Margarida Vasconcelos's written evidence to the Government's Review of the Balance of Competences Between the United Kingdom and the European Union: Police and Criminal Justice

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The enactment of criminal law has traditionally been the domain of sovereign legislatures. However, the Lisbon Treaty has given the EU competence to legislate in this area, by abolishing the Maastricht Treaty pillar structure and moving third pillar matters (police and judicial cooperation in criminal matters) to the Treaty on the Functioning of the European Union. This is irreversible and has serious implications to the United Kingdom's sovereignty over police and judicial cooperation in criminal matters as this area is no longer intergovernmental, but is subjected to the Community method, consequently there is no veto power. Hence, judicial cooperation in criminal matters and police cooperation comes within the scope of the Union's overall legal and judicial framework. The ordinary legislative procedure and qualified majority voting are the rule, and, accordingly, the secret trialogues and first reading deals have been extended to these matters, as well as the principles of Community law, created by the Court of Justice of the European Union (CJEU), such as supremacy of EU law, direct effect, indirect effect and state liability, with adverse consequences to the UK democracy and sovereignty.

The Lisbon Treaty extended the Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice to police and judicial cooperation in criminal matters. The UK has indeed the right to choose whether to take part in judicial and police cooperation in criminal matters. Although an opt out does not work as a veto, it allows the UK to decide whether to be bound by a particular measure. However, by deciding to opt into an EU draft proposal, and being subject to qualified majority voting and the ordinary legislative procedure, the Government might no longer be able to avoid being bound by that measure, even if it is against its will. The UK is required to decide whether it wants to take part in the adoption and application of a measure in the field of police and criminal justice within three months after that proposal has been presented. However, once it has decided to opt-in there is no right to opt-out even if the outcome of the negotiations is not acceptable. The government may try to influence the negotiations over these measures, and seek to amend draft proposals but there is no guarantee that this can be achieved, and once it has decided to opt in it cannot revoke its decision even if the final text is disadvantageous to the UK. It is important to note that these measures are subject to the ordinary legislative procedure and QMV in the Council, consequently the UK might be forced to accept EU measures, which it was against. It has in some cases the so called 'emergency brake' whereby a member state that considers that a draft directive would affect fundamental aspects of its criminal justice system, may request the draft to be referred to the European Council and the ordinary legislative procedure will be temporarily suspended. In these cases the European Council would decide by consensus, but this does not mean that the UK would be able to veto such measure. Moreover, once opting in, UK is subjected to the Commission enforcement powers and to the CJEU jurisdiction. Hence, it loses protection every

time it decides to opt in, as it transfers jurisdiction from the UK courts to the CJEU, jeopardising, in this way, vital aspects of UK's criminal law and procedures.

Judicial Cooperation

The principle of mutual recognition is the keystone of judicial cooperation in both civil and criminal matters within the Union whereby Member States are supposed to trust each other. The Lisbon Treaty enshrined the principle of mutual recognition of judicial decisions in criminal matters. Hence, such measures that are likely to affect fundamental issues of sovereignty are no longer adopted by unanimity in the Council. It is therefore easier to adopt measures based on the principle of mutual recognition of judicial decisions, which might lead to extremely injustice situations such as the European Arrest Warrant.

Under Article 82 (1) (a) TFEU, the Council, acting by QMV, and the European Parliament through the ordinary legislative procedure may adopt measures to "lay down rules and procedures for ensuring recognition through the Union of all forms of judgments and judicial decisions." This provision implies mutual recognition of non-custodial pre-trial supervision measures in the investigation procedure, mutual recognition of final judgments, which implies mutual information on convictions, enforcement of criminal penalties, enforcement of non-custodial measures, suspended sentences, and mutual recognition of disqualifications. Hence, it prevents any judgment from the courts of another EU member state from being challenged in the UK courts, with grave consequences for individuals, business and UK legal system.

The European Investigation Order

It is important to recall that the European Investigation Order has been proposed using Article 82 (1)(a) TFEU as legal basis. The directive regarding the European Investigation Order (EIO) in criminal matters was adopted in March 2014 and must be transposed into Member States' national law by May 2017. The directive creates a single instrument for obtaining evidence located in another Member State in the framework of criminal proceedings - the so-called European Investigation Order. The European Investigation Order is, therefore, a judicial decision issued by a Member State's competent authority (the issuing State) with the purpose to have one or more investigative measures carried out in another Member State (the executing State) to gather evidence within the framework of criminal proceedings.

There was no clear need to introduce the European Investigation Order. The transmission of criminal evidence between EU Member States has been governed by different legal instruments based on the principle of mutual assistance, such as the Convention on Mutual Assistance in Criminal Matters, but the EU wanted to subject all types of evidence used in criminal matters to mutual recognition between Member States. Nonetheless there was no evidence that the system of mutual assistance was not working to justify setting up a system based on mutual recognition. Hence, the European Evidence Warrant (EEW) was adopted in 2008 and all Member States were required to transpose it into national law by January 2011. The EEW covered evidence that already exists and is directly available in the form of objects, documents and data for use in criminal proceedings. There was no evidence to justify expanding the EEW's scope yet the scope of application of an EIO would be wider than the EEW

as it also covers evidence that is directly available but does not already exist, such as witnesses' statements, interception of communications and monitoring of bank accounts as well as evidence that already exists but is not directly available without further investigation, such as analyses of existing objects and DNA samples or fingerprints.

The Government has taken a huge risk by opting into the draft directive creating the European Investigation Order, as it could not veto the proposal and there was no emergency brake. The Government was in fact successful in introducing important changes to the original proposal, which have improved its content. Nevertheless, the UK authorities will be obliged to provide information about British citizens including bank accounts, as any judicial authority from any EU member state may ask the UK police to gather any criminal evidence. In fact, issuing authorities from other member states would be able to give instructions to the UK police officers. The EIO provides police and prosecution authorities from EU member states with the power to demand UK police forces to gather and share evidence with them within mandatory time limits. Consequently, police resources would be spend on such requests, which the UK would not be able to refuse.

