<sup>80</sup>

75. Professor Basilien-Gainche, Professor of Public Law at the University of Jean Moulin, Lyon, agreed that the Government's interpretation of main and ancillary purposes was not consistent with CJEU case law, although she was critical of how the CJEU decided the correct choice of legal base:

"The determination of the legal base of an EU norm must take into account its main or predominant object, the presence of some ancillary or incidental provisions not having any consequence on such a determination. Notwithstanding, such a position of the [CJEU] can be criticised and must be questioned."<sup>81</sup>

76. Dr Bradshaw also doubted the strength of the Government's argument, given recent CJEU decisions in which it held that the opt-in Protocol was not capable of having any effect on the question of the correct legal base; rather it was the legal base for a measure which determined whether the Protocol applied.<sup>82</sup> She did agree, however, that it was not always clear that the CJEU got the distinction between predominant and ancillary purposes right:

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<sup>78</sup> The case concerned the EEC-Turkey Association Agreement. It is explained at paras 156–162.

<sup>79</sup> Written evidence from Professor Chalmers, para 2 ([OIA0001](#))

<sup>80</sup> [Q 2](#)

<sup>81</sup> Prof Basilien Gainche's criticism of the CJEU's approach to determining whether a Title V legal base exists is considered in chapter 7, para 180.

<sup>82</sup> Written evidence from the Law Society of England and Wales and the Law Society of Scotland, para 15 ([OIA0004](#))

“The legal basis question is answered by reference to what the primary content or purpose of the measure is. It is quite clear from that case law that an ancillary content or purpose would not be sufficient to found a legal basis.”<sup>83</sup>

77. Prof Barrett regarded the Government’s approach as “deeply problematic” and “a fairly fundamental challenge to the EU legal order”, which had “implications for the rule of law in the European Union, and also for legal certainty and uniformity.”<sup>84</sup> He was puzzled as to how the UK Government intended to act on its belief that it was not bound by JHA provisions it had not opted in to. He thought this policy actively defied EU law and was a recipe for Commission prosecutions, prosecution by other Member States and fines under EU law.<sup>85</sup>
78. Janice Atkinson MEP (UK Independence Party) concluded that the Protocol was “the handmaiden of the treaty and not the equal”.<sup>86</sup>
79. Prof Cremona and Prof Chalmers both noted that the CJEU had applied the same predominant purpose test since 1990. Since then, it had not thought it necessary to change or update the test. Neither thought it would do so now.
80. Prof Chalmers referred us in particular to a case in which the UK had used the established approach to determining legal base for a measure which it argued concerned JHA policy. The case<sup>87</sup> concerned a Council Decision to exclude the UK from participating in the EU borders agency, FRONTEX,<sup>88</sup> on the ground that it constituted a development of provisions of the Schengen *acquis* in which the UK did not participate. The UK wanted to participate in FRONTEX, and argued that the Regulation establishing FRONTEX had been wrongly classified as a Schengen-building measure. Prof Chalmers said that the UK “used the aim and content rule for that. This was just as sensitive. It went to a similar-style protocol that could apply to policing, judicial co-operation and criminal matters.”<sup>89</sup>
81. **All the evidence we received contradicted the Government’s approach to determining the legal base of a measure with JHA content. We accept the weight of that evidence.**
82. **We conclude, therefore, that the Government’s distinction between whole, partial, and incidental JHA measures is misconceived. Its effect is to make a clearly established legal principle inordinately complex. A whole or partial measure should have a Title V legal base in any event, as a matter of EU law, because the JHA content is a predominant purpose. An incidental JHA measure would bind the UK, because the absence of a Title V legal base would prevent it from opting out of it.**

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<sup>83</sup> [Q 21](#).

<sup>84</sup> [Q 2](#)

<sup>85</sup> *Ibid.*

<sup>86</sup> Written evidence from Janice Atkinson MEP (UKIP) ([OIA0003](#))

<sup>87</sup> Case C-77/05 *UK v Council*

<sup>88</sup> Regulation 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, ([OJL 349](#), 25 November 2004)

<sup>89</sup> [Q 34](#)

83. **The Government's citing of the public's claimed perception of the opt-in Protocol to support its analysis lacks legal credibility.**
84. **We recommend that the Government reconsider its current approach to determining the legal base of a measure with JHA content.**

## CHAPTER 5: LEGAL CERTAINTY AND LOYAL COOPERATION

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### Legal Certainty

#### *The Government's view*

85. In its written evidence the Government said it was important that other Member States, the EU Institutions and third countries should be clear on whether or not the UK (and Ireland and Denmark) were taking part in particular provisions of international agreements and relevant EU measures which might be required to implement them.
86. In relation to mixed agreements, a recital was usually included in such agreements, which indicated to the third country in question that the UK, Ireland and Denmark have a special position in EU law in relation to JHA provisions of this agreement. The recital made it clear that the UK, Ireland and Denmark were each bound as individual Member States where not participating in provisions as part of the EU.
87. In addition, when a Decision containing a negotiating mandate or to sign or conclude an agreement, which the Government considered triggers the opt-in, was adopted without a JHA legal base, the Government made it clear whether or not the UK had opted in and was bound by the measure.
88. If the Government had opted in, it would send a letter to the Council to this effect, to put its opt-in "beyond doubt", and would also seek the addition of recitals in the text of the Decisions to sign and conclude the agreement, setting out the position of the UK. In some cases, the UK was not able to secure the addition of recitals to the text and so resorted to laying a unilateral statement, attached to the minutes of the relevant Council meeting, setting out the position of the UK. The UK's position in the Council was an EU matter. In mixed agreements, the UK would either be bound as a Member State or as part of the EU.
89. In its letter of 3 June 2014, the Government explained that, because of the difficulties inherent in identifying JHA content, there might be occasions where the Government failed to recognise JHA content in a proposal at the outset. In such circumstances, where the Government was successful in adding a Title V legal base, it committed to going through the opt-in process post-adoption.
90. In evidence the Home Secretary said that the Government's interpretation of the opt-in Protocol had not, in practice, led to legal uncertainty:

"I do not think we are aware of any case in practice where this has been a real problem. We always seek to ensure that our position in relation to the relevant international agreement is clear, and that can be by agreeing recitals, as you have suggested ... or by laying unilateral statements setting out our position. That would happen whether or not a Title V legal base was cited. We are very aware, as you say, of the importance of ensuring that our position is clear, but we would always take steps to make that position clear and to provide that legal certainty as far as we

can. As I say, we are not aware of any case where there has been a particular problem in relation to this.”<sup>90</sup>

*The Commission's view*

91. The Commission, in contrast, concluded that the Government's interpretation of the opt-in Protocol would create considerable uncertainty:

“It would create considerable uncertainty as to when and whether Protocol No 21 applies. Such uncertainty is particularly problematic in the context of international agreements, as it would mean that third countries might be unable to assess, when they conclude an agreement with the European Union, to what extent the Union assumes liability with respect to the United Kingdom. This will ultimately affect the correct implementation of the *pacta sunt servanda* principle, a cornerstone of international law.”<sup>91</sup>

*The views of the expert witnesses*

92. All witnesses agreed that the potential for legal uncertainty was great, not only for the third country, but also for the Danish and Irish positions, and for individuals seeking to enforce their rights under international agreement once entered into force. Prof Peers said that one of the purposes of the Protocol, and the formal processes for opting in and out of it, was to create legal certainty on what applied to the UK, Ireland and Denmark.<sup>92</sup> This was reflected by the Council's practice of using recitals to clarify the positions of these States, as explained in the Government's evidence. He also thought that legal certainty was just as important for third states and individuals:

“They [Member States] ought to know exactly who they are signing up to. That is perfectly reasonable. It is very important for individuals, too. If you are a Swiss person who moves to the UK, it is important that you know what exactly is happening with your social security contributions and whether they count when you go back to Switzerland. The same is true of a British citizen moving to Switzerland. It is important for them to be able to know what is happening, and important for the people who run the social security system in terms of national administrations. Those are complex enough without adding some great degree of uncertainty over whether they apply to the UK, Ireland or Denmark. It is important to people advising them such as lawyers or other types of advisers.”<sup>93</sup>

93. Prof Cremona agreed that the unilateral declaration by one Member State that it did not regard itself as bound by a particular provision of an agreement, without any basis for this in the concluding decision, created “an unacceptable level of uncertainty for third countries”.<sup>94</sup>

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<sup>90</sup> [Q 47](#)

<sup>91</sup> Written evidence from the European Commission, para 10 ([OIA0010](#))

<sup>92</sup> [Q 7](#)

<sup>93</sup> *Ibid.*

<sup>94</sup> [Q 26](#)



94. Prof Barrett distinguished between actual and potential uncertainty. He was unaware of whether actual legal uncertainty had been caused, because the Government's policy was not taken seriously and so had attracted little attention; but he thought that the potential uncertainty which the policy could cause in practice was "enormous". The Government "seemed to be asserting the right on the part of any Member State to regard individual provisions of measures to be inapplicable to them". If that were so, it had "implications for the rule of law in the European Union, and also for legal certainty and uniformity in the EU legal order".<sup>95</sup>
95. He explained the more practical consequences with reference to previous correspondence between the Committee and the Government:
- "That situation was perfectly summarised in the letter in December 2011 from Lord Roper to the Home Secretary<sup>96</sup>, in which he hypothesises—I quote him because it is as well put as I have seen it put: "The Government would assert that it does not participate unless it opts in, so it will do nothing and will presumably not vote in the Council. The Commission and the other members of the Council will consider that the UK is participating in negotiations and will be bound by the result. There will be no recital recording that the measure does not apply to the UK. On the adoption of the measure, how would a citizen decide what the law in the UK is?"
96. Prof Barrett added that the same uncertainty would apply to the Irish and Danish positions, because they would have the right not to opt into JHA measures, and might have exercised that right in relation to any given proposal: "One just would not know."<sup>97</sup> He also thought the policy would create uncertainty for parliamentary committees in knowing how far the opt-in Protocol applied<sup>98</sup> and knowing what to review.<sup>99</sup>
97. **We accept there is a distinction between actual and potential legal uncertainty. But the potential of the Government's policy to create real legal uncertainty is very considerable indeed. The unilateralism of the Government's approach also raises serious questions about the UK's acceptance of the uniform application of EU law, the defining trait of the rule of law in the European Union. We are concerned by this, and by the possible implications for the UK's reputation as a negotiating partner among other Member States**
98. **The Government's policy is creating actual legal uncertainty for the purposes of parliamentary scrutiny, as the two examples in the introduction to this report show. This is particularly so when it decides a proposal contains JHA content after the initial three-month opt-in period has passed. We confirm our view that the enhanced opt-in procedures apply only to draft legislation that is either proposed**

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<sup>95</sup> [Q 2](#)

<sup>96</sup> Letter from Lord Roper, Chairman of the European Union Committee, to the Rt Hon Theresa May MP, Home Secretary, Home Office, [14 December 2011](#)

<sup>97</sup> [Q 2](#)

<sup>98</sup> [Q 3](#)

<sup>99</sup> [Q 7](#)



**with a Title V legal base, or to which a Title V legal base is added by the Council. We invite the Government to agree.**

99. **We urge Government departments to inform us sooner when a Title V legal base is added by agreement of the Council.**

### **Compliance with the duty of sincere cooperation**

100. Article 4(3) of the Treaty on European Union defines the EU legal principle of “sincere cooperation”:

“Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

“The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

“The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”

101. Prof Chalmers drew our attention to the case of *Commission v Sweden*,<sup>100</sup> in which the CJEU found that there were “duties of cooperation that were legal duties—they are not just duties of what is politically desirable—in the negotiating process that bind all member states”.<sup>101</sup> These were “special duties of action and abstention that bind all member states to ensure that there is a concerted strategy”. Once the mandate was there, states were under a duty to ensure coherence, consistency of action and representation.

