HOUSE OF LORDS

EU SUB-COMMITTEE E (JUSTICE AND INSTITUTIONS)

EU Criminal Procedure Policy

Written Evidence

Contents

Bar Council of England and Wales – Written evidence

The Bar of England and Wales is honoured and delighted to have this opportunity to contribute to their Lordship's Inquiry into the very important developments that are currently underway, post the entry into force of the Lisbon Treaty, in the area of EU criminal procedural law.

The answers provided below are confined broadly to those matters referred to in Article 82(2) of the Treaty on the Functioning of the EU (TFEU) - the scope of the inquiry as defined by their Lordships. The Bar's response to similar questions in the area of substantive EU criminal law would likely be more guarded.

1. Is an EU system of criminal procedural law desirable?

1.1 It is said that national criminal justice systems reflect the societies in which they have developed. Can the EU establish a system which adequately reflects all the constituent societies within the EU?

1.1.1 The Bar of England and Wales submits that an EU criminal justice system should aim to reflect the best elements of the constituent societies, rather than the societies as a whole. The different Member States of the EU bring to the table different approaches, variable in their effectiveness, to the procedural and substantive law challenges faced by criminal justice systems: the definition of offences; legal capacity; collection and treatment of evidence; pre-trial, trial and post-trial procedures; access to legal assistance and legal aid; treatment of vulnerable persons; rights of victims; sentencing policy etc. Manifestly and to a great extent, the varied approaches to these issues stem from the differences between the inquisitorial and adversarial systems. Much of this rightly remains within the competence of the Member States themselves, though that should not in and of itself necessarily close the door to general, possibly EU-led efforts to learn from each other's best practice, where practicable.

1.1.2 However, the increasing numbers of EU citizens who take advantage of the Treaty-enshrined four freedoms, can and should expect to be subjected to similar and recognizable standards of procedures when in direct contact with the criminal justice system of another Member State, whether as an alleged or convicted offender; a witness or a victim of crime. The judicial authorities of the Member States, confronted with increasing cross-border movement of citizens and goods; and thus of crime too, will more readily prevent and solve crimes if there is mutual trust and confidence between them and in each other's systems, facilitating mutual assistance and cooperation.

1.1.3 A Member State like the UK, which is, for the most part, seen as a standard bearer in the criminal procedural law field, should be supportive of EU efforts to raise the bar in many of these areas in other Member States. Such efforts should, generally speaking, entail relatively little change to domestic law and procedure, but bring significant benefits to UK citizens who are arrested or detained or otherwise in contact with the criminal justice system of a far-flung, or even a neighbouring , Member State. Judicial authorities attempting, for example to obtain admissible evidence from another Member State will also benefit.

1.2 Are EU instruments necessary to safeguard the rights of citizens involved in criminal proceedings, in addition to the European Convention on Human Rights, the EU Charter of Fundamental Rights and the other multilateral and bilateral agreements?

1.2.1 Yes:

- Contained as they are or will be in EU directives, they provide an alternative means of enforcement before the Courts; and in some circumstances, may give rise to directly effective rights;
- The directives may seek to extend or add flesh to the bones of rights that are already set out in the ECHR and other sources, which may provide for greater certainty;
- They can be used to fill in gaps between existing Convention rights and jurisprudence – e.g. some elements of the Commission's current work on the Roadmap of Procedural Rights measures, including the right to legal assistance in extradition cases; the right to communicate with the outside world when in detention; etc.
- They are more flexible – and can be used to respond to changes in the real-politick, which occasionally, as in the post-September 2001 world, may mean fast-tracking a legislative measure to set in place a pan-European procedure to deal with a particular type of cross-border problem. That said, the Bar has, for more than 10 years, been among the many stakeholders to lament the fact that the EU saw fit to accelerate its adoption of EU prosecutorial measures, in particular the European Arrest Warrant; but is even now yet to adopt the full range of balancing defence safeguards. We are thus very supportive of the Commission's ongoing work on the Roadmap of Procedural Rights, adopted by the JHA Council in 2009[1].

1.3 To what extent does existing EU legislation affect national criminal justice systems?

1.3.1 Existing EU criminal procedural measures have the potential to impinge significantly in the areas in which they apply. For example, Framework Decision 2005/214/JHA on the application of mutual recognition to financial penalties, has, we hear, already resulted in a marked improvement in the enforcement of fines imposed by Member States whose road systems are regularly used by foreign motorists. Framework Decision 2008/675/JHA on the taking account of convictions in the course of new criminal proceedings, now requires domestic courts to take such foreign convictions into account in the same way as they would national. This of course, raises several evidential issues, and the implementing measures in England & Wales have sought to clarify the types of cases in which inquiries as to foreign convictions should be made; and the circumstances in which they can, for example, be challenged. The Bar notes here that there may be anxiety about the system of law or the definition of offence, which the strict proof required previously, helped to assuage.

1.3.2 The European Arrest Warrant 2002(584) JHA, about which much has already been written, is the most high profile of the existing Framework Decisions, together with the later European Evidence Warrant (2008/978 JHA), which itself should have been implemented in all national laws by January of this year.

1.3.3 The Bar believes that the impact of the less high-profile measures may not yet be fully seen in the English Courts, in part because the level of awareness of these provisions among legal practitioners is not yet optimal. The House will be aware of the continuous efforts

[1] http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm

made by the Bar: the Criminal Bar Association; the Bar European Group and many other legal professional bodies to educate members of the profession in this field; and we welcome the current emphasis at EU level on the provision and funding of training in EU law for all those professionals involved in the judicial process.

1.4 To what extent does existing EU legislation and proposed legislation go further than the existing EU or international instruments, or UK law?

1.4.1 As cited above, the current proposal for Measures C1 /D on the right to legal assistance and the right to communicate, is an example of a proposal that contains many elements that go beyond existing instruments, providing as it does for the right to legal assistance in extradition cases; and the right to communicate with the outside world when in detention. Moreover, it is arguable that it exceeds the requirements set down by the ECHR in the *Salduz* case (see further below), though the directive, when eventually formally adopted, may more closely reflect this line of ECHR jurisprudence.

1.5 What is the effect of importing the jurisdiction of the Court of Justice of the EU?

1.5.1 For the sake of completeness, the Bar notes that, in addition to importing for the first time the jurisdiction of the Court of Justice into the criminal justice field, the Lisbon Treaty also gives the Commission the power to bring infringement proceedings against Member States who fail, properly or at all, to implement a criminal justice measure. The Bar notes that, as the European Arrest Warrant is, to date, the only existing measure to have been fully implemented throughout all 27 Members, this change, in and of itself, should facilitate judicial cooperation.

1.5.2 As to the Court, it is now open to the national courts to apply to Luxembourg for a preliminary ruling on the application and interpretation of an EU criminal justice measure, though for the time being, the power is restricted in its application by the transitional provisions in the Treaty itself (about which, see further below).

1.5.3 The Bar welcomes this development in theory, as it should lead to the building up of a body of jurisprudence which would assist national judicial authorities and the courts in interpreting and applying EU criminal justice measures in a consistent manner, leading to some measure of legal certainty and predictability. However, here, as in other areas of EU law, the Bar remains concerned, both in the short and longer-term, as to the capacity and criminal expertise/experience of the Court to achieve this desirable result. As Lord Mance pointed out in his recent lecture to the UKAEL, entitled "The Composition of the European Court of Justice" the needs of the Court for expertise in particular areas do not figure as material considerations in the judicial recruitment process.[2] The government legal background of a substantial number of the appointees to the Court leads to expertise in public law and associated topics, but less so in relation to questions of criminal justice and procedure.

1.6 Will the Court of Justice be able to cope with litigation arising from EU legislation?

1.6.1 The Bar is not optimistic. The Court has this year been revising its procedural rules and composition in an effort to better cope with its ever-increasing workload. However,

[2] See §§28-29 of the paper published at http://ukael.org/past_events_46_1935078262.pdf

many commentators believe that even those changes currently tabled will barely deal with the already excessive workload and inherent delays; much less prepare the Court for yet more responsibility.

1.6.2 Moreover, the legal profession in the EU, including the Bar, through the Council of the Bars and Law Societies of Europe (CCBE) has expressed concern that some of the changes intended to increase capacity and reduce delays will have a negative effect on access to justice e.g. the proposed extension of the Court's powers to dispense with an oral hearing.

1.6.3 If one couples that with the fact that the Court was not conceived as, nor is it now being converted to, one that can readily handle the specific problems that are thrown up by cases in the several non-traditional EU law fields over which it now has competence, including asylum and family, as well as criminal law, one can see trouble ahead. An 18-month wait for a preliminary ruling in a competition law case may be expensive and commercially inconvenient for the companies involved, but for a person on remand pending conviction or acquittal, it poses an altogether more fundamental problem.

1.6.4 The restrictive interpretation of when the new procedures to expedite cases can be used does not encourage optimism that important or test-case "non-money" cases (e.g. family, asylum, criminal cases) will be turned around in the sort of timeframes that the UK courts and Practice Directions consider acceptable.
It is worth noting here that, as we are still in the transitional period set down by the Lisbon Treaty (see further below), the Court does not yet have competence to hear preliminary references in the criminal judicial cooperation field, except in relation to those new binding measures (directives) that have been adopted under the new TFEU provisions. As at the time of writing, that amounts to only 1 adopted text – Measure A of the roadmap of procedural rights, the right to translation and interpretation, adopted just over a year ago. It is plainly therefore too soon to say how many, and what type of, cases are likely to be referred once there are more measures on the statute books over which the Court has competence; nor how that will change once the transitional period is over (from mid-2014).

1.6.5 But any projection as to the numbers of criminal references as the Lisbon Treaty matures and secondary legislation is made pursuant to its legal bases must also be put in the context of other likely areas of substantial reference growth, notably from: (a) the newer Member States (evidence suggests that it takes time before any new Member State regularly begins to produce references); and
(b) other areas of EU activity (consumer law, commercial law and social security being likely growth areas).

1.7 Are there other areas of criminal procedure which should be covered by EU legislation and, conversely, are there areas which are covered unnecessarily?

1.7.1 The Bar notes the Commission's stated intention to conduct a Green Paper consultation on pre-trial detention, once the other roadmap measures have been adopted, and its express indication that the presumption of innocence and the right to silence are two procedural rights that it may look at again in this context in the future. The issue of conflicts of jurisdiction rules has also been mentioned.

2. Does EU legislation in the areas within scope add value?

2.1 What practical benefits does EU legislation bring - for citizens, law enforcement authorities, courts?

2.1.1 For citizens touched in some way by crime, including cross-border crime; if currently-proposed or envisaged measures in the areas within scope are eventually adopted:

- Victims of crime will benefit from new and enforceable rights and protections – a balancing act that is already subject to a change in attitude domestically. More generally, they should benefit from the greater prospect of perpetrators of the crime being brought to justice through the mechanism of the EAW, EEW etc in cases where, for example, the suspect has absconded or the offence was committed in a different Member State from that where the trial takes place.
- For suspects; defendants, be they vulnerable or otherwise, better guarantees that the procedures that will apply to them, from their first contact with the police onwards; and their access to legal and other necessary advice and support, will be appropriate and provide clarity, equality of arms and a fair trial; and appropriate treatment thereafter should they be convicted.
- Law enforcement bodies and the courts will benefit from higher levels of trust and cooperation with their opposite numbers in the other relevant Member States, with all the advantages that that would bring in terms of apprehending suspects and defendants, securing and admissibility of evidence; etc.

2.2 Do the benefits of EU legislation outweigh the disadvantages?

2.2.1 Yes, provided that:

- EU legislation defining criminal procedures continues to set minimum standards, and does not go beyond what is necessary to provide the agreed level of protection / procedural guarantees, but without unnecessarily interfering with due process in the particular Member State; and
- The line between Member State and EU competence is maintained.

2.2.2 The Bar's response were the present inquiry to be focussed on substantive criminal law provisions would be considerably more guarded.

2.3 Does EU legislation promote mutual trust between national authorities and facilitate judicial and police co-operation in practice?

2.3.1 The promotion of mutual trust is the most oft-cited justification for EU action in the criminal justice field by the EU institutions. It is true that empirically, the EAW has facilitated cooperation between Member States to a considerable extent, though it has also demonstrated the differences and perceived inadequacies of certain other Member States' police and authorities.

2.3.2 The Bar thus agrees with the underlying principle, and considers that for it to be fully achieved, EU legislation in this field must take a balanced, informed approach, mindful of the difficulties on the ground, and be properly implemented and applied.

2.4 Should EU minimum standards for criminal procedure apply only to cross-border cases?

2.4.1 On one reading of Article 82(2) TFEU and the strict division of competences as between the EU and the Member States, yes. But the roadmap measures proposed so far have not been so limited, nor indeed have proposals in the field of victims' rights. If one considers the reality of the situations in which these measures would bite, and the objectives they seek to achieve, it is clear that it would be difficult in practice to draw that line, so the EU legislator has instead sought to provide the rights without such discrimination. In these contexts, that may be the only workable solution. The issue is also less problematic than it might be in other areas, as the Treaty clearly provides for the establishment of "minimum rules" which "shall take account the differences between the legal traditions and systems of the Member States". The alternative would be to restrict these measures to cross-border cases, and then encourage Member States to raise their domestic standards in line with those of relevant EU cross-border measures, if and where necessary. That would not pose difficulties for the UK in the main, but might fall short of the desired result in certain other Member States.

2.4.2. It is informative here to note the current confluence of post-Salduz[3] activity, both at EU level (proposed Measure C1 / D, discussed further below) and moves by several Member States to revise their national laws so as to comply with the ECHR jurisprudence. The timing is not a coincidence however, as the EU expressly chose to separate out this aspect of Roadmap Measure C, in part so as to coincide with Member States' efforts in the same direction. For their part, the Member States' decisions to revise their own laws appear not to have been driven by anticipation of any EU activity, but rather the ECHR jurisprudence that showed that those States would otherwise continue to be in breach of Article 6 of the Convention.

3. The impact of the UK opt-in

3.1 To what extent should the UK opt in to legislation in this area?

3.1.1 The English and Welsh legal system, in which the Bar operates, is, and is widely seen as, one of the most developed and sophisticated criminal procedural law systems in the EU. This is amply illustrated in two of the primary areas of activity of the EU at the present, both of which the House is focusing on in this inquiry – the rights of the defence and of victims. On both, the law and practice in England & Wales is regularly held up in Brussels and in other Member States as a benchmark.

3.1.2 For example, in the wake of the European Court of Human Rights judgment in *Salduz* (above), and the subsequent confirmatory case law, many other EU Member States, including several neighbouring ones, have been revising their national law in order to comply. In doing so, they have specifically sought the advice and expertise of members of the legal profession in England and Wales, in particular to explain the operation of the Police and Criminal Evidence Act 1984, and supporting instruments, in practice.

3.1.3 Given this pre-eminence, the Bar believes that any actual or foreseeable EU legislative proposals imposing minimum rules in this field are unlikely to increase the legal or administrative burden in England & Wales, and when they do, we would likely welcome that change. Thus from a substantive and procedural point of view, our starting position is that

[3] Salduz v Turkey (2008) ECHR

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

3.1.4 This leads us to the significance of the message given to the EU institutions and to other Member States when the UK **does not opt-in**, in particular to measures the objective of which we broadly support and with which we are often already in compliance in practice.

3.1.5 The recent experience of UK non-opt in to Measure C1/D (right to legal assistance and to consular / family contact) is a possible example.
The UK chose to underline its non-opt in by co-signing a letter with 4 other Member States that opposed the Commission's proposal. This prompted a critical response, including from the Council of the Bars and Law Societies of Europe (CCBE), the latter viewable at: http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/29092011_EN_Response1_1317362944.pdf

3.1.6 It is the Bar's understanding that the UK non-opt in was driven by concerns that the Commission proposal as adopted went beyond the *Salduz* jurisprudence, and potentially would have required legal assistance to be made available to suspects and defendants at such an early stage in the process – point of arrest or perhaps even before - that there would be a real possibility of mischief (e.g. in a public order situation).

3.1.7 If this is a correct interpretation of the Commission's proposal, then the Bar appreciates the view taken by HMG, whilst still regretting that an opt-in was thus not possible. The reasoning appears not to be the same as for the other 4 signatories of the above-mentioned letter, each of which is in the process of, or has just, adopted new laws that, for the first time, bring their procedures into line with the ECHR and case law. It is perhaps unfortunate that the UK was unable to opt-in to a measure with which it is already basically compliant; which can only increase access to justice for its citizens when abroad, and that it then compounded the negative impression this gave by co-signing said letter.

3.2 What factors should inform the UK Government's decisions on opting in?

- Does the UK government support the overall objective(s) of the proposal and agree that it complies with the principles of subsidiarity and proportionality?
- How much of a change would the proposal as adopted by the Commission (or by at least a quarter of the Member States) impose on the law and practice in the UK?
- If considerable, would this add value?
- If minor, but nonetheless of value, the positive signal to other Member States and to the EU of a UK opt-in should weigh in the balance against any financial or administrative burden involved in compliance;
- If there is a monetary cost associated with compliance, is it outweighed by the advantages in terms of access to justice for UK and other EU citizens; increase in mutual trust between the Member States and /or potential simplification for UK bodies involved in cross-border law enforcement?
- Is the UK already in the vanguard in the particular area of law and procedure concerned, and thus looked to as an example by EU institutions and other Member States?

- Are the elements of the proposal as adopted by the Commission (or a group of at least a quarter of Member States) with which the UK is not happy, likely also not to find support among other Member States and/ or with the European Parliament?
- If so, how likely is it that negotiations within the Council and in the trialogue with the Commission and the EP are likely to resolve the problems in a way that would be acceptable to the UK? This question should be considered against the background that the UK, were it to opt-in at the beginning of a given procedure, would be signalling its support for the instrument in principle, and thus enjoy a stronger bargaining position during the negotiations themselves.

3.3 Additional considerations regarding opt-in to proposals *amending* existing EU criminal justice measures

3.3.1 Were the Commission (or the required number of Member States) to adopt a proposal *amending* an EU instrument by which the UK was already bound at the time of the entry into force of the Lisbon Treaty, (for example, the European Arrest Warrant), then there are two additional factors that the UK should weigh in the balance when deciding whether or not to opt-in:

(i) If the UK decides not to opt-in to such an amending measure, then Article 4a of the UK JHA protocol, provides for a qualified majority of the other Member States, through a prescribed and timetabled process, to decide to take the UK out of the original measure altogether in certain circumstances.
This must be regarded as a most unlikely scenario, but it is a theoretical possibility that cannot be ignored; and could be prompted by political considerations. Were it to happen in practice, it could lead to a great deal of legal uncertainty, potentially retrospectively.

(ii) If said amending proposal were to be tabled within 5 years of the entry into force of the Lisbon Treaty (so anytime up until 1 December 2014) then the Treaty's transitional provisions would apply. This would be relevant to the UK decision on whether or not to opt-in for the following reasons:
Article 10 of Title VII of the protocol on transitional provisions[4], provides that, for a period of 5 years following the entry into force of the Lisbon Treaty(1 December 2009), the pre-Lisbon Treaty limited jurisdiction of the ECJ in relation to Title VI TEU matters (police and judicial cooperation in criminal matters as was) will remain in place *in relation to measures already adopted under the existing Treaty provisions* (again, for example, the European Arrest Warrant). This limitation stands unless and until the act is amended, should that occur before the 5-year transitional period. Thereafter, the wider jurisdictional provisions will come into force in these areas too, including preliminary reference from lower courts; infringement proceedings against Member States, etc.

3.3.2 These provisions add further elements to be considered by the UK when deciding whether or not to opt-in to a proposal issued during this initial 5 year period, amending a criminal justice measure adopted under the old TEU. Not only will it be looking at the

[4] Protocol No 36 on transitional provisions, relating to application of acts adopted under Title VI TEU before entry into force of Lisbon Treaty. See consolidated Lisbon Treaty, C 115/325 at: www.consilium.europa.eu/igcpdf/en/07/cg00/cg00014.en07.pdf

amendments themselves, and the risk, as described above that a non-opt in could lead to the entire measure no longer applying to it; but it will also have to take into account the triggering of the application of the extended jurisdictional provisions to the amended act if it does choose to opt-in.

3.3.3 The Bar would also like to take this opportunity to comment on a wider but related policy decision that the UK will be faced with within the next 3 years:

Article 10(4) JHA Protocol - No later than six months prior to the end of the transitional period of 5 years (so no later than the end of May 2014) the UK may notify the Council that it does not accept the extension of ECJ jurisdiction and related jurisdictional changes. The UK negotiated this right because the pre-existing measures were negotiated under the old Third Pillar with no expectation that the ECJ would have this jurisdiction in the future. If the UK so notifies, then ALL measures described in the provision would *cease to apply* to the UK. Thus, if the UK decides that it does not accept the wider ECJ jurisdiction in judicial cooperation in criminal matters, already adopted measures such as the EAW would no longer apply to the UK. The Council can, by qualified majority, decide on any necessary and transitional arrangements, including requiring the UK to bear any financial consequences of its withdrawal from said acts. Article 10(5) provides a right to the UK to opt back in on a case-by-case basis at any time thereafter, using the procedure designated in the Schengen Protocol.

So, again, a very delicate and important tactical decision will have to be made in the one-off scenario that will arise no less than 6 months ahead of the lapse of the 5-year transitional period.

3.4 Will the fact that the UK has not opted in to some EU legislation undermine the trust of authorities of other Member States in the UK criminal justice system? If so how will this affect UK nationals involved in criminal proceedings in other Member States and the ability of the UK authorities to investigate and prosecute cross-border crimes.

3.4.1 It is difficult for the Bar to answer this question as framed.

3.4.2 However, we do consider, as indicated in response to questions above, that the exercise of the UK non-opt-in, particularly in areas of criminal law and procedure where the UK is often held up as an example of how to do it, sends out a negative message to the EU institutions and to governments and stakeholders of the other Member States.

