HM Government

Review of the Balance of Competences between the United Kingdom and the European Union

Police and Criminal Justice

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Contents

Executive Summary

This report examines the balance of competences between the European Union (EU) and the United Kingdom (UK) in the area of Police and Criminal Justice, and is jointly led by the Home Office and the Ministry of Justice. It is a reflection and analysis of the evidence submitted by practitioners, non-governmental organisations, Members of Parliament and other interested parties, either in writing or orally, as well as a literature review of relevant material. Where appropriate, the report sets out the current position agreed within the Coalition Government for handling this policy area in the EU. It does not predetermine or prejudge proposals that either Coalition party may make in the future for changes to the EU or about the appropriate balance of competences.

The report is structured as follows:

Chapter One looks at the history of EU competence in this area, and how it has developed over time, and how competence works today.

Chapter Two considers the impact of EU competence in this area, from the perspective of various actors, and looks at key issues and tensions as a result of EU competence.

Chapter Three considers future options and challenges.

This executive summary sets out the main points covered in this report.

In an increasingly globalised world, serious and organised crime and terrorism are also international in nature, and although this has been the case for some time, we are now faced with the likelihood that future developments will present new and evolving challenges.

Alongside this there has been an evolving series of international and multilateral frameworks for cooperation to address the transnational nature of the threats. The EU is one of those frameworks, alongside other bodies and organisations such as the United Nations, the Council of Europe, Interpol and bilateral arrangements with other countries.

Within the EU, Police and Criminal Justice (PCJ) cooperation is a relatively new area of competence. PCJ covers the area of business that involves the detection, investigation, prosecution and punishment of crime. It covers judicial cooperation measures, which is where assistance is requested and provided between different countries and can include activities such as extradition and the exchange of criminal records. PCJ measures also include those concerning police and customs investigations, which facilitate cooperation to ensure that law enforcement agencies can access and share information appropriately and work together with other Member States to combat crime. PCJ also includes the way in which offences are prosecuted, including minimum standards across all Member States in respect of procedural

fairness and the rights of defendants. Measures include, for example, enabling the transfer of prisoners from one Member State to another. PCJ is also involved in establishing minimum rules in criminal law in regard to serious crime, which would include terrorism and organised crime.

There are specific safeguards that apply to PCJ activity in the EU to reflect the particular sensitivity of EU competence in this field and how this impacts on national sovereignty. To reflect this, there are safeguards available to all Member States, to ensure that there are checks and balances on the exercise of EU competence in this area, such as an emergency brake to protect fundamental principles of criminal law. The UK also benefits from specific arrangements, such as those under Protocols 19 and 21 of the Treaties (discussed in paragraphs 1.28-1.33), which give the UK more flexibility to take account of the impact of EU action on the national interest and then decide the extent to which EU competence in this area should apply to the UK.

The report has been prepared on the basis of evidence received in response to the Call for Evidence on the Review of the Balance of Competences between the UK and the EU: Police and Criminal Justice.

The evidence submitted covered a broad range of topics. Some individuals or organisations focused on elements about which they hold a particular interest, whereas others responded more broadly. Some contributors provided submissions on topics which are out of scope of this review. In particular, a large amount of evidence that relates to measures subject to the UK's block opt-out under Protocol 36 to the Treaties ('the 2014 opt-out decision') was submitted. The 2014 opt-out decision was out of scope in the call for evidence as a result of, what were at the time, the ongoing negotiations on this matter (see the text box under 'Scope of this report' in the Introduction). Whilst that negotiation was completed on 1 December, it means this report does not address much of the pre-2009 legislative *acquis* in PCJ. Evidence received relating to this matter has therefore not been included, and this report draws only on the evidence received that was within scope of the Call for Evidence, as well as academic and other relevant literature.

The evidence shows that:

- The majority of respondents pointed to the benefits of practical co-operation mechanisms (such as the EU Organised Crime Policy Cycle).
- There is a broad consensus that more time is needed for the current legislation to be fully implemented and bedded down before consideration of any further legislative instruments.
- Views are split about whether the collapse from Third into First pillar was necessary or has been of benefit to this area. The European Parliament has an enhanced role as co-legislator while the overall responsibility to keep people safe is retained by governments. For some this raised issues of democratic accountability, while others considered the development positively as potentially providing balance in tensions between internal security and personal liberty.
- The 'opt-in' under Protocol 21 to the Treaties is seen as a positive tool, however opinions diverged on how and when it is best used. There were concerns, in particular from legal practitioners, that a decision not to opt in to new proposals had the potential to negatively impact the United Kingdom's ability to influence negotiations. However there was also evidence from stakeholders who felt that the ability of the UK to opt in on a case-by-case basis was beneficial, allowing the Government to, for example, consider the impact of proposals in light of our specific legal systems.

- Judicial and police cooperation benefit from both 'formal' and 'informal' arrangements resulting from EU action.
- Improving procedural standards across Member States was widely supported, however there was a lack of consensus regarding what, if any, role the EU has in delivering on this. Instruments based on mutual recognition require trust in the level of procedural standards in other Member States, but views were mixed as to whether EU legislation setting out such minimum procedural standards is the best vehicle for achieving this, or whether the aims could be achieved through inter-governmental agreements or non-legislative means.
- There is no appetite for standardising criminal law. Mutual recognition has helped to address issues raised by the differing penal codes and criminal justice systems in each Member State.
- Progress is needed to rebalance action in this area better to support victims of crime. Victims' groups in particular considered EU action to have been insufficiently focussed on areas key for them such as supporting victims and witnesses when engaging with Criminal Justice Systems (CJS) in other Member states.
- Emerging challenges include responding to the increasingly international nature of crime such as the evolving nature of the threat from foreign fighters, terrorists and serious and organised crime gangs who operate without respect for national or EU borders and increasing technological challenges, including cybercrime – which does not recognise physical borders. To tackle these challenges the Government need to ensure a genuine focus on practical cooperation is established, as well as finding ways to work more effectively with partners in EU Member States and in third countries.
- Further challenges include adapting to full European Court of Justice (ECJ) jurisdiction from 1 December 2014, and the effective implementation of existing legislation.

Introduction

This report is one of 32 reports being produced as part of the Balance of Competences Review. The Foreign Secretary launched the Review in Parliament on 12 July 2012, taking forward the Coalition commitment to examine the balance of competences between the UK and the European Union. It will provide an analysis of what the UK's membership of the EU means for the UK national interest. It aims to deepen public and Parliamentary understanding of the nature of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges. It has not been tasked with producing specific recommendations or looking at alternative models for Britain's overall relationship with the EU.

The review is broken down into a series of reports on specific areas of EU competence, spread over four semesters between 2012 and 2014. More information can be found on the review, including a timetable of reports to be published over the two years, at https://www.gov.uk/review-of-the-balance-of-competences.

For the purposes of this review, we are using a broad definition of competence. Put simply, competence in this context is about everything deriving from EU law that affects what happens in the UK. That means examining all the areas where the Treaties give the EU competence to act, including the provisions in the Treaties giving the EU Institutions the power to legislate, to adopt non-legislative acts, or to take any other sort of action. It also means examining areas where the Treaties apply directly to the Member States without needing any further action by the EU institutions.

Definition of EU Competence

The EU's competences are set out in the EU Treaties, which provide the basis for any actions the EU Institutions take. The EU can only act within the limits of the competences conferred on it by the Treaties, and where the Treaties do not confer competences on the EU they remain with the Member States.

There are different types of competence: exclusive, shared and supporting. Only the EU can act in areas where it has exclusive competence, such as the customs union and common commercial policy. In areas of shared competence, such as the single market, environment and energy, either the EU or the Member States may act, but the Member States may be prevented from acting once the EU has done so. In areas of supporting competence, such as culture, tourism and education, both the EU and the Member States may act, but action by the EU does not prevent the Member States from taking action of their own.

The EU must act in accordance with fundamental rights as set out in the Charter of Fundamental Rights (such as freedom of expression and non-discrimination) and with the principles of subsidiarity and proportionality. Under the principle of subsidiarity, where the EU does not have exclusive competence, it can only act if it is better placed than the Member States to do so because of the scale or effects of the proposed action. Under the principle of proportionality, the content and form of EU action must not exceed what is necessary to achieve the objectives of the EU Treaties.

Scope of this report

This review looks at the EU's competences in the field of police and judicial cooperation in criminal matters (also referred to as Police and Criminal Justice, or PCJ). PCJ formerly comprised the EU's 'Third Pillar' prior to the entry into force of the Lisbon Treaty, and is one of a number of areas of Justice and Home Affairs (JHA) policy which sit in Title V of the Treaty on the Functioning of the European Union (TFEU). The other aspects of Title V (immigration and asylum, and civil judicial cooperation) are covered in separate Balance of Competences Review reports.

This report focuses on measures adopted following the entry into force of the Lisbon Treaty in 2009. PCJ measures adopted prior to the Lisbon Treaty are subject to Article 10 to Protocol 36 to the Treaties (the 2014 opt-out Decision) and are not being considered as part of this review.

The 2014 opt-out decision

The Lisbon Treaty extended full ECJ jurisdiction and Commission enforcement powers to all pre-Lisbon legislation on police and judicial cooperation in criminal matters (see paragraphs 1.38-1.40). The UK negotiated a specific Protocol to the Treaties as a result of concerns that the measures had not been negotiated with ECJ jurisdiction in mind.

Under Article 10(4) of Protocol 36 to the Treaties, the UK was required to decide by 31 May 2014 whether or not it should continue to be bound by all PCJ measures which were adopted before the Lisbon Treaty entered into force, or whether the UK should exercise its right to opt out of them all. Protocol 36 also included provision for the UK to apply to rejoin individual measures.

On 24 July 2013, following votes in both Houses of Parliament, the Prime Minister wrote to the EU Council of Ministers exercising the UK's opt out of all pre-Lisbon PCJ measures. The Government has always been clear that, in exercising the UK's opt-out, it wanted to rejoin a smaller number of measures which give UK police and law enforcement agencies vital and practical help in the fight against crime. In July 2013 the Government published Command Paper 8671: *Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union* setting out a list of 35 measures on which it would commence discussions with the European Commission and other Member States to seek to rejoin under Article 10(5) of Protocol 36.[1]

On 9 July 2014, the Home Secretary updated Parliament on the progress of negotiations. The Home Secretary explained that the Government was very close to reaching 'in principle' agreement with the European Commission and other Member States to rejoin the 35 measures set out in Command Paper 8897: *Decision pursuant to Article 10(5) of Protocol 36 to The Treaty on the Functioning of the European Union* published on 3 July 2014, but that a small number of EU Member States had raised technical issues.[2] The last of these was resolved on 7 November 2014.

Both Houses of Parliament endorsed the Government's package of 35 measures in November 2014. On 20 November 2014, the Prime Minister formally notified the President of the Council of Ministers of the UK's wish to participate in 35 vital police and criminal justice measures in the national interest. Commission and Council Decisions permitting the UK's application to rejoin measures were adopted on 1 December 2014.

This report covers a number of subject areas which are linked to other reports being undertaken by the Government as part of the Balance of Competences Review. In particular: the borders and visas element of the Schengen agreements are covered in the Asylum and non-EU Migration report; the JHA opt-in (Protocols 19 and 21 to the Treaties) is also covered in the Asylum and non-EU Migration report and the Civil Judicial Cooperation report; customs cooperation under Title II (Article 33) of TFEU has been covered in the Free Movement of Goods report; financial crime is linked to the reports on Financial Services, the Free Movement of Capital, and the EU Budget; civil protection is covered in the Foreign Policy report; critical

1 HMG, '*Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union*', Column 8671 2013. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf, accessed on 25 November 2014.

2 HMG, '*Decision pursuant to Article 10(5) of Protocol 36 to The Treaty on the Functioning of the European Union*', July 2014 Cm 8897. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/326698/41670_Cm_8897_Accessible.pdf, accessed on 25 November 2014.

infrastructure has links to the Transport report; data protection is covered in the concurrent report on Information Rights; the ability of national Parliaments to issue a 'yellow card' (see paragraphs 1.44-1.47) is examined in more detail in the Subsidiarity and Proportionality review; processes to address crime threats and rule of law in EU candidate countries and accession states are covered in the EU Enlargement report; and the EU's framework on fundamental rights, including the Charter, has been considered as part of the Fundamental Rights report.

Engagement with interested parties

The analysis in this report draws on 30 pieces of evidence received in response to a Call for Evidence by the Home Office and the Ministry of Justice from 2 May 2014 to 24 July 2014. It also draws on notes of four workshops and two additional stakeholder meetings held during the Call for Evidence period. This report also draws on existing material, such as Parliamentary reports and an internal review of academic and other relevant literature. The report also takes account of relevant evidence submitted to other Balance of Competence reviews where issues relating to PCJ were raised, as well as information gathered during two EU conferences under the 2014 Italian Presidency.

This report does not draw on evidence submitted which relates to issues which are out of scope of this review, such as measures which were subject to the negotiations under Article 10 to Protocol 36 to the Treaties (the 2014 opt-in decision).

The Call for Evidence was distributed widely in the UK and in other EU Member States. Organisations and individuals with an interest in PCJ were encouraged to respond, including individuals or groups representing think tanks, academics, legal practitioners, and law enforcement agencies. Relevant Parliamentary committees, members of the European Parliament, government agencies, the European Commission, Europol, and Eurojust were also invited to contribute as were the administrations in Scotland, Wales and Northern Ireland, the Crown Dependencies and Gibraltar.

A programme of direct engagement was also undertaken. Four workshops were held to collect evidence, two in London, one in Brussels, and one in Edinburgh. These events were attended by over 50 individuals representing over 30 organisations. Several organisations were asked to publicise the Call for Evidence to their stakeholders and on their websites (over 1000 organisations or relevant individuals were directly contacted).

A list of those who submitted evidence can be found at Annex A, with details of those who participated in the various workshops at Annex B. A list of the additional literature and material considered as part of this report can be found at Annex C.

Chapter 1: Historical Development and Current State of Competence

Context

1.1 The need for effective cooperation in PCJ work has been brought sharply into focus and has evolved in response to events in Member States and the wider world, most notably the terrorist attacks in the USA (September 2001), Madrid (March 2004), and London (July 2005). More recently, the Arab Spring, the conflict in Syria, and the attack on the Jewish Museum in Brussels (May 2014) have focused minds on the growing threat from foreign fighters and the need to work more effectively with third countries to address cross-border threats and criminal networks.

1.2 In addition, governments and law enforcement agencies have also had to develop responses to other forms of cross-border crime, such as cyber crime, drugs and people trafficking being undertaken by transnational criminal gangs which operate across and without respect for national borders, and which continue to adapt presenting new and emerging threats.

Historical Development of Competence (Pre-Lisbon)

1.3 Following a number of intergovernmental meetings on terrorism in 1971 and 1972, in 1975 the UK proposed the establishment of a special working group to combat terrorism in the then European Community. This group became known as the TREVI group, and its creation marked the first steps in security and justice cooperation within the EU. The TREVI group was an intergovernmental network which operated outside the European Institutions, and was composed of JHA Ministers of the then 12 Member States.

1.4 It was not until nearly two decades later that the EU acquired competence in the field of JHA, through the conclusion of the Maastricht Treaty in 1992. Prior to the Maastricht Treaty, formal cooperation in PCJ matters between Member States largely existed under Council of Europe Conventions, for example the 1957 Extradition and 1959 Mutual Legal Assistance (MLA) Conventions. While many Member States had ratified and were operating one or both of these Conventions, they were not EU agreements. In addition to these international Conventions, bilateral Treaties between Member States were also in place.

1.5 Also during this period, a number of Member States decided to facilitate easier free movement amongst themselves. Before the First World War people could move easily between different European States, but after 1918 travel restrictions became common. The Schengen Agreement of 1985 was an attempt by the countries that joined it to create once again a passport-free travel area in Europe.

The Schengen Agreements

The Schengen Agreement of 1985 and the 1990 Convention that implements it are now collectively known as the Schengen *Acquis*.

Originally, five of the then 10 Member States (Belgium, France, Luxembourg, the Netherlands and West Germany) agreed to lift border controls amongst themselves, creating an area of unrestricted travel known as the Schengen Area. Over time it expanded to include nearly every Member State.[1]

The UK chose not to join the borders elements of Schengen when it was incorporated into the EU law under the Amsterdam Treaty as it wanted to maintain control of its own borders.

> For an island [...] frontier controls are the best and least intrusive way to prevent illegal immigration. For partners with extensive and permeable land borders things might look different. They rely on identity cards, residence permits, registration with the police, and so on to maintain internal security.
>
> Rt. Hon. Malcolm Rifkind MP, the then Foreign Secretary
> House of Commons: Column 434, 12 Dec 1996.

Ireland also chose not to join Schengen. The UK and Ireland have a separate Common Travel Area which allows for passport-free travel for their citizens between them and Jersey, Guernsey and the Isle of Man (which are outside the EU).

The Schengen *Acquis* was consequently integrated into the framework of the EU by the 1997 Amsterdam Treaty. It now also extends to Iceland, Liechtenstein, Norway and Switzerland.[2]

The Schengen *Acquis* contains policing and judicial cooperation measures, aimed at compensating for the loss of border controls through facilitating cross-border cooperation between the law enforcement and judicial authorities within the Schengen area. These include provisions on the Schengen Information System (a measure subject to the 2014 opt-out decision which enables all participating states to share real-time information on persons and objects of interest to law enforcement via a series of "Alerts"), cross-border surveillance and hot pursuit, Mutual Legal Assistance (MLA) in criminal matters (see paragraph 2.46) and combating drug trafficking.

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1 Italy signed the agreements on 27 November 1990, Spain and Portugal joined on 25 June 1991, Greece followed on 6 November 1992, then Austria on 28 April 1995 and Denmark, Finland and Sweden on 19 December 1996. The Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia joined on 21 December 2007 and the associated country Switzerland on 12 December 2008. Bulgaria, Cyprus and Romania are not yet fully-fledged members of the Schengen area; border controls between them and the Schengen area are maintained until the EU Council decides that the conditions for abolishing internal border controls have been met.

2 Iceland, Norway and the EU signed an agreement on Iceland's and Norway's association with the implementation, application and development of the Schengen *acquis* on 18 May 1999, which was followed by further agreements. Switzerland joined on 12 December 2008. A protocol on Liechtenstein's participation in the Schengen area was signed on 28 February 2008.

The Council of the European Union ("the Council") agreed that the UK could participate in the majority of the police and judicial cooperation elements of the Schengen *Acquis* in 2000 (Council Decision 2000/365/EC).[3] This did not affect UK's retention of border controls.

Prior to the entry into force of the Lisbon Treaty on 1 December 2009, the UK was bound by any Schengen legislation which built upon the part of the Schengen *Acquis* in which it participated. As a result the UK secured amendments during the negotiation of the Lisbon Treaty to the Schengen Protocol so that it could choose to opt out of any new proposals building on that part of Schengen in which it participates. This was part of the then Government's position that the UK should be able to choose whether to be bound by any new JHA measures post-Lisbon.

1.6 Customs cooperation between Member States also took place prior to the adoption of the Maastricht Treaty. For example, customs cooperation was intrinsic to the creation of a customs union in the 1957 European Economic Community Treaty, and on 23 January 1974 the UK acceded to the original 1967 Naples Convention between the Member States on the provision of mutual assistance by their customs authorities.

The Maastricht Treaty (1992)

1.7 In the negotiations leading up to the Maastricht Treaty, some Member States opposed the addition of powers in JHA and Common Foreign and Security Policy (CFSP) to the then European Community, as they considered they were too sensitive to national sovereignty, and believed that these matters were better handled inter-governmentally.

1.8 As a result, these additional matters were not included in the pre-existing structures that governed the European Community; but were added in the form of two further 'pillars'. The ability of the EU to act in these areas was limited.

Figure 1: JHA in the Three Pillars 1993-1999

The European Union

Pillar One	Pillar Two	Pillar Three
TEC (1957) European Communities	TEU (1992) Common Foreign and Security Policy (CFSP)	TEU (1992) Provisions on cooperation in the field of JHA
No JHA measures • Commission infraction powers • Full ECJ jurisdiction		**All JHA measures** • No Commission infraction powers • No general ECJ jurisdiction

[3] European Council, *Council Decision Concerning the Request of the United Kingdom of Great Britain and Northern Ireland to Take part in Some of the Provisions of the Schengen acquis* (2000/365/EC). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000D0365:EN:HTML, accessed on 1 October 2014.

1.9 Specifically, the 1992 Maastricht Treaty established JHA as the third of the EU's 'three pillars' (see Figure 1) and provided for Member States to "cooperate" under this pillar in a number of areas including asylum, immigration, border controls, civil and criminal judicial cooperation, customs cooperation, and police cooperation. Cooperation functioned largely through the Council, with the Commission and European Parliament having very limited involvement. This approach was deemed to strike an appropriate balance between recognising a growing appetite for greater JHA co-operation between Member States, whilst meeting the concerns of those Member States concerned about the effects of increased EU involvement in JHA matters on their national sovereignty.

1.10 EU action in the area of PCJ was limited to the adoption of joint positions and joint actions, and to recommending cooperation between Member States. However, Member States did agree certain Conventions, such as the Convention on the protection of the European Communities' financial interests (the 'PIF Convention') and the Europol Convention. These Conventions were a part of EU law, however the usual jurisdiction of the ECJ did not apply to these measures, and the Commission did not have any enforcement powers.

The Amsterdam Treaty (1997)

1.11 Whilst the Maastricht Treaty was regarded as ambitious and innovative as it set high ambitions for better co-operation in JHA matters amongst Member States, there was a feeling that it was not able to deliver on these ambitions. Due to increasing demands for EU mechanisms to help Member States to protect the public, counteract the internationalisation of crime, and concern about the impact of future enlargement, the 1997 Amsterdam Treaty marked the next significant development of EU competence in JHA.[4] It stated that the EU must:

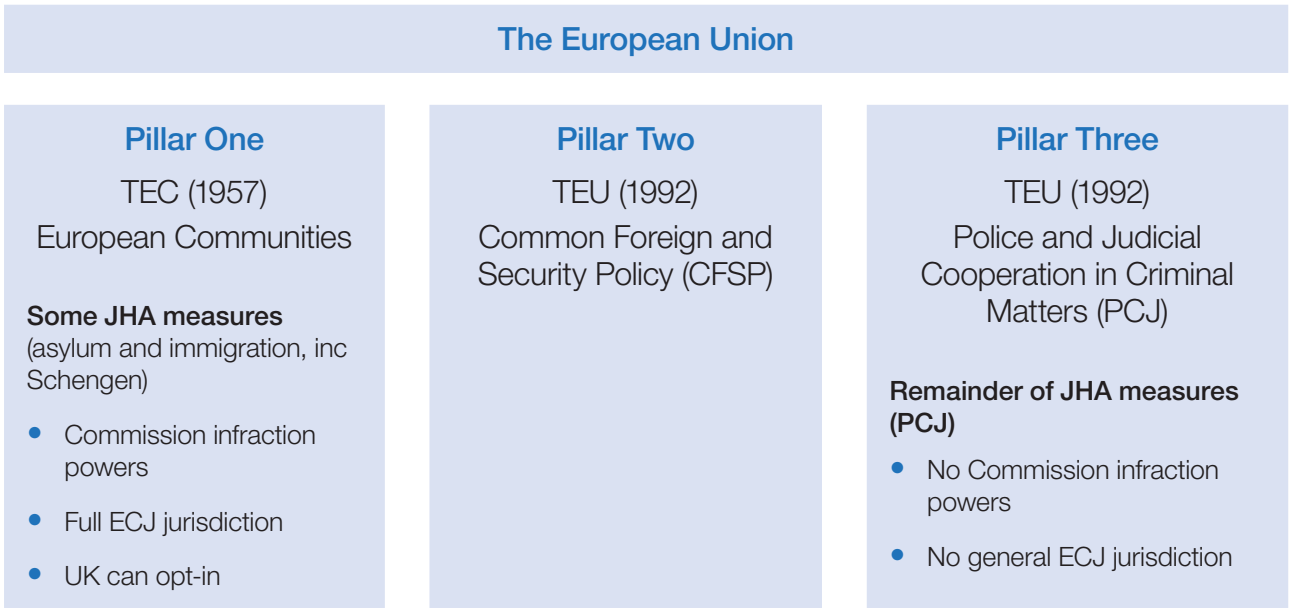
> 'maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'.[5]

1.12 The Amsterdam Treaty led to a differentiated approach to the various elements of JHA (see Figure 2). It transferred the areas of asylum, immigration and judicial cooperation in civil matters from the Third Pillar to the European Community Pillar (the First Pillar). The remainder was renamed PCJ and remained in the Third Pillar. In addition to matters related to cooperation, it provided for EU minimum rules on criminal law in certain areas, including terrorism and organised crime.