### *The Government's view*

102. The Government said the duty of sincere cooperation did not oblige it to agree with other Member States and the EU institutions on a policy that undermined the UK's opt-in safeguards. The Home Secretary said:

“Obviously there is the duty of sincere cooperation. That requires member states to work together to implement the EU's lawful objectives and decisions, but it is not intended to prevent a member state from exercising its lawful rights. We would say that that is what we would be doing if we were effectively saying that incidental JHA content was not binding on us unless we opted into it.”<sup>102</sup>

103. The Justice Secretary agreed: “It would be a nonsense if we were bound by treaty not to disagree with the majority of member states or with the institutions. No, we are absolutely certain that this does not impact on the duty of sincere cooperation.”<sup>103</sup>

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<sup>100</sup> Case C-246/07 *Commission v Sweden*

<sup>101</sup> [Q 35](#)

<sup>102</sup> [Q 47](#)

<sup>103</sup> *Ibid.*

*The views of the expert witnesses*

104. Prof Cremona said that the overall legal reasoning underpinning the Government's opt-in policy appeared to ignore the fundamental duty of sincere cooperation.<sup>104</sup> While interpretations of the opt-in Protocol differed, the EU Treaties provided mechanisms to resolve such differences and the Government's litigation reflected that. The assumption behind the Government's letter of 3 June, on the other hand, seemed to be that, if those strategies had failed, it could still insist it was right and could refuse to accept that it was bound by a measure by which, on its face, it was bound. This was contrary to the principle of sincere cooperation.

105. Prof Chalmers agreed:

“Member States, are by virtue of Article 4(3) TFEU, under a duty to cooperate strongly with EU Institutions in the negotiation and conclusion of a measure and in meeting commitments under it. The Court has held that unilateral action dissociating a State from a common agreed strategy which grants a mandate to the EU Institutions to negotiate violates that duty<sup>105</sup> ... It will be evident that the United Kingdom Government would be flirting with breaching that duty if it to'd and fro'd on whether to support a common front depending on whether the measure was perceived to have 'JHA content'. The political challenges are simply that it is likely to undermine EU strategy and annoy non EU States as it will be unclear what they are securing from the Union if they enter into an agreement with it. This will make negotiations harder for all parties.”<sup>106</sup>

106. **The Government's policy puts it at risk of breaching the duty of sincere cooperation, the importance of which was made clear by the CJEU in *Commission v Sweden*. We recommend the Government reconsider its opt-in policy in the light of the evidence we received, and that case.**

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<sup>104</sup> [Q 25](#)

<sup>105</sup> Case C-246/07

<sup>106</sup> Written evidence from Professor Chalmers, para 13 ([OIA0001](#))

## **CHAPTER 6: ARE THE UK'S OPT-IN RIGHTS BEING UNDERMINED BY THE EUROPEAN COMMISSION?**

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### **The Government's view**

107. In its written evidence the Government expressed the view that the Commission may have been “choosing non-JHA legal bases with the result of limiting the application of the UK’s JHA opt-in and requiring the UK to participate in measures”. The Government stated that it was strongly opposed to “‘legal base shopping’, that is, attempts to include JHA content in non-JHA measures”.<sup>107</sup> It aired similar concerns in its letter of 3 June.<sup>108</sup>
108. In evidence both Ministers underscored this concern. The Home Secretary said:
- “It surely cannot be right that there be an interpretation of this that would allow the European Commission to game this issue—effectively to decide to use its interpretation of the measures in a way such that even if something was plainly a justice and home affairs matter, it could put something else into it and then say, ‘Well, we won’t give it a Title V legal treaty. Therefore the UK’s opt-in doesn’t apply’. That would not be appropriate.”<sup>109</sup>
109. The Justice Secretary said there was “no doubt” in his mind that “some” were “looking at alternative routes to dilute that protocol and our opt-outs, and to limit our room for manoeuvre”, and that it was the Government’s policy to continue to try to uphold the principles in that protocol.<sup>110</sup> He spoke of a “tactic” being “used to try to bypass” the UK’s opt-in rights,<sup>111</sup> and warned that “if we are put in a position where it is possible to completely negate Protocol 21 by simply merging JHA content into other measures, that would be a significant political issue for this country”.<sup>112</sup>
110. He gave a first-hand account of the Commission circumventing a legal base in Title V for the draft Directive on the fight against fraud to the Union’s financial interests by means of criminal law<sup>113</sup> (the PIF-Directive):
- “Let me give you a very specific example. The proposal brought forward by the Commission for a measure that introduced common criminal penalties for fraud against EU institutions should, in the view of the Council legal service and most member states, have been brought forward on Title V legal base, and indeed now has been. The Commission brought it forward on a different legal base, and the previous Commissioner expressly said at a Council meeting said that she

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<sup>107</sup> Written evidence from the Home Office and Ministry of Justice, para 29 ([OIA0009](#))

<sup>108</sup> See para 10 of this report

<sup>109</sup> [Q 43](#); see also [Q 41](#) and [Q 51](#).

<sup>110</sup> [Q 41](#); see also [Q 44](#).

<sup>111</sup> [Q 43](#)

<sup>112</sup> [Q 47](#)

<sup>113</sup> Proposal for a Directive on the fight against fraud to the Union’s financial interests by means of criminal law, [COM\(2012\) 363](#)

had done so because she wanted to ensure that there were no geographic areas of the EU where the measure did not apply.”<sup>114</sup>

111. When questioned further, the Justice Secretary explained that it:

“would be on the record that there was a disagreement between the Council legal service and the Commission legal service over the legal base. The Council effectively said that the Commission was acting in a way that was not legally correct. The Commission disagreed, but the Commissioner expressly said that in her remarks to the Council.”<sup>115</sup>

112. The Home Secretary said that were a number, “albeit a small number”, of other examples where the Government believed the legal base had been used “not in a very clear, strict legal interpretation of what the legal base should be but as a means of ensuring the coverage of the measure.”<sup>116</sup> The Minister undertook to write to us with further examples.

*Letter from the Home and Justice Secretaries of 21 January 2014*

*The draft PIF Directive*

113. The Ministers’ letter<sup>117</sup> said the draft PIF Directive was “the most obvious example” of circumvention by the Commission. The Commission had chosen to propose the Directive under Article 325 TFEU, the legal base for countering fraud against the Community’s financial interests. The Government’s view was that the draft Directive was “clearly focused on criminalising fraud against the Community’s financial interests”, and so was “wholly JHA in nature”. At the JHA Council on 6 and 7 June 2013, the Commission opposed changing the legal base to Article 83(2) TFEU, a Title V legal base (concerning the approximation of national criminal laws). The Ministers stated that “it was noted in that Council meeting that preferring Article 325 for territorial coverage reasons was on political and not legal grounds.” The Government was successful in securing a change to a Title V legal base, and it has not opted into the draft Directive.

114. Officials subsequently provided us with a link<sup>118</sup> to the webcast of the JHA Council meeting in June 2013. The webcast confirms that Commissioner Viviane Reding stated, in French, that the Commission had chosen Article 325 TFEU as a legal base because that way the Directive would apply to the whole EU, which she regarded as very important. The Council’s Legal Adviser, responding in French, said that this approach to the choice of legal base was contrary to the case-law of the CJEU. He confirmed that the legal base depended on the subject matter and purpose of a measure, and the geographical extent was a consequence of the legal base and not a criterion for choosing it.

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<sup>114</sup> [Q 48](#); see also [Q 43](#)

<sup>115</sup> [Q 48](#)

<sup>116</sup> *Ibid.*

<sup>117</sup> Supplementary written evidence from the Home Office and Ministry of Justice ([OIA0012](#))

<sup>118</sup> <http://video.consilium.europa.eu/webcast.aspx?ticket=775-979-13017> [accessed 26 February 2015]. Commissioner Reding’s comments are made at two hours 13 minutes into the webcast.

*Draft Regulation relating to New Psychoactive Substances*

115. A second example given by the Government was the proposed Regulation relating to New Psychoactive Substances.<sup>119</sup> Previous legislation aimed at strengthening the EU's ability to tackle New Psychoactive Substances had been agreed under the pre-Lisbon equivalent of Title V TFEU. The Commission proposed this new Regulation under an Article 114 TFEU (internal market) legal base, which related to mitigating barriers to the internal market. However, "the measure was aimed primarily at a co-ordinated EU-wide approach to tackling illicit drugs, not barriers to trade". A large number of Member States agreed with the UK that the appropriate legal base was not Article 114 TFEU. The Ministers' letter states that "we have no specific evidence that the Commission's objective was to circumvent our opt-in, but, given the 2005 Decision had a clear JHA legal base, it is odd that the Commission proposed this measure under an Article 114 legal base and difficult to see what purpose this would serve beyond circumventing the application of our opt-in".

*Council Decision on the coordination of social security schemes in relation to the Agreement between the European Community and Switzerland on the free movement of persons*

116. The Ministers' letter explained that the Commission initially proposed the Decision in 2010 on the basis of Article 79(2)(b) TFEU (an immigration legal base under Title V TFEU). The UK did not opt in but offered to reach a separate agreement with Switzerland. Switzerland indicated that it could not accept this and the Commission withdrew the original proposal and produced a proposal with an Article 48 TFEU legal base (measures in the field of social security necessary to provide freedom of movement for workers). The Ministers explained that, "whilst the CJEU eventually ruled in favour of the use of Article 48 in this instance, it is clear to us that the legal base was amended because of concerns about the geographical scope of the measure".