The EIO can be issued to obtain evidence in all types of criminal proceedings, which raises proportionality issues, as well as in some administrative proceedings having a criminal dimension. It covers any "investigative measure" aiming at obtaining evidence in criminal proceedings, including interviewing witnesses and interception of telecommunications, and information on and monitoring of bank accounts. There were no "proportionality" requirements under the original draft proposal. Under the final draft, member states would be required to show that obtaining evidence is necessary and proportionate for the purpose of the criminal proceedings to which the issuing of the EIO is related. However, as the House of Commons European Scrutiny Committee noted, the Home Secretary, Theresa May, conceded that "the requesting Member State may ultimately decide whether or not to pursue a request for evidence, with the attendant costs falling on the requested Member State."[1]

It is important to mention that the Directive does not provide for an EIO to be solely issued where there is dual criminality, and there is no "double jeopardy" requirement in the EIO. The Government has failed, during the negotiations, to limit the scope of the EIO to matters, which are criminal offences in both the issuing and executing Member States. The European Scrutiny Committee pointed out "The Home Secretary indicated that the Government had fought, unsuccessfully for full dual criminality, but had been "something of a lone voice"."

The executing authority must recognise and execute the EIO, without any further formality being required, and, it must, therefore, take all the necessary measures for its execution in the same way as if an authority of the executing State had ordered the investigative measure, unless it decides to invoke one of the grounds for non-recognition or non-execution.

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1 See: http://www.publications.parliament.uk/pa/cm201415/cmselect/cmeuleg/219-vi/21918.htm

It is important to note that the Directive allows one or several authorities of the issuing State to assist in the execution of the EIO in support to the competent authorities of the executing State, at the request of the issuing authority. The executing State must comply with such request, unless such participation is contrary to its fundamental principles of law or it harms its "essential national security interests." Hence, the UK, as an executing state, might be obliged to allow the presence and participation of police forces from the member state that issued an EIO.

The original draft proposal provided very limited grounds for non-recognition or non-execution of an EIO in the executing State comparing to the both mutual legal assistance instruments and the EEW. The grounds for refusal have been extended during the negotiations but they are still too narrow. The Directive now provides that the execution of an EIO may be refused if it would be contrary to the double jeopardy (*ne bis in idem*) principle, which guarantees that no one is prosecuted more than once for the same facts. The addition of this new ground for refusal is definitely an improvement comparing to the original draft, however it would not prevent the possibility of people being subject to parallel prosecutions in different Member States and, accordingly, by different investigative measures. It also provides for the territoriality exception, whereby an executing state may refuse to execute an EIO if under its law the criminal offences in question are regarded as having been committed, wholly or partially, in its territory, and "the conduct in connection with which the EIO is issued is not an offence in the executing State;" The Government is particularly pleased with this provision as well as the new ground for refusal where the investigative measure would be incompatibility with EU fundamental rights.

The dual criminality has also been included as a ground for refusal to execute an EIO. However, the Government was unable to include "a full dual criminality ground for non-recognition". As the European Scrutiny Committee noted, "The exceptions to the principle of dual criminality are those applicable to the European Arrest Warrant." The Directive provides that the executing state may refuse the recognition or execution of an EIO if "the conduct for which the EIO has been issued does not constitute an offence under the law of the executing State, unless it concerns an offence listed within the categories of offences set out in Annex D, as indicated by the issuing authority in the EIO, if it is punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years". Yet, as the Government pointed out "a full dual criminality check cannot be applied to an EIO for coercive measures". Consequently, the UK would have to comply with an EIO even though the act for which assistance is requested is not a criminal offence in this country. The recognition or execution of an EIO may also be refused if "the use of the investigative measure indicated in the EIO is restricted under the law of the executing State to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO." But, these additional grounds only apply to coercive measures.

The recognition or execution of an EIO cannot be refused on the basis of the double criminality principle in case of non-coercive investigative measures, such as "the obtaining of information or evidence which is already in the possession of the executing authority and the information or evidence could have been obtained, in accordance with the law of the executing State", "the obtaining of information contained in databases held by police or judicial authorities and directly accessible by

the executing authority in the framework of criminal proceedings", "the hearing of a witness, expert, victim, suspected or accused person or third party in the territory of the executing State", and "the identification of persons holding a subscription of a specified phone number or IP address."

Whilst under the mutual legal assistance regime there is no obligation on time limits, the mutual recognition regime does provide for deadlines. The competent executing authority would have 30 days, after the receipt of an EIO, to decide on the recognition or execution of it, and then it would have 90 days to carry out the investigation measures. The Government believes that it would be particularly challenging to comply with these deadlines.

The Government was able, during the negotiations, to improve the content of the proposal. Nonetheless, the amendments that the Government was able to introduce are not enough to justify its decision to opt into the proposal. The Government has considered as essential the requirement for "full dual criminality" yet was unable to introduce it in the final draft.

The Government, by deciding to opt into this EU measure, has accepted to change national practice and procedures. James Brokenshire explained to the European Scrutiny Committee that the main changes required to the existing UK mutual legal assistance system are: "reduced discretion to refuse to accept/execute an EIO", a "standardised EIO form" and "creation of deadlines for accepting (30 days) and executing a request (90 days)". The Government is now required, under the European Communities Act 1972, to put forward secondary legislation to transpose and implement this Directive, which amounts to a loss of sovereignty and will unreasonably burden the police. It is highly expected that the EIO will lead to an increase in the number of requests for evidence, which, obviously, would entail further costs and resources.

