



HOUSE OF LORDS

European Union Committee

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30th Report of Session 2010–12

# The European Union's Policy on Criminal Procedure

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References in footnotes to the Report are as follows:

Q refers to a question in oral evidence;

Witness names without a question reference refer to written evidence.

## SUMMARY

Increasing mobility within the EU will have the inevitable consequence that more EU citizens will find themselves embroiled in the criminal justice system of another Member State, either as defendants or victims. This is likely to involve dealing with the consequences of traumatic events in a foreign language in the context of a very different legal system.

Until recently the EU has done little to protect the rights of defendants and victims caught up in crime with a cross-border dimension. This contrasts starkly with the measures adopted to facilitate cross-border law enforcement, notably the European Arrest Warrant. There is a widespread perception that the development of cross-border law enforcement measures has not been matched by balancing measures to ensure the rights of those defendants and victims involved. The Commission's 2004 attempt to introduce minimum rights for defendants stalled and EU victims legislation has proven ineffective. However the Lisbon Treaty has opened the way for this to be put right and two Roadmaps of planned legislation are now in place, for defendants and for victims.<sup>1</sup>

In this Report we take stock of the early Roadmap proposals and examine the potential benefit that they can, in principle, bring. We also examine the disadvantage of potential disruption to diverse and sensitive national criminal law systems—as illustrated by the controversial proposal for defendants' access to a lawyer at all stages of the investigative process.

We find that there is significant benefit to be gained from EU legislation setting minimum rights for defendants and victims, particularly for British citizens travelling within the EU who, on the whole, enjoy a high standard of rights at home. However, those minimum rights must be firmly grounded in international law norms, such as the European Convention on Human Rights, to minimise the risk of disrupting the UK criminal law systems.

Although the Commission is looking towards a more expansive EU criminal law policy we consider that the Roadmap legislation should be put in place and its impact assessed before moving forward any further.

In the light of these conclusions we encourage the Government to take a positive approach in principle to exercising the UK opt-in to Roadmap legislation. We draw attention to the decision which the Government will have to make by May 2014 on whether the UK opts out of the pre-Lisbon EU legislation, including the European Arrest Warrant.

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<sup>1</sup> The Roadmap for strengthening the procedural rights of those suspected or accused of criminal offences was adopted by the Council in November 2009; that for strengthening the rights and protection of victims was adopted by the Council in June 2011.



# The European Union's Policy on Criminal Procedure

## CHAPTER 1: INTRODUCTION

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1. EU citizens have the right to move and reside freely within the EU. An increasingly mobile citizenry leads inevitably to more crimes having a cross-border dimension—because they have been committed in another Member State, the perpetrator has fled to another Member State, or the victim is from another Member State. EU citizens are increasingly finding themselves engaged with the criminal justice system of another Member State with which they are unfamiliar. This can be particularly traumatic for British citizens because our criminal justice systems provide a high degree of protection.
2. To date the EU legislative effort has prioritised law enforcement. The challenge has been to achieve this in a framework of national criminal law systems which differ fundamentally. To meet this challenge the focus of the EU effort has been to facilitate mutual recognition, whereby decisions made by the judicial authorities of one Member State are given effect by the judicial authorities of another with minimum formality and only very limited grounds for refusal.
3. Even establishing mutual recognition has been a slow process. However, the events of 11 September 2001 gave impetus to the adoption of the first, and still the most high profile and controversial, EU mutual recognition measure, the European Arrest Warrant (EAW). This was designed to ensure quick extradition between Member States for serious offences.
4. The process begun by the EAW has since developed into a body of legislation requiring mutual recognition of a wide range of judicial decisions. However, the implementation of this legislation, and the EAW in particular, has highlighted a deficit in the protection of the rights of those accused or suspected of offences (termed “defendants” in this Report for ease of reference). Judges faced with a request for extradition may be increasingly reluctant to return a defendant if they believe his or her human rights would be violated, for example, by excessively long pre-trial detention, poor detention conditions, or if the consequent trial would be unfair because of inadequate translation or inadequate legal representation.
5. The agreement of EU criminal procedure measures, in the form of minimum rules intended to protect defendants and victims, applicable across the EU, has proved very difficult as such measures have an even greater potential for disrupting national criminal law systems than measures for mutual recognition. However, the changes to EU competence following the Lisbon Treaty have given impetus to EU legislation in this area and there is now in train the implementation of two packages of EU measures set out in “Roadmaps” dealing respectively with the rights of defendants and victims. These Roadmaps, and the individual proposals so far brought forward by the Commission, have been the subject of scrutiny by the Justice and Institutions Sub-Committee. In principle we have welcomed the establishment of minimum criminal procedure rules, but we have highlighted problems in

incorporating such rules into the UK's criminal law systems. This problem is particularly acute with a proposal on the right of access to a lawyer.<sup>2</sup> With the implementation of the Roadmaps now well underway the EU institutions have their eyes on further development of EU criminal procedure legislation.

6. In the light of these developments the Justice and Institutions Sub-Committee, whose members are listed at Appendix 1, initiated an inquiry to take stock of the development of EU activity in this area and to take an overview of the EU's policy in the area of criminal procedure. A call for evidence was published on 3 November 2011. This is at Appendix 3. Written evidence was received from 12 persons and organisations. Oral evidence was taken from seven witnesses specifically for this inquiry and we were also able to draw on the evidence of four witnesses who provided oral evidence for the purposes of our ongoing scrutiny of the access to a lawyer proposal.<sup>3</sup> The persons and bodies who provided evidence are listed at Appendix 2. We are most grateful to all those who gave us written and oral evidence.
7. This Report starts by providing a summary of how EU law on mutual recognition and criminal procedure has developed; and examines in more detail various limitations to EU competence. We consider the potential added value of EU legislation in this area and weigh it against the disadvantage of its potential adverse impact on national criminal law systems. Finally we look at future developments in this area.
8. **We recommend this Report for debate.**

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<sup>2</sup> COM (2011) 326.

<sup>3</sup> In the footnotes that follow their evidence is marked with \*\*.



## CHAPTER 2: BACKGROUND: PRE-LISBON DEVELOPMENTS

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9. The original European Economic Community had no express criminal law function. It was not until the coming into force of the Maastricht Treaty in 1994 that an express competence for action in this field was conferred upon the EU, by introducing a special framework for action in relation to 'Justice and Home Affairs', the so-called 'third pillar' of the EU, which brought previous informal co-operation between Member States under the auspices of the EU. However, to reflect the sensitivity of EU action in this area, this competence remained essentially intergovernmental in character, largely limited to promoting co-operation between police and judicial authorities, exercisable only by the Member States in the Council acting unanimously, and with only a limited role for the other EU institutions.
10. The Treaty of Amsterdam, which came into force in May 1999, incorporated some parts of the third pillar into the framework of the main European Community Treaty. However criminal justice remained within a third pillar, renamed 'Provisions on police and judicial co-operation in criminal matters'.
11. Under the pre-Lisbon Treaties, the European Council agreed a series of five year programmes, covering justice and home affairs, including criminal law. In the first of these, the Tampere Programme of 1999, the European Council expressed a determination to develop the Union as "an area of freedom, security and justice" by making full use of the possibilities offered by the Treaty of Amsterdam and endorsed "the principle of mutual recognition which ... should become the cornerstone of judicial co-operation in ... criminal matters within the Union". We were reminded by the Vice-President of the Commission, responsible for Justice, Fundamental Rights and Citizenship, Viviane Reding, that the system of mutual recognition was based on the model of the system that subsists between the UK's different jurisdictions and strongly advocated by the UK.<sup>4</sup> The subsequent Hague Programme of 1999 and the current Stockholm Programme of 2009 continued this focus on mutual recognition as the foundation for an area of freedom, security and justice.
12. Mutual recognition can be contrasted with the traditional international system of mutual assistance which requires a judge of the requesting state to route a request for assistance through the central authorities of that state to the executive authorities of the requested state who then arrange for the request to be actioned by their criminal enforcement authorities. That system of mutual assistance is more cumbersome and can be subject to an extra layer of decision making by the executive authorities.
13. Professor Steve Peers, of the Human Rights Centre and the Law School of the University of Essex, recalled that the original EU programme for mutual recognition in criminal matters of 2000<sup>5</sup> had set out a gradual process for developing mutual recognition, but that a sense of urgency resulted from the terrorist attacks of 11 September 2001. This hastened the adoption of the EAW which would otherwise have been a far more limited instrument and which set the template for the adoption of the other mutual recognition instruments which followed.<sup>6</sup>

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<sup>4</sup> Q 54.

<sup>5</sup> OJ C 12/02, 15.1.2001 p10.

<sup>6</sup> Q 18.

14. The legal instruments in force promoting mutual recognition in various criminal matters and their dates are listed in Box 1.<sup>7</sup>

### BOX 1

#### Mutual recognition legislation

- 2002: on the European Arrest Warrant.<sup>8</sup>
- 2003: on the execution of orders freezing property or evidence.<sup>9</sup>
- 2005: on mutual recognition of financial penalties.<sup>10</sup>
- 2006: on mutual recognition of confiscation orders.<sup>11</sup>
- 2008: on the taking into account of previous convictions in other Member States in the course of new criminal proceedings.<sup>12</sup>
- 2008: on mutual recognition of custodial sentences,<sup>13</sup> thus facilitating the transfer of prisoners to serve their sentences in their home states.
- 2008: on mutual recognition of probation decisions and other non-custodial sanctions, thus facilitating such sentences being carried out in the offender's home state.<sup>14</sup>
- 2008: on the European evidence warrant for the purposes of obtaining objects, documents and data for use as evidence in criminal proceedings.<sup>15</sup>
- 2009: on mutual recognition of decisions rendered in the absence of the person concerned at the trial.<sup>16</sup> This amends previous mutual recognition legislation to give a greater scope for refusal in cases where a person has been tried in their absence.
- 2009: on the mutual recognition of pre-trial bail decisions. This facilitates the supervision of such decisions in the defendant's home state.<sup>17</sup>

15. These measures principally facilitate the work of law enforcement authorities. However, it is clearly also in the interests of victims of cross-border crime that the perpetrators are brought to justice expeditiously. Of direct benefit to defendants are the mutual recognition of custodial sentences, non-custodial sentences and bail decisions, all of which facilitate the person concerned returning to his or her home Member State, family or job, whilst awaiting trial or to serve a sentence.
16. Mutual recognition legislation, although in many cases only operational for a relatively short period, has generally been regarded as beneficial. There has been the longest experience with the EAW. Vice-President Reding identified

<sup>7</sup> All these measures are subject to Protocol 36 to the Lisbon Treaty which enables the UK to cease to apply them. We look at this Protocol in more detail in Chapter 7.

<sup>8</sup> Council Framework Decision 2002/584.

<sup>9</sup> Council Framework Decision 2003/577.

<sup>10</sup> Council Framework Decision 2005/214.

<sup>11</sup> Council Framework Decision 2006/783.

<sup>12</sup> Council Framework Decision 2008/675.

<sup>13</sup> Council Framework Decision 2008/909.

<sup>14</sup> Council Framework Decision 2008/947.

<sup>15</sup> Council Framework Decision 2008/978.

<sup>16</sup> Council Framework Decision 2009/299.