3.4.3 Use of the "non-opt-in" can be seen as "anti-European" (especially in light of current high-level developments in response to the Eurozone and financial crisis) and more damagingly, as not supportive of efforts by the EU to encourage or require a raising of standards of criminal law and procedure in other Member States that do not enjoy our traditions.

3.4.4 Over time, we are observing an increasing expectation that the UK will not take part in such measures, almost on principle. This may tie the hands not only of UK negotiators in Council, but also of MEPs in certain fields of activity; and even of stakeholders that are actively engaged in trying to influence EU policy, for the benefit of UK citizens.

14 December 2011

Council of Bars and Law Societies of Europe (CCBE) – Written evidence

Introduction

1. The Council of Bars and Law Societies of Europe (CCBE) represents more than 1,000,000 European lawyers through its member Bars and Law Societies of the European Union and the European Economic Area. In addition to membership from EU Bars, it has also associate and observer representatives from a further ten European countries' Bars.

Request for evidence

2. The CCBE is happy to respond to the request for evidence concerning areas of EU competence set out in Article 82(2) of the Treaty of the Functioning of the EU (TFEU) in relation to -

- Investigation of offences
- Evidence
- Pre-trial procedure
- Procedural rights of suspects and defendants
- The position of victims of crime

General comments

3. Before dealing with the specific topics identified we believe that it is apposite to express by way of general comment a concern that EU Criminal Justice Policy both in terms of legislation and specifically in terms of application, has developed in an imbalanced fashion which if not redressed will pose a significant difficulty for Member States endeavouring to protect their own fundamental rights systems.

4. From the introduction of the Intergovernmental Provisions at the Treaty of Maastricht in 1993, immediate steps were taken to advance police and judicial cooperation. Specifically the Europol convention of 1995 and the subsequent establishment of Eurojust demonstrated that political priority was given to the issue of law enforcement without any complimentary steps being taken to secure fundamental rights either by legislating for them, or providing citizens with access to adequately trained lawyers at public expense to protect their rights. Europol is now, since January 2010 a fully fledged EU body.[5] Similarly, with regard to Eurojust, its status, powers and functions have been enhanced substantially by Council decision 2009/426/JHA. The commitment of the Member States to judicial cooperation is evidenced by the comparative speed with which fundamental measures such as the European Arrest Warrant, and currently the European Investigation Order have been promoted.

5. By contrast the Green Paper on Procedural Safeguards in Criminal Cases first published in 2002 failed politically. Some of its constituent elements have been identified for individual legislation in the Stockholm Programme. However, so far only measure A (Right to interpretation and Translation) has been agreed, while measure B (Right to information) is

[5] Council decision 2009/371/JHA

expected shortly. Measure C (access to a lawyer and Right to Communicate) has not secured agreement at a Council level and is being discussed in the European Parliament.

6. In each case however the measures have been substantially diluted from what was originally proposed, and arguably fall below the minimum standards guaranteed by Article 6.

7. Our concern is that all the evidence to date is to the effect that the Member States are willing to commit substantial resources, both legislative and financial, to the development of ever increasing European Union criminal justice measures without having any adequate regard to the necessity to introduce contemporaneously adequate safeguards for citizens. Each national system has developed its own checks and balances which are in general terms available to protect the citizens from any excesses in domestic legislation. However checks and balances have not been developed on a European Union wide basis to deal with legislative measures emerging from the Union itself.

8. Given that the Treaty of Amsterdam confers competence in criminal matters as diverse as –

- Protecting the EU's financial interest
- Counterfeiting currency
- Counterfeiting non-cash instruments
- Money laundering
- Corruption
- Trafficking of persons
- Child pornography and prostitution
- Facilitation of irregular entry or residence
- Drug trafficking
- Terrorism
- Organised crime
- Attacks on information systems
- Intellectual property rights

it is our strong view that further measures should not be introduced unless and until a procedure is established for the Parliament to satisfy itself that any legislation is fully compliant with Article 6, including a specific requirement that adequate legal representation is available to citizens.

Question 1 - Is an EU system of criminal procedural law desirable?

It is said that national criminal justice systems reflect the societies in which they have developed. Can the EU establish a system which adequately reflects all the constituent societies within the EU?

9. The CCBE strongly supports the proposition that Member States must be in a position to retain their individual systems, reflecting not only general legal heritage, be it of the civil law or common law tradition, but also reflecting specific cultural requirements unique to individual Member States. However that is not to say that there is not a role for the European Union in identifying and articulating common standards which ought to properly apply throughout the EU. This is, after all, closely mirrored by the application of the European Convention of Human Rights throughout the Council of Europe countries. The Convention and its newfound status within the Treaty is a living instrument and the EU has a

role to play in codifying and promoting knowledge of developing trends across the whole EU.

10. It is especially true that where the Union seeks to develop its competence in the criminal justice field, that there should be emphasis on "justice" by ensuring that procedural law accompanies substantive law, with a view to ensuring the protection of fundamental rights.

Are EU instruments necessary to safeguard the rights of the citizens involved in criminal proceedings, in addition to the European Convention of Human Rights, the EU Charter of Fundamental Rights and the other multi-lateral and bi-lateral agreements?

11. For any right to be of practical benefit to a citizen it must be well known, in the sense that it is clearly and expressly articulated and accessible so that adequate legal resources are available to a citizen to enforce his rights. Both of these aims are best served by requiring specific consideration to be given to how rights might best be protected in practice, at the time of the introduction of legislation in the field of criminal justice.

12. It may not be adequate to rely on the mechanisms in place in individual Member States given the transnational nature of the measures under discussion. For instance, dual representation, namely the access to legal assistance in more than one Member State may be an essential safeguard where specific measures are concerned. The requirement to provide this is one that should be imposed on Member States as a necessary corollary for the additional powers being exercised, powers that the Member States have supported.

13. It should be possible for individual citizens and their advisors to find the guarantees of their fundamental rights in the same instrument conferring those additional powers.

To what extent does existing EU legislation affect national criminal justice systems?

14. While individual Member States may be reluctant to concede to a domestic political audience the extent to which criminal justice policy is in fact framed in Brussels/Strasbourg, the reality is that from a practitioners point of view we see on a daily basis the extent to which entirely unforeseen consequences now flow from the nature of measures adopted at European Union level.

15. Perhaps the most obvious and strident example is the operation of the European Arrest Warrant. It is generally accepted that the measure was subjected to less than robust scrutiny, in the wake of the 9/11 atrocities. Now the reality for many European citizens is that they can find themselves being surrendered to a requesting State with little or no real opportunity to challenge that surrender in their home State. Particularly in cases where the requesting State exercises extra-territorial jurisdiction it is possible that a citizen can find themselves on trial in a country where they have never been, and subject to powers of investigation and rules of evidence far removed from their domestic system. To such a citizen, and indeed to every Member State, there is an urgency to ensuring that equivalent procedural safeguards apply throughout the European Union and that a citizen should not find themselves disadvantaged by failure of the Union to act in that regard. That is a clear example of the extent to which in procedural terms national laws have been affected in a most unforeseen way.

16. In terms of substantive law, a good example will be the extent of the changes to domestic law in the field of money laundering brought about by the three directives to date. The abolition of the entitlement to client confidentiality is as far-ranging a modification to centuries-old legal traditions as one could imagine[6].

To what extent does existing EU legislation and proposed legislation go further than the existing EU or international instruments or UK law?

What is the effect of importing the jurisdiction of the Court of Justice of the EU?

Will the Court of Justice be able to cope with litigation arising from EU legislation?

17. The clear danger is that the broader the remit the European Union gives itself in the field of criminal justice, the more far reaching the measures that will be introduced. It follows that the nature and extent of the legal challenge to such measures will increase, as will the number of cases which are incapable of resolution at the national level, and which will require reference to the Court of Justice. There is every danger that the Court will become as over burdened by its case load as has happened to the European Court of Human Rights. To avoid this, the following principles must attach to developing areas and new legislation.

    a. They should be clear in their terms and self-contained in respect of application. Fundamental rights should be expressly stated and provided for to reduce the necessity for subsequent challenges.

    b. National Courts should develop real expertise in the Charter so that domestic decisions reflect as closely as possible the probable outcome at the Court of Justice. This will involve Member States providing adequate resources in terms of training and research to their national Courts and to the lawyers practicing in those Courts.

       The Court of Justice itself will need to ensure that it has adequate judicial resources to deal with the increase in the volume of challenges before the case load becomes backlogged.

Are there other areas of criminal procedure which should be covered by EU legislation and, conversely, are there areas which are covered unnecessarily?

18. As we have alluded to, our primary concern is that effectively the exclusive attention of Member States has been to provide themselves with additional law enforcement resources whether in terms of black letter legislation, enhanced judicial cooperation or administrative measures such as the arrest warrant and investigation order. It follows that there is a deficit in counter-balancing measures required to ensure equality of arms on the part of citizens specifically where they are embroiled in complex transnational investigations or prosecutions.

19. We have stressed the importance of providing procedural safeguards to meet the challenges of these new legislative developments. For the safeguards to be effective however, citizens will have to access them, and in order to do so they will need to have available to them

[6] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing,

lawyers specially trained in the field of European Union Criminal law. As many of the persons affected by these measures will be unable to pay for their own representation, and many lawyers who are prepared to undertake this work would be unable to meet from their own resources the cost of training, the European Union must ensure that there are in place adequate systems of legal aid and professional training. It is noted that there appears to be no shortage of resources when required by Europol and Eurojust, but nothing has been provided by way of support for practitioners on the defence side.

20. The issue of legal aid is an urgent one, and while it is under consideration as part of the Stockholm programme, it does not appear to have the same level of political support/priority as law enforcement projects.

21. Another area where more work can be done is in the area of conditional release pre-trial. While one would have thought that the outstanding success of the European Arrest Warrant in simplifying surrender proceedings would lead to a situation where authorities accept that persons should be allowed return to their home States awaiting trial (because of the ease of having them surrendered) this has not occurred n practice. Measures to secure provisional release are suitable for further work at EU level.

Question 2 - Does EU legislation in the areas within scope add value?

What practical benefits does EU legislation bring – for citizens, law enforcement authorities, Courts?

22. Insofar as law enforcement authorities are concerned, the question is capable of a straight-forward answer. Every aspect of international prosecution has been enhanced by the measures both legislative and practical that have been put in place. For instance, the provision in the Treaty of Lisbon authorising Europol to request national authorities to take certain actions, coordinate investigations and establish joint investigation teams is far-reaching, as is the obligation on the Member States to explain itself if it does not accede. Law enforcement agencies benefit from the enhanced judicial cooperation and mutual recognition not least in the area of the European Arrest Warrant.

23. Substantial resources both in terms of legislative time and in terms of direct support have been invested in the law enforcement sector.

24. Equally from the point of view of Courts, enhanced judicial cooperation and mutual recognition is a real benefit. The increasing willingness to accede to requests for surrender is the clearest evidence of this.

25. However, when it comes to looking for practical benefits enjoyed by ordinary citizens the question is much more complex. As previously stated, there is an imbalance between the scale of the introduction of new intrusive powers and the creation of new offences, with the complete failure to introduce any harmonised standards for the defence. The reality is that the individual citizen is now more heavily legislated than ever before, dealing both with criminal law measures at domestic and European Union level without any increase in the level of legal protections available either in theoretical or practical form.

Do the benefits of EU legislation outweigh the disadvantages?

26. This is classically a question where the answer will differ depending on the perspective you have. From the point of view of the Member States and the law enforcement machinery of those States it is clear that the extra powers have clear advantages.

27. From the point of view of a citizen more heavily regulated than ever without adequate safeguards the disadvantages outweigh the advantages. The gap of course can be closed if Member States accord real meaning to their obligations to advance human rights standards and to secure personal freedoms for all citizens.

Does EU legislation promote mutual trust between national authorities and facilitate judicial and police cooperation in practice?

28. Yes, and there is no doubt but that the entire trend in national courts is to accommodate European Union measures at the request of other Member States. However, it is equally the situation that there is a growing clamour of concern in legal and political circles at the fact that in some regards measures that ought to be capable of challenge are in fact immune. We would say rhetorically how many cases of miscarriage of justice where perhaps a citizen is held in poor prison conditions for a lengthy period pre-trial having been surrendered on a European Arrest warrant will it take before national courts resent the very limited role they have in the scrutiny of such requests? The fact that citizens may be sent for trial to a jurisdiction where there is an absence of adequately trained lawyers or the absence of legal aid is another area which is likely, if not corrected to undermine confidence in judicial systems of other Member States. We can see these difficulties arising in practice on a daily basis and it can only be a matter of time before cases, stark on their facts, emerge to compromise the whole exercise.

Should EU minimum standards for criminal procedure apply only to cross border cases?

29. Absolutely not. We strongly take the view that the same procedural rights should attach to all (EU citizens or otherwise) engaged by the criminal procedure of any Member State. It is in our view invidious that a different, and therefore lesser standard, should apply in one category of case rather than the other. To be respected, fundamental rights may need different expression in different types of cases. It is, for instance, not every case that will require an interpreter or dual representation. The important point is that where required they should be provided. Obviously it is to be hoped that with the passage of time best practice will be learned from other Member States and followed throughout the European Union. In the short term however it is essential that minimum safeguards apply throughout Europe, properly protected by non-regression measures.

Question 3 - The impact of the UK opt-in

To what extent should the UK opt into legislation in this area?

30. This is a judgement call. It is obviously easier for the UK to opt in to legislation which is already in place, and one example is legislation involving victims and vulnerable witnesses where there is a whole raft of legislation in the UK. It has of course to be remembered that the UK has separate legal systems, some would say three or four - England and Wales, Scotland, Northern Ireland and, for example, strangely the Channel Islands. It is of course a system also linked to Ireland and all are adversarial rather than inquisitorial. The judgement also would be whether to opt-in totally or to specific instruments and this is referred to on

page four of the Commission paper on access to a lawyer where it states "*Denmark is not participating in newly adopted measures on substantive criminal law, while the United Kingdom and Ireland only participate in the adoption and application of specific instruments after a decision to "opt in".* The UK should opt-in to ensure the effective implementation of EU policies on the basis that this should support the needs of EU Systems and the EU area of freedom, security and justice, while fully respecting subsidiarity and the last-resort-character of criminal law.

What factor should inform the UK government's decisions on opting in?

31. The initial factor is the benefit to the UK, its individual jurisdictions and obviously its citizens, and its obligations and commitment to Europe - Article 67(1) TFEU *"the Union should constitute an area of freedom, security and justice with respect for fundamental rights and different legal systems and traditions of member states*".

Will the fact that the UK has not opted into some EU legislation undermine the trust of authorities of other Member States in the UK criminal justice system? If so how will this affect UK nationals involved in criminal proceedings in other Member States and the ability of the UK authorities to investigate and prosecute cross border crimes.

32. It is apparent that extensive use of the opt-out possibility, especially in relation to fundamental rights such as the right to legal assistance or other procedural rights, would be highly counter-productive with respect to European integration and could undermine mutual trust between Member States. A common area of justice is based on common fundamental values; this area cannot develop properly if some states –especially very influential ones like the UK - prefer to opt out in the above cases.

7 December 2011

City of London Law Society's Corporate Crime and Corruption Committee (CLLS) – Written evidence

A. Introduction

(i) Individuals.

Criminal procedure rules in the UK already provide comprehensive safeguards for the rights of citizens who are subject to UK rules and there is no need for the UK to have additional procedural rules. We have gold plated legislation resulting from EU Directives, for example, our anti money laundering regime is one of the stritest in the world. However, in other Member States where criminal protections for the accused and/or the victims may not be as robust, having a "minimum" EU standard could be beneficial -- especially for British citizens who travel to or live in other Member States.

(ii) Corporate Crime

2.1 Establishing EU criminal procedural rules in corporate criminal law may be beneficial. While natural persons are less likely to move across borders to benefit from more lenient criminal laws/procedures, a corporate body may evaluate the laws of various jurisdictions and may choose to establish its principle place of business (or do business in) only jurisdictions that have more lenient criminal laws/procedures and sanctions or in jurisdictions that do not effectively enforce relevant laws.

2.2 The EU Paper "Towards an EU Criminal Policy" states that one of the goals of EU-wide law is to "reduce the degree of variation between the national systems and to ensure that the requirements of 'effective, proportionate, and dissuasive' sanctions are indeed met in all Member States." Reducing variations between Member States will create a more level playing field for businesses that operate in different jurisdictions and may prevent corporations from jurisdiction shopping.

B. The questions posed by the Sub-Committee.

1. Is an `EU system of criminal procedural law desirable?

Q: It is said that national criminal justice systems reflect the societies in which they have developed. Can the EU establish a system which adequately reflects all the constituent societies within the EU?

A: A major difficulty with having one system for so many countries is the difference between the adversarial, common law model, and countries that have the Civil Code. There are many differences, including in relation to bail, disclosure, trial process, and the role of investigating judge and prosecutor. Each system has its own positive and negative qualities, but we cannot see a case for wholesale change. The EU should concentrate on certain minimum standards and measures which aim at cross border cooperation.

Q: Are EU instruments necessary to safeguard the rights of citizens involved in criminal proceedings, in addition to the European Convention on th Human Rights, the EU Charter of Fundamental Rights and the other multilateral and bilateral agreements?

A: No, in our view the ECHR gives more than adequate protection.

Q: To what extent does existing EU legislation affect national criminal systems?

A: UK – ECHR, Arrest Warrant, Data Protection, AML, Competition, many others.

Q: To what extent does existing EU legislation and proposed legislation go further than the existing EU or international instruments, or UK law?

A: We see that criminalising financial markets is one suggestion. It is crucial for the UK regulator that it has the discretion to decide whether to use its civil regime, and when to be a criminal enforcer, we cannot imagine that it would welcome this discretion being threatened . Reference to "Euro Crimes" – what is justified? UK domestic law deals comprehensively with all these crimes.

Q: What is the effect of importing the jurisdiction of the Court of Justice of the EU? Will the Court of Justice be able to cope with litigation arising from EU legislation?

A: We believe the existing system of the criminal process in national Courts and ECHR to Strasbourg, is best left as it is.

Q: Are there other areas of criminal procedure which should be covered by EU legislation and, conversely, are there areas which are covered unnecessarily?

A: No views

2. Does the EU legislation in the areas within scope add value?

Q: What practical benefits does EU legislation bring – for citizens, law enforcement authorities, courts?

A: We can think of examples like the money laundering (AML) regime and Mutual Legal Assistance, with cross border cooperation. Communications between EU police and regulators.

Q: Do the benefits of EU legislation outweigh the disavantages?

A: No views

Q: Does EU legislation promote mutual trust between national authorities and facilitate judicial and policy cooperation in practice?

A: Yes

Q: Should EU minimum standards for criminal procedure apply only to cross-border cases?

A: Yes.

3. The impact of the UK opt in

Q: To what extent should the UK opt in to legislation in this area?

A: Where is the benefit?

Q: What factors should inform the UK Government's decisions on opting in?

A: Benefit to UK citizens and companies. There should be an analysis of benefit and burden before any further steps are taken. With the Extradition/EU Arrest Warrant debate and vote in Parliament on 5th December, minds are concentrated on why the UK should espouse further international obligations, which may arguably harm its citizens and businesses.

Q: Will the fact that the UK has not opted in to some EU legislation undermine the trust of authorities of other Member States in the UK criminal justice system? If so how will this affect UK nationals involved in criminal proceedings in other Member States and the ability of the UK authorities to investigate and prosecute cross-border crimes.

A: Opt ins should not undermine trust, of other member state authorities or prejudice UK nationals in other EU states, or ability of UK authorities to investigate. Good level of cooperation already.

Faculty of Advocates – Written evidence

(I) Is an EU system of criminal procedural law desirable?

1. *It is said that national criminal justice systems reflect the societies in which they have developed. Can the EU establish a system which adequately reflects all the constituent societies within the EU?*

   (a) No. There are significant differences between the criminal procedural laws of the different member states, and indeed within member states (as, for example, between Scotland on the one hand and England and Wales on the other). It would not be realistic to seek to establish a harmonized system of criminal justice across the whole EU. Nor would the Faculty of Advocates regard this as desirable.

   (b) Individual measures or proposals for measures at European level may nevertheless have merit. The Faculty recognizes that the free movement of persons and capital across the European Union have implications for the criminal justice systems in individual member states. The question of whether any particular measure is a justified response to the implications of free movement of persons and capital is one which, in the Faculty's view, should be addressed on a case by case basis. Any such measure must respect Convention rights. Adequate resources must be made available to allow Convention rights to be made effective. Further, the compatibility of any proposed measure with domestic criminal procedure in the various jurisdictions of the United Kingdom is a legitimate consideration – any system of criminal procedure requires to be considered as a whole, and any individual change to our domestic systems of criminal procedure must be considered in light of its effect on the system as a whole.

   (c) Applying these principles, the Faculty has taken the following positions on recent EU proposals:-

      (i) The Faculty supports, in principle, the UK opting into the proposed Directive on Access to a Lawyer, while expressing concern that the measure does not address the provision of legal aid.

      (ii) The Faculty does not support the UK opting into proposed Directive on Victims' Rights. There are features of this proposal which, in the Faculty's view, are inconsistent with fundamental features of our domestic system – a system which, in any event, has developed a satisfactory regime for the support of victims consistent with respect for the fundamental features of our criminal justice system.

      (iii) In response to the Commission's Green Paper on Detention, the Faculty has expressed support in principle for measures such as the European Supervision Order which would permit non-custodial

alternatives to imprisonment on remand or by way of sentence to be undertaken in the home state of an accused from another member state of the European Union. The Faculty recognizes that the use made of any such system would depend on confidence in the effectiveness of measures in other states. Likewise, the Faculty recognizes that the effectiveness of the European Arrest Warrant regime and arrangements for prisoner transfer post-conviction will be undermined if there is not confidence in conditions of detention in other member states.

