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Submission of written evidence

**Call for evidence on the Review of the Balance of Competences
between the UK and the European Union**

Police and criminal justice

a) General questions

1. Has the development of EU police and criminal justice competence over the years led to improved cross-border co-operation?

Yes, indeed the development of EU competence in this area was a direct result of cross-border cooperation and the need for a coordinated EU response in police and criminal justice matters.

The establishment of Europol was only made possible by the development of EU competence in the field of police and criminal justice cooperation; Europol has now become a centre for European cooperation, facilitating 18,000 cross-border operations in 2013.

The creation of Joint Investigation Teams (JITs) at Europol has brought law enforcement experts together from across the EU, with the UK participating in more than 21 of them during 2011 and 2012. JITs were highlighted by the UK as an example of best practice on practical cooperation to tackle organised crime in its 2010 paper to COSI (11401/10). They also facilitate improved cross-border cooperation by providing a mechanism of 'umbrella' authorisation for the participation in investigation teams with other Member States. This presents significant benefits over separate bilateral authorisations by streamlining the process, in particular by reducing overheads, minimising the administrative burden and speeding up processes.

Based on the recommendations published by Europol, the Council of Justice and Home Affairs (JHA) Ministers comes together in order to define the priorities in tackling cross-border crime over the coming four years. The European Multidisciplinary Platform against Criminal Threats, or EMPACT framework, facilitates the implementation of these priorities by enabling Member States to coordinate the required planning and strategy. The UK has now joined all nine EMPACT priorities, acting as the 'Driver' for two of the associated action plans, further increasing the situations in which it cooperates with other EU Member States to combat crime.

The development of EU competence has also enabled the creation of the European Arrest Warrant (EAW) and facilitated the extradition of criminals between Member States (elaborated in Questions 4 and 5 below).

2. What are the advantages and disadvantages arising from the UK's ability to opt in to new or amended EU policing and criminal justice legislation, and opt-out individually of new policing and criminal justice measures in relation to Schengen?

The UK is one of the most active Member States within Europol; ranking third for overall activity in Europol's Secure Information Exchange Network Application (SIENA), third for the number of contributions made to the Europol Information System (EIS) and third in terms of the number of cross-border cases initiated at Europol in 2013 (1,872 in 2013). It has also led the way in a significant number of areas, notably by raising EU standards in relation to intelligence-led policing and by establishing the framework of the Schengen Information System.

The crime situation also suggests a need for extensive cross-border cooperation. The UK is a major destination country for many criminal 'commodities', from cocaine and heroin to trafficked individuals forced into prostitution or labour exploitation. Europol's 2013 Terrorism Situation and Trend (TESAT) Report showed

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the UK to rank third across the EU for the number of terrorism related offences committed¹.

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.

In this respect, Europol welcomes the UK Government's stated intention to opt in to the Europol Regulation provided that certain important issues are addressed. As the first round of Council discussions on the draft Regulation showed, there is a strong consensus between the UK and other Member States about the direction Europol should take. Such consensus paves the way for an acceptable final text, the provisions of which would present significant operational benefits for UK law enforcement.

3. Are there any areas where the EU is looking to expand its competence (either by legislating or by other means) beyond the treaty?

Although the current multiannual work programme (the Stockholm programme) is coming to an end, the EU is *"and will remain for the next couple of years in implementing mode"*². 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 (elaborated in Question 14 below).

Under the terms of the Lisbon Treaty, Europol's mission "shall be to support and strengthen action by the Member States' police authorities and other law enforcement services". Although it envisages Europol's tasks to include taking the lead by effecting "the coordination, organisation and implementation of investigative and operational action", the actual terms of Europol's legal basis under the Europol Council Decision reflect its objectives of playing a supporting role in the action of Member States. Thus, for example, the Europol Council Decision gives the power to "ask the competent authorities of the Member States concerned to initiate, conduct or coordinate investigations". The terms of the Draft Europol Regulation demonstrate that Europol's role as a service provider remains largely unchanged and, when considered in light of the Treaty of Lisbon, highlight the fact that EU competence in this area has remained consistently below the range of actions envisaged by the Lisbon Treaty.

