HOUSE OF LORDS

EUROPEAN UNION COMMITTEE

HOME AFFAIRS, HEALTH AND EDUCATION SUB-COMMITTEE

Future Justice and Home Affairs Programme (2015-2019) Oral and Written Evidence

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Evidence Session No. 2 *Heard in Public* *Questions 15 - 28*

WEDNESDAY 27 NOVEMBER 2013

Members present

Lord Hannay of Chiswick (Chairman)
Viscount Bridgeman
Lord Faulkner of Worcester
Lord Hodgson of Astley Abbotts
Lord Judd
Lord Morris of Handsworth
Baroness Prashar
Lord Rowlands
Lord Sharkey
Earl of Stair
Lord Wasserman

Examination of Witnesses

Mike Kennedy, **Sarah Garvey**, Law Society of England and Wales, and **Professor Estella Baker**, Leicester De Montfort Law School

Q15 The Chairman: Thank you very much for coming along. I should remind you that this evidence session is public and is being broadcast. A note is being taken and a copy of the transcript will be sent to you to give you the opportunity to make minor corrections to it, although in fact it will be published online in an uncorrected form before that. The purpose of this session, which I am sure you know because you have responded to our call for evidence, is to go over the ground that we wish to cover in our current inquiry. It is about the future justice and home affairs programme of the EU, the one that is likely to emerge during the course of 2014 and probably to be agreed by the European Council in December 2014. It is likely to be called the Rome Programme, following the Stockholm, Hague and Tampere programmes. What we trying to do is amass as much evidence as we can about

what people like yourselves, in civil society and institutions that are interested in this area, think about what should go in before we give any thoughts on the subject ourselves. With that, I would ask you very kindly to introduce yourselves. If any of you wished to make an opening statement, that is entirely acceptable to the Committee, but if you wish to go straight to the questions, that is equally acceptable.

Professor Estella Baker: I am Estella Baker, Professor of European Criminal Law and Justice at De Montfort University in Leicester and a member of the European Commission's expert group on EU criminal policy.

Sarah Garvey: My name is Sarah Garvey, and I work at Allen & Overy, an international law firm in London. I am a member of the Law Society's EU Committee, and perhaps just by way of clarification and possibly disclaimer, I focus on private international law and I am an expert in the area. On an almost daily basis, I advise clients on issues such as governing law, jurisdiction clauses, arbitration and immunity. What I do not specialise in is criminal law, so I would defer on that to others on the panel. As a result of the work I do, I spend a lot of time reviewing EU instruments—Rome I, Rome II, the Brussels Regulation—advising not just UK-based but international clients who might be thinking of choosing English law in their contracts or of choosing the English courts as their dispute resolution mechanism or London arbitration. I advise clients worldwide on these issues, and obviously the EU instruments are hugely important as part of that conflicts of law analysis.

The Chairman: Thank you very much. That brings out the fact that not all three of you will be commenting on all the questions. Obviously we would like those with particular expertise to reply, so please do not feel under any pressure to respond, in your case, to criminal law questions.

Mike Kennedy: I am Mike Kennedy. I was a member of the Crown Prosecution Service for many years, but in 2001 I went to work in Europe as the UK's national representative at

Eurojust. I served as the president of Eurojust from 2002 until 2007, when I came back to work for the Crown Prosecution Service as its Chief Operating Officer until last year, 2012, when I left.

Q16 The Chairman: Thank you. Shall we go straight on to the questions? Can you say whether you think there are any lessons from the Stockholm Programme, the one that is running now, for the design of the next programme? For example, have the road maps for particular areas that are in the Stockholm Programme been useful? Has the programme been the right approach, in your view? If not, where do you think it has gone wrong, either in its conception or in its implementation?

Mike Kennedy: Estella would like to make a preliminary point. We spoke about this earlier.

Professor Estella Baker: One thing that you can say about the Stockholm Programme as compared with its predecessors is that it is extraordinarily long and complicated. That is not necessarily desirable, and something a little more succinct and punchy might be better. What I would say about all of these programmes, and it is a problem in general, is that it is not entirely clear what the area of freedom, security and justice actually is and therefore what it is that these things are supposed to be constructing. There is a lot of ambiguity about it which makes it potentially quite difficult to draw up a programme. The analogy at the beginning was supposed to have been with the single market, where I think the goal of the exercise was much more straightforward. If you ask people, they have different conceptions of what this whole enterprise is supposed to be for. If that has not been settled, it is difficult to draw up a programme for getting there, leaving aside the fact that it is going to be contentious anyway. It is a huge problem.

The Chairman: Could I interrupt you and ask, because I think that it is rather germane, whether you think that the lack of clarity about the end object is still as unclear now that the Lisbon Treaty has entered into force. Of course, that was the difference. The Stockholm

Programme was adopted before the Lisbon Treaty entered into force. There was no Lisbon Treaty on which to base it. Could you comment on that because I think that it would help the Committee?

Professor Estella Baker: Actually, that is not exactly right. The Treaty entered into force within days of the programme being agreed; the two events were virtually simultaneous. However, it is instructive to look back at the Hague Programme in this respect because that programme was premised on the entry into force of the Constitutional Treaty. If you read through it, you see in lots of places words to the effect that, "We cannot do this now, but when the Constitutional Treaty enters into force, we will be able to." I was saying outside, before this hearing started, that I have never come across an official document anywhere which says, "We wanted to do so and so, but the Constitutional Treaty fell apart and therefore we had to abandon the idea." What seems to make the difference, or has done up to now, is the necessary political will, rather than transparent legal competence.

But in the eyes of some people, although not everybody, there is some confusion between the competences in the Treaty which provide the legal basis for action and these programmes which give a political mandate for doing various things. I think that some people sometimes treat the programmes as if they were legal competence documents, and they do not understand the difference. That is not necessarily an argument against having the programmes, but I do not think that the Lisbon Treaty per se, by providing a firmer legal footing for Union action, gets rid of the ambiguity about what the end goal is supposed to be. You can see the area of freedom, security and justice as basically a policy field, and in a sense that goes along with the programmes we have had so far. However, looked at through different eyes, it is an infrastructure and constitutional project, which puts a different complexion on the whole thing and on what kind of things should be there. The two conceptions are not always disentangled.

The Chairman: Thank you. That is very helpful. Are there any other comments from the panel on the first question?

Mike Kennedy: From a practical perspective, I agree entirely with Estella that the documents from Tampere, when there was a minimal amount of material produced, through to the Hague Programme and the Stockholm documentation, it has become far more lengthy, far more complex and actually very difficult to follow. That said, I think if you are going to be working in this area, it is always good to have some sort of business plan in order to set objectives about what you desire to do in a certain period of time. It tends to focus minds, and that helps a lot of people. Also, it gives some authority to the work that is being done, particularly if it has been agreed by all the Member States and under the new arrangements with the European Parliament as well.

However, so much has been covered, particularly by the Stockholm Programme, that it would be sensible to have a real evaluation not just of the programmes that have gone through—the Stockholm Programme is now coming to the end of its time—but perhaps halfway through or on an annual basis of any new programme that is agreed. One of the easy things to do is to agree a list of objectives and things that ought to be done. But then you come to implementing it and checking on the implementation within national legislation across the 28 Member States, and checking the effectiveness of that implementation and how the measures are working in practice. For example, it would be interesting to know how the implementation of the supervision order which was introduced at the end of last year is going in Member States both in terms of the legislation and in terms of practice.

The Chairman: That point about the evaluation has been made by previous witnesses and it is certainly one that we will want to look at.

Sarah Garvey: Very briefly, like a corporate having a strategy, the Law Society thought it was helpful to have goals in order to help prioritise issues in the broadest sense, but care

needs to be taken regarding the text because tiny references can be picked up by the Commission and huge workstreams then developed. I think that the contract law initiative might be an example of that.

Professor Estella Baker: Can I just add something to your specific question about the road maps? I think that they have been quite helpful in terms of breaking things down into bite-sized chunks. That has been a lot more successful, albeit that some of the politics have changed which has helped in terms of getting procedural rights instruments actually adopted. We are now in the process of implementing the first few. It has worked better than trying to chew the whole lot all at once and running into a lot of opposition. It is not a bad approach.

Sarah Garvey: And the Law Society supports that road map on minimal criminal protections.

Q17 Lord Rowlands: The Government's response to the call for evidence states that their view is that the guidance should not repeat the format of the Stockholm Programme with its detailed list of proposed measures. As a point of clarification, do all three of you agree with that?

Professor Estella Baker: This comes back to what I said earlier about trying to work out what this is for. You can either see it as a policy field, in which case you might have a detailed checklist of measures that you think should be in the pipeline or you can see it in a more holistic, constitutional sense as being about the way that we do things within the EU. It is about the values that we are aiming for, which in principle would mean that there is more leeway for Member States to sort out for themselves the way they do things, as long as the common values that we think ought to be respected and protected are actually respected and protected. In a sense, it is the same kind of thinking that goes into a Directive. We are concerned about the end result, not the way in which we do it.

The Chairman: I suspect that we will end up with a mixture of the two, because that is what usually happens. Your answer is very helpful. Perhaps we could move on to Lord Stair.

Q18 Earl of Stair: I appreciate that forecasting five or six years ahead is extremely difficult. Do you think that the programme should focus on objectives and principles, possibly with a period of consolidation—bearing in mind what you have said about how the programmes have got so long—rather than setting out a "shopping list" of initiatives?