2. *Are EU instruments necessary to safeguard the rights of citizens involved in criminal proceedings, in addition to the European Convention on Human Rights, the EU Charter of Fundamental Rights and the other multilateral and bilateral agreements?*

The law currently contains substantial protection for the rights of citizens involved in criminal proceedings in Scotland:-

(i) The public prosecutor is obliged to respect Convention rights: (a) by reason of the Human Rights Act 1998; and (b) by reason of the vires limit on acts of the Lord Advocate (and hence on all public prosecutions in Scotland) imposed by section 57(2) of the Scotland Act 1998. Although clause 17 of the Scotland Bill currently before Parliament would remove the vires limit on the acts of the prosecutor, it would not affect the prosecutor's obligation under the Human Rights Act 1998 to respect Convention rights.

(ii) The Scottish Courts (including the UK Supreme Court), as public authorities, are also obliged by the Human Rights Act 1998 to act compatibly with the European Convention on Human Rights.

(iii) Criminal justice is a devolved matter. An Act of the Scottish Parliament in the field of criminal justice is not law if it does not comply with Convention rights. For practical purposes, the Scottish Parliament (and the Scottish Government, exercising any delegated powers in this field) must act compatibly with Convention rights.

There is a potential gap in the current protection for the rights of the citizen. Sections 6(2) of the Human Rights Act 1998 and 57(3) of the Scotland Act 1998 mean that an act of the prosecutor or court would not be unlawful if- (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions. In effect, therefore, where a Breach of Convention rights arises by reason of the provisions of an Act of the UK Parliament, the Court is limited to a declarator of incompatibility. It is no doubt likely that legislation would follow to correct the position, but an individual affected by such a measure would have no remedy in the domestic courts. An application to the European Court of Human Rights, if successful, would not affect the validity of any conviction or sentence.

An EU measure would "trump" an Act of the UK Parliament and could provide a remedy in the domestic courts to an individual in such a situation.

As a general proposition, the Faculty would prefer to see any breach of Convention rights attributable to UK legislation dealt with domestically and without the need for recourse to EU legislation. A legislative reform by one of our own legislatures tailored to our own system of criminal justice is likely to be preferable to a pan-European provision. The key problem in this area is the position of the individual accused whose rights have been infringed by UK legislation but who cannot obtain any effective remedy through the domestic system. This could be resolved by making provision under which domestic criminal courts could review the conviction and/or sentence of an accused person in circumstances where the Strasbourg Court has held that his rights have been infringed even though the infringement arose by reason of legislation of the UK Parliament.

3. *To what extent does existing EU legislation affect national criminal justice systems?*

At present, EU legislation does not affect purely domestic criminal procedure in Scotland. Extradition to other member states of the EU is dealt with through the European Arrest Warrant system, which is given effect under Part 1 of the Extradition Act 2003.

4. *To what extent does existing EU legislation and proposed legislation go further than the existing EU or international instruments, or UK law?*

The proposed Directive on Access to a Lawyer goes with the grain of our domestic law as it has been reformed following *Cadder v. HM Advocate* 2010 SC (UKSC) 13. However, the UK Supreme Court has recently identified a particular respect in which the proposed Directive on Access to a Lawyer would go further than Article 6 of the Convention as interpreted by the Court: *Ambrose v. Harris* 2011 SLT 1005 (see in particular the opinion of Lord Mathew Clarke paragraph 124)

The proposed Directive on Victim's Rights goes further than existing UK law in the following respects:-

(i) There are features of the proposed Directive which, in the Faculty's view, would be inconsistent with the fundamental principle of our law that prosecution is in the hands of the independent prosecutor acting in the public interest and is not brought at the instance of the complainer (who may or may not, in fact, be a victim). While the Faculty supports the effective provision of support and appropriate information to complainers (something which is now well-established in Scotland), the Faculty would not support the imposition on the prosecutor of an obligation to provide detailed reasons for decisions made in the public interest, to enter into a dialogue with complainers in relation to such decisions. Nor would it support the subjection of the prosecutor's decision to an appeal process.

(ii) Article 20(c) does not form part of Scots law. It is unnecessary for a complainer to be accompanied by a lawyer at interview. The complainer is

not a party but a witness who should provide a full and accurate account to both prosecution and defence representatives. We note, in relation to Articles 21(2)(c) and (d) that it will not always be possible for a defence solicitor to conduct all interviews with a complainer or to guarantee a same-sex interview.

5. *What is the effect of importing the jurisdiction of the Court of Justice of the EU? Will the Court of Justice be able to cope with litigation arising from EU legislation?*

We have two concerns about the jurisdiction of the Court of Justice in this context: (1) the speed with which references to that Court would be determined; and (2) the expertise of the judges in matters of criminal law and procedure. As we understand it a reference to the ECJ would currently take between 1 and 2 years to be dealt with by that Court. In the context of Scottish criminal proceedings, we would regard such a delay as wholly unacceptable.

(1) Scots law applies strict time limits and very short maximum periods of pre-trial detention: 40 days in summary cases; 110 days in solemn cases in the sheriff court; 140 days in solemn cases in the High Court of Justiciary In non-custody solemn cases, the accused must be brought to trial within a year of first appearance on petition. Although these periods may be, and often are, extended, it is plain that a reference to the ECJ in respect of an issue which arises pre-trial could play havoc with these time limits.

(2) Even post-trial, we would regard such a delay as unacceptable. In practical terms, a reference would be likely to be made only on appeal to the Criminal Appeal Court, or on a further appeal to the UK Supreme Court (which might be obliged to make a reference), so the period taken for the reference to be dealt with would have to be added to the time required in the domestic system. In relation to an appellant whose conviction has merited a custodial sentence such a delay in disposal of an appeal would be most unsatisfactory. Either he is kept in custody even though his appeal might ultimately be successful, or he is released on bail – albeit with the potential of being recalled to serve the remainder of his sentence hanging over him. The uncertainty created for victims of crime and complainers is also a significant reason why such delays should not be tolerated.

Accordingly, it appears to us that, if there is to be EU legislation affecting domestic criminal procedure it would be essential that serious attention be paid to the working of the Court to ensure: (a) that criminal justice cases are dealt with expeditiously, particularly in pre-trial cases; and (b) that the personnel of the Court include judges with experience of criminal justice. It would plainly be desirable that this include judges with experience of criminal justice from the main legal traditions of Europe.

6. (2) Does EU legislation in the areas within scope add value?

7. *What practical benefits does EU legislation bring - for citizens, law enforcement authorities, courts?*

EU legislation may have the following practical benefits:-

(i) It may provide mechanisms for cross-border co-operation in the investigation and prosecution of crime which would not otherwise be available.
(ii) It may secure that in relation to such mechanisms the rights of the citizen are protected.
(iii) It could allow for cross-border co-operation in relation to punishment, and, in particular, allow non-custodial and custodial sentences imposed in a host state to be served in a home state.
(iv) EU action (not necessarily at the level of legislation) could secure minimum standards in order to achieve the mutual confidence which will be necessary if any system of cross-border co-operation in relation to remand and punishment is to work, and which is also necessary to the smooth running of the EAW system.

Any benefits are likely to accrue only if any measure in the criminal justice field is adequately resourced.

8. Do the benefits of EU legislation outweigh the disadvantages?

This can only be addressed on a case by case basis.

9. Does EU legislation promote mutual trust between national authorities and facilitate judicial and police co-operation in practice?

We do not consider that we are well-placed to offer evidence on practice. But in principle it seems to us that there are areas – such as in relation to extradition and the operation of any system of cross-border co-operation in relation to punishment in which mutual confidence may be significant.

10. Should EU minimum standards for criminal procedure apply only to cross-border cases?

If the EU were to impose minimum standards for criminal procedure, it does not seem to us that these could be limited to cross-border cases. However, some of the measures which we would support (such as measures concerning service of custodial and non-custodial sentences in a home state) and measures directed to the effective operation of the extradition system by their nature involve a cross-border element.

11. (3) The impact of the UK opt-in

12. To what extent should the UK opt in to legislation in this area?

This should be decided on a case by case basis by reference to the merits of each individual measure.

13. What factors should inform the UK Government's decisions on opting in?

The following factors would be relevant:-

(1) Whether the measure is necessary in the interests of the effective investigation, prosecution and punishment of crime in the context of the free movement of persons and capital.

(2) Whether the measure protects and promotes the rights of the citizens. It would be a strong reason not to opt into a measure which might be justified in the interests of the effective investigation, prosecution and punishment that it does not adequately protect and promote the rights of citizens. On the other hand, it would be a good reason to opt into a measure that it does promote and enhance rights of citizens where those are not or cannot be adequately secured through domestic measures alone.

(3) Whether the measure goes with the grain of our domestic law or, on the other hand, involves innovations which would not cohere with our own law or would, when applied in our own law, result in anomalies or difficulties, or would result in a system which did not, looked at overall, achieve the purposes of the criminal justice system.

(4) Whether the measure is adequately resourced (including, where appropriate, by the provision of legal aid).

(5) Whether the measure creates a situation in which domestic criminal proceedings are liable to be affected by references to the European Court of Justice.

6 December 2011

Fair Trials International – Written evidence

About Fair Trials International

Fair Trials International (FTI) is a UK-based NGO that works for fair trials according to internationally recognised standards of justice and defends the rights of those facing charges in a country other than their own. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused.

FTI pursues its mission by providing individual legal assistance through its expert casework practice. It also addresses the root causes of injustice through broader research and campaigning and builds local legal capacity through targeted training, mentoring and network activities.
Although FTI usually works on behalf of people facing criminal trials outside of their own country, we have a keen interest in criminal justice and fair trial rights issues more generally. We are active in the field of EU Criminal Justice policy and, through our expert casework practice we are uniquely placed to provide evidence on how policy initiatives affect defendants throughout the EU.

Introduction

1. Fair Trials International (FTI) welcomes this opportunity to present its views on European Union (EU) Criminal Procedure to the Justice and Institutions Sub-Committee of the House of Lords European Select Committee. The last decade has seen the EU place unprecedented emphasis on increasing and improving the cooperation between EU Member States in criminal justice matters. It is a sad truth that, for most of this period, the fundamental rights of suspects and defendants have been largely ignored.

2. The mutual cooperation introduced in an effort to streamline procedure in the fight against cross-border crime and create an "area of justice, freedom and security" within Europe is based on the principle of "mutual recognition". Mutual recognition means that if one EU country makes a decision (for example that a person must be extradited to face a criminal trial or serve a sentence), that decision will be respected and applied throughout the EU, no questions asked. However, given the unacceptable differences in protections for defence rights across the EU, there is not (yet) a sound basis for such trust.

3. The European Arrest Warrant (EAW), the procedure for fast-track extradition between EU countries, was the flagship mutual recognition measure. Now the EU is negotiating similar legislation to facilitate cross-border investigations, in the form of the European Investigation Order (EIO). It has also adopted a Framework Decision on mutual recognition of custodial sentences (the Prisoner Transfer Framework Decision, due for implementation, December 2011) and another on the European Supervision Order (due for implementation, December 2012).

4. We accept the need for a coherent package of effective measures to tackle serious cross-border crime and ensure that those wanted by prosecutors cannot evade justice by exploiting open borders: this means an effective, simple extradition system and a speedy and safe system of cross-border investigations. Equally important, but until recently neglected by legislators, are the legal instruments needed to ensure fair

investigations and trials throughout the EU, including in cross-border cases. Many now consider that it was a mistake to introduce mutual recognition instruments for prosecutors when suspects and defendants do not have tangible, enforceable fair trial rights in many EU countries.

5. During the drafting of the Lisbon Treaty, the UK negotiated an "opt in" mechanism in relation to new EU laws on police and judicial cooperation. This means the UK is only bound by such measures if it first agrees to take part in them. When the coalition came to power, the Government announced it would approach forthcoming EU legislation in the area of criminal justice on a case-by-case basis with a view to: maximising our country's security; protecting Britain's civil liberties; and preserving the integrity of our criminal justice system.[7] For the reasons set out in Section B below, we believe that the Government should opt in to EU measures necessary to protect fair trial rights, and that a failure to do so will adversely affect UK nationals involved in criminal proceedings in other Member States.

6. Despite recent progress under the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings (the Roadmap)[8] we are still a long way from an EU where every Member State offers sufficient fundamental rights protections for suspects and defendants. For example, the right to legal advice at the early investigative stage of a case is still not respected in many countries, despite the ruling of the European Court of Human Rights (ECHR) in the *Salduz* case.[9] In many states there is no adequate legal aid provision for accused persons unable to afford a lawyer.

7. In addition, the use of pre-trial detention in many parts of Europe is excessive in length and often imposed without proper justification. In October 2011, FTI published a major report on pre-trial detention and has called for new EU legislation in this area.[10] Pre-trial detention can offer important safeguards to ensure justice is served but depriving people of their liberty in the period before trial should be an exceptional measure, only to be used where absolutely necessary. As our report shows, the reality is that there are hugely varying standards in the way that pre-trial detention is used across the EU and the lengths of time for which people are held, often without adequate review of whether remand in custody is still necessary. This is at odds with the idea that all Member States have criminal justice systems that respect fundamental rights and undermines the trust needed for mutual recognition instruments to work effectively.

Executive Summary

8. This submission examines the steps necessary to establish an effective and coherent system of EU criminal justice procedure: one which enables Member States' prosecution and judicial authorities to cooperate effectively in the fight against serious cross-border crime, while also ensuring sufficient protection for the fundamental rights of suspects and defendants. The submission draws on previously published briefings and submissions

[7] *The Coalition: our programme for government*, p.19.
[8] Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, (2009/C 295/01), 30 November 2009.
[9] *Salduz v Turkey* [2008] ECHR 1542.
[10] *Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention*, October 2011, available at http://www.fairtrials.net/documents/DetentionWithoutTrialFullReport.pdf. See also the recent European Commission publication *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*, COM(2011) 327, Brussels 14 June 2011.

containing more detailed criticisms and recommendations of the relevant instruments and backed up by the case studies of our own clients. (References and links to these documents are provided in the body of this submission.) It covers the following areas.

9. **Extradition:** FTI fully accepts the need for an effective system of extradition within the European Union. It is now important for the Government to prioritise the task of building safeguards into the EAW system in order to ensure it operates fairly for the many hundreds of people who are affected by this system in the UK each year. To address the widely recognised flaws in the EAW system, action is needed at EU level to ensure that: (i) a proportionality test is applied by both the issuing and executing states; (ii) extradition can be refused on properly made out human rights grounds; (iii) states are required to remove an EAW request they have issued, where this request has been lawfully refused by an executing state; and (iv) surrender under an EAW can be deferred, where the court in the executing state is satisfied that the prosecution case is not "trial ready". The Government will need to work with other EU Member States and institutions in order to achieve these changes to the Framework Decision.

10. FTI will also urge the Government to reform the UK legislation implementing the EAW (Part 1 of the Extradition Act 2003), by: (i) ending legal aid means-testing for extradition cases; (ii) extending the time limit for appeals in the Extradition Act from 7 to 14 days, or by giving courts discretion to extend the appeal time limits in the interests of justice; and (iii) bringing the forum-based refusal ground contained in Section 19B of the Extradition Act into force by the necessary commencement order.

11. **Procedural defence rights:** The first two measures of the Procedural Rights Roadmap have now been adopted, the first guaranteeing the right to interpretation and translation and the second the right to information during criminal proceedings. These will provide valuable protection for the rights of suspects and defendants, when transposed into the domestic systems of all EU countries. FTI believes the Government should have taken the lead in protecting the rights of accused persons across Europe, by opting in to the latest draft Directive, on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, as it did with the previous two Roadmap measures. An opt in would be fully concordant with the Government's three point test (paragraph 4 above), and a failure to use its full influence in bringing about a strong Directive will mean that the millions of British people who travel to European countries each year may not have adequate protection in the event of their arrest.

12. **Cross-border evidence gathering:** FTI believes that any new law that effectively increases the amount of relevant, legally and fairly obtained evidence can only have a positive impact on the trial process. However, our view is that for all EU countries to shift to a mutual recognition based system as envisaged by the proposed European Investigation Order is premature and potentially harmful both to fundamental rights and to the efficient prosecution of cross-border crime. FTI has serious concerns about some of the draft provisions of the EIO:
    - Additional safeguards must be included to ensure that the human rights of affected parties are given adequate consideration before the execution of an EIO and that safeguards are in place to prevent disproportionate evidence requests;
    - Data protection requirements should be made clearer to Member States to ensure that they are aware of the legislative framework within which they are operating; and

- Express provision is needed to allow for evidence gathering on behalf of the defence, on reasonable request or at the court's own initiative.

13. **Pre-trial detention in the EU:** Pre-trial detention provides an important way to ensure defendants attend trial, to protect the evidence and witnesses in a case and to prevent reoffending. However, due to the overuse of pre-trial detention and the varying standards in how it is applied and reviewed, which adversely affect fair trial and other fundamental rights and waste billions of Euros in prison costs each year, FTI has called for the following action at EU level:
    - The EU should legislate to set minimum standards for the use of pre-trial detention in the EU and for the effective and regular judicial review of decisions to remand in custody;
    - Member States should implement the European Supervision Order (ESO) in such a way that it represents a real and practical alternative to pre-trial detention in cross-border EU cases;
    - Deferred surrender should be used under the EAW to avoid unnecessary pre-trial detention post-extradition; and
    - The EU should examine the viability of establishing a flexible one year maximum pre-trial detention limit.

14. **Prisoner transfers within EU:** FTI believes that allowing convicted prisoners who are serving a sentence in an EU country other than their own to return to their home country to complete the sentence in their home state improves rehabilitation prospects and is fairer for their families. However, we have major concerns about the human rights implications of the Prisoner Transfer Framework Decision, given the number of EU countries with severe overcrowding and unacceptably poor prison conditions:
    - Safeguards should have been included to ensure that the Framework Decision cannot be used to send people to prisons with very poor conditions and that blanket transfers of all non-nationals by Member States do not increase overcrowding in other States; and
    - The fact that, under the new system, the consent of the sentenced person to the transfer is no longer required means that greater attention will have to be paid to ensuring that prisoners' fundamental rights are protected: there is no guarantee this will happen.

Section A: The European Arrest Warrant

15. FTI fully accepts the need for a fair and effective system of extradition within the European Union. In an EU without borders, effective justice policy depends on speedy and efficient cooperation in transnational cases. However, the benefits of a streamlined system must be weighed against the heavy toll that extradition proceedings take on individuals. FTI's casework team deals with numerous EAW cases each year. These cases provide a unique insight into the human costs of this fast-track extradition system.

Problems with the EAW

16. FTI's work on EAW cases has highlighted the following human rights concerns:[11]

[11] For FTI's full briefing on the European Arrest Warrant see *Fair Trials International's submission to the Extradition Review Panel* 21 December 2010, available at http://www.fairtrials.net/documents/FTI_submission_to_the_extradition_review_panel.pdf.

- The EAW is being used to extradite people for minor offences, disproportionately interfering with their fundamental rights;
- Individuals are being extradited to stand trial on charges based on improper police investigations, including where evidence has been obtained through police brutality;
- Following extradition people are spending unacceptable periods of time in pre-trial detention, sometimes in prison conditions which are inhuman or degrading;
- Once extradited, people are standing trial in legal systems which do not afford sufficient protection for defence rights, thus jeopardising the right to a fair trial;
- Individuals have been extradited to serve prison sentences even where there is compelling evidence that their original trial was unfair;
- Judicial decisions not to execute EAWs are not being recognised by issuing countries, resulting in an unjustified curtailment of individuals' right to liberty and free movement;
- People are facing extradition decades after an alleged offence;
- Extradition is taking place for investigative purposes only, when authorities in the issuing State are not ready to mount a prosecution;
- Individuals face extradition even where there is clear evidence that they are the victim of mistaken identity;
- The basis for refusing extradition where it would result in a human rights violation is not being used effectively in practice and requires clarification;
- In the UK appeal deadlines are too short; and
- Legal aid means testing is causing unnecessary delays and other difficulties and often results in defendants appearing without representation, or in adjournments.

Case Study: Garry Mann

17. Garry Mann, a former fireman, was extradited to serve a 2 year prison sentence imposed following a trial in Portugal in 2004, described by a UK court as "so unfair as to be incompatible with [his] right to a fair trial". Garry was arrested in Portugal in 2004 where he was attending the Euro 2004 football tournament. Garry was tried and convicted in the space of 48 hours for involvement in a riot. A British police officer present at the trial described it as a "farce". Garry had no time to prepare a defence and standards of interpretation were grossly inadequate. The UK courts have repeatedly recognised the serious injustice in his case but said they were powerless to stop Garry's extradition after his arrest under a European Arrest Warrant, despite a senior UK judge describing the case as an "embarrassment." Garry was transferred to a UK prison on 19 May 2011 and finally released in August 2011.

Ending injustice under the EAW: need for reform now accepted by two UK review bodies

18. Given the impact which extradition can have on the fundamental rights of the individuals involved, FTI has welcomed the reports of both the Parliamentary Joint Committee on Human Rights (JCHR)[12] and the Scott Baker Extradition Review Panel (Panel)[13] in the last twelve months.[14] The reports of the JCHR and of the Panel both recognised that there

[12] *The Human Rights Implications of the UK's Extradition Policies* 22 June 2011.
[13] *A Review of the United Kingdom's Extradition Arrangements* 30 September 2011.
[14] See *Fair Trials International's submission to the Joint Committee on Human Rights* 21 January 2011, available at http://www.fairtrials.net/documents/FTI_submission_to_the_Joint_Committee_on_Human_Rights.pdf and *Fair Trials International's submission to the Extradition Review Panel* 21 December 2010.

are flaws in the way the EAW system operates and both reports call on the Government to introduce reforms to ensure it operates more fairly and efficiently in the future.

19. Building on the findings of these two reports, FTI calls for the following reforms:

European legislation

- **Proportionality:** FTI continues to call for a proportionality test to be introduced into the Framework Decision, both for the issuing state prior to the decision whether to seek extradition, and for the courts in the executing state when considering whether to extradite.[15] FTI sees numerous cases of extradition requests for minor offences or where the suspect's circumstances make extradition disproportionate.