Moreover, the UK is now subject to the Commission enforcement powers and to the CJEU jurisdiction. Therefore, it can be taken before the CJEU for failure to transpose or to implement, or failure to implement correctly or in due time the directive. Furthermore, the provisions of the Directive on the European investigation order in criminal matters are subject to the CJEU purposive interpretation, through the preliminary reference procedure, which might change the content, reach and impact of the EIO and the way it applies in the UK. Hence, it is not in the UK national interest to participate in such measure.

Criminal proceedings

Judicial cooperation in criminal matters also covers the approximation of laws and regulations of the Member States concerning criminal proceedings and the definition of criminal offences and sanctions.

Since the entry into force of the Lisbon Treaty the EU has competence to adopt measures concerning criminal proceedings. Under Article 82 (2) TFEU the Council acting by QMV together with the European Parliament, through the ordinary legislative procedure, may adopt directives establishing "minimum rules" to "facilitate mutual recognition of judgments and judicial decisions and police and

judicial cooperation in criminal matters having a cross-border dimension." It specifically provides for the EU's competence to adopt directives establishing "minimum rules" on mutual admissibility of evidence between Member States, which are related to different modes of trial in the Member States. The Union may also adopt the so-called "minimum rules" concerning the rights of individuals in criminal procedure as well as concerning the rights of victims of crime. These rules apply to cases with cross border implications but they will also apply to purely domestic situations.

Member States have different legal traditions and different legal systems with different types and stages of proceedings, hence the EU's directives have an impact on the structure of criminal proceedings as defined by each member state's national laws, particularly in the UK. The above-mentioned provision stresses that the adoption of *minimum rules,* "shall take into account the differences between the legal traditions and systems of the Member States." However, the experience tells us that the Commission puts forward proposals in complete disregard of the different legal systems within the EU, particularly the common law system. In fact, this provision might raise concerns over limitation of the right to trial by jury and habeas corpus. Yet, there is no veto but an "emergency brake".

It is important to mention that in November 2009 the Justice and Home Affairs Council adopted a *Resolution on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings,* which was included in the Stockholm Programme. The Commission was invited to present proposals concerning the following areas: *Translation and Interpretation, Information on Rights and Information about the Charges, Legal Aid and Legal Advice, Communication with Relatives, Employers and Consular Authorities, Special Safeguards for Vulnerable Persons and Pre-Trial Detention.*

The UK decided to opt into the Directive 2010/64/EU on the right to interpretation and translation in the framework of criminal proceedings and Directive 2012/13/EU on the right to information in criminal proceedings, ceding jurisdiction in this area to the European Court of Justice.

The EU measures are likely to enhance the rights of suspects and accused persons. However, to foster mutual trust and to improve these rights, the EU just have one solution – harmonisation. The mutual recognition measures are not intended to enable the Member States' diverse legal systems to continue to work co-operatively while maintaining their diversity, they are indented to coordinate and govern our legal system. Mutual recognition is a disguise to harmonisation.

The measures mentioned in the roadmap, which, in fact, most of them have already been adopted and entered into force, are the first step towards the harmonisation of criminal procedural law, entailing the codification of the rights of defendants across the EU. One could wonder whether the EU ultimate aim is to create a EU criminal procedural code. In fact, we are moving towards a EU common criminal system.

<u>Criminal Law</u>

The EU has also competence to define certain criminal offences and set minimum sentences for those found guilty of them, overriding UK criminal laws and sentencing policies. Under Article 83 TFEU, the European Parliament together with the Council, acting by QMV, thorough the ordinary legislative procedure, may adopt directives establishing "minimum rules" concerning the definition of "criminal offences and sanctions" in areas such as terrorism, illicit drug trafficking, organised crime, trafficking in human beings and sexual exploitation of women and children, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment and computer crime. It is important to note that these areas of crime are quite broad, allowing the EU to regulate offences without a cross border dimension. Furthermore, such list is not exhaustive as this provision provides that the Council, acting unanimously, after obtaining the consent of the European Parliament, "may adopt a decision identifying other areas of crime..." Such measures are likely to affect fundamental issues of sovereignty; it is therefore vital that the UK does not opt into any proposal based on this provision. The power to determine criminal liability and to impose criminal penalties is a sovereign power, which should be kept. The Member States are best placed to decide what should be criminalised.

The Government has decided to opt into the draft Directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA, which was adopted in July 2013. The directive is based on Article 83(1) TFEU that provides for the adoption of measures concerning the definition of criminal offences and sanctions. It is important to note that under the Protocol on the Position of the UK in respect of the Area of Freedom, Security and Justice, the UK can opt out of amendments to legislation from which it has already opted in. If the Government had decided not to op in, the existing measure, the framework decision, would no longer apply to the UK. The Computer Misuse Act 1990 was amended in 2008 in order to the UK to meet the framework decision's requirements and now it would have to be amended again to meet the Directive's requirements. The Government believes that it was successful in bringing offences and penalties into line with those in the UK. Nonetheless, the UK is now subject to the European Commission enforcement powers and to the CJEU jurisdiction, which are *per se* enough reasons for the Government not to opt in.

It is important to recall that in 2005 the European Court of Justice ruled that the European Community had competence under the EC Treaty to adopt criminal law measures when they were necessary for the implementation of Community objectives. The Court of Justice held that the European Parliament and the Council had the power to adopt criminal law sanctions where it was necessary to facilitate the enforcement of EC law. The Lisbon Treaty has confirmed and expanded the CJEU rulings, as it allows the EU to adopt rules on criminal law regarding definitions of criminal offences and sanctions, if EU rules are not effectively enforced. The EU can, therefore, use criminal law to strengthen the enforcement of EU policies. Under Article 83 (2) TFEU "if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned." The procedure to adopt such directives will be the one followed to adopt the harmonization measures in question, consequently

harmonization of criminal law will be decided by QMV through the ordinary legislative procedure.