The Chairman: That is very similar ground to what we have just covered, but perhaps you could elaborate a little on this point.

Sarah Garvey: I think that a mixture is good. If you are going to aim for five years, it would be difficult to have a series of tangible goals because the world changes. You need some more general principles. A mixture would be good if you are going to cover that sort of period. You need to retain some flexibility.

Mike Kennedy: Often the shopping list of measures might be the measures that are required to deliver those principles, so they fit neatly together.

Q19 Lord Faulkner of Worcester: On the same theme, how far is any programme likely to constrain the Commission or, alternatively, encourage it to bring forward proposals?

Professor Estella Baker: The idea of constraining the Commission is interesting. Mike is also a member of the expert group I mentioned. Unless he corrects me, I would say that when we sit in meetings, there is not much sign in the Commission contributions that it thinks much about constraints other than the legal bases in the Treaty. It definitely thinks about that. Personally, I think that a lot more attention should be put into the way in which instruments and programmes are designed. One the problems we and the Commission have—it is certainly aware of this—is in what might be called the technology of regulation. It is quite new to the game of regulating in this field and thinking about what might happen

down the line if measures come before the European Court of Justice and are challenged. I do not think that the Commission has really made its mind up on the best approaches to take, but there are signs which suggest, going along with the stereotype, that it is more inclined to go with the techniques of drafting and regulation which give more of a toehold on national systems rather than keeping out. It is inclined to a way of thinking which tends to expand its view about what competence is actually there and what it might be able to do. Somebody suggested to me the other day that some people in the Commission think that the mutual recognition framework decision on probation and alternative sanctions potentially gives scope for arguing that those Member States which do not have a full complement of alternative sanctions should introduce new ones, because otherwise they are not complying with EU obligations. I am not sure that I myself read the framework decision in that way. This is a whole area of the territory which needs to be closely inspected.

The Chairman: If I have understood your answer rightly, you are really saying that Member States and bodies like this House should become more involved in the upstream shaping of Commission proposals rather than waiting for them to be delivered in a final form. If I have understood rightly, you are a bit critical of the way the Commission conducts consultations before it comes forward with a legislative proposal. It has made up its mind before it started and it does not pay a huge amount of attention to the consultations. Have I got that right?

Professor Estella Baker: I am not sure that I would go that far. There are some things on which the Commission has quite firm views and on which it has made up its mind. However, there are also quite a lot of things where it is genuinely not sure what should be done or how it should be done. It knows by and large what kind of result it wants to get at the other end, but it is trying to grapple with 28 Member States and even more criminal justice systems than that. It is difficult to design instruments that will work in all them, with lots of

different constitutional and cultural traditions. There are some things which the Commission is finding too difficult to handle, and on those it is genuinely open-minded and amenable to information and influence.

The Chairman: Thank you. Are there any other comments on the issue?

Mike Kennedy: Yes, I would echo that. There is clearly a desire from the Commissioner herself to focus on a number of areas and to bring the different criminal justice systems up to higher standards. Indeed, the Hague and Stockholm programmes focused on a number of individual issues to achieve that. A lot of the work within these programmes is not something that the Commission would feel particularly constrained about. It provides the Commission with a framework. For example, an awful lot of energy has been expended on the European public prosecutor and getting the draft regulation for that off the ground. Not much mention is made of it was made in either the Hague or the Stockholm programmes, although it has been in the background. The Commission is very determined, from my experience attending the expert group with Estella, to think things through. It has its own ideas, but the ideal that it is aiming for seems to be to improve criminal justice systems. For example, at one of our recent meetings we talked about introducing a presumption of innocence, which is something we take for granted in our system, but it is not something that necessarily applies in all the other 27 systems.

The Chairman: Of course, the other thing that we have to bear in mind, and will hang over our inquiry, is that it will almost certainly be a different Commissioner and a different Commission, which will carry out this programme and will be bringing forward whatever proposals may come forward. So we are in a rather grey area at the moment, but we have to live with that.

Lord Sharkey: The Law Society has suggested that a period of consolidation, allowing for legislation to bed in and for evaluation of its implementation, would be helpful. Do others

agree, and if so, would that apply to the entire period of the next programme? Further, is this a way of saying that we do not actually need a new programme?

Sarah Garvey: I think that I would like just to clarify the Law Society's position in this area. It is not a uniform do-nothing stance. In fact, it is a flexible stance. In some areas, the Law Society can see a need for further measures, and in that sense setting up tangible goals would be helpful, but in other respects it would be helpful to take stock and see how certain new regulations or amendments to existing regulations bed down. In terms of representing the Law Society's position, it is more nuanced than that. I can give examples on the civil side of particular areas where we think it might be helpful to do further work and for there to be further initiatives either now or later.

The Chairman: Could you give us that in writing? That would be very helpful indeed. We would then be able to use it in our evidence.

Sarah Garvey: Yes, of course.

The Chairman: Rather than take up a lot of the time of the Committee this morning, that would be very helpful. Thank you very much. Your answers to this question are linked to the issue of evaluation, which we have already discussed. The desire to have better evaluation mechanisms and to make better use of those mechanisms is going to be very much a part of our inquiry and our look at the future.

Q20 Viscount Bridgeman: Thank you, Chairman. In which areas of civil or criminal justice can the EU add value over the next five to six years? Conversely, are there any areas that the EU should keep away from—for example, because the implications for fundamental characteristics of national systems would be too great? I have to say that, as a non-lawyer, I have always been amazed at the dexterity with which the common law and the Code Napoleon are moulded. I suppose that Mr Kennedy's example of presumption of innocence might be relevant to this question.

Mike Kennedy: Yes, there are areas to look at, particularly with technology and the use of electronic evidence, that might benefit from some view from the EU to try to ensure that the quality and admissibility of the evidence is considered properly by the different systems. There is no doubt that in a number of areas, we feel that in the UK—England, Wales, Scotland and Northern Ireland—we have developed quite sophisticated systems for dealing with a range of both investigation and prosecution work, and indeed work in the courts. The presumption of innocence is something that we have had since Magna Carta and it goes back a long way, but its application is built in as part of all the criminal justice legislation that touches on practice and procedure. That goes back to perhaps the largest piece of recent legislation, which was the Police and Criminal Evidence Act 1984 and the various codes attached to it. We have done a lot of work and we tend to think that we are better than many other systems. I would not say that we are, but there are a lot that fall short of the standards that we might expect in this country. So the sort of work that the EU should be looking at is bringing up the weaker systems, which is why the idea of the European public prosecutor has, as it were, taken off. The EU wants to ensure that cases involving fraud against the budget of the EU are properly investigated and prosecuted.

Viscount Bridgeman: Going back to the presumption of innocence, are there any measures in the EU that would embed that principle, or is it still a totally new subject between the two systems?

Mike Kennedy: There are more than two systems; that is the problem. Certainly in the common law system, it is there, and in other systems as well there is that understanding. Whether it is actually embedded and there is any EU legislation on it, I cannot think of any.

Professor Estella Baker: There is no specific legislation as such. I understand that the Commission is about to produce a proposal on it. But the principle is enshrined in the European Convention on Human Rights, and Convention rights are respected as

fundamental rights within EU law. In addition to that, it is written into the Charter of Fundamental Rights, the EU's own instrument of rights. The problem is not so much that the 28 Member States do not respect the principle; the problem is that when it comes down to enforcing it on the ground there is good reason to think that not all of them are doing it effectively. In a sense, the EU is now thinking about acting in this area because it recognises that the Convention system has failed sufficiently to secure rights across the Member States. You then get into the mutual recognition debate that underpins the whole area of justice in that respect. I hope that that is of help.

Q21 Lord Hodgson of Astley Abbotts I want to ask Mr Kennedy whether his thought about electronic evidence would include things like closed-circuit television to avoid people having to be moved around pursuant to the European Arrest Warrant. If so, should the EU be mandating that to ensure that states are required to use it rather than shift the unfortunate person?

Mike Kennedy: I think we should take as much advantage as we possibly can of technology, but whether that would go as far as requiring or not requiring the surrender of individuals is quite a difficult question to answer. I am really thinking about the electronic world in which we live, and the capacity of criminal justice systems to deal with electronic evidence and to investigate computer-generated fraud and other criminality. In this country we are not perfect by any means. The Germans have done a lot of work on this, but other countries are lagging some way behind. If we want to raise standards of investigation and prosecution, this is certainly something that would be worth looking at. The question is what issues might be addressed.

The Chairman: These are presumably areas in which the trans-border or trans-national aspect of criminality is very obvious and we are all vulnerable to it.

Mike Kennedy: Indeed, both in terms of individuals and in terms of companies. The capacity of this criminality is not just trans-national, it is global.

Lord Rowlands: Has not the basis of most of these measures been mutual recognition? If that is the case, what has been the experience? How effective has the process been, and should it be the basis on which we co-operate for the next five or six years?