**The views of the expert witnesses**

117. Although none of our expert witnesses was able to point to evidence of "legal-base shopping" by the Commission, some saw the reason for the Government's concern. Prof Peers said: "I do agree with the government's objective to avoid circumvention of the UK's opt out".<sup>120</sup> But when asked about whether the Commission had circumvented the UK's opt-in rights, he said:

"'Circumvention' is not necessarily the right word to use because reasonable people can have different approaches to the interpretation of what the legal bases are in treaties. This issue of social security, for instance, has run on for years about exactly what the legal base was for third-country nationals. I do not think that the Lisbon treaty really settles it very clearly or conclusively."

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<sup>119</sup> Proposal for a Regulation on new psychoactive substances, [COM\(2013\) 619](#)

<sup>120</sup> Written evidence from Professor Peers, para 2 ([OIA0002](#))

118. Prof Chalmers agreed that the term “legal-base shopping” was “a little too pejorative and tendentious”. He did not have any sense that the Commission was “opportunistically trying to destroy” the opt-in Protocol as part of “some grand scheme”.<sup>121</sup> But he did say that the Commission would “push the envelope and push at things that national Governments and the European Parliament might not be comfortable with in some circumstances”.<sup>122</sup> This was because the Commission would always “choose the legal base that best suited its interests.” He noted that the Commission’s right of initiative meant its choice of legal base was influential. In the context of international agreements he said the Commission:

“Traditionally likes big general bases, such as development, that get maximum leverage *vis-à-vis* non-EU states and give a sweeping mandate, so sometimes it will push the envelope. Sometimes an agreement is made and then the Council will challenge it. That is the push and pull.”<sup>123</sup>

119. Dr Bradshaw said that the Law Society had no insight into the Commission’s thinking, but noted that the choice of legal basis was “a matter of profound disagreement on occasion, not just between the EU institutions and the member states, but also within and among the EU institutions.”<sup>124</sup>

120. Prof Cremona agreed that it was difficult to second guess what the Commission’s motives were, but she was sure that there was no basis from the cases decided by the CJEU for concluding that the Commission was doing “anything other than following standard legal basis arguments”.<sup>125</sup> She noted that sometimes these arguments (that a Title V legal base was not necessary) were supported by the UK, for example in the *Mauritius* case.<sup>126</sup> She also cited the signature of the EU Association Agreement with Ukraine as an example of where a Title V legal base was included.<sup>127</sup>

*Further written evidence in response to the Home and Justice Secretaries letter of 21 January 2014*

121. We asked the expert witnesses whether they wanted to submit further written evidence in the light of the Government’s letter of 21 January. Profs Cremona, Chalmers and Barrett submitted supplementary evidence. Prof Cremona questioned the accuracy of the Government’s explanation of the negotiations leading to the adoption of the Council Decision on the EC-Switzerland Free Movement Agreement. She concluded from the record of the negotiations that the Council, rather than the Commission, proposed the Title V legal base, and that the Swiss had then refused to conclude a separate agreement with the UK.

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<sup>121</sup> [Q 38](#)

<sup>122</sup> *Ibid.*

<sup>123</sup> [Q 36](#)

<sup>124</sup> [Q 17](#)

<sup>125</sup> [Q 27](#)

<sup>126</sup> C-658/11

<sup>127</sup> [Q 27](#)



122. Prof Chalmers also questioned the Government's claim that the Commission manipulated the legal base in the negotiations on the EC-Switzerland Agreement:

"I take a very dim view of this argument being put forward without the Government disclosing whether it offered to opt-in if the measure was based on Article 79 TFEU, and whether this was refused. If no such offer was made, it is not right to claim that the Commission was being manipulative. It initially did what the British Government wanted. The British Government then obstructed pan-Union agreement even though there was the possibility of doing this on the basis of Title V. Then, without disclosing this context, an allegation of *male fide* is made by it against a party (the Commission) whose position is upheld by the Court."

123. He thought the draft Regulation relating to New Psychoactive Substances could legitimately be based on Article 114 TFEU. Accordingly, he saw "no evidence, therefore, of Commission manipulation".<sup>128</sup>

*Mechanisms to address the Government's concerns*

124. Several expert witnesses stated that mechanisms existed to address the UK's concerns. According to Prof Barrett, the first were political; and if they proved unsuccessful, the second were legal.<sup>129</sup> Prof Peers agreed:

"The first recourse is political. You try to convince the rest of the Council to back the UK's view.<sup>130</sup> That is sometimes successful, as it was in the case of the road traffic offences directive, where the Parliament was ultimately also convinced. However, the recourse is also legal; ultimately, if the UK is not successful in convincing other countries to share its point of view, you may have to bring annulment actions at some point in the process."<sup>131</sup>

125. Moreover, Prof Peers thought that the Government's concerns about Commission circumvention were misdirected. Since the Commission could not take binding decisions, it was only the Council, in some cases with the consent of the European Parliament, which would be in a position to circumvent it.<sup>132</sup> He said in evidence: "I do not think that you can really talk about circumvention at the stage of a Commission proposal. In any event, when the Commission states its view, the Council and Parliament might not necessarily agree with that ... it is a bit premature to be terribly concerned about what the Commission believes when it first makes its proposal."<sup>133</sup>

126. **A distinction should be drawn between a Commission policy of circumventing the UK's opt-in rights, and one of choosing a legal base that the Commission believes best suits the EU's interests.**

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<sup>128</sup> Supplementary written evidence from Professor Chalmers ([OIA0015](#))

<sup>129</sup> [Q 8](#)

<sup>130</sup> The Council can amend a Commission proposal, but has to act by unanimity (Article 293 TFEU).

<sup>131</sup> [Q 8](#); see also [Q 6](#).

<sup>132</sup> Written evidence from Professor Peers, para 2 ([OIA0002](#))

<sup>133</sup> [Q 6](#)

127. **Choosing a legal base for an EU proposal is complex. It is, as a consequence, often disputed between the institutions in the course of negotiations, with recourse to the CJEU as final arbiter. Nevertheless, as a point of principle, we agree with the Council's legal service that geographical extent is a consequence of the legal base and not a criterion for choosing it.**
128. **The Government alleges that the Commission has actively pursued a policy of "legal base shopping", in order to undermine its opt-in rights. In one specific case—the draft PIF Directive—it has provided evidence that lends some support to this allegation, in respect of the former Commission.**
129. **With this partial exception, the Government's letter of 21 January provided no persuasive evidence of Commission circumvention of the UK's opt-in rights. There is certainly no evidence to support any allegation that such circumvention is systemic. Moreover, we note that in the specific case of the draft PIF Directive the Council accepted the Government's view and agreed to change the legal base for one in Title V. This is an example of the institutional check on the Commission's role as initiator working well.**
130. **We invite the new Commission to confirm that the legal base of any individual proposal should be determined by its subject matter and purpose, not its intended geographical scope; and that geographical scope is a consequence of the choice of legal base.**
131. **We recommend that the Government focus on addressing any concerns over the choice of legal base through the existing mechanisms in the legislative process, particularly within the Council. We note that, in addition to the PIF Directive, the UK succeeded in persuading the Council to add a Title V legal base to the EU Decision concluding the Partnership and Cooperation with the Philippines, and to the road traffic offence Directive.**



## **CHAPTER 7: IS THE CASE LAW OF THE CJEU UNDERMINING THE SCOPE OF THE OPT-IN PROTOCOL?**

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132. We summarise below the six recent CJEU judgments on, or relevant to, Title V and the application of the opt-in Protocol, and then consider the inferences the Government and expert witnesses drew from them.

### *Case C-431/11: UK v Council of the European Union (the EEA case)*<sup>134</sup>

#### *Facts*

133. The UK, supported by Ireland, sought the annulment of a Decision, adopted in the context of the European Economic Area (EEA) Agreement, which extended the EU's *acquis* on access to social security schemes to nationals of the three European Free Trade Association (EFTA) states (Iceland, Lichtenstein and Norway) lawfully resident in the EU, and to EU citizens lawfully resident in those EFTA states. It was adopted under Article 48 TFEU which provides for the adoption of "social security measures ... necessary to provide freedom of movement for workers". The UK argued that in defining the freedom of movement rights of legally resident third-country nationals the Decision related to the EU's common immigration policy and ought to have been adopted under Article 79 TFEU to which the UK's opt-in applies.
134. The Council argued that the contested Decision sought to extend the EU's *acquis* on social security systems to EFTA States, which was "indispensable" to the main objective of the EEA Agreement. This was aimed at guaranteeing those nationals effective freedom of movement within the EU. Accordingly, Article 48 TFEU was the appropriate legal basis.

#### *The CJEU's decision and reasoning*

135. In line with settled case law, the CJEU held that the choice of a legal basis must rest on "objective factors amenable to judicial review" such as the proposal's aim and content. In this case this included the fact that the EEA Agreement established a "special" and "privileged"<sup>135</sup> relationship between the EFTA States and the EU, which was designed to provide the "fullest possible realisation" of the EU's free movement principles within the EEA, "so that the internal market established within the European Union is extended to the EFTA States".<sup>136</sup> In addition, the CJEU pointed out that the contested Decision not only regulated the social rights of EFTA nationals but also EU citizens in the EFTA States. Without this legislation the free movement of persons could not be exercised within the EEA under the same conditions as those applying within the EU, which would undermine the purpose of the EEA Agreement. In these circumstances, the CJEU agreed with the Council that it was correct to adopt the Decision under Article 48 TFEU.

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<sup>134</sup> Judgment delivered on 26 September 2013.

<sup>135</sup> Para 49 of the judgment

<sup>136</sup> Para 50 of the judgment

136. The CJEU pointed out that legislation on the EU's common immigration policy aimed to ensure "the efficient management of migration flows, fair treatment of third-country nationals ... and the prevention of ... illegal immigration and trafficking in human beings".<sup>137</sup> These aims were "irreconcilable" with those of the Decision when viewed in the context of the EU's relationship with the EFTA States.

*Case C-137/12: European Commission and the European Parliament v the Council of the European Union (the conditional access services case)*<sup>138</sup>

*Facts*

137. The facts of this case turned on the application of the common commercial policy to the Council of Europe Convention on the legal protection of services based on, or consisting of, conditional access (the Convention).<sup>139</sup> A provision in the Convention stipulated that criminal penalties were required to enforce a prohibition in the Convention.