It should be mentioned that the UK's JHA opt-in might not cover substantive criminal law measures as the legal basis use might not be Article 83 (2) TFEU but the legal basis concerning the policy in question, which will be out of the Protocol 21. Article 83 (3) provides for an emergency break on draft directives establishing minimum rules with regard to the definition of criminal offences and sanctions to ensure the implementation of a Union policy. But, an emergency break does not work as a veto and it might not prevent a measure to be adopted. Moreover, the emergency break does not apply to measures on a different legal basis.

The Government was able to not opt in to the draft directive on criminal sanctions for market abuse, which has already been adopted, because the legal basis used was Article 83(2) TFEU. However, the draft proposal for a directive on the fight against fraud to the Union's financial interests by means of criminal law was originally based on Article 325(4) TFEU. The Government took the view that the UK's JHA opt-in under Protocol 21 could be triggered as regards measures containing obligations under Title V TFEU. The then Minister Chloe Smith said to the European Scrutiny Committee "it has long been Government policy to seek the addition of a Title V legal base to proposals that contain JHA obligations. The advantage of doing so, as the Committee will be aware, is that it puts the application of the opt-in beyond doubt as all parties, including the European institutions, recognise that the opt-in applies in such circumstances."[2] In June 2013 the Council reached a general approach and agreed to change the legal base to Article 83(2) TFEU. The Government has therefore decided not to opt into the PIF Directive.

It is important to note that according to the Council Legal Service opinion, from October 2012, "A change of the legal basis of the proposed Directive from Article 325(4) to Article 83(2) TFEU would not entail a modification of the applicable voting rules in the Council (qualified majority), nor of the adoption procedure (which will remain the ordinary legislative procedure)..." and stressed "The only consequence would be that since Article 83(2) TFEU is part of Title V of Part Three of the TFEU, the proposed Directive would fall within the ambit of Protocols No 21 and No 22 according to which the United Kingdom, Ireland and Denmark would not take part in the adoption of the proposed Directive, which would not be binding upon them." Hence, it seems, contrary to the government's view, that Protocol No 21 can only be trigger by Title V legal bases. Ultimately, it would be for the CJEU to decide on decide on the appropriateness of a legal basis and whether it may trigger Protocol 21, and it will do so with the objective of the uniform application and effectiveness of EU law.

It should be recalled that the European Court of Justice has recently annulled the *Directive on cross-border exchange of information on road safety related traffic offences*. The European Parliament and the Council adopted the Directive in October 2011 using Article 87(2) TFEU as the legal basis. However, in January 2012, the European Commission brought an action of annulment before the European Court of Justice on the ground that the directive had been adopted on the wrong legal basis.

2 See: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xx/8317.htm

The European Commission argued that the Directive is aiming at improving road safety, consequently its goal and content "fall within the field of transport policy", thus it should have been based on Article 91(1)(c) TFEU. The Council reiterated its position that the aim of the Directive provisions is to improve road safety but "by deterring certain types of behaviour regarded as dangerous," which "are necessarily 'criminal' matters and cannot be classified as road safety related norms within the meaning of Article 91 TFEU." The Court examined both the aim and the content of the directive to determine whether it could validly be adopted on the basis of police cooperation, but then held that the directive was adopted on the wrong legal basis, and decided to annul it.

The new proposal will be adopted on a different legal basis, Article 91(1)(c) TFEU (transport policy), and it will apply to all member states. The Commission will put forward a very similar proposal, which would set up a procedure for the exchange of information between Member States in relation to eight traffic offences, including speeding, non-use of a seat-belt, failing to stop at a red traffic light, driving under the influence of alcohol and drugs, failing to wear a safety helmet, use of forbidden lanes and illegally using a mobile telephone while driving. The new proposal would also allow Member States, where one or more of the above-mentioned offences have taken place, and have not been sanctioned, to have access to vehicle registration data (VRD) of the Member State of registration, with the aim of identifying the holder or owner of a vehicle. Then, the authorities of the member state where the traffic offence took place would be able to send out a notification to the owner or holder of the vehicle involved in the offence, containing information on the nature of the traffic offence, the place, date and time of the offence as well as the sanction and a reference to the national law infringed. The Government has not opted in to the directive, which has now been annulled by the CJEU, because it was particularly concerned about the measure set up and implementation costs. According to the Government the proposal put disproportionate burdens on Member States enforcement, driver licensing and vehicle registration authorities. The new proposal, as the previous one, would allow law enforcement agencies, from the other member states, to have access to data relating to British's vehicles and drivers and it would entail undue burdens for the Driver and Vehicle Licensing Agency (DVLA) and UK police forces.

All Member States, with the exception of the UK, Ireland and Denmark, have agreed to the measures and have already started transposing the directive, which has been recently annulled, into national law. The new proposal would be renegotiated but the legislative procedure would be speed up, as the European Parliament and Council are likely to reach an early agreement. The government cannot veto such proposal and is unlikely to form a blocking minority against it. The Government decided not to opt into the original proposal because it was not in the UK national interest to take part, but due to the ordinary legislative procedure and QMV would be forced to accept a similar EU measure.

<u>EU Criminal Policy</u>

In 2011, the European Commission announced its intention to put in place an EU Criminal Policy. The Communication entitled "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law", represented the Commission first step in developing an EU criminal policy, by setting

out a strategy and principles that it intends to apply when using criminal law to ensure the effective implementation of EU policies.

Member States are required to ensure that breaches of EU law are sanctioned with effective, proportionate and dissuasive penalties, but they have been able to decide on the EU policies enforcement instruments, and to choose between criminal law and administrative law, however under future EU legislation this choice would no longer be possible. Progressively, national legislations would have to provide for the types and levels of sanctions that the EU considers necessary to enforce EU policies.

The Commission announced the EU policies areas where criminal law measures at EU level are required, including the financial sector, the fight against fraud, the protection of the euro against counterfeiting through criminal law. The Commission also indicated other EU policies that might require criminal sanctions to ensure that they are properly enforced, such as road transport (including serious infringements of EU social rules for professional transports), data protection, customs rules, environmental protection, fisheries policy and internal market policies.