Professor Estella Baker: There is a whole family of mutual recognition instruments. Obviously the best known of them is the European arrest warrant, which if not literally unique, it is all but unique in the sense that all Member States have implemented it and are operating it. We have witnessed effectively 10 years of its operation, for better or worse. But as for the rest, there is a very patchy picture of whether these instruments have actually been implemented into national law and then whether they are being used. One of the points I wanted to make alongside what has been said is that from 1 December 2014, at the end of the transitional phase of the Lisbon Treaty, the European Court of Justice will acquire an expanded jurisdiction over the pre-Lisbon body of Third Pillar measures. We might expect at that point, for those Member States which do not have an opt-out as we have, that there will be more action in terms of implementing the other mutual recognition measures and getting them working. It is crystal clear from things that the Commission has been saying for some little while that it is thinking hard about enforcing these measures, which so far it has not been able to do. It is quite clearly thinking about—I would put quite a lot of money on this—which guinea pig case or cases to bring before the Court of Justice in due course. We might have a clearer idea about how effectively mutual recognition works across the board when a bit more of it is actually operating.

The other point tangentially to make about this is that the prospective new programme is also potentially a signal to the Court in terms of where the political will lies and what

Member States might or might not wear. That is a missing dimension in thinking about it, but it is an important one, and certainly will be from December 2014 onwards.

The Chairman: I think I am right in saying that the Court has in fact had jurisdiction in this area in quite a large number of Member States on a voluntary basis.

Professor Estella Baker: It has had some jurisdiction, as some Member States agreed during the Amsterdam phase to allow their courts to send questions for preliminary rulings from the Court of Justice. Some Member States did not opt into that jurisdiction, and of course we were one of them. It has produced some interesting case law. However, the Court will have full competence across this whole area, leaving aside our own special position, from 1 December next year. One of the other things that can be seen happening in the case law, which I think will be accelerated by this, is that the Court will start joining up the bodies of law on European citizenship, on the Charter of Fundamental Rights and on criminal law and criminal justice. There are some signs that that is happening already. It is different route through which to consolidate this area from the political, legislative process, and it will coincide exactly with the start of any new programme.

Q22 Lord Morris of Handsworth: Could you give us your thoughts on the current problems in private international law? Do you think that EU legislation could help to solve those problems wholly or partially?

Sarah Garvey: Maybe I could just address the civil law aspects. The Brussels regulation, which is the regulation dealing with jurisdiction and enforcement, has been broadly helpful for litigants before the English courts. It has allowed jurisdiction clauses which specify that disputes have to go to the English courts. That jurisdiction clause is then recognised under Article 23 by other Member States. They are common rules, and that is helpful for legal certainty. It has also meant that it is much easier to transport English judgments and get

them enforced in other Member States. That is a relatively straightforward process. The Brussels Regulation has been really helpful.

However, there have been problems, and the Commission has sought to address some of them in the new 'recast' Regulation that will be applied from January 2015. That has been a helpful measure. One thing that litigants have experienced is the lis pendens rules where proceedings between the same parties and the same matter are pending between two Member State courts. What parties have done is where there has been a contractual agreement to go, say, to the English courts to resolve the dispute, one of the parties, usually the debtor, has started proceedings in breach of contract before another Member State. They have tended to choose a Member State court that will be quite slow-moving and one that deals with the question of whether or not they have jurisdiction, not as a preliminary matter, but some time on. This has been a real problem for commercial parties because they have seen their jurisdiction clauses breached. It became known as the 'Italian Torpedo'. We see this very regularly. It seems to be courts in Italy, and to a certain extent courts in Greece, which do not deal with jurisdiction as a preliminary matter as we do in England. The reason this is a problem under the Brussels Regulation is that the rules say that where there are pending proceedings dealing with the same matter and the same parties, if you are second in time it does matter if you are the named court, you have to wait until the Italian court, for example, has determined whether it has jurisdiction before you can even proceed to hear the case. It is a massively effective strategy as a litigation tactic. To its credit, the Commission has grappled with this problem in the 're-cast' and has sought to fix it. Indeed, there is a partial fix in the 're-cast' Regulation because the new rules now say that if you are the named court, you do not have to wait for a year or two years until the court has determined whether or not it has jurisdiction. If you are the named court, you can proceed and determine the issue. So it has tackled the 'torpedo'.

There are other things it has not done that it might have been able to do, but I would definitely point to this as an improvement. Where the EU could take the lead and do more is in relation to third states—non-EU jurisdiction clauses where there are proceedings outside the EU. I understand that the Hague Choice of Court Convention is to be ratified by the EU in the period running up to January 2015. This should be helpful, because it will mean that signatories, Contracting States, will recognise jurisdiction clauses in favour of Contracting States' courts. The problem is that currently only Mexico is a Contracting State. The Hague has some way to go, but it would be fantastic if the EU could lead the move to get people to sign up to Hague.

I think that it could help with service to other Member States because it is still taking too long. It can take four months to serve proceedings in other Member States, and that is too bureaucratic. You do not have to get the permission of the English court to serve in other Member States, but you do have to go through certain competent authorities, and that is taking too long. You also have to get lots of translations. It would be good if the EU could do an impact assessment and ask whether there is a better way. For example, could registered post be used, particularly between companies? Perhaps more protections are needed where individuals are concerned.

One big issue that is being looked at is the Unified Patent Court. That is a massive initiative. That may be an area, in terms of bedding down and further change, to focus on in order to see how it works. That is a massive initiative and a big change in the IP field.

We need to look at the plans for a pan-European freezing order, which is more controversial. We are currently opted out of that, but it looks as if in Council they are seeking to reach agreement next week and it will go to the Parliament in the new year. So it may be that there is a consultation, and the UK may opt in to the freezing order. But, again, that is quite a controversial area.

Lord Morris of Handsworth: Would you be in favour of opting in to the freezing order?

Sarah Garvey: I think that I would need to see what the draft said. I felt that the original draft that the Commission put out did not sufficiently protect defendants. It would allow a Member State court to issue a freezing order blocking bank accounts of a defendant on an ex parte basis and on paper. The test that was set out in the rules was really low. It is pretty hard to get a freezing order in England in civil proceedings, as the test is quite high, but this test was very low. There were real concerns that parties could just put in a paper application saying, "I've got all this evidence and this is my damages claim", and effectively block all accounts in Europe. It would really depend on what the ultimate draft looked like.

Q23 Lord Judd: Following on from your very interesting comments in this area, it is argued that the differences between the way in which Member States' criminal justice systems operate in practice mean that there is an insufficient basis for mutual trust. How far do you feel that the principle of mutual recognition depends on mutual trust in each other's systems? Is this really still viable as a foundation for EU criminal justice policy?

Mike Kennedy: Let me try to answer. Trust between the criminal justice systems is based on two important issues. The first is the individual—the individual exchange with, from my perspective, prosecutors talking to one another, or police officers talking to one another or, indeed, courts engaging with one another. If those outcomes are positive, there tends to be a generation of trust. The second point is the operation of the interchange. If one has had a good experience on one occasion, it is likely that one would be more likely to try that same route. It is difficult to envisage an interaction between the very different criminal justice systems within Europe by any means other than mutual recognition. In all the states, in every criminal case there will be a crime committed and an investigation, hopefully. There will the gathering of evidence and a point at which someone is arrested and interviewed. A decision will be made on whether the evidence is sufficient for there to be a charge. These various

building blocks or stepping stones along the route to conviction or acquittal and then penalty are very similar—you can find all those stepping stones in each system. It is quite natural to look at recognising and accepting that a conviction in France, for example, is a conviction that we can accept in this country. The thing is that the routes by which one makes those steps between the various stones is very different. In the different countries, the individuals conducting those steps might be very different. In one country it will be a police officer and in another country it will be a judge or an investigating prosecutor, or it might be somebody completely different.

Recognising the stepping stones gives the capacity to build trust and confidence, provided that one can follow through with that recognition, as we have in a number of areas. For example, with the European Arrest Warrant, the arrest process has, although there have been problems, generally worked pretty well. Further down the line, we have had problems with the recognition of asset-freezing orders; in this country, we deal with things on the basis of a civil arrangement, but other countries cannot accept that at all—that is a problem. Yet, moving further down the process, as it were, there is the question of penalties such as a driving disqualification or the imposition of a probation order or supervision order of some sort—those are the things that can be recognised. The more the systems work together, using these stepping stones as building blocks, the better the trust and confidence are. Certainly, at Eurojust, the fact that we had 26 or so prosecutors—one from each country—working round the table together helped to build trust and confidence. It might be possible to develop such trust and confidence in a different way, through bilateral arrangements or through multilateral conventions, as happened pre the third pillar, but it is quite difficult and it takes a lot of successful operational practice for that trust and confidence to grow from a very small seed.

Q24 Lord Judd: I am interested in how this operates psychologically. Is it a question of those involved saying, "There really aren't viable alternatives and we've therefore just got to get used to the differences and make the best of them"? Or is there a widespread sense of confidence, which is the basis of trusting one another? Is it making the best of it or is it really just saying, "We have to accept"?

Mike Kennedy: I think that it is probably making the best of it. There is not an alternative at the moment.

Lord Judd: Can I ask one other question against this background? Are there areas of crime that should be the subject of further measures defining offences and sanctions?

Mike Kennedy: I thought about this, because the European Union has made a comprehensive effort in the programmes that we have been talking about to address crime types. One could start thinking about high-tech crime and its relationship with child abuse and pornography on the internet, but work has been done in that area. As we mentioned, there is a time for consolidation, evaluation and improvement of what we have. I could not think of any particular additional area of crime that would need to be addressed.

The Chairman: I think Lord Faulkner would like to follow that up and I know that Professor Baker would like to come in on this.