[4] Michel Petite, *The Treaty of Amsterdam*, Jean Monet Working Papers No.2/98. (1998).

[5] Idem.

Figure 2: JHA in the Three Pillars 1999-2009



1.13 The Amsterdam Treaty meant that for the first time the EU was able to adopt Council Framework Decisions or Council Decisions in order to take forward cooperation in the field of PCJ. Unlike other areas of the European Community, Member States retained a right to initiate new proposals in this area alongside the Commission. Any proposals, from either the Commission or Member States, had to be agreed by unanimity in Council. In practice, therefore, individual Member States could block the passage of legislation in this field and practical exercise of competence by the EU therefore remained more limited than in other areas.

1.14 Member States could also elect to subject themselves to the preliminary ruling jurisdiction of the ECJ (the ability of the ECJ to interpret EU law for use in national proceedings following a reference for a preliminary ruling from a national Court) as concerned PCJ measures.[6] The UK did not avail itself of this possibility as it felt no need to supplement the domestic courts, though many Member States did so.[7]

1.15 One of the most significant policy developments to occur during this period was the adoption of the principle of 'mutual recognition'. This was regarded as the basis for facilitating judicial cooperation in criminal matters and as an alternative to the creation of a single EU criminal code.

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6 Article 35(1) Treaty of European Union (Official Journal C340, 10 November 1997) stated that the ECJ "shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this title and on the validity and interpretation of the measures implementing them." Article 35(2) gave a right for Member States to accept this jurisdiction. Article 35(6) gave the ECJ jurisdiction to review the legality of framework decisions and decisions, and Article 35(7) gave it jurisdiction to rule on disputes between Member States regarding the interpretation or application of such (and other) measures if disputes could not be settled by the Council.

7 At least Germany, Austria, Belgium, Spain, Finland, France, Greece, Hungary. Italy. Latvia, Lithuania, Luxembourg, Netherlands, Portugal, Czech Republic, Slovenia and Sweden. From: European Commission Research and Documents Service, *Jurisdiction of the Court of Justice to Give Preliminary Rulings on Police and Judicial Cooperation in Criminal Matters* (2008). Available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/art35_2008-09-25_17-37-4_434.pdf, accessed on 15 October 2014.

Mutual Recognition and Dual Criminality

Mutual recognition of judicial decisions is the process by which a decision taken by a judicial authority in one EU Member State is recognised, and enforced where necessary, by the authorities in another Member State as if it were a decision of the judicial authorities in that State.

The concept was proposed in relation to JHA by the then Home Secretary, Jack Straw MP, at the Cardiff European Council in 1998, which concluded:

> 'The European Council underlines the importance of effective judicial cooperation in the fight against cross-border crime. It recognises the need to enhance the ability of national legal systems to work closely together and asks the Council to identify the scope for greater mutual recognition of decisions of each others' courts'.[8]

The principle of mutual recognition as the cornerstone of EU judicial cooperation was then established at a special meeting of the European Council in Tampere in October 1999. In its Tampere Declaration, the European Council agreed that:

> 'Enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgments and to other decisions of judicial authorities'.[9]

The aim of adopting the principle of mutual recognition was to allow cooperation to proceed with the minimum number of obstacles possible, whilst avoiding the need to harmonise Member States' distinct legal systems. It was a reaction, not least, at the time, to a study that had been published by a group of academics called *Corpus Juris,* which had mooted the idea of a European penal code for the purpose of protecting the financial interests of the EU; it is best known as initiating the idea for a European Public Prosecutor (see paragraphs 2.48-2.55). Rather than seeking to harmonise what were seen as diverse but equally valid legal systems that had developed from individual countries' histories and cultures, Member States agreed that instead the principle should apply that decisions made by a system in one state should be seen as valid in others, with the minimum of challenge.

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[8] Cardiff European Council, *Presidency Conclusions, 15-16 June* 1998 (SN 150/1/98 REV). Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/54315.pdf, accessed on 1 October 2014.

[9] Tampere European Council, '*Presidency Conclusions', 15 and 16 October* 1999 (200/1/99). Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm, accessed on 1 October 2014.

This principle of mutual recognition as the basis for judicial cooperation in the EU was specifically recognised in the Lisbon Treaty.

An element of mutual recognition is the limitation of the principle of 'dual criminality.' The principle of 'dual criminality' requires that the conduct in respect of which assistance is sought is criminal both in the State seeking assistance and in the requested State. Mutual recognition instruments – including the European Investigation Order (EIO) Directive – now commonly exclude the need to verify the dual criminality of certain acts provided the offence is punishable in the State seeking assistance. Whilst premised on the fact that most Member States regard the same conduct as unacceptable e.g. all have basic offences of murder or theft, it has given rise to debates around the fact that they are not always defined in the same way. This has been evidenced particularly in debates in Parliament on how this would work in respect of Holocaust denial or abortion.

To that extent, mutual recognition instruments now tend to include as standard a clause which makes clear that a State does not have to provide assistance if the conduct took place on its territory but was not criminal there.

1.16 The Amsterdam Treaty also incorporated the Schengen *Acquis* into the laws of the European Union and European Community (see text box after paragraph 1.5), along with a Protocol determining a mechanism for the UK and Ireland to participate in all or part of Schengen.[10]

1.17 The Amsterdam Treaty further established a Protocol allowing the UK and Ireland to decide whether to opt into certain legislation adopted in the area of freedom, security and justice, which includes all matters previously part of the pre-Amsterdam JHA pillar.[11] This was so as to ensure that national interests could readily be protected, including where these stemmed from the fundamental differences in legal systems between those in the UK and those in many other Member States. At the same time, Denmark negotiated a Protocol under which asylum and migration measures do not apply in Denmark.[12]

1.18 One significant development of competence under the Amsterdam Treaty was that the European Union (as opposed to the European Community) was able to conclude international agreements with other countries in relation to police and judicial cooperation in criminal matters under Articles 24 and 38 of the Treaty on the European Union (TEU), for example the agreement between the European Union and the USA, Canada and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers, and the Agreement between the European Union and Norway and Iceland on the application of certain provisions of the MLA Convention 2000 and the 2001 Protocol.[13] [14]

[10] Protocol (No 2) *Integrating the Schengen Acquis into the Framework of the European Union* (1997).

[11] Protocol (No 4) *On the position of the United Kingdom and Ireland* (1997).

[12] Protocol (No 5) *On the Position of Denmark* (1997).

[13] *Council Act (2000/C 197/01)*. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:197:0001:0023:EN:PDF, accessed 4 December 2014.

[14] European Council, *Protocol established by the Council in accordance with Article 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.* Available at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:42001A1121(01), accessed 4 December 2014.

The Current State of Competence (Post-Lisbon)

The Lisbon Treaty (2009)

1.19 The Lisbon Treaty, which came into force in December 2009, aimed to streamline the EU Institutions, and make the enlarged group of 27 (now 28) Member States function more efficiently.

1.20 The Lisbon Treaty removed the previous three-pillar structure – see Figure 3.

Figure 3: JHA Post Lisbon – the third pillar collapses

The European Union

Pillar One

TFEU (2009)

The European Union

All JHA measures:

- Commission infraction powers
- Full ECJ jurisdiction
- UK can opt-in

Pillar Two

TEU (1992)

- Common Foreign Policy
- Common Defence Policy
- Foreign Aid
- Peacekeeping

1.21 The collapse of the previous three pillar structure has had significant implications. In particular, almost all new or amended PCJ measures adopted post-Lisbon are now subject to qualified majority voting (QMV) in the Council. Previously, when PCJ was in the Third Pillar, legislation had to be agreed unanimously.

1.22 In addition, under Lisbon, almost all PCJ measures need to be agreed in conjunction with the European Parliament through the ordinary legislative procedure (previously and still commonly referred to as 'co-decision'). The exceptions, due to their sensitivity for Member States, include measures to agree a European Public Prosecutor (Article 86 TFEU), family law (Article 81(3) TFEU) and operational police cooperation (Article 89 TFEU), as well as provisions concerning passports, identity documents, residence permits or similar documents (Article 77(3) TFEU).

1.23 Article 76 TFEU gives equal power to the Commission and a group of at least seven (a quarter of) Member States to initiate legislation. In practice, this power is almost exclusively exercised by the Commission. Where a group of at least seven Member States do initiate legislation – a so called 'Member State Initiative' – there is no formal role for the Commission, but legislation still needs to be agreed by qualified majority in Council and in conjunction with the European Parliament. The European Investigation Order (EIO) was brought forward as a Member State Initiative, and is discussed in more detail in the text box after paragraph 2.46.

1.24 Under Article 216 TFEU, the European Union has competence to act externally on its own behalf, in particular by entering into binding agreements under international law. For example, it has renewed its PNR Agreements with Australia, Canada and the United States of America[15]; and it has also agreed the Terrorist Finance Tracking Programme

[15] In November 2014 the European Parliament voted to refer the EU Canada PNR Agreement to the ECJ. See the text box after paragraph 2.129.

with the United States of America. The EU has also become a party to the United Nations Firearms Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

1.25 The Lisbon Treaty also provided that Commission enforcement powers and full ECJ jurisdiction would extend to include PCJ matters (though this only applies from 1 December 2014 in relation to measures enacted prior to the Lisbon Treaty), where previously it was more limited. The ECJ may not however rule on the proportionality of national police operations, or on the exercise of Member States' responsibilities in relation to internal security matters. Internal security is discussed in more detail at paragraphs 2.83-2.87.

1.26 The move away from unanimity voting in Council on PCJ measures meant that individual Member States lost the ability to 'veto' proposals. Given the sensitivities in relation to PCJ measures and their impact on national sovereignty (since national security is the sole responsibility of the Member States), the UK and Ireland negotiated amended Protocols to the Lisbon Treaty allowing them the right to decide whether or not to participate in any new legislation in this field. These are known as the JHA opt-in and Schengen opt-out Protocols.

1.27 The JHA opt-in Protocol and the Schengen opt-out Protocol are distinct from the UK's 2014 opt-out decision. As explained above, measures which are subject to the 2014 opt-out decision are not being considered as part of this review.

The JHA opt-in

1.28 The JHA opt-in was originally introduced by the Treaty of Amsterdam, allowing the UK and Ireland to decide whether or not to opt in to proposals for EU legislation on asylum, immigration and border controls, as well as judicial cooperation in civil and family matters. As above, this was to compensate for the loss of unanimity in this area when the policy moved to the First Pillar.

1.29 The Treaty of Lisbon extended the UK's JHA opt-in to proposed EU legislation covering PCJ matters. Under the terms of the JHA opt-in (Protocol 21 to the Treaties), from the point a draft proposal for new EU JHA legislation or to amend an existing JHA measure is presented to the Council, the UK has three months to decide whether to opt in to that proposal at the outset. If UK decides to opt in it must communicate this decision to the Commission within the three month window and from that point on the UK is committed to be bound by the final adopted instrument.

1.30 Where the UK or Ireland does not opt in at the outset, they can still participate in negotiations, but do not have a vote in the Council when the measure is considered for adoption. Where the UK or Ireland have not opted in at the outset of a proposal they can subsequently apply to opt in to legislation at any time after it has been adopted. Unlike an opt-in exercised at the outset, a post-adoption application is subject to the agreement of the Commission (or ultimately the Council). The Commission examines whether the conditions for participation have been fulfilled. It has four months to agree the application or it can write "imposing conditions" prior to re-joining. If the UK is unhappy with those conditions the matter can be referred to the Council for a vote, although this has never happened to date.

The Schengen opt-out

1.31 Under the terms of the Lisbon Treaty, the UK was also given the express right to opt out of new or amending legislation that builds on the parts of the Schengen *acquis* in which it participates (broadly, the PCJ elements – but not those that relate to border controls). This is referred to as 'the Schengen opt-out Protocol'.

1.32 The UK's Schengen opt-out was also originally introduced by the Treaty of Amsterdam. The UK maintained this opt-out under the Lisbon Treaty (Protocol 19 to the Treaties), although with one significant change under the Lisbon Treaty, which introduced the right to opt out of measures deemed to build on that part of the Schengen *acquis* in which we had asked to participate. As indicated in the text box on the Schengen Agreements after paragraph 1.5, before the Lisbon Treaty the UK was bound to such measures automatically. Under its terms, from the point a draft proposal for new or amending legislation building on the PCJ elements of the Schengen *acquis* is presented to the Council, the UK has three months to decide whether to exercise the opt-out.

1.33 If the UK were to exercise its opt-out the Council might review this. In doing so the Council should seek to retain the widest possible measure of participation of the Member State concerned without seriously affecting the practical operability of the various parts of the Schengen *aquis*, while respecting their coherence (see Article 5(3) of Protocol 19 to the Treaties). The Council might ultimately adopt a Decision to disapply the other PCJ elements of the Schengen *acquis* to the UK.

The Danish Opt-Out

1.34 In the Lisbon Treaty, Denmark negotiated a full opt-out from JHA matters, extending the opt-out it had from asylum and migration matters under the Amsterdam Treaty. Like the UK, Denmark secured special arrangements for JHA both when asylum and migration moved to the Community pillar and then again when PCJ moved. Pre-Lisbon PCJ measures therefore continue to apply to Denmark, even though post-Lisbon ones do not. Denmark does participate in some of the Schengen *acquis*, which includes some of the measures on the gradual abolition of checks at common borders, and is a member of the Schengen passport-free travel zone. In October 2014, the Danish Government announced a referendum after its next general election to transform its JHA 'opt-out' to a UK-style 'opt-in'.

1.35 As a result of the Danish opt-out the EU has no competence to legislate for Denmark in the field of JHA. Member State cooperation with Denmark is therefore intergovernmental rather than within the context of EU law.

1.36 When a proposal for a new or amending JHA measure is made by the Commission, Denmark's JHA opt-out is automatically triggered. Denmark has no control over this. Unlike the UK and Ireland's Protocols, Denmark's Protocol does not allow them to opt in to JHA measures on a case by case basis. Denmark can, however, voluntarily agree to implement measures building on the Schengen *acquis* in which it already participates.

1.37 As a result of the Danish opt-out, the EU has concluded a number of third country agreements with Denmark to allow for Danish participation in JHA measures. These agreements extend the EU measures to Denmark and bind Denmark to EU law. All of these agreements require Denmark to submit to ECJ jurisdiction both for interpretation and to ensure compliance.

The Court of Justice of the European Union (ECJ)

1.38 The ECJ has jurisdiction over the interpretation and application of legislation adopted under Title V TFEU, in the same way that it does for other EU legislation. This includes measures in the field of PCJ adopted since the entry into force of the Lisbon Treaty.

1.39 On 1 December 2014 the ECJ gained full jurisdiction over all unamended pre-Lisbon PCJ measures. This means that for the first time there will be full ECJ scrutiny of all JHA matters, and the European Commission will be able to bring forward infraction proceedings against any Member State which does not fully or (in its view) correctly implement pre-Lisbon JHA measures in which it participates.

1.40 There are limits to the ECJ's jurisdiction. Article 276 TFEU restricts the ECJ's jurisdiction so that it may not rule on the proportionality of national police operations, or on the exercise of Member States' responsibilities in relation to internal security.

Safeguards

1.41 Given that JHA is still a relatively new area of EU competence, it is unclear exactly where the boundaries lie.

> Because the EU's competency in the JHA space is much less clear than its competency in trade, it seeks to expand its competency as much as possible with uneven effect.
>
> Center for Strategic and International Studies, *submission of evidence to HMG Review of the Balance of Competences between the United Kingdom and European Union: Foreign Policy,* 2014.

> There will be ongoing tensions between EU provisions and member state provisions, as the EU attempts to address transnational criminality, while the individual law enforcement, criminal justice and criminal procedure remains a matter for individual EU member states. Individual member states should police the tensions on this boundary by making greater use of the subsidiarity and proportionality provisions which are already in the TFEU.
>
> Dr Maria O'Neill, *submission of evidence.*

1.42 To mitigate this uncertainty and to reflect sensitivities in relation to national sovereignty, in addition to the specific Protocols available to the UK (discussed in paragraphs 1.28-1.33) there are several intended safeguards available to all Member States under the Treaties.

National Security exemption

1.43 Article 4(2) of the Treaty on the European Union (TEU) states in relation to Member States that the Union 'shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'.[16]

The 'yellow card'

1.44 The Lisbon Treaty introduced a 'yellow card' mechanism, whereby if a sufficient number of national Parliaments have issued a reasoned opinion – stating concerns on subsidiarity grounds – the Commission is obliged to reconsider its proposal.

[16] See also Article 346(1)(a) TFEU.

1.45 The 'yellow card' mechanism is not limited to PCJ measures, as national Parliaments may issue a reasoned opinion on any new Commission proposal. So far the mechanism has been triggered twice, one of these on a PCJ matter; the proposal for a new European Public Prosecutor's Office prompted national Parliaments to issue a 'yellow card' to the Commission.

1.46 The 'yellow card' mechanism has attracted criticism that it has limited effect – for example, the Law Societies stated 'we are not confident that the procedure offers sufficient scrutiny or accountability'.[17] The application and impact of the 'yellow card' mechanism is discussed in more detail in paragraphs 2.52-2.55, and in the concurrent Subsidiarity and Proportionality report.

1.47 The Dutch Government published their own subsidiarity review highlighting certain measures which they felt breached the principles of subsidiarity and proportionality. Five of the measures included were JHA related, including proposals to harmonise criminal law and procedure, and proposals to harmonise substantive criminal law.[18]

Emergency brake

1.48 The EU's competence to take action in the field of minimum standards of criminal law and procedure is limited by an 'emergency brake', which applies for measures introduced under Articles 82(2) and 83(1) and (2) TFEU, whereby any Member State can suspend discussions on a proposal which it considers would 'affect fundamental aspects of its criminal justice system' and refer the proposed legislation to the European Council for discussion. The European Council then has four months in which to reach consensus and to refer the proposed legislation back to the relevant sectoral Council for discussion. If the European Council cannot reach consensus in that time, then nine or more Member States may establish enhanced cooperation amongst themselves through a mechanism set out in the TFEU.

1.49 To date, these 'emergency brake' provisions have not been used by any Member State.

Respect for national legal systems (Article 67)

1.50 Article 67 TFEU maintains that 'the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and different legal systems.'

1.51 This is particularly important for the UK, as the UK legal systems have significant differences from the legal systems in most other Member States.

[17] The Law Societies, *submission of evidence.*

[18] Government of The Netherlands, *Testing European Legislation for Subsidiarity and Proportionality – Dutch list of Points for Action* (2013).

The UK Legal Systems

Most Member States have civil law systems. This means that their law is taken entirely from statute, often strictly codified. Judges control investigations and proceedings, which are generally inquisitorial.

By contrast, England and Wales, and Northern Ireland, have common law systems. This means that much of the law has evolved through judicial decision over the years as opposed to deriving from a statutory criminal code. In such systems, statute law is amplified by binding precedent established by the higher courts and some law (common law) that is entirely made by judicial decisions. Judges preside over an adversarial system where a judicial decision is made after prosecution and defence have had the opportunity to put forward their own case and challenge the case put forward by the other side according to strict rules of evidence.

Scotland's legal system incorporates elements from both common and civil law traditions.

The paragraphs below show these differences in respect of the England and Wales legal system, and the Spanish legal system (as an example).

England and Wales

A prosecutor will consider the evidence provided by the police and decide whether there is sufficient evidence to charge an individual and then to prosecute. If the defendant pleads not guilty then a prosecution and defence case will be presented before a court and either one or more magistrates, a judge, or a jury (depending on the seriousness of the case) will determine whether the defendant is guilty beyond reasonable doubt based on the evidence presented.

Spain

An investigative judge carries out an investigation with a prosecutor. In the case of crimes with penalties of less than nine years the decision to try the defendant is taken by the investigative judge. In other cases, the decision to try the defendant is taken by the trial court. The evidence is tested in the trial court.

Work programmes (Article 68 TFEU)

1.52 As well as the more formal 'safeguards' above, the European Council has a role in setting 'strategic guidelines' for the EU in the field of JHA through a succession of multiannual work programmes. This gives Member States the opportunity to set out the broad parameters under which the Commission should bring forward new JHA measures.

1.53 The first such programme was the Tampere Programme, which was adopted in 1999. In a special session of the European Council the 15 EU Heads of Government met to 'kick start' the EU's JHA programme. The Tampere Programme was built around four milestones: common EU asylum and migration policy (including achieving the first phase of a Common European Asylum System), a genuine European area of justice, the Union-wide fight against crime and stronger external action. As noted, it also established the principle that judicial cooperation should be based on mutual recognition.

1.54 This was followed by the Hague Programme, which was adopted in 2004 and focused not only on legislation, but also on solidarity[19], including the establishment of three

[19] Solidarity is discussed in more detail in the Asylum and non-EU Migration report**:** HMG**,** *Review of the Balance of Competences between the United Kingdom and European Union: Asylum and Non-EU Migration*, 2013.

large financial framework programmes – the General Programme 'Solidarity and the Management of Migration Flows', the Specific Programme 'Prevention, Preparedness and Consequence Management of Terrorism and other Security-related Risks' (CIPS) and the Specific Programme 'Prevention of and Fight against Crime' (ISEC).

1.55 The EU's third JHA Work Programme (the Stockholm Programme) set out the EU's priorities for the area of justice, freedom and security for the period 2010-14. The Stockholm Programme was structured around key themes – fundamental rights, access to justice, protecting citizens from organised crime and terrorism, facilitating legal access to Europe while ensuring internal security, developing a comprehensive and flexible migration policy, and strengthening cooperation with non-EU countries.

1.56 The Lisbon Treaty then provided a specific Treaty base (Article 68 TFEU) under which the European Council can set these 'strategic guidelines' and the EU has now adopted a successor to the Stockholm Programme. The new Strategic Guidelines for JHA were agreed by the European Council in June 2014.[20] The new Strategic Guidelines send a clear signal that the focus should be on practical cooperation and the proper implementation of existing measures. It is clear that the priority is to transpose, implement and consolidate existing legal instruments.

1.57 The Government welcomed the new Strategic Guidelines, in particular the references to the need to tackle terrorism and organised crime (including specific references to tackling trafficking of human beings), improve the exchange of criminal records information between Member States, and strengthen the link between the EU's internal and external security policies.