In fact, the Commission has already proposed a new directive on the protection of the euro and other currencies against counterfeiting by criminal law, a draft directive on criminal sanctions for insider dealing and market manipulation, which have already been adopted, and a draft directive on the fight against fraud to the Union's financial interests by means of criminal law. The EU legislation covers not only offences committed by natural persons but also by legal persons, despite the fact the concept of criminal liability of legal persons does not exist in all national legal orders. Moreover, these measures provide for the definition of the offences, including the description of conduct of the main perpetrator as well as ancillary conducts such as instigating, aiding and abetting. Moreover, the Commission is considering putting forward a EU-wide definition of what should be considered aggravating or mitigating circumstances for the determination of the sanction in a given case.

Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice and Protocol (No 36) on transitional provisions

In accordance with the Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice, the UK has the right to choose whether to take part in EU's legislation in the field of police and judicial cooperation in criminal matters. It is required to decide whether it wants to take part in the adoption of a proposed measure within three months after that proposal has been presented. However, once it has decided to opt-in there is no right to opt-out even if the outcome of the negotiations is not acceptable. Then, it is required, under the European Communities Act 1972, to transpose and implement the EU measure, in fact due to the primacy of European law over national law, it is not allowed to legislate against such measure. Moreover, the UK is subject to the Commission enforcement powers and to the CJEU jurisdiction.

The Lisbon Treaty has introduced a provision whereby the UK can opt out from amendments to an existing measure to which it has already opted in. However, if the Council, acting on a proposal from the Commission, determines that the non participation of the UK in the amending version of an existing measure makes the

application of that measure inoperable for other Member States or the Union, it may urge the UK to take part in the adoption and application of the proposal. The Council will make such determination acting by QMV without the UK participation. Moreover, the Council acting by QMV may determine that the UK shall bear the direct financial consequences incurred as a result of the cessation of its participation in the existing measure. This can act/ have acted as an incentive to the Government to opt in, which might be under pressure to participate. However any risk of losing a benefit of an existing measure, by choosing not to participate in its amendment, or any financial risk, to which the UK should not have been exposed in the first place, would be overcome by getting rid of an existing obligation. If the UK decides not to op into to a proposal amending an existing measure, this measure will not be bidding or applicable to it.

The Protocol (No 36) on transitional provisions annexed to the Treaties covers the European Court of Justice's jurisdiction and the European Commission competence over the so called 'third pillar acts' adopted before the entry into force of the Lisbon Treaty. In accordance to Article 10 of this Protocol, until 1 December 2014, these acts will continue to be subject to the Court competences as provided for by Article 35 TEU, i.e jurisdiction to give preliminary rulings. It is important to recall that under former Article 35 TEU, the CJEU has jurisdiction to give preliminary rulings on interpretation and validity of measures adopted under Title VI (police and judicial cooperation in criminal matters) but only to the courts of a Member State that has expressly accepted such jurisdiction, and the UK has not accepted it. The Commission has no powers to initiate infringement procedures against Member States in respect of any alleged failure to transpose or implement, in their national law, EU legislation in the field of police and judicial cooperation in criminal matters, within this period.

However, the European Commission is allowed to launch infringement procedures against member states as regards legislation adopted after the entry into force of the Lisbon Treaty likewise the CJEU has full jurisdiction as regards legislation adopted before the Lisbon Treaty entry into force if such acts are amended during the transition period.

From 1 December 2014 the new system will be fully applicable. The CJEU will have full jurisdiction to review and interpret measures on judicial cooperation in criminal matters and police cooperation. It will have jurisdiction over infringement actions, actions brought by the European Commission against Member States for failure to comply with EU legislation in this area. This will substantially strengthen the European criminal law-enforcement area and promote its uniform application.

The CJEU does not have jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services in a Member State, or to rule on the exercise of responsibilities incumbent on Member States to maintain law and order and safeguard internal security (Article 276 TFEU). However, it remains to be seen whether this exception is able to effectively restrict judicial review by the CJEU. Yet, the precise scope of this exception would be interpreted by the CJEU itself.

<u>The UK's block opt-out</u>

The UK has not been subject to the CJEU jurisdiction as regards existing measures on police and judicial cooperation for a five years period. The above-mentioned Protocol granted the UK the possibility of opting out of all EU police and criminal law measures, which had been adopted prior to the entry into force of the Lisbon Treaty and then opting back into the ones that it wishes to continue to apply. The transitional period began on 1 December 2009 and will end on 30 November 2014. The UK had to choose whether to accept the application of the Commission's infringement powers and jurisdiction of the Court over these laws or to opt out of them entirely, in which case they will cease to apply to it. The UK has decided to exercise its 'block opt out' hence, all the EU laws in the field of police and judicial cooperation in criminal matters, adopted before the Lisbon Treaty, which has not been amended since that Treaty came into force, would no longer apply to the UK as of 1 December 2014. It is important to stress that the block opt-out just applies to EU's laws in the field of police and judicial cooperation in criminal matters adopted before the Lisbon Treaty and that have not been amended since this Treaty has entered into force. The former third pillar acts, which have been amended or replaced by new legislative measures, adopted after the entry into force of the Lisbon Treaty, are not included in the block opt-out. Hence, if the UK decides to opt into an amending act during this five-year transition period it would be subject to the CJEU jurisdiction. In fact, it is important to note that the UK has already opted in to several proposals replacing the so-called third pillar acts, namely the European Investigation Order that replaces the Framework Decision on the European Evidence Warrant, the Directive on attacks against information systems, repealing Council Framework Decision 2005/222/JHA. These are irreversible decisions, as the UK is not allowed to opt out from EU policing and criminal justice laws that it had previously decided to opt in.