Lord Faulkner of Worcester: It is not just a question of diversity of approach when a matter gets to court and where a sentence or a punishment may vary from one state to another. Some actions, particularly actions of a private nature, may be crimes in one country but not crimes in another. Do you see any way in which issues such as that can be resolved under EU auspices?

Mike Kennedy: It depends. What is that you are thinking about and what do you want to resolve? Which sort of problem is it? For example, the EU has tried to list offences with, for example, the European Arrest Warrant—which offences it applies to and which offences it

does not apply to. There is a realm of criminal activity that is within the ambit of some of these mutual recognition measures and there are other offences that are not.

Lord Faulkner of Worcester: Should there be a constant effort to reduce the number of those that are not or should the state be allowed to pass its own laws?

Mike Kennedy: This is one of the principles: the investigation, prosecution and trying of criminal cases should be a matter for domestic law and the Member States. That applies across the board, but the EU has tried to introduce some common standards, particularly for the more serious offences. I do not think that it would be necessary for the more minor offences to be taken within the ambit of that sort of work.

Q25 The Chairman: I see very large resistance in this country, for example, to doing that. It would be grist to the mill of those who say that the Commission is trying all the time to homogenise this area, when it is probably not desirable that it should be homogenised. Professor Baker?

Professor Estella Baker: I have several things to say arising from the discussion that has just occurred. One of them is that of course there are two things going on. When we talk about the mutual recognition instruments, we are talking about an EU instrument being there to help Member States to enforce their own internal laws across borders, by and large, whereas when we talk about EU instruments that instigate the introduction of offences and sanctions, we are effectively talking about a harmonised measure at EU level that the Member States have to implement. Those two things are not the same; they have to be distinguished, albeit that, the longer this goes on, the more they start to join up and the analytical distinction starts to fall away. If they are all somehow regulated by EU law, we would expect there to be some kind of common principles and regulation. However, I still think that it is important to distinguish them and to think about them separately, because

they are not the same thing—the principles that we might think apply to one, we might think do not apply to the other.

The Chairman: Could you give examples of the two categories, so that we can get an understanding of this at the practical level?

Professor Estella Baker: For example, on mutual recognition measures, we have written into them the list of 32 offence types in respect of which the principle of double criminality is, or may be, abolished. In fact, in the financial penalties instrument, there are slightly more than 32 offence types. The basis of these instruments is that the offences that we are talking about are defined by national law. Rape is one of them. The law of rape differs in detail across the different criminal jurisdictions in the 28 Member States. The EU instrumenst say quite clearly that what is in issue is rape as defined in the national law of the issuing State and as penalised in that national law.

You can contrast that with, for example, the human trafficking Directive, a piece of EU legislation that says, "Member States will criminalise behaviour X and their sanctions for this behaviour must comply with these specifications". Member States might have already criminalised some of the relevant behaviour—we had done so in this particular instance—but that is a different kind of thing. It is a top-down criminalisation from EU level and the implementation of that. It is not about "ordinary decent criminal law", if you want to put it in those terms, which has grown up in the national legal order, and the Member State's ability to get its hands on somebody who has fled out of its jurisdiction and to bring them back to face justice. As I say, the two things are starting to join up and common principles apply to both of them, but they are not the same thing.

The other thing I would like to say about mutual recognition is that one reason why there has been more progress with adopting instruments to enhance procedural rights is the problem with mutual recognition and the unwillingness of Member States to send people

back to other Member States where they do not feel that their procedural rights are respected. That has been a critical driver. In the allied field of asylum law, there is a Court of Justice case that says that even if you have an instrument based on mutual recognition, if you have knowledge of the fact that fundamental rights are not respected you cannot use the instrument. You can see that the whole system would break down completely if we found that this was happening in respect of all criminal justice instruments.

The Commission is also quite concerned about the potential consequences of the justiciability of the Charter now. Specifically, it is worried that will happen in due course is that people will start to sue the Union for having been transferred across borders under these criminal justice instruments, basing their case on the Charter. That might fuel a lot of litigation.

There is another practical issue about the amount of business going before the Court of Justice in Luxembourg, as opposed to Strasbourg, as you can bring proceedings before the Luxembourg court a lot quicker than you can the Strasbourg court. There is a worry that the Luxembourg court is going to be completely overwhelmed with cases coming out of criminal justice systems where people are arguing that their fundamental rights have not been respected.

From what I hear from people in practice, it is also the case that they trust some Member States more than others and they do not see all Member States as being the same.

The other point that I want to make, going back to what ought to be put into the new programme—we talked about evidence—is that something that I think is quite clearly missing, and defence lawyers would also say is missing, is some kind of infrastructure to enable defendants and suspects to enforce their rights when they are in other Member States. We have the instruments coming along now in a steady flow, but the infrastructure

to match that and to make the enforcement of rights happen in practice is quite clearly a missing piece of the machinery.

Lord Rowlands: With the two categories that you have described, is not that the basis on which the Government have chosen the 35 opt-ins? They have gone for those that fall in the first category with the intent to say that they do not want to take part in anything that smacks of harmonisation? Is that the basis?

Professor Estella Baker: No, I do not think that is the basis. They have chosen what to opt into on the basis of what is practically useful, such as the European Arrest Warrant, and what we have already implemented or do not mind implementing, and where we would not find ourselves in front of the Court of Justice having to answer for our failure to implement relevant pieces of legislation.

Lord Rowlands: But they all fall in that first category.

The Chairman: If you do not mind, I honestly do not think that we had better get on to protocol 36. It is extremely interesting, but not entirely germane to the inquiry that we are conducting now.

Q26 Lord Judd: The Chairman at the beginning asked whether we had learnt any lessons and whether you felt that lessons had been learnt and that there were things that should be addressed in the next programme. Are you saying that this whole area, which can be strikingly imperfect, to put it bluntly, should be addressed in the next programme, or do you think that it would be too soon?

Professor Estella Baker: I do not think that it can be. There is no getting away from the fact that there is a very real tension in having a system that you might say is very effective, with all Member States enforcing it as it should be enforced, which means having uniformity, harmonisation and a single EU criminal justice system, and so on. There is a tension between that and, on the other hand, saying that Member States should have the ability to respect

their own cultural and national traditions and their own constitutional rights, and all the rest of it. The game that we are in, for all the time that we are doing this, is trying to reconcile the tension between those two things. It is a matter of how good and smart we are in designing regulations to reconcile those tensions, and working out—this is partly what I was referring to earlier—at what level of abstraction the EU regulations should be there and what the framework should be, and how much wriggle room or flexibility there should be within that framework for Member States to sort out details of their own, whilst travelling in one common direction. In a sense, that was also what I was getting at when I asked whether the programmes are directed at "doing justice" in a certain way, or "brand Europe", if you like, or about having a shopping list of measures which we can tick off and say that we have implemented them. You come up with different answers, depending on how you think about this and what you think the objective actually is.

The Chairman: Thank you, I think that that was an admirable description of a paradox that we live with all the time.

Baroness Prashar: Thank you very much for the very interesting discussion. Following on from that, would you support the EU's effort in areas of training and exchange of the judiciary, judicial officer-holders and practitioners? If so, how do you think the EU can contribute?

Professor Estella Baker: I would say, resoundingly, yes.

Baroness Prashar: I thought you might say that.

Professor Estella Baker: For all kinds of reasons, I would say a resounding yes. It is of course written into the Treaty. There is some competence in this area, with respect to the judiciary and prosecution, notably in Article 82 of the Treaty on the Functioning of the European Union. There are two things here. First, there is what actually can be done. The Commission has budgets, and so on, and throws some of its money at constructing training

programmes and drawing up training materials. It can do more of that and it can try to incentivise, but it is faced with a situation where, again, national traditions are very different. If you go across the Channel, to Member States that have a career judiciary, there is a formal expectation that there is a lot of training. I know that our Dutch colleagues, for example, write the EU dimension into their training manuals for the judiciary across the board,; it is just incorporated, full stop—whereas I have done a little bit of training here with the Judicial College on EU criminal law, and there you get one day's worth out of a session of a day and a half, and the last occasion on which it was due to run it was cancelled due to lack of demand. I understand the constraints that the Judicial College is operating under, but it is disappointing. We have to be very careful about how much workload gets attached to all this and how much it is reasonable to expect. I am not saying that such a short course is not valuable—I think that it was valuable—but if you cannot get people to participate, there is a different kind of problem. The other thing that the Commission or somebody could do is to accredit people who really do genuinely know about this stuff, because I get the impression that quite a lot of people who really do not understand it very well can see that there is money in it and that they can get a career out of it. I am not sure that that is very helpful to anybody. As a colleague of mine said, you do not really dabble in this stuff. It is very complicated, as you will be well aware.

Q27 The Chairman: It sounds to me that it is a rather like the situation over the British attitude towards learning foreign languages.