1.58 As part of the new Strategic Guidelines, the Commission is due to issue its Communication on the renewal of the EU Internal Security Strategy (ISS) in 2015. The original EU ISS was adopted in 2010. The Government is actively engaged in the current consultation in order to ensure the new ISS reflects UK priorities.

Additional UK Safeguards – The European Union ('EU') Act 2011

1.59 As well as the safeguards contained within the Treaties, the UK has also implemented its own domestic safeguards through the EU Act 2011. The EU Act provides that:

- any future proposal to transfer power by Treaty change from the UK to the EU shall be approved by an Act of Parliament, and by a referendum,[21]
- Acts of Parliament, and in some cases a referendum, are required to approve certain other decisions under the EU Treaties including the use of *passerelles* (a legislative tool which allows for changes in scope of EU action or changes to ways measures are agreed, without specific Treaty change),[22] and
- directly applicable or directly effective EU law is only recognised and available in national law by virtue of the European Communities Act 1972 or another Act of Parliament.[23]

In particular, the EU Act makes clear that a UK Government cannot agree to be part of a European Public Prosecutor without a referendum and Act of Parliament. There are other locks in relation to JHA matters in the EU Act.

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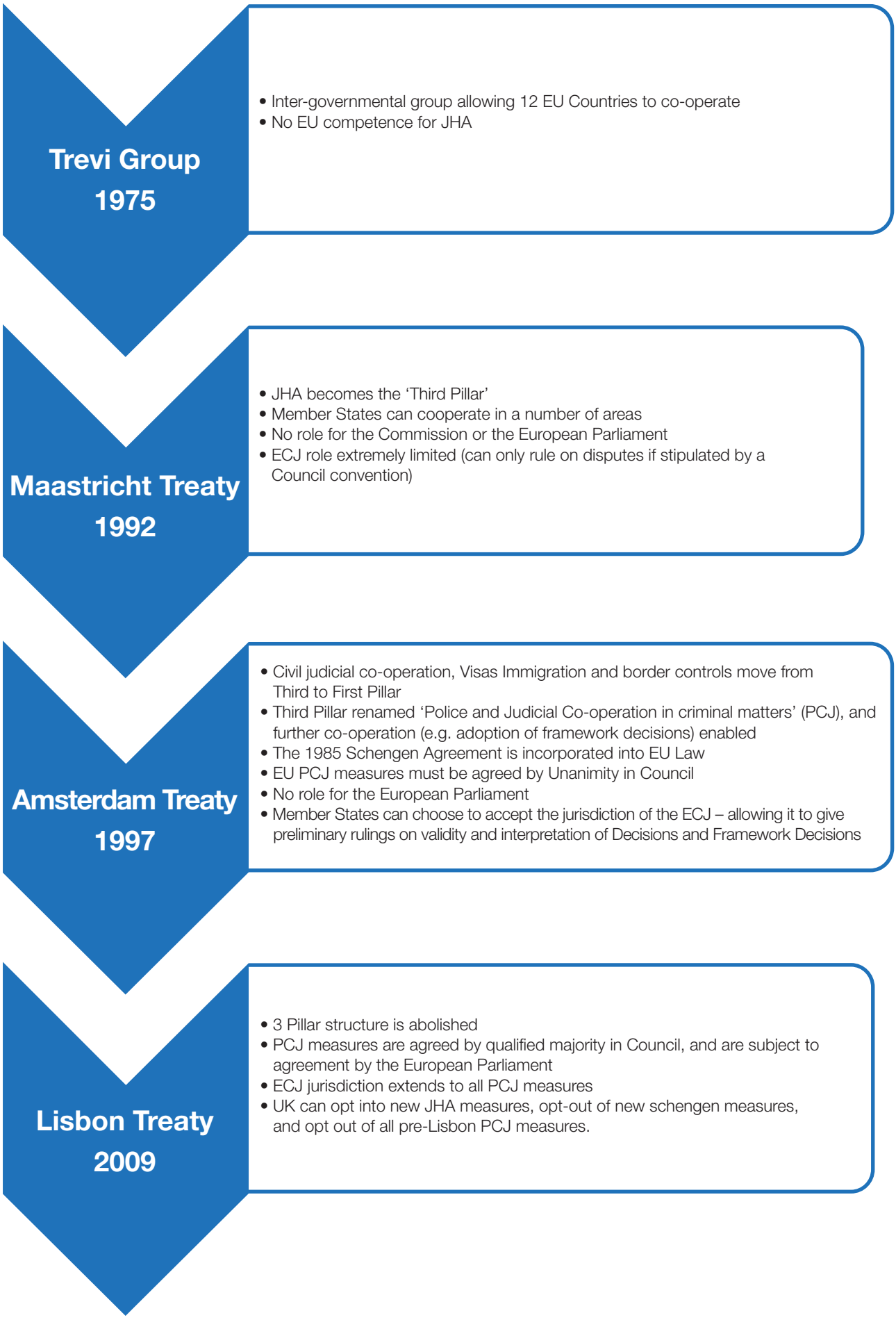
[20] European Council, *26 and 27 June Conclusions,* (EUCO 79/14), (2014). Available at: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf, accessed on 1 October 2014.

[21] Section 4, EU Act 2011.

[22] *Idem*, Sections 2 and 6.

[23] *Idem*, Section 18.

Figure 4: Development of EU Competence in the Field of JHA



Chapter 2: Impact on the National Interest

2.1 When considering the impact of EU competence in the specific areas covered by this report, it is important to understand the global context.

2.2 The UK, (and indeed the EU) is an increasingly international and multicultural society, with net migration to the UK steadily increasing and EU accession in 2004 causing a particular increase in EU nationals coming to the UK.[1] There are increasing numbers of citizens from other Member States and non-EU countries coming to live and work in the UK, and UK citizens also choosing to live and work elsewhere.[2]

Figures to show PCJ in an International Context

There has been a significant increase in the numbers of citizens from other EU Member States in the UK: from around 1.1 million in 2004 to approximately 2.3 million by 2012. Numbers of non EU citizens in the UK increased from around 1.9 million to 2.5 million in the same period.[3]

There are 12,250 foreign national offenders in England and Wales, serving in prison or living in the community after prison pending removal action, end of March 2014.[4]

Organised crime costs the UK £24billion a year.[5]

Globally there are an estimated 2.8 billion people and over 10 billion Internet-enabled devices access the Internet. The growing adoption of the Internet provides increasing opportunities to commit crime facilitated, enabled or amplified by the Internet.[6]

2.3 The vast majority of organised crime activity has an international element, and increased migratory flows mean that the opportunities for criminals to establish networks and operate effectively across borders increases (these challenges are discussed in more detail in Chapter 3). At the same time, UK citizens residing in other countries expect a

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1 See Chart 1 – HMG, *Review of the Balance of Competences between the United Kingdom and the European Union: Single Market – The Free Movement of Persons*, 2014.

2 See Table 3, idem.

3 Idem.

4 National Audit Office, *Managing and Removing Offenders* (2014).

5 HMG, *Serious and Organised Crime Strategy*, 2013.

6 EC3, *The Internet Organised Crime Threat Assessment (iOCTA)* (2014). Available at: https://www.europol.europa.eu/iocta/2014/keyfindings.html, accessed on 25 November 2014.

certain level of protection and procedural standards. The challenges that governments and law enforcement agencies face in addressing these issues are ever increasing.

2.4 Consequently, there is parallel and increasing need for international cooperation in order to address emerging threats and to protect citizens. Much of the groundwork for this was laid out in the Council of Europe, and key measures from that organisation are part of the layers of law applying to EU Member States in relation to PCJ although the UN has also established a considerable framework for cooperation on matters such as counter terrorism and organised crime.[7] Examples include the 2000 UN Convention against Transitional Organised Crime and its Protocols, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

2.5 The Government acknowledged much of this context in its 2010 National Security Strategy (NSS).[8] Some of the most serious ('tier one') threats identified by the NSS are those for which organisations such as the UN, Council of Europe and EU can act, for example cybercrime. The NSS also recognises that we should 'Work in alliances and partnerships wherever possible to generate stronger responses'.[9] This was further reinforced in the Government's 2013 national 'Serious and Organised Crime Strategy', which called for a collaborative response to the widespread threat from organised crime.

> Organised crime is a threat to our national security. It costs the United Kingdom at least £24 billion each year, leads to loss of life and can deprive people of their security and prosperity [...] Like other threats to our national security, serious and organised crime requires a response across the whole of government, and close collaboration with the public, the private sector and with many other countries.
>
> HMG, *Serious and Organised Crime Strategy*, 2013.

2.6 A specific example of how quickly and how transnational organised crime is developing is in relation to cybercrime. The Internet Organised Crime Threat Assessment (iOCTA) produced by EC3, the European Cybercrime Centre in Europol, indicates this global context of a fragmented and more transient organised crime threat in this field. It also recognises the unpredictability of developments we will have to tackle in the future.

> This trend towards adopting the cybercrime features of a more transient, transactional and less structured organisational model may reflect how all serious crime will be organised in the future [...] In general cybercrime is increasing in scale and impact; while there is a lack of reliable figures, trends suggest considerable increases in scope, sophistication, number and types of attacks, number of victims and economic damage.
>
> EC3, *The Internet Organised Crime Threat Assessment (iOCTA)*, 2014.

2.7 The internationalisation of crime, including the specific threat from cybercrime, is discussed in more detail in Chapter Three. However the inherent tension in trying to address these trans-national challenges whilst recognising the sensitivities that arise in areas where criminal justice systems reflect the specifics of a country's historical and cultural development, as well as the impact of external action on matters many perceive as those for national governments, within their remit of protecting the public, is explored in more detail throughout this chapter.

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7 Examples include the 1959 Mutual Legal Assistance Convention, and its protocols.

8 HMG, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, 2010.

9 Idem.

2.8 The Enlargement Report also considered the impact of EU enlargement on international crime threats. Some evidence suggested that enlargement, by lowering barriers, may have made it easier for international crime threats to reach the UK. Other contributors, however, believed that enlargement had in fact extended the reach of law enforcement and judicial cooperation across Europe, thus strengthening the UK's outer defences against organised crime and terrorism. Embedding the rule-of-law and tackling organised crime and corruption in EU aspirant countries are now major priorities in the enlargement process.[10]

2.9 This chapter next considers the impact of the UK's ability to decide whether to opt in to or opt out of certain EU police and criminal justice measures. This sets the overall impact of EU PCJ competence in context, by setting out the extent to which EU competence applies to the UK.

2.10 This chapter then goes on to look at the impact of EU competence in the specific thematic areas which were covered in the call for evidence for this report, these are:

- judicial cooperation;
- police, customs cooperation and internal security; and
- EU minimum standards in criminal law and procedure.

2.11 There follows consideration of the broader impact of the institutional and procedural changes brought about under the Lisbon Treaty, that is the move to qualified majority voting in Council for all JHA legislation, and the increased involvement of the European Parliament.

2.12 Finally, this chapter considers whether the EU is the appropriate level for action, or whether policy aims could be equally or better achieved through alternatives such as bilateral agreements, informal networks, or other international fora.

The UK opt-in and opt-out

2.13 The UK's ability to decide whether or not to opt in to new legislation is critical to understanding the UK-EU balance of competence in this area. Protocols 19 and 21 to the Treaties were drafted, inter alia, to enable the UK (and Ireland) to determine the extent to which the EU's competence in PCJ is exercised in relation to the UK (and Ireland).

2.14 Most respondents, in particular those from the legal professions, were positive about the UK's ability to decide whether to opt in to new measures and it is viewed by some as a safeguard which allows the Government to decide not to be bound by EU legislation which would adversely affect the UK's legal systems.

The Scottish Government, for example, considered it an important additional safeguard in respect of the distinct Scottish legal system, and the UK Law Societies highlighted in their submission of evidence the merit of the UK's ability to decide whether to opt in to new legislation due to the differences in the legal systems that operate in the UK, compared to other continental systems.[11]

[10] HMG, *Review of the Balance of Competences between the United Kingdom and European Union: EU Enlargement*, published in parallel.

[11] Scottish Government, *submission of evidence.*

> The Law Societies acknowledge that England and Wales, as well as Ireland, is in a particular situation due to its Common Law system, with a hybrid system existing in Scotland [...] Legislative proposals in the criminal justice field often reflect the principles and practices of continental inquisitorial systems, and are difficult to accommodate conceptually within the Common Law adversarial model of criminal justice [...]
>
> The Law Societies, *submission of evidence.*

2.15 However, there are varying views on how the opt-in should be exercised. Some stakeholders at the London event raised concerns that the interlinked nature of measures could make the UK's ability to opt in to some measures and not others problematic.[12] Others, including the Senior European Experts Group, felt that the UK's ability to decide whether to opt in on a case by case basis was positive.[13]

2.16 In practice, the UK has taken a case-by-case approach, as set out in the Coalition Agreement.

> We will approach forthcoming legislation in the area of criminal justice on a case-by-case basis, with a view to maximising our country's security, protecting Britain's civil liberties and preserving the integrity of our criminal justice system.
>
> HMG, *The Coalition: our programme for government,* page 19, 2010.

A number of respondents, including the Senior European Experts Group, noted the practical benefits to the UK of being able to identify whether it was in its interests to participate in a particular piece of legislation on a case-by-case basis.[14]

2.17 Some respondents called for the UK to codify its approach on the use of the opt in, for example through a default position of opting in to or out of measures at their outset unless certain criteria are met. The Bar Council's submission of evidence included a list of potential criteria by which the UK could assess whether or not the UK should opt-in.[15] Other contributors suggested the benefits of opting into all new EU measures as a default position.

> Liberal Democrats believe that there should be a 'presumption to opt in' to EU criminal justice measures, subject of course to any overriding contrary arguments.
>
> Liberal Democrats Home Affairs Justice and Equalities Parliamentary Party Committee, *submission of evidence.*

Conversely, Open Europe expressed a preference for the UK adopting a more cautious approach, suggesting that the UK should only exercise its' opt-in after a measure has been adopted, at which time there would be more certainty about the potential impact.

> If we use the opt-in at all it should always take place post-adoption and efforts to shape the proposal should take place from this position.
>
> *Record of meeting with Open Europe*, 2014.

2.18 Where the UK chooses not to opt in to a measure at the outset, it maintains a right to engage in negotiations. There are those who see value in the UK engaging with negotiations and influencing the direction of EU action in order to ensure UK priorities are reflected, regardless of whether the UK subsequently opts in.

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[12] *Record of 18 June stakeholder event in London.*

[13] Senior European Experts Group, *submission of evidence.*

[14] *Idem*.

[15] Bar Council, *submission of evidence.*

> By sitting at the negotiating table, the UK has consistently demonstrated its ability to ensure that JHA measures reflect its own policies.
>
> Europol, *submission of evidence.*

> The only way we can influence such arrangements is to be part of the structures making them [...] Making these procedures slicker, more streamline and less complicated will not only reduce costs but lessen the likelihood of mistakes with consequently fewer successful legal challenges, which has got to be a good thing for the administration of justice (if not necessarily for the earnings of the legal profession).
>
> Hertfordshire Criminal Justice Board, *submission of evidence.*

2.19 The Senior European Experts Group pointed out that the UK may, in the future, not be permitted to join measures it wishes to join post adoption, and the potential loss of UK negotiating leverage by not opting in at the outset. It has also been argued that if the UK decides to opt in to proposals at the outset this would give the UK more influence in negotiations, although this does bind the UK to participation in the measure without knowing what the final text might look like. The Bar Council noted that improvements in the quality of the drafting in the original Commission proposal would be an obvious first step and would assist the UK in its assessment of the use of the opt-in.[16] More specifically, the Law Societies present the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the EU as a key example where negotiating leverage was lost by the UK not opting in at the outset.

> The existing UK legislation, in the form of the Proceeds of Crime Act 2002 and related Regulations, already permits UK authorities to freeze and confiscate assets at the request of Member States. Nevertheless the UK's failure to opt in at the outset of the negotiations on this instrument was a lost opportunity for the UK to improve the ability of Member States to act on its own requests. Given the importance currently placed by the present Government on enforcing confiscation orders [...] the ability to enforce confiscation orders overseas should have been an obvious priority.
>
> The Law Societies, *submission of evidence.*

2.20 The Government's experience to date is that the UK has been able to join any measure that it wished to opt into post-adoption. For example, the UK has successfully opted in post adoption to the Directive on Trafficking in Human Beings, having been satisfied with the final package. The Government's experience suggests that, in practice, a UK decision not to opt in at the outset does not have an adverse affect on the UK's ability to influence negotiations and to achieve our objectives. For example, in the ongoing negotiations on Europol the UK did not opt in pre-adoption but the Government believes the UK has secured some quite significant improvements to the text during negotiations, including on Europol's power to request investigation and to the duty of Member States to supply it with information.

2.21 The potential difficulties which could ensue from a 'patchwork' approach have been raised.

> Not opting into a measure can cause difficulties in cross border co-operation cases where there is an uneven implementation of EU law in the UK, with the result that UK criminal justice authorities may not be in a position to extend the full cooperation sought by another Member State and/or may not receive the full extent of cooperation the UK criminal justice authorities require from other Member States.
>
> The Law Societies, *submission of evidence.*

[16] Bar Council, *submission of evidence.*

2.22 However, once the UK has opted in, there is no mechanism for the UK subsequently to withdraw from a measure. Open Europe were of the view that the UK should be allowed to opt back out of EU legislation at a later date, as subsequent case law from the Courts could take a Regulation or Directive in a direction that is not in the UK's interest. Fresh Start also considered that it would be better if there were such a mechanism.

> The UK should seek EU treaty change to allow it to opt out of those EU PCJ laws that it has opted into since the Lisbon Treaty entered force.
>
> Fresh Start, *submission of evidence.*

Open Europe were concerned that a lack of ability to opt back out of EU legislation at a later date could result in the UK's opt-in decisions being cautious, and skewed due to a 'rational fear' at what stance the ECJ might take in the future.[17]

2.23 There was considerable interest in how the UK applies its opt-in more generally. Some respondents, including the Faculty of Advocates, expressed concern at the long term impact on the UK's influence in the EU if the UK fails to opt in.

> A major area of concern is if the UK does not engage completely with proposed policing and criminal justice measures by opting out there is a significant risk that its voice is not heard and the UK is unable to influence change as it might if it had opted in.
>
> Faculty of Advocates, *submission of evidence.*

2.24 The Senior European Experts Group suggested that the UK 'may lose negotiating leverage by not opting in from the outset'.[18] The idea that the negotiating position of the UK would weaken over time was also raised in the Civil Judicial Cooperation report.[19]

2.25 The Law Societies highlighted concerns that the UK's reasoning for deciding whether or not to opt in or not have been too narrow and do not reflect wider benefits.

> It is noted that the Government puts national interest and the benefits to citizens and business at the heart of its decision-making [...] This test has not proved sophisticated enough to incorporate considerations of the impact of the UK's failure to participate in EU cooperation instruments on how cooperation requests from the UK are received by other EU Member States.
>
> The Law Societies, *submission of evidence*.

2.26 Some stakeholders at the Brussels event were of the view that the UK should start from a positive standpoint, and opt in to new proposals wherever possible.[20]

> [...] the Bar believes that any actual or foreseeable EU legislative proposals imposing minimum rules in these fields are unlikely to increase the legal or administrative burden in England and Wales [...] With little cost to our system therefore, the message of engagement and support for the underlying principles that UK participation in such measures gives to other EU Member States is invaluable. For this reason, our starting position has long been and remains that the UK can and should be seen to be leading

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17 *Record of meeting with Open Europe*, 2014.

18 Senior European Experts Group, *submission of evidence.*

19 HMG, *Review of the Balance of Competences Between the United Kingdom and the European Union: Civil Judicial Cooperation*, 2014.

20 *Record of Brussels stakeholder event 2014.*

from the front in this area, and manifesting this by positive use of its opt-in wherever possible, though we are of course mindful of the need to balance the interests of the UK as a whole.

Bar Council, *submission of evidence.*

2.27 The high esteem and positive reputation that the UK has in Europe for its criminal justice agencies was recognised by many. Some attending the Brussels stakeholder event concluded from this that they would wish to see the UK demonstrate positive leadership in the area of PCJ such as in opting in to measures even where the UK already has equivalent domestic provisions.[21]

As a whole, the ability of the UK to opt in to policing and criminal justice legislation is therefore vastly important as it permits the UK to continue to be at the forefront of decisions, making sure that it fully influences the direction of future developments in an area where it has fundamental interests to protect.

Europol, *submission of evidence.*

While the Law Societies recognise the difficulty in getting the right balance and understand the need for the UK to assess each instrument separately to determine whether the instrument will provide added value to national law, and be in the national interest, it should also be borne in mind that, in not opting in, the UK loses its ability to influence in the development of EU instruments by proposing provisions which could benefit the UK as well as the entire EU criminal justice system.

The Law Societies, *submission of evidence.*

Others are of the view that it is of little benefit to the UK or Europe more widely for the UK to engage in measures that are domestically unnecessary, and that surrendering competence in order to undertake such a leadership role might not be in the national interest.

Some may argue that there is a need for international requirements to strengthen the domestic criminal law of countries [...] The UK is perfectly capable of adapting its domestic criminal law through its democratic system, which could include aligning that law with other countries' provisions if this was felt desirable. The UK does not need to transfer control to the EU to achieve this.

Fresh Start, *submission of evidence.*

The UK's ability to 'opt-in'

2.28 When a measure is proposed, it is important to establish whether the UK's opt-in under Protocol 21 (or opt out under Protocol 19) to the Treaties is triggered. This determines whether the UK has a choice whether to participate in the proposed measure. There have been examples in recent years of the Commission bringing forward proposals for legislation under non-JHA legal bases which contain JHA content. The Government's view is that if there is JHA content, a JHA legal base should be cited, as this provides clarity that the opt-in applies. However, even if a JHA legal base is not cited, the Government will assert the JHA opt-in to JHA content.

2.29 In determining whether there is JHA content and whether a JHA legal base should be cited in proposals, there can be different views among the European Institutions and Member States. For example, the Commission used a non-JHA legal base (Article 325

[21] *Record of Brussels stakeholder event 2014.*

TFEU) in its proposal for a Directive on the Protection of the Financial Interests of the Union (the 'PIF Directive'). The UK, along with other Member States, argued that this proposal contained JHA content, and the General Approach concluded by the Council included a change of the legal base to a JHA legal base. The proposal remains under negotiation with the European Parliament.

2.30 On some occasions, the ECJ has been asked to determine the correct legal base for a measure. In a recent judgment, the ECJ annulled a Directive facilitating the cross-border exchange of information on road safety related traffic offences.[22] The measure was initially proposed by the Commission with a transport legal base (Article 91 TFEU), which had been substituted by the Council for a JHA legal base (Article 87 TFEU). The ECJ concluded that the aim and content of the measure was road safety and therefore a transport legal base was needed. The Commission has since put forward a new proposal based on the original Directive using a transport legal base. Given the judgment of the Court, that the aim and content were transport rather than JHA, the UK is unable to assert the JHA opt-in to the revised measure.

2.31 The Civil Judicial Cooperation report also considered this issue.[23] It explained how, in the field of civil judicial cooperation, some recent proposals had been brought forward under Article 114 TFEU (the legal base for proposals which have as their object the establishment and functioning of the Single Market, rather than JHA matters) where there has been a debate as to whether a JHA legal base such as Article 81 TFEU would be more appropriate.[24]

2.32 The Government always considers whether a legislative proposal contains the appropriate legal base under the Treaties. The Government believes that the selection of the correct legal base is important to avoid the UK's opt-in being undermined, for example, to avoid harmonisation of criminal law sanctions through non-JHA measures.