The UK's block opt out also does not apply to new EU police and criminal law measures, proposed after the entry into force of the Lisbon Treaty. It is important to note that the Government has already opt into the directive on the right to interpretation and translation of criminal proceedings and the directive on the right to information in criminal proceedings, ceding, in this way, jurisdiction in these areas to the CJEU.

Hence, even with the UK exercising the block opt out, the CJEU still has jurisdiction over acts adopted in the areas of police cooperation and judicial cooperation for criminal matters transposed by the UK.

It is important to note that the block opt out not only covers EU's measures on cross-border cooperation, but also measures that interfere with national cases and might require changes to national legislation. In fact, when jurisdiction is given to the EU through an opt-in, it applies not just to cross-border crime but it brings all UK's criminal law within the jurisdiction of the CJEU.

The European Court of Justice

The Court of Justice's preliminary rulings have *res judicata* force. In order to ensure the effective and uniform application of EU law, national courts, when faced with an issue concerning the interpretation or validity of a EU act, may seek a preliminary ruling from the CJEU. However, if it is a last instance court, it is compelled to refer the matter before the CJEU. The CJEU rulings not only bind the national court to

which it is addressed but also all national courts facing the same issue. Obviously, this has an impact on the sovereignty of the UK as the national courts have lost a significant part of their independence to the Court.

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 situation will get worse when the CJEU has full jurisdiction over measures in the field of police and judicial cooperation in criminal matters. The European Court of Justice will have the last word on how legally binding EU police and criminal justice measures are interpreted and applied. The UK Courts would be bound by the CJEU rulings and interpretations of Union law in this sensitive area. This would adversely affect the UK national interest, as the CJEU's interpretations are likely to change the content, reach and impact of measures and the way they apply in the UK. The CJEU has been expanding the reach and scope of European law, using a purposive interpretation, to promote European integration.

It is undeniable that the CJEU has been the motor behind European integration. The function of the European Court of Justice has been strengthened with the collapse of the pillar structure, which enabled the Court to rule on almost all Treaty matters. The Lisbon Treaty has strengthened the political role that the CJEU has been developing for itself.

It is well known that the CJEU, in its need to ensure a uniform interpretation and application of Community Law, has extended its competences beyond the Treaties. Moreover, following its own principle that the Treaties cannot be strictly interpreted, enabled the Community to legislate in areas without a Treaty base. In fact, the Treaties as well as secondary EU legislation were amended to incorporate CJEU rulings. This is a perfect recipe for further European integration.

Despite having a very limited jurisdiction over criminal matters, the Court had handed down several judgments, since the entry into force of the Amsterdam Treaty, and the insertion of Article 35 TEU (4). The European Court of Justice extended the powers of the European Community over the protection of the environment through criminal sanctions and applied the principle of conforming interpretation to framework decisions. Such judgments were the first indicators of the CJEU inclination towards a supranational competence over criminal matters.

The EC Treaty provided no powers for the Community to adopt criminal law measures. In fact, before the Lisbon Treaty, criminal matters under the third pillar were intergovernmental in nature. Nonetheless, in 2005 and then in 2007, the European Court of Justice ruled that the European Community had competence, under the EC Treaty, to adopt criminal law measures when they are necessary for the implementation of Community objectives. The CJEU held that the European Parliament and the Council had the power to adopt criminal law sanctions where it was necessary to facilitate the enforcement of EC law.

The CJEU has therefore given to the European Community powers to introduce criminal law provisions. Hence, these rulings were the first steps towards a body of European criminal law. All Member States decided at Maastricht that judicial cooperation in criminal matters should have a special pillar of intergovernmental

nature, yet the CJEU ruled in favour of integration over these matters, overruling national governments, as it took away from them, for the first time, the exclusive right to draft criminal laws.

The Council and the European Parliament adopted, in 2009, a Directive amending Directive 2005/35/EC on ship source pollution and on the introduction of penalties for infringements, this was only possible because the CJEU ruled that provisions defining criminal offences could be adopted under the EC Treaty if they were necessary to guarantee that EC rules on maritime safety were effective. The Commission could not include provisions on criminal penalties types and levels, as the Court held that "the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence." Nonetheless, the Commission just had to wait for the Lisbon Treaty to enter into force to put forward another legislative proposal harmonising sanction levels.

The Court held in Pupino that 'irrespective of the degree of integration envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe (…), it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it useful to make provision, in the context of Title VI of that treaty, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union's objectives'. This case is another example of a CJEU's ruling expanding the reach and scope of European law, in favour of European integration.

Several member states, including the UK, argued that the 2001 Framework Decision on the rights of crime victims in criminal procedure had a limited legal scope, due to its intergovernmental nature, therefore the application for a preliminary ruling was inadmissible. Nonetheless, the Court held that Member States are required to interpret national law in conformity with community law in the area of police and judicial cooperation in criminal matters.

Under the principle of loyalty to the Union, Member States are required to "take all appropriate measures to ensure fulfilment of their obligations arising out of this treaty." This principle was not applicable to third pillar matters but the CJEU has extended it to it. Moreover, the ECJ held that the principle of indirect effect, created in Von Colson, is applicable in relation to framework decisions adopted under the third pillar, which do not have direct effect but are capable to have indirect effect. Hence, the Court ruled "*The binding nature of framework decisions … is formulated in terms identical with those in the third paragraph of Article 249 EC, concerning directives.…Thus, when applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU."* This is another CJEU interpretation aimed at achieving further integration with obvious constitutional implications.

All EU Member States agree at Maastricht to keep their decision-making powers over Police and Judicial Cooperation in Criminal Matters yet the CJEU, with the above judgments, attempted to achieve further integration with total disregard to national parliaments, which have not agreed to give such powers to the European Community, on behalf of their citizens. These cases clearly show how the CJEU interferes with

member states legal systems, as it overrides national rules while these issues should have been left to a democratic decision making process.