<sup>17</sup> Council Framework Decision 2009/829.

this as a very successful mutual recognition tool, although it has shortcomings, in particular because it has been used to request the extradition of persons for disproportionately minor offences. This may be because of a lack of discretion afforded to prosecutors in some Member States. She was not however envisaging amendment, but seeking to prevent this abuse through guidelines contained in the handbook which complements the legislation and enhanced judicial training.<sup>18</sup> Sir Scott Baker's Review of the United Kingdom's Extradition Arrangements reported that the EAW has improved the scheme of extradition between Member States and that, broadly speaking, it operates satisfactorily.<sup>19</sup> The Council of Bars and Law Societies of Europe (CCBE) described enhanced judicial co-operation and mutual recognition more generally as "a real benefit" as most clearly evidenced by an increasing willingness to accede to requests for surrender under the EAW.<sup>20</sup> Professor Spencer of the Law Faculty of the University of Cambridge considered that, although some of the legislation was "ineptly done", mutual recognition was a practical necessity whether we liked it or not and that the EAW had brought a significant practical benefit for policemen and prosecutors.<sup>21</sup> The Bar Council commented favourably on the effect of the 2005 legislation on mutual recognition of fines and the 2008 legislation on taking account of convictions, and believed that the effect of some of the less high profile measures had still to be fully felt in the English Courts.<sup>22</sup>

17. The Tampere, Hague and Stockholm Programmes recognised the need for mutual recognition measures to be complemented by some further legislation on common minimum standards in criminal procedure. Most of our witnesses accepted that there is now an imbalance between mutual recognition and fundamental rights<sup>23</sup> although it is difficult to gauge the extent to which this imbalance impairs mutual recognition. The Government expressed a belief 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.<sup>24</sup> The CCBE believed a lack of defence rights in some Member States would be likely, if not corrected, to undermine the confidence of judicial systems of other Member States.<sup>25</sup>
18. Vice-President Reding emphasised that for mutual recognition to operate it is necessary to build bridges to reinforce mutual trust between judicial systems.<sup>26</sup> This is reflected in the Stockholm Programme which both identifies mutual trust between the decision makers in the different Member States as the basis for efficient co-operation and also identifies a need for it to be strengthened.<sup>27</sup>
19. Professor Spencer regarded the issue of mutual trust as being wider: "What is done in trans-border cases has to be acceptable to public opinion, not just prosecutors and people who work the system. If there are dysfunctions in the

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<sup>18</sup> QQ 52 and 53.

<sup>19</sup> Available at <http://www.homeoffice.gov.uk/publications/police/operational-policing/extradition-review?view=Binary>. See para 11.1.

<sup>20</sup> CCBE, para 24.

<sup>21</sup> QQ 2, 7 and 17.

<sup>22</sup> Bar Council, paras 1.3.1 and 1.3.3.

<sup>23</sup> Q 2 (Professors Spencer and Peers); Q 31 (CCBE); Q 54 (Vice-President Reding); Professor Mitsilegas, para 7; Fair Trials International, para 1; Baroness Ludford, para 3; CCBE, para 18.

<sup>24</sup> Ministry of Justice, para 40.

<sup>25</sup> CCBE, para 28.

<sup>26</sup> Q 46.

<sup>27</sup> Paragraphs 1.2.1. and 3.2.

criminal justice systems of some other Member States like terribly overcrowded prisons, disastrous waits in custody before trial, inefficient translation, incompetent legal assistance and so on, they are not likely to be sorted out just by people getting to know each other ... Unless these matters are addressed, public opinion will not accept the too ready functioning of cross-border criminal justice ...”<sup>28</sup>

20. In 2004 the Commission made an omnibus proposal for legislation protecting defendants’ rights<sup>29</sup> which was the subject of our Report “*Procedural Rights in Criminal Proceedings*”.<sup>30</sup> We supported this initiative, emphasising the need to put in place minimum standards which are observed in order to ease the strain on the confidence and trust of Member States in each other’s criminal justice systems. Its lack of progress was the subject of our subsequent Reports “*Breaking the deadlock: what future for EU procedural rights?*”<sup>31</sup> and “*Procedural rights in EU criminal proceedings—an update*”<sup>32</sup> in which we deplored the watering down of the Commission’s proposal in subsequent negotiation and concluded that there was a strong case for setting out in legislation rights which go beyond those in the European Convention on Human Rights (ECHR). Ultimately this proposal fell through lack of support from Member States, including the UK.
21. However in 2009, just before the Lisbon Treaty was due to come into force, the Council adopted a “Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings”.<sup>33</sup> This set out six measures to be pursued as separate proposals. Box 2 outlines the measures adopted, or in train, under this initiative.

## BOX 2

### **The Roadmap of measures concerning criminal procedural rights**

- Measure A: translation and interpretation. This has now been adopted as Directive 2010/64.
- Measure B: information to be provided in the course of criminal proceedings. The Council and the European Parliament have agreed a text for a new directive.<sup>34</sup>
- Measure C: legal advice and legal aid. A Commission proposal for a directive on the right of access to a lawyer and on the right to communicate upon arrest is still under negotiation in the Council.<sup>35</sup> The Commission has yet to bring forward a proposal on legal aid, but it features in its work programme for 2012.<sup>36</sup>
- Measure D: communication with relatives, employers and consular authorities. Some provisions are now incorporated into the proposal on right of access to a lawyer.

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<sup>28</sup> Q 8.

<sup>29</sup> COM (2004) 328.

<sup>30</sup> 1st Report of Session 2004–05.

<sup>31</sup> 2nd Report of Session 2006–07.

<sup>32</sup> 9th Report of Session 2008–09.

<sup>33</sup> Council Resolution of 30 November 2009, OJ C 295, 4.12.2009, p 1.

<sup>34</sup> COM(2010) 392.

<sup>35</sup> COM(2011) 326.

<sup>36</sup> COM(2011) 777.

- Measure E: special safeguards for suspected or accused persons who are vulnerable. The Commission has yet to bring forward a proposal, but it features in its work programme for 2012.
- Measure F: a Green Paper to examine appropriate measures concerning the period of pre-trial detention. This was issued by the Commission in June 2011. At the same time it has also sought information on the effect of different prison conditions.<sup>37</sup>

22. In contrast to the progress of legislation concerning defendants' rights, early progress was made in relation to the position of victims. This is less problematic as it poses less of a threat to law enforcement and attracts greater sympathy from the public. Nevertheless protection of victims' rights can be important in creating the general public acceptance of cross-border law enforcement raised by Professor Spencer.
23. Legislation was adopted in 2001 and 2004, first on the standing of victims in criminal proceedings, and then relating to compensation to crime victims. The former sets out rights for victims in very general terms, whilst the latter is limited to facilitating access to state criminal injury compensation schemes in the case of cross-border crime.<sup>38</sup> In addition three measures were adopted which included general requirements for the protection and assistance of victims, concerning terrorism, human trafficking and the sexual exploitation of children, although the latter two have been recently replaced by legislation providing more detailed provisions, which we have supported.<sup>39</sup>
24. All the legislation in this area requires transposition (or implementation) into national law. Generally the EU legislation itself specifies that this must be done within two or three years of the date of adoption. The date for transposition of all the legislation adopted before the Lisbon Treaty came into force has now passed, except for the 2009 measure for recognition of bail decisions. Nevertheless the record of Member States in transposing EU law into national law has been patchy. The Bar Council noted that the EAW is the only existing measure to be implemented by all Member States,<sup>40</sup> although even in this case the Commission regretted, as recently as April 2011, that 12 Member States have not amended their legislation implementing the EAW despite having been recommended to do so in previous Council and Commission reports; in the case of six of these Member States as long ago as 2007.<sup>41</sup> The Commission has continued to draw attention to difficulties over implementation of other legislation. The UK is not immune from criticism on this score.<sup>42</sup>

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<sup>37</sup> COM(2011) 327.

<sup>38</sup> Council Framework Decision 2001/220 and Directive 2004/80. The latter has an internal market legal basis.

<sup>39</sup> Council Framework Decisions 2002/475 (terrorism), 2002/629 (human trafficking) and 2004/68 (child abuse); the latter two replaced by Directives 2011/36 and 2011/92.

<sup>40</sup> Bar Council, para 1.5.1.

<sup>41</sup> Commission Communication on the implementation since 2007 of the EAW—COM (2011) 175, Section 3. The Member States concerned are Belgium, Cyprus, Denmark, Germany, Greece, Spain, Finland, Italy, Malta, the Netherlands, Sweden and the UK.

<sup>42</sup> See for example COM(2004) 54 and COM(2009) 166, relating to the 2001 legislation on the standing of victims, COM(2010) 428 on the 2006 measure for mutual recognition of confiscation orders and COM(2011) 175 on the EAW. All note a UK failure to notify implementation fully within the time limit set by the legislation. An external study of mutual recognition funded by the Commission and published in 2008 indicated that the UK had been late in transposing the Framework Directives on freezing orders and financial penalties: [http://ec.europa.eu/justice/doc\\_centre/criminal/recognition/docs/mutual\\_recognition\\_en.pdf](http://ec.europa.eu/justice/doc_centre/criminal/recognition/docs/mutual_recognition_en.pdf) at page 93.

25. **The legislation that has been adopted for mutual recognition in criminal matters has been subject to some justified criticism, and its implementation by Member States has been poor. Nevertheless mutual recognition is a practical necessity in order to combat cross-border crime and has already demonstrated its potential benefit as an effective tool to fight cross-border crime. However for that potential to be fully realised there must be confidence, on the part of the judicial authorities and also of the general public, that giving effect to judicial decisions made in other Member States will not result in injustice or unfairness.**

## CHAPTER 3: THE LISBON TREATY AND SUBSEQUENT DEVELOPMENTS

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### The general Lisbon Treaty changes

26. Impetus was given to legislation in the areas of criminal procedure law by the Lisbon Treaty which came into force on 1 December 2009. It amended the former third pillar and incorporated it into the mainstream EU framework. The resulting institutional changes are set out in Box 3.

### BOX 3

#### The institutional changes of the Lisbon Treaty on mutual recognition and criminal procedure law

- The European Parliament must act with the Council in adopting legislation. The European Parliament encourages more to be done at EU level for defendants and victims.<sup>43</sup>
- The Council acts by qualified majority voting.
- The Commission's role as the initiator of legislation is enhanced whilst that of Member States is reduced.<sup>44</sup>
- The EU can adopt legislation which is capable of having direct effect.<sup>45</sup>
- The Commission assumes its normal role of "guardian of the Treaty" with a power to bring infringement proceedings which can, ultimately, lead to fines for recalcitrant Member States.
- The Court of Justice assumes its usual powers to rule on the validity and meaning of EU legal instruments.

27. The Treaty embedded the principle that judicial co-operation in criminal matters was to be based on the principle of mutual recognition and conferred an express power for the EU to legislate to prescribe the rules and procedure for ensuring mutual recognition of all forms of judgments and judicial decisions.<sup>46</sup> There is currently only one further mutual recognition proposal on the table, for a European Investigation Order. This would be issued by a judicial authority in order to have investigative measures, such as searches of premises, carried out in another Member State. It would replace the European Evidence Warrant. This proposal is still under discussion in the Council and awaits its first reading by the European Parliament.<sup>47</sup>
28. In respect of criminal procedure, power is now expressly conferred upon the EU to legislate on—
- the mutual admissibility of evidence between Member States,

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<sup>43</sup> Q 50 (Vice-President Reding); Baroness Ludford, para 1.