Sarah Garvey: It is hugely important in the civil sphere. We have to apply EU instruments, and it is hugely important for practitioners and the judiciary. We have not currently opted into the justice programme, which would help on the funding. Certainly the Law Society would support that opt-in. There is a worry that if we do not, we will find City law firms being able to train their lawyers on conflicts of law issues, but high street practitioners

would just not be able to afford to fund that sort of training. The training that the Commission runs is okay, although it is quite academic, and it tends to run programmes on private international law in Trier, which is not easy to get to. You cannot get there and back in a day, and it costs at least £1,000, because you have to stay over. That is unfortunate, and could be changed. The training that they run could be more about what the law is and how it is applied, as opposed to what it might be and how we might change things in future, which tends to be the focus of these two-day conferences. On a practical level, if we are involved in the training and our judges are there, they can share the common-law perspective, and really add value. We are running consultations, for example, with the Chancery Review. We are looking at things—we have done ADR for years now, and are ahead of the game, in many respects. So we have a lot to offer, and it is important that we are there, participating in the training, both judges and practitioners.

The EU could also improve its access to materials. Last night, I went on the Europa website just to have a look. I think that the Bailli online service is brilliant; we can get our English judgments very easily. It is free—it is amazing. If you go to the UK site, you can access it that way, but other Member States do not have that facility. With EU judgments, you have to register, and with one of them you actually have to pay to access the case reports. That cannot be right. It should be free, and there should be a way of doing a Google translate for the headnotes. That is what they have done with the patent courts at the UPC. That is the approach that they are taking. Okay, it is not perfect, but at least you can see something. There should be a better way in which to organise material when you have Member State judgments on these instruments that affect all of us, to see how people are implementing them. I think that the Commission could do a lot to improve that, as they have the funds.

Baroness Prashar: Mr Kennedy, would you like to add anything?

Mike Kennedy: Yes, I would, if I could. I agree that there should be awareness-raising, and I think that it should be focused. The EU's role here would be to organise and accredit programmes. It is no use having people going on these programmes who are not working in this area. It is quite an unusual area, and most criminal practitioners would not know anything about mutual recognition. If you talked to them about it, they just would not understand it. But there are those who would benefit from it, on both the prosecution and the defence side, and that would be very helpful. My experience in my previous role at the Crown Prosecution Service was that there was a lot of demand for our prosecutors to give training and to go and work on secondment in developing countries—in Africa and the Caribbean, prosecuting pirates in the Seychelles, for example. It is a huge drain on resource, so I think the EU might be able to find some resource for this, if it could, to fund the programme and accredit it. But there is huge ignorance in this regard, and that applies not just to prosecutors as criminal justice practitioners but probably to practitioners in the judiciary and on the defence side.

Q28 Lord Wasserman: All this talk about practical measures and training in details and location brings me to my concern about the agencies and institutions, Eurojust and Europol. Do you think that we should be reviewing them in the programme? We have been talking a lot about legal aspects, theory and policies, but here we have institutions where people are working. Would this not be a good opportunity to evaluate them and get some improvements, if necessary, in implementation?

Mike Kennedy: I would think so, yes. It is an ideal opportunity. I talked about evaluation earlier in this session. Eurojust has been running for about 10 years and Europol, in previous guises, for a little longer. There is a big opportunity here to evaluate. However, the Commission has just produced a new draft regulation that has been considered on reforming Eurojust, or at least potentially its structure and organisation. There is the question that is

coming up about the European Public Prosecutor and whether Eurojust will be involved in that. It certainly will be involved in some way, but in quite what way I do not know. I am a great believer in having a fairly regular evaluation and a fairly rigorous and robust approach to that sort of evaluation, particularly looking at the numbers of cases and the outcomes of those cases, as well as at the money that has been spent on the organisation as a whole.

The Chairman: Are there any additional points on that? We have definitely registered that this evaluation issue is something that needs to be looked at, and we will do so in our report. It has a number of different facets—the periodicity in which you do it. To some extent, I suppose that you can say that the negotiation of the new Eurojust and Europol regulations are inevitably going to involve a degree of evaluation on the existing ones, but probably not in a very scientific or objective way. So I think that we will certainly want to return to that. If nobody has any other questions, I thank all three of you for coming along this morning. We have learnt a great deal from your expertise and I hope that you will find, when we come to write our report, that we will have benefited from it—I believe so, anyway.

Bar Council—Written evidence

Introduction

1. This is a response by the Bar Council to Sub-Committee F's Call for Evidence of 29 July 2013 into the EU's five year agenda for Justice and Home Affairs (JHA) activity (2015-2019).[1]

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

4. The present inquiry identifies a number of policy areas which may be touched upon in the next EU JHA Programme. The Bar Council's observations below are based on our views, expertise and experience of EU activity to date in just a few of those named, namely Criminal justice; Civil justice; Data protection/privacy/retention (including the revision of existing legislative proposals); and Relations with third countries on JHA. We have focused our response on the areas that have been, and remain, of greatest interest to the Bar of England and Wales.

5. We have divided our response into two sections:

- Section I sets out the questions posed by the Call for Evidence and our brief general responses, and
- Section II provides comments and suggestions about the possible content of the future JHA programme, looking in particular at civil and criminal law.

Section I – General responses to the Inquiry questions

Question 1. Should there be a fourth JHA programme? If so what should its content, focus and purpose be, with reference to the previous programmes and evaluations thereof?

6. Yes, we would support the adoption, by the Council, of a new five year JHA programme. A well-considered and defined programme should provide a route map of what is to be achieved, and the context in which it is to be achieved, aiming at a coherent whole.

[1] Lords Select Committee, Future Justice and Home Affairs Programme (2015-2019)

7. Its aim should, in the first instance, be to consolidate and simplify existing EU JHA measures, including revising and repealing them where necessary; and identifying and filling in any gaps, in accordance with the principles of subsidiarity and proportionality, to enhance mutual trust and ensure effective judicial cooperation across the range of policy areas covered.

8. It is important that the Member States, through the Council, develop and agree these plans in advance:

- The Council's direction adds to the democratic accountability of the EU's work in this area - the Member State governments have defined in advance the aims and how to achieve them – it is not simply "Brussels bureaucrats talking", as some would have us believe; and
- Member States can, and should, be reminded of this support in principle should they demur once a measure they called for is later tabled.

Question 2. What is the relevance of the political context? For example, how relevant will the debates and controversies surrounding the free movement of persons, privacy (the Prism programme in the US, as well as similar programmes in some Member States) and the negotiation of a US-EU free trade agreement be?

9. The political context is certainly relevant, particularly when there is a marked increase in nationalistic and related protectionist sentiment in many Member States, as well as pressure on the public purse. The JHA area encompasses many policies that go to the heart of these debates, including immigration; the many aspects of the fight against crime; privacy and fundamental rights.

10. It is important that the Member States work together to support each other in identifying and pursuing policies to assuage and deal with some of the public concerns, legitimate or otherwise; and for the other EU institutions to support the Council in that endeavour.

Question 3. What lessons from the application of the Stockholm Programme could usefully be reflected in the next JHA Programme? Did the Stockholm Programme involve too much or too little legislation and what were its tangible outputs? How successful have some of these outputs, such as the Standing Committee on Operational Cooperation on Internal Security (COSI), been and are they working as intended?

11. During 2009, the Bar Council joined the calls for the emphasis of the Stockholm Programme to be on evaluation, simplification and consolidation. In practice however, the past five years have seen a rapid expansion of the EU *acquis* in this area. This is not in fact surprising, bearing in mind the increased competence of the EU in general and the European Parliament (EP) in particular, in these fields following the entry into force of the Lisbon Treaty, which coincided with the adoption of the Stockholm Programme. We do, however, consider that a more considered and modest focus is needed now, to enhance legal certainty and mutual trust, thus improving the functioning of the area of security and

justice. Moreover, such an approach is also in keeping with the current political and economic climate.

12. In saying this, we recall that the Stockholm Programme Action Plan as adopted by the Commission in April 2010, which set out the Commission's plans to implement the Stockholm Programme, including a detailed legislative timetable, was in fact more ambitious than either the Council or the EP desired. The June 2010 JHA Council Conclusions expressly underlined the fact the Programme and the Action Plan diverged in material respects and that the Programme was the authoritative instrument. It thus called on the Commission to adhere to the latter. Later that year, the EP also indicated some reservations about the scope of ambition and the sheer volume of legislative proposals that the Commission aimed to push through in one legislative period. We caution against a repeat of that scenario.

13. Apart from considerations of legitimacy and accountability mentioned above, a programme that is designed to consolidate, identify outdated and unnecessary legislation and as necessary, replace it with updated versions, and fill in any gaps where need is shown - all done in a more measured and less rushed manner - ought to produce more coherent and better legislation, an express EU goal. There are several examples of legislative files that have emerged in the past five years, that would have benefitted (for example in the scope, quality and fitness for purpose of the initial Commission proposal, thus perhaps avoiding problems in Council and the EP later on) from more time and care taken at the outset to take account of Member State and key stakeholder needs and concerns. Examples include:

- The January 2012 package of proposals to reform the EU Data protection rules (the fact that there were more than 3000 amendments tabled in the EP to the general regulation alone is telling in and of itself);
- the 2011 proposal for a European Account Preservation Order – this went too far;
- Common European Sales Law and its precursor, the Common Frame of Reference (proven need, the type of instrument to use, legal basis);
- Freezing and confiscation of the proceeds of crime (where the proposal gave rise to concerns about lack of defence safeguards); and
- the recent proposal for a European Public Prosecutor's Office (EPPO), to which 11 Member State Parliaments objected on grounds of subsidiarity.

14. It is important to underline the fact that the Bar Council is not doubting the work that was put in by Commission officials in the preparation of these proposals. Rather, we consider that a legislative agenda containing fewer but more considered measures would have produced better results through the EU legislative process, and in all likelihood more quickly.