The CJEU by extending the Community law principle of "conforming interpretation" to Framework Decisions in Pupino has overridden the wishes of Westminster Parliament. The House of Lords applied the Pupino principle in Dabas and in Calderelli. It held that Pupino was biding in UK courts, consequently it was required to interpret the Extradition Act 2003 in the light of the European Arrest Warrant Framework Decision. It is important to mention that the House of Lords by applying the Pupino principle in Dabas overruled the 2003 Act requirement for an EAW to be accompanied by a separate certificate, which is not provided by the EAW Framework Decision. This therefore demonstrates that EU legislation jeopardises British citizens rights, as Lord Hope noted Parliament had inserted that requirement to be used as *"protection against carelessly issued EAWs".*

The European Communities Act 1972 provides for the incorporation of European Community law into UK's domestic legal order. The UK agreed on a voluntary basis to accept the EU legislation and jurisdiction, in fact without the European Communities Act 1972 EU law could not become part of national law.

However, the House of Lords disregarded the fact that the measures agreed under Title VI of the TEU were not given effect under Section 2 of the European Communities Act. While the UK has implemented into national law measures adopted under Title VI, such as the EAW, this Title have not been included in the 1972 Act. Consequently, the CJEU's decisions concerning measures adopted under this title, as well as EU legislation itself, do not bind the UK courts. The Supreme Court in Assange confirmed this in May 2012.

Lord Mance's speech in Assange clarified the legal position in relation to measures adopted under Title VI of the TEU, the so called third pillar acts. He recalled that the UK is bound by EU law and by the CJEU's rulings just because Section 2 of the European Communities Act 1972 gives them that force. Then, Lord Mance stressed that Section does not include in its scope the TEU's Title VI framework decisions. Hence, he concluded that the CJEU's decision in Pupino, requiring national courts to interpret national legislation "as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues", does not bind the UK's courts.

Lord Mance referred to Article 9 of Protocol 36 whereby "the legal effects of agreements concluded between Member States on the basis of the TEU prior to the entry into force of the Treaty of Lisbon shall be preserved until such agreements are repealed, annulled or amended in implementation of the Treaties" and Article 10 which provides that the powers of the European Commission and CJEU remain the same with regard to acts of the Union in the field of police co-operation and judicial co-operation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, until such measures are repealed, annulled or amended or until 1 December 2014. He then noted that the EAW Framework Decision should be regarded as a TEU Title VI measure which has not been amended yet consequently it is not covered by the "Treaties" definition provide in Section 1 of the European Communities Act 1972, and it is outside the scope of section 2.

Lord Mance dismissed the argument that Title VI measures, including CJEU decisions, were biding on the UK under Section 3 of ECA, as he noted that this section "regulates the manner in which and principles by which European law is to be given effect, not the extent to which European law applies." Pointing out that "... Title VI measures ... remain for the time being Title VI measures and not "EU instruments" within section 3, stressed that it would be *"bizarre to provide for United Kingdom courts to be bound by principles established and any decision reached by the Court of Justice in cases which happened to be referred by courts of other member states, but to have no power to refer themselves"*.

Lord Mance concluded therefore "*The framework decision, the Court of Justice's decision in Pupino and the European legal principle of conforming interpretation are not therefore part of United Kingdom law under the 1972 Act."* In fact, Lord Mance particularly stressed that, "*whatever may be the meaning of the Framework Decision as a matter of European law, the intention of Parliament and the effect of the Extradition Act 2003 was to restrict the recognition by British courts of incoming European arrest warrants to those issued by a judicial authority in the strict sense of a court, judge or magistrate."*

The fact that it has been accepted, until Assange, that CJEU's rulings relating to Title VI measures, i.e third pillar acts, were binding on the UK whilst the scope of "The Treaties" in the ECA does not include Title VI, clearly demonstrates that the UK courts should be restrained from having opportunities of interpreting EU law and applying the CJEU's rulings that override national rules.

However, the legal position set in Assange will no longer apply when the five years transition period to amend third pillar acts expires, which is this coming December. As Lord Mance recalled "Failing their repeal, annulment or amendment, the position in respect of Title VI measures remaining in force unamended at the end of the five year period..." but "If the United Kingdom decides not to notify the blanket opt-out or if, having notified one, it applies successfully to opt back in to the Framework Decision on the European arrest warrant, it must accept the jurisdiction of the Court of Justice and the Commission's right of enforcement."

Hence, as already stressed in this paper, if the Government decides to opt in back to Title VI measures, such as the EAW, it would be subject to the CJEU jurisdiction, and the European Commission enforcement powers. The CJEU's rulings, including Pupino, would be binding on the UK courts.

Consequently, the will of Westminster Parliament wont be preserved, as due to Section 2(4) and 3(1) of the European Communities Act 1972 the UK's courts are required to override national legislation deemed incompatible with EU law, as well as to set aside national legislation in order to comply with the CJEU's interpretations. Hence, the government should introduce primary legislation, as recommended by the European Scrutiny Committee to disapply EU legislation notwithstanding the ECA 1972.

It remains to be seen how the court will adjudicate on its new area of competence. Yet, the Court is very likely to use its power of interpretation, as it has done in the past, in a committed judicially active manner. The CJEU case law clearly shows its judicial activism. The European Court of Justice interprets the Treaties and secondary legislation in the light of the overall objective of "an ever closer union". The above-mentioned cases, in fact, all the CJEU jurisprudence, clearly shows that the Court most of the time rules in favour of the EU and further European integration. It is important to recall that even before the entry into force of the Lisbon Treaty the CJEU gave to the European Community implied powers to harmonise criminal law matters.
The CJEU will use its new competence to further EU integration. The CJEU rulings have revealed the Court's position that, when faced with a choice between subsidiarity and integration the Court will choose, without a doubt, integration and strengthening the EU powers. The Court has already showed its intentions to subject these matters to "an ever closer union".