2.33 The UK's ability to decide whether to opt in or opt out of certain measures has given a unique perspective to the national debate around where EU action can best add value. Not least, enhanced arrangements for scrutiny of the opt-in were agreed in 2008 and 2011, which are now embedded in a Code of Practice and have prompted extensive debates in both Houses of Parliament on the use of the opt-in.[25]

2.34 This chapter will now go on to consider the impact of EU competence on the three thematic areas covered by this review.

[22] *Commission v Council and Parliament, Case C-43/12*, 2014. A further example is *Commission v Council, Case C-377/12*, 2014.

[23] HMG, *Review of the Balance of Competences: Civil Judicial Cooperation*, 2014.

[24] These included a Directive on consumer alternative dispute resolution and a Regulation on consumer online dispute resolution, both of which were adopted, as well as a proposal for a Regulation on a Common European Sales Law, which has not been adopted.

[25] HMG, *Code of Practice on Scrutiny of Opt-In and Schengen Opt-Out Decisions in Justice and Home Affairs Matters (JHA).* Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206475/JHA_Code_of_Practice.pdf, accessed on 1 October 2014.

Judicial Cooperation in Criminal Matters

2.35 Judicial cooperation in criminal matters applies to the investigation, prosecution and enforcement of decisions in relation to all crimes. Judicial cooperation can happen at any time in the process, from prior to the trial until after a judgment, court order, or sentence has been given. It can cover a wide range of activities and areas. This includes, but is not limited to:

- extradition;
- mutual legal assistance (MLA) in criminal matters;
- exchange of criminal records;
- freezing and confiscation of assets;
- prisoner transfer;
- supervision of alleged and convicted offenders; and
- enforcement of fines.

2.36 EU judicial cooperation measures provide a mechanism for courts and prosecuting authorities to share information with their counterparts in other Member States.

2.37 The term judicial cooperation, as understood in the EU, sits uneasily in the UK system. In a number of EU Member States prosecutors have an investigatory role and judges have an examining role (as with the French *magistrat)*. This differs from the UK system, where the courts and the judiciary operate entirely independently of prosecutors and law enforcement investigators. In terms of judicial co-operation between the UK and other Member States, this can lead to confusion over who does what and to inappropriately directed requests for assistance. This is not just an issue for the UK – for example, a number of the Scandinavian countries regard their senior police officers as judicial authorities for the purposes of such cooperation.

2.38 The legal profession referred to misunderstandings that can occur when UK prosecuting authorities try to co-operate with counterparts in other Member States due to these different legal systems.

> It is considered that there is a difficulty which arises due to the difference in civil and common law judicial systems. Whilst co-operation does exist it is often difficult to know where to go to get it, what processes need to be followed and the delay that follows after requesting it.
>
> Prosecutors from Northern Ireland, *submission of evidence*.

The Bar Council gave a further specific example of the UK courts' reliance on live witness evidence, which can be tested in cross-examination, which contrasts with the continental codified jurisdictions elsewhere in the EU, where evidence can be given by deposition. This highlights the gap between what a UK citizen would expect, and the traditions in some other EU criminal law systems.[26] But others did not feel that these problems had yet materialised in practice.

[26] Bar Council, *submission of evidence.*

> We can find no evidence that in the implementation of EU law differences between the common law in Britain and continental systems has caused any problems or undermined the former.
>
> Senior European Experts Group, *submission of evidence*.

2.39 Alongside concerns around how cooperation works in practice between Member States with different legal systems, there are also concerns that the Commission sometimes fails to take these differences into account when proposing new legislation.

> Legislative proposals in the criminal justice field often reflect the principles and practices of continental inquisitorial systems, and are difficult to accommodate conceptually within the common law adversarial model of criminal justice.
>
> The Law Societies, *submission of evidence.*

2.40 A number of stakeholders raised the importance of EU judicial cooperation in particular due to the growing internationalisation of crime. Those contributors mostly considered that EU frameworks made it quicker and easier to obtain cooperation with other Member States.

> [...] the increasing international nature of modern criminality means that EU action on the field of judicial co-operation is not only an advantage but a necessity if such crime is to be effectively policed and punished.
>
> Liberal Democrats Home Affairs Justice and Equalities Parliamentary Party Committee, *submission of evidence.*

> There is a considerable and noticeable difference in our High Court and International Section dealings with countries outside the EU framework – there is a lack of expectation of assistance and delay and expense to establish a common basis for proceeding.
>
> Prosecutors from Northern Ireland, *submission of evidence*.

2.41 Although they highlighted the value of EU frameworks for facilitating cooperation, prosecutors from Northern Ireland felt that their informal networks with colleagues in Ireland, allowing the various actors to form relationships and share best practice, were of as much value in fostering effective judicial cooperation as the EU measures themselves.[27]

2.42 Whilst there is some EU legislation that establishes bodies to co-ordinate and facilitate cooperation between EU Member States, judicial cooperation instruments within the EU are now largely based on the principle of mutual recognition (see the text box after paragraph 1.15). Many respondents raised the benefits of such an approach rather than harmonisation of laws. Professor Valsamis Mitsilegas emphasised that mutual recognition helps to avoid a 'one size fits all' approach in the EU.[28] Other respondents were also of this view.

> Cooperation is favoured by way of mutual recognition rather than by approximation, and an understanding of the differences between the criminal justice systems of the 28 EU Member States is key to the success of mutual recognition.
>
> The Law Societies, *submission of evidence.*

[27] Prosecutors from Northern Ireland, *submission of evidence*.

[28] Professor Valsamis Mitsilegas, *submission of evidence.*

> Mutual recognition provides a means to co-operate above the detail of differing legal systems with minimum legal process in each Member State. This is an advantage both from a resource perspective in a small jurisdiction and for the speed and mutual confidence with which judicial co-operation can be conducted, enhancing the quality of dispensing justice generally.
>
> HM Government of Gibraltar, *submission of evidence.*

2.43 HM Government of Gibraltar also felt that mutual recognition was particularly useful for developing a common basis of understanding with newer Member States, or those countries where bilateral relationships did not traditionally exist.

> Gibraltar has found EU measures of judicial co-operation to be most helpful in providing evidence in a format which is readily acceptable in the legal process and as a common basis for its dialogue with other Member States, especially the new accession countries, where knowledge of each other's systems can be lacking.
>
> HM Government of Gibraltar, *submission of evidence.*

2.44 At a conference attended by Home Office officials in Siracusa, Sicily in September, which was organised by the Italian Presidency of the Council of the EU with the International Institute of Higher Studies in Criminal Sciences, several participants noted that mutual recognition had brought improvements to judicial cooperation compared to what had gone before, for example through the introductions of deadlines for providing assistance. However, the same participants also felt that the ambition foreseen at the Tampere Council had not been met, as there was no standard approach to mutual recognition across the measures adopted.[29]

2.45 Mutual recognition measures have also been criticised in the past due to the fact that they have been used disproportionately by some Member States, which creates considerable burden on prosecutors and law enforcement authorities. And some stakeholders, including the Bar Council, felt that mutual recognition measures were founded on an overly optimistic assessment of the level of mutual trust that existed between Member States when the measures were first introduced.

> At the time mutual recognition was conceived there was assumed to be much more trust between Member States of their respective legal systems than has in reality been the case.
>
> Bar Council, *submission of evidence.*

2.46 More recent mutual recognition measures, such as the EIO (see text box below), have sought to address these criticisms. The EIO was the first such measure to include the need to consider proportionality when making a request for mutual legal assistance (MLA). MLA is a method of cooperation between States for obtaining assistance in the investigation or prosecution of criminal offences. MLA agreements provide a framework through which states can obtain evidence from overseas. MLA has therefore been an

[29] Conference organised by the Italian Presidency of the Council of the EU with the International Institute of Higher Studies in Criminal Sciences, *Mutual Recognition of Judicial Decisions and Confiscation 15 years after Tampere: an additional tool for depriving criminals of their illicit assets all over the union*, 22-23 September 2014. Available at: http://www.isisc.org/dms/index.php?option=com_k2&view=item&id=209:the-italian-minister-of-justice-opens-isisc-conference-on-confiscation&Itemid=222. The conference hosted wide-ranging informal discussions under the Chatham House Rule and was attended for HMG by Home Office Officials. Further information is also available at: http://www.isisc.org/dms/index.php?option=com_k2&view=item&id=208:conference-on-mutual-recognition-of-judicial-decisions-and-confiscation&Itemid=222, accessed on 11 December 2014.

important tool in the fight against international crime and terrorism. It has been crucial in a number of high-profile cases. For example, Hussein Osman, one of the failed terrorists from the 21/7 attacks five years ago, might not have been convicted had it not been for evidence obtained through MLA.

Case Study: European Investigation Order

The EIO was a Member State initiative. It is an EU Directive aimed at streamlining the existing process of MLA in full between Member States.

Respondents were generally positive about the introduction of the EIO.

We believe that the EIO will improve cross border efficiency of Member States in a number of ways: the creation of a standardised request form, formal deadlines for the execution of requests, limited grounds for refusal and putting the mechanics in place to transmit, receive and execute requests.

Scottish Government, *submission of evidence*.

Prosecutors from Northern Ireland described the EIO as a 'significant weapon' in the investigation of crime and enforcement of court orders.[30] And the Law Societies, in their submission of evidence, consider that the EIO will provide added value through the introduction of a standardised form to make requests to other Member States and through the provision for legal remedies.[31]

However, submissions of evidence from the Association of Chief Police Officers (ACPO) criminal justice business area, coordinated and consolidated by ACPO (hereinafter referred to as 'ACPO consolidated submission of evidence') raised the potential impact of EIOs, which give the EU powers to set timescales for investigations to be carried out by one Member State on behalf of another.[32] They highlighted that as an example the City of London Police has at times struggled to meet timescales for responding to Letters of Request for evidence and suggest that mandatory timescales for all EIOs regardless of the 'level' of the investigation 'may significantly impact on resources' with implications for other higher priority work of the forces.[33]

Approximately 80% of the UK's MLA is with other EU Member States. It is therefore important that EU mutual recognition agreements work effectively. Overall the Government believes that the EIO will simplify (by using standardised forms) and expedite (by imposing deadlines) judicial cooperation within the EU without radically amending the specific way in which Member States choose to use investigative measures in their territory on behalf of overseas authorities. In particular the inclusion of an explicit fundamental rights ground for refusal and an explicit obligation on the issuing authority to consider whether the EIO is necessary and proportionate is an improvement over previous mutual recognitions instruments.

The UK opted in to this measure in July 2010 as it offers practical help for the British police and prosecutors to help them cut crime and deliver justice. After nearly four years of negotiations it entered into force on 21 May 2014. Participating Member States have three years in which to implement the Directive.

[30] Prosecutors from Northern Ireland, *submission of evidence*.

[31] The Law Societies, *submission of evidence*.

[32] ACPO, *consolidated submission of evidence*.

[33] Idem.

2.47 A further example of a mutual recognition measure is the European Protection Order (EPO).

Case Study: European Protection Order

The EPO (comprising a criminal Directive and a civil Regulation) seeks to create a legal framework whereby Orders made to protect a person in one Member State (for example a restraining order in England) can be quickly recognised and enforced in any other Member State to which the protected person has travelled. The EPO started as a Member State initiative before being carried forward by the Commission.

A range of respondents to the call for evidence welcomed the agreement of the EPO.

Although this measure is pending implementation across the EU, we are clear that [...] this is an area where the EU can add value, in this case in relation to providing assistance to vulnerable persons in cross border situations, particularly individuals who may be subject to domestic abuse.

Scottish Government, *submission of evidence.*

Victim Support Scotland supports the EPO's extension of protection afforded to victims by their country of residence to other Member States and see this as going hand in hand with improved cooperation in cross border investigations.

As part of its call for extended cross-border cooperation in international cases, Victim Support Europe (VSE), the umbrella network for European victim support organisations, calls for the implementation of the European Protection Order (EPO) directive across Europe. VSS reiterates this call, as we believe that the EPO is essential in allowing victims of crime who require protection to exercise their right to free movement within the EU.

Victim Support Scotland, *submission of evidence.*

However, Professor Kiron Reid raised his concern about its practical implementation. In addition to his general point that there is insufficient scrutiny of EU measures he highlights a risk that the EPO could contribute to the curtailing of civil liberties in other Member States where the legal basis for a protective order issued in one Member State was overly wide or founded on a relatively low burden of proof.[34]

The UK opted in to this measure in March 2010 and it is due to be implemented by January 2015. The UK Government believes that there are procedural protections for the person posing the risk within the EPO system as well as those that exist in the national laws of the issuing and executing Member States.

Proposals currently under negotiation: Eurojust and the European Public Prosecutor (EPPO)

2.48 Article 85 TFEU provides for reform of Eurojust, while Article 86 TFEU provides for the creation of an EPPO to grow out of Eurojust. In line with this provision in the Treaties, the Commission's EPPO proposal was published on 17 July 2013 alongside a proposal to reform Eurojust. The impact of these proposals is not yet known as they have not yet been agreed.

[34] Professor Kiron Reid, *submission of evidence*.

2.49 The Government decided not to opt in to the European Commission's proposal to reform Eurojust due to concerns that the proposal would conflict with criminal justice arrangements across the UK, and over its interaction with the EPPO.

> The reforms proposed to Eurojust would involve deep connections with the EPPO, because the legal base for the EPPO requires it to be created 'from Eurojust'. The Commission has sought to reflect that by creating operational, management and administrative links between the two bodies. That includes the exchange of data, including personal data; automatic cross-checking of data held on each body's IT system; and Eurojust's treating any request for support from the EPPO as if it had been received from a national competent authority.

James Brokenshire MP Minister for Security, House of Commons debate on Eurojust opt-in, *(House of Commons, 29 Oct 2013: Column 874).*

2.50 The Scottish Government, in their evidence, expressed particular concerns that the proposed reforms breached principles of proportionality by giving Eurojust the ability to act independently from national prosecutors, flagging that the Commission had not adequately considered alternatives.

> [...] no effort had been made to establish whether the objectives could be better achieved by continuing with the existing arrangements, which respect national and local jurisdictions more.

Scottish Government, *submission of evidence.*

2.51 The Government has committed to consider whether to opt in to the Eurojust Regulation post adoption, and will remain a full and active participant in the Eurojust negotiations. The Coalition Agreement makes clear that the UK will not participate in any EPPO proposal as it is incompatible with UK systems of law which do not combine police and prosecutorial powers. This concern was echoed by the Law Societies, who believe that conflicts of jurisdiction between EU Member States could increase as a result of the establishment of the EPPO, given the proposed breadth of its jurisdiction.[35]

2.52 A number of national Parliaments raised concerns regarding the Commission's EPPO proposal. Indeed, the EPPO proposal triggered the second 'yellow card' in EU history when 11 Member States' national Parliaments (now 18 chambers in total) issued reasoned opinions setting out their view that the proposal breached the principle of subsidiarity.[36]

> [...] the EPPO proposal breaches the principle of subsidiarity and the Committee is in agreement that a national-level approach, supported by existing EU mechanisms, would be more appropriate [...] the Commission did not adequately consider the option of strengthening existing or alternative mechanisms

House of Commons Justice Select Committee, *submission of evidence.*

2.53 Following the 'yellow card', the Commission concluded that its proposal did not breach the principle of subsidiarity and did not require any revision. The EPPO is yet to be agreed by the Council of the European Union. At the JHA Council meeting in October 2014 the Italian Presidency concluded further work would be needed on the detail of certain aspects of the concept.

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[35] The Law Societies, *submission of evidence.*

[36] House of Commons Justice Select Committee, *submission of evidence.*

2.54 The existence of the 'yellow card' mechanism gives national Parliaments a role in holding the Commission to account regarding issues of subsidiarity. The Law Societies raised concerns that this role is limited as the yellow card process is not sufficiently accountable.

> We wish to highlight the need to ensure that the EU institutions adhere strictly to proportionality and subsidiarity principles when proposing new initiatives. In this context the Law Societies are concerned that the current operation of the 'Yellow Card' procedure and the method it offers to determining whether a proposal falls within EU competence may not be strong enough. Based on the Commission's response to the 'Yellow Card' raised by 14 national parliaments following the Commission's adoption of the proposal on the establishment of the European Public Prosecutor's Office, we are not confident that the procedure offers sufficient scrutiny or accountability.
>
> The Law Societies, *submission of evidence.*

The Government is of the view that the role of national Parliaments should be strengthened in order to ensure, inter alia, that legislative proposals do not violate the subsidiarity principle.

2.55 Further detail on subsidiarity and proportionality, and the yellow card mechanism can be found in the Subsidiarity and Proportionality report.

Funding programmes

2.56 The European Commission operates a funding programme relating to justice and rights. The current funding programme for the period 2014 to 2020 funds projects aimed at supporting judicial cooperation in civil and criminal matters; promotion of judicial training with a view to fostering a common legal and judicial culture; facilitation of effective access to justice for all, including promotion and support for the rights of victims of crime; and support for initiatives regarding judicial cooperation and crime prevention in the field of drugs policy. The UK did not opt in to the new justice funding programme at the start of negotiations and has not opted into the programme post-adoption at this stage because there is no firm evidence that the programme offers value for money for the UK taxpayer. The Government can and will review the decision in the coming years, as it is open to the UK to opt in at any time.

Impact of EU external competence

2.57 In certain circumstances the EU has competence to act 'externally'. This means that the European Union has the capacity to act internationally as a single entity in its own right, in particular by entering into binding agreements under international law. The EU has exercised this competence by developing MLA Agreements which provide for judicial cooperation between the EU and third countries. The UK is seen by the Senior European Experts Group as benefitting from this kind of EU external action.

> EU agreements with third countries give us greater reach. Such agreements are attractive to third countries because through the EU they can work with all 28 Member States.
>
> Senior European Experts Group, *submission of evidence.*

2.58 For example, one particular measure which was highlighted by respondents to our call for evidence was the MLA agreement with Japan.

Case Study: EU-Japan MLA Agreement

The Agreement between the EU and Japan on MLA in criminal matters was signed in 2009. The UK opted into the Agreement, which entered into force on 2 January 2011.

The Agreement provides for MLA (i.e. requests for evidence) between Japan and EU Member States (although the Agreement does not apply to Denmark due to its opt-out arrangements). When one side makes a request, there is a general obligation (subject to certain exceptions) to provide 'assistance' such as provision of evidence in connection with investigations or prosecutions.

The Japan Agreement is the first free standing EU-level MLA Agreement with a third country. Previous agreements, such as the EU-US MLA Agreement, required that Member States amend existing bilateral MLA treaties, rather than creating a new standalone EU-level agreement.

The Scottish Government stated that, if the EU had not negotiated this agreement on behalf of Member States, it is unlikely that formal arrangements would be in place, as the UK did not have any prior bilateral agreements in place.[37] However, it is the Government view that this does not mean that the UK (or other Member States) could not have negotiated a treaty bilaterally with Japan if considered of benefit (for instance, the UK has recently negotiated a bilateral MLA agreement with China).

2.59 The Scottish Government emphasised the safeguards which have been built into all MLA agreements. For example, the EU-Japan MLA provides that a request for assistance can be refused in a case where the death penalty may be imposed.[38] These sorts of safeguards are common to such agreements. Stakeholders at our London events also raised the importance of MLA in promoting trade by providing security and assurance to third countries.[39]

2.60 However, the 'one size fits all' approach of EU MLA treaties could fail to take into account specific aspects of the UK's legal systems. For instance, Article 18 (1) of the EU-Japan Agreement suggests that tracing bank accounts should be done through MLA agreements (which relate to cooperation between prosecutors), but in practice in the UK this is a police function. The requirement to go through prosecutors in the MLA makes the system slower and more complex than it needs to be, and in these cases a bilateral treaty could be more a more effective means of ensuring that the UK's distinct legal system is fully reflected in the way cooperation under the treaty framework will function.

2.61 Overall the UK Government is cautious as to the added value of EU level MLA agreements with third States and believes that in most cases the goal of an MLA agreement can be achieved through bilateral arrangements or by third country ratification of multilateral agreements (for instance South Korea and Chile have ratified the 1959 Convention on Mutual Assistance in Criminal Matters).

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37 Scottish Government, *submission of evidence*.

38 Idem.

39 *Record of 18 June stakeholder event in London*, and *Record of 23 June stakeholder event in London*.

Police, customs cooperation in criminal matters, and internal security

2.62 The aim of police and customs cooperation on criminal matters, broadly, is to ensure that law enforcement agencies in EU Member States can access appropriately all relevant information held in other Member States, share information as appropriate and work together to combat crime.

Police cooperation

2.63 The EU has competence to adopt measures in the following areas of police cooperation:

- the collection, storage, processing analysis and exchange of relevant information;
- support for training of staff, and cooperation on the exchange of staff, on equipment and research into crime detection;
- common investigative techniques in relation to the detection of serious forms of organised crime;
- operational cooperation (although this requires all States to agree); and
- laying down the conditions and limitations under which police authorities of one State may operate in the territory of another State with its agreement (again, this requires all States to agree).

2.64 These measures operate across a range of areas, such as terrorism, organised crime, drug and human trafficking, financial crime, cyber crime, and fraud.

2.65 In general, cross-border police cooperation will be undertaken where there is no need for a judicial decision to be involved, most often at the investigatory stage. For example, police may ask their counterparts in another Member State if they can take a statement from a willing witness for use in an investigation.

2.66 The EU has implemented measures to foster better cooperation between police, and is bringing forward information sharing measures such as the proposed PNR legislation, which is discussed in more detail in the text box after paragraph 2.129.

2.67 Most respondents saw considerable value in practical cooperation at EU level amongst police and customs authorities in order to tackle crime.

> In order to illustrate the appropriateness of the EU level for cooperation on policing, customs cooperation on judicial matters and internal security, one has to consider the growing complexity and sophistication of organised crime as well as the fact that its very international nature constitutes an obstacle to the effective investigation of such crimes by any single member state.
>
> Europol, *submission of evidence.*

> Over the last decade the co-operation achieved through the EU has improved from being inconsistent and reliant on personal relationships to being a far more organised and effective system.
>
> ACPO, *consolidated submission of evidence.*

> The main advantages are that police co-operation extends the reach of UK police forces so that they can work with other Member States authorities to investigate crossborder crime, including fraud, cyber crime and terrorism.
>
> Senior European Experts Group, *submission of evidence.*

Case Study: Operation Archimedes

An example of existing cooperation working well is Operation Archimedes, which was coordinated by Europol, with participation from 34 countries, Frontex, Interpol and Eurojust. The operation has resulted in over 1000 arrests to date.

Operation Archimedes has been the biggest ever cooperated international law enforcement operation targeting serious and organised crime in the EU and involved actions at hundreds of locations between 15 and 23 September 2014.

EU Member States and their international partners came together to disrupt the activities of criminal groups engaging in the trafficking and production of drugs, the trafficking of human beings, the facilitation of illegal immigration, organised property crime, the trade in firearms and counterfeit goods.

As part of Operation Archimedes, law enforcement authorities committed thousands of police officers to actions focusing on key hot spots in the EU with the aim of having a lasting and significant impact on serious and organised crime disrupting criminal groups and their activities for months or even years to come.

Europol website, *Operation Archimedes*.[40]

2.68 ACPO's consolidated submission of evidence illustrated the practicalities of UK police operating cooperatively in other Member States, citing the different procedures and protocols that apply which provide a steep learning curve for UK officers, but more importantly have implications for the admissibility in UK courts of evidence secured in other Member States.