<sup>44</sup> At least a quarter of Member States must take the initiative to propose legislation whereas previously any one Member State could do so.

<sup>45</sup> Direct effect is the principle that a directive may, in appropriate circumstances, confer on individuals rights and obligations which must be recognised by national courts.

<sup>46</sup> Article 82(1) TFEU.

<sup>47</sup> The proposal was made at the initiative of seven Member States, not including the UK.



- the rights of individuals in criminal procedure,
  - the rights of victims of crime, and
  - any other specific aspects of criminal procedure which the Council has identified in advance, acting unanimously and with the consent of the European Parliament.<sup>48</sup>
29. However the sensitive nature of EU competence in this area is still recognised by the following safeguards built into the Treaty:
- The scope of EU competence remains narrowly circumscribed. The EU may legislate using only directives<sup>49</sup> to “establish minimum rules” in defined areas of criminal procedure “to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and judicial and police co-operation in criminal matters having a cross-border dimension” and such legislation “shall take into account the differences between the legal traditions and systems of the Member States”.<sup>50</sup>
  - There is an “emergency brake” enabling a Member State which considers its criminal justice system to be fundamentally affected by proposed EU legislation to suspend the legislative procedure and bring the matter before the European Council which, by consensus only, can remit the matter back to the Council to continue the legislative procedure. In the event of there being no consensus, at least nine Member States can proceed amongst themselves by way of enhanced co-operation.<sup>51</sup>
  - The Court of Justice may not “review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”.<sup>52</sup>
  - There are transitional provisions<sup>53</sup> retaining the existing limitations on infringement proceedings and Court of Justice jurisdiction in relation to pre-Lisbon legal instruments until December 2014, with a specific power for the UK to opt out of any subsisting pre-Lisbon legislation by May 2014.
30. **The Lisbon Treaty changes have facilitated and given impetus to the adoption of EU criminal procedure legislation.**

### The UK opt-in

31. Moving the former third pillar measures into the part of the new Treaty on the functioning of the European Union which deals with the areas of freedom, security and justice, also means that these Treaty provisions do not, in principle, apply to the UK, Ireland and Denmark, but, in accordance with Protocol 21, the UK and Ireland may opt in to proposals and legislation.<sup>54</sup>

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<sup>48</sup> Article 82(2) TFEU.

<sup>49</sup> Which accord a degree of flexibility, as Member States need only ensure that their national legislation achieves the results required by the Directive.

<sup>50</sup> Article 82(2) TFEU.

<sup>51</sup> Article 82(3) TFEU.

<sup>52</sup> Article 276 TFEU.

<sup>53</sup> Title VII of Protocol 36. The UK opt-in and the implications of Protocol 36 are considered at Chapter 6.

<sup>54</sup> Protocol 21 deals with the UK and Ireland opt-in.



32. This opt-in may be exercised at either of two stages:
- Within three months of a new proposal being presented to the Council, in which case the UK participates fully in the adoption of the proposal. The opt-in takes automatic effect and the UK is able to vote on the proposal. Once such legislation is adopted it applies in the UK, even if it voted against.<sup>55</sup>
  - At any time after the adoption of legislation the UK may apply to opt in, in which case the Commission can confirm the participation of the UK and set out any necessary transitional provisions. If the Commission does not do so the UK can ask the Council (with the UK not participating) to decide the matter.<sup>56</sup>
33. The Coalition Agreement commits the Government to assessing all measures in this area on a case by case basis, with a view to maximising the country's security, protecting Britain's civil liberties and preserving the integrity of our criminal justice systems.<sup>57</sup>
34. The Rt Hon Kenneth Clarke MP QC, Secretary of State for Justice and Lord Chancellor, outlined how the opt-in works in practice. If the opt-in to a proposal is exercised then the UK fully participates in negotiations. If it does not opt in at this stage then the UK can still negotiate to achieve an acceptable text to which it can opt in once the legislation has been adopted, although its influence in the negotiations would be diminished by the fact that the UK does not have a vote and cannot therefore form part of a blocking minority. Its negotiating power depends on the likelihood of actually opting in to the adopted legislation and the extent to which other Member States want the UK to do so.<sup>58</sup>
35. Witnesses were generally sympathetic to the UK exercising the opt-in in relation to criminal procedure legislation. Professor Spencer asserted that the UK should be pushing hard for the criminal procedure Roadmap measures and characterised the UK's case by case policy on the opt-in as being "essentially opportunistic". Both he and the Bar Council made a specific link to the high standards in the UK which means not only that there is unlikely to be significant disruption to UK law, but also that we can bring a beneficial influence in creating a sufficiently high pan-EU standard.<sup>59</sup>
36. Professor Mitsilegas, Professor of European Criminal Law and Director, Criminal Justice Centre, Queen Mary, University of London, considered it 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.<sup>60</sup> Vice-President Reding and the CCBE similarly emphasised the deleterious effect of non-participation by the UK on European integration and mutual trust.<sup>61</sup> It appears to us that an advantage of the UK opting in to EU legislation prescribing minimum rights is that this legislation, which is translated into all EU languages and readily available throughout the EU, would make it clear that these rights applied in the UK. If the UK does not participate in the EU legislation a judge of another

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<sup>55</sup> Article 3.

<sup>56</sup> Article 4.

<sup>57</sup> Ministry of Justice, para 2.

<sup>58</sup> QQ 68 and 69.

<sup>59</sup> QQ 2 and 23; Bar Council, para 3.1, Q 19.

<sup>60</sup> Professor Mitsilegas, para 10.

<sup>61</sup> QQ 45 and 46; CCBE, para 32.

Member State asked to operate mutual recognition involving the UK, but unfamiliar with UK law, would have to use more difficult means to obtain assurance that UK domestic law does indeed provide these rights.

37. Whilst there were a number of suggestions that failure to opt in could adversely affect UK citizens travelling abroad,<sup>62</sup> such a consequence would not arise directly from the UK's non-participation, because the other Member States (except Denmark and possibly Ireland) would still be applying the EU prescribed minimum rules.<sup>63</sup> Such disadvantage could, however, arise indirectly from the fact that the UK's non-participation in negotiations led to lower minimum standards.
38. Baroness Ludford cautioned the UK against an inconsistent and haphazard approach resulting from individual decisions conditioned mainly by political considerations, and also cautioned against the UK using its opt-in as a negotiating tactic. She thought that UK non-participation in negotiations, arguably, denied UK MEPs their voice. She favoured a presumption that the UK should opt in, rebuttable by manifest incompatibility with, or disruption to, the UK criminal law system.<sup>64</sup> The Lord Chancellor reflected this in his evidence: "Assuming that the general objective of the proposal is one with which we are perfectly comfortable, I would prefer to opt in because I think that it gives a greater role and influence at an early stage of the subsequent negotiations and you have a vote in the course of any decisions on drafting, so you can be in a better position to remedy any queries you have about it".<sup>65</sup>
39. The UK has, on the whole, opted in to proposals relating to criminal procedure at the earlier stage of negotiations. The exceptions are the proposal for access to a lawyer and the proposal for human trafficking. We look at the former in more detail in Chapter 6. The UK did eventually opt in to the latter having refrained from doing so earlier for reasons which this Committee in the course of its scrutiny considered were unjustified.<sup>66</sup>
40. **In practice the case by case approach to the UK opt-in set out in the Coalition Agreement has resulted in the Government opting in to proposals for criminal procedure legislation. We agree that the UK should opt in to proposals for criminal procedure legislation at an early stage unless there is clear justification for not doing so.**
41. Professor Peers mooted the point that the existence of the "emergency brake" could have an impact on the decision by the UK whether or not to opt in, on the grounds that we could take the risk of having to negotiate away an unacceptable provision, in the knowledge that if this did not succeed then we could invoke the emergency brake. He accepted, however, that doing so would look particularly odd.<sup>67</sup>
42. **It is notable that the emergency brake has not yet been used by any Member State in relation to criminal procedure legislation.**

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<sup>62</sup> Fair Trials International, para 5, Q 46 (Vice-President Reding).

<sup>63</sup> Denmark does not participate at all in any of these matters, and Ireland has the same arrangement for opting in as the UK.

<sup>64</sup> Baroness Ludford, paras 17–19.

<sup>65</sup> Q 68.

<sup>66</sup> Relevant correspondence concerning this proposal is found at <http://www.parliament.uk/documents/lords-committees/eu-sub-com-e/cwm/CwMSubEMay-Oct10.pdf> and <http://www.parliament.uk/documents/lords-committees/eu-sub-com-e/cwm/CwMSubEDec2010onwards.pdf>

<sup>67</sup> Q 23.

### The Victims Roadmap

43. The explicit competence for measures on the rights of victims of crime introduced by the Lisbon Treaty is now supported by a Roadmap setting out general objectives for future legislation in this area, highlighting five specific measures to be pursued.<sup>68</sup> These are set out in Box 4.

#### BOX 4

##### The Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings

- Measure A: a new directive on the standing of victims in criminal proceedings which would apply to a broader category of victims, extend the rights previously available and give them more detailed and concrete expression. This has been agreed in the Council and is awaiting a first reading by the European Parliament.<sup>69</sup>
- Measure B: recommendations providing guidance and best practice to facilitate implementation of the new Directive on the standing of victims in criminal proceedings. No proposal has yet been published by the Commission.
- Measure C: mutual recognition of protection measures for victims in civil matters. The original Commission proposal for a “European Protection Order” has now been limited to protection granted in the course of criminal proceedings. It has been agreed in the Council and is awaiting a first reading by the European Parliament. It is now complemented by a proposal for the mutual recognition of protection measures in civil matters which is under negotiation in the Council.<sup>70</sup> Separate instruments were needed because the mutual recognition sought covered orders by both civil and criminal courts and distinct Treaty bases are required.
- Measure D: a review of the 2004 Directive on compensation to crime victims. This review has not yet been undertaken, but the Commission’s Work Programme for 2012 envisages bringing forward legislation to ensure that victims of crime receive fair and appropriate compensation in all Member States.
- Measure E: recommendations, guidance and best practice in implementing EU legislation concerning vulnerable victims.

44. The protection of victims is also enhanced by the recently adopted provisions to protect victims of human trafficking and victims of child sex abuse and sexual exploitation included in directives intended to combat these crimes.<sup>71</sup> We have supported, in principle, the proposals that have been brought forward.<sup>72</sup>

<sup>68</sup> Council Resolution of 10 June 2011, OJ C 187, 28.6.2011, p1.

<sup>69</sup> COM(2011) 275.

<sup>70</sup> COM(2011) 276. This is based on the civil judicial co-operation provisions of the TFEU.