- **Protection of fundamental rights:** FTI is pleased that recent case law[16] shows an increasing willingness (at least in principle) on the part of the courts to assess the human rights implications of extradition. FTI will also continue to press for better protection at EU level given that many states' implementing laws do not have any grounds for refusal of EAWs on human rights grounds.

- **Removal of warrants:** FTI continues to push for an amendment to the Framework Decision to require states to remove an EAW where this has been properly refused by an executing authority. The lack of remedies available to people in this position, who risk re-arrest and imprisonment each time they cross an EU border and are therefore virtual prisoners in their home state, is unacceptable.[17]

- **Deferred extradition:** FTI will continue to call for deferred surrender under the EAW where a case is not "trial ready". FTI sees numerous cases where people are extradited under an EAW before any decision has been made to prosecute and are then held for months in prison in extremely difficult conditions awaiting trial. FTI also hopes that greater use will be made of the ESO to address this problem.[18]

Domestic legislation

- **Legal aid:** FTI calls for an end to legal aid means-testing for extradition cases. It causes injustice and results in unnecessary and expensive adjournments and in requested persons appearing unrepresented at hearings, adding considerably to the burdens of the courts.[19]

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[15] The Scott Baker Report recommended amending the Framework Decision to include a proportionality test for the issuing state but not for the executing state (see page 321).
[16] See *Targosinski v Poland* [2011] EWHC 312 (Admin) where it was held that to refuse to consider any Article 3 based refusal unless the constitutional order had been overthrown was too high a threshold and *Agius v Malta* 15 March 2011, Divisional Court (Sullivan LJ, Maddison J) where the court held that when considering the human rights implications of extradition the starting point - an assumption that an EU Member State will fulfill its obligations under the ECHR - is not easily displaced but can be rebutted by clear and cogent evidence. In neither of these cases was extradition refused.
[17] The Scott Baker Report acknowledged this problem but recommended addressing it through Article 111 of the Schengen Convention (see page 323). It is FTI's view that this would not provide an adequate remedy and that an amendment to the Framework Decision is required.
[18] These recommendations were made by the Scott Baker Report (see page 327).
[19] This recommendation was made by the Scott Baker Report (see page 335).

- **Appeals deadline:** FTI will urge the Government to extend the time limits for appeals in the 2003 Extradition Act from 7 to 14 days or to grant the court discretion to extend the time limit in the interests of justice.[20]. In the case of Garry Mann, for example, injustice occurred due (in part) to the one week deadline being missed by solicitors.

- **Forum:** FTI will urge the Government to bring section 19B of the Extradition Act into force which would allow the judge at an extradition hearing to consider the most appropriate forum for trial. FTI believes that this will bring much needed transparency to the process of forum choice and will ensure that judges have the power to prevent extradition where the interests of justice suggest that the trial should take place in the UK.

20. Although FTI considers the EAW an important tool in combating serious cross-border crimes, this cross-border cooperation must not be at the expense of basic principles of fairness and justice. While recognising that the Government has not yet provided its response to the Panel's report and that there will be a Home Affairs Committee report on extradition likely to be published in February 2012, we consider that it is important to prioritise the task of creating a fairer extradition system for the many hundreds of people who are affected by this system in the UK each year. FTI acknowledges that changes to the Framework Decision may prove difficult to negotiate. However, some of the necessary safeguards cannot be brought about without these changes and the UK must work with other European Member States and institutions, to ensure that fundamental rights are better protected in the EAW system.

21. The past month has shown the degree of cross-party political support for reform of the EAW system. This was evident during a Westminster Hall debate in November and a full Commons debate in December, and FTI will now urge the Government to take note of this support for reform and take decisive action both domestically and at EU level.

Section B: The Procedural Rights Roadmap

22. The Roadmap is a set of procedural safeguards for accused persons intended to ensure that fair trial rights are protected across the EU. FTI sees numerous cases of people who are arrested in a foreign country, unable to speak the language, with inadequate access to a lawyer and limited knowledge of the charges being brought against them. FTI welcomed the defence rights Roadmap which, once implemented, will represent an important step towards ensuring that the rights enshrined in the ECHR are respected in practice and in a consistent manner across all Member States.

23. For the reasons set out below, FTI's view is that the Government should opt in to Roadmap measures necessary to raise defence rights protection. Stronger, enforceable minimum defence standards will help avoid the potential injustice that will otherwise result from continued participation in mutual recognition instruments such as the EAW and the proposed EIO. A failure to opt in and give backing to strong measures could have a detrimental effect on the rights and protections afforded to British nationals who are arrested abroad.

[20] This recommendation was made by the Scott Baker Report (see page 303).

Directive on the right to interpretation and translation in criminal proceedings and Directive on the right to information in criminal proceedings

24. FTI welcomed the Government's decision to opt in to these Directives which, when transposed into the domestic systems of all EU countries, will help ensure that nobody is denied a fair trial due to a lack of understanding of the language in the country in which they are arrested[21] and that people are provided with timely information about the charges against them, enabling them to prepare effectively for trial.[22]

Draft directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest [23]

25. Standards of access to early and confidential legal advice and consular access vary across the EU. Even when the right to legal assistance exists in theory in a country's legal system, it is sometimes not provided in practice. FTI sees cases on a regular basis that demonstrate the detrimental impact that failure to provide legal advice or early communication with consular or diplomatic authorities can have on fair trial rights. The Government has decided not to opt in to the draft directive but has stated that it intends to take a full role in future negotiations on the text in the hope that text will emerge which the Government finds acceptable, enabling it to opt in to the directive later.

Case study: James Milton

26. James Milton (not his real name) was 16 years old and had recently moved with his mother from the UK to Malta, when he was arrested. James was taken to the police station where he was questioned aggressively for over four hours, without a lawyer or other appropriate adult present. His mother was refused entry to the interview room despite her presence at the police station and her frequent requests to see her son.

27. During police questioning, James was not told about the details of the allegations or of any charges against him or informed of his legal rights. He was interrogated from 9.30pm until 2.30am the following morning and was not even given a glass of water during this time. James's passport was taken pending trial, so that from June 2009 until the trial in June 2010, he was unable to visit family and friends in the UK, despite his mother's offer to post security or give up her own passport. James was acquitted of all charges at trial. After further delay the case was eventually dropped and James's passport was returned to him, although he continues to suffer stress and depression.

Key elements of the draft directive

28. There are a number of key protections in the draft directive that, in our view, must not be diluted. While many of these rights are already protected under UK law, they are not

[21] The Directive requires all member states to implement legislation by July 2013 to ensure that a suspected or accused person who does not understand or speak the language of the criminal proceedings is provided with interpretation during criminal proceedings. Fair Trials International's submission to the Ministry of Justice regarding the draft Directive is available at http://www.fairtrials.net/documents/FTI_submission_on_the_right_of_access_to_a_lawyer_in_criminal_proceedings_and_on_the_right_to_communicate_upon_arrest.pdf.

[22] A directive to ensure that everyone arrested in any EU country gets key information about basic legal rights and the charges against them was recently approved by the Committee of Permanent Representatives of the Council of the European Union.

[23] Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326 final, 8 June 2011.

guaranteed in many other Member States, and it is therefore imperative that they are included to ensure that the rights of suspects and defendants such as James Milton are protected across Europe:

- Legal representation must be provided in both the issuing and executing state where an EAW has been issued;[24]
- Confidential access to a lawyer must be sufficiently safeguarded to ensure that suspects and defendants can communicate effectively with their lawyer;
- Access to a lawyer 'in person' is vital to ensure not only that suspects are aware of their rights but also that those rights are not infringed through ill-treatment or threatening behaviour by the police; and
- Arrested persons must have the right to communicate *in person* with consular officials.

29. The directive has the potential to address the serious inequality of arms that characterises so many criminal cases across the EU, often to the detriment of British nationals. The Coalition Government has pledged to "put the national interest and the benefits to our citizens' businesses at the heart of our decision-making"[25] on opt-in matters. An opt-in would be fully concordant with the Government's three point test (paragraph 4 above) as the draft directive will: (i) maximise the security of the UK by increasing trust in other Member States' ability to deliver justice; (ii) protect Britain's civil liberties by providing protection for the rights of millions of British people who travel to European countries for business and pleasure each year;[26] and (iii) preserve the integrity of the UK's criminal justice system by creating the conditions for mutual trust to exist throughout the EU necessary for the continued participation in mutual recognition instruments such as the EAW and the proposed EIO. It is therefore regrettable that the Government has not opted in to this directive.[27] We hope it will reconsider and opt in, as it has done with the previous two Roadmap measures, in order to promote basic and consistent common standards throughout the EU.

Special safeguards for vulnerable suspects or accused persons

30. The Roadmap also envisages a draft directive introducing special safeguards for suspected or accused persons who are vulnerable, such as juveniles or the mentally ill. While this directive is at a very early stage of European Commission consultation, FTI looks forward to participating in this in due course and later commenting on the draft directive.

31. FTI hopes that the Government will opt in to this measure and take the lead in the negotiations on its content, in order to ensure that adequate safeguards are implemented for vulnerable suspects. FTI's casework in various European jurisdictions, as demonstrated by the case of James Milton described above, shows that vulnerable suspects are not sufficiently protected in some EU countries.

Section C: The European Investigation Order (EIO)

[24] This recommendation was made by the Scott Baker Report (see page 324)
[25] *Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union and the Treaty on the Functioning of the European Union in Relation to EU Justice and Home Affairs Matters* (1 December 2009 - 30 November 2010), p.2.
[26] Over 19 million British nationals travel to France each year, 13 million to Spain, four million to Italy, and two million to Greece – hundreds of them (in Spain's case, over two thousand of them) will end up being arrested for a criminal offence. In all of these countries there are serious, reported deficiencies in the way fair trial rights are protected.
[27] The JCHR report on extradition urged the Government to take a lead in supporting EU legislation to raise basic defence standards, including in relation to laws to ensure that people are given legal advice in both countries.

32. The EIO is a proposed mutual recognition instrument which would allow requesting States to demand existing evidence from another EU country, or order another Member State to carry out an investigation to obtain evidence. The requested State would have very limited grounds for refusing such an order, and would have to comply with fixed deadlines for providing the evidence. This is a far cry from the flexibility of the current mutual legal assistance system, not least because it replaces "requests" with "orders". The EIO was proposed not by the European Commission, but by a small group of EU countries led by Belgium. It is still in negotiation more than 18 months since it was first proposed. The UK opted into the EIO.

33. The new EIO regime would allow requests to be made for the interception of telephone calls and surveillance of real-time banking activity. This would also encompass evidence that, although it is in existence, requires further investigation or analysis prior to its transfer, such as the conducting of interviews and the taking of DNA samples. The EIO proposal also contemplates the transfer of prisoners to other States to aid an investigation, and the hearing of evidence via video and teleconferencing.

34. The UK's opt in decision was made without any prior scrutiny by the relevant Parliamentary Committees and with no public or political debate on the measure. In its announcement, the Government stated that the EIO was no more than a simplification and codification of the existing system, but closer analysis of the EIO suggests this is far from the case.

FTI's concerns about the EIO[28]

35. FTI often sees cases where the defendant has no power to challenge prosecution evidence or to obtain evidence for use in the defence, which is particularly difficult when the evidence is overseas. Also, there are widely differing standards around the way different Member States go about obtaining evidence and then storing, analysing and transferring it. Clearly in these respects, the existing mutual legal assistance system and the way EU countries are operating it could be improved.

36. FTI believes that any new law that effectively increases the amount of relevant, legally and fairly obtained evidence can only have a positive impact on the trial process. The gathering and sharing of evidence, however, engages important fundamental rights and if these are ignored or sidelined, States will risk infringing individuals' rights to a fair trial and privacy rights. It is therefore crucial that any new instrument contains sufficient safeguards for such rights and respects the principle of equality of arms. In its current form the EIO proposal does not do either.

37. **Human rights**: The current draft proposal (at Article 1(3)) states: "This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the Treaty on European Union". Recital 17 contains a similar guarantee and provides that nothing in the Directive may be interpreted as prohibiting the refusal of an EIO where there are reasons to believe that it has been issued for the purpose of prosecuting a person on account of his or her sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions. Article 10(1) states that the refusal grounds which it lists (for example, "*ne bis*

[28] For more information see Fair Trials International's Submission on the European Investigation Order available at http://www.fairtrials.net/documents/FTI_Submission_on_the_European_Investigation_Order_1.pdf.

in idem") are without prejudice to Article 1(3). However, this falls short of a refusal ground where the executing state considers that complying with the issuing state's demand would be incompatible with an affected person's fundamental rights. It is an unfortunate reality that EU Member States do not always respect fundamental rights despite their obligation to do so under international instruments such as the ECHR and the Charter of Fundamental Rights. In the circumstances it would in FTI's view be preferable if the EIO in its final form contained a clear fundamental rights based refusal ground.

38. **Data protection**: According to Recital (17a) of the current draft any personal data processed when implementing the EIO should be protected in line with the provisions on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters and with relevant international instruments. For the sake of clarity these relevant instruments should be set out in full to ensure that Member State authorities are aware of the legislative framework in which they are operating when issuing and executing EIOs. This would also reveal the gaps in what the Data Protection Supervisor called the "incomplete and inconsistent" application of data protection to the field of judicial cooperation.[29]

39. **Use by the defence**: The current draft lacks any reference to the rights of the defence to have an EIO issued on its behalf, in order to gather potentially exculpatory evidence located in another Member State. In many EU countries, existing domestic mutual legal assistance implementation laws do not enable evidence requests to be made by the defence. In practice courts in many states do not make orders, of their own motion, for the production of evidence potentially helpful to the defence. To operate fairly, the EIO should expressly allow for evidence-gathering on behalf of the defence, on reasonable request or at the court's own initiative: yet the draft text still contains no such provision.

Is the EIO necessary?

40. FTI believes that before yet another EU law is introduced, it would have been preferable for those proposing it to have made a stronger case that it was actually necessary. This is especially so for a law on cross-border police and judicial cooperation that will curtail the discretion of requested Member States, could have significant human rights implications, and may also impose extra burdens on the police and judicial authorities responsible for complying with orders to obtain and produce evidence. Those in favour of the EIO claimed that the current system needs replacing because it is fragmentary and over-complicated, but no hard evidence has yet been provided about where it is failing.

41. Clearly in a European Union without borders, it is crucial that Member States can share evidence quickly and effectively, not only because this helps ensure that the guilty are brought to justice, but also because it may speed up the investigation and trial and prevent innocent individuals spending prolonged periods in pre-trial detention.

42. The topic of cross-border evidence gathering is vast and complex. Until real mutual trust exists between EU countries, a "no-questions-asked" system for demanding cross-border investigations and evidence appears to be premature and potentially harmful to both fundamental rights and the efficient prosecution of cross-border crime.

[29] Opinion of the European Data Protection Supervisor on the European Investigation Order, 18 October 2010, Para 28

Section D: Pre-trial Detention and the need for EU action

43. FTI is concerned about overuse of pre-trial detention in the EU and the insufficient use of more humane, effective and cost-efficient alternatives. This concern is borne out by our own casework and our research on the law and practice of pre-trial detention in several EU countries. Under the Roadmap, the European Commission published a Green Paper on detention in June 2011.[30] The consultation has now closed. Our report "Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention" contained case studies of 11 FTI clients, a comparative analysis of the use of pre-trial detention in 15 Member States and recommended legislation at EU level to reduce the use of excessive pre-trial detention.[31]

44. Pre-trial detention provides an important way to ensure defendants attend trial, to protect the evidence and witnesses in a case, and prevent reoffending behaviour. However, pre-trial detention should only ever be used as a last resort, in a non-discriminatory manner and when all other alternatives have been considered and deemed inappropriate. Inappropriate and excessive pre-trial detention clearly impacts on the right to liberty and the right to be presumed innocent until proven guilty. It also has a detrimental effect on the rights of the suspect's family members under Article 8 ECHR. This is particularly so when the suspect is detained overseas, as visiting will be more costly and difficult and lengthy detention will usually result in the suspect losing his or her job. Where the pre-trial detainee is also the family's main breadwinner this has a severe financial impact on other family members. These knock-on effects further increase the costs of pre-trial detention to the State.

45. FTI has reported that:
    - approximately 21% of the total EU prison population is in pre-trial detention and over a quarter of those detainees are foreign nationals;
    - across the EU, people who have not been convicted of any crime are being detained without good reason for months or even years, often in appalling conditions that make trial preparation impossible;
    - some countries' laws allow people to be detained for years before trial, others have no maximum period at all;
    - few countries have an adequate review system;
    - non-nationals are far more likely than nationals to suffer the injustice of arbitrary and/or excessive pre-trial detention and be deprived of key fair trial protections;
    - growing numbers are being extradited under the EAW, only to be held for months in prison, hundreds of miles from home, waiting for trial;
    - Europe's over-use of pre-trial detention costs EU countries approximately €5 billion every year (not including wider costs to society when jobs are lost and children are taken into care); and
    - many EU countries' justice systems are not ready to make full use of the potentially valuable European Supervision Order (below), which could save resources and ease the severe overcrowding that blights prisons in over half of all Member States.

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[30] *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM (2011) 327*, Brussels 14 June 2011.

[31] *Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention*, October 2011. See also the recent European Commission publication *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*, COM(2011) 327, Brussels 14 June 2011.

Case study: Andrew Symeou

46. Andrew Symeou, then a 20-year-old student from the UK, was extradited to Greece under an EAW in July 2009 on manslaughter charges. Following his surrender Andrew was denied release pending trial by a Greek court on the basis that he had not shown sufficient remorse for committing the crime which he was accused of – a clear violation of the presumption of innocence. Another "reason" Andrew was denied release pending trial was that he was a non-national and therefore was assumed to represent a flight risk. This was despite the fact that Andrew had met all his supervision conditions in the UK and his father had arranged to hire a flat for him to stay at during the run-up to the trial. Andrew spent a harrowing 11 months on remand in Greece.

47. The prison conditions Andrew has described included: filthy and overcrowded cells (with up to six people in a single cell); sharing cells with prisoners convicted of rape and murder; violence among prisoners (one was beaten to death over a drug debt while Andrew was there); and violent rioting. The shower room floor was covered in excrement, there were cockroaches in the cells, fleas in the bedding, and the prison was infested with vermin. Following numerous delays due to prosecution errors, Andrew was finally released pending trial in June 2010. His four-year ordeal finally came to an end on 17 June 2011, when he was acquitted by a Greek court.

Problem with mutual recognition in pre-trial detention and the need for EU legislation

48. The reality of varying standards in pre-trial detention regimes across the EU is at odds with the idea that all Member States have criminal justice systems that respect fundamental rights and deliver justice; the premise of "mutual trust" on which the EAW is based. Inadequate systems for imposing pre-trial detention and poor pre-trial detention conditions undermine the trust needed for mutual recognition instruments to work effectively.

49. FTI has concluded that the EU should legislate to set minimum standards for the use of pre-trial detention in the EU and for effective and regular judicial review of decisions to remand in custody. In practice Member States are failing to meet their obligations as set out in the ECHR, in particular in relation to pre-trial detention. Unlawful detention also jeopardises the principle of mutual cooperation based on mutual trust.

The European Supervision Order (ESO)

50. The problems non-nationals face when applying for release pending trial may be eased by the introduction of the ESO,[32] which was adopted by the EU on 23 October 2009. The ESO lays down rules according to which one Member State must recognise a decision on supervision measures issued by another Member State as an alternative to pre-trial detention.

[32] Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, 2009/829/JHA, 23 October 2009

51. Member States should implement the ESO in such a way that it represents a real and practical alternative to pre-trial detention.[33] To be effective the ESO system must be seen by judges across the EU as a viable alternative to pre-trial detention. There is a danger that the instrument will not be used consistently across all Member States, but only between those countries where mutual trust already exists, leading to inequality in the way defendants benefit from the ESO.

FTI's other recommendations for action at EU level to reduced unnecessary pre-trial detention

52. Deferred surrender under the EAW should be used, in appropriate cases, to avoid unnecessary pre-trial detention post-extradition. Defendants are often surrendered to a Member State where prosecution authorities have not considered alternatives to immediate extradition and the fact they are non-national can mean they are denied release pending trial. This is unjust to the individuals involved and is a waste of resources. Deferred issue and negotiated deferred surrender should also be used to ensure defendants are not surrendered speedily when there is no prospect of a speedy trial and defendants who are able to meet supervision conditions in their home country should be allowed to do so until the case is ready for trial. The ESO should remedy some of these problems.

53. The EU should examine the viability of establishing a flexible one year maximum pre-trial detention limit. Article 6(1) ECHR states: "in the determination [...] of any criminal charge against him, everyone is entitled to a fair and public hearing in a reasonable time." This is a right which is repeated in the pre-trial detention context in Article 5(3) ECHR. It is FTI's position that it is inherently unreasonable to imprison someone who has not been found guilty of any offence for more than a year, unless there are exceptional prevailing circumstances (for example, the highly complex nature of the case). A 12 month limit, containing the requisite flexibility, is an ideal for which all democratic societies should strive.

54. FTI is of the view that pre-trial detention is an area of criminal procedure which should be covered by EU legislation and will urge the Government to work with its EU partners towards ending the use of unjustified, or unacceptably long, pre-trial detention. Action as recommended above would stop excessive periods of pre-trial detention in some Member States as well as help promote efficient trial processes, which will benefit the overall interests of justice, including the interests of victims of crime. Significant financial savings could also be made as alternatives to pre-trial detention are far cheaper than holding suspect in custody for months or years while they await trial.

Section E: Prisoner transfer: Framework Decision on mutual recognition of custodial sentences[34]

55. Enabling convicted prisoners serving a sentence in an EU country other than their own to return to their home State to complete the sentence improves rehabilitation prospects and is fairer for families. Prisoner transfers in Europe are currently governed

[33] The Framework Decision must be implemented by all Member States by 1 December 2012.
[34] 2008/909/JHA Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union

by the 1983 Council of European Convention on the Transfer of Sentenced Persons. This has been deemed slow and bureaucratic and, for all EU countries, is due to be replaced by a Framework Decision on prisoner transfer which was to be implemented by 6 December 2011, but which virtually no EU countries have yet transposed into national law.[35]

FTI's concerns with the Prisoner Transfer Framework Decision

We have major concerns about the human rights implications of this Framework Decision.