4. Has the development of EU police and criminal justice competence helped or impeded the effectiveness of law enforcement?

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.

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.

¹ Total of twenty-four failed, foiled or completed attacks in 2012.

² European Policy Centre, *The Stockholm programme: what's next?* (11/07/2013).

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Aside from operational support, Europol has facilitated information exchange so that UK law enforcement can act quicker and therefore more effectively. A hit rate of 10-20% in the EIS means that, in a significant number of cases, Member States benefit from the identification of new lines of inquiry. Further, overall access to vital information increased between 2012 and 2013 with the monthly average of secure messages sent up by 10%, overall EIS content up by 31% and an increase of 47% in the number of suspected criminals stored.

UK law enforcement also benefits from the expectation that all Member States should supply certain information in the field of police and criminal justice. Not only is the onus on other Member States to provide access to information asked for by UK investigators, but the procedure for gaining such access is less cumbersome than ever before. On this point, it should be highlighted that Europol is a service provider, existing to assist Member States; the UK will therefore not be compelled by Europol to supply it with information.

In helping to facilitate this cooperation, Europol serves as a one-stop-shop by providing direct access to Liaison Officers from all Member States. The foreseeable alternative to the current model would be based on the UK's ability to rely on bilateral agreements with other Member States; however the costs of facilitating 27 bilateral agreements far outweigh those of a single multilateral hub. Housing Liaison Officers in the same building streamlines the processes of cross-border cooperation by reducing the need for multiple postings across the EU and providing direct access to EU counterparts, thereby reducing the costs of, and barriers to, information exchange.

Outside of Europol, information exchange through the Schengen Information System II, the Prüm system, the Customs Information System and other databases dramatically increases the effectiveness of UK law enforcement by providing expeditious methods of obtaining vital crime-related information.

Elsewhere, the development of EU police and criminal justice competence has led to the introduction of new procedures and principles designed to increase the effectiveness of law enforcement. For example, the EAW contains an automatic mechanism, making it far less cumbersome than the Council of Europe Convention on extradition that was previously applicable. With the previous system, some Member States would refuse to extradite their own nationals if they had committed a crime in the UK and then fled home. The EAW therefore greatly increases the effectiveness of law enforcement by making sure that this type of loophole cannot be exploited by criminals.

In 2003, before the EAW, 55 people were extradited from the UK following requests received from all over the world, while 87 global requests for extradition were made by the UK. In 2010 under the EAW, 1,068 people were extradited from the UK to other EU Member States, while 256 requests for extradition were made by the UK (116 of which were complied with)³. The average time to extradite an individual where the case is contested was reduced to 48 days, as opposed to a year under the old system⁴.

The UK has also benefitted from the suppression of the dual criminality requirement; those who commit a crime in the UK can no longer escape liability based on the fact that the conduct in question is not punishable in their home states.

<i>5. Has the development of EU police and criminal justice competence benefitted or caused problems for the British criminal justice system?</i>
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³ Scott Baker, Perry and Doobay, *A Review of the United Kingdom's Extradition Arrangements* (2011).

⁴ European Commission report [SEC/2011/0430 FIN].

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Development of the rules concerning extradition has significantly benefitted the British criminal justice system by making it easier to extradite within the EU. The high-profile case of Jeremy Forrest stands as an example of the need for quick and simple cooperation in this area. The increased number of successful extraditions, as noted above, has the added benefit of removing many criminals from UK and reducing the burden placed on the British criminal justice system.

The EU Directive on the standing of victims has benefitted the British criminal justice system by further securing a decent standard of protection for victims and demonstrating the UK's commitment in this area on the international stage.

Further, the framework decision on previous judgements has benefitted the British criminal justice system by rendering its decisions effective across the EU, meaning that the rulings of UK courts are not taken lightly in other Member States. A more tangible benefit of this is that recidivists sentenced elsewhere in the EU cannot travel to the UK to reoffend and take advantage of a clean record in order to receive a reduced sentence.

b) Questions on policing, customs co-operation on judicial matters, and internal security

11. What are the advantages and disadvantages to the UK of EU action in the field of policing, internal security, and customs co-operation in criminal matters? You may wish to refer to specific examples.