> During a search for an investigation carried out in Spain, this resulted in a much wider search than would have undertaken in the UK, with exhibits seized differently, which has implications for the investigation with regards to disclosure of the material to be scheduled for court, as practices are so varied.

ACPO, *consolidated submission of evidence*.

2.69 But whilst overall practical cooperation was seen as a good thing, there are sensitivities where these measures can potentially impact on national sovereignty and the role of Member States in protecting the public, for example, in relation to the Commission's new proposal to reform Europol, which is discussed in more detail below.

Proposals currently under negotiation: Europol, CEPOL and law enforcement training

2.70 The UK currently cooperates with Europol under the terms of the 2009 Europol Council Decision. Europol provided considerable evidence to the call for evidence, highlighting their views on how UK participation in Europol is beneficial.

> UK Law enforcement benefits from expertise offered by Europol that isn't found elsewhere; a prime example thereof being Operation Rescue, where Europol staff decrypted hard drives at the request of the UK and Dutch authorities. This led to the distribution of over 4,000 intelligence reports to 30 countries, ultimately resulting in 190 arrests and the identification of 230 victims of child sexual exploitation.

[40] Available at: https://www.europol.europa.eu/content/operation-archimedes, accessed on 1 October 2014.

> The UK also draws significant benefit from real-time coordination with days of action. The level of cross-border cooperation amongst criminals is constantly on the increase and so targeting criminals simultaneously before word gets out is essential. In a recent operation on 11 June 2014, for example, joint action with 14 other European countries helped to identify 111 potential victims of human trafficking and 30 individuals suspected of criminal involvement, highlighting the benefits that can be achieved through live intelligence support.
>
> Europol, *submission of evidence.*

2.71 In April 2013, the European Commission brought forward a draft proposal for a new Europol Regulation which, once adopted, was intended to supersede the existing Council Decision. The Government believes that the text of the new Regulation should be clear that law enforcement remains a Member State responsibility, and considered that there were some elements of the Commission's initial proposal that caused significant concerns in this regard. For this reason the Government decided not to opt into the proposal at the outset, but committed to opting in post-adoption if these concerns were resolved during the course of negotiations.

2.72 In a Written Ministerial Statement to the House of Commons, James Brokenshire MP, Home Office Minister, said 'the UK should opt into the Regulation post-adoption, provided that Europol is not given the power to direct national law enforcement agencies to initiate investigations or share data that conflicts with national security'.[41]

2.73 The Scottish Government, in their evidence, registered their concerns that the current balance between national law enforcement and Europol should not be disrupted by any new measures.

2.74 CEPOL is the European Police Training College, which until recently was based in Bramshill (UK). In March 2014, the UK Government decided to opt into a Member State initiative, which relocated CEPOL from the UK to Hungary, and the new HQ officially opened on 6 November 2014.

2.75 On 16 July 2014, the European Commission brought forward a draft proposal for a new CEPOL Regulation.[42] The draft Regulation provides for a legal framework for a new CEPOL with broader objectives and modernised governance. It also increases training on EU-related issues and aims to make training systematically accessible to all relevant law enforcement professionals (not only police officers of senior rank as is the case under the current CEPOL Decision). It calls for the implementation, by CEPOL, of a new training approach set out in a European Law Enforcement Training Scheme (LETS). The proposal also aims to improve the governance of CEPOL by seeking increased efficiency and aligning it with the principles laid down in the Common Approach on EU decentralised agencies. The opt-in deadline for this measure was 24 November and the UK did not opt in.

2.76 There were calls from other stakeholders for improved training in other areas. Some prosecutors from Northern Ireland said that there was, in practice, a general lack of awareness about policy, legislation and powers of various institutions and the powers of

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[41] UK Parliament *Written Ministerial Statement on 'Opt-in decisions'*, (House of Commons,5 Sept 2013: 2NWS). Available at: http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130905/wmstext/130905m0001.htm, accessed on 19 November 2014.

[42] European Commission, *Proposal for a Regulation Establishing a European Union Agency for Law Enforcement Training (Cepol), Repealing and Replacing the Council Decision 2005/681/JHA /* COM/2014/0465 final – 2014/0217*, (2014). Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014PC0465 accessed on 4 December 2014

the EU.[43] This was further echoed by the Bar Council who would welcome 'funding for training and exchange of best practice between defence and other practitioners and legal professionals'.[44]

2.77 However, when LETS was published as a draft Commission Communication in 2013, the Government opposed its introduction on the basis that police and other law enforcement training should be led by the police and other agencies themselves and there should not be an increased role for the EU in this area.

2.78 ACPO, in their consolidated submission of evidence, felt that it would serve UK interests to ensure that practitioners are consulted or involved when EU proposals are being formulated, as they considered little thought had been given in the past to the implications on practitioners.[45]

Customs cooperation in criminal matters

2.79 Customs authorities and other law enforcement agencies around the world cooperate with each other to tackle smuggling and carry out criminal investigations into customs offences. This helps to ensure that customs and police in different countries can work effectively to tackle international cross-border crime, such as smuggling of drugs and firearms.

2.80 Much of this mutual assistance requires the exchange of information between customs authorities. It can also involve spontaneous disclosures of information, when one agency chances upon an irregularity that will be of interest to another. Customs authorities also share information on new trends in fraud or smuggling, and effective ways of tackling these.

2.81 Cooperation between the UK and other EU Members States' customs services, police and other agencies takes place on a daily basis and is an important element in tackling cross-border crime.

2.82 Dr Maria O'Neill, in her submission of evidence, stated that EU customs cooperation is driven by external factors such as the US Customs-Trade Partnership Against Terrorism (C- TPAT), and the World Customs Organisation's SAFE framework of Standards.[46] The Government acknowledges that C-TPAT and SAFE have had an impact, but does not agree that they have been the primary drivers of customs cooperation.

Internal Security

2.83 Whilst national security remains the sole responsibility of each Member State (Article 4(2) TEU), the EU does have shared competence in relation to the internal security of the Union. The EU's role in internal security consists of common policies, legislation and practical cooperation in the areas of police and judicial cooperation, border management, and crisis management.

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43 Prosecutors from Northern Ireland, *submission of evidence.*

44 Bar Council, *submission of evidence.*

45 ACPO, *consolidated submission of evidence.*

46 Dr Maria O'Neill, *submission of evidence.*

2.84 The EU has an Internal Security Strategy (ISS), which sets out 5 strategic objectives for internal security:[47]

- disrupt international crime networks;
- prevent terrorism and address radicalisation and recruitment;
- raise levels of security for citizens and businesses in cyberspace;
- strengthen security through border management; and
- increase Europe's resilience to crises and disasters.

2.85 Underpinning the ISS are specific work programmes and strategies in certain key areas. For example, in the area of counter-terrorism there is an EU Counter Terrorism Strategy, a Strategy for combating recruitment and radicalisation, a Strategy on terrorist financing, the Radicalisation Awareness Network, and the European Network of Associations of Victims of Terrorism. There is also an EU Counter-Terrorism Co-ordinator – responsible for ensuring coordination of external and internal EU efforts in Counter Terrorism, an EU cybersecurity strategy – which covers a range of areas including crime, resilience, defence, industrial and technical capabilities, and an EU Drugs Strategy – which aims to contribute to a reduction in drug demand and drug supply in the EU.

2.86 Another example of EU activity in the internal security spectrum is the EU Organised Crime Policy Cycle.

Case Study: The EU Organised Crime Policy Cycle

The EU Organised Crime Policy Cycle is a multi-annual work programme that aims to improve operational collaboration amongst Member States and EU Institutions to address the Serious and Organised Crime types that pose the greatest threats to the EU.

Nine crime types have been identified as priorities for the current 2014-2017 programme (illegal immigration, cocaine/heroin, counterfeit goods, excise/missing trader (MTIC) fraud, firearms, trafficking in human beings, organised property crime, synthetic drugs, and cyber (child sexual exploitation, cyber attacks and card fraud).

Annual operational action plans (OAPs) underpin each strategic objective, each designed to improve operational collaboration between law enforcement officers in Member States in addressing the key threats. The UK participates in all OAPs; and leads on the strands relating to child sexual exploitation and trafficking in human beings. The UK also co-leads the cocaine/heroin, firearms and excise/MTIC strands.

The Scottish Government highlighted the importance of non-legislative measures, such as the EU Organised Crime Policy Cycle, which seeks to put cooperative action in this area on a firmer footing, through a serious of time-bound action plans, which include a review process and end of term analysis of achievements.[48]

The Government believes that the EU Policy Cycle is an effective mechanism by which Member States can work together to tackle serious and organised crime.

[47] European Commission, *Communication from the Commission to the European Parliament and the Council: The EU Internal Security Strategy in Action: Five steps towards a more secure Europe* (2010).

[48] Scottish Government, *submission of evidence*.

2.87 The Commission has brought forward a number of specific measures under the current EU ISS. The Government is of the view that a number of these measures have been beneficial e.g. the creation of the European Cybercrime Centre (EC3), or have the potential to be beneficial, such as the proposed Directive on Passenger Name Records. The Government also welcomes the emphasis on practical cooperation in this field, which the ISS has helped to bring about. The ISS is due to be renewed in 2015. The UK Government's priorities for the new ISS are discussed in paragraph 3.35.

Critical Infrastructure

2.88 The European Programme for Critical Infrastructure Protection (EPCIP) aims to improve the protection of critical infrastructure in the EU from both threats and natural or man-made hazards. The programme consists of various strands:

- a Directive setting out a procedure for the identification and designation of European critical infrastructures and assessment of the need to improve their protection;[49]
- measures designed to facilitate the implementation of EPCIP, including an Action Plan, the Critical Infrastructure Warning Information Network (CIWIN), the use of Critical Infrastructure Protection (CIP) expert groups at EU level, a CIP information-sharing process, and the identification and analysis of interdependencies; and
- the development of an EPCIP external dimension (which currently consists of engagement with the U.S. and Canada).

2.89 All Member States have implemented the Directive by establishing a process to identify and designate European critical infrastructures in the energy and transport sectors. In 2013, the Commission adopted a new approach to EPCIP, looking at interdependencies between critical infrastructures, industry and state actors through a series of pilot studies in order to facilitate better cooperation on critical infrastructure protection and resilience within the EU.[50]

Funding Programmes

2.90 The European Commission runs a range of funding programmes for police and customs cooperation. Under the last financial perspective the main funds were ISEC (prevention of and fight against crime) and CIPS (terrorism and other security related risks).[51] From 2014-2020 these have been replaced by a consolidated Internal Security Fund – which will cover all internal security issues (law enforcement cooperation, organised crime and counter terrorism).[52] The UK did not exercise its opt-in when the Regulation establishing the Fund was first published. Now the Regulation has been adopted, the Government will consider whether it is in UK interests to seek to opt-in post adoption.

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[49] Council Directive 2008/114/EC on the Identification and Designation of European Critical Infrastructures and the Assessment of the Need to Improve their Protection, 2008.

[50] European Commission, *working document on a new approach to the European Programme for Critical Infrastructure Protection Making European Critical Infrastructures More Secure* (2013). Available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/crisis-and-terrorism/critical-infrastructure/docs/swd_2013_318_on_epcip_en.pdf, accessed on 1 October 2014.

[51] European Commission, *Prevention of and Fight against Crime (ISEC)* (2007). Available at: http://ec.europa.eu/dgs/home-affairs/financing/fundings/security-and-safeguarding-liberties/prevention-of-and-fight-against-crime/index_en.htm, accessed on 1 October 2014.

[52] European Commission, *Terrorism & other Security-related Risks (CIPS)* (2007). Available at: http://ec.europa.eu/dgs/home-affairs/financing/fundings/security-and-safeguarding-liberties/terrorism-and-other-risks/index_en.htm, accessed on 1 October 2014.

EU Minimum Standards in Criminal Law and Procedure

2.91 EU competence to take action in this area is provided for under Articles 82 and 83 TFEU. The European Parliament and the Council may adopt Directives which set minimum standards in criminal procedure or which establish minimum rules regarding the definition of criminal offences and penalties. Such Directives are subject to QMV in Council.

Mutual Recognition, as outlined in the text box after paragraph 1.15, whereby Member States accept the criminal justice systems as they operate in each Member State arguably avoids the need for Member States to harmonise their distinct legal systems. This sits in contrast to EU measures that establish harmonised rules at EU level, and the tensions between these two approaches is explored in more detail below.

2.92 The standards by which criminal law and criminal procedure operate were addressed in many of the submissions to this review. There was a variety of views on how best to achieve a minimum standard and, in particular, differences in approach depending on whether the standards related to criminal procedure or to criminal offences and penalties.[53]

2.93 Proposals in this area are subject to a further safeguard under the Treaties, in the form of the 'emergency brake' (Article 82(3) and Article 83(3)) which can be used by a Member State if a draft proposal would 'affect fundamental elements of its criminal justice system' (see paragraphs 1.48-1.49). To date, the 'emergency brake' provisions provided for by the Treaty have never been used.

2.94 Dr Maria O'Neill said that the 'emergency brake' should be used more often in this area.

> There are already [...] "accelerator" and "emergency brake" provisions, which should be use more often in the AFSJ [Area of Freedom Security and Justice], as appropriate. It should be remembered that provisions/ proposals that might well work well, and are of considerable added value for some EU member states, may prove to be a mis-fit for others. In this case alternative arrangements should be made by non-participating countries to address the issue, in order not to leave a gap in the law enforcement and justice procedures that organised crime and international terrorism, amongst others, could exploit. In the event that the objective of the proposal is shared, but the method to achieve that objective is not due to internal constitutional or other constraints, it could be recommended that the alternative to the EU measures might be attached to the relevant EU document by way of a declaration, so that they are easily accessible by police, prosecutors (and their advisors at Europol and Eurojust), and academics.
>
> Dr Maria O'Neill, *submission of evidence.*

This view was shared by the Liberal Democrats Home Affairs, Justice and Equalities Committee, who also highlighted the possibility of using the emergency brake provision to protect the national interest.

> In any case, the risk of prejudice to national legal interests is addressed by the possibility of pulling the 'emergency break' in Articles 82 (3) and 83 (3).
>
> Liberal Democrats Home Affairs Justice and Equalities Parliamentary Party Committee, *submission of evidence.*

[53] Scottish Government, *submission of evidence.*

Criminal Procedure

2.95 EU action related to procedural rights is covered in Article 82(2) TFEU, which provides that the EU can act 'to the extent necessary to facilitate mutual recognition' and 'by means of Directives' to establish common minimum rules related to criminal procedure law. The minimum rules can apply in the following areas:

- mutual admissibility of evidence between Member States;
- the rights of individuals in criminal procedure; and
- the rights of victims of crime.

2.96 The EU may only act in other areas of criminal procedure where the Council unanimously adopts a Decision giving it authority to do so. To date the Council has not adopted such a decision. Any such decision also requires the approval of the European Parliament.

2.97 Criminal procedure measures aim to support and promote mutual recognition of orders between Member States. They do so by guaranteeing that certain minimum procedural protections are afforded to individuals who become involved in criminal proceedings, irrespective of the Member State in which those proceedings are taking place.

Case Study: The Criminal Procedural Rights Roadmap

The 'Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings' was agreed by a Council Resolution in 2009 and set out the priority areas for action, which were later confirmed in the Stockholm Programme.

The Roadmap set out measures which aim to facilitate protection of suspected and accused persons in criminal proceedings and the application of the principle of mutual recognition of judicial decisions. The Council resolved to take action in six areas:

- translation and Interpretation;
- information on rights and information about the charges;
- legal advice and legal aid;
- communication with relatives, employers and consular authorities;
- special safeguards for suspected or accused persons who are vulnerable; and
- pre-trial detention.

The Roadmap was incorporated into the EU's JHA work programme (The Stockholm Programme) in 2009.

2.98 In the area of defendant rights the UK has so far opted in to two Directives concerning minimum rights for suspected or accused persons: Directive 2010/64 on the right to interpretation and translation; and Directive 2012/13 on the right to information.

2.99 The UK has also chosen not to opt in to some proposals in this area. For example, in 2011 the UK did not opt in to the proposal for a new Directive concerning access to a lawyer in criminal proceedings.[54] [55] The Government will in due course review its position on future participation in light of the final text which was adopted in October 2013.

2.100 Most recently the Government also decided not to opt in to three further Directives proposed by the Commission in December 2013 concerning provisional legal aid; the procedural rights of child defendants; and a proposal relating to the presumption of innocence and the right to be present at trial. The Government considered these proposals individually and chose not to opt in due to specific concerns with each. Those concerns included doubts over the need for the change in these areas at all and on how the changes might impact on the delivery of justice in the UK where the standards in each area are already high. For example, the very limited circumstances in which adverse inferences can be drawn from a defendant's silence or refusal to co-operate would likely have to be changed if the UK had opted into the Presumption of Innocence Directive.

2.101 However, minimum standards across the EU are considered by some stakeholders as crucial to underpinning the principle of mutual trust and mutual recognition.

> The advantage of setting minimum standards across the EU is that we can rely on the information and treatment of detainees from other member states. If the standards are maintained then the reliance on previous convictions and the quality of those convictions becomes business as usual.
>
> ACPO, *consolidated submission of evidence.*

> Mutual recognition measures were adopted prematurely. Experts agree that it was necessary to audit and improve the procedural safeguards for defendants and complainants across the member states before judicial co-operation could work.
>
> Fair Trials International and JUSTICE, *submission of evidence.*

2.102 In addition to incorporating the Procedural Rights Roadmap, the Stockholm Programme also gave priority to the protection and rights of victims of crime, with a specific focus on vulnerable groups such as children, victims of domestic violence and victims of female genital mutilation. This resulted in the Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings. The Government welcomed the Roadmap when it was introduced in 2011.

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[54] *Council Directive 2013/48/EU on The Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings, and on the Right to have a Third Party Informed Upon Deprivation of Liberty and to Communicate with Third Persons and with Consular Authorities While Deprived of Liberty* (2013).

[55] UK Parliament, *Written Ministerial Statement (House of Commons, 11 October 2011: 23WS-24WS).* Available at: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111011/wmstext/111011m0001.htm#11101169000008, accessed on 19 November 2014.

Case Study: The Victims Roadmap

The 'Roadmap for Strengthening the Rights and Protection of Victims, in Particular in Criminal Proceedings' was agreed by a Council Resolution in 2011 and it sets out measures that aim to facilitate specific action to 'establish a common minimum standard of protection of victims of crime and their rights in criminal proceedings throughout the Union'.[56]

The Council resolved to take action in five areas:

Measure A: A Directive replacing Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings

Measure B: A recommendation of practical measures and best practice in relation to the Directive set out in Measure A

Measure C: A Regulation on mutual recognition of protection measures taken in the context of civil proceedings (see case study at paragraph 2.38)

Measure D: A review of the 2004 Council Directive relating to compensation to crime victims (2004/80/EC) to consider whether revision or simplification is required, and to present any appropriate legislative or non-legislative proposals

Measure E: Proposals on specific needs of victims in relation to special types of crimes.

The UK Government opted into the EU Victims' Directive which was brought forward by the European Commission in June 2011 and was adopted in October 2012. The aim of the Directive is to ensure that all victims of crime receive appropriate protection and support; are able to participate in criminal proceedings; and are recognised and treated in a respectful, sensitive and professional manner. All Member States need to fully implement the Directive by 16 November 2015.[57]

In February 2014, the Commission circulated a guidance document setting out recommendations on practical measures and best practises to facilitate the effective and timely transposition of the EU Victims' Directive.[58]

Measure C is addressed in the Balance of Competences between the United Kingdom and the European Union – Civil Judicial Cooperation Report. Measure C also complements the Directive on a European Protection Order in criminal matters (see text box after paragraph 2.46).

Measures D and E have yet to be published.

2.103 Some organisations representing the victims of crimes were critical of what has been achieved through the Victims Rights Roadmap and consider EU level action is required to compel Member States to improve their standards. This view was echoed by the Law Societies and others.

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[56] European Council, *Resolution of the Council on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings (2011/C 187/01)* (2011). Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011G0628(01)&qid=1417700137948&from=EN, accessed on 4 December 2014

[57] Council Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision (2012).

[58] European Commission, *DG Justice Guidance Document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*. Available at: http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf, accessed on 15 December 2014.

> We do not consider that recommendations or other soft law measures carry sufficient weight to encourage Member States to improve their systems.
>
> Fair Trials International and JUSTICE, *submission of evidence*.

2.104 The Government has taken steps to share best practice with Member States. In March 2014 the UK delivered presentations on good practice models for conducting needs assessment for victims and victim support service models as part of the Commission's EU experts' workshop on the Victims' Directive.

2.105 Support for minimum procedural standards was also advanced by others who see in them an opportunity to remedy problems in the operation of Mutual Recognition. This was because Mutual Recognition, it was argued, had been predicated on a false assumption that Member States having signed up to the European Convention on Human Rights (ECHR) would always provide the necessary guarantees.

> In fact, detailed research over more than a decade has repeatedly showed that the ECHR is an insufficient tool to ensure protection of suspects' and accused persons' rights in the context of mutual recognition arrangements.
>
> Fair Trials International and JUSTICE, *submission of evidence*.

> EU action on minimum standards in criminal law and procedure is essential to give more consistency and effectiveness to the way EU Countries implement ECHR rules. Without EU legislation backed by Commission and CJEU enforcement codifying ECtHR judgments, EU states can and do implement Strasbourg case law in a variety of ways. This is unhelpful to both police cooperation and to judicial cooperation based on mutual recognition: if minimum standards are not established and followed, police and judicial co-operation could be longer, slower and more expensive if open to challenge.
>
> Liberal Democrats Home Affairs Justice and Equalities Parliamentary Party Committee, *submission of evidence*.

2.106 Some respondents, including the Bar Council and the Faculty of Advocates, felt that the standards for criminal procedures in the UK already delivered guarantees of fairness.[59] However as described above there was concern that the same was not true in all Member States and this impacted on UK citizens who were either the victim of a crime or accused of a crime in another Member State.

2.107 Fresh Start considered this point further.

> Some may argue that there is a need for international requirements to strengthen the domestic criminal law of countries. This could be aimed at [...] providing people with minimum procedural rights as they travel through different countries. As a general point, this may well be true. However, it is no argument for the UK to submit itself to EU criminal law.
>
> Fresh Start, *submission of evidence*.

2.108 Others were cautious as to the benefits of further EU involvement in this area, if future developments do not respect national systems.

> The Law Societies see the further development of minimum procedural rules under article 82 TFEU as an area in which EU law could potentially develop in a direction which is adverse to the UK's national interest, if such instruments do not adequately provide for the principles and practices of the Common Law adversarial system.
>
> The Law Societies, *submission of evidence*.

[59] Bar Council, *submission of evidence,* and The Faculty of Advocates, *submission of evidence*.

2.109 In addition, Open Europe sees risks to the UK's distinct legal systems due to the ECJ's ongoing ability to interpret EU minimum standards, and felt that other mechanisms (e.g. peer reviews) would work similarly without the need for ECJ involvement, and would be preferable to a 'one size fits all' approach.[60]

2.110 The difficulties in delivering minimum standards were highlighted by the Scottish Government, who observed that attempting to harmonise minimum standards in criminal procedure across the Member States is a complex task, for example due to differences between adversarial and inquisitorial approaches, or differences in procedure.[61] In the same vein, ACPO's consolidated submission of evidence states that:

> The disadvantages [of setting minimum standards] are that these standards must be well worked out in advance before they are accepted, as the fine analysis of the directive can lead to inefficiencies or confusion.
>
> ACPO, *consolidated submission of evidence*.