56. Material prison conditions and the laws governing the rights of detainees vary widely across the EU. The Framework Decision could be used to send people to prisons with very poor conditions. Blanket transfers of all non-nationals from other EU countries could be used to ease prison overcrowding in one State, only to exacerbate overcrowding in another. This could be a particular problem where one Member State has a high proportion of prisoners who are nationals of another, perhaps neighbouring, Member State.

57. From a procedural rights perspective, the Framework Decision is disappointingly weak. There is no longer any requirement for the prisoner to consent to a transfer, only the right to express views on the matter which the issuing State may, but need not, take account of. Roadmap measures will not apply to the transfer procedures envisaged by the Framework Decision because it is not concerned with the pre-conviction period. However, the fact that the Framework Decision removes the requirement that the sentenced person consents to transfer means that even greater attention must be paid to the possible infringement of fundamental rights, post-transfer. Greater access to information on prison conditions and other States' criminal justice systems is therefore vital. We will call on the UK government to ensure it seeks the necessary information and ensures its dissemination to the relevant authorities, before implementing this law domestically.

58. Given the apparent lack of research on the number of prisoners who will fall within the ambit of the Framework Decision, it is likely that many countries will not be sufficiently prepared for its impact. This may well explain the delay in its implementation. Neither the European Commission nor the Council has made any public statements about this issue.

Conclusion

59. The introduction of the EAW on the basis of mutual recognition was the start of the creation of an EU wide criminal justice system. The introduction of the EIO will increase the cross-border options available to Member States in the investigation of cross-border criminal offences. The challenge now is to make sure that there is a coherent package of effective measures to tackle cross-border crime, which does not sacrifice basic human rights but preserves fair trial rights and improves equality of arms. It is important to ensure that existing and future EU criminal justice legislation works in a fair and just way to protect the rights of those who are investigated, tried or detained.

[35] Poland has secured a five year extension for implementation due to concerns about prisoner overcrowding.

60. Mutual recognition in the European Union should not be seen as an end in itself but as one of several potential means to achieve justice across the 27 countries within the EU, all with their own separate and varied legal systems. Mutual recognition cannot achieve justice if it erodes fundamental rights. Further reforms to the EAW and sufficient safeguards in the EIO are essential to ensure that mutual recognition is based on mutual trust.

61. The EU's Roadmap for strengthening procedural rights envisages vital safeguards which, once fully implemented and transposed into the domestic law of Member States, will help ensure fundamental rights do not continue to be sidelined in the push for ever-increasing cooperation among law enforcement authorities. FTI will urge the Government to re-visit its decision not to opt in to the legal advice directive and to take a leading role in relation to protecting defence rights for vulnerable suspects or accused persons.

62. The figures on the numbers of Britons travelling to other EU countries speak for themselves. When British citizens come into contact with police and prosecutors in other EU countries, in our experience they are frequently surprised by the lack of protection of basic rights they take for granted at home. They would doubtless expect the Government to opt into legal measures necessary to raise basic standards to an acceptable level across the Union.

63. EU legislation is now needed on the use of pre-trial detention. This legislation, in partnership with the effective use of the ESO, will help ensure that people are not held in unnecessary pre-trial detention for excessive periods of time. We hope the Government will press for action at EU level to end the misuse and overuse of pre-trial detention in the EU, which has harsh effects on the lives of many British nationals and their families.

9 December 2011

Mrs Joanne Froud – Written evidence

I am writing in response to the call for evidence, to be used in the inquiry into EU criminal procedure. I write not as a representative of a group or organisation but as a mother and a victim of crime, which has devastated my family.

I will try to keep my evidence, succinct and factual and within the scope of the Inquiry. This is though my personal story and I think it is important that this inquiry listen to such evidence.

Background

Firstly I want to give an overview on what happened to my son Matthew David Cryer

Matthew was 17 almost 18 when he went on holiday to the Greek island of Zakynthos in July 2008, with four friends and two of their parents; he had spent months working in between his engineering studies at college to afford the trip, he was very excited and just looking forward to having a good time. We waved him off and of course worried as parents do, but never did we expect him not to return to us.

On the first night of his holiday, Matthew became separated from his friends in a bar called Cocktails and Dreams; he was seen by witnesses (who were later called to give evidence at his UK inquest in May 2008) to be sat quietly at the bar. We do not, nor probably ever will know the reason for what happened next. Four bouncers from the bar were seen to run over, grab him, drag him out of the bar half way down a steep flight of stairs, where they then threw him rest of the way, once in a heap at the bottom, they picked him up and threw him on to a marble paved area to the side of the bar, a bouncer at this time was seen to punch him in the head. Matthew died from head injuries (finding of a UK forensic post mortem) a short time later, on the pavement outside the club with other holiday makers helping and supporting him. The UK inquest ruled his death to be that of unlawful killing, yet to date no one has been, as far as we know, investigated or charged in Greece.

We feel strongly that those responsible for the death of Matthew should be brought to trial. Not only do we feel we need this for our own peace of mind, but also to stop such a thing happening again. Since his death we have been contacted by other young holiday makers with similar stories, which thankfully to date have not proved fatal. It is this that has motivated us to campaign for the case to be reopened and investigated in Greece properly, the British authorities (Derbyshire police and Chesterfield Coroners office) have been tremendous in helping establish what happened and we continue to work along side them. They have compiled a large case file, which has been translated into Greek and have managed with the assistance of SOCA, to persuade the Greek authorities to accept a copy. Matthews case was reopened in April this year after an appeal, via our solicitor to the high court in Athens, but to date little has happened and we have been told the investigating magistrate is currently reviewing the case file.

Investigation of offences

Whilst I can find no fault with the UK investigation, the same cannot be said for the investigation in Greece. Matthews's death has never been treated in Greece as crime, the

police were present when he died, but witness statements (UK police) show them to have been stood around smoking. Even when other people present pleaded with them to help, they did not offer any assistance and in fact refused to listen or take a statement off a young woman, who spoke fluent Greek and saw the majority of the incident. She describes both herself and the police present being intimidated by the door staff, thankfully she came forward on return from her holiday and gave a statement to the UK police and was also a key witness at the UK Inquest in May 2009.

In the aftermath of Matthew's death, the Greek police did in fact take statements from the people he went on holiday with, who were not present at the time of his death and 2 of the door staff of the bar. It would seem they accepted without question their version of events, which was that Matthew was drunk, had vomited in the bar and that they carried him outside, sat him down and gave him water. They claimed he died though excessive alcohol consumption and the police in Greece fully accepted this. No examination of the scene of his death was ever performed and no checking of CCTV cameras (visible outside the club) was ever made. The police are clearly at fault here, as there is witness testimony (UK police and inquest) that they were told in Greek that Matthew had been assaulted by the door staff, so I can only presume they wilfully choose not to investigate the death of my son.

A post mortem was carried out on Matthew on the Greek mainland, the only finding we were told was that Matthew died of pulmonary oedema.

It is only recently that we have managed after 3 years of asking, to obtain through our legal team the Greek case file, currently this is being translated into English, but early indications suggest that the interviews carried out by the Greek police were inadequate, contradictory and unsubstantiated.

By comparison the UK police investigation has been excellent. We did however have to ask for the involvement of the Derbyshire police ourselves, by chance a family member works for South Yorkshire police and firmly believed that UK police should also be involved. Something I didn't think of myself in my grief stricken state or was informed of by the FCO. It would have been preferable for the FCO to inform the local Derbyshire police that there had been a suspicious death abroad; this would have saved us time and the difficulty of having to ask for help at such a difficult and distressing time.

Once the Derbyshire police became involved we were appointed a FLO (family liaison officer) and an investigating team lead by an experience detective inspector. Their press office appealed on the in the media for witnesses to come forward and others were identified though articles that had appeared in the press. Over 15 witness statements were taken from various parts of the UK and from this they were able to piece together the events of Matthew death. The North Derbyshire coroner asked for a forensic post mortem, which was carried out after Matthew was repatriated to the UK in early August 2008. The findings of the post mortem took till Dec 2008, as his brain was extensively examined by a specialist pathologist at Kings College London, the findings collaborated the witness evidence and the cause of death was given as brain injury, he had 22 separate areas of injury to his body. Though he had drunk alcohol that night, the levels in his blood stream were just over twice the legal limit in the UK and the pathologist concluded could not have caused in any way his death.

His UK inquest was held in May 2009, and it was concluded that Matthew was unlawfully killed.

I feel it could then be said that the investigation in Greece was substandard and fell way below what should be expected of a civilised country and an EU member state.

Evidence

As far as I can tell little evidence was ever collected in Greece, but what has emerged does seem to be flawed. Take for example, Matthews post mortem in Greece, when we finally obtained the document it had on it the wrong date and was littered with crossings out and crude alterations. Also at the time of post mortem the pathologist retained Matthews heart and other tissue samples, these were sent back to the UK in November 2008 and delivered to the forensic pathologist, who did intend to carry out her own examination on them. However, when returned they were so badly decomposed that even DNA testing was impossible, we understandably were distressed by this and will never know if the body parts we buried in Matthews grave were his, (see case of Christopher Rochester for further information, his family were sent the body parts of an unidentified male instead of his own after his death/post mortem in Greece in 2001).

The case file we have obtained from the Greek investigation holds only short, poorly detailed witness accounts and whilst we have not yet had all the documents translated into English our Greek solicitor in Athens tells us there is very little detail contained within and that they are unlikely to give any new information that would clarify the case.

The UK police case file holds over 15 witness statements and a detailed post mortem report, this has been translated into Greek and has been sent via SOCA and Interpol to the Greek authorities. Nevertheless, the Greek authorities have chosen to ignore the evidence contained within. Even after the investigating magistrate on Zakynthos had seen the UK file, the case was closed in Jan 2010. This was on the evidence of a Greek police officer, who wasn't present when Matthew was killed, but testified that in his opinion no crime had been committed, it would seem no reasoning for his opinion was needed or sought in order for my sons murder to be ignored. As a family we were understandably distressed at this decision, but also bewildered as to how such a decision could be made with so little thought to the evidence or for us his family. We then had to launch an appeal at the Greek high court to get the case reopened, which was successful in April 2011, but to date little has been accomplished and our sons killers remain free to hurt others.

In September 2011 a new investigating magistrate was appointed on Zakynthos and we understand he is currently reviewing the case file (both UK and Greek); he has implied that he will take the case forward but to date it is unclear what action will be taken. We have, though been told he cannot use the evidence/testimony gathered by the Derbyshire police, as it is not his. All witnesses will need to be interviewed again and may even have to go to Zakynthos to give their evidence in person, or the home office could be instructed to ask, UK police to take statements on behalf of the Greek investigating magistrate This to us seems like an unnecessary delay, and we question why statements taken by the police in the UK cannot be used in a Greek investigation.

Since Matthews's death we have been in touch with the FCO, but have found that there remit is very limited. I cannot tell you how many times I have been told that "we can not get involved in the judicial process in another country", when all I have asked them is to bring their influence to ensure that the unlawful killing of a British subject is not ignored. I often feel that my son's life is worth little in the eyes of the authorities both here and in Greece,

before this I thought I would be protected by my country should harm come to me or my family through no fault of my own, but now I know that I am on my own.

Pre trial procedure/Procedural rights of suspects and defendants

I have few comments to make in this area, as we have never even got close to having a trial and no one has been charged in connection to Matthews's death.

However, I understand that legal aid, help with travel costs etc, are available to suspects and defendants who have to travel abroad. This doesn't happen for victims, their families and witnesses who are needed abroad to give evidence. In fact you are left with all your costs to pay no matter what financial hardship this may bring. This is clearly unfair; we have been told that if a Greek national were to be unlawfully killed in this country then his/her family in Greece would be supported both legally and with travel costs. Greece does not offer this in any way to us and nor does out own government.

The position of victims of crime

As the mother of a young man unlawfully killed I do consider myself a victim. However I do not feel I have been treated as one. Instead of being able to grieve for the loss of a wonderful young man, full of vitality and promise I have had to fight for justice. Had I just accepted my sons death as an unfortunate event then he would still be labelled as he was in the press as "boy who drank himself to death", if it were true I would have accepted this, hard as it would have been, but it wasn't and I will not be able to rest until those who hurt him are brought to justice.

The fight for justice has been difficult and emotionally draining, I have had to give up any elusion of privacy and allow the press into my home and my private thoughts in order to get publicity to drive the case forward. This is not something that is easy for me or something I would want, but I now see as a necessity. It is strange but in some ways I have been better supported by the press than I have my own government.

The death of Matthew has had an enormous impact on the lives of my family and myself, emotionally there will always be a gap in all our lives where he should be. No specialist counselling or support was available to help us cope and we all found that generic counselling available on the NHS though well-meaning was inadequate.

No financial support has been offered or given from any government or other organisation, though thankfully Matthew did have travel insurance and this paid for his repatriation and some legal costs. Financially, Matthew's death and the events since have had a huge impact on our lives, I no longer feel able to work full time in my role as a palliative care nurse and this along with other events has left our finances stretched and I worry how if there is a trial will we be able to afford to go, as I know there will be no help to support me and my family.

As a victim I have few rights and little support, I do not ask that suspects and defendants are denied these rights, I ask only for equality.

I would be happy to give evidence in person in required, please do not hesitate to contact me for any further information you may require

3 December 2011

Mrs Margaret Hughes – Written evidence

1. Investigation of offences,
2. Evidence.
3. Pre-trial procedure.
4. Procedural rights of suspects and defendants.
5. The position of victims of crime.

The EAW fast tract arrest warrant can be open to abuse?

Example one of the defendants in my son Robert case attacked another UK subject on his return from Greece in 2008 and this defendant has now been found guilty of that crime for the second time. The problem being that this other case in the UK has held up an attempted Murder case in Crete for nearly two years.

The five other defendants in my son's case where taken back on this fast track EAW warrant in 2010 but were released on bail within a week of arriving in Crete from the courts and sent back to the UK until the last defendant case was sorted out in the UK.

There has been many so called hold ups by this defendants legal team. One being for nine months because the number six defendants solicitor went off on a 26 week maternity leave so this meant a date could not be fixed to have this retrial for the ABH case in the UK until this solicitor retuned after 26 weeks leave. My son's case with the fast track EAW arrest warrant waiting to be executed for this particular defendant again and my son's human rights held up again.

However when Mr Bruckland's solicitor came back off of her maternity leave, I am told this law company decided they were no longer going to representing him because there was a problem with his legal aid ? So my question is why this part could not be dealt with by another member of their legal team as this held up the extradition for this particular defendant for over nine months.

Why is it that a defendant's in cases like this get legal aid?
Example all of the defendants in this case have jobs, cars, and some own their own homes. As at least two are advertising that they have their own businesses and are earning a living from this source, but still manage to get legal aid out of our legal aid pot when victim's who need representation to safe guard themselves in other countries can't get a penny ?

I am also told that when the defendants that were given bail from Greece get called back for the trial in Greece, that all six could decline. As the bail bond they were given at the time to get there release from Greece is not valid here in the UK.

This could mean no justice at all for my son the victim and if the defendants decline to return to Greece, it would also mean that the Greeks would have to re issue the fast track EAW warrant again. However there is no guarantee that this would happen due to the time and costs and recession etc.

This outcome would mean no justice for my son or even compensation directly from the courts against these defendants if they were guilty or a chance for the victim's family taking out a private prosecution on the defendants due to this fact.

The cost to a victim and there family is so great .It's not just about money there are no clear guild lines or advice centre in the UK for a victim's family to turn to for legal advice ,funding ,or support through this very complicated one sided justice maze . You can't even turn to the victim's support office in the UK as they say if a crime happens outside of England and Wales it's not in there remit.

The British police are at a lost to help as it's not in there remit or duadicion which means no help for a victim or their family at the time it would be needed the most. But if a criminal or defendant is outside of the UK and is accused of a crime then they can turn to fair trials abroad and other such agency for help and legal advice from the UK.

The investigation is very important for both defendants and victims. However in Roberts's case and other victim's cases evidence has been lost due to lack of foreign police investigation throughout. No CCTV was ever sort from the night clubs in my son's case nor other evidence sort from witnesses on the street or where the defendants where staying in Malia etc.

Neither my son nor any member of my family ever had a visit from the police or by the police investigating officer in the 3 long months that we were in Greece. It was just left to me on the day I arrived on the 19th of June 2008 to send the boys that where with my son back to resort in Malia, to see whether there were any witnesses that would recognize the culprits or try and get the names of the attackers. The hospital should have taken photos of my son's injuries but I am told this did not happen again lost evidence .My own instincts as a victim's mum told me that this can't be right, I know it was down to me to take my own .so I took not only photos and video as documented evidence. I complained to the embassy about the lack of police intervention but was told there was a 48 hour law that meant you have to report the crime within the first 48 hours? How could a victim like my son get out of an intensive care hospital bed to report a crime?

How would a victim or their family have known of such a law, this was not our country and at this time we hadn't had any contact from the embassy or police to direct us? When a victim's family received that first phone call all you have on your mind is who did this and why and whether or not your love one will live or die. You should not have to spend most of that time running run trying to get help and advice you should be dealing with the accident or crime.

I had to make an appointment with the British Embassy to try and get an appointment with the Greek police as no one had contacted me or member of my family. We needed to get their attention to see what has been done after the culprits and to see that were eventually dealing with my sons attack. It took quite a few attempts by the embassy staff to track him down.

The Embassy did not inform me about the attack on my son or where he was in Crete i.e. hospital and condition .In fact they did not send a representative at all .It was in our case that the tour rep that deals with injured holiday makers who had been to see my son just before we had arrived. Why was my family not told of this attack and why did we not have a phone

call from the embassy of forum office to say what had happened .Why was there no visit to the hospital at all in 3 months from the Greeks police.

It was left to me the victim's mum to travail to Malia which was nearly an hour away which meant leaving the bedside of my very ill son who could have dead at any time. Then when myself and Roberts girlfriend arrived we were taken into a very small room to speak to a Greek police officer who spoke very poor English and we were expected to explain all that we knew to him and to produce the photos of my sons injuries who was still in the hospital in Crete struggling to hang on to his life .This officer wrote all that we said down in Greek we had no way of knowing whether or not it was written correctly and to top it all every two minute other police officers were coming in and out asking the officers that was supposed to be conducting a interview questions on other things that were happening out side of the room.

Although we were there in that room for 4 hours most of that time was wasted with interruptions and no duty of care was given to me or Charlotte as it was very hot and the room very cramped no offer of a cold drink or an interpreter to deal with information on an attempted murder case.

Why we were not offered an interpreter? We did ask the embassy but were told that this service was not available to us and that you would only get this service through a solicitor but at a price which could be very costly.

I was also told that we should have been offered an interpreter at the police station, but when we arrived I asked at the desk and the police officer there said again in broken English you don't need one.

Where is the support for victims and their families as they are left to pay in the aftermath in so many different ways and one is for all their own legal team costs that's if the stand a chance to get any justice in the aftermath of crime abroad?

Unlike the UK OTHER COUNTRY'S REQUIE you to have your own lawyer as a safe guard in some cases to getting justice and to seeking compensation from the defendants after a case is finalised etc.

Why is there a system for defendants to tap into organisations like fair trials abroad? And victim's support offices in the UK as the victim's and their families have no were to turn to.

The British passport says quite clearly by her majesty the Queen that her British subjects will be safeguarded where ever they are around the world .However victim's like Robert my son and many others like him who happen to go out of the UK with a valid British pass and become victim's abroad are told they will get no support from their country and are left to pick up the pieces on their own and at a very high cost to them and their families. Why is it that UK defendants have support from the UK and agencies but the victim seam to become none British?

As a British victim abroad your rights as her Majesty subject should not be compromised by our UK government. A victim of crime abroad or a seriously injured British subject abroad, have to rely on the country that they have been injured in to support and to protect our British victim's rights through the whole process?

However we all know this system is not in a working practice and our British government has a duty of care laid down by our Majesty the Queen to safe guard her subjects where ever they may be around the world.

As a victim's mum I have watched my family falling apart. Not to the fact that I lost my son Robert to death, but to a life sentence of severe memory lose with hardly any knowledge of his family or friends and me his mum . He has no sense of smell or taste, OCD, Tinnitus in both ears and still with signs of paralysation on the left side. I have only just received the letter confirming after three and half years to say now Robert will get seen and maybe have some treatment for his injuries since the attack. If he was a criminal or defendant would he have had to wait so long or would it be his human right to get the treatment that he deserves.

I am member of GMB trade union who have been assisting and supporting me in my campaign for justice for my son Robert. They also have learnt just like me that this is not an isolated situation but in fact there are many other victim's that face this lack of support when they become victims of crime or become seriously injured abroad .

GMB has concerns with regard to numerous issues which have arisen from the attack on Robert in Crete. Particularly on the question of the in balance in provision and legal support for victims and their families.

My trade union like myself would like to see decision makers, agencies , companies and politicians working together to ensure that people who have faced the same situation as myself in relation to victims of crime abroad or accidents get the advice, information, support and counselling that they desperately need.'

As a victim's mum the fact is my family are still struggling daily with the lack of help and support that needs to be available to support us through this long process. In the aftermath Crime and serious injury abroad.

I would welcome the opportunity if required to speak directly to the House of Lords committee dealing with this issue.'

December 2011

JUSTICE – Written evidence

Introduction

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

2. The Committee has embarked on a timely inquiry considering the advancement of criminal procedural law making in the EU. The legislative changes introduced by the Lisbon Treaty have made it even more possible to advance the mutual recognition principal through qualified majority voting in the Council and the co-legislative procedure with the European Parliament. But the changes also bring enforcement powers which will be invoked by the Commission where member states infringe the implementation process and no doubt by individuals who seek to apply EU law or object to it. This requires the member states to ensure that legislative acts comply with fundamental rights from the outset.

3. We address below each of the Committee's questions in turn.

(1) Is an EU system of criminal procedural law desirable?