The jurisdiction of the Court of Justice over criminal law will seek to uniformise member states legal systems, undermining the UK's distinctive and well-established legal system, if the UK decides to opt in. As the House of Commons European Scrutiny Committee noted in its report *The UK's block opt-out of pre-Lisbon criminal law and policing measures* "Whilst the full implications of extending the jurisdiction of the Court of Justice and conferring enforcement powers on the Commission in relation to these measures are, as yet, uncertain, it is clear that opting back in will increase the powers of both institutions and diminish the role and function of domestic courts in the UK as well as Parliament."[3]

By removing unanimity and by giving full jurisdiction to the Court of Justice over criminal matters, the EU has set its mind on harmonisation and further integration in this area. The CJEU is drive by the 'ever closer union'. The CJEU, as well as the European Commission had already showed their ambitious to expand their competences over this area. As Bill Cash noted, there has been a continuous process of Europeanization on criminal law and criminal procedure. The European Commission is looking to put in place an EU Criminal Policy, and it has already taken several steps towards harmonisation of criminal law, which could affect the whole UK justice and criminal law system. In fact, we are moving towards a single criminal justice system across the EU that will be controlled by the CJEU. It is important to mention that Lord Chief Justice noted in 2010, "The European Union is about to expand not simply its influence but its jurisdiction over criminal matters." Then, he stressed "… that the development of the European Union, and the extended jurisdiction of the European court in criminal matters, will have a significant impact domestically. Twenty years down the line, where will we be?"[4]

The power to determine criminal liability and to impose criminal penalties is a sovereign power, which should be retained by the UK. As above-mentioned the Court has been ruling in favour of further integration hence the government takes a huge risk by opting into these measures surrendering sovereignty to the CJEU. The UK loses protection every time it decides to opt in, transferring jurisdiction from the UK

[3] See: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/683/68320.htm

[4] Lord Judge, Lord Chief Justice of England and Wales, _The Judicial Studies Board Lecture 2010', Inner Temple, 17 March 2010

courts to the CJEU, jeopardising, in this way, important aspects of UK criminal law and procedures. The CJEU has full jurisdiction to give preliminary rulings on interpretation and validity of measures on judicial cooperation in criminal matters and police cooperation as well as to review the legality of member states acts adopted in this area of law. The Commission can bring infringement procedures against the UK for failure to transpose and/or implement correctly or in due time criminal law legislation. The CJEU has the power to impose financial penalties on Member States, which fail to comply with a previous Court's judgment. Hence, if the UK fails to comply with a Court's judgment, meaning amending national legislation, it might face fines.

By deciding to opt in the Government gives in Parliament sovereign power to legislate over these matters, surrendering control over police and criminal justice to the EU institutions. The UK parliament and UK courts will cease to be the ultimate source of law.

It was therefore vital to protect British national interests that the Government had decided to opt out from all third pillar measures adopted before the Lisbon Treaty, which have not yet been amended or repealed. These measures would no longer apply to the UK as of 1 December 2014. However, this would not be enough to protect British national interest. The Government should not opt back into 35 "third pillar acts" which have ceased to apply to it. The Government should stop opting in to these measures and repatriate all the powers, which are not covered by the block opt out, namely proposals replacing third pillar acts adopted before the Lisbon Treaty as well as to criminal law measures presented after the entry into force of this Treaty. This is a policy area that must be decided by the Westminster Parliament not by the EU.

Not opting into EU measures and rejecting the CJEU jurisdiction and the European Commission enforcement powers serves better the UK's national interest. The ordinary legislative procedure, QMV, the European Commission powers and the CJEU jurisdiction are substantive reasons for not opting in to any measure regardless of any benefit it might have.

The benefits of participating in police and judicial cooperation in criminal matters should be set against the risks associated with the undemocratic EU decision making process, including QMV and the ordinary legislative procedure. Such measures are adopted by the ordinary legislative procedure and by QMV and this is the main issue, as the UK might be forced to accept EU measures against its will. The UK might not be able to prevent disadvantageous amendments that the European Parliament or other member states might try to introduce to the proposal during the negotiations. On the other hand, the UK is not always able to form political alliances to stop damaging legislation, or to introduce changes, particularly if there is an earlier agreement and a compromise deal is reached between the Council and the European Parliament. Once it has decided to opt-in there is no right to opt-out even if the outcome of the negotiations is not acceptable. There is an emergency brake but only on draft directives establishing minimum rules on criminal proceedings and draft directives establishing minimum rules with regard to the definition of criminal offences and sanctions to ensure the implementation of a Union policy. Nonetheless, the European Council would decide by consensus, which does not mean that the UK has agreed to it. On top of that, once such measures are adopted the UK is subject to the

Commission enforcement powers and to the CJEU jurisdiction. Hence, the European Court of Justice can override British courts. In fact, the European Court of Justice and UK Courts might strike down Acts of Parliament that are passed according to voters' democratic wishes. Any benefit that an EU measures in police and judicial cooperation in criminal matters might have cannot justify the lost of sovereignty.

The Treaty provides "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States". However, these proposals are put forward in complete disregard of the different legal systems within the EU, particularly the common law system. In fact, they are likely to undermine the UK common law traditions and values and its rule of law, particularly when all these measures became justiciable in the CJEU.

The UK should not participate in any of these matters and submit itself to the jurisdiction of the European Court of Justice as this would be irreversible, unless the UK, unilaterally, decides to repeal and disapply EU legislation notwithstanding the European Communities Act 1972, as the European Scrutiny Committee has recommended.[5]

The UK can secure access to police and judicial co-operation in criminal matters without having to be absorbed by the EU and subject to the CJEU jurisdiction, as it does not need the EU to engage in international co-operation to tackle cross-border crime. The UK could sign up international agreements with other member states on different issues where it considers necessary.

[5] See: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/109/10902.htm