2.111 ACPO's consolidated submission of evidence gave a specific example of the use of the Directive on Interpretation and Translation for persons being investigated for a criminal offence. They pointed out that the Directive makes no reference to telephone interpreting, which is UK standard practice when booking someone into custody.[62] As a result, several statements relating to detention needed to be translated into over 50 languages and made available for detainees in written form as requested.

2.112 There was concern from the Faculty of Advocates that the imposition of minimum standards risked stifling the ongoing rise in standards, effectively acting as a 'maximum' standard, with Member States unwilling to invest in further improvements, and no incentive for them to go beyond the minimum.[63] At worst this could lead to Member States allowing their standards to slip to the minimum.

2.113 The evidence submitted also addressed the current balance in procedural rights regarding the various needs of those who are victims of or witnesses to crime and those who are accused of crime.

> Victims throughout Europe benefit from the minimum standards in criminal procedure and law; measures such as the Victims' Directive will help ensure that regardless of the location of the crime or the nationality of the perpetrator, victims are aware of their rights, have access to support, and can expect efficient and effective investigation and prosecution of their crimes.
>
> Victim Support Scotland, *submission of evidence.*

> Article 6 of the ECHR sets out the right to a fair hearing for persons accused. SAMM Abroad and MAMAA strongly argue that all parties in criminal proceedings should have the absolute right to a fair trial, not just the alleged offender. Without legal representation this can be almost impossible for a victim of crime overseas to achieve.
>
> SAMM Abroad (Support After Murder and Manslaughter Abroad) and MAMAA (Mothers Against Murder & Aggression), *submission of evidence.*

[60] *Record of meeting with Open Europe*, 2014.

[61] Scottish Government, *submission of evidence.*

[62] ACPO, *consolidated submission of evidence.*

[63] Faculty of Advocates, *submission of evidence.*

Stakeholders at the Brussels event further commented that EU instruments have been effective in cooperation, but potentially at the expense of the impact of the individual's rights. This was later echoed in further comments that prosecutorial and law enforcement measures had advanced more than provision for the rights of victims/defendants.[64]

Criminal Law

2.114 EU competence in this area seeks to approximate criminal laws by establishing minimum rules to deal with particularly serious crimes of a cross-border dimension, and to ensure the effectiveness of EU law in other areas where criminal law is considered essential.

2.115 Article 83(1) TFEU provides a list of types of 'serious crime with a cross-border dimension' where the EU has competence to establish minimum rules concerning the definition of criminal offences and sanctions. These are:

- terrorism;
- trafficking in human beings and sexual exploitation of women and children;
- illicit drug trafficking;
- illicit arms trafficking;
- money laundering;
- corruption;
- counterfeiting of means of payment;
- computer crime; and
- organised crime.

2.116 This list of specified crimes can only be added to by unanimous Council decision after obtaining the consent of the European Parliament.

2.117 Article 83(2) TFEU also provides EU competence for the approximation of criminal law and sanctions beyond the list of 'serious crimes' specified above if it 'proves essential to ensure the effective implementation of a Union Policy in an area which has been subject to harmonisation measures'.

2.118 This means that any areas of EU policy which are subject to harmonising measures (for example protection of the environment) could also be subject to criminal law measures pursuant to Article 83(2). The ability of the EU to set criminal penalties has long been subject to debate, as illustrated in the following case study from the Energy and Climate Change report (though, as set out in Appendix A the Government takes the view that the case-law set out below is no longer applicable).[65]

[64] *Record of Brussels stakeholder event*, 2014.

[65] Case study in the text box after paragraph 2.118 from: HMG, *Review of the Balance of Competences between the United Kingdom and the European Union: Environment and Climate Change*, 2013.

Case Study: Environmental Crime

In 2001, the European Commission proposed a Directive to ensure that certain environmental activities would be deemed criminal offences.

The Council took the view that this went beyond the scope of the EU's environmental powers, but the ECJ ruled in the European Commission's favour that, 'as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence. However, [this] does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure. One measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective' (Case C-176/03, para 47-48).

This judgment was seen by some as a potentially significant extension of the EU's competence in the area of criminal law. However, a subsequent ECJ case made clear that EU environmental legislation cannot specify the type or level of criminal penalties that should be imposed, and that this remains a matter for each Member State (Case 440/05, paragraphs 70-71).

The outcome of this protracted process was the adoption in 2008 of Directive 2008/99/EC on the protection of the environment through criminal law, which required Member States to criminalise serious breaches of specified EU environmental laws and to set effective, proportionate and dissuasive penalties for such offences.

2.119 The case study above illustrates the tensions in this area. These sensitivities may arise more widely following the adoption of the Lisbon Treaty, which now lets the EU specify the type and level of penalties beyond the list of serious crimes. So, as more areas of EU law become harmonised, there is the potential for criminal law measures pursuant to Article 83(2) to be used more widely.

2.120 For criminal law measures, in most cases seen so far UK law has already met or exceeded the 'minimum standard' set by the EU in respect of both the definition of the offence and the associated penalty. This is not the case however for all Member States.

2.121 As with other JHA proposals, the UK can choose whether to opt in to proposals establishing minimum standards in criminal law. For example, the UK has opted into Directives on Trafficking in Human Beings, Sexual Exploitation of Children and on Attacks on IT systems. However, the UK did not opt in to the Directive on counterfeiting proposed by the Commission in February 2013, as the UK already has effective laws and sanctions for counterfeiting, and the Directive would require that the UK take extra-territorial jurisdiction for the offences committed by UK nationals abroad which the Government considered was not necessary.

2.122 Whilst views are mixed on the benefits of minimum procedural standards, there was little evidence submitted on advantages in the development and setting of EU minimum standards in substantive criminal law.

> [...] it may be preferable for the EU to focus its attention on procedural means of improving co-operation rather than standardisation of criminal law.
>
> HM Government of Gibraltar, *submission of evidence*.

> While Member States have recognised the need for more interconnection between their systems at EU level, this interconnection primarily relates to cross-border procedural law. The Law Societies take the view that a harmonisation of substantive law is, in principle, an unnecessary action which does not match the organic development of national systems.
>
> The Law Societies, *submission of evidence.*

2.123 We also received a number of submissions from stakeholders of the view that, in particular, the EU should not be attempting to introduce mandatory minimum sentences.

> [...] we opposed attempts to impose minimum (as opposed to 'minimum maximum') sentences in the Directives on protection of the euro against counterfeiting and on the fight against fraud to the Union's financial interests ('PIF').
>
> Liberal Democrats Home Affairs Justice and Equalities Parliamentary Party Committee, *submission of evidence.*

> Mandatory minimum sentences would place limits on the discretion of judges to pass sentence based on the facts of the individual case in front of them and run counter to the long established principle of judicial independence.
>
> Scottish Government, *submission of evidence.*

2.124 On this issue, Dr Theodora Christou states that the Commission have undertaken recent studies regarding EU legislation on substantive criminal law, including the definition of offences, and the deployment of minimum sanctions. Dr Theodora Christou also questions why national discrepancies should matter to the EU.

> Interference at a detailed level of national criminal justice (whether it be the precise definition of an offence or the sanction to be imposed) should occur only where national law interferes with the horizontal coherence of EU laws and mechanisms. Any new legislation at EU level must include a fully reasoned justification.
>
> Dr Theodora Christou, *submission of evidence.*

2.125 The Government opposes any EU proposals to set minimum sentences. The Government believes that this would undermine the discretion of judges to set appropriate sentences based on the facts of the case; and that setting the sentencing framework is properly the role of democratically elected national government.

> This proposal [the Directive on the protection of the euro and other currencies against counterfeiting by criminal law] could have unwelcome legislative consequences for the UK, particularly as regards obligations in respect of minimum penalties and jurisdiction over counterfeiting offences committed by UK nationals overseas. The former is objectionable on the grounds that it is inconsistent with previously agreed EU Council conclusions on legislation on penalties and because of the obvious threat to the exercise of judicial discretion in sentencing for counterfeiting.
>
> Rt Hon Chris Grayling MP, The Lord Chancellor and Secretary of State for Justice, *Written Ministerial Statement*.[66]

[66] *Written Ministerial Statement on the Directive of the European Parliament and of the Council on the protection of the euro and other currencies against counterfeiting by criminal law* (10 May 2013). Available at: http://www.parliament.uk/documents/commons-vote-office/May-2013/10th-May-2013/7.JUSTICE-Directive-European-Parliament.pdf, accessed 4 December 2014.

The role of the European Parliament, and the move to QMV

2.126 The Lisbon Treaty, for the first time, gave the European Parliament a role as co-legislator in agreeing legislation on police and criminal justice matters. Prior to that, whilst it had to be consulted on all proposals and the Council had to consider the opinions it provided, those opinions were not binding.

2.127 Some contributors to our review felt that the increased scrutiny of EU legislation as a result of the increased role of the European Parliament had improved the quality of legislation.

> [...] the co-decision of the European Parliament provides greater scrutiny of the proposed measures and a vehicle through which stronger procedural safeguards can be obtained.
>
> Bar Council, *submission of evidence.*

> Subsequent to the agreement of the Lisbon Treaty there has been an improvement in decision making as a result of co-decision, producing much more concrete, clear and robust instruments. The EIO is a prime example of this. The strength of the final measure from a fairness perspective is a result of the involvement of the EU Parliament
>
> Fair Trials International and JUSTICE, *submission of evidence.*

2.128 Some have cited the Directive on the rights to interpretation and translation in criminal proceedings as an example, with its provisions regarding the quality of interpretation and translation stemming directly from the European Parliament's input.[67] However Open Europe argued that the final provisions are proving costly to implement and that the European Parliament may struggle to provide effective scrutiny if they bear no responsibility for the cost of implementation.[68]

2.129 As ultimate responsibility to keep people safe lies with national Governments, there were questions posed by some stakeholders as to the appropriateness of giving the European Parliament powers to prevent measures which would increase public security being adopted. For example, the draft Passenger Name Records (PNR) Directive has remained before the European Parliament for consideration since 2011 with no progress being made, largely due to European Parliament concerns around data protection.

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[67] Steve Peers, *Mission Accomplished? EU Justice and Home Affairs law after Lisbon* (2011). Common Market Law Review, Volume 48, Issue 3, pp. 661–693.

[68] *Record of meeting with Open Europe*, 2014.

Case Study: Passenger Name Records (PNR)

PNR consist of the data provided by passengers to airline companies during the course of booking their flight. This information can prove very useful for law enforcement officers when it comes to tackling serious crime and terrorism. It is of major importance in assisting competent authorities to detect and investigate the journeys of persons travelling to fight in conflict zones around the world.

There is a clear public interest in tackling terrorism and serious crime and more and more countries from around the world are using PNR data as a way of protecting passengers, their citizens and their infrastructure. This data is of the utmost importance to assist in the wider prevention and detection of terrorist activity in Europe, and to curb organised crime – no other tools can provide this vital information. The absence of a PNR framework puts the competent authorities in Europe at a disadvantage in protecting the general public.

A unified PNR framework, set out at European level but implemented by the Member States (according to their own national requirements) would provide the common rules for how PNR data is processed and managed across the Union, in line with data protection legislation.

The proposed PNR Directive has been before the EP since 2011. The House of Lords supported the case for action at EU level in relation to PNR.

> The case for EU-wide legislation is compelling. It is essential that a single legislative measure should cover the collection of PNR data on flights into all the Member States, and the sharing of those data with the authorities of other Member States.
>
> House of Lords European Union Committee, *Report on The United Kingdom opt-in to the Passenger Name Record Directive*, (2011).[69]

The Government is pressing the new European Parliament to take forward negotiations to agree proposals which include provision for sharing intra-EU PNR data as a priority.

> The European Parliament is right to insist that key liberties are protected but it must also act in a responsible manner given the threat that the EU faces. MEPs cannot use this issue to make a political point; the stakes are far too high. This EU-wide PNR system has clearly been carefully designed to prevent profiling and to ensure innocent passengers face no inconvenience or threat to the integrity of their personal data.
>
> Timothy Kirkhope MEP, *Press Release: EU passenger data proposals are necessary in the fight against terror*, (2011).[70]

The European Council, at its meeting in August 2014 where it discussed the importance of action to stem the flow of foreign fighters, called on the Council and the European Parliament to finalise work on the EU PNR proposal before the end of the year.

In November 2014 the European Parliament voted to refer the EU Canada PNR Agreement to the ECJ regarding its compatibility with the Treaties, citing questions around the proportionality and necessity of long-term mass storage of personal data.[71] Whilst this Agreement is separate from the proposed PNR Directive, there is a clear read across, and this reference may affect progress within the European Parliament on the Directive.

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[69] House of Lords European Union Committee, *The United Kingdom opt-in to the Passenger Name Record Directive*, 11th Report of Session 2010–11 (HL Paper 113), 2011.

[70] Available at: http://www.kirkhope.org.uk/press_and_photo_gallery/PNR_Feb2011, accessed on 1 October 2014.

[71] European Parliament, Seeking an opinion from the Court of Justice on the compatibility with the Treaties of the Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data. (25 November 2014). Available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2014-0058&language=EN&ring=B8-2014-0265, accessed on 26 November 2014.

2.130 There are mixed views about the benefits of the Council's shift to QMV, rather than by unanimity as was previously the case. This change meant that individual Member States lost the ability to 'veto' new legislative proposals. The Scottish Government feels that the move to QMV has the potential to result in higher quality legislation, and to encourage Member States to think more about how they will implement the legislation.[72] Others were concerned that QMV would actually have the opposite effect.

> The ordinary legislative procedure and qualified majority voting are the rule, and, accordingly, the secret trilogues and first reading deals have been extended to these matters [...] with adverse consequences to the UK democracy and sovereignty.
>
> Margarida Vasconcelos, *submission of evidence*.

> When QMV and 'co-decision' with the European Parliament apply, this means that the UK may find itself bound by a law it did not agree with.
>
> Fresh Start, *submission of evidence.*

2.131 Whilst the move away from unanimity took away some of the power of Member States to resist proposals which they felt were not in their national interest, there are safeguards (such as the UK and Ireland's JHA opt in and the emergency brake provisions) in the Treaties intended to provide balance. These safeguards are discussed in more detail in chapter 1. Steve Peers summarised the trade-off which was made. Whilst the introduction of co-decision increased the role of Parliament in legislating on PCJ matters, this was balanced by:

- clarification of the EU's competence in relation to certain areas of crime;
- the inclusion of 'emergency break' provisions, which allow a Member State to block discussions if they would affect fundamental aspects of its criminal justice system; and
- retaining the ability for a quarter of Member States to propose legislation on police and criminal law (previously an individual state could do this).[73]

Alternatives to EU-level action

2.132 Whilst many stakeholders felt that the EU is the most appropriate level for cooperation, there are those who feel that there are specific areas where the aims and objectives could be achieved through other means, for example through bilateral arrangements, or through non-legislative means. We also heard from those who felt that certain areas, such as setting mandatory minimum sentences, should not be taken forward at EU level.

2.133 Those who felt that the EU is the most appropriate level for cooperation mainly cited speed and enforceability as key reasons for this view.

> The EU is the right level for co-operation in PCJ because other arrangements, e.g. through Council of Europe, are slower, more costly and less effective than the instruments adopted through the EU. The main reason for that is that there is a properly functioning legal order in the EU which does not exist in the Council of Europe.
>
> Senior European Experts Group, *submission of evidence*.

[72] Scottish Government, *submission of evidence*.

[73] Steve Peers, *Mission Accomplished? EU Justice and Home Affairs law after Lisbon* (2011). Common Market Law Review, Volume 48, Issue 3, pp. 661–693.

2.134 Stakeholders were also keen to highlight the benefits of EU action in the field of judicial co-operation (see paragraph 2.40, and paragraphs 2.42-2.43)

2.135 The Senior European Expert Group suggested that EU cooperation in this field had developed largely due to the fact that existing international mechanisms were not adequate. Other mechanisms for co-operation, such as Interpol, were seen by stakeholders including Fair Trials International and JUSTICE as complementary to, not a substitute for, cooperation at EU level.

> There is a particular need for improvement amongst EU member states to ensure that EU citizens receive at least a minimum standard of rights protection wherever they travel or mutual recognition instruments are applied. The EU is the most appropriate body to achieve action in this area because the need has been created by the agreement and application of mutual recognition instruments.
>
> Fair Trials International and JUSTICE, *submission of evidence.*

2.136 ACPO's consolidated submission of evidence recalled that prior to the existence of EU cooperation mechanisms it was very difficult to get evidence or assistance to extradite from outside the UK.[74] This was also raised by stakeholders at our engagement events. Stakeholders at the London event were of the view that bilateral relations were out of date, and that multilateral cooperation is needed to address international and cyber crime.[75]

2.137 The UK has an interest in raising standards in other countries so that UK citizens who are victims, witnesses or accused of an offence in other Member States are guaranteed a minimum level of protection. EU measures can play a key role in ensuring these safeguards exist. Victims organisations at our stakeholder events were of the view that it was necessary for the EU to bring forward legislation, rather than softer measures, as this is the only way to ensure that Member States do improve their systems. This view was echoed by Fair Trials International and JUSTICE:

> We do not consider that recommendations or other soft law measures carry sufficient weight to encourage member states to improve their systems [...].
>
> Fair Trials International and JUSTICE, *submission of evidence.*

2.138 However, some stakeholders were critical of the EU level framework. For example, a number of prosecutors from Northern Ireland noted in their submission to this review that where Member States were not willing to co-operate there was no effective sanction, and also highlighted that it is sometimes difficult to know where to go to get assistance, due to the different systems in the different Member States. We also heard that there was a general lack of awareness amongst practitioners as to what EU tools and processes are available to them.

> Prosecutors felt that it was important to communicate at the outset that there was a real lack of awareness about policy/legislation/powers of various institutions and the powers of the EU in this area of law.
>
> Prosecutors from Northern Ireland, *submission of evidence.*

[74] ACPO, *consolidated submission of evidence.*

[75] *Record of 25 June stakeholder event in London.*

2.139 Professor Kiron Reid also called for the experience of British judges, police officers, prosecutors and court staff, who have contributed to international missions in other European countries to be used more effectively to review and share best practice.[76]

2.140 However, EU efforts to tackle international crime cannot be considered in isolation, but with the acknowledgement that the work carried out at EU level is part of a much broader framework, and that there are non-EU organisations that facilitate cross border cooperation to tackle crime.

There are alternative models to EU level action. For example:

- The Crown Prosecution Service (CPS) has made use of 'liaison magistrates' to work in France, Italy, Spain, Pakistan, the United Arab Emirates and the USA. Their function is to facilitate extradition and mutual legal assistance between the host country and the UK, with reciprocal secondments to the UK.
- Through the Council of Europe the UK has signed up to a range of European Conventions over the past few decades. A few examples are: the Convention on Mutual Assistance in Criminal Matters (CETS 030 and 099); on the Compensation of Victims of Violent Crimes (CETS 116); and on Extradition (CETS 024 and 098). A key example is the Convention on Cybercrime (sometimes referred to the 'Budapest Convention') which came into force in 2004 and shows the increasing focus on cyber threats from other organisations as well as the EU.
- Interpol have a key role in training, operational support and information exchange to help law enforcement agencies around the word tackle various types of criminality, including trafficking in human beings, people smuggling, and trafficking in illicit goods.[77]
- The United Nations Convention against Transnational Organised Crime was, adopted in November 2000 and entered into force on 29 September 2003. It is the main international instrument in the fight against transnational organised crime, and is supplemented by three Protocols, which target Trafficking in Persons, the Smuggling of Migrants, and Illicit Manufacturing of and Trafficking in Firearms.
- Beyond Europe the UK also has bilateral and multilateral agreements for matters such as judicial cooperation and extradition. For example the UK has bilateral agreements on "Mutual Assistance in Relation to Criminal matters" with countries such as Canada (1988), Columbia (1997), and Thailand (1994).[78]

2.141 Stakeholders at one London event stated that the network of CPS funded liaison magistrates was a useful, relatively cheap alternative to the EU frameworks, but one drawback cited was that practitioners can only use them for prosecution, and not for defence. However, other attendees were of the view that to fund 27 liaison magistrates would be far more expensive than participating in EU arrangements.[79]

2.142 Attendees at a stakeholder event also stated that working through a Council of Europe framework would not have the same impact or bite as EU frameworks, the main reason

[76] Professor Kiron Reid, *submission of evidence.*

[77] Interpol website, *Interpol Fact Sheet: Trafficking in illicit goods* (2012). Available at: http://www.interpol.int/News-and-media/Publications#picto_publication, accessed on 25 November 2014.

[78] A comprehensive list of the MLA agreements the UK is party to can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249275/Treaty_List.pdf, accessed on 26 November 2014.

[79] *Record of 18 June stakeholder event in London.*

cited was the lack of effective enforcement mechanisms.[80] The Bar Council also felt that non-EU mechanisms would not be so effective.

> If we were to revert to non-EU-led cooperation in the fight against crime, we would be relying on intergovernmental conventions that need to be ratified. There is ample evidence from the past that this is not an effective approach, and would be even less so in the face of the growth of technology-enabled crime.
>
> Bar Council, *submission of evidence.*

2.143 The TaxPayers' Alliance took the view that the UK could reach agreements bilaterally, without the need to sign up to an EU system.[81] This scepticism about the value of EU level action was echoed by Fresh Start.

> [...] the UK should pursue operational co-operation with EU partners via other means, such as international agreements, memoranda of understanding and voluntary co-operation on a case-by-case basis.
>
> [...] EU policing and criminal justice laws that have arrived since the Lisbon Treaty's entry into force usually have positive-sounding names. Who would criticise measures to fight human trafficking, child sex exploitation or cyber attacks? [...] which [...] may not be necessary to ensure international co-operation to fight these appalling scourges and protect British citizens
>
> Fresh Start, *submission of evidence.*

2.144 The Scottish Government flagged that this is an area where non-legislative measures could also have a positive impact, and that EU legislation should not be the first port of call. In particular the EU could work co-operatively with the Council of Europe, particularly in areas where EU legislative competence may be in doubt and where there is a high risk that negotiations become enmeshed in potentially intractable legal debates.[82]

2.145 However, many respondents suggested that there were certain areas where the EU is trying to run before it can walk. For example the proposals for the new EPPO (see paragraphs 2.48-2.55).

> We are concerned that under the Commission's proposal the EPPO is at risk of being overwhelmed by its workload.
>
> House of Lords European Union Committee, *'The impact of the European Public Prosecutor's Office on the United Kingdom'*.[83]

2.146 The Liberal Democrats Home Affairs Justice and Equalities Parliamentary Party Committee, in their submission of evidence, drew attention to the potential conflicts with Article 8 of the European Convention on Human Rights if judicial cooperation leads to the removal of a person who has been resident for some time in another Member State and has a family, job, home etc within that new Member State.[84] Dr Theodora Christou also noted this conflict.[85] This is discussed in more detail in Chapter Three.

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[80] *Record of 25 June stakeholder event in London.*

[81] TaxPayers' Alliance, *submission of evidence to HMG Balance of Competences Review: Civil Judicial Cooperation* (2014).

[82] Scottish Government, *submission of evidence.*

[83] House of Lords European Union Committee, *The impact of the European Public Prosecutor's Office on the United Kingdom*, 4th Report of Session 2014-15 (HL Paper 53) (2014).

[84] Liberal Democrats Home Affairs Justice and Equalities Parliamentary Party Committee, *submission of evidence.*

[85] Dr Theodora Christou, *submission of evidence.*

Chapter 3: Future Options and Challenges

3.1 PCJ is an area which has seen considerable developments in EU competence, from informal cooperation under the TREVI group, to the significant changes brought about by the Lisbon Treaty. The EU now has the ability to legislate in many more areas and the ECJ gained full jurisdiction over all pre-Lisbon JHA measures on 1 December 2014, effectively representing the final move of JHA into standard 'first pillar' EU working arrangements.