It is said that national criminal justice systems reflect the societies in which they have developed. Can the EU establish a system which adequately reflects all the constituent societies within the EU?

4. The aim of mutual recognition is to avoid the problem of approximation of law in complex and politically sensitive areas of national sovereignty. The analogy with market integration is however more difficult in practice due to the wide variance of approach to penology between the member states. There needs to be an appropriate balance between giving effect to a request from a judicial authority outside of a member state and ensuring national law and values are respected. A system that adequately reflects all constituent societies first needs to understand those societies and their values. We are a long way from learning the fundamentals of each member state's system, never mind its mechanisms for administering justice fairly.

Are EU instruments necessary to safeguard the rights of citizens involved in criminal proceedings, in addition to the European Convention on Human Rights, the EU Charter of Fundamental Rights and the other multilateral and bilateral agreements?

5. Procedural safeguards for suspects and mechanisms to assist victims and witnesses vary greatly between member states of the EU. Much research has identified these differences, across the justice system. Research has revealed large and concerning gaps in the protection of both groups and in their ability to access justice which need to be addressed.[36] Equally, given that the EU has legislated for streamlined prosecution procedures which have largely ignored the role of the defence, witnesses and victims, instruments on procedural safeguards are necessary to counter the impact of these instruments.

[36] In particular see our joint three year research project with the University of Maastricht, the University of the West of England and the Open Society Justice Initiative, *Effective Criminal Defence in the EU* (Intersentia, 2010)

6. The ECHR is a reactive instrument: it requires breach of human rights prior to taking effect. It is administered by a court so back logged that there are some 153,000 cases pending before it[37]. Enforcement mechanisms for decisions of the court are weak, with many cases being repeat breaches by the same states.

7. The EU Charter of Fundamental Rights is still a reactive instrument, though the Court's enforcement mechanisms are greater. It also has the possibility to develop rights protection in this area. The Court of Justice of the European Union has already demonstrated concern for fundamental rights through its case law for many years.[38] However, the scope of the CFR is limited to EU legislative acts under article 51. EU instruments are therefore necessary for the Charter to apply. Article 47 is not limited to the rights of defendants in criminal proceedings and could therefore be invoked for victims and witnesses.

8. Both article 6 ECHR and article 47 CFR are widely drawn and the member states are afforded a wide margin of appreciation in ensuring the fairness of a trial at domestic level. EU instruments are necessary to ensure that mechanisms are in place at the outset that are sufficiently detailed to ensure practical and effective protections. EU measures are implemented by national law and national courts can therefore supervise their application. Measures are accompanied by resolutions for greater cooperation, training programmes and enforcement mechanisms of the Commission. 27 member states working intensely together in Brussels through the Commission, Parliament and Council are able to develop legislation that is workable.

To what extent does existing EU legislation affect national criminal justice systems?

9. The instruments adopted have the potential to influence all aspects of criminal proceedings.[39] Not all of these have been implemented across the EU, but as more

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[37] European Court of Human Rights, Statistics, 1/1-31/10/2011, available at http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+data/

[38] See in particular C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (3 September 2008) and more recently Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* (22 December 2010)

[39]
1. Framework Decision 2001/220/JHA on the status of victims in criminal proceedings (OJ 2000 L 82/1)
2. Framework Decision 2001/500/JHA on proceeds from crime (OJ 2001 L 182/1)
3. Framework Decision 2002/584/JHA on the European arrest warrant and surrender procedures (OJ 2002 L 190/1)
4. Framework Decision 2003/577/JHA on the execution of orders freezing property or evidence (OJ 2003 L 196/45)
5. Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties (OJ 2005 L 76/16)
6. Framework Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property (OJ 2005 L 68/49)
7. Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders
8. Framework Decision 2008/675/JHA on taking account of convictions in the member states of the EU in the course of new criminal proceedings (OJ 2008 L 220/32)
9. Framework Decision 2008/978/JHA on the European evidence warrant (OJ 2008 L 350/72) – *this instrument has not been implemented in most member states as a result of ongoing negotiations for its replacement.*
10. Framework Decision 2009/299/JHA a**mending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ 2009 L 81/24) – *Italy does not have to implement this FD until 1 January 2014***

national measures are adopted and countries become familiar with how to use the new systems, there will be increasing application of EU law, from bail decisions, to character, to sentencing and treatment of assets.

10. With respect to pre Lisbon instruments, the UK will have to decide whether to continue to engage with criminal procedure in 2014, as a result of protocol 36 TFEU. If it does not do so, the affect on the UK will depend on any future instruments (for example, we have opted in to the directive on the European investigation order, so will have to implement the final instrument. This instrument is likely to have a large impact on resources when requests for investigative assistance across a broad spectrum of actions arrive).

To what extent does existing EU legislation and proposed legislation go further than the existing EU or international instruments, or UK law?

11. There are two types of measure – mutual recognition, and harmonisation. The mutual recognition instruments require UK courts to accept a request from another member state without the possibility of scrutiny or refusal for grounds which would have been possible under mutual legal assistance arrangements with the executive. They must also be actioned within a reasonably short period of time. Objection by the accused person is very limited as complaint should be made in the requesting state.

12. Harmonisation is occurring with respect to the Swedish Roadmap on procedural safeguards[40] and the Budapest Roadmap on victims rights.[41] These are entirely new areas of competence for which there has not been previous action, other than the framework decision on standing of victims which was poorly implemented, and the attempt at the framework decision on procedural safeguards which could not be agreed. These instruments determine the scope, content and mechanism of the safeguards that whilst giving effect to the jurisprudence of the ECHR also aim go further and through the establishment of networks, organisations, training and even,

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11. Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU (OJ 2008 L 327/27)
12. Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation matters with a view to supervision of probation measures and alternative sanctions (OJ 2008 L 327/27)
13. Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between member states (OJ 2009 L 93/23) - *deadline for implementation 27 April 2012*
14. **Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ 2009 L 294/20) – *deadline for implementation 1 December 2012***
15. **Framework Decision 2009/948/JHA on prevention and settlement of conflicts of jurisdiction in criminal matters (OJ 2009 L 328/42) – *deadline for implementation 15 June 2012***
16. Directive 2010/64 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280/1) – *passed under the Lisbon Treaty, deadline for implementation 27 October 2013*

[40] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ 2009 C 295/1)

[41] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/585&format=HTML&aged=0&language=EN&guiLanguage=en

in the proposal for a directive on the right of access to a lawyer (measure C), redress for breach.[42]

13. For the UK, these instruments on procedural rights do not require much change, though there will be more impact in Scotland than England, Wales and Northern Ireland in respect of police station safeguards for detained persons (in respect to notification about rights and entitlements, access to a lawyer and disclosure or information to be provided to defence lawyers). The objections to the proposals in measure C relate to proposed presence of lawyers largely at fingerprint and DNA taking exercises, and the prospect of extending access to a lawyer in all cases at the police station. Currently telephone advice is available for the most minor cases. There is also concern about treatment of evidence obtained from witnesses who become suspects which the proposal suggests should be excluded. This, however, is a crucial safeguard in member states where suspects are treated as witnesses to avoid rights of suspects.

What is the effect of importing the jurisdiction of the Court of Justice of the EU? Will the Court of Justice be able to cope with litigation arising from EU legislation?

14. Legislative acts of the Union will have to be taken seriously and implemented in order to avoid enforcement mechanisms being utilised through the jurisdiction of the Court, which was not the case pre Lisbon. Only the European arrest warrant has been fully transposed across all member states. The Court, as indicated above, has already developed a fundamental rights jurisprudence which it will no doubt deploy in this area. It is as yet unclear whether the Court of Justice will be able to manage the enhanced workload, a point this Committee made in its enquiry earlier this year[43]. One consequence may be that cases which would otherwise have been taken to the Strasbourg court will be litigated in Luxembourg, subject to the reference procedure being invoked by the courts. In the area of criminal litigation, these decisions will have serious consequences and may need to invoke the fast track procedure under article 267 TFEU, which will have an impact upon the existing case load.

Are there other areas of criminal procedure which should be covered by EU legislation and, conversely, are there areas which are covered unnecessarily?

15. Legislation thus far has focussed on ensuring swift mechanisms to give effect to judgments at a domestic level, but has not considered the consequences of what can be draconian and harsh methods. For example, use of the European arrest warrant could be greatly diminished if an EU summons procedure existed, or technology was utilised across the Union for video link courts. Some measures not yet implemented may have an impact upon resort to the EAW, but are unlikely to be interpreted in this way. For example it is hoped that the European supervision order will enable requested people to remain in the executing state pending trial on an accusation warrant. But many warrants are issued to enable judicial inquiries or prosecutorial interrogation short of trial. Equally, this presupposes that bail measures in the executing state will be acceptable to the issuing state. At the other end of the

[42] Proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, Com (2011) 326/3

[43] European Union Committee, *Workload of the Court of Justice of the European Union*, 14th Report of Session 2010-2011, HL Paper 128, 6th April 2011 (London: TSO)

spectrum, the framework decisions on the transfer of prisoners and transfer of probation and alternative measures came into force on the 5th and 6th December respectively. The UK relies on the Repatriation of Offenders Act for prisoner transfer and has not yet implemented the second. Again, it was hoped that these measures could be employed in conviction warrants to enable service of sentence in the executing state. This would require a wider interpretation of the ROA than is currently given.

16. Whilst there is a programme of measures for procedural safeguards, this is moving slowly, with the directive on interpretation and translation adopted last year but not due for implementation until 2013, and the adoption of the directive on information as to rights not due until the spring. Length and conditions of detention is being considered through a green paper (the deadline for submissions having passed at the end of November).[44] In 2014, according to its Action Plan under the Stockholm Programme, the Commission is to consider whether other safeguards should be protected.[45] One may be the presumption of innocence, and the right to silence.

17. Distinctly lacking is a network of defence practitioners capable of undertaking cross border work, in an effort to negate the impact of mutual recognition measures upon individuals who find them caught between two legal systems and unable to demonstrate an injustice to either. Less than this, to ensure an adequate defence. This requires the Union to acknowledge that there is a role for the individual in mutual recognition cases. Out of all the instruments adopted so far, the European arrest warrant offers the greatest protection, and this has been shown to be often lacking.

(2) Does EU legislation in the areas within scope add value?

What practical benefits does EU legislation bring - for citizens, law enforcement authorities, courts?

18. Criminals taking advantage of open borders can no longer act with impunity through an EU wide system of recognition of judgments and decisions. This means that law enforcement agencies can act quickly where previously investigations were slow, cumbersome and often limited in success.

Do the benefits of EU legislation outweigh the disadvantages?

19. In our view, the impact upon the rights of individuals affected by these decisions can never be justified by making efficiencies. The legislation only works where all member states enact it uniformly and provide sufficient resources to ensure it will be effective in practice. For example, the European protection order is about to be adopted, which aims to give a victim of abuse, often domestic, an injunction that will be recognised across the EU.[46] But if the law enforcement agencies are not willing to

[44] European Commission, Green Paper, *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*, COM(2011) 327 final (Brussels, 14th June 2011)
[45] Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions, *Delivering an area of freedom, security and justice for Europe's citizens: Action Plan Implementing the Stockholm Programme*, COM(2010) 171 final (Brussels, 20th April 2010), p 14.
[46] Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Hungary, the Republic of Poland, the Portuguese Republic, Romania, the

arrest the abuser, the instrument will have no teeth. The enforcement mechanisms in the instrument are extremely weak and in member states which do not take domestic abuse as seriously as the UK, the protection will be meaningless.

Does EU legislation promote mutual trust between national authorities and facilitate judicial and police co-operation in practice?

20. The legislation presumes that trust already exists. Rather, finding the trust is an afterthought, and is promoted through an expensive training programme for judges and prosecutors and facilitated through expensive institutions such as Eurojust and the European Judicial Network. As indicated above, the exclusion of defence practitioners from any training requirements and institutions will not enable trust to be fostered. However, where fully implemented, the legislation generally facilitates cooperation, as can be seen from the continued increase in requests for EAWs.

Should EU minimum standards for criminal procedure apply only to cross-border cases?

21. It is extremely hard to define a cross border case. Cases may start this way, be end up being domestic only, or the converse, by which time enhanced procedures will be too late. A person may not speak the national language well, but proceedings may relate to an entirely domestic issue. To ignore their need for interpretation because it is a domestic case would discriminate and still lead to unfair proceedings. Many attempts were made to limit the harmonisation of safeguards in this way previously and the consensus was that the only way to ensure minimum standards would actually apply in the necessary cases was to legislate domestically.[47]

(3) The impact of the UK opt-in

To what extent should the UK opt in to legislation in this area?
What factors should inform the UK Government's decisions on opting in?

22. In our view, the UK should aim to opt in to all measures that would enhance procedural safeguards, to ensure that standards across the Union are raised and to balance the impact of mutual recognition instruments. The approach of the Government is to preserve UK law, and will not opt in to a measure where our law will have to change. If all member states took this approach, no instruments would be adopted. We should not be opting in to measures which would create a new competence for the Union but ignore procedural safeguards.

Will the fact that the UK has not opted in to some EU legislation undermine the trust of authorities of other Member States in the UK criminal justice system? If so how will this affect UK nationals involved in criminal proceedings in other Member States and the ability of the UK authorities to investigate and prosecute cross-border crimes

23. We are very concerned by the decision not to opt in to the proposal for a directive on the right of access to a lawyer because this is the most important instrument in the Roadmap and whilst the UK has concerns about the operation of some measures

Republic of Finland and the Kingdom of Sweden with a view to the adoption of a Directive of the European Parliament and of the Council on the European Protection Order (2010/C 69/02) OJ (2010) C 69/5.
[47] See Resolution, note 5 above.

as they were first proposed, initial indications from other member states were that the same concerns were shared. The UK could have opted in on this basis, as it did in relation to the proposal for a European investigation order, where there were far greater problems with the text. We are to some extent appeased by the continued efforts of the UK in the working party to ensure the measure is adopted, but the UK's commitment to instruments that we choose not to opt in to is nevertheless questioned by other states. More disconcerting, it gives them an opportunity to use our decision as an excuse not to engage seriously with the proposal. The extraordinary decision to issue a letter with four other member states that do not provide anything near the protections offered by the Police and Criminal Evidence Act 1984, publicly complaining about the measure, is a prime example[48]. We considered this approach to be unnecessary to preserve the UK's concerns and extremely misguided.[49]

December 2011

[48] Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest - *Note by Belgium / France / Ireland / the Netherlands / the United Kingdom,* 14495/11 (Brussels 21st September 2011)

[49] See our response in Joint Open Letter regarding the Proposal for a Directive of the European Parliament and of the Council on the rights of access to a lawyer and of notification of custody to a third person in criminal proceedings, 29th September 2011

Ministry of Justice – Written evidence

Executive Summary

1. The Government welcomes the opportunity to share our views on this interesting and complex area of EU legislation with the Committee. As the area of criminal procedure crosses the boundaries of Government Departments this Memorandum incorporates views from other Departments including the Home Office.

2. The Government's approach to EU legislation in the area of criminal justice is set out in the Coalition Agreement[50], in which we commit to assessing measures on a case by case basis, with a view to maximising our country's security, protecting Britain's civil liberties and preserving the integrity of our criminal justice systems. This applies to EU legislation on criminal procedure as well as substantive criminal law. The Coalition Agreement also states that the Government will not participate in the establishment of any European Public Prosecutor.

3. The Call for Evidence covers a wide range of issues and this Memorandum attempts to respond to the Committee's questions as far as possible.

Is an EU system of criminal procedural law desirable?

It is said that national criminal justice systems reflect the societies in which they have developed. Can the EU establish a system which accurately reflects all the constituent societies within the EU?

4. Whilst we do not think that it is necessary or desirable to have harmonised EU-wide criminal procedural law, we do think it possible to find sufficient common denominators in all 27 Member States so that minimum standards at EU level can be developed where necessary in such a way so that they reflect all the constituent societies within the EU.

5. As Article 82(2) of the Treaty on the Functioning of the European Union (TFEU) sets out, EU legislation in the area criminal justice must also "take into account the differences between the legal traditions and systems of the Member States". The EU must therefore take account of the criminal justice systems of individual Member States when drafting and agreeing legislative measures. The recent Communication from the Commission "Towards an EU policy: Ensuring the effective implementation of EU policies through criminal law"[51] also stressed that national criminal law systems "reflect the basic values, customs and choices" of a society and made clear that the diversity of Member States' criminal justice systems must be respected. The Government,

[50] The Government's Coalition Agreement, "The Coalition: A Programme for Government" was published on 20 May 2010.
[51] The Commission's Communication "Towards an EU criminal policy: Ensuring the effective implementation of EU policies through criminal law" was published on 20 September 2011.

in its Explanatory Memorandum[52] on the Commission's Communication, endorsed the Commission's approach. Ensuring the continuing diversity of national criminal justice systems should guard against any proposals to develop a pan-EU criminal justice system.

6. Overall, it is important to bear in mind that the powers of the EU to act and to legislate in relation to judicial cooperation in criminal matters are limited. They are based on mutual recognition of judgments and judicial decisions, and not (with limited exceptions) approximation of laws.

7. Importantly, the EU can also only set minimum standards in the area of criminal procedure. Member States will always need to have their own rules of criminal procedure in addition to those required by the EU, because the EU rules are not designed to – and never could – work on their own. They are not intended to harmonise criminal proceedings but to be implemented against the background, and in the context, of existing domestic criminal process

8. As to the UK's participation in EU law in this area, the Coalition Agreement sets out the importance that the Government attaches to preserving the integrity of our criminal justice systems. The decision not to opt in to the draft Directive on Access to a Lawyer[53] at the outset of negotiations because of the effect that the Directive as drafted by the Commission would have on the ability to investigate and prosecute crime effectively in the UK indicates how seriously the Government takes this matter. In this case, because of the importance we attach to a Directive in this area in order to support the functioning of instruments of mutual recognition and to raise standards across the EU, we have undertaken to work together with other Member States through the negotiating process to improve the Directive so that we can be in a position to consider applying to opt in on adoption, if our concerns have been met. Conversely, we were very pleased that the Commission's proposal on rights for victims of crime reflected that victims are not party to proceedings in our legal system and did not attempt to change this through EU minimum standards.

Are EU instruments necessary to safeguard the rights of citizens involved in criminal proceedings, in addition to the European Convention on Human Rights, the EU Charter of Fundamental Rights and other multilateral and bilateral agreements?

9. EU legislation is not necessary to protect the rights of individuals involved in criminal proceedings in the UK. The rights set out in the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights

[52] The Government's Explanatory Memorandum on the Commission's Communication was sent to the Parliamentary Scrutiny Committees on 12 October 2011.
[53] Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest.

are expressed at a relatively high level of generality and citizens' experience of criminal proceedings across Member States can vary.

10. It is not always the case that EU instruments are the right solution for protecting the rights of citizens in criminal proceedings across Member States. Practical co-operation between Member States, for example, can be one important alternative means of protecting standards.

11. EU instruments can sometimes help ensure an agreed minimum level of standards in criminal proceedings across the EU and can be beneficial in improving the standards in some Member States where they may be lower than the standards that we have in the UK. It is important to examine each situation on a case-by-case basis.

12. Additionally, some areas of criminal procedure addressed by EU law are not addressed under the ECHR. One example is rights for victims of crime. The proposed EU Directive on victims of crime[54] will ensure that UK citizens who are victims of crime in another EU Member State receive a minimum standard of support that is not required by the ECHR.

13. EU instruments which build on the minimum standards set out in the ECHR can also be an important means of supporting instruments of mutual recognition in place across the EU, such as the European Arrest Warrant[55], which oblige Member States to accept and act upon decisions and judgments made in other Member States. These instruments can build greater trust among EU Member States including between the competent authorities charged with acting upon decisions made in other Member States, by giving them greater confidence that those decisions were made against the background of minimum standard that can be robustly enforced.

To what extent does existing EU legislation affect national criminal justice systems?

14. Existing EU law in this area pre-dating the Lisbon Treaty is in the form of Framework Decisions. They are binding on Member States as to the result to be achieved but leave to the national authorities the choice of form and methods for doing it. The European Court of Justice (ECJ) has found that national courts owe a duty of consistent interpretation in relation to them, that is to say, they must interpret national law consistently with the Framework Decision if it is possible to do so.[56] The Government approaches proposed legislation in the area of criminal justice on a case-by-case basis, with a view to maximising our country's security, protecting Britain's civil liberties and preserving the integrity of our criminal justice system.

[54] Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime
[55] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.
[56] Case C-105/03 Pupino [2005] ECR I-5285.

15. EU legislation can only affect national criminal justice systems as far as the EU has competence to legislate. Articles 82 and 83 TFEU set out the extent of the EU's ability to legislate. In particular, Article 82 links legislation with the principle of mutual recognition.

16. The TFEU also provides for the safeguard of an "emergency brake" in Article 82(3) so that any Member State which considers draft legislation to affect "fundamental aspects of its criminal justice system" can request the proposal be referred to the European Council.

To what extent does existing EU legislation and proposed legislation go further than existing EU and international instruments, or UK law?

17. EU legislation builds on existing international instruments, including Council of Europe measures, United Nations Conventions as well as the ECHR. For example the Roadmap for action in the area of procedural rights (a Council Resolution[57] that was agreed in 2009) draws on the ECHR. The Roadmap is a political agreement to the direction of travel in the area of procedural safeguards for defendants. The idea is that action in this area at EU level should be taken in a focused and targeted way that builds on the foundation of the ECHR and fleshes out what these rights mean in practice.

18. An example of where this approach complements the ECHR is the adoption of measure A on the roadmap – the Directive on interpretation and translation[58]. Article 6(3)(e) ECHR provides that suspects are entitled to interpreters in criminal proceedings where they do not understand "the language used in court." The Directive makes clear that interpretation will be provided in investigative stages (not just during the trial) and will apply to the execution of a European arrest warrant. It also clarifies that the interpretation must be of adequate quality, which is only implied in the ECHR at present and it lays down where translation of essential documents must be provided. It is helpful to deal with this in EU legislation so that clear minimum standards apply across Member States.