15. The Commission also has an important monitoring role in ensuring that legislation adopted at EU level is implemented in the Member States. The production of too much legislation may reduce the focus on measures gone before. It is particularly important in the newer areas of competence, such as judicial cooperation in criminal matters, that measures are reviewed for their practical application. This may reveal that assistance is needed in some Member States, through training and from the funding programmes, to support implementation, or ultimately that amendments are needed to the legislation where a

measure is shown not to be productive.

16. This desire to emphasise considered quality over quantity is widely supported, including among influential officials in the Council of the European Union, who have recently cautioned that before the EU takes steps in the justice field, it should take care that it does not damage or erode the legitimacy of national justice systems with their own social and historical roots in society. With this in mind, there have been calls for greater reflection upon the effective implementation of existing measures and the effects of those measures, rather than the production of further measures.

Question 4. Should the EU's focus be on consolidating existing JHA cooperation before embarking upon further EU legislative proposals and initiatives? The UK Government, in particular, has emphasised in the past that the EU should focus on practical cooperation, which does not necessarily require a legislative underpinning.

17. Yes, for the reasons explained above.

Question 5. Should the Programme include a timeline for repealing and/or consolidating existing JHA legislation where necessary?

18. Yes – but based on solid objective evidence, rather than political considerations.

Question 6. What should be the format of the next JHA Programme? For example, should it comprise a concise set of principles or contain a longer, and more detailed, set of initiatives as per the previous programmes?

19. A set of principles supported by a more detailed list of initiatives. It is useful to define general objectives to which reference can be made as measures are developed.

20. For the reasons set out in answer to Question 3 above, the Bar Council also takes the view that the Council should lay out quite detailed plans about the types of measures, legislative and otherwise, that it wishes to see pursued in particular policy areas. It should not be open to the Commission significantly to add to this (except to react to a significant and unforeseen event or change of circumstances), particularly when, as last time, the other institutions did not welcome the Commission's action plan.

Question 7. What role should the European Parliament and national parliaments play, if any, in defining the content of the next JHA Programme?

21. For the reasons of legitimacy and accountability set out in answer to Question 3 above, we expect that the EP and national parliaments would have, at the least, a consultative role. We would, however, prefer to avoid overly politicising the process, which would carry the risk of the process being hi-jacked for short-term political gain rather than the medium to long-term enhancement of the area of security and justice.

Question 8. Is the funding allocated to JHA activity in the Multiannual Financial Framework for the period 2014-2020 sufficient to achieve existing aims?

22. The Bar Council would like to see European Commission conduct more thorough, open-ended public consultations and transparent impact assessments (IA) and then properly to take account of the results. In particular, if the IA or key stakeholder responses indicate that it should revise its planned approach, the Commission should be willing to do so. This may mean no action at EU level. There have been a number of examples in recent years of the Commission prioritising its stated political ambition over the actual proven need on the ground. It is the view of the Bar council, and has been for a long time, that considerable funds – both public and private - could have been saved in some areas over several years in the past if only the Commission had paid greater heed to informed opinion that the need for a particular measure was not proven; or that the planned EU approach was inappropriate.

Question 9. What are the potential implications of further EU Treaty change for JHA cooperation, including the position of the UK?

23. We do not consider it likely that further Treaty change will occur in relation to the JHA area during the course of the next work programme.
The Bar Council believes the full scope of the present Treaty provisions that cover the JHA area remain to be fully explored and tested before the Court of Justice. In the area of civil justice, for example, the changes from the wording of Article 65 TEC to the current Article 81 TFEU include:

- The statement of Union competence in Article 81 is more open to interpretation than the previous version. The Commission has shown signs that it considers the requirement of "cross-border implications" to be less binding under the TFEU. This phrase was interpreted strictly by the Council under the TEC.
- Article 81(1) permits the adoption of measures approximating the law and regulations of the Member States and not just the *procedural* rules as before.
- The list of objectives of possible measures contained in 81(2) is longer than under 65 TEC, and notably includes the wide aim of ensuring "effective access to justice".
- Family law remains a special case (81(3)), with Council unanimity required to adopt a measure, or to introduce any other form of legislative procedure such as the ordinary legislative procedure – the "*passarelle*". It is not thought likely that the required unanimity to adopt this change could ever be secured, but enhanced cooperation (Article 329(1) TFEU) is becoming more of a feature.
- The Commission is increasingly trying to rely on Article 114 TFEU as the legal basis for action in the civil law field, when Article 81 proves too limiting. This approach has yet to be tested judicially in this context, but it opens up other avenues if it stands, and ones that remove the UK's right to opt-in or not to particular measures.

24. In the criminal justice field, the Lisbon Treaty brought in significant changes, not least the EU competence to adopt binding and enforceable judicial cooperation measures, as well as to apply criminal sanctions in the pursuit of other EU policy objectives, which are familiar to all, and will not be examined further here.

25. The Bar Council thus considers that the TFEU already provides significant competence to the EU in these areas, and does not perceive a particular appetite for further Treaty change. That said, if there were to be a move to expand competence in the family law field, or (for example) to move from the present requirement for unanimity in order to extend the competence of the future EPPO, we would be very concerned.

Question 10. What form could or should the UK's future participation in JHA matters take beyond the 2014 opt-out decision? What are the priority areas for potential cooperation in this respect, assuming that the UK will end up participating less in this area than it does at present? Will exercising the opt-out undermine the UK's ability to influence the content of the next JHA Programme?

26. The UK's legal system has enjoyed a deservedly high reputation over many decades; and as a result, its input has been sought and taken account of in the development of EU JHA policy over the past 20 years or so. Indeed, the cornerstone of judicial cooperation, mutual recognition, was an idea that originated in the UK.

27. From this position as one of the most influential players in the development of justice policy in the EU, we now find ourselves increasingly isolated. That is not to say that EU officials and judicial actors from other Member States no longer hold our system in high esteem. Rather they are losing patience with the political stance taken at Member State level. They would prefer us to be in the club, but not at any price.

28. The Bar Council has given evidence to the House of Lords EU Committee during the past year, in the context of the separate inquiries relating to the 2014 opt-out decision, in which, amongst other things, we highlighted our very real concerns about the potential damage to the UK's influence of exercising the 2014 opt-out, not limited to the criminal justice, or even the JHA fields. Those concerns, are, if anything, even stronger now, and certainly go to influencing the future JHA programme.

29. We said then, and we say again now, that it was the wrong battle to fight. A great deal of time of the EU institutions is having to be being given over to the UK-opt-out and the negotiations to opt-back in once the list is defined and formal notice given. This is time and manpower that could usefully have been focussed on the future JHA programme.

30. Moreover, it is not only the Opt-out decision that may undermine the UK's ability to influence the future programme, but also our option to opt-in to each measure that is proposed. Frequent exercise of this protocol right not to opt-in (such as in the criminal sphere in relation to the Directive on the Right of Access to a Lawyer and the Proposal for a Directive on the Freezing and Confiscation of Assets, or choosing not to opt-in when other Member States believe that they have accommodated UK concerns during the legislative negotiations, as seems to be the view abroad of the Succession regulation) may create an impression that the UK is not committed to the further enhancement of the JHA area, thereby limiting any sensible and productive contributions that the UK could make with regard to consolidation and effective implementation of the existing *acquis*.

31. In an ideal world, the Bar would like to see the UK continue to lead and engage across the range of EU JHA policy areas in a constructive manner and with its customary pragmatism. Not all EU initiatives are to be welcomed, but many are. In order to be able to influence which initiatives find their way to the statute book and which do not, and the form and content of those that do, the UK needs to be at the table.

32. We refer to Section II containing some suggestions for measures that that we would like to see included in the future JHA programme.

Section II Comments and suggestions regarding possible content of thefuture JHA programme, looking in particular at civil and criminal law

General remarks

33. The Stockholm Programme, adopted in December 2009, contained a full and ambitious legislative programme, much of which has been tabled, and some measures adopted, over the intervening five years. We call on the EU to focus its energies in the coming years on completing that work; reviewing its product and that of previous JHA programmes and where necessary, repealing, simplifying, consolidating, modernising; and filling in gaps where need is proved.

34. **The Commission's public consultations** on future measures should be, and be seen to be, open-ended – that is not anticipating or leading towards a pre-determined result.

35. The Commission should take account, and be seen to take account, of stakeholder responses to consultations, particularly if the target group(s) for a particular planned measure express a strong opinion for or against a possible course of action. The Commission should act, or decide not to act, accordingly.

36. **Impact assessments** should be conducted in a more transparent, open-ended and thorough manner.

37. **Rule of law** – the idea being mooted that formal notice (Possibly under Article 2 TFEU) could be given by the Commission to a Member State that is acting inconsistently with the rule of law may be worth exploring, but more needs to be done regarding competence, legal basis, what such a formal notice would look like; and issues of enforceability.

38. We would also welcome improvement to the functioning of the General Court so that it operates as a true administrative court for decisions and acts of the EU institutions, including in relation to Charter rights. Currently the General Court fails in that regard (see C-40/12 P of 26 November 2013) through excessive delay in hearing cases.