*The CJEU's decision and reasoning*

138. Of relevance to our inquiry were the CJEU's comments on the applicability of the opt-in Protocol to determining the legal base of the Council Decision allowing the EU to sign the Convention. The CJEU said that, contrary to the arguments of the Council, the opt-in Protocol "was not capable of having any effect whatsoever on the correct legal basis for the adoption of the Decision".<sup>140</sup> It confirmed that the legal basis of the measure, to be assessed according to the established case law of the CJEU, "determines the protocols to be applied, and not vice versa."<sup>141</sup>

*Case C-656/11: UK v Council of the European Union (the Swiss case)*<sup>142</sup>

*Facts*

139. The UK, supported by Ireland, sought the annulment of a Decision which sought to coordinate the social security schemes of the EU and Switzerland under the EC-Switzerland Free Movement Agreement. The background to the litigation is disputed, and is considered in the previous chapter.
140. The UK argued that Article 79 TFEU (an immigration legal base under Title V) ought to be the appropriate legal basis for the Decision because it concerned the rights of third-country nationals residing legally in the Member States. It argued that by not choosing this legal base the Council had denied the UK its rights under the opt-in Protocol. The UK also argued that Article 48 TFEU could not be extended to address third-country nationals or economically inactive persons.

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<sup>137</sup> Para 63 of the judgment

<sup>138</sup> Judgement delivered on 22 October 2013.

<sup>139</sup> These are services such as TV or radio broadcasts that require prior individual authorisation such as subscription, pay-per-view and/or signal decoders.

<sup>140</sup> Para 73 of the judgment

<sup>141</sup> Para 74 of the judgment

<sup>142</sup> Judgement delivered on 27 February 2014.

141. The Council said that the aim of the contested Decision was to extend the EU's *acquis* on the coordination of social security systems both to lawfully resident Swiss nationals in the EU and to EU nationals residing lawfully in the Swiss Confederation. The contested Decision was designed to implement the free movement of persons between the EU and the Swiss Confederation in the same way as it was implemented within the EU. As for the UK's opt-in, the Council argued that the exclusion of the UK (and potentially Ireland) from its scope could jeopardise the agreement's aims and, by introducing a lack of uniformity, undermine the EU's obligations to the Swiss Confederation.

*The CJEU's decision and reasoning*

142. In line with its established case law, the CJEU said that the choice of legal basis for EU measures must rest on objective factors amenable to judicial review including the proposal's aim and content, and restated the significance of the predominant purpose test. The CJEU added that the operation of the UK's opt-in Protocol was not relevant to the question of legal base.

143. In rejecting the UK's application, the CJEU noted that, according to its preamble, the aim of the EC-Switzerland Free Movement Agreement was to bring about the free movement of persons between them on the basis of relevant EU law. Both the Agreement and the contested Decision were intended to benefit Swiss nationals in the EU, and EU nationals in Switzerland. The contested Decision's aim was to modernise, clarify and simplify the rules on the coordination of social security systems, "in order to preserve a coherent and correct application of the legal acts of the European Union and to avoid administrative and ... legal difficulties".<sup>143</sup> In the CJEU's view, it was "properly" adopted under Article 48 TFEU.<sup>144</sup>

*Case C-43/12: European Commission v the European Parliament and the Council of the European Union (the road traffic offences case)*<sup>145</sup>

*Facts*

144. The Commission sought the annulment of a Directive designed to facilitate the cross-border exchange of information on road traffic offences<sup>146</sup> and the cross-border enforcement of sanctions for such conduct, on the grounds that it was adopted under the wrong legal basis. The Directive was proposed by the Commission under the EU's transport competence as a measure to improve transport safety; but it was adopted by the Council in October 2011 as a JHA police cooperation measure under Title V (Article 87(2) TFEU).

145. The Commission argued that Article 87(2) TFEU applied to police cooperation designed to address the prevention, detection and investigation of "criminal offences". The aim of the contested Directive, however, was to

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<sup>143</sup> Para 62 of the judgment

<sup>144</sup> Para 64 of the judgment

<sup>145</sup> Judgment delivered on 6 May 2014.

<sup>146</sup> The offences were: speeding, non-use of a seat belt, failure to stop at a red traffic light, drink driving, driving under the influence of drugs, failure to wear a safety helmet, use of a forbidden lane, and the use of a mobile phone or communication device while driving.

organise the exchange of information between the Member States on traffic offences; it did not oblige the Member States to harmonise their approaches to these matters nor were they obliged to criminalise the conduct. In the Commission's view, the goal and the content of the contested Directive fell within the EU's transport policy.

146. The Council, supported by a number of Member States including the UK and Ireland, argued that the Directive's aim was to protect legal interests such as life, physical and mental health and property, matters which were usually protected by the criminal law. In addition, given that the aim of the Directive was to promote road safety by deterring behaviour regarded as dangerous, the Directive dealt with criminal matters that could not be classified as road safety norms within the meaning of the EU's transport policy.

*The CJEU's decision and reasoning*

147. The CJEU repeated that the choice of legal basis must rest on objective factors, such as the proposal's aim and content that are amenable to judicial review, and reiterated the importance of the predominant purpose test.
148. In upholding the Commission's application the CJEU noted that the Directive's preamble said that its aim was to "ensure a high level of protection for all road users in the Union by facilitating the cross-border exchange of information on road safety related traffic offences".<sup>147</sup> The Directive pursued this by introducing a cross-border system for the exchange of vehicle registration information in order to assist with identifying people who have committed the traffic offences listed in the Directive; this was pursued regardless of whether those offences were criminal or administrative. The Directive's approach was based on the fact that financial sanctions for road traffic offences were often not enforced in the Member States if those offences are committed by a vehicle registered in another Member State. In the CJEU's view, the Directive's aim was clearly to improve road safety which was a "prime objective" of the EU's transport policy. It therefore annulled the Directive. The Commission subsequently proposed a replacement Directive with a transport legal base.

*Case C-377/12: European Commission v the Council of the European Union (the Philippines case)*<sup>148</sup>

*Facts*

149. The Commission sought the annulment of the Council Decision which provided for the signing of a Framework Agreement on Partnership and Cooperation between the EU and the Philippines. The Commission proposed the Decision under Article 207 TFEU, relating to the common commercial policy, and Article 209 TFEU, on development cooperation. When the Council unanimously adopted the contested Decision, in September 2010, it added a range of additional legal bases, including Article 79(3) TFEU, a Title V legal base which provides for the conclusion of "agreements with third countries for the readmission to their countries of

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<sup>147</sup> Para 32 of the judgment

<sup>148</sup> Judgment delivered on 11 June 2014

origin ... of third-country nationals who do not ... fulfil the conditions for entry ... or residence in the territory of one Member State". These are known as "readmission agreements".

150. The Commission challenged the addition of these legal bases, arguing that they were unnecessary because all the provisions of the Agreement, save for the part on trade and investment, were designed to pursue the development of the Philippines and did not impose extensive obligations distinct from this development goal.
151. The Council, supported by a number of Member States including the UK and Ireland, argued that partnership and cooperation agreements sought to establish, between the signatories, a "comprehensive relationship covering many different areas of cooperation".<sup>149</sup> As such, no particular area of the Agreement could be established as "predominant", and a "specific or substantial commitment requires the addition of a corresponding legal basis".<sup>150</sup> In relation to the section of the Agreement addressing readmission, the Council argued that this imposed a clear legal commitment that necessitated a specific legal base, namely Article 79(3) TFEU.

*The CJEU's decision and reasoning*

152. The CJEU repeated the significance of analysing the aim and content of the contested legislation and the predominant purpose test; adding, that where it was established that a measure pursues several objectives the "measure must be founded on the various corresponding" legal bases unless their inclusion led to incompatible legislative procedures.<sup>151</sup> In the CJEU's view, the Commission's application rested on the question whether the sections of the Agreement covering readmission, environmental and transport cooperation fell within development cooperation or went wider, requiring specific legal bases.
153. In upholding the Commission's application, the CJEU said that the primary objective of the EU's development policy was the long term eradication of poverty by fostering sustainable economic, social and environmental development in developing countries. In order to qualify as a development measure, the Agreement must pursue these goals. While development agreements will include clauses covering various different matters this "cannot alter the characterisation of the agreement, which must be determined having regard to its essential object and not in terms of individual clauses".<sup>152</sup>
154. The preamble of the agreement and its contents illustrated that the intention of the contracting parties was to promote sustainable development and the eradication of poverty. The CJEU examined whether the provisions governing readmission and the environment also contributed to the objective of development cooperation. The CJEU noted that both migration and the environment were among the many development activities envisaged by the Millennium Development Goals and that the contents of the Agreement

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<sup>149</sup> Para 24 of the judgment

<sup>150</sup> Para 25 of the judgment

<sup>151</sup> Para 34 of the judgment

<sup>152</sup> Para 39 of the judgment

addressing these issues reflected this. Regarding readmission, the CJEU pointed out that the Agreement linked migration to development, and that it did not “prescribe in concrete terms the manner in which cooperation concerning readmission ... is to be implemented”. This fact was reinforced by the requirement that the parties conclude a readmission agreement “very soon”.<sup>153</sup>

*Case C-81/13: UK v The Council of the European Union (the Turkey case)*<sup>154</sup>

*Facts*

155. The UK, supported by Ireland, sought the annulment of the Council Decision on the position to be taken on behalf of the EU with regard to the coordination of social security systems between the EU and Turkey. The contested Decision was adopted under Article 48 TFEU governing the adoption of “social security measures ... necessary to provide freedom of movement for workers”. The contested Decision sought to repeal and replace an existing measure covering the application of Member State social security schemes to Turkish workers and their families (Council Decision No 3/80) which, in turn, gave effect to the aspects of the EU-Turkey Association Agreement, signed in 1963, dealing with the free movement of workers.
156. The UK Government argued that the proposed legal basis was incorrect because it ought to be applied to situations governing the application of free movement principles to nationals of EU Member States, and not, as in this case to third-country nationals. In the UK’s view, the Decision ought to have been adopted under Article 79(2)9(b) of Title V TFEU, the common immigration policy, which empowered the EU to adopt legislation defining the freedom of movement rights of legally resident third-country nationals. The UK distinguished this case from the Swiss case in that the aim of this proposal was not to extend the provisions of the single market to Turkey; rather, it was a measure “limited to updating the limited rights presently enjoyed by Turkish workers” under existing EU laws (Decision No. 3/80).<sup>155</sup>
157. The Council, supported by the Commission, disagreed, pointing out that the aim of the contested Decision was not the development of a common immigration policy, but securing freedom of movement for workers by providing for the partial coordination of social security systems between the EU and Turkey.

*The CJEU’s decision and reasoning*

158. The CJEU repeated its settled case law that the choice of legal base must rest on objective factors that are amenable to judicial review, including the aim and content of the proposal, and that the application of the UK’s opt-in has no bearing on the matter.
159. In dismissing the UK’s application, the CJEU acknowledged that Article 79 TFEU empowered the EU to adopt measures defining the free movement

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<sup>153</sup> Para 58 of the judgment

<sup>154</sup> Judgment delivered on 18 December 2014.