19. The draft Directive on the Right to information in criminal proceedings[59] also goes beyond the ECHR. The ECHR sets out the rights to be provided to a person who is suspected or accused of having committed a criminal offence but does not require that information should be provided on those rights. EU law now does that.

20. The UK is acknowledged to have high criminal procedural standards. For example, the UK was identified in the Commission's Impact Assessment on the draft Victims' Directive as providing particularly high standards of support and protection to victims of crime, and the Commission's proposal reflected

[57] Resolution of the Council of 30 November 2009on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.
[58] Directive of 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.
[59] Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings.

some aspects of our system. The draft Directive on the Right to Information in Criminal Proceedings also draws inspiration from domestic practice – notably from the Police and Criminal Evidence Act [1984] Notice of Rights and Entitlements provided in England, Wales and Northern Ireland to arrested persons.

21. In other examples, post-Lisbon EU laws and proposals update existing EU legislation and change it when they are agreed as Directives rather than Framework Decisions. When the EU updated the Framework Decisions on child sexual exploitation[60] and human trafficking[61], it also significantly expanded the common minimum standards relating to victim protection and the conduct of trials for these offences.

What is the effect of importing the jurisdiction of the Court of Justice of the EU? Will the Court of Justice be able to cope with the litigation arising from EU legislation?

22. Following the entry into force of the Lisbon Treaty, the ECJ's jurisdiction applies to all new measures in the field criminal justice. The ECJ can hear cases referred to it, and interpret the EU law in question. A limit on its powers is set out in Article 276 TFEU which provides that the ECJ cannot review the validity or proportionality of operations carried out by the police or other law enforcement services or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. Any judgment from the ECJ would only bind the UK if the UK had opted in to the relevant measure.

23. However, under the terms of Article 10(1) of Protocol No 36 on Transitional Provisions, the ECJ will only have full jurisdiction over a criminal justice measure adopted before the Lisbon Treaty from 1 December 2014 or sooner if any of these measures are amended or replaced. However, under that Protocol, the UK has until May 2014 to decide whether it wishes to accept the ECJ's jurisdiction for all unamended third pillar measures or to opt out of all of these measures en masse from December 2014. The Government has committed that Parliament will have vote in both Houses on this decision.[62]

24. Prior to the Lisbon Treaty, the Court had jurisdiction to give preliminary rulings in the area of criminal justice only where the Member State in question had made a declaration accepting its jurisdiction and was able either to limit this to courts of final appeal or alternatively to allow any national courts to refer a question to the Court. Now any national court or tribunal of a Member State may make a reference in the area of criminal justice (subject to transitional arrangements). However, within a national system, it may be appropriate for lower courts' views of EU law to be considered on appeal by higher courts before a reference is made to the ECJ.

[60] Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography.
[61] Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings.
[62] Written Ministerial Statement made by the Minster for Europe on 20 January 2011.

25. However, as 16 of the 27 Member States had already conferred jurisdiction for their national courts to refer matters to the ECJ, it may be that this impact will be limited. There have been few references in respect of Framework Decisions concerning criminal procedure, for example, there are only 5 cases about the Framework Decision on victims' rights[63], and none on the Framework Decisions about child sexual exploitation or human trafficking.

26. The most significant change in this area may result from the fact that unlike Framework Decisions, Directives adopted post-Lisbon have direct effect. Individuals will now be able to give effect to seek their rights under EU law more easily in cases where EU legislation has not been properly implemented and we expect litigation in the area of criminal justice to increase.

27. It is likely that there will be an increase in the number of preliminary references made to the ECJ, given the expansion in its jurisdiction and new legislation.

28. In 2008, the Court instituted a *procédure préjudicielle d'urgence* (PPU) procedure for preliminary rulings in Justice and Home Affairs cases. It was sought four times between 2008 and 2010, and granted twice in 2008 and once in 2009. There were no requests in 2010. The average time for a PPU case was 2.3 months. Although they significantly decrease the duration of proceedings in a particular case, it may have a negative effect on the duration of other cases as the resources of the Court need to be diverted to the urgent case. However, the evidence to date indicates that this type of procedure has been rarely used.

29. The Court itself has introduced better ways of working which has reduced the time taken to deliver judgment on preliminary references and further reform to the way in which the Court works have been put forward by the Court in its current proposals to amend the Statute of the Court and in the recast of its Rules of Procedure.

Are there other areas of criminal procedure which should be covered by EU legislation, and conversely, are there areas which are covered unnecessarily?

30. The Government has committed in the Coalition Agreement to approach forthcoming legislation in the area of criminal justice on a case-by-case basis and will consider, amongst other things, the impact of any proposal on the integrity of the UK common law systems. Any future proposals on criminal procedure will be considered in line with this.

31. The Commission's Work Programme for 2012[64] envisages a legislative proposal that intends to set out the framework and conditions for establishing the European Public Prosecutor's Office to focus on the protection of the financial interests of the Union. The Government has stated in its Coalition

[63] Council Framework Decision 2001/220/JHA of 15 March 2001on the standing of victims in criminal proceedings.
[64] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Commission Work Programme 2012; Delivering European renewal (http://ec.europa.eu/atwork/programmes/index_en.htm)

Agreement that it will not participate in a European Public Prosecutor's Office. The Government has also been clear that there is no need to strengthen Eurojust's remit and powers beyond what is already provided for in existing legislation that only came in to force this year.

Does EU legislation in the areas add value?

What practical benefits does EU legislation bring – for citizens, law enforcement authorities, courts?

32. Appropriate and proportionate EU legislation in the area of substantive criminal law and criminal procedure can have significant practical benefits for British citizens if they become subject to the criminal justice systems of another Member State. For example, as a result of a recently adopted Directive and one which is likely to be agreed shortly, in the event that a British citizen becomes suspected or accused of a criminal offence elsewhere in the EU, he will be guaranteed interpretation and translation in criminal proceedings, a letter of rights, the right to know what he is accused of and the right to access evidence.

33. Furthermore, the recent adoption of the Directive on combating child sexual abuse and exploitation[65] provides UK children who travel to other Member States the same basic level of protection from having these crimes perpetrated against them and prevents child sex offenders from 'forum shopping' or exploiting inconsistencies between the various criminal law systems. The Directive will improve the experience of a British child who is called as a witness in proceedings elsewhere in the EU: the child could be entitled to special measures during the trial, and may be able to give evidence by video or by video link without having to attend the hearing.

34. EU legislation already provides for some victims' rights under a Framework Decision but standards will be raised under the terms of the draft Directive currently under negotiation. The resulting Directive is likely to have significant benefits for UK citizens if they fall victim to crime in another EU Member State, by establishing minimum standards on the rights, support and protection of victims throughout the EU.

35. The EU Framework Decision requiring criminal convictions to be taken into account during criminal proceedings[66] indicates some of the benefits that EU legislation can have for the protection of citizens, aiding law enforcement and enabling courts to take all relevant factors into account in a case. In the case of GA, a 32-year-old Romanian national, previous convictions were used as bad character evidence allowing his Romanian rape conviction to be put before the jury raised in the course of his trial in the UK. He received an indeterminate prison sentence – the judge's sentencing remarks referenced

[65] Directive of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA

[66] 2008/675/JHA of 24 July 2008, given effect in relation to England and Wales and Northern Ireland by s. 144 of, and Sch 17 to, the Coroners and Justice Act 2009.

his previous conviction for rape in Romania and remarked on the similarity of the UK offence and the Romanian one. The investigating officer was clear that the previous convictions undoubtedly assisted in securing the prosecution.

36. As well as allowing competent authorities who need to act on the basis of decisions made in other Member States to do so in the knowledge that those decisions would need to have been made against the background of robust minimum standards, more generally, minimum standards permit citizens to be confident that basic protections for defendants and victims are available in all EU states. They are also much more accessible than are the rules of another country's criminal procedural law. We have access to the rules about basic rights in our own language and can expect them to be followed elsewhere.

Do the benefits of EU legislation outweigh the disadvantages?

37. The Government has only opted into measures which it considers benefit the UK in line with the Coalition Agreement. Any future proposals in this area will be considered in line with the Coalition Agreement in which the Government has committed to consider forthcoming legislation with a view to maximising our country's security, protecting Britain's civil liberties and preserving the integrity of our criminal justice systems.

38. The Government is currently reviewing the EU legislation adopted before the Lisbon Treaty in light of the decision which the Government must make in relation to remaining bound before 2014.

39. In this context it is worth noting the European arrest warrant (EAW). In September 2010 the Home Secretary announced a review of the UK's extradition arrangements. The independent review panel, led by Sir Scott Baker, examined the operation of the EAW in significant detail. The review panel's findings were published on 18 October 2011[67]. The Government is currently considering its response to the review including the recommendations made in respect of the EAW.

Does EU legislation promote mutual trust between national authorities and facilitate judicial and police co-operation in practice?

40. The European Commission has stated in its Communication on EU criminal law that EU legislation in this field is essential to enhance the mutual trust between national authorities in Member States. The Commission believes that this level of trust is indispensible for smooth co-operation between the judiciary (and other authorities). The Government believes that in principle, minimum defence rights in certain areas and minimum guarantees for victims of crime in criminal proceedings can facilitate judicial co-operation and mutual recognition by building trust and confidence between Member States. However, as the Government said in the Explanatory Memorandum on this Communication, it is important that EU legislation should only be brought

[67] The report is available at http://www.homeoffice.gov.uk/publications/police/operational-policing/extradition-review.

forward where there is a convincing evidence base for the need for such legislation and it is a proportionate response to the identified problem.

Should EU minimum standards for criminal procedure apply only to cross-border cases?

41. Article 82 TFEU allows the EU to establish minimum rules regarding the rights of individuals in criminal procedure, to the extent necessary to facilitate mutual recognition of judgments and police and judicial cooperation in criminal matters "having a cross-border dimension".

42. It is often impossible to tell at the beginning of a case whether there might be a cross-border element to it. What appears to be a purely domestic case at the outset may turn out to have a cross-border element some years later. For example, the offender may commit another crime in another Member State, and his previous convictions may be relevant to that later trial. It helps the judicial authority to be able to rely on them if the previous trials have been conducted in accordance with basic rules.

43. It is therefore necessary in order to support the instruments of mutual recognition, at least in some cases, to cover what may appear to be purely domestic cases as well as obviously cross-border cases (e.g. where the offender or victim is a national of or resident in a Member State other than the State where the crime occurred).

The impact of the UK's opt-in

To what extent should the UK opt-in apply to legislation in this area?

44. Criminal procedure is an area where it is essential to apply the UK's opt in, to ensure that the EU minimum standards are compatible with our common law systems of criminal justice. Criminal procedural rules are complicated and reflect a long tradition which has evolved over time.

45. EU proposals on criminal procedure have been based on Article 82 TFEU and it is clear that the UK's opt in applies. Article 3 of the Protocol to the Treaties on the position of the UK and Ireland sets out that the UK (and Ireland) may notify the Presidency within three months of the presentation of a proposal pursuant to Title V of the TFEU whether it wishes to take part in that proposal. The UK may also seek to opt in after a measure has been adopted (if it has not done so within the initial 3 months).

46. In relation to international agreements the Government has indicated that it will apply the opt-in wherever Justice and Home Affairs obligations arise. This applies to agreements that touch on criminal procedure as it does other areas of JHA business.

47. The Government's view is that a JHA obligation in a measure should never be regarded as ancillary for the purpose of the predominant purpose test and will always justify the citation of a JHA legal base. It is clear that in such

circumstances the Government would consider that the UK is not bound by a measure which creates JHA obligations unless we have opted in pursuant to the Protocol. Furthermore, the Government considers that this is the case irrespective of whether a JHA legal base has been cited. On this basis, if we cannot persuade the Council to cite a JHA legal base, the Government would nonetheless assert that the opt-in applies where the measure creates obligations in relation to criminal procedure and other JHA areas.

What factors should inform the UK Government's decision on opting in?

48. The Coalition Agreement states that opt in decisions on legislation in the area of criminal justice will be made on a case by case basis. The Government takes account of specific factors raised by an individual proposal, such as the effects on law and practice in deciding whether to opt in to it, in line with the commitments to maximise our country's security, protect Britain's civil liberties and preserving the integrity of our criminal justice system. The Government also assesses the negotiability of any concerns that may exist.

Will the fact that the UK has not opted in to some EU legislation undermine the trust of authorities of other Member States in the UK criminal justice system? If so how will this affect UK nationals involved in criminal proceedings in other Member States and the ability of the UK authorities to investigate and prosecute cross border crime?

49. There have been very few occasions to date in which the Government has not opted in to legislative proposals in this area. On the Directive on Human Trafficking[68], although the Government did not opt in to the proposal at the outset of negotiations, it has now done so. The UK is therefore now bound to that measure. In considering whether to opt-in to a measure the Government has regard to the operational benefits of the proposals in supporting UK efforts to tackle serious and organised cross-border crime. One of the reasons we had for not participating in the Directive on Human Trafficking at the outset was that we judged it would not add to our current capabilities. However, as was made clear in the reasons given for opting in to the European Investigation Order[69] in July 2010, we had clear advice from national prosecutors that the proposal could improve arrangements for securing evidence in relation to cross-border investigations.

50. The only measure concerning criminal procedure to which the Government has not opted in at the outset of negotiations is the draft Directive on access to a lawyer. However, we have committed to review this decision once the measure has been adopted. The Government agrees that a Directive in this area is a good idea in principle. We believe that it could benefit UK nationals who become subject to the criminal justice systems of other Member States. Such a Directive could also build greater trust and confidence among the competent authorities of all EU Member States who may be expected to

[68] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.
[69] Proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters.

accept and act upon decisions or judgments made in other Member States. However, a number of provisions in the proposal, as published by the European Commission, go substantially beyond the requirements of the ECHR and would have an adverse impact on our ability to investigate and prosecute offences effectively and fairly. Given the extent of our concerns on the detail of this Directive, we could not at the early stage of negotiations, be confident that all of them will be addressed. We have been clear that this decision was taken despite the fact that domestic standards on access to a lawyer are high. There has been a right of access to a lawyer before and during police interview since the mid 1980's in England, Wales and Northern Ireland, and a similar right was afforded in Scotland in 2010.

51. Given the importance the Government attaches to the principles of this Directive, we have been working and will continue to work very closely with our European Partners to negotiate a text which takes greater account of the practical realities of the investigation and prosecution of crime and reflects the flexibility which Member States need in order to the meet the requirements of the ECHR in a way which is consistent with their justice systems. If our concerns in the initial draft of the Directive are satisfactorily dealt with during the negotiations, we will give serious thought as to whether we should to opt in to it once it has been adopted. The Government will consult Parliament about any decision to apply to opt in to the Directive once adopted.

52. The Government does not believe that UK nationals involved in proceedings in other Member States will be prejudiced if the UK does not opt in to a minimum standards measure as the other Member States (other than Ireland and Denmark) will be bound by the measure and must provide the rights irrespective of nationality, including to UK nationals.

53. The Government believes that European initiatives and measures such as Joint Investigation Teams, Eurojust and Mutual Legal Assistance can be beneficial in combating cross-border crime. The Government will consider the opt in to any new proposal in line with Coalition Agreement and on case by case basis, including possible implications on the ability to investigate and prosecute cross border crime.

December 2011

Law Society of Scotland – Written evidence

The Law Society of Scotland welcomes the opportunity to respond to the House of Lords, Justice and Institution Sub-Committee Call for evidence on EU Criminal Procedure.

The Society recognises that there is an ever increasing amount of European Legislation and various measures relating to criminal procedure which impact on the differing criminal justice systems and procedures of each member state.

Although the Society is generally welcoming of such legislation and measures, consideration and care must be taken by the European Commission in framing Directives to ensure they have at their core the protection of fundamental rights in accordance with the Articles of the European Convention of Human Rights.

In relation to Scotland. The Society is of the opinion, as stated in our response to the Carloway Review Consultation (June 2011), that a full audit of criminal procedure, applying in Scotland, is necessary to ensure compliance and compatibility with the European Convention of Human Rights, ensuring that the rights of the individual are both recognised and protected.

8 December 2011

Baroness Sarah Ludford MEP, Liberal Democrat European Justice spokeswoman – Written evidence

1) Is an EU system of criminal procedural law desirable?

It is said that national criminal justice systems reflect the societies in which they have developed. Can the EU establish a system which adequately reflects all the constituent societies within the EU?

1. The European Parliament has taken a great deal of interest in the long term shape of the European 'area of freedom, security and justice' and has consistently called for a balanced development in which the strengthening of cross-border policing and prosecution would be matched by stronger defence and procedural safeguards. It has repeatedly deplored the failure of the Council of Ministers under the old 'Third Pillar' arrangements which applied until late 2009 to justice and home affairs legislation (and which gave MEPs only consultation rights) to legislate on fair trial measures.

2. I share the view of the majority in the European Parliament that an EU system of criminal procedural law is in fact highly desirable. The case for EU legislation in this field was indeed admirably made in the House of Lords EU committee 2005 report 'Procedural Rights in Criminal Proceedings' (1st report of session 2004-5) and in its follow-up reports on this topic in 2007 and 2009.

3. It is indeed regrettable that the procedural rights 'roadmap' was only agreed in 2009 and incorporated in the Stockholm Programme, and the first measure (right to interpretation and translation, on which I was the EP 'rapporteur') finalised in 2010. The EU has lost the best part of a decade in implementing the safeguards necessary to bring the trust to underpin essential but controversial 'mutual recognition' prosecutorial measures like the European Arrest Warrant. The EAW has had some unfortunate consequences for individuals returned to Member States where their fair trial rights have not been respected. This has unfortunately meant that a head of stem has been generated in criticism of such measures which might have been averted or at least moderated by coterminous introduction of defence rights measures. I warmly welcome the recognition by the recent Baker review of extradition of the value of EU legislation on procedural guarantees.

4. Another area where common safeguards for citizens are necessary through EU law is in the exchange of personal data such as DNA in criminal investigations. It is vital that, as cooperation between European police forces becomes more intense, citizens in cross-border cases or in Member States other than their own have a common level of protection.

5. In the Council of Europe's European Convention of Human Rights and Strasbourg case-law we already accept the notion of common standards and their common interpretation across Europe, on the basis that while our systems and our societies vary, we are pledged to shared values and principles. Therefore the notion of EU

legislation is evolutionary rather than revolutionary. The European Parliament is in a key position for building a European framework for criminal procedural law as our role is to represent the interests of citizens whereas EU governments may focus more on the interests of the state.

Are EU instruments necessary to safeguard the rights of citizens involved in criminal proceedings, in addition to the European Convention on Human Rights, the EU Charter of Fundamental Rights and the other multilateral and bilateral agreements?

6. The value of EU criminal procedural law is to build on the Convention system by making those fair treatment and fair trial obligations more specific, concrete and enforceable within the EU, and if possible raising practice in EU countries above the minimum Council of Europe level. It has been demonstrated frequently through the courts that the ECHR and even the EU Charter are not enough in themselves to guarantee proper national implementation of fundamental rights since they operate at the level of principles whereas legislation can spell out the precise way that rights are to be put into practice. Foreign nationals are particularly vulnerable and are unfortunately often subject to discrimination, such as in pre-trial detention and refusal of bail. We urgently need the implementation of the Procedural Rights roadmap in order to guarantee rights for individuals in practice, without them having to resort to lengthy court proceedings.

7. The European Parliament fights for human rights safeguard clauses in mutual recognition instruments. It offends against a sense of justice for example for British person to be returned to poor detention conditions, unreasonable trial delays or substantiated suspicions of illtreatment. Equally, it does the EU reputation no good for a Polish woman to be returned to Poland, under the EAW classification of 'murder which Polish law assigns to abortion, for having had a termination which is not a crime under UK law. The EU must consider more carefully before removing provisions on dual criminality or territoriality with such possible consequences.

To what extent does existing EU legislation affect national criminal justice systems? To what extent does existing EU legislation and proposed legislation go further than the existing EU or international instruments, or UK law?

8. EU measures are binding our disparate legal systems to each other in quite a complex way in furtherance of the goals of catching criminals and ensuring fair trials for defendants and decent treatment of victims. But it is important to recall that EU legislation needs only to make national criminal justice systems compatible in quality and 'interoperable'. The objective is to harmonise them in the proper sense of working in harmony and 'talking' to each other, rather than to interfere in their structure and make them uniform. Achieving this interoperability while respecting subsidiarity is not an easy balance to attain since there are bound to be ripples across the national systems from the need to implement EU law. Under the Lisbon Treaty the restraint on the EU, to legislate only if there is a clear need at European level, is strengthened. After 2014 it will be possible for a Member State to take the EU to the CJEU for annulment of a legislative act on grounds of infringement of the principle of subsidiarity.

9. It may be easier to keep that balance on procedural law than on substantive law, where definition of offences and setting of minimum-maximum sentences may be disruptive. It is interesting to note though that procedural elements are creeping into 'substantive' Directives, for example the new anti-Trafficking Directive obliges Member States to ensure that prosecution is not dependent on reporting or accusation by a victim and that prosecution can be avoided if the victim is forced to commit an otherwise criminal act.

10. The European Parliament's Civil Liberties, Justice and Home Affairs (LIBE) committee is again examining the overall direction of EU criminal justice policy and legislation and is holding a hearing on December 8th 2011 on 'an EU approach to criminal law.' The committee is responding to the European Commission's communication 'Towards an EU criminal policy: ensuring the effective implementation of EU policies through criminal law' (Com 2011 573) and will also take account of the the Council conclusions of November 2009 on 'model provisions guiding the Council's criminal law deliberations'. Questions likely to come up in the quest for a sound foundation for EU criminal law instruments include: the criteria for judging when EU criminal legislation is justified; the validity of an oversight mechanism or a central unit in the EU institutions to oversee the proper application of EU legal principle in criminal law; and better equipping the legal services of the 3 EU institutions to advise the EU legislators on how EU principles of criminal law can be respect the varying national systems.