The advantages to the UK of EU action in the field of policing, internal security, and customs cooperation in criminal matters are both of strategic and operational nature⁵.

Strategically, the advantage to the UK can be assessed by the extent to which it is able to yield influence on policy-making in EU internal security. By sitting at the negotiating table, the UK has consistently demonstrated its ability to ensure that JHA measures reflect its own policies. For example, when an overhaul of the Schengen Information System was discussed by the Council of Ministers in response to the 9/11 attacks, the UK provided the core of the functional requirements for the SIS II. Similarly, the whole EU policy cycle for combating organised and serious international crime rests on the European Criminal Intelligence Model (ECIM) that the UK successfully pushed for adoption in 2005 during its presidency of the Council. The ECIM laid out the scope and terms of reference for the production of the Organised Crime Threat Assessment (OCTA) used to agree EU policy in tackling organised crime – introducing the concept of intelligence-led policing to EU police cooperation. Nine years later, this concept can be found in almost all EU strategic documents relating to police cooperation. Finally, the EU Action Plan on combating terrorism, first drafted during the UK presidency in 2005, is closely modelled on the UK's own CONTEST strategy.

Operationally, Europol offers unique capabilities and services resulting from the powerful combination of information flow and expertise⁶: a network of liaison officers and analysts sharing a single secure environment; a secure information exchange network (SIENA) for all Member States and third parties connecting thousands of users; and extensive and highly secure databases on all main organised crime and counter-terrorism threats. In addition, Europol's experts produce threat analyses, monitor crime trends, organise trainings, contribute to capacity-building and knowledge management (platform of experts, best practices, etc.). Lastly, Europol provides direct support to Member States' investigations, such as operational analysis, supplying investigators with leads and connecting

⁵ Rob Wainwright, Police Co-operation. In: Regent's University London (ed.). *The UK & Europe: Costs, Benefits, Options. The Regent's Report 2013*, pp.203-204.

⁶ European Police Office, *EUROPOL Review. General report on Europol activities* (2013).

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investigations in different countries, coordinating cross-border operations (including JITs) and offering support in the field (through forensic and technical expertise and the deployment of mobile office).

The following figures provide some insights into the importance of the inputs Europol provides to the UK's law enforcement agencies: 23,985 SIENA messages were exchanged in total by the UK in 2013; the UK occupies the third position amongst the Member States and Third Parties for the total number of cases initiated via SIENA, with 1,872 cases (11% of the total), and the fourth position for overall activity with 23,985 messages exchanged (7% of the total).

Recent operational successes involving the UK were obtained thanks to Europol's support. On 8 and 9 July 2014, an alliance of law enforcement and industry undertook measures against the Internet domains and servers that form the core of an advanced cybercriminal infrastructure attacking online banking systems around the globe using the Shylock Trojan. Shylock has infected at least 30 000 computers running Microsoft Windows worldwide and is believed to target the UK more than any other country. The operation, coordinated by the UK National Crime Agency (NCA), brought together partners from the law enforcement and private sectors, including Europol, the FBI, BAE Systems Applied Intelligence, Dell SecureWorks, Kaspersky Lab and the UK's GCHQ (Government Communications Headquarters) to jointly combat the threat. Investigative actions were undertaken from the operational centre at the European Cybercrime Centre (EC3) at Europol in The Hague. Investigators from the NCA, the FBI, Italy, the Netherlands and Turkey gathered to coordinate action in their respective countries, in concert with counterparts in Germany, France and Poland. Coordination through Europol was instrumental to taking down the servers that form the core of the botnets, malware and Shylock infrastructure. The CERT-EU (EU Computer Emergency Response Team) participated in the take down and distributed information on the malicious domains to their peers⁷.

On 1 July 2014, five defendants were found guilty of being part of an organised crime group involved in trafficking human beings into the United Kingdom. Their conviction is the result of a UK-led cross-border investigation, run by the Metropolitan Police Service and supported by Hungary and Europol, which led to the dismantling of an organised crime group engaged in trafficking over 120 Hungarian victims into the UK to exploit them through forced prostitution. Europol actively supported this cross-border human trafficking operation from the start and provided operational analytical support throughout the investigation to the countries involved, including by facilitating information exchange and analysis and participating in coordination meetings⁸.

