CALL FOR EVIDENCE ON THE GOVERNMENT'S REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION
Police and Criminal Justice

LEGAL ANNEX

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

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

The Maastricht Treaty

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]

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 actions in this field.

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 EEC Treaty.

The establishment of EU legislative competence: the Amsterdam Treaty

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]

[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.
[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. 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 co-operation 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

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.

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]

9. Under the terms of the Schengen Protocol,[8] the UK is not bound by provisions of the Schengen *acquis* unless it requests to take part. 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]

<u>Section 2: The EU's competence today</u>

The Lisbon Treaty

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'*.

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*

[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 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)).

with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."

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]

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 police and criminal justice 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 binding.[12] [13] (See Section 3 below.)

14. Articles 82, 83 and 87 TFEU contain the key provisions on co-operation in the area of police and criminal justice 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]).

- 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:

[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)).

[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.

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.

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 co-operation.

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. These are discussed in further detail.

UK opt-in

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.

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,

[15] Case C-176/03 Commission v Council (*Environmental Penalties*).
[16] Case C-440/05 Commission v Council (Ship-Source Pollution).

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.

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]

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

21. The European Union Act 2011 ('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. Section 6(3) makes clear that the UK may not decide to join the European Public Prosecutor's Office (or support an extension of the powers of that office) unless it holds a referendum[19] on the issue and the proposal is approved by Parliament.

Transitional arrangements

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).

23. The Transitional Protocol further provides that, at the end of the 5-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 as a matter currently under negotiation.

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

Internal and external competence

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]

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

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. Similarly, if the UK has not opted into an EU external agreement, it is not bound by the agreement; 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)

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

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."*

[21] Article 4(2)(j) TFEU.
[22] Art. 3(2) TFEU describes the situations in which the Union's external competence is exclusive. Article 216 TFEU further provides that the EU may conclude an international agreement where it is *"necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter* their *scope".*
[23] The EU's exclusive external competence has been the subject of a number of cases conducted by the ECJ. These include the 1971 *AETR* judgment, in which the ECJ held that *"each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provision laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules...."* (Case 22/70 *Commission v Council (AETR)* [1971] ECR 263, para. 17). In 2006 the ECJ confirmed and refined this principle, holding that the EU has implied exclusive external competence only if action by the Member States would, on the facts of the case, have some identifiable effect on the EU's internal rules (*Opinion 1/03 (Lugano)*) [2006] ECR I-1145.
[24] Article 19(1)TEU.

Transitional arrangements

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

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. There is therefore already some ECJ case-law available in this field.

31. 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.

32. ECJ rulings ca*n 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

33. 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

34. 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:

[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(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"*;

- 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.

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

36. 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).

37. 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

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

National security exemptions

39. 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'*.

40. 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*".*

[30] Further details on the relevant subsectors is 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.