11. I would judge that EU law has had no more of an impact in changing UK law than most Member States and less than on some. We do have a sophisticated and well-developed criminal justice system with a wealth of legislation in place including on many aspects of procedural guarantees. Although much is sometimes made of the specific nature of our (and some other member states') common law system, I am not aware that the UK has had any more difficulties in adjusting to EU legislation than Continental countries. However, it is the case there are certain aspects of criminal procedure currently foreseen at EU level which are not currently statutory in the UK, for example the Victims' Code. Although the proposed EU Directive on victims' rights may broadly correspond to that Code, it will require a change to allow UK citizens to challenge alleged breaches of their rights in court for the first time.

What is the effect of importing the jurisdiction of the Court of Justice of the EU? Will the Court of Justice be able to cope with litigation arising from EU legislation?

12. Due to the 5 year transitional period before the Court has oversight of the criminal justice field, it is as yet difficult to judge its impact and so far the Court does admittedly lack experience in dealing with criminal law issues. But its jurisdiction will improve the implementation of EU law due to the ability of the Commission to take infringement proceedings. It can also be expected to help ensure consistency and coherence of legislation through its judgements and critiques, applying the ECHR and the Charter, of exceptions and derogations in some existing measures. The Supreme Courts of some Member States (Germany, Romania) have overruled on constitutional or human rights grounds the EU Directive on Data Retention, and the same may well happen with the CJEU.

Are there other areas of criminal procedure which should be covered by EU legislation and, conversely, are there areas which are covered unnecessarily?

13. I strongly support the Procedural Rights roadmap and hope that the UK will opt into the remainder of these measures, covering access to a lawyer, rights for vulnerable suspects, legal aid and pre-trial detention rights. I also support minimum harmonised rights for victims of crime across the EU. A further relevant area is data protection in the field of police and judicial cooperation, which should be brought within the normal legal framework of the EU and this is likely to be proposed by the Commission in spring 2012. I would like to see the European Supervision Order and the measure on Transfer of Prisoners speedily implemented.

(2) Does EU legislation in the areas within scope add value?

What practical benefits does EU legislation bring - for citizens, law enforcement authorities, courts? Do the benefits of EU legislation outweigh the disadvantages?

14. The benefits of common standards in criminal procedural law are clear for citizens when they encounter a criminal justice system abroad and are guaranteed rights which as foreign nationals they might otherwise not get in practice. For law enforcement authorities and governments the benefits are in avoiding disruptive challenge or political controversy which might otherwise frustrate the application of EU mutual recognition measures. It is the job of EU legislators and the courts to make sure that EU law does not create more red tape or infringe individual rights by removing safeguards.

Does EU legislation promote mutual trust between national authorities and facilitate judicial and police co-operation in practice?

15. Unbalanced reliance on mutual recognition as the engine of EU judicial cooperation has not been helpful because it always needed to be accompanied by legislation on safeguards to ensure mutual trust and the necessary confidence for courts in divergent criminal justice systems. I believe it has become clear to all those involved in the justice systems of Member States that such trust requires not only better training and networks among legal professionals but also the level playing-field that only EU legislation can give.

Should EU minimum standards for criminal procedure apply only to cross - border cases?

16. No, since that would create anomalies and injustices which are the precise opposite of the level playing-field that should be created.

(3) The impact of the UK opt-in

To what extent should the UK opt in to legislation in this area?

What factors should inform the UK Government's decisions on opting in?

Will the fact that the UK has not opted in to some EU legislation undermine the trust of authorities of other Member States in the UK criminal justice system? If so how will this affect UK nationals involved in criminal proceedings in other Member States and the ability of the UK authorities to investigate and prosecute cross-border crimes.

The UK must adopt a clear policy towards opt-ins which bases our participation on the consistent application of legal criteria and public policy, avoiding an inconsistent or haphazard approach resulting from individual decisions conditioned mainly by political considerations. It was difficult to discern a consistent approach when the decision was taken to opt out (initially) from the Directive on combating trafficking but to opt in to the Directive on the sexual exploitation of children, under Home Office and Ministry of Justice responsibility respectively. The UK should have a presumption of opt-in to EU criminal justice legislation, rebuttable by demonstration of manifest incompatibility with or disruption to our own system.

While there may be EU initiatives which the UK has serious reasons for staying out of, our possibility of opt-out should not be used as a negotiation strategy. The shift to Qualified Majority Voting (QMV) under the Lisbon Treaty in policing and criminal justice matters does mean the loss of the formal veto and thus a certain risk that, having opted in to a proposal, the UK might be subsequently outvoted during the Council negotiations and hence be bound by legislation it is not fully behind. But the UK is skilled in negotiation and is very unlikely to be placed in an intolerable position in the Council. It is true that UK officials seem to play an active role in discussions in the Council even when the UK has announced its intention to wait till the end of negotiations before deciding to opt in to a decision. But this situation arguably disables UK MEPs during the proceedings of the Parliament from arguing for provisions that might suit the UK.

The other effect of a decision not to opt in at the beginning could be to implicitly lower the bar for those countries participating in the measure. On the draft Directive on the right to a lawyer in criminal proceedings, the UK is largely compliant and the problems are, if not technical, then capable of being overcome in the negotiations. It is not the case that the UK is in a unique position which the other Member States are unsympathetic to. The tactic of initially opting out and monitoring the progress of discussion on an initiative before opting in at a later date must in my opinion be adopted sparingly. Although it has been effective in certain cases, when doing this we lose the opportunity to play a full or leading part through both the Council and the European Parliament in shaping the legislation.

7 December 2011

Professor Valsamis Mitsilegas, Professor of European Criminal Law and Director, Criminal Justice Centre, Queen Mary University of London – Written evidence

1. Thank you for the invitation to submit written evidence to the Committee's inquiry into EU criminal procedure. This is a timely and important inquiry in the light of the growth of European criminal law in recent years and the fresh momentum towards the adoption of further EU measures in the field generated by the entry into force of the Lisbon Treaty. EU action in the field of criminal law in general and criminal procedure in particular has potentially profound implications for both the relationship between Member States and the European Union (and state sovereignty) and the relationship between the individual and the state (and the fundamental rights of affected individuals). My contribution to the inquiry will examine the principal issues arising from the development of EU law on criminal procedure largely from an EU constitutional law perspective.

Is an EU system of criminal procedural law desirable?

2. In order to address the question of whether an EU system of criminal procedural law is desirable a useful starting point would be to ascertain the extent of EU competence in the field. It must be noted that the Lisbon Treaty does not confer upon the European Union a broad, self-standing competence to legislate on criminal procedure. Following a functionalist logic, the Treaty on the Functioning of the European Union (TFEU) states that the Union can adopt criminal procedure measures only if such measures are necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension (Article 82(2) TFEU). Competence to legislate on criminal procedure is thus dependent upon establishing that criminal procedure measures are necessary to facilitate judicial or police cooperation.

3. Article 82(2) TFEU places further limits to the extent of EU harmonisation in the field of criminal procedure. The EU can legislate only in the form of Directives (leaving thus Member States with some breathing space as to their choices of how exactly they will transpose the relevant EU requirements to their domestic legal order). Criminal procedure measures can take the form of minimum rules, with the Treaty envisaging minimum harmonisation only. Last, but not least, the Union currently has competence to legislate only on three, exhaustively enumerated, areas of criminal procedure: on the mutual admissibility of evidence between Member States, on the rights of individuals in criminal procedure and on the rights of victims of crime.

4. The above analysis demonstrates that when the Commission or a group of Member States table proposals to legislate in criminal procedure they have to demonstrate that the conditions set out in Article 82(2) TFEU are met. Of particular importance in this context is the need to establish a link between the proposed criminal procedure measure and its necessity for the effective functioning of mutual recognition or cooperation in criminal matters having a cross-border dimension. It is submitted that in doing so, a generally worded link will not suffice: the Commission

(or the Member States) will have to make an express link between proposals on criminal procedure and specific EU measures on mutual recognition or judicial or police cooperation whose operation will be facilitated. To take an example, proposals aiming to establish minimum standards on defence rights in criminal proceedings should be justified on the basis of the existence of an express link between these measures and specific mutual recognition instruments, such as the European Arrest Warrant Framework Decision. This approach will contribute to meeting the criteria set out by the Court of Justice when ascertaining the legality of EU instruments, namely that the choice of legal basis must be based on objective factors which are amenable to judicial review.[70]

5. Criminal procedure measures tabled and adopted after the entry into force of the Lisbon Treaty do not seem to meet the justification threshold proposed above. The Preamble to the recently adopted Directive on the right to interpretation and translation[71] makes a general link between minimum standards and mutual trust, stating that 'common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust.'[72] Mutual trust is not limited to trust between judicial authorities, but also extends to 'all actors in the criminal justice process.'[73]

6. While achieving mutual trust is certainly a laudable objective, the concept of trust is highly subjective. Moreover, reliance to mutual trust may actually dilute the causal link between the adoption of minimum standards and the facilitation of mutual recognition: according to the Preamble to the interpretation Directive, minimum standards should lead to increased confidence, which in turn should lead to efficient judicial cooperation.[74] The more general, subjective and diluted the link between minimum standards and judicial cooperation is, the harder it is to satisfy the requirement that the legal basis of an EU instrument is based on objective, factual circumstances.[75] An alternative approach would be to highlight more specifically why minimum standards are necessary: for instance, by explaining how minimum standards would interact with the human rights clauses in the European Arrest Warrant Framework Decision and national implementing law.

7. Having stressed the need for detailed and specific justification of EU proposals for criminal procedural law, it is submitted that EU action in the field of defence rights is a welcome step to address the needs of the individuals affected by the growing acquis in the field of mutual recognition in criminal matters. This acquis is not limited to the European Arrest Warrant Framework Decision but consists of a raft of measures extending to various stages of criminal procedure, both pre- and post-trial. Measures such as the Framework Decision on the transfer of sentenced persons are key

[70] See inter alia Case C-300/89, Commission v Council [1991] ECR I-2867 (Titanium Dioxide).
[71] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L280, 26 October 2010, p.1.
[72] Recital 9.
[73] Recital 4.
[74] Mitsilegas, EU Criminal Law, Hart, 2009, pp.105-107.
[75] The recent Commission proposal for a Directive on the right of access to a lawyer (COM (2011) 326 final, Brussels, 8 June 2011) goes a step further by stating that 'common minimum rules should increase confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust and to the promotion of a fundamental rights culture in the Union.' (Recital 3).

examples where defence rights at EU level are necessary to safeguard the rights of the individuals concerned in a system where the execution of a transfer request is currently based on a high degree of automaticity and with little regard for the view of the individuals concerned. Common EU minimum standards on the admissibility of evidence are also necessary to address gaps in the mutual recognition system to be established by the Directive on the European Investigation Order, currently under negotiation in the Council of Ministers and the European Parliament.

8. The area where the need for EU action seems harder to justify is the area concerning the rights of the victims. Explaining how EU minimum rules on the rights of victims will facilitate mutual recognition is far from straightforward. There is currently little in terms of mutual recognition instruments in the criminal justice field on victims, with the existing proposal on the European Protection Order instrument covering a very specific aspect of victims' protection. It is further not clear how minimum standards on the rights of victims would facilitate police and judicial cooperation in criminal matters having a cross-border dimension. In its recent Communication introducing a package on victims' rights, the Commission failed to substantiate a link under Article 82(2) in a clear-cut manner.[76] It is submitted that, even if EU competence under Article 82(2) is established, the question of whether EU proposals on victims' rights meet the subsidiarity test should be examined carefully and thoroughly by both the Commission and national parliaments. The Court of Justice case-law on the basis of the Framework Decision on the rights of victims in criminal proceedings currently in force has involved predominantly cases with no cross-border element.[77]

Does EU legislation in the areas within scope add value?

9. EU law on criminal procedure can add value at three levels:
   - It rebalances the relationship between the individual and the state by putting forward measures which expressly and in detail provide rights to the individuals affected by the plethora of EU enforcement measures in the field of criminal justice
   - It places criminal procedure measures under the scrutiny of EU institutions such as the Commission (which will post-Lisbon monitor the proper implementation of criminal procedure instruments by Member States) and the Court of Justice. In this context, cooperation between national courts and the CJEU via the preliminary reference procedure is of great value in establishing legal certainty in the application of EU criminal law, in particular as regards the affected individuals. It is noteworthy that the Luxembourg Court has already embarked upon the development of autonomous concepts in EU criminal procedure, including the concept of 'resident' or 'staying' in the optional grounds for refusal,[78] and the

[76] See the Commission Communication, Strengthening victims' rights in the EU, COM (2011) 274/2, where it is stated that 'One of the European Union's objectives is to offer its citizens an area of freedom, security and justice in which their freedom of movement is ensured. However, without effective EU-wide application of a minimum level of rights for victims, mutual trust is not possible. This means that judicial systems should have full faith in each other's standards of fairness and justice, and citizens should have confidence that the same level of minimum rules will be applied when they travel or live abroad...Member States need to raise standards on victims' rights and the EU must ensure that victims benefit from a level playing field. A certain minimum level of safeguards and standards that are applied in all Member States will facilitate judicial cooperation and increase the quality of justice and also improve people's confidence in the very notion of 'justice'.' (p.3).
[77] See inter alia the cases of Pupino (Case C-105/03 ECR [2005] I-5285) and Katz (Case C-404/07).
[78] Case C-66/08 Kozlowski [2008] ECR I-6041, paras. 42 and 43.

concept of 'same acts' in the ne bis in idem provision of the European Arrest Warrant Framework Decision.[79]

- It empowers the individuals affected to claim their rights before domestic courts. It is highly likely that a great number of provisions on EU criminal procedure law, in particular defence rights provisions, will have direct effect.

The impact of the UK opt-in

10. There are two separate but interrelated arguments in support of a UK opt-in to EU criminal procedure measures. The first argument relates to the positive impact that EU criminal procedural law may have for the protection of fundamental rights, as outlined in paragraph 9 above. The second argument is systemic: it is submitted that, in an increasingly integrated European criminal justice area, it is extremely difficult both legally and politically for the UK to 'pick and choose' which measures it wishes to opt into. The systemic approach to European integration in the field of Justice and Home Affairs has already been confirmed by the Court of Justice in relation to UK participation to Schengen-building measures.[80] A similar approach is applicable to UK participation in EU criminal law measures, in the light of the systemic link between criminal procedure law and mutual recognition/judicial and police cooperation in order to establish competence. For example: to what extent is it feasible for the UK not to participate in a Directive on access to a lawyer in criminal proceedings, but for the UK to continue to take part in the European Arrest Warrant system? After all, the raison d' etre of the access to a lawyer Directive is to facilitate mutual recognition. It is difficult for the UK to argue that it can continue to participate in mutual recognition if it refuses to participate in measures which are deemed necessary for its operation. This approach is increasingly not feasible at a practical level with integration in the field progressing. It is also legally untenable if the UK 'opt-out' arrangements post-Lisbon are interpreted not strictly in a 'black latter law' manner, but under a systemic, teleological approach focusing on the Area of Freedom, Security and Justice as an integrated area.

11. A further issue which should be considered in this context is whether the UK should accept the remaining third pillar acquis by the expiry of the 30 November 2014 deadline introduced in the Transitional Provisions Protocol to the Lisbon Treaty. It is noteworthy in this context that it is highly likely that the Framework Decision on the European Arrest Warrant will form part of this acquis. It is submitted that UK acceptance of the full powers of EU institutions with regard to 'old' third pillar law is long overdue, in particular as regards the cooperation between domestic courts and the Court of Justice in Luxembourg. At present UK courts have to resolve complex issues of EU criminal law without having the option to send interpretation questions to Luxembourg. Not only does this limit the options of domestic courts, but it deprives the development of EU criminal law from the input of the UK judge and the specific concerns arising from the domestic legal systems. These limitations are highlighted in the recent case of Julian Assange, for which an appeal to the Supreme Court is not precluded at the time of writing. A key issue in the proceedings concerns the meaning of a 'judicial authority' for the purposes of the European Arrest Warrant Framework Decision. If leave to appeal is granted, this question will

[79] Case C-261/09 Mantello. para. 38.

[80] See in particular Case C-77/05 on the UK participation in the Frontex Regulation and Case C-482/08 on the UK participation in the Decision authorising access by police authorities to the Visa Information System.

have to be determined without recourse to Luxembourg- notwithstanding the fact that a uniform and autonomous EU law interpretation would be key to ensuring legal certainty in this highly contested field.

Summary of Conclusions and Recommendations

12. On the basis of my submission, the main conclusions and recommendations are as follows:
    - EU action in the field of criminal law in general and criminal procedure in particular has potentially profound implications for both the relationship between Member States and the European Union (and state sovereignty) and the relationship between the individual and the state (and the fundamental rights of affected individuals).
    - In order to address the question of whether an EU system of criminal procedural law is desirable a useful starting point would be to ascertain the extent of EU competence in the field.
    - The Lisbon Treaty does not confer upon the European Union a broad, self-standing competence to legislate on criminal procedure.
    - Article 82(2) TFEU states that the Union can adopt criminal procedure measures only if such measures are necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. The EU can legislate only in the form of Directives. Criminal procedure measures can take the form of minimum rules. The Union currently has competence to legislate only on three, exhaustively enumerated, areas of criminal procedure: on the mutual admissibility of evidence between Member States, on the rights of individuals in criminal procedure and on the rights of victims of crime.
    - For the Union to legislate in criminal procedure, it is necessary to establish a link between the proposed criminal procedure measure and its necessity for the effective functioning of mutual recognition or cooperation in criminal matters having a cross-border dimension.
    - A generally worded link (such as the link between proposed measures and the achievement of 'mutual trust') will not suffice: the Commission (or the Member States) will have to make an express link between proposals on criminal procedure and specific EU measures on mutual recognition or judicial or police cooperation whose operation will be facilitated.
    - An alternative approach would be to highlight more specifically why minimum standards are necessary: for instance, by explaining how minimum standards on the rights of the defendant would interact with the human rights clauses in the European Arrest Warrant Framework Decision and national implementing law.
    - Subject to the requirements mentioned above, EU action in the fields of defence rights and admissibility of evidence can be deemed to be in principle justified. The same cannot be said with regard to proposals on the rights of the victim. The link between these measures and mutual recognition/cooperation in cases with a cross-border dimension is difficult to establish.
    - In the light of the absence of a cross-border element and the often local character of cases involving victims, national parliaments should also check thoroughly whether proposals on victims' rights pass the subsidiarity test
    - EU law on criminal procedure would add value by: promoting fundamental rights; placing these measures under the scrutiny of EU institutions, in particular the

Court of Justice; and empowering individuals to claim rights in domestic courts by using the principle of direct effect.

- In an increasingly integrated European criminal justice area, it is extremely difficult both legally and politically for the UK to 'pick and choose' which measures it wishes to opt into.
- It is difficult for the UK to argue that it can continue to participate in mutual recognition (such as the European Arrest Warrant Framework Decision) if it refuses to participate in measures which are deemed necessary for its operation (such as the Directive on access to a lawyer). A systemic and teleological interpretation of EU law would place limits to the UK leeway to decide selectively on opt-ins.

7 December 2011

Professor Valsamis Mitsilegas, Professor of European Criminal Law and Director, Criminal Justice Centre, Queen Mary University of London – Supplementary written evidence

I was asked to comment further on the extent of European Union competence to legislate in the field of criminal procedure (and the rights of victims in particular) and the implications of EU law-making in the field for the principle of subsidiarity. The main points I would like to raise in this context are as follows:

Competence

Article 82(2) TFEU does not confer upon the European Union a general competence to adopt measures on criminal procedure, even as regards the areas expressly enumerated therein. The Union has power to legislate in these fields- which include the rights of victims of crime- only

'to the extent necessary to facilitate mutual recognition of judgements and judicial decisions and police and judicial cooperation in criminal matters having a cross- border dimension.'

It follows from the express Treaty wording that, when EU proposals on criminal procedure are put forward, the Commission (or Member States if they exercise the right of initiative) is under a duty to demonstrate that these proposals are *necessary* to facilitate mutual recognition and police and judicial co-operation.

In other words, the Union does not have competence to legislate in the fields enumerated in Article 82(2) TFEU if there is no link between these measures and the facilitation of mutual recognition and police and judicial cooperation in criminal matters.

Cross-border dimension

Article 82(2) TFEU states that the Union can legislate in the field of criminal procedure to the extent necessary to facilitate mutual recognition and police and judicial cooperation in criminal matters having a cross-border dimension.

The reference to a 'cross-border dimension' here is another factor determining the extent of Union competence to act in the field of criminal procedure. In other words, for the Union to be able to adopt measures in the areas enumerated in Article 82(2) TFEU, these measures must be necessary to facilitate cooperation in criminal matters having a cross-border dimension. The term 'cross-border dimension' is broad enough not to be limited to instances of cross-border crime *stricto sensu*.

The 'cross-border dimension' criterion is a criterion determining EU power to act, and should not be confused with the question of the cross-border applicability of EU criminal procedure measures. Once EU competence under Article 82(2) TFEU is established, the Treaty is silent as to whether the actual EU measures adopted will apply to cross-border cases only or to purely domestic law cases as well.

Professor Valsamis Mitsilegas, Professor of European Criminal Law and Director, Criminal Justice Centre, Queen Mary University of London – Supplementary written evidence

It is submitted that limiting the applicability of EU criminal procedure measures to cross-border cases only would be detrimental to the achievement of legal certainty and equality before the law and could lead- especially in these fields where rights are concerned- to reverse discrimination.

Subsidiarity

Compliance with the principle of subsidiarity is tested after EU competence to act in criminal procedure has been established. Even in cases where a link between mutual recognition/judicial and police cooperation and the adoption of minimum standards is established under Article 82(2) TFEU, the Commission needs to demonstrate (and national parliaments to check) that proposals in the field pass the subsidiarity test.

A subsidiarity assessment will depend largely on the content of the proposed measures and their individual provisions. While EU-level provisions granting legal rights to individuals may be more readily justified in this context, measures related to practical assistance to individuals (including victims of crime) provided locally may need to be scrutinised more carefully in terms of their compliance with subsidiarity.

10 January 2012