<sup>155</sup> Para 24 of the judgment



rights of third-country nationals, but its purpose lay in the prevention of illegal immigration and the trafficking in human beings. In contrast, the EU's relationship with Turkey was aimed at securing the progressive free movement of workers between them, and the contested Decision constituted a further step in that relationship. In this context, it was clear to the CJEU that the predominant purpose of the contested Decision was not the pursuit of a common immigration policy designed to ensure effective management of migration flows.

160. The CJEU did recognise the distinction between the EU-Swiss relationship dealt with in case C-656/11, and accepted that the purpose of the contested Decision was not to extend the principles of the single market to Turkey. It agreed that Article 48 TFEU could not be relied upon as the sole legal basis. Instead, the CJEU concluded that the contested Decision required two legal bases: Article 48 TFEU, in conjunction with Article 217 TFEU, which empowers the Union to conclude agreements with Third-Countries involving reciprocal rights.
161. To that extent, the CJEU decided that the legal basis for the contested Decision was incorrect, inasmuch as Article 217 TFEU was omitted.

#### **The Government's views on Title V case-law**

162. The Government stated that these judgments did “not have a significant impact” on its opt-in policy,<sup>156</sup> because none of the judgments had addressed the UK's principal argument on the application of the opt-in Protocol to the determination of the legal base of a measure with JHA content.<sup>157</sup>
163. The Government commented in more detail on four of the cases in its written evidence:<sup>158</sup>
- *The conditional access services case*: the UK did not argue in favour of the citation of a JHA legal base, nor did it argue that the existence of the opt-in Protocol meant that CJEU had to approach how it determined legal base differently. This was because the legal challenge related to whether a single market or common commercial policy legal base should have been used; the opt-in was largely irrelevant to this issue. The CJEU's conclusion that Protocol 21 was not relevant did not come as a surprise to the Government. The question of whether JHA content could be incidental to a measure was not a material part of the CJEU's judgment.
  - *The EEA and Swiss cases*: in both cases, the UK challenged the legal base cited for the Decisions agreeing a Council position on an amendment to social security provisions in the EEA and Swiss Agreements. The CJEU was asked to consider whether the Decisions were rightly adopted under an Article 48 TFEU legal base (free movement of workers) or whether they should have instead been adopted under an Article 79(2)(b) TFEU legal base (immigration policy). The CJEU decided that the Decisions were rightly adopted under Article 48 TFEU as they were aimed at

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<sup>156</sup> Written evidence from the Home Office and Ministry of Justice, para 38 (OIA0009)

<sup>157</sup> *Ibid.*; see also Q 49 (Teresa May MP).

<sup>158</sup> Written evidence from the Home Office and Ministry of Justice, paras 39–55 (OIA0009)



ensuring the free movement of workers between the EU and EFTA states and the EU and Switzerland, based on the close association between the EU and those states. The Government said that both cases related “specifically to whether the measures contained JHA content”, and that the CJEU’s judgments were “narrowly focused on the specific issues of the cases and did not consider in detail wider issues relating to the application of the UK’s JHA opt-in”.<sup>159</sup>

- *The road traffic offences case*: the Council adopted the Directive on a legal basis under Title V TFEU (Article 87(2) TFEU on police co-operation) rather than the transport policy legal base proposed by the Commission. The UK did not opt into this measure. The Government said the CJEU’s reasoning in this case “is again open to differing interpretations. The CJEU’s conclusion focused mainly on the ultimate aim of the measure, which was transport policy, and less on the content supporting that aim, “which was clearly JHA”. Again, the CJEU did not properly engage with the UK’s arguments that the existence of the opt-in Protocol meant that it had to approach how it determined legal base differently. This was because, in the CJEU’s view, this was a road transport rather than a JHA measure.

164. Of the *Philippines* case the Home Secretary said the Government did not consider that the judgment could be applied more widely to other agreements with third countries where there was no overarching development co-operation aim. So for other types of third-country agreements the Government would continue to assert the opt-in to JHA content. Even where an agreement promotes development co-operation, the Government believed that the opt-in could also apply to agreements that had more extensive JHA content than the Philippines agreement did.<sup>160</sup>

165. John Ward, of the Legal Adviser’s Branch of the Home Office, said of the Turkey case:

“We do not believe that that judgment takes us any further forward ... because the court decided, as it did in the EEA/Swiss agreement ... that there is no JHA content ... so the court has again definitively decided that it does not want to deal with squarely and head-on the issue of the nature of incidental JHA content. It is avoiding the issue, in our view because it knows that ultimately our interpretation is going to be the right one.”<sup>161</sup>

166. The Justice Secretary seemed less convinced that the CJEU would ultimately uphold the Government’s interpretation. When asked whether he thought there were any grounds for thinking the CJEU would change its approach, he replied: “Who knows? The court has not really had to face up to this particular issue.”<sup>162</sup>

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<sup>159</sup> Written evidence from the Home Office and Ministry of Justice, para 42 ([OIA0009](#))

<sup>160</sup> [Q 41](#)

<sup>161</sup> [Q 44](#)

<sup>162</sup> [Q 45](#)

### The views of the expert witnesses on Title V case-law

167. The views of expert witnesses differed on whether the CJEU could be said to be undermining the opt-in Protocol by restrictively interpreting the scope of Title V.
168. On one hand Prof Cremona said that the CJEU's approach in these cases was one that had been "adopted consistently by the court over many, many years, both for internal measures and for international agreements." It was "not something especially crafted for the JHA and the protocol."<sup>163</sup>
169. She said that the CJEU's approach to legal base was also very much dependent on context. For example, its approach to determining the legal base of an internal EU measure, such as the road traffic offences Directive, was different from its approach to determine the legal base of an international agreement:
- "These two contexts operate in different ways. In the second type of context, as in the *Philippines*, the approach of the court, the predominant purpose test, will have the effect of favouring broad expressed legal bases—trade, development, Common Foreign and Security Policy, et cetera—over secondary legal bases. This means that Title V, the JHA, tends to be used as a legal basis only for those international agreements that are clearly sectoral in nature, such as a private international law agreement or a readmission agreement, and not for agreements that cover a multitude of different clauses and different provisions."<sup>164</sup>
170. Prof Cremona thought this approach to determining the legal basis of international agreements could be described as "somewhat reductionist", because "it forces the decision-maker to identify a predominant purpose and means that the complexity of an agreement is not reflected in the resulting choice ... it renders somewhat invisible the ancillary or secondary objective."<sup>165</sup>
171. Like Prof Cremona, Prof Barrett did not see reason to criticise the CJEU's approach to determining legal base in these judgments. He agreed that it favoured a single legal base where possible. He thought the CJEU's decision in the road traffic and *Philippines* cases could have gone either way, but in relation to all of them he did not think "there would be any doubt about the CJEU's sincerity on the conclusions that it reached"<sup>166</sup>
172. Prof Chalmers, on the other hand, was critical of the CJEU, and sympathised with the Government's concerns:
- "Through a series of judgments that allow the EU to engage in international agreements across almost all areas of migration, asylum and humanitarian policy, you have the possibility that the safeguards for the British Government position that were negotiated under Protocol 21 have been largely eroded. I think that is the political context that worries

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<sup>163</sup> [Q 27](#)

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> [Q 9](#)

them. I am sympathetic to that, and I think one can be sympathetic to that on the basis that this was negotiated by both previous Governments and this Government, and it is a long way from what was anticipated.”<sup>167</sup>

173. He found the distinction drawn by the CJEU between immigration and free movement policies in the EEA and Swiss cases “very ambiguous”,<sup>168</sup> concluding that the CJEU had restricted Article 79 TFEU, the immigration policy legal base, in an “unsatisfactory”<sup>169</sup> way.

174. Prof Chalmers agreed with Prof Cremona that “the development competencies and now the association competencies have been developed so widely that they can subsume Title V”.<sup>170</sup> On this basis he was critical of the CJEU’s reasoning in both the *Philippines* and *Turkey* cases, concluding that it had given the Commission “a *carte blanche*” in its interpretation of the scope of development and association competencies.<sup>171</sup>

175. Prof Peers’ opinion fell somewhere between those of Prof Cremona and Prof Chalmers: he thought four of the cases had been correctly decided; but that two, the road traffic offences and *Philippines* cases, had not been. On the EEA and Swiss cases he said:

“I have always thought that if you have an association agreement between the EU and a third country, the whole logic of the association agreement is that you are extending some aspects of the internal law of the European Union to the third country. If you are extending some aspects of the EU’s internal law to the third country, the legal bases to do that, if you are taking individual decisions, such as on social security, are those that relate to the internal policy measure. In this case it is social security, what is now Article 48 of the Treaty on the Functioning of the European Union. I would say that any association agreement, not just those with the particular features of the European Economic Area or Switzerland, such as the adoption of social security rules, needs the legal base of Article 48. Therefore, no opt-out applies. All member states are covered.”<sup>172</sup>

176. He noted that the concept of an association agreement had existed since the EU’s beginning, and that the UK signed up to it when it joined in 1973.

177. On the conditional access services case he thought the CJEU’s judgment of the scope of the common commercial policy power was a reasonable interpretation of the intention of the drafters of the Treaty of Lisbon to expand the scope of that policy.<sup>173</sup> He did not think a Title V legal base was required: “The mere fact that there is a brief mention of seizure and confiscation on a purely ancillary basis, backing up the main prohibitions of

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<sup>167</sup> [Q 34](#)

<sup>168</sup> [Q 36](#)

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> [Q 38](#)

<sup>172</sup> [Q 9](#)

<sup>173</sup> Written evidence from Professor Peers, para 17 ([OIA0002](#))

descrambling devices in the international treaty that was the subject of that case I do not think is enough to make it a criminal law measure as well as a commercial policy measure.”<sup>174</sup>

178. In the road traffic offences case he thought the CJEU was not correct to rule that a measure concerning the exchange of information on road traffic offences should only have a transport policy legal base, because the issue fell within the scope of either criminal law or administrative law depending on Member States’ different legal traditions. So there should have been two parallel measures, following the precedent set by the European Protection Order rules. As an alternative, a single measure could have been adopted including JHA and non-JHA legal bases (assuming that this was legally possible; the CJEU had not yet ruled on this issue), indicating clearly in the preamble which Member States were covered by which provisions.<sup>175</sup>
179. Finally, as regards the *Philippines* case he thought the CJEU was right to reject the Advocate-General’s argument that readmission issues fell within the scope of EU development policy simply because of a political link made between the two issues. The CJEU instead ruled that readmission issues fell within the scope of development policy, even if they contained legally binding obligations, as long as those obligations were not very specific. This ruling was not entirely convincing, because it failed also to consider whether the provisions in question contributed to the development of the country concerned, which was the core of the legal base:

“I cannot quite see how readmission treaties help the development of the third country concerned. It has to take its own citizens—and, perhaps, citizens of neither the EU nor that country—back on to its territory if they have lived there in transit. I cannot see how that helps their development. The mere fact that there is some EU legislation—EU soft law—that refers to readmission as part of the development process is not convincing. As the Court of Justice says in most of its case law, the mere fact that the EU has taken one approach in the past to the legal scope of its powers does not create a precedent to bind the Court of Justice in future.”<sup>176</sup>

180. Prof Basilien-Gainche agreed with Prof Peers that the CJEU’s reasoning in the road traffic offences and *Philippines* cases was unconvincing. She thought the CJEU’s approach to determining legal base was “defective”, because it required it to take a “formal and restrictive” approach to sensitive provisions in the EU Treaties, particularly JHA policies under Title V.
181. Dr Bradshaw stated that: “the distinction between ancillary and principal is very context-specific, and it is quite a difficult question to answer when you ask whether or not the court has reached the right conclusion, necessarily, in each case.”<sup>177</sup>

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<sup>174</sup> [Q 9](#)

<sup>175</sup> Written evidence from Professor Peers, para 15 ([OIA0002](#))

<sup>176</sup> [Q 9](#)

<sup>177</sup> [Q 21](#)

182. We were grateful for the insights that our experts provided into the CJEU's approach to determining the correct legal base in these six cases. We found Prof Cremona's explanation of the CJEU's reductionist approach to determining the legal base of an international agreement particularly helpful.
183. **We conclude that the CJEU's approach to determining legal base in the six cases relating to Title V does not differ from its established case law.**
184. **We agree with witnesses who have suggested that the CJEU's approach to determining the legal base of international agreements means that the complexity of an agreement is not always reflected in the resulting choice: it renders somewhat invisible the ancillary or secondary objective, including ancillary or secondary JHA objectives. We understand why this would cause concern to the Government.**
185. **Nevertheless, this does not, in our view, amount to a deliberate undermining of the safeguards in the opt-in Protocol. We note that for internal EU measures on JHA policy, the opt-in Protocol is a very effective safeguard for the UK.**
186. **The Government's view that these cases do not have an impact on its opt-in policy lacks credibility. We conclude that they have far-reaching implications for its policy.**

## CHAPTER 8: THE GOVERNMENT'S LITIGATION STRATEGY

### **The Government's views**

187. In the course of our evidence session with the Government it became clear that the CJEU's failure to address the Government's arguments on incidental JHA content was the basis of its litigation strategy. The Home Secretary put it this way:

“In none of the decisions on *Turkey*, the *Philippines*, road safety and Swiss social security conditional access did the court rule on whether JHA content alone could trigger the opt-in or whether incidental JHA content requires a JHA legal base. It has singularly so far avoided addressing what we feel is the fundamental issue of the correct interpretation of Protocol 21.”<sup>178</sup>

188. The Home Secretary thought that, in the light of the *Turkey* case, it was possible there were internal divisions within the CJEU on the Government's arguments on incidental JHA content:

“The fact that the court actually failed to deal with the question of the application of Protocol 21 in its most recent decision suggests that there is at least some potential disagreement about the operation of Protocol 21, and the case may not be as clear from its point of view as might be being assumed from the judgments that it has made so far.”<sup>179</sup>

189. In light of the CJEU's failure to address the UK's arguments, the Government explained that it would continue to bring challenges before a definitive judgment was delivered: “We can have an interesting academic debate about whether we are right or wrong, but ultimately we will not know for certain until the European Court of Justice rules, and at the moment it is not doing so.”<sup>180</sup> The Justice Secretary did “not expect the Government to change their policy”<sup>181</sup> until a “clear-cut” decision was delivered by the CJEU.

190. If the CJEU rejected the Government's argument, the consequences were likely to be political, and might lead to a desire for renegotiation:

“The Government would have to accept a ruling by the court, but that would generate a significant political issue that I suspect would form a significant part of any potential future renegotiation of the arrangements of our membership.”<sup>182</sup>

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<sup>178</sup> [Q 49](#)

<sup>179</sup> [Q 45](#)

<sup>180</sup> [Q 44](#) (Chris Grayling MP)

<sup>181</sup> [Q 44](#)

<sup>182</sup> [Q 43](#)(Chris Grayling MP); see also [QQ 46, 47, 49](#)

## The views of the expert witnesses

### *The likelihood of the recent case-law being reversed*

191. Our expert witnesses all drew the opposite conclusion to the Government: they thought the CJEU's case law on determining the legal base of a measure with JHA content was very unlikely to change. Prof Cremona said:

“I think it is highly unlikely that the court will depart from its approach to the protocol. In other words, its application is determined by legal basis and the protocol is no reason to alter the standard tests for legal basis, so it seems to me highly unlikely that this will alter. In that case, it does not mean that legal basis cannot be argued or litigated, but my advice would be to do that only in cases where you can make a plausible case that Title V is either the predominant or an equally important purpose or where the Title V obligations in an agreement are such as to justify a separate legal basis”.<sup>183</sup>

192. Prof Chalmers' view was similar:

“I have to be a little careful, but if I was betting money I would say that I would expect the current trajectory to remain stable. There are two reasons for that. The Court has cited itself on this, and once it has done that it is very unusual for it to reverse it. Also, a lot of that case law is quite recent. The Court has said three or four times, ‘This is what we have done’, and only one government are isolated on this—perhaps because it has a particular interest and situation because of Protocol 21—so I would expect the case law to remain pretty stable.”<sup>184</sup>

193. Prof Barrett agreed, and did not see it as at all likely that the case law would be reversed: “In so far as government policy involves pushing for the addition of Title V legal bases in EU negotiations on any measure it considers to have JHA content, I think it is really pursuing a lost cause.”<sup>185</sup>

194. The Law Societies of England and Wales and Scotland thought that the CJEU's case law on the opt-in had reached a point where it would not be reversed by further case law. They suggested the Government should reconsider its policy as a consequence.

### *The CJEU's failure to address the UK's arguments*

195. Three of our expert witnesses responded to the Government's claims that the CJEU had avoided the UK's arguments on ancillary JHA content. All thought they were without foundation. Prof Cremona, citing the *Philippines*, *Conditional Access Services* and *Turkey* cases, said: “It is difficult to see room for much further argument on whether Protocol 21 can apply to JHA content in a measure that does not cite a Title V legal basis.”<sup>186</sup>

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<sup>183</sup> [Q 29](#)

<sup>184</sup> [Q 40](#)

<sup>185</sup> [Q 10](#)

<sup>186</sup> Supplementary written evidence from Professor Cremona, para 3 ([OIA0013](#))



196. Prof Barrett said of the *Philippines* case: “I do not agree with the argument that ‘it did not give judgment on the UK’s arguments’. It is more accurate to say that it did not accept them.”
197. Prof Chalmers agreed too. He refuted the Government’s proposition that the *Turkey* judgment suggested there was a possible disagreement about the operation of the opt-in Protocol 21 within the CJEU. The consequences of that case for the Government’s opt-in policy were, in his view, plain. The CJEU, following the Opinion of Advocate General Kokott, decided that “Protocol No 21 as such is not capable of having any effect whatsoever on the question of the correct legal basis for the adoption of the contested decision.”<sup>187</sup>

*Advocate General Kokott’s Opinion in the Turkey case*

198. Given the Government’s claim, made repeatedly in oral evidence, that the CJEU had failed to address its arguments, we were surprised to see the following footnote to Advocate General Kokott’s Opinion in the *Turkey* case:

“In the present proceedings the United Kingdom and Ireland have expressly objected to such a strict interpretation of Protocol 21, but without putting forward any specific arguments to support their view.”<sup>188</sup>

*Inter-institutional agreement*

199. Prof Chalmers suggested that an inter-institutional agreement on the scope of Title V might have more success than the UK’s current litigation strategy:

“It might be possible to get some—this would require a lot of negotiations between the United Kingdom and the other states—inter-institutional agreement on some of the things that would be covered by association and development and some of the things that would not. That might be one way of doing it, so that you structure expectations about what the Commission can go off and negotiate or seek to negotiate with other states.”<sup>189</sup>

200. The Government agreed to look at this possibility further.<sup>190</sup>
201. **All our expert witnesses agreed that there is now a significant body of case law which confirms that the CJEU’s established approach to determining legal base applies to measures with possible Title V content. They also all agreed that it was highly unlikely that the CJEU would change its approach.**
202. **We agree. The CJEU’s judgments have rejected the UK’s arguments on determining the legal base of a measure which it considers to contain JHA content. They have done so directly in the *Conditional Access Services* and *Turkey* cases, and by clear implication in the *EEA*, *Swiss* and *Philippines* cases.**

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<sup>187</sup> C-81/13, para 42.

<sup>188</sup> *Ibid.*, Opinion of Advocate General Kokott of 17 July 2014, footnote 74

<sup>189</sup> [Q 39](#)

<sup>190</sup> [Q 50](#)

203. **The Government's claim that the CJEU has failed to address its arguments on incidental JHA content is hard to reconcile with these views, to the extent that we conclude it is politically, rather than legally, driven. Its suggestion that there may be internal divisions within the CJEU in favour of the UK's arguments is unsupported by any evidence.**
204. **We recommend that, in the future, the Government should challenge only those cases where it can make a plausible case that Title V is either the predominant or an equally important purpose, or where the Title V obligations in an agreement are such as to justify a separate legal basis.**
205. **We were surprised to read in a footnote to Advocate General Kokott's Opinion in the Turkey case that, although the UK expressly objected to a strict interpretation of the opt-in Protocol, it did not put forward "any specific arguments to support its view". If this is so, it would contradict the essence of the Government's evidence to us. We ask the Government whether it can explain why the Advocate General should have made this comment.**
206. **We recommend that the Government give careful consideration to the feasibility of an inter-institutional agreement on the scope of Title V, as suggested by Prof Chalmers. If Denmark decides to alter its opt-in arrangements to those of the UK and Ireland, three Member States will have an interest in an inter-institutional agreement on the scope of Title V.**
207. **Beyond that, the only available recourse for the Government to ensure the opt-in Protocol is applied as it wishes, is to seek to renegotiate it.**

## CHAPTER 9: THE THREE-MONTH PERIOD PROVIDED FOR IN THE OPT-IN PROTOCOL

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### The Government's view

208. The Government said that if a measure contained an exercise of JHA competence, the Government would assert the opt-in and take an opt-in decision, irrespective of whether a Title V legal base is cited. Therefore, the Government's view was that the three-month period provided for in the opt-in Protocol always commenced on the day of publication of the last language version of a proposal, regardless of the legal base. The later addition of a Title V legal base would confirm that applicability of the opt-in, but would not trigger (or re-trigger) it. It did not allow for a second opt-in decision to be taken.<sup>191</sup>

### The Commission's view

209. The Commission looked at this question in the context of international agreements, so excluding internal EU JHA measures. Article 3(1) of the opt-in Protocol provides that:

“The United Kingdom or Ireland can notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union, that it wishes to take part in the adoption and application of any such proposed measure, whereupon that State shall be entitled to do so.”