<sup>71</sup> Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629; and Directive 2011/92/ JHA on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

<sup>72</sup> Relevant correspondence concerning these proposals is found at <http://www.parliament.uk/documents/lords-committees/eu-sub-com-e/cwm/CwMSubEMay-Oct10.pdf> and <http://www.parliament.uk/documents/lords-committees/eu-sub-com-e/cwm/CwMSubEDec2010onwards.pdf>

## CHAPTER 4: THE SCOPE OF EU LEGISLATION

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### The requirement to facilitate mutual recognition

45. Professor Mitsilegas discussed the requirement that EU legislation must be necessary to facilitate mutual recognition.<sup>73</sup> He criticised post-Lisbon legislation and proposals on the ground that they did not seek to demonstrate that the specific criminal procedure measure in question facilitated a specific aspect of mutual recognition. Rather, they employed vague and general assertions that the measure in question would facilitate mutual recognition. His example was that proposals to establish minimum defence rights should be justified on the specific basis that they facilitate the EAW. He also found it hard to make any linkage between procedural rights for victims and mutual recognition, criticising the recent Commission Communication introducing a package of victims' rights for not doing so.<sup>74</sup> Professor Peers also raised a concern about the weakness of the link between facilitating mutual recognition and the position of crime victims in other Member States. However he saw the political necessity of addressing the needs of victims.<sup>75</sup>
46. On the other hand Mr Tim Jewell of the Ministry of Justice, who gave evidence with the Lord Chancellor, did not agree that the wording of the Treaty required such a specific link, although he accepted that the more general and subjective the link the more difficult it would be to show that the setting of minimum standards was necessary to facilitate mutual recognition.<sup>76</sup> In its written evidence the Ministry of Justice acknowledged that EU legislation can play an important role in supporting instruments of mutual recognition such as the EAW.<sup>77</sup>
47. Baroness Ludford put forward the proposition that minimum standards of defendants' rights benefit law enforcement authorities by avoiding disruptive challenge or political controversy which might otherwise frustrate the application of EU mutual recognition measures.<sup>78</sup>
48. In considering Professor Mitsilegas' argument we take into account that Article 82(2) TFEU is capable of being read in a manner that does not require a specific linkage, and that to read it as he suggests would result in the overturning of valuable legislation assisting victims of crime and protecting the rights of defendants. The latter, if not as popular as assisting victims, is nevertheless consonant with the fundamental values of the EU. Furthermore the assessment of what is necessary or otherwise in order to facilitate mutual recognition is one which the legislator is best placed to make and therefore is likely to be given a margin of appreciation.
49. **The Treaty requirement that the EU should only legislate on criminal procedure to the extent necessary to facilitate mutual recognition is an important limitation on competence. However, it does not go so far as to require a criminal procedure measure to demonstrate that it**

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<sup>73</sup> Professor Mitsilegas, paras 2–8.

<sup>74</sup> COM(2011) 274.

<sup>75</sup> Q 16.

<sup>76</sup> Q 73.

<sup>77</sup> Ministry of Justice, para 13.

<sup>78</sup> Baroness Ludford, para 14.

**facilitates a specific mutual recognition measure. It is enough that the criminal procedure measure provides support for the operation, generally, of mutual recognition.**

### **The cross-border dimension**

50. We also considered whether EU legislation could only prescribe minimum rules applicable to criminal procedure in cases involving a cross-border dimension, in the light of the Treaty requirement that EU legislation must be necessary to facilitate mutual recognition “in criminal matters having a cross-border dimension”.
51. Whilst the Bar Council and the City of London Law Society’s Corporate Crime and Corruption Committee accepted that this could be one reading of Article 82(2) TFEU, the other legal evidence did not subscribe to this view.<sup>79</sup> Furthermore it was pointed out that it would be impractical to seek to limit EU legislation to cross-border cases as it is often impossible to tell at the beginning of a case whether there might be a cross-border element to it.<sup>80</sup> The Bar Council mooted the possibility that EU legislation could be limited to cross-border cases and Member States encouraged to raise their domestic standards. Whilst this would not pose difficulties for the UK, it considered that this approach might fall short of the desired result in certain other Member States.<sup>81</sup>
52. We note, however, that no legislation or proposal has been challenged on this ground. Nor does examination of the text of Article 82(2) TFEU force an impractical approach. Indeed it seems to us that the stronger reading of this Article is that the minimum criminal procedure rules are not limited cases with a cross-border dimension, rather they must facilitate mutual recognition which has a cross-border dimension.
53. **We accept the evidence given to us that it is not practical or strictly necessary for EU criminal procedure legislation to be limited to cross-border offences.**

### **Subsidiarity**

54. Even if legislation is within the strict competence laid down in the Treaty, the principle of subsidiarity applies to the area of criminal procedure. Under this principle the EU should only legislate if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States but can, rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. Professor Mitsilegas suggested that EU proposals on victims’ rights merited careful examination of their compatibility with the principle of subsidiarity, without suggesting that the proposals to date violated it.<sup>82</sup>
55. **Although, strictly, a legal test, compliance with subsidiarity involves an assessment by the legislator on a case by case basis of the added**

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<sup>79</sup> Bar Council, para 2.4 and City of London Law Society’s Corporate Crime and Corruption Committee, para B2; contrasted with Q9 (Professor Spencer and Professor Peers); Q 44 (Law Society); Faculty of Advocates, para 10; CCBE, para 29.

<sup>80</sup> Q 9 (Professor Peers and Professor Spencer); Bar Council, para 2.4; Ministry of Justice, para 43.

<sup>81</sup> Bar Council, para 2.4.1.

<sup>82</sup> Professor Mitsilegas, para 8.

**value of legislating at an EU level. In relation to the criminal procedure proposals brought forward for scrutiny to date we have not yet found it necessary to raise a subsidiarity objection, but we shall continue to scrutinise this aspect of any future proposals.**

## CHAPTER 5: CAN EU CRIMINAL PROCEDURE LEGISLATION BRING ADDED VALUE?

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56. In this Chapter we look in more detail at whether EU legislation can, in principle, bring added value. We have not sought to examine the detailed substantive provisions of each proposal as that is the proper function of our scrutiny of each proposal.
57. Our witnesses placed great emphasis on the potential benefit of minimum criminal procedure rules to EU citizens travelling in other Member States and we start by looking at this point in more detail. However, even if such a benefit is established, that cannot alone justify EU legislation, given the limitations imposed by the Treaty. There is also the question whether existing or alternative measures can achieve the overriding Treaty objective of facilitating mutual recognition. We examine this question further by considering—
- the extent to which mutual recognition measures already incorporate human rights safeguards,
  - whether existing ECHR provisions already meet the objectives of EU legislation, and
  - whether non-legislative measures, such as judicial training, could meet these objectives.

### EU citizens travelling abroad

58. Our witnesses overwhelmingly supported the proposition that EU legislation in the field of criminal procedure could be of direct benefit to those who travel from their home Member State to another and find themselves accused of a crime or become victims of a crime; and that this was particularly the case for UK citizens travelling abroad because they expected to have rights which were of the same high standard as in the UK. Fair Trials International provided two examples in respect of defendants to support their view that we were still a long way from an EU where every Member State offered sufficient fundamental rights protections for defendants.<sup>83</sup> Mrs Froud and Mrs Hughes told us about their sons, who had been attacked abroad. These examples are outlined in Box 5.

### BOX 5

#### UK citizens as defendants and victims in other Member States

- In 2004 Gary Mann was convicted in Portugal for football violence following a trial in Portugal and accepted voluntary deportation rather than implementation of a two year prison sentence. The next year a British court refused to impose a football banning order, and described the Portuguese trial as “so unfair as to be incompatible with [his] right to a fair trial”. In 2009 he was arrested under an EAW to serve this sentence and the UK court felt unable to refuse extradition.<sup>84</sup>

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<sup>83</sup> Fair Trials International, para 6.

<sup>84</sup> Fair Trials International, para 17.

- Following the death of Jonathan Hiles in a nightclub on the Greek island of Zakynthos, Andrew Symeou was extradited from Britain to Greece in 2009 to face a manslaughter charge. He was initially remanded in custody because, as a non-national, it was assumed that he represented a flight risk. The prison conditions were very poor. He was only released after 11 months and was eventually acquitted at trial on the prosecutor's recommendation.<sup>85</sup>
- Mrs Froud's son Matthew died of head injuries in a cocktail bar on Zakynthos in 2008, subsequently determined to be an unlawful killing by a British coroner. No-one has yet been brought to trial. Mrs Froud is deeply unsatisfied with the post-mortem examination in Greece, the investigation by the Greek police and the actions of the Greek prosecuting authorities. The case was closed by the Greek authorities in January 2010, a decision which was overturned in April 2010 in proceedings she launched in the Greek court. She feels that, as a victim, she "had few rights and little support".<sup>86</sup>
- Mrs Hughes' son Robert was attacked in Malia in 2008 leaving him brain damaged. Although five of his alleged attackers were sent back to Greece for trial in 2010 under an EAW, the trials were delayed pending the extradition of a sixth, and the five have been allowed to return to the UK on bail. Mrs Hughes, too, is critical of the investigation by Greek police and the support for both her son and herself as victims. She considers there to be an imbalance between the rights of defendants and those of victims.<sup>87</sup>

59. The Law Society started from the premise that being arrested for a crime is an isolating process, and becomes doubly so if it occurs abroad under a foreign process and in a foreign language.<sup>88</sup> Baroness Ludford MEP also highlighted the possibility of discrimination in the treatment of foreign nationals, in practice, within a Member State's criminal justice system which could be alleviated by EU minimum rights.<sup>89</sup> This is illustrated by the case of Andrew Symeou.
60. There was a widely shared view that UK standards were high and that the negotiation of EU legislation was a way to influence other Member States to raise standards to the UK level to the benefit of travelling UK citizens.<sup>90</sup> Specifically in relation to defendants' rights, Vice-President Reding indicated that she is lobbied by UK citizens and British MEPs for more to be done to protect UK citizens when they go abroad.<sup>91</sup> Professor Spencer described how the Police and Criminal Evidence Act 1984 started a transformation in the UK resulting in UK practices, such as the tape recording of interviews, which

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<sup>85</sup> Fair Trials International, paras 46 and 47.

<sup>86</sup> Mrs Joanne Froud.

<sup>87</sup> Mrs Margaret Hughes.

<sup>88</sup> Q 28.\*\*

<sup>89</sup> Baroness Ludford, para 14.

<sup>90</sup> Bar Council, para 1.1.3; Ministry of Justice, para 32; City of London Law Society's Corporate Crime and Corruption Committee, para A(i).

<sup>91</sup> Q 49.



were superior to those of other Member States.<sup>92</sup> The Law Society considered that some eastern European Member States had a worrying lack of protection and thought that many lawyers throughout Europe regarded the UK jurisdictions as a model of what they would like to see in their own countries.<sup>93</sup> The provisions for right of access to a lawyer in England and Wales were seen as a model, by both the Law Society and Association of Chief Police Officers.<sup>94</sup>

61. As far as victims are concerned Vice-President Reding also praised the systems in place for supporting victims of crime in the UK,<sup>95</sup> whilst the Lord Chancellor recalled parliamentary pressure supporting constituents who had been victims of crime in other Member States, but who considered their treatment to have been unsatisfactory.<sup>96</sup> Professor Spencer was of the view that, realistically, EU legislation trying to raise standards has the best chance of actually raising them.<sup>97</sup>
62. **There are legitimate concerns that EU citizens who find themselves involved in the criminal justice system of another Member State, either as defendants or as victims of crime, are disadvantaged and, in the case of British citizens, may find themselves with fewer rights than they would expect in their own country. Having minimum rules operable throughout the EU can materially improve their position.**

#### Human rights safeguards in mutual recognition legislation

63. The ECHR is widely considered as providing the benchmark for minimum human rights standards. The rights it confers are recognised in EU law as a constituent element of “general principles of the Union’s law”<sup>98</sup> and of the Charter of Fundamental Rights of the European Union. Some of the rights set out in the Charter correspond directly to those in the ECHR.<sup>99</sup> The Charter, which has the same legal status as the Treaties themselves, is primarily addressed to Union institutions, in order to ensure that EU legislation conforms to fundamental rights, but it also applies to Member States “only when they are implementing Union law”.<sup>100</sup>
64. Each item of EU legislation on mutual recognition already asserts in its preamble that the measure conforms to the ECHR and the Charter of Fundamental Rights of the European Union, and therefore does not inhibit mutual recognition being refused on the grounds of violation of either.
65. The measures covering mutual recognition of confiscation orders, financial penalties and pre-trial detention also include a provision to the same effect in their substantive provision setting out the scope of the legislation. However

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<sup>92</sup> Q 12.