<i>12. To what extent is EU action in this area effective in raising standards, or enhancing cooperation? And to what extent is it necessary? And to what extent is the EU the most appropriate level for co-operation on policing, customs co-operation on judicial matters, and internal security?</i>

The EU's effectiveness in raising standards can be illustrated by how high-level policing standards percolate to all EU Member States through the EU framework. The adoption by the EU of the SIS II, the ECIM and the EU action plan on terrorism, - as developed in Question 11 - are cases in point. Additionally, the Europol Platform for Experts (EPE) provides a secure environment for specialists from a variety of law enforcement areas, enabling them to share, within their respective communities, knowledge, best practices and non-personal data on crime. Europol

⁷ European Police Office, *Global Action Targeting Shylock Malware*, Press release (10/07/2014) [online], <https://www.europol.europa.eu/content/global-action-targeting-shylock-malware>

⁸ European Police Office, *Severe Sentences for Criminal Gang Behind Forced Prostitution in the UK*, Press Release (3/07/2014) [online], <https://www.europol.europa.eu/content/severe-sentences-criminal-gang-behind-forced-prostitution-uk>

also assists Member States to raise their investigative standards on specific crimes by organising, for example, an annual training course on Combating the Sexual Exploitation of Children on the Internet for law enforcement officers and the judiciary. Likewise, the JIT framework offers an opportunity for EU law enforcement officials to participate in investigations involving their own nationals operating on UK soil and to be exposed to the UK law enforcement investigation techniques. EU action also contributes to raising standards in third countries (specifically, in the Western Balkans). Through its enlargement and neighbourhood policies, the EU exports legal standards on cross-border policing, promotes rule of law reforms and conducts capacity-building programmes for the law enforcement agencies of third countries. By doing so, the EU improves the capabilities of law enforcement agencies in countries with which the UK needs to cooperate in order to fight organised crime networks operating on its soil.

As far as its effectiveness in enhancing cooperation is concerned, Europol has facilitated information exchange so that EU Member States' law enforcement agencies can act quicker and therefore more effectively. Over the past five years, Europol's coordination of major international police operations based on the intelligence analysed and exchanged has doubled to reach 18,000 cases per year. Furthermore, in 2013, 307,842 SIENA messages were received by Europol, Member States and external partners (representing a 39% increase compared to 2011). 18,310 SIENA cases were initiated in 2013 (representing a 34% increase compared to 2011). 245,142 objects were also uploaded to the EIS by Member States in 2013 (representing a 34% increase compared to 2011).

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. While data-sharing is essential to improve the fight against organised crime at an international level, Europol provides a well-proven platform to share intelligence to fight these transnational threats. Moreover, Europol is able to offer a range of services to EU Member States' law enforcement agencies in a much more effective way and at much lower cost than if these law enforcement agencies had to build a network of bilateral relationships with their counterparts in Europe⁹.

It is important to note that the principle of information ownership remains the cornerstone of Europol's information exchange model. Member States can decide what information to share, when and with whom thanks to an advanced system of handling codes.

<i>13. Is EU competence in this area appropriate or are there any areas where it may have led to unintended and / or undesirable consequences for individuals and their civil liberty rights?</i>
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Europol can be proud of the reputation it has earned for having the most robust and effective data protection regime of any police agency in Europe. Europol's model strikes the necessary balance between data protection and law enforcement effectiveness.

Europol's Data Protection Officer (DPO) ensures compliance, in an independent manner, with the data protection framework. The main task in this area is to supervise a tailor-made legal framework which serves the needs of the operational units and, at the same time, protects the fundamental rights of citizens. In addition, the DPO acts as the main contact point with the Joint Supervisory Body (JSB) and assists in their inspections. The JSB, composed of representatives from data protection authorities in all Member States, conducts regular inspections of

⁹ Wainwright. Op.Cit, p.205.

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Europol's databases and produces reports to the Europol Management Board and the JHA Council.

As regards Europol's cooperation with third partners, the DPO also prepares data protection reports for those third parties with which Europol intends to conclude operational cooperation agreements. Member States have the final say in deciding which non-EU states may enter into cooperation with Europol.