210. The Commission said that this provision, which appeared to have been drafted with the legislative process in mind, should be interpreted consistently with its wording and with the Protocol's rationale. In its “provisional view”, therefore, the three-month period started to run when the Commission proposed to the Council the first formal act with a view to concluding the agreement, which was usually the Council decision on the signature of the agreement. The three-month period should not apply to the decision authorising the opening of negotiations, as such a decision is preparatory to the “adoption and application” of the international agreement.
211. The Commission did not address the specific issue of concern to us, namely when the three-month period should commence if the Council adds a Title V legal base to an internal EU measure, as happened with the PIF Directive and the road traffic offences Directive.

### The views of the expert witnesses

212. Professor Peers thought that a strict interpretation of the opt-in Protocol would deprive it of its *effet utile*.<sup>192</sup> On this basis he concluded that a liberal

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<sup>191</sup> Written evidence from the Home Office and Ministry of Justice, para 56 ([OIA0009](#))

<sup>192</sup> A term developed by the CJEU meaning that, amongst several possible interpretations, the one will prevail which best guarantees the practical effect of existing EU law.

interpretation should be applied, with the effect that the three months should run from the date of political agreement in the Council. Prof Barrett agreed:

“If one takes the view that the protocol is engaged only when a Title V legal base exists, it makes sense that the three-month period should run from the time that the Title V legal base is added because otherwise one renders the protocol either partly or entirely ineffective in any case where a Title V legal base is added in the course of negotiations.”<sup>193</sup>

213. Prof Cremona<sup>194</sup> and Dr Bradshaw<sup>195</sup> agreed.

214. **In cases where the Council adds a Title V legal base to a proposal in the course of negotiations, we consider that the three-month period should run from the date the Council agrees to add the Title V legal base. We agree with the expert witnesses that the opt-in Protocol would otherwise be rendered either partly or entirely ineffective.**

215. **We recommend that the Government seek the agreement of the EU institutions to this proposal.**

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<sup>193</sup> [Q 11](#)

<sup>194</sup> [Q 30](#)

<sup>195</sup> Written evidence from the Law Society of England and Wales and the Law Society of Scotland, para 18 ([OIA0004](#))

## **SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS**

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### **The Government's cooperation with the inquiry**

1. Four months elapsed from the launch of the inquiry before the Home and Justice Secretaries submitted written evidence and confirmed their readiness to attend to give oral evidence. Until December the cooperation from their departments was such that we contemplated having to report without the benefit of government evidence. Seven months was an excessive amount of time to consider the judgment of the CJEU in the Philippines case. The complexity of that judgment in no way justified the Government's failure to cooperate with a select committee inquiry. We urge future Governments to ensure such practice does not reoccur. (Paragraph 21)

### **The Government's application of the opt-in Protocol 2010–2014**

2. The Government's annual opt-in reports demonstrate that the opt-in Protocol has provided the UK with a very effective safeguard against participating in legislation with a legal base in Title V, particularly internal EU legislation, when it does not consider it to be in the national interest to do so. (Paragraph 36)
3. The inclusion of legislation in annual opt-in reports which does not have a Title V legal base is misleading. Members of Parliament, or the public, seeking to understand the extent of the UK's opt-in rights on the basis of these reports, would be likely to conclude that they are far wider than, in reality, they are. We recommend that the Government include only legislation with a Title V legal base in future annual opt-in reports, or that it makes clear where it has asserted that the opt-in Protocol applies to legislation without such a legal base. (Paragraph 37)

### **The meaning to be given to "pursuant to" in Articles 1 and 2 of the opt-in Protocol**

4. None of the written or oral evidence we received in the course of this inquiry supported, or referred to others supporting, the Government's interpretation of "pursuant to". (Paragraph 58)
5. We note in particular that Ireland, which would seem to stand to gain the most were the UK's interpretation to be right, does not follow the UK's practice of asserting the application of the opt-in Protocol in the absence of a Title V legal base. (Paragraph 59)
6. We conclude that the phrase "pursuant to" has an accepted legal meaning, namely that a Title V legal base is required before the opt-in can be triggered. A link to a legal base is also necessary to define the source of the EU's power to act, and this is consistent with the principle of conferral. We agree that the opt-in Protocol, as with any Protocol to the EU Treaties or Treaty Article, has to be viewed objectively, rather than subjectively. (Paragraph 60)
7. The Government's interpretation leads to anomalous consequences that further undermine its argument. It automatically renders the position of Ireland and Denmark legally uncertain—are they presumed not to participate in a measure if the UK has asserted that it has JHA content? It is striking that

the very broad interpretation of “pursuant to”, on which the Government seeks a ruling from the CJEU, would give the EU wide powers to increase its competence in other fields. There is a potential irony to this to which the next Government should pay particular heed. (Paragraph 61)

8. It follows that we are unpersuaded by the Government’s interpretation of “pursuant to”. We found the argument that “pursuant to” in the opt-in Protocol should be singled out for different interpretation from elsewhere in the Treaties equally unconvincing. (Paragraph 62)
9. We recommend that the Government reconsider its interpretation of “pursuant to”. (Paragraph 63)

### **Determining the legal base of an EU measure with JHA content**

10. All the evidence we received contradicted the Government’s approach to determining the legal base of a measure with JHA content. We accept the weight of that evidence. (Paragraph 81)
11. We conclude, therefore, that the Government’s distinction between whole, partial, and incidental JHA measures is misconceived. Its effect is to make a clearly established legal principle inordinately complex. A whole or partial measure should have a Title V legal base in any event, as a matter of EU law, because the JHA content is a predominant purpose. An incidental JHA measure would bind the UK, because the absence of a Title V legal base would prevent it from opting out of it. (Paragraph 82)
12. The Government’s citing of the public’s claimed perception of the opt-in Protocol to support its analysis lacks legal credibility. (Paragraph 83)
13. We recommend that the Government reconsider its current approach to determining the legal base of a measure with JHA content. (Paragraph 84)

### **Legal certainty and loyal cooperation in the negotiation of international agreements with JHA content**

14. We accept there is a distinction between actual and potential legal uncertainty. But the potential of the Government’s policy to create real legal uncertainty is very considerable indeed. The unilateralism of the Government’s approach also raises serious questions about the UK’s acceptance of the uniform application of EU law, the defining trait of the rule of law in the European Union. We are concerned by this, and by the possible implications for the UK’s reputation as a negotiating partner among other Member States (Paragraph 97)
15. The Government’s policy is creating actual legal uncertainty for the purposes of parliamentary scrutiny, as the two examples in the introduction to this report show. This is particularly so when it decides a proposal contains JHA content after the initial three-month opt-in period has passed. We confirm our view that the enhanced opt-in procedures apply only to draft legislation that is either proposed with a Title V legal base, or to which a Title V legal base is added by the Council. We invite the Government to agree. (Paragraph 98)
16. We urge Government departments to inform us sooner when a Title V legal base is added by agreement of the Council. (Paragraph 99)

17. The Government's policy puts it at risk of breaching the duty of sincere cooperation, the importance of which was made clear by the CJEU in *Commission v Sweden*. We recommend the Government reconsider its opt-in policy in the light of the evidence we received, and that case. (Paragraph 106)

### **Are the UK's opt-in rights being undermined by the European Commission?**

18. A distinction should be drawn between a Commission policy of circumventing the UK's opt-in rights, and one of choosing a legal base that the Commission believes best suits the EU's interests. (Paragraph 126)
19. Choosing a legal base for an EU proposal is complex. It is, as a consequence, often disputed between the institutions in the course of negotiations, with recourse to the CJEU as final arbiter. Nevertheless, as a point of principle, we agree with the Council's legal service that geographical extent is a consequence of the legal base and not a criterion for choosing it. (Paragraph 127)
20. The Government alleges that the Commission has actively pursued a policy of "legal base shopping", in order to undermine its opt-in rights. In one specific case—the draft PIF Directive—it has provided evidence that lends some support to this allegation, in respect of the former Commission. (Paragraph 128)
21. With this partial exception, the Government's letter of 21 January provided no persuasive evidence of Commission circumvention of the UK's opt-in rights. There is certainly no evidence to support any allegation that such circumvention is systemic. Moreover, we note that in the specific case of the draft PIF Directive the Council accepted the Government's view and agreed to change the legal base for one in Title V. This is an example of the institutional check on the Commission's role as initiator working well. (Paragraph 129)
22. We invite the new Commission to confirm that the legal base of any individual proposal should be determined by its subject matter and purpose, not its intended geographical scope; and that geographical scope is a consequence of the choice of legal base. (Paragraph 130)
23. We recommend that the Government focus on addressing any concerns over the choice of legal base through the existing mechanisms in the legislative process, particularly within the Council. We note that, in addition to the PIF Directive, the UK succeeded in persuading the Council to add a Title V legal base to the EU Decision concluding the Partnership and Cooperation with the Philippines, and to the road traffic offence Directive. (Paragraph 131)

### **Is the case law of the ECJ undermining the scope of the opt-in Protocol?**

24. We conclude that the CJEU's approach to determining legal base in the six cases relating to Title V does not differ from its established case law. (Paragraph 183)
25. We agree with witnesses who have suggested that the CJEU's approach to determining the legal base of international agreements means that the complexity of an agreement is not always reflected in the resulting choice: it



renders somewhat invisible the ancillary or secondary objective, including ancillary or secondary JHA objectives. We understand why this would cause concern to the Government. (Paragraph 184)

26. Nevertheless, this does not, in our view, amount to a deliberate undermining of the safeguards in the opt-in Protocol. We note that for internal EU measures on JHA policy, the opt-in Protocol is a very effective safeguard for the UK. (Paragraph 185)
27. The Government's view that these cases do not have an impact on its opt-in policy lacks credibility. We conclude that they have far-reaching implications for its policy. (Paragraph 186)