<sup>93</sup> Q 33.\*\*

<sup>94</sup> QQ 30–32.\*\*

<sup>95</sup> Q 59.

<sup>96</sup> Q 75.

<sup>97</sup> Q 8.

<sup>98</sup> The general principles of EU law have been developed by the Court of Justice in order to assist in interpreting EU law and in testing its validity.

<sup>99</sup> Articles 4 and 47 of the Charter cover the prohibition of torture and inhuman or degrading treatment or punishment, and the right to an effective remedy and to a fair trial. These correspond to Articles 3 and 6 of the ECHR.

<sup>100</sup> Article 51(2); Q 5 (Professor Peers) and Q 56 (Vice-President Reding).

when it comes, in all cases, to listing the grounds on which mutual recognition can be refused in the substantive text, it is notable that they do not include violation of human rights, whereas there are several other grounds which are commonly listed.<sup>101</sup>

66. Professor Peers drew attention to the legislation on mutual recognition of financial penalties which includes a provision expressly permitting refusal of mutual recognition of a foreign financial penalty in the (albeit unlikely) event that the certificate from the requesting Member State explicitly indicates that there may have been a human rights breach. Therefore it is possible to infer that, in the absence of such a statement, refusal on this ground is impossible. He also indicated that a number of national courts have asked the Court of Justice for an interpretation of the EAW legislation on refusal on human rights grounds without receiving a clear answer. On the other hand, Professor Spencer expressed the view that, if faced with the issue, the Court of Justice would interpret the EAW as permitting refusal of mutual recognition if the national court of the Member State asked to execute an EAW has applied a plausible interpretation of human rights. Certainly in the UK, section 21 of the Extradition Act 2003 permits refusal of extradition on human rights grounds. Other Member States have similar domestic provisions.<sup>102</sup>
67. For its part, the CCBE welcomed the ability to decline mutual recognition on human rights grounds as a useful cross-check between Member States on human rights grounds rather than as an attack on the legal system of the requesting country.<sup>103</sup>
68. However, even if it is possible to refuse mutual recognition on human rights grounds it can prove difficult in practice to establish such a breach. Professor Peers indicated that it would be necessary to establish a flagrant disregard, which was particularly difficult to do in relation to the right to a fair trial conferred by Article 6 ECHR, because that involves arguing about something that might happen in the future in another country.<sup>104</sup>
69. **Current EU legislation, subject as it is to the Charter of Fundamental Rights, does permit the court of a Member State to refuse mutual recognition on human rights grounds in justified cases. However there is reluctance by judicial authorities to do so. If such refusal became widespread there is a risk of undermining mutual trust because it calls into question the human rights protection provided by the Member State requesting mutual recognition. EU legislation setting down minimum rights can help avoid this risk.**

### The European Convention on Human Rights

70. Our witnesses identified three broad areas where EU legislation could be regarded as bringing added value over and above rights conferred by the ECHR.

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<sup>101</sup> Such common grounds for refusal of mutual recognition include: that the person concerned has already been prosecuted for the offence (*ne bis in idem*); that the activity in question is not a crime in the requested Member State (dual criminality); the offence is time barred in the requested Member State or the person could not be prosecuted there because of immunity granted there or because they are below the age of criminal responsibility.

<sup>102</sup> Q 3.

<sup>103</sup> Q 29.

<sup>104</sup> Q 3. This is borne out by domestic case law such as *Symeou v Greece* [2009] EWHC 897 (Admin).

*The coverage of EU legislation*

71. The ECHR does not provide comprehensive coverage. For example, it is silent on the rights of victims of crime<sup>105</sup> although some rights conferred by the ECHR, such as those governing the time for bringing a defendant to trial, and requiring a proper investigation of a death, indirectly assist the victims of crime.
72. Furthermore EU legislation can add a level of detail to broadly drawn ECHR rights. For example, the ECHR right to a fair trial includes the specific right for a person charged with an offence “to have the free assistance of an interpreter if he cannot understand or speak the language used in the court”. Professor Peers pointed out that this has been interpreted by the European Court of Human Rights at Strasbourg (the ECtHR) as covering the right to the translation of documents. EU Directive 2010/64, which is measure A on the criminal procedure Roadmap, now clarifies this ECHR right by including the right to interpretation of conversations with a lawyer and by imposing safeguards against waiver of a right to interpretation.<sup>106</sup> The Ministry of Justice also pointed out that this Directive has also added to the ECHR right the right to interpretation at the investigative stages of a criminal procedure, and the express clarification that translation must be of sufficient quality and applicable to essential documents.<sup>107</sup>
73. The flexibility of EU legislation was highlighted by the Bar Council as an advantage over the ECHR.<sup>108</sup> The qualified majority required in the EU Council and the agreement of the European Parliament required to adopt or amend EU legislation is less daunting than the unanimity of 47 even more diverse states needed to amend the ECHR. Furthermore, as JUSTICE pointed out, the ECHR and the ECtHR operate within a framework that tries to reach accord between 47 different countries which have a much wider breadth of different legal systems than even the 27 EU Member States.<sup>109</sup>

*The enforcement of EU legislation*

74. EU criminal procedure legislation adopted post-Lisbon takes the form of directives which are capable of having direct effect. As a consequence, any defendant who considers that they are being denied rights by state authorities can invoke those rights before the domestic court and seek an immediate and effective remedy in the course of the relevant criminal proceedings.<sup>110</sup> It is also possible for disputed issues of interpretation of the EU legislation to be resolved by referring the matter to the Court of Justice for guidance. In the ordinary course of events such guidance can be given in approximately 18 months, but there is a procedure for urgent cases, introduced specifically to deal with the expansion of the Court of Justice’s jurisdiction into matters of justice and home affairs, under which guidance can be delivered in about three months.<sup>111</sup>

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<sup>105</sup> Ministry of Justice, para 12.

<sup>106</sup> Q 5.

<sup>107</sup> Ministry of Justice, para 18.

<sup>108</sup> Bar Council, para 1.2.

<sup>109</sup> Q 37.

<sup>110</sup> Bar Council 1.2.

<sup>111</sup> Ministry of Justice, para 28.

75. Even before the Lisbon Treaty the Commission was able to monitor the effectiveness and implementation of EU legislation in the area of criminal procedure. However it was unable to take infringement proceedings for failure to implement, or for incorrect implementation. It was effectively limited to naming and shaming.<sup>112</sup> Following the Lisbon Treaty the Commission can now take infringement proceedings and recalcitrant Member States could find themselves, ultimately, facing a significant fine. The power of an individual to invoke direct effect of a directive, or of a national court to seek guidance on the interpretation of a EU directive, also have the indirect effect of encouraging full and correct implementation by all Member States.
76. This can be contrasted with the position under the ECHR. Individuals seeking to vindicate their rights under the ECHR must first of all exhaust domestic remedies and then bring proceedings before the ECtHR which currently has a backlog of over 150,000 cases with an average waiting time of five years. Even then the power of the ECtHR is to declare a breach, leaving the state party to resolve the violation itself.<sup>113</sup> It can order financial recompense to the person who has suffered a violation of his or her rights, but this is generally modest.
77. Of course, states which are party to the ECHR can choose to integrate ECHR rights within their own legal systems as has happened in the UK by the Human Rights Act 1998, which is intended to enable UK courts to vindicate ECHR rights, subject to parliamentary sovereignty, and to provide domestic remedies for breaches. That, however, is the choice of each Member State. Even if it were the case that each Member State has its own equivalent of the Human Rights Act this would not fill in the gaps in the ECHR or provide the extra clarification that EU legislation can provide.
78. **EU legislation brings a considerable added value over the ECHR in that it can be effectively enforced by individuals directly in all national courts and by the Commission through infringement proceedings. It also can cover matters not adequately covered by the ECHR and is more flexible.**

### Alternatives to criminal procedure legislation

79. The case for EU legislation is reduced if it is possible to facilitate mutual trust and mutual recognition by non-legislative means such as judicial training, judicial exchanges or by improving the mechanisms for liaison between judicial authorities.
80. Professor Spencer drew on his personal experience that judges do meet, and exchanges do take place, and that this builds up a greater understanding and good relations.<sup>114</sup> JUSTICE and the CCBE both considered that the alternatives to legislation were helpful, that there was still much that could be done in terms of training, but that this could only complement, not replace, the establishment of minimum standards by legislation.<sup>115</sup>

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<sup>112</sup> An exception is Directive 2004/80 on compensation to crime victims which has an internal market legal basis. On 31 March 2011 the Commission secured a fine from the Court of Justice on Greece of €3 million for late implementation of this Directive (Case C-407/09).

<sup>113</sup> Q 37 (JUSTICE).

<sup>114</sup> QQ 8 and 11.

<sup>115</sup> QQ 32 and 35.

81. Vice-President Reding accepted that mutual recognition has to be complemented by the judicial network that reinforces it, such as Eurojust and the European Judicial Network on criminal matters and by judicial training.<sup>116</sup> These are described in Box 6.

### BOX 6

#### **Eurojust and the European Judicial Network**

- Eurojust is an EU body whose role is to improve the fight against serious crime by facilitating optimal co-ordination of action for investigations and prosecutions covering the territory of more than one Member State. The Stockholm Programme calls for Member States to implement recent legislation on the strengthening of Eurojust.<sup>117</sup>
- The European Judicial Network is a network of national contact points for the facilitation of judicial co-operation in criminal matters which exchanges information, provides advice, and can act as an intermediary.

82. Vice-President Reding also pointed to a new judicial training programme that had been tabled by the Commission which aimed to train 700,000 practitioners in European law matters by 2020.<sup>118</sup> This has been the subject of scrutiny by our Committee and supported in principle, although we have observed that the financing of this programme is uncertain.
83. The Lord Chancellor saw both judicial training and improved judicial co-operation as helpful, but not a top priority.<sup>119</sup> The Ministry of Justice warned that it was not always the case that EU instruments are the right solution to protecting the rights of citizens in criminal proceedings across Member States, but accepted that EU legislation could play an important role in supporting mutual recognition.<sup>120</sup>
84. **Whilst non-legislative actions, such as improved judicial training and improvements to Eurojust and the European Judicial Network, are helpful in building mutual trust between judicial authorities, they can only complement, not replace, EU legislation setting minimum rights for defendants and victims.**

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<sup>116</sup> Q 54.

<sup>117</sup> Decision 2009/426.

<sup>118</sup> Communication from the Commission: Building Trust in EU-Wide Justice; a New Dimension to European Judicial Training, COM (2011) 551.

<sup>119</sup> Q 90.

<sup>120</sup> Ministry of Justice, paras 9 and 13.