39. If the Commission wishes to be taken seriously by the Member States on high level matters such as the rule of law, it should in turn be seen to be, and be, respectful of Member States' concerns. An example would be in its response to reasoned opinions from national parliaments regarding a proposal's compliance with the principles of subsidiarity and proportionality under Protocol 2 TFEU, particularly when the so-called yellow card threshold is reached. In this, we refer to the July 2013 proposal for a European Public Prosecutor's Office (EPPO), which attracted just such a yellow card. The Commission's late November 2013 Communication responding to the Member States' concerns tells them, in essence, that they are wrong, and re-tables the proposal without amendment. Whilst this is strictly within the terms of the protocol, it seems ill-advised given that this is only the second time that the yellow card has been invoked; and also given the sensitivity of a proposal having constitutional significance for several Member States.

40. **Judicial training**, including for defence lawyers in criminal cases, must continue to be a cornerstone of JHA policy. Member States should engage with all such initiatives without reservation.

41. **E-justice** - EU standards could be developed to ensure the interoperability of certain national e-justice systems and to enhance the quality of cross-border proceedings.

Criminal law

42. Please refer to Annex 1, a text based on the address given by the 2013 Chairman of the Bar Council, Maura McGowan QC, at the Commission's *Assises de la Justice* Conference which took place in Brussels on 21-22 November 2013. That address ends with the following action list, some of which would need to be reflected in the future JHA work programme:

- The **completion of the Roadmap of defence rights** as originally foreseen, as well as measures laying down minimum standards for other defence rights already identified, as soon as possible; and in particular the adoption of a **binding measure on legal aid to cover the entirety of the proceedings**.
- **Transfer of evidence** – relying on principles of mutual recognition. This should be explored, but delicately. In principle, we would not support any initiative aimed at harmonising evidential standards, except in the most limited of circumstances, for example when it was shown to be necessary to support defence safeguards.
- An EU measure to provide for **remedies** when procedural safeguards are breached, or mutual recognition instruments are misapplied.
- The **inclusion of appropriate defence rights in other EU instruments** whenever there is a possibility of criminal or quasi-criminal sanctions being applied.
- The **review and if necessary amendment of existing criminal justice measures** to ensure that the rights of the defence are properly reflected.
- The swift adoption or full implementation of measures such as the European Supervision Order, by all Member States. The Commission should take necessary steps to ensure that is the case.
- The Commission actively to police the implementation by the Member States of the measures already in place, and where necessary, to bring infringement proceedings.
- The reform of the European Arrest Warrant (EAW) to reduce its misuse, and adoption of flanking measures such as the EIO.
- Funding for training and exchange of best practice between defence and other practitioners and legal professionals
- e-justice – continuing investment and expansion.

Institutional

43. Appointment of judges to the Court of Justice of the EU (CJEU) with criminal justice experience and training for all CJEU judges who may preside in such cases, on criminal law.

44. Ensure that Commission officials, so far as possible, who are drafting legislation in this field, not only have criminal justice experience, but are also drawn from the different legal traditions in the Member States. The Commission should make greater use of temporary staff to fill lacunae where necessary in order to achieve the right mix.

Civil Law

45. Mutual recognition, combined with EU rules of private international law and jurisdiction, have proved to be an effective combination to date and we continue to support this approach.

46. External dimension – we would support the ratification of the Hague Convention and a renewed attempt to revise the Brussels I regime to make it less Euro-centric.

47. Support a new focus on new **procedural matters in cross-border cases**, for example service and recognition of documents, and gathering of evidence.

48. The Stockholm Action plan included for 2014 a legislative proposal aimed at improving the consistency of existing Union legislation in the field of civil procedural law. We endorse this and call for it to be included in the future JHA programme if it is not achieved under the current one.

49. **Collective redress,** but not based on the US model**.**

50. Initiatives to increase awareness, both of judicial actors and of the public, of existing EU measures that provide access to justice, but which may underused – for example, the EU Small Claims procedure (now under revision), European Protection Order; the recent ADR and ODR measures amongst others.

European Contract Law

51. The Bar Council does not support the development of a European contract law instrument, either in the currently tabled form of an optional Common European Sales Law, or in any of the other forms so far mooted. We continue to believe that the need for such an EU instrument has never been proved.

52. We would not support the inclusion in the future programme of any similar initiative, such as in the field of insurance contract law, or service contracts.

53. The Bar Council continues to support the idea of maintaining the valuable content of the Common Frame of Reference that preceded the CESL as an up-to-date, non-binding toolbox for legislators.

54. Optional instruments - The Bar Council continues to doubt the suitability of Article 114 TFEU as the legal basis for an optional instrument, either the CESL or any other that might be under consideration. We would look at any future proposal for a truly optional instrument, with the appropriate legal basis, on its individual merits.

- **Consumer Rights Directive** – proposals to complete it should be explored once its operation has been reviewed.
- **Family Law** - Areas of improvement could include more cooperation in cross-border aspects, better tools for locating debtors abroad, and harmonised criteria for

the assessment and evaluation of the child's interest in order to avoid contradictory conclusions.

Fundamental Rights

55. The Commission could do much to educate the public and legal practitioners on the application of the EU Charter of Fundamental Rights to the JHA area, through information to EU citizens, support for training of practitioners and exchange of information.

12 December 2013

European Asylum Support Office—Written evidence

INTRODUCTION

The European Asylum Support Office (EASO) is an EU regulatory agency that as an independent centre of expertise contributes to the implementation of a common European asylum system (CEAS) by providing support and facilitating, coordinating and strengthening practical cooperation among Member States. EASO provides practical and technical support to Member States, operational support to Member States with specific needs and to Member States subject to particular pressure on their asylum and reception systems, including the coordination of asylum support teams made up of national asylum experts; and scientific input for EU policymaking and legislation in all areas having a direct or indirect impact on asylum.

The legal framework underpinning the CEAS, also called EU asylum package, has been adopted by the EU in June 2013. This consists of five legal instruments: the Qualification Directive (Directive 2011/95/EU), the Dublin III Regulation (Regulation (EU) No 604/2013), the Reception Conditions Directive (Directive 2013/33/EU), the Asylum Procedure Directive (Directive 2013/32/EU) and the Eurodac Regulation (Regulation (EU) No 603/2013). EASO will play a key role in supporting Member States in the implementation of the new EU asylum acquis through a vast array of tools that are being developed to fulfil this purpose. In developing these tools, EASO has taken into account the existing best practices and practical cooperation measures to ensure complementarity and avoid duplication.

After the entry into force of the Lisbon Treaty, the area of asylum has been incorporated in the normal decision-making processes of the EU. Therefore the next JHA programme could incorporate **policy orientations** rather than a catalogue of actions. **Flexibility, cost-effectiveness and evidence based policy making** should be guiding principles of the programme. All EU institutions, national parliaments and civil society should play a role in defining the next JHA Programme.

This paper provides two sets of suggestions; 1) general orientations, and 2) specific actions.

1. GENERAL ORIENTATIONS

1.1 Focus on implementation and consolidation

The focus of the Stockholm Programme in the field of asylum was to ensure that a Common European Asylum System (CEAS) is established by 2012. With the adoption of the EU asylum package, the focus of the new JHA Programme should therefore be directed towards ensuring effective and coherent implementation of the EU asylum acquis. Key to the further development of the CEAS is sufficient capacity in Member States' national asylum systems. EASO will have a more central role in coordinating these capacity building measures.

1.2 From mutual trust to mutual recognition

The Stockholm Programme called for a CEAS characterised by solidarity, responsibility and mutual trust. These concepts are pertinent if the CEAS is to work effectively. A natural implication of the harmonisation process characteristic of the CEAS is interdependency of the national asylum systems in the EU. A decision on an asylum claim by a Member State could have a direct effect on another Member State. Furthermore, information provided by a

Member State could affect the policies of another, and so on. Ideally, national asylum systems should mirror each other; the aim should be to have a framework within which Member States' asylum systems operate. Therefore special attention needs to be paid to the interdependency Member States on each other in a CEAS and the important role that EASO, as coordinator of practical cooperation among Member States has in ensuring that this interdependency is strengthened.

Moreover, once an assessment of the impact of the recast EU asylum instruments takes place, the possibility of transferring protection for beneficiaries of international protection when exercising their acquired residence rights under EU law should be explored. This has already taken place within the framework of intra-EU relocation measures that have been implemented from Malta, and is necessary in view of possible joint processing. However, this dimension becomes all the more important in an increasingly borderless (internal) Europe and adequate legal and practical solutions need to be identified.

1.3 Constant evaluation and assessment of the EU asylum acquis

The adopted recast EU asylum instruments must be constantly evaluated and reassessed to ensure that the desired goals are met and that legislation provides better solutions to the constantly changing circumstances in the asylum and migration field. Focus should be placed in particular on the Dublin III Regulation, which still, in its recast version, does not provide a comprehensive framework to adequately support the CEAS. Furthermore, possible additional legislative and/or non legislative instruments could be considered following evaluations and provision of evidence based policy input.

1.4 EU agencies as a source of evidence based policy input

In achieving the EU's objectives in the JHA domain, EU JHA Agencies are playing collectively a significant role by supporting the implementation of the EU acquis. Such actions are predominantly of operational or practical nature and consist of exchange of information, data collection and analysis, capacity building, training, provision of expertise and specialised networks. Given that EU Agencies are usually closer to the action in the field, they can better understand the challenges and realities that Member States encounter when implementing the EU acquis and can provide useful evidence based input to the policy debate. Member States and EU institutions should harness this opportunity and give agencies the mandate to do so.