### **The Government's litigation strategy**

28. All our expert witnesses agreed that there is now a significant body of case law which confirms that the CJEU's established approach to determining legal base applies to measures with possible Title V content. They also all agreed that it was highly unlikely that the CJEU would change its approach. (Paragraph 201)
29. We agree. The CJEU's judgments have rejected the UK's arguments on determining the legal base of a measure which it considers to contain JHA content. They have done so directly in the Conditional Access Services and Turkey cases, and by clear implication in the EEA, Swiss and Philippines cases. (Paragraph 202)
30. The Government's claim that the CJEU has failed to address its arguments on incidental JHA content is hard to reconcile with these views, to the extent that we conclude it is politically, rather than legally, driven. Its suggestion that there may be internal divisions within the CJEU in favour of the UK's arguments is unsupported by any evidence. (Paragraph 203)
31. We recommend that, in the future, the Government should challenge only those cases where it can make a plausible case that Title V is either the predominant or an equally important purpose, or where the Title V obligations in an agreement are such as to justify a separate legal basis. (Paragraph 204)
32. We were surprised to read in a footnote to Advocate General Kokott's Opinion in the Turkey case that, although the UK expressly objected to a strict interpretation of the opt-in Protocol, it did not put forward "any specific arguments to support its view". If this is so, it would contradict the essence of the Government's evidence to us. We ask the Government whether it can explain why the Advocate General should have made this comment. (Paragraph 205)
33. We recommend that the Government give careful consideration to the feasibility of an inter-institutional agreement on the scope of Title V, as suggested by Prof Chalmers. If Denmark decides to alter its opt-in arrangements to those of the UK and Ireland, three Member States will have an interest in an inter-institutional agreement on the scope of Title V. (Paragraph 206)

34. Beyond that, the only available recourse for the Government to ensure the opt-in Protocol is applied as it wishes, is to seek to renegotiate it. (Paragraph 207)

**When should the three-month period provided for in the opt-in Protocol run when a Title V legal base is added by the Council?**

35. In cases where the Council adds a Title V legal base to a proposal in the course of negotiations, we consider that the three-month period should run from the date the Council agrees to add the Title V legal base. We agree with the expert witnesses that the opt-in Protocol would otherwise be rendered either partly or entirely ineffective. (Paragraph 214)
36. We recommend that the Government seek the agreement of the EU institutions to this proposal. (Paragraph 215)

## APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

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### Members

Lord Anderson of Swansea  
 Lord Blair of Boughton  
 Baroness Corston (Chairman until 11 November 2014)  
 Lord Dykes  
 Baroness Eccles of Moulton  
 Viscount Eccles  
 Lord Elystan-Morgan  
 Lord Hodgson of Astley Abbotts  
 Baroness Liddell of Coatdyke  
 Baroness O'Loan  
 Baroness Quin (Chairman)  
 Lord Richard  
 Lord Stoneham of Droxford

### Declarations of interest

Lord Anderson of Swansea  
*No interest relevant to the subject matter of the report was declared*  
 Lord Blair of Boughton  
*No interest relevant to the subject matter of the report was declared*  
 Baroness Corston  
*No interest relevant to the subject matter of the report was declared*  
 Lord Dykes  
*No interest relevant to the subject matter of the report was declared*  
 Baroness Eccles of Moulton  
*No interest relevant to the subject matter of the report was declared*  
 Viscount Eccles  
*No interest relevant to the subject matter of the report was declared*  
 Lord Elystan-Morgan  
*No interest relevant to the subject matter of the report was declared*  
 Lord Hodgson of Astley Abbotts  
*Trustee of Fair Trials International*  
 Baroness Liddell of Coatdyke  
*No interest relevant to the subject matter of the report was declared*  
 Baroness O'Loan  
*No interest relevant to the subject matter of the report was declared*  
 Baroness Quin  
*No interest relevant to the subject matter of the report was declared*  
 Lord Richard  
*No interest relevant to the subject matter of the report was declared*  
 Lord Stoneham of Droxford  
*No interest relevant to the subject matter of the report was declared*

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

Lord Boswell of Aynho  
Earl of Caithness  
Lord Cameron of Dillington  
Lord Foulkes of Cumnock  
Lord Harrison  
Baroness Henig  
Lord Kerr of Kinlochard  
Lord MacLennan of Rogart  
Baroness O’Cathain  
Baroness Parminter  
Baroness Prashar  
Baroness Quin  
Baroness Scott of Needham Market  
Lord Tomlinson  
Lord Tugendhat  
Lord Wilson of Tillyorn

No interests relevant to the subject-matter of the report were declared by Members of the Committee.

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: LIST OF WITNESSES

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Evidence is published online at [www.parliament.uk/the-uks-opt-in-and-international-agreements](http://www.parliament.uk/the-uks-opt-in-and-international-agreements), and available for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with \*\* gave both oral evidence and written evidence. Those marked with \* gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

### Oral evidence in chronological order

**	Professor Gavin Barrett, Professor of European Constitutional Law, University College Dublin	<a href="#">QQ 1–11</a>
**	Professor Steve Peers, Law School, University of Essex	
*	Dr Anna Bradshaw, Member of the Law Society's EU Committee	<a href="#">QQ 12–22</a>
**	Professor Marise Cremona, Professor of European Law, European University Institute, Florence	<a href="#">QQ 23–30</a>
**	Professor Damian Chalmers, Professor of European Union Law, London School of Economics	<a href="#">QQ 31–40</a>
**	Rt. Hon. Theresa May, MP, Home Secretary	<a href="#">QQ 41–52</a>
**	Rt. Hon. Chris Grayling MP, Lord Chancellor and Secretary of State for Justice	
*	Charlotte Spencer, Deputy Director, International Directorate, Ministry of Justice	
*	John Ward, Head of JHA Team, Legal Advisers' Branch, Home Office	

### Alphabetical list of all witnesses

**	Professor Gavin Barrett, Professor of European Constitutional Law, University College Dublin (QQ 1–11)	<a href="#">OIA0014</a>
	Professor Marie-Laure Basilien-Gainche, Professor in Public Law, University Jean Moulin Lyon 3	<a href="#">OIA0005</a>
*	Dr Anna Bradshaw, Member of the Law Society's EU Committee (QQ 12–22)	
**	Professor Damian Chalmers, Professor of European Union Law, London School of Economics (QQ 31–40)	<a href="#">OIA0001</a> <a href="#">OIA0015</a>
**	Professor Marise Cremona, Professor of European Law, European University Institute, Florence (QQ 23–30)	<a href="#">OIA0008</a> <a href="#">OIA0013</a>

	European Commission	<a href="#"><u>OIA0010</u></a>
**	Rt. Hon. Chris Grayling MP, Lord Chancellor and Secretary of State for Justice (QQ 41–52)	<a href="#"><u>O1A0009</u></a> <a href="#"><u>O1A0012</u></a>
	Greek Ministry of Foreign Affairs	<a href="#"><u>OIA0006</u></a>
	Law Society of England and Wales and Law Society of Scotland	<a href="#"><u>OIA0004</u></a>
**	Rt. Hon. Theresa May, MP, Home Secretary (QQ 41–52)	<a href="#"><u>OIA0009</u></a> <a href="#"><u>OIA0012</u></a>
**	Professor Steve Peers, Law School, University of Essex (QQ 1–11)	<a href="#"><u>OIA0002</u></a>
*	Charlotte Spencer, Deputy Director, International Directorate, Ministry of Justice (QQ 41–52)	
	UK Independence Party	<a href="#"><u>OIA0003</u></a>
*	John Ward, Head of JHA Team, Legal Advisers' Branch, Home Office (QQ 41–52)	

### APPENDIX 3: CALL FOR EVIDENCE

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The House of Lords European Union Committee, chaired by Lord Boswell of Aynho, is launching an inquiry into the UK's opt-in policy and its application to international agreements. We invite you to contribute evidence to this inquiry. Written evidence is sought by Tuesday 30 September 2014. The inquiry will be conducted by the Justice, Institutions and Consumer Protection Sub-Committee, chaired by Baroness Corston.

#### Background

Protocol (No.21) of the Treaties on the Functioning of the European Union (TFEU) allows for the United Kingdom and Ireland to opt into any measure under Title V (which is in relation to the area of freedom, security and justice) before or after the measure has been adopted.

The European Union Committee has considered a large number of EU international agreements over the last few years where the Government has asserted that the opt-in Protocol applies to certain provisions within those agreements, despite a legal base in Title V TFEU not being cited in the enabling legislation.

The Committee has repeatedly questioned this interpretation of the opt-in Protocol. The principles of conferral of power, and of legal certainty, require EU legislation to state the legal base on which the EU has power to act. Citing the legal base reflects what has been agreed between the EU institutions to be the scope of the legislation; without it Member States could decide the scope of a provision unilaterally, based on a subjective view of its content, as the Government contends. This would lead to uncertainty and inconsistency in the application of EU law.

The Government has responded by explaining that it considers the opt-in Protocol to be engaged wherever a measure covers a matter that falls within Title V, but that this is not dependent on the citation of a Title V legal base. In other words, it is the content that matters, subjectively assessed, rather than the legal base.

The Government has continued to assert its right not to opt into provisions of international agreements based on their content, including unsuccessfully challenging two agreements over the last 12 months where a Title V legal was not added—C-431/11 on the EEA Agreement and C-656/11 on the EC-Switzerland Agreement on the Free Movement of Persons—before the Court of Justice. This has led to confusion about the domestic effect of the agreement in the UK, and about whether the UK Parliament's enhanced opt-in procedures apply.

The Committee believes that this is a timely opportunity to assess the Government's policy, and to seek the views of others on a disagreement that has largely been limited to the UK Government and Parliament.

Particular questions raised to which we invite you to respond are as follows (there is no need for individual submissions to deal with all of these issues):

- the consistency of the policy with Treaty provisions and general principles of EU law;



Is the UK Government's opt-in policy, most recently reflected in its letter to Lord Boswell of 3 June, a correct interpretation of Protocol (No.21)? (The letter of 3 June is available on the inquiry page of the Sub-Committee's website.)

- the view of the institutions and other Member States of the policy, particularly Ireland and Denmark;

Is the opt-in policy similarly applied in Ireland, or does Ireland accept that a legal base in Title V is necessary?

How do other Member States and the EU institutions view the UK's assertion that its opt-in rights can apply in the absence of a Title V legal base?

- the impact of the policy on other Member States;

Does the Government's assertion that its opt-in rights apply in the absence of a Title V agreement have an impact on the UK's credibility in the negotiation of the draft legislation in question, or rather are Member States untroubled by it?

- the consequences of the policy for legal certainty in international agreements;

What has been the impact of this policy, in terms of legal certainty in international agreements, since the adoption of the Treaty of Lisbon?

- the Government's litigation strategy;

Is the Government's opt-in policy sustainable in the light of the decisions of the Court of Justice in C-137/12, C-431/11 and C-656/11?

- the Court of Justice's interpretation of the scope of Title V TFEU; and

In each of the cases above, and also in cases C-43/12 and C-377/12, has the Court of Justice correctly interpreted the scope of Title V, or has its interpretation of the scope been too restrictive?

- lastly, on a question of procedure, if a Title V legal base is added in the course of negotiations, from when should the three-month period provided for in the opt-in Protocol run?

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