## CHAPTER 6: EU CRIMINAL PROCEDURE LEGISLATION AND NATIONAL LAW

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85. Any EU criminal procedure legislation carries the risk of interference with the different criminal justice systems of the Member States which are based on very different legal traditions. This is recognised in the Treaty, which requires EU legislation to take account of the differences between the legal traditions of the Member States.
86. In this Chapter we examine the extent to which the differences between the legal traditions of Member States hinders the setting of minimum standards, and how far EU legislation and proposed legislation could adversely interfere in national law, taking the proposal for access to a lawyer, which has attracted widespread significant concern, as a case study.

### The impact of EU legislation on diverse national laws

87. The differences in the legal traditions of Member States are starkly illustrated by comparing the inquisitional system found, for example, in France and Germany and the adversarial system common to the UK jurisdictions and Ireland. In the former an investigation by police is commonly overseen by an examining magistrate, who is drawn from the judicial profession and such oversight is seen as providing protection for a defendant. Hence the French system of police detention known as “*garde à vue*”, which, until July 2010 when it was overturned by the French constitutional court in response to the ECtHR case of *Salduz*,<sup>121</sup> provided the framework for the detention and interrogation of suspects by police. It gave only limited protection of the sort found in the UK in the police station and the court process.<sup>122</sup>
88. These differences led the Faculty of Advocates to the view that it would not be realistic to seek to establish a harmonised system of criminal justice across the whole EU.<sup>123</sup> The Ministry of Justice agreed that it is neither necessary nor desirable to have harmonised EU-wide criminal procedure law as there are insufficient common denominators, but accepted that minimum standards can be developed at EU level where necessary.<sup>124</sup> The CCBE supported this approach, noting that the ECHR imposes certain rights upon diverse legal systems in any event.<sup>125</sup> The Law Society of Scotland, whilst generally welcoming EU criminal procedure legislation advised that care should be taken in framing the measures to ensure that they have at their core the protection of fundamental rights in accordance with the ECHR.<sup>126</sup> The Bar Council considered that neither the diversity of legal systems, nor the substantial residual competence reserved to Member States, need close the door to general, possibly EU-led, efforts for each of them to learn from each other’s best practice.<sup>127</sup> Indeed many witnesses felt able to recommend the UK standards as a benchmark for other Member States.

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<sup>121</sup> *Salduz v Turkey*, Case number 36391/02, judgment of 27 November 2008.

<sup>122</sup> Q 31 and 33 (Law Society).\*\*

<sup>123</sup> Faculty of Advocates, para 1(a).

<sup>124</sup> Ministry of Justice, para 4.

<sup>125</sup> CCBE, para 9.

<sup>126</sup> Law Society of Scotland.

<sup>127</sup> Bar Council, para 1.1.1.



89. Vice-President Reding emphasised that EU legislation was intended to complement the national criminal law systems, and that the Commission only made a proposal after in-depth consideration and consultation, for example with national experts, with European organisations of lawyers and the European Parliament. She accepted that it was not possible to adopt, as EU minimum standards, “the best solutions in the best Member States” as that would be too intrusive. Instead the Commission put forward “basic rights” in its proposals which, as a result of the EU legislative procedure, end up as a balance between the more ambitious European Parliament and the more cautious Council of Ministers.<sup>128</sup>
90. Professor Peers was of the view that EU legislation, on the whole, genuinely reflected the proviso in the Treaty that the diversity of legal traditions should be taken into account. Professor Spencer expressed the view that Roadmap measures on criminal procedure “did not involve anything that should scare the UK”.<sup>129</sup> These views were supported by the Bar Council, which considered that EU efforts to raise the standards in many other Member States should entail relatively little change to domestic law.<sup>130</sup> It is significant that the Government have opted in to all the criminal procedure proposals so far brought forward by the Commission with the exception of that on access to a lawyer. This is an indication that in their view the proposals were capable, through negotiation if necessary, of being turned into legislation that would be acceptable to the UK.
91. The position of victims is different in that the international law standards are not so well developed as those for defendants.<sup>131</sup> It is therefore less easy to base EU minimum standards on those found in international law. On the other hand such legislation is likely to have greater popular appeal. Vice-President Reding stressed to us that it was the story of Mrs Hughes, outlined in Box 5, that brought her to the victims Roadmap.<sup>132</sup> None of our witnesses pointed to any provision in the victims legislation or in the current proposals which is unnecessary and indeed the Government have so far opted in to all proposals.

### Case Study: the proposal for access to a lawyer

92. The risk posed by ambitious EU legislation is illustrated by the Commission’s proposal for access to a lawyer, on which detailed evidence was taken in the course of our scrutiny. This is the only proposal to which the UK has, so far, not opted in. The problem is not confined to the UK. The French, Belgian, Dutch and Irish Governments have joined the UK in writing to the Commission to comment adversely on this proposal;<sup>133</sup> and the European Affairs Committee of the French National Assembly has complained that this

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<sup>128</sup> QQ 50 and 51.

<sup>129</sup> QQ 9 and 12.

<sup>130</sup> Bar Council, para 3.1.3.

<sup>131</sup> There is a United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985 which does not have binding legal effect and, within the framework of the Council of Europe, a European Convention on the Compensation of Victims of Violent Crimes (which has been signed by 19 Member States and ratified by 16) and two Recommendations of the Committee of Ministers, No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure, and R (2006) 8 on assistance to crime victims.

<sup>132</sup> Q 46.

<sup>133</sup> <http://register.consilium.europa.eu/pdf/en/11/st14/st14495.en11.pdf>

proposal appears better suited to proceedings of the adversarial type.<sup>134</sup> We retain this proposal under scrutiny. The text is evolving through negotiation, but for the purposes of this Report, references to this proposal are references to the proposal as presented by the Commission.<sup>135</sup>

93. Professor Peers identified this proposal as being “ambitious” and having the biggest impact on national law, but thought that the Council had rejected the provisions which could be regarded as changing the core of national criminal procedure.<sup>136</sup> There were suggestions that in the formulation of this proposal the liberal instincts of the Commission had achieved the upper hand or that the lobbying of the Commission by lawyers and non-governmental organisations concerned with criminal defence had proved particularly effective.<sup>137</sup>
94. However they might have arisen, there were some serious concerns with the proposal. Frank Mulholland QC, the Lord Advocate, explained that, following the Supreme Court decision in the case of *Cadder*<sup>138</sup> and consequent recent changes to ensure compliance with the ECHR, Scottish law complied with the broad principle that there should be a right of access to a lawyer, but would not comply with the Commission’s proposal at the detailed level. The thrust of his concerns, which he described as “fundamental”, was that the proposal was framed in absolute terms without recognising the proper interest of the law enforcement authorities, compounded by a rule that evidence taken in contravention of the terms of the Directive must be regarded as inadmissible.<sup>139</sup> He was supported from the perspective of the law of England and Wales by ACPO. These concerns are summarised in Box 7.

### BOX 7

#### Concerns raised with the Commission’s proposal for a Directive on access to a lawyer

- The proposal requires suspects and accused persons to have access to a lawyer “as soon as possible” which in an extreme case could prevent a person who initially confesses to a crime from continuing to provide further details until access to a lawyer had been granted. These further details could include information needed for corroboration, to apprehend others or prevent further crime. It could also prevent a suspect providing information when being initially taken to a police station<sup>140</sup> and, according to ACPO, inhibit beneficial and informal “community resolution” of minor crimes.<sup>141</sup>
- The proposal requires access to a lawyer “upon carrying out any procedural or evidence gathering act at which the [suspected or accused] person’s presence is required or permitted as a right in accordance with national law, unless this would prejudice the acquisition of evidence”. This could require a lawyer to be present before a house could be searched for drugs or firearms, for example.<sup>142</sup>

<sup>134</sup> <http://www.assemblee-nationale.fr/13/europe/c-rendus/c0229.asp>

<sup>135</sup> COM (2011) 326.

<sup>136</sup> Q 13.

<sup>137</sup> Q 14 (Professor Peers) and Q 85 (Lord Chancellor).

<sup>138</sup> *Cadder v Her Majesty’s Advocate* [2010] UKSC 43.

<sup>139</sup> QQ 2, 3 and 10.\*\*

<sup>140</sup> QQ 3 and 19.\*\*

<sup>141</sup> Q 45.\*\*

<sup>142</sup> Q 3.\*\*



- The rule that evidence gathered in contravention of the Directive would be inadmissible “unless such evidence would not prejudice the rights of the defence” could result in the exclusion from evidence of a witness statement given by a person who subsequently becomes a suspect, or evidence which is “fruit of the poison tree” i.e. collected in the course of a line of investigation initiated by information provided by a suspect who did not have access to a lawyer.<sup>143</sup>
- The right of access to a lawyer is the right to face to face contact which may not be a reasonable use of resources and would present practical difficulties in remote areas.<sup>144</sup>
- There are no exceptions to the rule of confidentiality of communication with the lawyer, even for cases when the lawyer is involved in criminal activity.<sup>145</sup>

95. The Lord Advocate’s view was that these provisions go beyond the requirements of the ECHR and what is necessary to provide minimum safeguards.<sup>146</sup> Liberty strongly disagreed with this assessment of the proposal, and considered, in particular, that the words conditioning the absolute exclusion of evidence obtained in contravention of the proposal (“unless such evidence would not prejudice the rights of the defence”) was consistent with the rule, in England and Wales, allowing a judge to exclude evidence if it would adversely affect the fairness of the trial.<sup>147</sup> The Law Society accepted that the proposal went further than national law, but was content that it should, particularly in relation to face to face access to a lawyer and absolute lawyer-client confidentiality.<sup>148</sup> The Lord Chancellor accepted that the Commission may not have intended the apparent perverse effects of its proposal, but argued that, even so, the drafting ought to be clearer to ensure it was not capable of being misunderstood.<sup>149</sup>
96. In relation to the exercise of the UK opt-in, the views of witnesses depended on their approach to the substance of the proposal. Fair Trials International believed that the UK should have taken the lead in protecting the rights of accused persons across Europe by opting in to this proposal.<sup>150</sup> The Law Society, which welcomed both the raised standards of access and absolute lawyer-client confidentiality, was of the view that the proposal would not cause insurmountable difficulties even though it goes beyond UK law.<sup>151</sup>
97. The Lord Chancellor indicated that, although the UK did not opt in at the early stage, this was one of those cases where the UK has been able to negotiate with a view to opting in to the legislation once adopted because

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<sup>143</sup> Q 3 and Q 8; \*\* in *HM Advocate v P (Scotland)* [2011] UKSC 44 the Supreme Court decided that there was no absolute rule that evidence which was the fruit of the poison tree would violate a defendant’s ECHR rights.

<sup>144</sup> QQ 13 and 14. \*\*

<sup>145</sup> QQ 16 and 17. \*\*

<sup>146</sup> QQ 9 and 11. \*\*

<sup>147</sup> Q 40.

<sup>148</sup> Q 39; QQ 36 and 46.

<sup>149</sup> Q 84.

<sup>150</sup> Fair Trials International, para 11.