3.2 PCJ is an area where the UK is seen as a leader, with considerable knowledge and best practice, and where there are opportunities for the UK to use its expertise and share best practice to enhance cooperation and raise standards across the EU.

> The UK continues to be looked upon as a country with one of the best law enforcement systems as well as procedural rights protections in the world, and is an example to countries around the world that it is possible to combine the two endeavours.
>
> Fair Trials International and JUSTICE, *submission of evidence.*

There are a number of examples of UK leadership in this area. The UK plays an active role in delivering the EMPACT priorities which underpin the EU Policy Cycle on Serious and Organised crime (see text box after paragraph 2.86), and the UK Government has offered a team of experts to the Commission to establish a Strategic Communications Advisory Team. This will support Member States in developing counter radicalisation campaigns.

3.3 However, several issues have been raised which could present options and challenges for the future.

Ensuring High Quality EU PCJ Legislation

3.4 Given the rapid pace of change in this area, and the large amount of relatively new legislation, a number of respondents thought that the time is now right for the EU to focus on full implementation, and evaluate the measures which are now in place. This was a key theme of the new Strategic Guidelines for JHA, which were agreed at the June European Council.

3.5 Reviewing and taking stock of existing EU legislation is important to ensure that EU legislation remains high quality.

> The EU rules adopted in the field of police and criminal justice are wide enough already; what is needed is to make sure that they are maximised and properly implemented in the Member States.
>
> Europol, *submission of evidence.*

> It is now timely for the EU to pause and reflect on progress.
>
> Scottish Government, *submission of evidence.*

> Rather than focusing exclusively on a programme of new initiatives, there could be real value in full review and renewal of key existing measures, to ensure that any weaknesses in provision or changes in requirements are taken into account. Such renewal, based on empirical experience, would serve to reinforce the value of EU co-operation.
>
> ACPO, *consolidated submission of evidence.*

And some stakeholders called for out of date or ineffective legislation to be withdrawn.

> It would be helpful if defunct or largely out of date PCJ legislation could be removed from the statute book.
>
> Senior European Experts Group, *submission of evidence.*

The European Commission appears to have recognised the need for unnecessary legislation to be withdrawn in its most recent REFIT Communication on better regulation. This states that: 'As part of the preparations for the expiry of [the] transition period on 1 December 2014, the Commission is examining whether some of these legal acts could be repealed without hampering the effective operation of the EU area of freedom, security and justice, or of EU law in general'.[1]

3.6 The Law Societies also reiterated the need for the EU to demonstrate clearly whenever it proposed new measures that EU action is the best option.

> Not every instance of cross-border criminality merits an EU-response [...] We would like to see more rigorous interrogation, by the EU institutions as well as by national parliaments, of the methodology adopted in any research relied on by the Commission in order to justify its proposals and to inform its impact assessments (including a thorough cost benefit analysis) in the criminal justice policy area. The necessity of EU action needs to be beyond dispute.
>
> The Law Societies, *submission of evidence.*

3.7 Another important part of the quality assurance of EU legislation is to ensure appropriate consultation with stakeholders, and good quality impact assessments, in order to inform proposals.

> We would like to see a more transparent, interactive approach preceding the adoption of proposals by the Commission. More thorough impact assessment and greater consultation with relevant practitioner groups, less recourse to largely academic expert groups, often working behind closed doors, and a more obvious respect for the views of professional practitioners, and indeed Member States, should they disagree with the Commission's proposed course of action.
>
> Bar Council, *submission of evidence.*

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[1] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*: *Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook* (2014). Available at: http://ec.europa.eu/smart-regulation/docs/com2014_368_en.pdf, accessed on 1 October 2014.

3.8 ACPO's consolidated submission of evidence refers to the feeling among practitioners that they should be consulted or involved when EU proposals are being formulated, and that they considered little thought had been given in the past to the implications on practitioners.[2] The Government of Gibraltar raised the particular difficulties felt by small jurisdictions in seeking to implement and make use of certain EU measures.

> EU measures could usefully take account of the needs of small jurisdictions by providing specifically for light touch mechanisms for cooperation, avoiding the need for complex infrastructure, and special arrangements for practical implementation.
>
> HM Government of Gibraltar, *submission of evidence.*

The need for the EU to consult stakeholders at an early stage in policy development is a core component of the Government's EU smart regulation agenda.[3]

3.9 Concerns around implementation were also put forward in ACPO's consolidated submission of evidence, which states that more time should be given for implementation, and that practitioners should have been involved earlier in the EU legislative process.

> The implementation [of the Directive on Interpreters and Translations for persons being investigated for a criminal offence] seemed to be rushed and it was clear that the directive had been agreed without reference to the persons who would actually have to implement the changes. Involvement of practitioners at the time of the wording of the directive could have either advised on amendments, made different provisions, or made recommendations to opt out.
>
> ACPO, *consolidated submission of evidence.*

3.10 The Government fully supports efforts to ensure that EU legislation is proportionate, effective, and takes account of the specific circumstances in the Member States. The Government therefore welcomes the commitment in the new JHA Strategic Guidelines to undertake a mid-term review in 2017, which provides Member States with an opportunity to establish whether existing legislation is effective, and to hold the Commission to account for delivering on the priorities set out by the Member States.

The role of the European Court of Justice

3.11 The ECJ's jurisdiction was extended by the Lisbon Treaty. The Court already had full jurisdiction over all post-Lisbon JHA measures. However, because of the UK's ability to decide, under Protocols 19 and 21 of the Treaties, whether to participate in measures on a case-by-case basis, for the UK the full jurisdiction of the ECJ is limited to those post-Lisbon measures which it joins.

3.12 On 1 December 2014, the ECJ also gained full jurisdiction over the pre-Lisbon JHA measures. The UK's 2014 opt-out decision means that, for the UK, the full jurisdiction of the ECJ is limited to those pre-Lisbon JHA measures in which it is now participating.

3.13 There is uncertainty about how the ECJ will use its new role. Some commentators stated that the ECJ interpretation of cases can and does stray beyond the original aim/intention.

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[2] ACPO, *consolidated submission of evidence.*

[3] For more information see HMG, *'Reducing the Impact of Regulation on Business'* (2012). Available at: https://www.gov.uk/government/policies/reducing-the-impact-of-regulation-on-business/supporting-pages/reducing-the-cost-of-eu-regulation-on-uk-business, accessed on 19 November 2014.

> It is clear, in my view beyond all serious doubt, that the ECJ will often interpret measures in ways which depart from their wording or the actual intentions of the states or legislators who negotiated and agreed them in order to further wider political interests including that of European Integration.
>
> Martin Howe QC, *written evidence to the House of Lords inquiry into the UK's 2014 Opt-Out Decision*.[4]

> The CJEU has been deeply interfering with the UK legal system, overriding national rules as regards a wide range of EU policies and legislation [...] the CJEU's interpretations are likely to change the content, reach and impact of measures and the way they apply to the UK. The CJEU has been expanding the reach and scope of European Law, using a purposive interpretation, to promote European integration.
>
> Margarida Vasconcelos, *submission of evidence*.

3.14 However, others felt that there would be little practical impact for the UK.

> The Law Societies are of the view that accepting the jurisdiction of the CJEU over post-Lisbon instruments is unlikely to cause any practical difficulties for the UK.
>
> The Law Societies, *submission of evidence.*

3.15 While still there was some evidence that national courts are starting to push back against expansive interpretations.

> While the equivalent of the High Court in most EU member states appear to have been loyally following the EU law/ Court of Justice of the EU lead, individual Supreme/ Constitutional courts of the various EU member states – where the most senior judges in a member state can be reluctant to overly defer to another court – have been adding a level of complexity to this issue [...] there do appear to be judicial red lines over which EU law is not permitted to cross.
>
> Dr Maria O'Neill, *submission of evidence*.

3.16 Open Europe has highlighted concerns about the ECJ interpreting cases in ways which would cause issues for the UK. They further suggested that perhaps the UK's opt-in decisions may be cautious and skewed due to a rational fear of ECJ interpretation and that, to mitigate this risk, the UK should be able to opt back out again at a later date from legislation which has been interpreted in a direction which is contrary to the national interest.[5]

3.17 The Centre for European Reform (CER), in its report 'Twelve things everyone should know about the European Court of Justice', highlights a number of elements of the ECJ's approach and culture that will have a bearing on the UK's interaction with the Institution.[6] The report recommends that EU judges and Governments should consider further reforms. Some could be initiated immediately. The report suggests examples, such as encouraging delegations of national Parliaments to visit the ECJ in order better to understand its work, or the Court's establishing 'a centre for the study of national jurisprudence' – so that EU judges could learn about other EU legal systems. Other suggestions are more fundamental, for example to allow the Commission to take Member States before national courts for not implementing EU rules, and to give

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4 House of Lords European Union Committee, *'UK's 2014 Opt-Out Decision ('Protocol 36') – Oral and Written Evidence*' (2013). Available at: http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/Protocol36OptOut/VolofevidenceP36asat250313.pdf, accessed on 1 October 2014.

5 *Record of meeting with Open Europe,* 2014.

6 Hugo Brady, *Twelve things everyone should know about the European Court of Justice*, Centre for European Reform (July 2014).

national constitutional courts a way to contest the ECJ's interpretation of the Charter of Fundamental Rights (similar to the existing 'yellow card' mechanism whereby parliaments can raise subsidiarity concerns).

3.18 There are signs that the ECJ is taking a greater interest where there is an allegation that EU law is incompatible with the EU Charter of Fundamental Rights. All EU legislation must comply with the Charter.

3.19 However, the ECJ decision in April 2014 to strike down the EU Data Retention Directive 2006/24/EC did have particular implications in the field of PCJ. Communications data (the who, when, where and how of a communication, but not its content) is a vital resource for law enforcement and intelligence agencies to investigate crime. In the UK it has played a significant role in 95% of serious and organised crime cases and every major Security Service counter-terrorism investigation over the last decade.

The EU Data Retention Directive was a harmonising measure aimed at ensuring communications service providers retained communications data for the purposes of prevention, detection and prosecution of serious crime. The basis for the ECJ decision to strike down the Directive was that the Directive contained insufficient safeguards in relation to protection of and access to retained data. The Government believes that the UK Regulation of Investigatory Powers Act (RIPA) provides robust safeguards for accessing communications data. The Government introduced domestic legislation on data retention in July 2014 to provide greater clarity and certainty for Communications Service Providers, and ensure that law enforcement and intelligence agencies maintain the right tools to protect citizens.

3.20 Steve Peers notes that the general enhancement of the status of human rights is likely to have a significant impact in practice on the development of JHA law.[7] The Law Societies also commented on this issue.

> The Law Societies are aware of concerns being expressed in several quarters, including by several judges of the Supreme Court – relating to the extension of the ECHR into areas which are for decision by national parliament and national law. The balance between national and European competences in this context as well as in the context of EU post-Lisbon criminal justice instruments is an issue which will continue to be examined, particularly as the protection of fundamental rights plays an important role.
>
> The Law Societies, *submission of evidence.*

3.21 The Fundamental Rights Report discusses the balance of competence in this area in more detail.[8]

Internationalisation of Crime and Criminal Networks

3.22 The security challenges we face are cross-border and cross-sectoral in nature, and over the last five years have become even more so. We are living in an increasingly globalised world, and the threat, whether it is from terrorism or from organised crime, has become more fragmented and in closer proximity to European shores than ever before. The importance of addressing the threat from terrorism and organised crime at its roots cannot be underestimated.

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7 Steve Peers, *Mission Accomplished? EU Justice and Home Affairs law after Lisbon* (2011). Common Market Law Review, Volume 48, Issue 3, pp. 661–693.

8 HMG, *Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights,* 2014.

3.23 The threat posed by foreign fighters is not a new one, but the scale of the problem is unprecedented; foreign fighters engaging with terrorist groups in Syria and Iraq will remain a significant challenge for the EU for the foreseeable future due to the increasing number of Europeans fighting with terrorist groups, their proximity to Europe, ease of travel across porous borders and the ready availability of weapons.

3.24 The challenge of addressing Serious and Organised crime threats requires a coherent strategic approach addressing, not just in relation to the commodities in question (such as drugs, firearms or trafficked individuals), but the criminals and crime gangs facilitating those crimes. The situation at Calais, and in the Mediterranean, has illustrated the growing threat from the organised crime behind illegal immigration, which can only be tackled by action both in Europe and in third countries, making full use of the powers of the relevant agencies of the EU.

3.25 Organised criminal gangs are often adaptable, and focus their activities in the area likely to make the greatest profit, rather than facilitating only one crime type. Law enforcement collaboration and information sharing is vital to address this threat. The internationalisation of crime, and the need for international co-operation to tackle this was a clear theme running through the evidence received.

> Organised crime groups (OGCs) are increasingly flexible and transnational [...] Criminals act undeterred by geographic boundaries.
>
> Europol, *submission of evidence.*

> European measures have to be put in place which ensure that co-operation in this field is at least as effective and pan-European as the co-operation between criminals.
>
> The Aire Centre, *submission of evidence.*

3.26 Europol's Serious and Organised Crime Threat Assessment 2013 (SOCTA) states that more than 40% of criminal groups have a 'network' type structure, and more than 30% of organised crime groups active in the EU are involved in more than one crime area. 70% of organised crime groups are multinational in their membership.[9] As criminality expands and moves across borders, there will be increasing need to co-operate with international partners to address this. In addition, Europol's EU-wide strategic analysis has shown that organised criminals tend to exploit arbitrary differences between jurisdictions.[10]

> The free movement of villains, their assets and money across frontiers is going to occur, chasing these down will be time consuming and costly unless standard requirements are in place.
>
> Hertfordshire Criminal Justice Board, *submission of evidence.*

> The population here is now increasingly diverse and so links are now in place for this type of crime to increase – open borders are very attractive to organised crime operations.
>
> Prosecutors from Northern Ireland, *submission of evidence*

3.27 The Government believes that the EU Policy Cycle provides an effective mechanism for Member States to work together to address serious and organised crime, as shown through the success of the recent Operation Archimedes, and is an example of the benefits of practical cooperation over legislation (see Chapter Two).

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9 Europol, *Serious and Organised Crime Threat Assessment (SOCTA)*, (2013).

10 Europol, *submission of evidence.*

3.28 On the other hand, the Bar Council suggested that in practice, very few cases were genuinely multinational, and that those that are were largely limited to trafficking and fraud. In their view, it is more usual for the investigation to be a single State investigation that overlaps into one or more other States.[11]

3.29 In order to address international crime, a number of respondents highlighted the importance of working more effectively with third countries in order to tackle crime. Dr Maria O'Neill states in her submission of evidence that a key future challenge in the field of judicial cooperation will be developing effective working relationships with non-traditional law enforcement and criminal justice partner countries, and in new crime areas.

3.30 The Government considers developing these relationships with countries wishing to join the EU to be a priority. The UK championed reforms to the enlargement process to ensure greater emphasis was placed on embedding the rule-of-law and tackling organised crime and corruption in EU aspirant countries, and these are now prioritised from the very beginning of the accession process. The UK Government consequently believes that enlargement can be an effective vehicle to strengthen the UK's defences through increased operational co-operation between UK law enforcement and judicial agencies and their counterparts in EU aspirant countries. For example, Albania was required to push through major reforms, including to root out corruption and to crack down on illegal migration and other aspects of organised crime, in order to be awarded EU Candidate Status in 2013. Albania will be required to continue these efforts before it can progress towards opening accession negotiations. This is discussed in more detail in the Enlargement Report.[12]

3.31 As well as criminals moving physically across borders, a number of respondents emphasised the growing threat of cyber-crime.

[11] Bar Council, *submission of evidence.*

[12] HMG, *Balance of Competences between the United Kingdom and European Union: EU Enlargement,* published in parallel.

Cyber Crime

The growing adoption of the Internet provides increasing opportunities to commit crime. The growing phenomenon of cybercrime is the subject of a new Internet Organised Crime Threat Assessment (iOCTA) from the EC3, Europol's cybercrime unit, which highlights the scale of the challenge we face, and the need for a strong, coordinated EU response.[13]

> The EU will remain a key target for cybercrime activities because of its relative wealth, high degree of Internet penetration, its advanced Internet infrastructure and increasingly Internet-dependent economies and payment systems.
>
> Europol, *iOCTA,* 2014.

The growing threat from cybercrime was also highlighted in the evidence received.

> It was also felt that in terms of cybercrime, investigators were behind the curve in keeping up with offenders and new technologies.
>
> Prosecutors from Northern Ireland, *submission of evidence*.

> The EU is a highly attractive target for cybercrime in all its forms, because of its high level of internet penetration (73%) and advanced internet mediated services.
>
> Europol, *SOCTA*, 2013.

Cybercriminals need not be present in target countries in order to conduct attacks, and the transnational nature of cybercrime presents specific and significant challenges for law enforcement authorities and Governments; international cooperation is essential. The Government believes that the EU should focus on practical co-operation to tackle cybercrime, including through identification and sharing of best practice, cooperation with other bodies, and work with the EU External Action Service (EEAS) to support capacity building in third countries.

The area of cybercrime is also an area where the EU has an opportunity to demonstrate leadership globally. To this end, the Government supports the work by the EEAS to build capacity to tackle cybercrime in countries outside the EU, working in partnership with the Council of Europe, the UN, and the Commonwealth to develop a coordinated and coherent approach to the problem.

However, there is also a place for wider global action to fight cybercrime. The Government strongly supports the Council of Europe's 'Budapest Convention', which is the first international treaty on crimes committed via the Internet and other computer networks, dealing particularly with infringements of copyright, computer-related fraud, child pornography and violations of network security. It also contains a series of powers and procedures such as the search of computer networks and interception. Its main objective is to pursue a common criminal policy aimed at the protection of society against cybercrime, especially by adopting appropriate legislation and fostering international co-operation.

3.32 In October 2013 the Government published a new Serious and Organised Crime Strategy. This new strategy has a significant focus on action overseas to address the growing threat. In particular the new strategy calls for enhanced law enforcement cooperation, and more work to build capacity in third countries to address serious and organised crime.

[13] EC3, *The Internet Organised Crime Threat Assessment* (iOCTA), (2014).

3.33 Another key component in tackling international organised crime and terrorism is EU action to enhance sharing and exchange of information between law enforcement authorities. Information sharing on EU nationals has improved, but there is scope to use existing frameworks more effectively to safeguard the public. There is also a need to improve our knowledge about the offences committed in Europe by non-EU nationals. Another area of particular importance is the issue of PNR (see text box after paragraph 2.129) and the need to be able to collect and use the data on journeys within the EU to tackle serious crime and terrorism.

3.34 The need to address the growing internationalisation of crime will be a key feature of discussions surrounding the renewal of the EU's ISS – which we expect will focus on the need to strengthen external borders and tackle organised crime. This will be the subject of a Commission Communication in 2015.

3.35 The Government is engaged in these negotiations to ensure that the new ISS reflects UK priorities. Key UK priorities for EU action over the next 5 years include:

- action to tackle human trafficking and modern slavery. This is particularly relevant at present given the situation at Calais, where organised immigration gangs are exploiting the situation in the Mediterranean and across the EU;
- action to tackle abuse of free movement where criminal activity such as sham marriage, benefit fraud and document fraud are very often facilitated by organised immigration gangs;
- action to strengthen the EU's external borders, both to address the threats from terrorism and to undermine the work of those facilitating illegal immigration into the EU;
- enhancing information sharing between law enforcement agencies, particularly in relation to criminal records on both EU nationals and third country nationals resident in the EU, reducing the risk posed by serious mobile offenders, and sharing passenger data; and
- action to tackle cybercrime, and in particular to tackle online child sexual exploitation through focusing on practical steps to tackle these images, and on sharing expertise.

Annex A: Submissions Received to the Call for Evidence

Submissions were received by email. Some submissions considered the broad range of topics in scope of the questions of the Call for Evidence, whilst some individuals or organisations focussed on elements about which they held a particular interest. Some submissions contained viewpoints on topics not within the scope of this review.

The following responses to the call for evidence were received:

The Aire Centre

The Association of Chief Police Officers (ACPO) criminal justice business area, coordinated and consolidated by ACPO – referred to in this report as 'ACPO, consolidated submission of evidence'

Bar Council of England and Wales

British Dyslexia Association

Dr Theodora Christou

Crown Dependencies

Sir David Edward QC

Europol

Faculty of Advocates

Fresh Start

Hertfordshire Criminal Justice Board

HM Government of Gibraltar

Independent Academic Research Studies

JUSTICE and Fair Trials International (Joint Response)

Law Society of England and Wales and the Law Society of Scotland (Joint Response) – referred to in this report as 'The Law Societies'

Liberal Democrats Home Affairs Justice and Equalities Parliamentary Party Committee

Mothers Against Murder and Aggression (MAMAA UK) and Support after Murder and Manslaughter Abroad (SAMM Abroad) (Joint Response)

Dr Maria O'Neill, Abertay University

Donald Prentice

Police Scotland

Prosecutors from Northern Ireland

Professor Kiron Reid, University of Liverpool

John Riddell

Scottish Government

Senior European Experts Group

Margarida Vasconcelos, The European Foundation

Victim Support Scotland

The following interested parties also submitted existing work for consideration:

European Commission:

A list of previously published documents and reports on a variety of topics

House of Lords European Union Committee (submitted to the whole Balance of Competences Review):

A list of reports that the Committee has previously published.

House of Commons European Scrutiny Committee (submitted to the whole Balance of Competences Review):

A summary of reports that the Committee has published from 2007.

In addition to the formal submissions to the Police and Criminal Justice Call for Evidence, the following responses to other reviews have been considered:

Center for Strategic International Studies (USA), (submission to the Foreign Policy report)

Fresh Start (submission to the Foreign Policy report)

TaxPayers' Alliance (submission to the Civil Judicial Cooperation report)

Annex B: Engagement Events

A number of engagement events were held with interested parties in the Call for Evidence period to explore the issues raised in the Call for Evidence. These events, held under the Chatham House Rule, included:

Four Stakeholder events, two in London on 18 and 25 June 2014, one in Brussels on 19 June 2014, and one in Edinburgh on 23 June 2014; Further meetings with specific stakeholders were held on 3 July.