14. Could the EU use its existing competence in this area in a different way which would deliver more in the UK national interest?

Over the last few years, in the framework of the Stockholm programme, the work to build the international security architecture has mainly been done, but the implementation of that has been incomplete. There is a need to focus now on implementation and therefore on the practical outcomes to the strategy that the EU has.

For example, as far as the overall coherence of EU instruments is concerned, most of the legal frameworks of EU JHA agencies and bodies are under review (Europol, Eurojust, EPPO) or have recently been reviewed (EUROSUR/Frontex, OLAF). This is an opportunity for legislators to ensure that EU agencies do not duplicate each other's mandate and tasks. Legal frameworks must be complementary and allow for effective, efficient cooperation where needed.

JITs are still underused although they are a great instrument for police and judicial cooperation. Europol is involved in approximately 30 each year. To increase their use, there is a need to allow Europol and Eurojust to provide financial support to Member States when setting up JITs. Consideration should also be given to using JIT capabilities to deliver a more effective task force-style response to the top few organised crime syndicates operating in Europe, which would involve establishing a semi-permanent pool of investigators based at Europol in each case.

The EAW is an important tool in the fight against Serious Organised Crime. However, there is wide recognition that the EAW needs to be reformed. The European Parliament recently issued a legislative initiative report calling on the Commission to reform it.

Lastly, the negotiation of Europol's new regulation aims at fine-tuning the current legal framework and making it more effective. As regards data management, artificial limitations have been established by the current Europol Council Decision between information stored in different 'systems', preventing Europol analysts to see all data lawfully collected the Member States' competent authorities and stored by Europol. It impedes, on a daily basis, on the agency's ability to maximise its support to Member States. A desirable outcome of the negotiation of the new regulation would be the creation of an integrated data management system to respond to the increasingly dynamic and transnational nature of threats. Other elements of the draft regulation could contribute to increase Europol's operational efficiency, such as improving Europol's participation in JITs and communication arrangements with competent authorities, as well as increasing possibilities for Europol to fund operational activities by Member States. The new regulation will also most likely strengthen the oversight exercised by the European and national Parliaments, specifically by introducing a mechanism for control of Europol's activities by the European Parliament, together with national Parliaments.

15. What future challenges do you see in the field of policing, internal security, and customs co-operation in criminal matters and what impact might this have on the national interest?

Organised Crime Groups (OCGs) are increasingly flexible and transnational¹⁰. As far as the nature of these groups is concerned, there are an increased number of heterogeneous OCGs that are no longer defined by nationality or ethnicity. Other forms of serious crime are also fundamentally affected by the process of globalisation. Criminals act undeterred by geographic boundaries and can no longer be easily associated with specific regions or centres of gravity as they capitalise on new opportunities offered by globalisation in order to generate profit. OCGs in particular are increasingly flexible, engaging in multiple forms of criminality. Transnational security threats are also evolving as their scale and nature continue to grow, especially in cyber space.

The recent developments related to data protection and privacy rights will certainly impact on EU cooperation in this area. There is a growing concern in civil society and public opinion about data protection and privacy issues that needs to be taken into account when developing policies. One of the most important challenges for the EU will be to reach a lasting political consensus on the balance between security and freedom; doing so in the context of serious criminality operating online and across borders to a much greater extent than ever before.

c) Questions on minimum standards in criminal law and procedure

17. What are the advantages and disadvantages to the UK of EU action in the field of minimum standards in criminal law and procedure? You may wish to refer to specific examples

JHA measures make an important contribution to harmonising legislation and law enforcement practices across the EU, as well as to streamlining the practical cooperation procedures which investigators must follow.

Europol's EU-wide strategic analysis has shown that organised criminals tend to exploit arbitrary differences between jurisdictions. Collectively, the JHA *acquis* has sought to create a level playing field for law enforcement and judicial authorities, thereby reducing opportunities for criminals. For example, a current major challenge is to address new psychoactive substances that emerge on the market at a rapid speed. There is a need to have standardised laws across Europe to facilitate the action of EU law enforcement agencies against synthetic drugs trafficking.

¹⁰ European Police Office, *SOCTA 2013, EU Serious and Organised Crime Threat Assessment*, (2013). pp. 6-7.