<sup>151</sup> Q 39.

other Member States were positive about UK participation and shared its concerns. He would be surprised if, at the end of the negotiations, the UK would not be able to opt in to the adopted legislation.<sup>152</sup> This view was echoed by the Bar Council.<sup>153</sup>

98. **As the example of the proposal for access to a lawyer demonstrates, EU minimum rules for criminal procedure can present a significant risk to the functioning of national criminal law systems. That risk can be greatly reduced by firmly grounding such legislation in the principles of the ECHR and other international law norms.**
99. **We agree with the Government that the proposal for access to a lawyer, in the form put forward by the Commission, would be too disruptive for the UK criminal justice systems and therefore support the Government's decision not to opt in. However, even in this exceptional case, we remain hopeful that the outcome of negotiations may be legislation to which the UK could opt in.**

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<sup>152</sup> Q 84.

<sup>153</sup> Bar Council 3.1.7.

## CHAPTER 7: FUTURE DEVELOPMENTS

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### Further development of EU criminal law

100. The further development of mutual recognition and EU criminal procedure law is foreseen in the Stockholm Programme, albeit in tentative terms. This is set out in Box 8.

#### BOX 8

#### Stockholm Programme measures for mutual recognition and criminal procedure

The Stockholm Programme envisages that mutual recognition could extend to all types of judgments and judicial decisions, and invites specific action on the following:

- A proposal for a comprehensive system for gathering evidence, now the EIO.
- An exploration of other means to facilitate the admissibility of evidence.
- An exploration of the results of the evaluation of the EAW and, where appropriate, further proposals to increase the efficiency and legal protection of individuals in the process of surrender by a step by step approach to other instruments of mutual recognition.
- A study on obstacles to cross-border enforcement of penalties and administrative decisions for road traffic offences, with, where necessary, further legislative and non-legislative initiatives to improve road safety.

It also sets out a long term aim of mutual recognition of judgments imposing certain types of disqualification.<sup>154</sup>

In respect of criminal procedure it calls for the recently adopted criminal procedure Roadmap to be implemented swiftly and to “examine further elements of minimum procedural rights for suspected persons, and to assess whether other issues, for instance the presumption of innocence, needs to be addressed, to promote better co-operation in this area”.<sup>155</sup>

In respect of victims it calls on the Commission and Member States—

- to examine how to improve legislation and practical support measures for victims, and to improve the implementation of existing measures;
- to offer better support to victims in other ways, such as existing European networks; and
- to examine the opportunity of making one comprehensive legal instrument on the protection of victims.<sup>156</sup>

101. Vice-President Reding signposted a greater ambition on the part of the Commission. She indicated that she was “fully persuaded that a European

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<sup>154</sup> Section 3.1.1.

<sup>155</sup> Section 2.4.

<sup>156</sup> Section 2.3.4.

system of criminal procedure law is not only desirable but essential. Cross-border crime happens and requires a cross-border mechanism to defeat it. Judicial co-operation between the Member States can function efficiently only if there is legislation and if there are procedures available.” She also pointed to the pressure from the European Parliament to legislate,<sup>157</sup> confirmed by Baroness Ludford.<sup>158</sup>

102. The Vice-President’s evidence is consonant with another indication of the Commission’s ambitions. Its Communication of September 2011, although directed at another area of EU criminal law,<sup>159</sup> began its very title with the phrase “Towards an EU Criminal Policy” and included the general assertion that EU legislation can add important value to existing national criminal law systems by fostering confidence for EU citizens to exercise their free movement rights through the adoption of a more effective fight against crime and the adoption of minimum standards for procedural rights; and to strengthen mutual trust among the judiciaries and law enforcement authorities of the Member States.<sup>160</sup>

103. The Commission’s 2012 Work Programme envisages that it will bring forward two proposals that are in accordance with the criminal procedure Roadmap:

- Providing special safeguards in criminal procedures for suspected or accused persons who are vulnerable.
- Defining minimum rules for legal aid, timetabled for 2013.

However it also signals future legislation going beyond the Roadmaps:

- Establishing limitation and prescription periods for cross-border road traffic accidents.
- Revising the 2004 Directive on compensation for victims of crime, whereas the victims Roadmap envisaged merely a prior review.

It also indicates that the Commission will issue a Green Paper in 2013 on the possible extension of minimum procedural rights.<sup>161</sup>

104. Measure F of the criminal procedure Roadmap was a Green Paper concerning the period of pre-trial detention which the Commission has also used to consult on the conditions of pre-trial detention. From our scrutiny of this Green Paper it appears that the Commission was essentially seeking factual information at this stage and not putting forward specific proposals. This is a particularly sensitive issue as it impacts on the costs of the criminal justice system to a similar extent, if not more, than legal aid, which is a criminal procedure Roadmap measure that is likely to prove controversial. However the need for a measure on pre-trial detention depends to a significant extent on the success of the legislation which has been adopted for the recognition of bail decisions.<sup>162</sup> If, in the light of this legislation, Member

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<sup>157</sup> QQ 46 and 49.

<sup>158</sup> Baroness Ludford, paras 2 and 5.

<sup>159</sup> The extent to which EU legislation in other policy areas should prescribe the criminal law sanctions that Member States should put in place to ensure enforcement.

<sup>160</sup> COM(2011) 573 “Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law”.

<sup>161</sup> COM(2011) 777.

<sup>162</sup> Q 16 (Professor Peers).

States are sufficiently ready to grant bail to citizens of other Member States then the period before trial, provided it remains within the bounds set by the ECHR, becomes less critical.

105. Our witnesses generally took a cautious approach to future developments beyond the Roadmaps. Whilst JUSTICE identified the presumption of innocence and the right to silence as areas of criminal procedure needing further EU legislation,<sup>163</sup> Professor Peers pointed out that the Commission had produced a Green Paper in 2006 on the presumption of innocence,<sup>164</sup> but that it did not thereafter make out a sufficient case for EU legislation on this issue.<sup>165</sup> He also issued a specific warning against EU legislation to make evidence which is admissible in one Member State automatically admissible in another. This would, in his opinion, require some degree of harmonisation of the law of evidence.<sup>166</sup>
106. A significant body of witnesses considered that mutual recognition should not be taken beyond the existing proposal for the European Investigation Order until the framework for minimum rights was in place.<sup>167</sup>
107. **We agree that no new proposal for mutual recognition should be brought forward until the current proposals for legislation under the two Roadmaps have been put in place and have had time to make an impact. In particular, very good justification is needed before further legislation on the admissibility of evidence is proposed.**
108. **Overall, existing EU criminal procedure legislation and current proposals provide benefits to British citizens travelling abroad, and to law enforcement authorities.**
109. **The Government should therefore continue to look favourably, in principle, at opting in to further Roadmap legislation bearing in mind particularly the influence that the UK can bring in raising standards across the EU to the benefit of travelling UK citizens, and the risk, if we do not opt in, that the trust placed in the UK criminal justice systems by judges of other Member States will be diminished.**

### **The UK opt-out of existing EU criminal law**

110. Protocol 36 to the Lisbon Treaty ensures that pre-Lisbon third pillar legislation continues in force, but measures “in the field of police and judicial co-operation in criminal matters” (which include criminal procedure legislation) are only subject, until December 2014, to the limited, pre-Lisbon, jurisdiction of the Court of Justice; and the Commission is not able to take infringement proceedings. However until May 2014 the UK is able to opt out from all the pre-Lisbon legislation. This is an all or nothing decision which, if taken, triggers another possible decision by the other Member States to determine whether there are unavoidable financial consequences which the UK must bear. The opt-out decision is tempered by the possibility of the UK subsequently opting back in to individual measures. If it does, the application is treated as if it were an application for the UK to participate under Protocol 21 in a measure already adopted by the other Member States,

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<sup>163</sup> Q 34.

<sup>164</sup> COM(2006) 174.

<sup>165</sup> Q 16.

<sup>166</sup> Q 2.

<sup>167</sup> Q 2 (Professor Peers); CCBE, para 19.

subject to the additional proviso that “the Union institutions and the United Kingdom shall seek to re-establish the widest possible measure of participation of the United Kingdom in the *acquis* of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence”.

111. If a pre-Lisbon third pillar measure is amended by post-Lisbon legislation then the whole of the legislation, as amended, becomes subject to the full post-Lisbon regime insofar as concerns those Member States participating in the amending instrument and no question of a UK opt-out arises.<sup>168</sup> In a Declaration to the Lisbon Treaty the EU institutions were invited to adopt, in appropriate cases and as far as possible before the expiry of the transitional period, new legislation amending and replacing the pre-Lisbon measures.<sup>169</sup>
112. The Government have provided a list of the instruments which are presently affected by the opt-out.<sup>170</sup> These include the pre-Lisbon mutual recognition legislation listed in Box 1, and the 2001 Framework Directive on the standing of victims in criminal proceedings for which a post-Lisbon replacement is under negotiation and likely to be adopted before the opt-out decision is taken, and the 2002 Framework Decision on countering terrorism which includes a minor provision for the benefit of victims of terrorism.<sup>171</sup> Further repeals and replacements of existing third pillar legislation in the areas of mutual recognition or criminal procedure are not in prospect.<sup>172</sup>
113. The Bar Council described the opt-out decision as “a very delicate and important tactical decision”<sup>173</sup> whilst Professor Peers drew attention to the possibility that the UK could exercise the opt-out and then quickly opt back in to those measures which it wanted to retain, but cautioned that this could not only cause political problems but would also leave a gap that could cause a number of legal problems.<sup>174</sup> Professor Spencer alerted us to the “unthinkable mess” that would ensue in relation to extradition if we were to opt out of the EAW.<sup>175</sup>
114. The Lord Chancellor has indicated that the Government’s consideration of the opt-out decision has only just started with the compilation of the list of measures to which it applied and no collective ministerial decision has yet been taken.<sup>176</sup> He too was sceptical that the UK would be allowed to take a “pick and mix” approach. But in any event he gave an assurance that no decision would be taken without giving both Houses of Parliament an opportunity to vote on it.<sup>177</sup>
- 115. Although the decision whether to opt out of pre-Lisbon third pillar legislation is unlikely to involve any significant EU criminal**

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<sup>168</sup> Articles 9 and 10.

<sup>169</sup> Declaration 50.

<sup>170</sup> Letter of 21 December 2011 from the Home Secretary, available at <http://www.openeurope.org.uk/Content/Documents/Pdfs/JHA2014choice.pdf>

<sup>171</sup> The 2004 Directive on relating to compensation for victims of crime was not a third pillar measure.

<sup>172</sup> Q 26 (Professor Peers).

<sup>173</sup> Bar Council, para 3.3.3.

<sup>174</sup> Q 24.

<sup>175</sup> Q 24.

<sup>176</sup> Q 71.

<sup>177</sup> Q 70.

**procedure legislation, there is nevertheless likely to be a significant body of subsisting EU mutual recognition legislation which will be involved. Opting out of this legislation would have significant repercussions on UK criminal enforcement. We share the scepticism that it will be possible for the UK to “pick and mix” by opting out of all the subsisting pre-Lisbon legislation and immediately opting back in to some only.**

- 116. We welcome the Government’s assurance that the opt-out decision will be subject to debate and vote in both Houses of Parliament. The questions raised by Protocol 36 are wider than the subject of this Report and we plan to undertake a separate inquiry by this Committee in 2013, so that the Government will have our views well in advance of the deadline of May 2014.**

## CHAPTER 8: SUMMARY OF CONCLUSIONS

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### The development of criminal procedure law

117. The legislation that has been adopted for mutual recognition in criminal matters has been subject to some justified criticism, and its implementation by Member States has been poor. Nevertheless mutual recognition is a practical necessity in order to combat cross-border crime and has already demonstrated its potential benefit as an effective tool to fight cross-border crime. However for that potential to be fully realised there must be confidence, on the part of the judicial authorities and also of the general public, that giving effect to judicial decisions made in other Member States will not result in injustice or unfairness (paragraph 25).
118. The Lisbon Treaty changes have facilitated and given impetus to the adoption of EU criminal procedure legislation (paragraph 30).