Organisational and individual participants included:

The Aire Centre

AXA Insurance

Bar Council of England and Wales

Bar Council EU Law Committee, Criminal Law Working Group

Lord Carlile of Berriew CBE QC

Centre for European Reform

Channel Islands Brussels Office

Dr Theodora Christou

Clerk to the EU Sub-Committee for Home Affairs, Health and Education of the House of Lords European Union Committee

Criminal Injuries Compensation Authority (CICA)

Crown Office and Procurator Fiscal Service

Crown Prosecution Service

Sir David Edward QC

European Commission Representation in the United Kingdom (Edinburgh Office)

European Commission Representation in the United Kingdom

(London Office)

Europol

Faculty of Advocates

Fair Trials International

General Council of the Bar of England and Wales in Brussels

General Secretariat of the Council of the European Union

Hertfordshire and Cambridgeshire Criminal Justice Boards

HM Government of Gibraltar

Isle of Man Government Brussels Office

Mike Kennedy

Law Society of England and Wales

Law Society of Scotland

Legal Adviser to the Joint Committee on Human Rights, UK Parliament

LIBE Secretariat (European Parliament)

Baroness Sarah Ludford

Mothers Against Murder and Aggression (MAMAA UK)

Professor Valsamis Mitsilegas, Queen Mary University London

Dr Maria O'Neill, Abertay University

Open Europe

Nottinghamshire Probation Trust

John Riddell

Scottish Government

Scottish Legal Board

Senior European Experts Group

Professor John Spencer

Support after Murder and Manslaughter Abroad (SAMM Abroad)

Margarida Vasconcelos, The European Foundation

Aled Williams

Annex C: Other sources

The following list is not exhaustive but sets out some of the main sources drawn upon in preparing the analysis:

Anagnostopoulos, Ilias. *The Right of Access to a Lawyer in Europe: A Long Road Ahead?*, European Criminal Law Review (2013)

Brady, Hugo. *Twelve things everyone should know about the European Court of Justice'*, Centre for European Reform (2014)

Bressan, Serena. The European Protection Order: No Time to Waste or a Waste of Time?, European Journal of Crime, Criminal Law and Criminal Justice (20:3, 2012)

Curtin and Fahey (eds.) *Translantic Community of Law*, CUP (2014)

Heard, C, Mans, D, *The European Investigation Order: Changing the Face of Evidence-Gathering in EU Cross-Border Cases*, New Journal of European Criminal Law Issue 4 (2011)

Europol, *EU Serious and Organised Crime Threat Assessment* (2013)

Europol, *The Internet Organised Crime Threat Assessment (iOCTA)* (2014)

Government of the Netherlands, *Testing European legislation for subsidiarity and proportionality – Dutch List of Points for Action*' (2013)

Long, Nadja. *Towards a European Criminal Code?*, Eipascope (Issue 1, 2011)

Peers, Steve. *Mission accomplished? EU justice and home affairs law after the Treaty of Lisbon*, Common Market Law Review 48:3 (2011)

Petite, Michel. *The Treaty of Amsterdam*, Jean Monet Working Papers, 2:98 (1998)

Tinsley, Alex. *Protecting Criminal Defence Rights through EU Law: Opportunities and Challenges*, New Journal of European Criminal Law Issue 4 (2013)

The following written and oral evidence provided to the House of Lords European Union Committee inquiry into the UK's 2014 opt-out decision was reviewed internally

In particular, evidence to the inquiry from the following stakeholders was reviewed internally:

- Martin Howe QC
- Open Europe
- Professor John Spencer

For more information please see:

http://www.parliament.uk/2014opt-out

The House of Lords European Union Committee submitted to the whole Balance of Competences Review a list of reports that the Committee has previously published including:

- 'The impact of the European Public Prosecutor's Office on the United Kingdom', 4th Report of Session 2014-15, HL Paper 53 (3 November 2014)
- 'The Eurojust Regulation: Should the UK Opt-In?', 4th Report of Session 2013–14, HL Paper 66 (28 October 2013)
- 'The UK opt-in to the Europol Regulation', 2nd Report of Session 2013–14, HL Paper 16 (7 June 2013)
- 'The United Kingdom opt-in to the draft directive on proceeds of crime', 32nd Report of Session 2010–12, HL Paper 295 (27 April 2012)
- 'The European Union's Policy on Criminal Procedure' 30th Report of Session 2010–12, HL Paper 288 (26 April 2012)
- 'The United Kingdom opt-in to the Passenger Name Record directive', 11th Report of Session 2010–11, HL Paper 113 (11 March 2011)
- 'Procedural rights in EU criminal proceedings—an update', 9th Report of Session 2008–09, HL Paper 84 (11 May 2009)

Appendix A: Legal Annex

Section 1: Development of the EU's competence in the field of police and judicial cooperation in criminal matters

A.1 Member States have been co-operating in the field of JHA, which includes police and judicial cooperation in criminal matters, for many years.[1] [2]

The Maastricht Treaty

A.2 In 1992, the Member States agreed the Maastricht Treaty which established European Union competence in the field of JHA for the first time, with an objective *"*[...] *to develop close cooperation"*.[3]

A.3 JHA was placed in the so-called *'Third Pillar'* of the European Union, which established a limited EU-level competence in certain fields.[4] Title VI of the EU Treaty was entitled *'Provisions on Co-operation in the Fields of Justice and Home Affairs'* and encompassed judicial cooperation in criminal matters and police cooperation for the purposes of preventing and combatting terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organisation of a Union-wide system for exchanging information within a European Police Office (Europol). It allowed the Council, for example, to adopt 'joint actions' and to draw up conventions which it could recommend to Member States. But the institutions of the EU did not have competence to adopt legally binding acts in this field.

A.4 Measures in the field of police and judicial cooperation therefore remained largely a matter for intergovernmental cooperation, either based on Article K of the EU Treaty or on Article 220 of the EC Treaty.

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1 From 1975 until 1993, an intergovernmental network, known as 'TREVI', enabled national ministers and officials to meet to discuss such issues.

2 In the Council of Europe, since the 1950s states have gradually negotiated a series of treaties relating to cooperation in criminal matters. For example, the conclusion of the European Convention on Extradition (Paris, 13.XII.1957) and the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20.IV.1959).

3 Treaty on European Union ('EU Treaty'), Article B, Official Journal C 191, 29 July 1992.

4 This was done expressly *'without prejudice'* to Article 220 of the Treaty establishing European Economic Community (the 'EEC Treaty') (1957), which provided that Member States, to the extent necessary, were able to enter into negotiations with each other in order to secure benefits for their nationals, for example, in relation to the protection of persons. Member States were thereby able to conclude conventions in this field.

The establishment of EU legislative competence: the Amsterdam Treaty

A.5 In 1997, Member States agreed the Treaty of Amsterdam which contained an objective '[...] to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'.[5]

A.6 The Amsterdam Treaty moved some Third Pillar provisions, in relation to visas, immigration and border controls, to the so-called 'First Pillar', known as the *'European Community'*. Police and judicial cooperation in criminal matters remained in the Third Pillar. Further cooperation was introduced in this field, for example, to enable the adoption of framework decisions.[6]

Schengen

A.7 The Amsterdam Treaty also incorporated into the framework of the Treaties the body of international law known as the 'Schengen *acquis*'. This comprised measures on the abolition of internal border controls adopted by a group of states (not including the UK) contained in the 1985 Schengen Agreement and the 1990 Convention Implementing the Schengen Agreement. The Schengen Protocol was annexed to the Amsterdam Treaty and listed the main provisions incorporating the Schengen *acquis* into EU law.

A.8 While the UK was not a signatory to the Schengen Agreement, it was prepared to participate in some Schengen measures and this is reflected in the Schengen Protocol. The main aim of the Schengen *acquis* is the abolition of border controls at borders between states, but it is applied broadly to a range of other measures including: police cooperation; mutual assistance in criminal law enforcement; extradition; national laws on illegal drugs and arms; and a Schengen Information System holding data to assist with checks on visas, third country nationals, and external border controls.[7]

A.9 Under the terms of the Schengen Protocol the UK is not bound by provisions of the Schengen *acquis* unless it requests to take part.[8] The UK has chosen to opt in to certain parts of the *acquis*.[9] The UK also participates in measures building on the *acquis* in which it has chosen to take part unless it opts out.[10]

Section 2: The EU's Competence Today

The Lisbon Treaty

A.10 The Lisbon Treaty, which came into force on 1 December 2009, completed the integration of JHA into the main EU decision-making structure. It abolished the pillar structure, regrouping all JHA aspects of EU competence in Title V of Part 3 of the TFEU under the title of the *'Area of Freedom, Security and Justice.'*

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5 The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts, Article 1(5), Official Journal C 340, 10 November 1997.

6 Framework decisions do not have direct effect but, as is the case with Directives, require Member States to achieve particular outcomes without specifying the means for implementation.

7 Originally, the Schengen *acquis* reflected a multilateral agreement and only later became a part of EU law. Four non-EU states have joined the Schengen area. These are: Iceland, Norway, Switzerland and Liechtenstein.

8 This was initially included in Protocol 2 to the EU Treaty and is now found in Protocol 19 to the EU Treaty and Treaty on the Functioning of the European Union ('TFEU'), Official Journal C 326, 26.10.2012.

9 Council Decision 2000/365/EC of 29 May 2000, as amended on 1 December 2014, concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*.

10 While this was not clear in the Amsterdam Treaty, the Lisbon Treaty provided for an explicit opt-out (Protocol 19 to the Treaties, Article 5(2)).

A.11 Today, EU competence to act in the field of police and judicial cooperation in criminal matters is governed by Title V of Part 3 of the TFEU (Articles 67 to 89 TFEU). Article 3(2) of the TEU also refers to this as one of the EU's objectives:

> 'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'.

A.12 Further, Article 4(2)(j) TFEU expressly states that this is an area of shared competence between the EU and its Member States.[11]

A.13 Transitional provisions preserving the legal effects of instruments adopted under the old Third Pillar (before the Lisbon Treaty's entry into force) can be found at Protocol 36 to the Treaties. This is discussed in greater detail below. All measures adopted under Title V since the Lisbon Treaty's entry into force are now straightforward EU measures. This means that qualified majority voting (QMV) in the Council has replaced unanimity for the majority of PCJ measures. In addition, the jurisdiction of the Court of Justice for the European Union (ECJ) to give preliminary rulings in the field of police and judicial cooperation in criminal matters has become compulsory.[12] [13] (See Section 3 below).

A.14 Articles 82, 83 and 87 TFEU contain the key provisions on cooperation in the area of PCJ and may be summarised as follows:

- Article 82 states that judicial cooperation in criminal matters shall be based on the principle of mutual recognition of judgments (and judicial decisions). This may be achieved by the approximation of the laws of Member States.
- Under Article 82(1) measures may be taken to ensure recognition of judgments, prevent conflicts of jurisdiction, support the training of the judiciary and to facilitate cooperation between judicial authorities in relation to criminal proceedings and the enforcement of decisions.
- Article 82(2) deals with the introduction of minimum standards, to the extent necessary to facilitate mutual recognition in criminal matters having a cross-border dimension. It also sets out those specific areas in which measures may be adopted to facilitate this, namely:
  - mutual admissibility of evidence between Member States;
  - the rights of individuals in criminal procedure;
  - the rights of victims in crime; and
  - any other specific aspects of criminal procedure that the Council has identified in advance by a decision (the so-called passarelle).[14]

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[11] Declarations by Member States may also be annexed to the Treaties or entered in the relevant Council minutes. For example, under Declaration 50 annexed to the Treaties, the Conference *"invites"* the Council, EP and Commission within their respective powers, to seek to adopt, in appropriate cases, *"legal acts amending or replacing the acts referred to in Article 10(1) of Protocol 36"*.

[12] Previously, the ECJ's jurisdiction to give preliminary rulings was subject to a declaration by each Member State recognising that jurisdiction and specifying the national courts that could request a preliminary ruling (Article 35(2) and (3) Treaty on European Union (Official Journal C 340, 10 November 1997)) and certain other limited matters.

[13] According to Article 10(1) of Protocol 36 to the Treaties, in relation to pre-Lisbon measures in this area the ECJ's jurisdiction will remain unchanged until the end of the transitional period on 1 December 2014.

[14] The Council must act unanimously after obtaining the consent of the European Parliament.

- Article 83 concerns the setting of minimum rules for definitions of criminal offences and sanctions in areas of serious crime with a cross border dimension, for example: human trafficking, terrorism, sexual exploitation of women and children, corruption and organised crime. Article 83(2) includes provision for the approximation of laws and the setting of minimum standards, where this is considered essential to ensure effective implementation of EU policy.
- EU competence on criminal offences is of particular importance as it may affect a range of other areas of EU policy measures. Prior to the Lisbon Treaty's entry into force, in the cases of Environmental Penalties[15] and Ship-Source Pollution[16] the ECJ gave guidance on when instruments adopted under the old First Pillar, could include provisions relating to the criminal law. In Environmental Penalties, it was concluded that criminal sanctions could be included under such legal bases where that was essential in order to ensure that the rules are fully effective. Ship-Source Pollution went on to make clear that determination of the type and level of those penalties to be applied did not fall within the Community's sphere of competence. Nevertheless, as these authorities pre-date the entry into force of the Lisbon Treaty (and Article 83(2) in particular), the UK Government takes the view that these cases are no longer applicable.
- Article 87 sets out areas of competence for the purpose of establishing cooperation between the police, customs and enforcement agencies across all Member States'. These include:
  - The collection, analysis and exchange of relevant information;
  - Support for training staff and on exchange of staff and equipment; and
  - Common investigative techniques.

A.15 Articles 82(3) and 83(3) provide an emergency brake procedure where a member of the Council considers that the proposed legislative measure (based on 82(2), or 83(1) or 83(2) respectively) would affect fundamental aspects of its criminal justice system. In these circumstances, the draft directive is referred to the European Council for deliberation and the ordinary legislative procedure is suspended. If consensus is achieved within 4 months of the suspension the draft is referred back to the Council for negotiations to continue. If consensus cannot be achieved there is provision for Member States to establish enhanced cooperation.

A.16 Provisions on competence in respect of the European Police Office ('Europol') are found under Article 88 TFEU. Similar provisions dealing with Eurojust, the European Union body tasked with stimulating and improving judicial cooperation in criminal matters between Member States, are found under Article 85 TFEU.

UK opt-in

A.17 Subject to decisions to opt-in, Protocol 21 to the Treaties provides that the UK (and Ireland) do not take part in the adoption by the Council of EU legislation pursuant to Title V TFEU. The UK thus has the right to decide case by case whether to opt-in to such measures.

[15] Case C-176/03 Commission v Council (*Environmental Penalties*).

[16] Case C-440/05 Commission v Council (Ship-Source Pollution).

A.18 Protocol 21 establishes the essential procedural requirements for exercise of the UK opt-in under Title V. Under Article 3 of the Protocol, the UK (the same provisions apply to Ireland) may choose, within three months of a proposal being presented to the Council pursuant to Title V, whether it wishes to participate in the adoption and application of any proposed measure. If the UK notifies the President of the Council of its intention to participate within that three month period, it will participate in the adoption of such measure and there is no possibility of opting out later. If the measure is adopted, the UK would be bound and would be subject to the jurisdiction of the ECJ and powers of the Commission to enforce in respect of any failure to implement properly the measure in the same way as any other Member State.

A.19 If the UK chooses not to opt in by the three month point, it may still take part in the negotiation of the measure but may not vote. The UK may, at any stage after a measure has been adopted, indicate its wish to participate in such measure (Article 4 of Protocol 21). In such circumstances, the UK is subject to the approval procedure set out in Article 331(1) TFEU.[17] Therefore, the UK may only opt in (post-adoption) if the Commission or Council approves its request.[18]

A.20 The procedures described above for opting in to newly proposed or adopted measures also apply to the UK's opt-in in relation to decisions of the EU in relation to the negotiation, signature and conclusion of international agreements.

European Union Act 2011

A.21 The EU Act 2011 sets out domestic requirements in respect of certain Title V matters. This includes section 6 of the Act which sets out decisions which require approval by Act of Parliament and by referendum. For example, section 6(3) makes clear that the UK may not decide to participate in the European Public Prosecutor's Office (or support an extension of the powers of that office) unless it holds a referendum on the issue and the proposal is approved by Parliament.[19]

Transitional arrangements

A.22 Protocol 36 to the Treaties (the *'Transitional Protocol'*) makes specific provision for legislation which was adopted under the Third Pillar prior to the Lisbon Treaty's entry into force, with a 5-year transitional period which runs until 1 December 2014 (This applies to all Member States but there is specific provision in relation to the UK). Whilst the provisions of Title VI of the former EU Treaty were repealed by the Lisbon Treaty, Third Pillar measures and their legal effects are preserved by the Transitional Protocol (see Article 9).

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[17] Within 4 months of the notification, the Commission must issue a decision under Article 331(1) TFEU on the UK's request to opt in.

[18] Examples of where this occurred include: Commission Decision of 14 October 2011 on the request by the United Kingdom to accept Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA; and, in the context of civil judicial cooperation, Commission Decision of 22 December 2008 on the request from the United Kingdom to accept Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), and Commission Decision of 8 June 2009 on the intention of the United Kingdom to accept Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

[19] The requirement is for a *'referendum condition'* to be met. This is detailed in full at section 3(2) of the Act.

A.23 The Transitional Protocol further provides that, at the end of the five-year transitional period (i.e. on 1 December 2014), all remaining unamended Third Pillar instruments become subject to the full enforcement powers of the Commission and the full jurisdiction of the ECJ (although the effect of this has been limited for the UK by the 2014 decision referred to on page 2).[20] This is out of scope of this review.

Internal and external competence

A.24 The EU shares competence with the Member States in the field of police and judicial cooperation in criminal matters,[21] both to legislate internally and to negotiate and enter into international agreements. The UK considers that there is currently no exclusive 'external competence' in the field of police and judicial cooperation in criminal matters.[22] [23]

A.25 Where the EU's competence is not exclusive, external competence is shared between the EU and Member States. In a mixed agreement (for example, concluded by the EU and its Member States) the UK's opt-in would not be relevant where the UK, like the other Member States, is signing up to the relevant obligations in its own right.

A.26 The UK's opt-in applies both to the EU's internal and external competence. If the UK does not opt in to an internal measure, as stated above it is not bound by the measure or any ECJ decisions interpreting it. Where the UK decides to opt in to an internal measure, it cannot legislate in a manner contrary to that measure. If the UK has not opted into an EU external agreement, it is not bound by the agreement as part of the EU (although it may be bound by the agreement in its own right); and if it has, it is bound to comply with that agreement in the same way as the other Member States.

Section 3: Role of the Court of Justice of the European Union (ECJ)

A.27 As with other areas of EU law, the ECJ's role under Title V is to *"ensure that in the interpretation and application of the Treaties the law is observed"*.[24] For example, the ECJ may receive a preliminary reference from a national court to interpret a provision of EU law, enabling the national court to then issue a final judgment in a case. In addition, the Commission may commence proceedings in the ECJ if it believes that a Member State is failing to fulfil its duties of EU law. There are, however, some limits to the ECJ's jurisdiction.

No jurisdiction to review validity/proportionality of operations

A.28 Article 276 TFEU restricts the ECJ's jurisdiction by providing that:

> '[...] the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.

[20] Article 10(3) of Protocol 36 to the Treaties.

[21] Article 4(2)(j) TFEU.

[22] Article 3(2) TFEU describes the situations in which the Union's external competence is exclusive.

[23] Please see Chapter 2 of the Review of the Balance of Competences between the United Kingdom and the European Union Foreign Policy for further information.

[24] Article 19(1) TEU.

Transitional arrangements

A.29 The Transitional Protocol provides that the ECJ will not take full jurisdiction over measures in the field of police and judicial cooperation in criminal matters concluded prior to the Lisbon Treaty until the end of the transitional period (1 December 2014), unless such measures have been amended.[25] Measures concluded after the coming into force of the Lisbon Treaty are already subject to the ECJ's full jurisdiction (although the effect of the ECJ's jurisdiction in relation to pre-Lisbon measures has been limited for the UK by the 2014 decision referred to on page 2).

Case-law

A.30 While Member States are not required to accept the ECJ's jurisdiction in relation to measures concluded prior to the Lisbon Treaty prior to the 1 December 2014, a number have chosen to do so. So, for example, in an Italian preliminary reference called *Pupino*,[26] the ECJ considered the interpretation of the Framework Decision on the standing of victims in criminal proceedings.[27] This case established that a national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision.

A.31 ECJ rulings c*an clarify* the competence of Member States in certain matters. For example, in the field of civil judicial cooperation, in 2006 the ECJ ruled that the EU had exclusive external competence to conclude an agreement with three non-EU countries (Iceland, Norway and Switzerland) on rules governing jurisdiction and the recognition and enforcement of judgments.[28]

Section 4: Critical Infrastructure and National Security

Background

A.32 Activity by the European institutions in the field of critical infrastructure began in June 2004 when the European Council requested the preparation of a strategy for the protection of critical infrastructures. This was followed in 2005 by a request from the JHA Council for a proposal on a European programme for critical infrastructure protection ('EPCIP').

Critical infrastructure measures

A.33 EU competence in the field of critical infrastructure has so far been based on Article 308 TEC (now Article 352 TFEU). The Directive on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection was enacted under this legal basis.[29] This Directive sets out a procedure for the identification of European critical infrastructures as well as a common approach regarding the assessment of the need to improve the protection of such infrastructures. As examples:

- Article 5(1) provides for 'operator security plans' to "identify the critical infrastructure assets of the [European critical infrastructure] and which security solutions exist or are being implemented for their protection";

[25] Article 10(2) of Protocol 21 to the Treaties.

[26] Case C-105/03 *Pupino*, [2005] ECR I-5285.

[27] Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.

[28] See footnote 26 concerning Opinion 1/03 *(Lugano)* [2006] ECR I-1145.

[29] Directive 2008/114/EC on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection.

- Article 5(4) requires Member States to introduce a means of communication "[...] with the objective of exchanging relevant information concerning identified risks and threats in relation to the ECI concerned [...]" with other Member States; and
- Article 7 requires Member States to conduct a threat assessment in relation to European critical infrastructure subsectors.

A.34 The scope of the Directive is set out in Article 3(3) and covers the energy and transport sectors.[30]

A.35 The Commission staff working document on a new approach to the EPCIP outlines the current framework and gives an indication of possible future developments,[31] which could include:

- greater use of the Critical Infrastructure Warning Information Network (CIWIN),[32] a secure online information and communication system for exchanging and discussing information relating to critical infrastructure protection; and
- the creation of an external dimension of EPCIP (for example, in relation to countries in the European Free Trade Association).

A.36 In addition, it is possible that the information and communication technology sector could in the future be considered for inclusion in the scope of the Directive.[33]

Sector-specific measures

A.37 Specific security and protection measures can also be included in internal market legislation under Article 114 TFEU.

National security exemptions

A.38 Article 4(2) TEU provides, in relation to Member States, that the Union 'shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.' In addition, Article 346(1)(a) TFEU provides that *'no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security'*.

A.39 There is however scope for operational cooperation on internal security. Article 71 TFEU provides for a standing committee to be established within the Council 'in order to ensure that operational cooperation on internal *security is promoted and strengthened within the Union.'* The standing committee is also intended to "[...] facilitate coordination of the action of Member States' competent authorities."

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30 Further details on the relevant subsectors are set out in Annex I.

31 Commission Staff Working Document on a new approach to the European Programme for Critical Infrastructure Protection, SWD(2013) 318 final. Making European Critical Infrastructures more secure.

32 This was created pursuant to the Communication from the Commission on a European Programme for Critical Infrastructure Protection (COM(2006) 786 final).

33 Directive 2008/114/EC, *op. cit.*, recital 5.

Appendix B: Abbreviations and Acronyms

AFSJ	Area of Freedom Security and Justice
CJS	Criminal Justice System
CPS	Crown Prosecution Service
CEPOL	European Police Training College
the Council	The Council of the European Union
EC3	European Cybercrime Centre
ECHR	European Convention on Human Rights
ECI	European Critical Infrastructure
ECJ	European Court of Justice
EEAS	EU External Action Service
EIO	European Investigation Order
EP	European Parliament
EPCIP	European Programme for Critical Infrastructure Protection
EPO	European Protection Order
EPPO	European Public Prosecutor's Office
Eurojust	European Union's Judicial Cooperation body
Europol	European Police Office
ISS	EU Internal Security Strategy
JHA	Justice and Home Affairs
MLA	Mutual legal assistance
PCJ	Police and Criminal Justice
PNR	Passenger name record
QMV	Qualified majority voting

TEC	Treaty establishing the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union