### The UK opt-in

119. In practice the case by case approach to the UK opt-in set out in the Coalition Agreement has resulted in the Government opting in to proposals for criminal procedure legislation. We agree that the UK should opt in to proposals for criminal procedure legislation at an early stage unless there is clear justification for not doing so (paragraph 40).
120. It is notable that the emergency brake has not yet been used by any Member State in relation to criminal procedure legislation (paragraph 42).

### The scope of EU criminal procedure legislation

121. The Treaty requirement that the EU should only legislate on criminal procedure to the extent necessary to facilitate mutual recognition is an important limitation on competence. However, it does not go so far as to require a criminal procedure measure to demonstrate that it facilitates a specific mutual recognition measure. It is enough that the criminal procedure measure provides support for the operation, generally, of mutual recognition (paragraph 49).
122. We accept the evidence given to us that it is not practical or strictly necessary for EU criminal procedure legislation to be limited to cross-border offences (paragraph 53).
123. Although, strictly, a legal test, compliance with subsidiarity involves an assessment by the legislator on a case by case basis of the added value of legislating at an EU level. In relation to the criminal procedure proposals brought forward for scrutiny to date we have not yet found it necessary to raise a subsidiarity objection, but we shall continue to scrutinise this aspect of any future proposals (paragraph 55).

### The value of EU criminal procedure legislation

124. There are legitimate concerns that the EU citizens who find themselves involved in the criminal justice system of another Member State, either as defendants or as victims of crime, are disadvantaged and, in the case of British citizens, may find themselves with fewer rights than they would



expect in their own country. Having minimum rules operable throughout the EU can materially improve their position (paragraph 62).

125. Current EU legislation, subject as it is to the Charter of Fundamental Rights, does permit the court of a Member State to refuse mutual recognition on human rights grounds in justified cases. However there is reluctance by judicial authorities to do so. If such refusal became widespread there is a risk of undermining mutual trust because it calls into question the human rights protection provided by the Member State requesting mutual recognition. EU legislation setting down minimum rights can help avoid this risk (paragraph 69).
126. EU legislation brings a considerable added value over the ECHR in that it can be effectively enforced by individuals directly in all national courts and by the Commission through infringement proceedings. It also can cover matters not adequately covered by the ECHR and is more flexible (paragraph 78).
127. Whilst non-legislative actions, such as improved judicial training and improvements to Eurojust and the European Judicial Network, are helpful in building mutual trust between judicial authorities, they can only complement, not replace, EU legislation setting minimum rights for defendants and victims (paragraph 84).

#### **EU legislation and national law**

128. As the example of the proposal for access to a lawyer demonstrates, EU minimum rules for criminal procedure can present a significant risk to the functioning of national criminal law systems. That risk can be greatly reduced by firmly grounding such legislation in the principles of the ECHR and other international law norms (paragraph 98).
129. We agree with the Government that the proposal for access to a lawyer, in the form put forward by the Commission, would be too disruptive for the UK criminal justice systems and therefore support the Government's decision not to opt in. However, even in this exceptional case, we remain hopeful that the outcome of negotiations may be legislation to which the UK could opt in (paragraph 99).

#### **Future developments**

130. We agree that no new proposal for mutual recognition should be brought forward until the current proposals for legislation under the two Roadmaps have been put in place and have had time to make an impact. In particular, very good justification is needed before further legislation on the admissibility of evidence is proposed (paragraph 107).
131. Overall, existing EU criminal procedure legislation and current proposals provide benefits to British citizens travelling abroad, and to law enforcement authorities (paragraph 108).
132. The Government should therefore continue to look favourably, in principle, at opting in to further Roadmap legislation bearing in mind particularly the influence that the UK can bring in raising standards across the EU to the benefit of travelling UK citizens, and the risk, if we do not opt in, that the trust placed in the UK criminal justice systems by judges of other Member States will be diminished (paragraph 109).

133. Although the decision whether to opt out of pre-Lisbon third pillar legislation is unlikely to involve any significant EU criminal procedure legislation, there is nevertheless likely to be a significant body of subsisting EU mutual recognition legislation which will be involved. Opting out of this legislation would have significant repercussions on UK criminal enforcement. We share the scepticism that it will be possible for the UK to “pick and mix” by opting out of all the subsisting pre-Lisbon legislation and immediately opting back in to some only (paragraph 115).
134. We welcome the Government’s assurance that the opt-out decision will be subject to debate and vote in both Houses of Parliament. The questions raised by Protocol 36 are wider than the subject of this Report and we plan to undertake an inquiry by this Committee in 2013, so that the Government have our views well in advance of the deadline of May 2014 (paragraph 116).

## **APPENDIX 1: JUSTICE AND INSTITUTIONS SUB-COMMITTEE**

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The Members of the Sub-Committee which conducted this inquiry were:

Lord Anderson of Swansea  
Lord Blackwell  
Lord Bowness (Chairman)  
Lord Boyd of Duncansby  
Lord Dykes  
Lord Elystan-Morgan  
Lord Maclennan of Rogart  
Baroness O'Loan  
Lord Renton of Mount Harry  
Lord Rowlands  
The Earl of Sandwich  
Lord Temple-Morris

### **Interests declared by Members which are relevant to this inquiry:**

Lord Anderson of Swansea  
*Barrister-at-law (non-practising)*

Lord Bowness  
*Solicitor and Notary Public*

Lord Boyd of Duncansby  
*Solicitor Advocate qualified in Scotland and a former Lord Advocate*

The Members of the European Union Committee who attended the meeting at which the Report was approved:

Lord Bowness  
Lord Carter of Coles  
Lord Dear  
Lord Dykes  
Lord Foulkes of Cumnock  
Lord Hannay of Chiswick  
Lord Harrison  
Baroness Howarth of Breckland  
Lord Jopling  
Lord Richard  
Lord Roper (Chairman)  
The Earl of Sandwich  
Lord Teverson  
Lord Tomlinson  
Baroness Young of Hornsey

### **During consideration of the Report the following Member of the EU Committee declared interests which are relevant to this inquiry:**

Lord Dear  
*Previously senior officer in UK police forces  
Assistant Commissioner, Metropolitan Police: 1980–85  
Chief Constable, West Midlands: 1985–90  
HM Inspector of Constabulary: 1990–1997*

**Declarations of Interests:**

A full list of Members' interests can be found in the Register of Lords Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>

## APPENDIX 2: LIST OF WITNESSES

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Evidence is published online at [www.parliament.uk/hleue](http://www.parliament.uk/hleue) and available for inspection at the Parliamentary Archives (+44 (0)20 7219 5314).

The evidence is listed below in chronological order of oral evidence session and in alphabetical order.

### Oral evidence in chronological order

- QQ 1–26 Professor John Spencer, Selwyn College, University of Cambridge  
Professor Steve Peers, University of Essex
- QQ 27–45 Mr Ilias Anagnostopoulos, CCBE representative  
Dr Anna Odby, Law Society representative  
Jodie Blackstock, JUSTICE representative
- QQ 46–64 Vice-President Viviane Reding, European Commission (*via videolink*)
- QQ 65–91 Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice

### Alphabetical list of all witnesses

*Witnesses marked with \* gave both written and oral evidence:*

- Bar Council of England and Wales
- City of London Law Society's Corporate Crime and Corruption Committee
- \* Council of Bars and Law Societies of Europe (CCBE)
- \* Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Justice Secretary
- Faculty of Advocates
- Fair Trials International
- Mrs Joanne Froud
- Mrs Margaret Hughes
- \* JUSTICE
- \* Law Society of England and Wales
- Law Society of Scotland
- Baroness Sarah Ludford MEP
- \* Ministry of Justice
- Valsamis Mitsilegas, Professor of European Criminal Law, Queen Mary, University of London
- \* Professor Steve Peers, University of Essex
- \* Vice-President Viviane Reding, European Commission (*via videolink*)
- \* Professor John Spencer, Selwyn College, University of Cambridge

### **The Sub-Committee's scrutiny of the access to a lawyer proposal**

*Witnesses marked with \*\* gave oral evidence in connection with the Commission's proposed Directive on the right of access to a lawyer and on the right of notification of custody to a third person in criminal proceedings and on the right to communicate upon arrest (Doc 11497/11):*

- \*\* QQ 1–26 The Lord Advocate, Frank Mulholland QC
- \*\* QQ 27–53 Alex Marshall, Chief Constable, Hampshire Police
- \*\* QQ 27–53 Andy Adams, Assistant Chief Constable, Kent Police
- \*\* QQ 27–53 Ian Kelcey on behalf of the Law Society of England and Wales

## APPENDIX 3: CALL FOR EVIDENCE

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The Sub-Committee on Justice and Institutions is conducting an inquiry into aspects of EU criminal justice policy and invites you to submit written evidence to the inquiry. Please note the limitations on the scope of this inquiry mentioned below.

### Introduction

There is now a growing body of EU legislation in the field of criminal justice, including measures in the areas of criminal procedure with which our inquiry is concerned. Perhaps the most high profile is the European Arrest Warrant, but there are also measures in relation to the status of victims, on mutual assistance in gathering evidence and on pre-trial bail. The Commission and Member States have made a number of proposals since the new arrangements for an area of freedom, security and justice set out in the Lisbon Treaty have come into force.

The Sub-Committee on Justice and Institutions has scrutinised individual measures as they have been proposed and retains under scrutiny a number of recent proposals. It has also undertaken inquiries into criminal justice policy.<sup>178</sup> The Sub-Committee now seeks to assess this developing area of EU policy insofar as it relates to particular areas of EU competence.

### *Scope of the inquiry*

In terms of EU competence, the inquiry is limited to the following areas, broadly those referred to in Article 82(2) of the Treaty on the Functioning of the EU (TFEU)—

- investigation of offences,
- evidence,
- pre-trial procedure,
- procedural rights of suspects and defendants,
- the position of victims of crime.

The inquiry will not consider other areas of criminal justice policy, as set out in Articles 82–87 TFEU.

### *Issues*

In relation to those areas of policy, the inquiry will focus on three broad themes, on which we would welcome views. Specific questions are set out in italics:

#### **(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?

Are EU instruments necessary to safeguard the rights of citizens involved in criminal proceedings, in addition to the European Convention on Human Rights,

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<sup>178</sup> See our Reports: *Procedural Rights in Criminal Proceedings* (February 2005); *European Arrest Warrant—Recent Developments* (April 2006); *Breaking the deadlock: what future for EU procedural rights* (January 2007); *European Supervision Order* (July 2007); *Procedural rights in EU criminal proceedings—an update* (May 2009).

the EU Charter of Fundamental Rights and the other multilateral and bilateral agreements?

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?

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?

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

**(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?

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

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

**(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.

You need not respond to all those points, and we welcome views on any other aspects of the matters within the scope of the inquiry.

**Written evidence is invited in response to this Call for Evidence, to arrive no later than 7 December 2011.**

3 November 2011