1.5 Enhanced use of the Asylum and Migration Fund

From 2014, the new Asylum and Migration Fund (AMF) will become the principal instrument for allocation of EU funding in the field of asylum and migration. In the area of asylum, Member States will be expected to use their national programmes to further strengthen and develop the CEAS with a strong focus on prevention of crises and solidarity and responsibility sharing. One of the opportunities that the AMF offers is the move from the current system of annual national programmes to one of multiannual national programmes covering the whole Multiannual Financial Framework (MFF) 7 year period. This creates ample room for flexibility and possibilities to plan in a more long term and strategic manner. Furthermore, there are more possibilities for funding under the AMF and the strategic priorities are being discussed with each individual MS with input from EASO. Member States should use to the (asylum) funds to improve the quality of their asylum and reception

systems even through transnational initiatives, as well as to improve practical cooperation at EU level and show solidarity with those MS that need it most.

1.6 Boosting efforts on the External Dimension of Asylum and Migration

Boosting cooperation, partnership and solidarity with third countries by building capacity on asylum and migration issues should be one of the key priorities of the new JHA Programme. EASO can support EU and MS actions on the external dimension of the CEAS through the coordinating the provision of information, data and analysis that could inform policy decisions in this field. EU agencies could coordinate this effort with the European Commission and the European External Action Service (EEAS) through the EU Delegations present in third countries. Furthermore, the concept of Regional Protection Programmes could be evaluated to ensure that it is sufficiently effective, flexible and addresses the key objective for which they have been established, i.e., to improve protection. Finally, resettlement efforts made within the EU should be enhanced. Improvements to the EU resettlement programme on the basis of an evaluation in 2014 should be considered to ensure that the programme reaches it intended objectives. EASO could play the role of clearing house to this effect.

1.7 Recognising the interdependence between asylum and migration

Over the years, efforts to decouple asylum and migration have backfired and evidence clearly shows that there is interdependence between asylum and migration. Several policies have been developed in both fields in recent years. Consolidation of these policies in the new JHA Programme will also imply the development of a detailed common understanding of the meaning of the agreed rules in both fields, which is crucial for their effective implementation.

2. SPECIFIC ACTIONS

2.1 A more central role for training in asylum

There are differences in training of officials dealing with asylum and reception in Member States. Some MS provide extensive training to their staff, others do not. The EASO Training Curriculum has spread to more Member States in particular during the past two years since it has been taken over by EASO. The EASO Training Modules are developed with MS experts and is constantly updated to reflect recent developments and more modules are added every year. Therefore a European Certification process, using the EASO Training Curriculum could be put in place to ensure that those officials that deal with asylum claims have an adequate level of knowledge that is common across the EU.

Moreover, a functioning appeal system is an essential part of the asylum procedure. Approximately one half of all applications go to appeal. The second instance also has a strong influence on national policy for first instance as Member States seek to avoid making decisions that will be rejected at appeal. Therefore, providing training to judges (which can range from non-specialised judges in regional courts to expert judges in specialised tribunals) and boosting communication between second and first would greatly improve the application of the acquis and thus the functioning of the CEAS. A specialised European curriculum could also be developed by EASO in cooperation with members of the judiciary and other relevant partners.

2.2 Production of Common Country of Origin Information (COI)

COI is an integral part of the asylum procedure and should continue to be a principal aim of national quality processes. The creation of COI however should be rationalized – considerable capacity in COI production already exists at EU level – it is expected that the network approach adopted by EASO will a) accurately map needs for COI at EU level, and b) thus help to fill gaps and avoid duplication.

Therefore more emphasis should be placed on producing common COI with EASO playing a key coordinating role. EASO should produce more COI reports in cooperation with MS to ensure a European dimension to the reports. Furthermore, joint fact finding missions, coordinated by EASO, should become standard. This concentrated effort would yield better results and save time and money. The choice of countries could be determined by EASO and the COI strategic network. Of course, this would not impede MS from conducting their fact finding missions.

2.3 Improving and sharing reception capacity

There are considerable differences in reception capacity in Member States. Some Member States have limited capacity, others have excess capacity. There is lack of monitoring of capacity and standards and lack of funding in a number of Member States. Therefore measures should be aimed at establishing reception monitoring systems and contingency planning for possible influxes of migrants.

Furthermore, as the analytical section of the 2012 EASO Annual Report shows, influxes of asylum seekers are not evenly distributed across the EU and vary considerably from year to year. Looking at the statistics for past 20 years, overall the numbers of asylum claims has remained relatively stable at 300-350 000 year with variations of not more than 20% (and usually around 10%) from year to year. In comparison, in 2012 alone, flows at national level have risen and fallen compared to the previous year by as much as 56% and 9 MS of 27 saw variations of more than 40%. It is thus advisable to invest in transnational projects/initiatives aimed at rationalising the use of reception capacity in the EU, and possibly also for creating intra-national capacity.

2.4 Creation of databases, adjusting existing databases and linking with EU platforms

One way of supporting the development of the CEAS is through easy exchange of information. Many Member States would benefit from creating central databases such as on COI, jurisprudence etc.., at national level and to connect those databases to EU platforms, such as the EASO COI Portal and the future EASO asylum information and documentation system. MS should allocate funding to create databases or to modify existing ones to make them more effective and/or those that would like to link their databases to European/regional/national portals.

2.5 Better identification of vulnerable persons and victims of trafficking requesting asylum and assistance to unaccompanied minors

Asylum officials in a number of Member States are not adequately trained to identify and cater for the needs of vulnerable persons, victims of trafficking seeking asylum and unaccompanied minors. The number of unaccompanied minors in Member States has increased over the past years and not all Member States provide adequate assistance to

them. Shortcomings exist in age assessment, family tracing, education, legal guardianship and reception conditions. Member States should invest in national/transnational/European measures aimed improving identification and needs assessment of vulnerable persons, victims of trafficking and unaccompanied minors, in particular through training on unaccompanied minors issues (also through EASO Training Modules, expert meetings on family tracing, the EASO book on age assessment) but funding should be prioritised for measures aimed at vulnerable persons which involve provision of education, legal guardianship, psychological and or legal assistance and appropriate care conditions for unaccompanied minors according to best practice manuals gathered by EASO.

2.6 Early warning, preparedness and Crisis Management

The Early warning, preparedness and crisis management are essential tools for a well functioning CEAS. EASO is developing and Early warning and Preparedness System (EPS) that aims at providing Member States, the European Commission, the Council of the European Union and the European Parliament with accurate, timely information and analyses on flows of asylum seekers to and within the EU and the Member States' capacity to respond to them. The EASO early warning and preparedness system (EPS) will feed into the early warning, preparedness and crisis management mechanism provided for in Article 33 of the recast Dublin III regulation. Therefore the EPS together with the mechanism under Article 33 of the Dublin III Regulation should be further enhanced over the coming years. In addition, a toolbox for crisis management should also be developed in order to be better prepared for an EU coordinated response to emergency or specific situations.

2.7 Production and collection of asylum statistics

Clearly, it is difficult to gain an accurate overview of the functioning of the CEAS if asylum-related statistics are not collected in the same way. However, there may be objective difficulties with this in several MS that, because of their national organisation, would find it very time-consuming or impossible to collect certain types of information. Notwithstanding, EASO has, in cooperation with Commission, EUROSTAT and Frontex devised a comprehensive set of indicators, Member States could update their systems in order to allow submission of information under these thanks to new management information systems. Much greater use of biometrics and integration with EURODAC checks as far as possible should be supported so that misuse of the asylum system can be largely eradicated. Systems should be made capable of quickly and accurately registering and following applicants through all stages of the asylum system so that those who need protection are afforded it and those who do not are quickly removed.

2.8 Improving the quality of asylum decisions

Not all MS have quality systems which allow them to review asylum decisions they have made and check their conformity with the legal requirements and the appropriateness of the policies chosen. Quality processes should be put in place in all Member States in cooperation with EASO. Interviews, credibility and evidence assessment, awareness of the latest state of the CEAS including relevant EU jurisprudence, use of COI in the asylum procedure, and many other aspects of the asylum system require staff to be trained to a high and uniform standard. EASO training programme is taking the train-the-trainer approach with blended learning methodology.

2.9 Joint processing of asylum claims

Joint processing of asylum applications in the EU would constitute a major step forward in the development of a CEAS taking it to a new level. Building on the concepts of solidarity, responsibility and mutual trust, Member States could consider engaging in joint processing particularly in emergency situations of mass influxes of migrants possibly also coupled with intra-EU relocation of beneficiaries of international protection. As suggested in the recently published study on joint processing of asylum applications and discussion in the Council of the EU, EASO will start coordinating pilot joint processing operations. It is advisable that cross training of staff as decision makers should be established to make this possible.

2.10 Better integration of beneficiaries of international protection

Better integration, in particular access to education and employment, could avoid secondary movements. Integration issues should be incorporated in a comprehensive way in all relevant policy areas.

2.11 Assisted voluntary return and reintegration measures for beneficiaries of international protection

In some cases, beneficiaries of international protection originating countries where the situation has improved, would be willing to return to their countries if supporting measures are offered. Taking advantage of the experience of IOM, such support measures could consist of training, counseling, and reintegration package in the form of start up grants and temporary accommodation in the country of origin. Such initiatives were undertaken successfully by some Member States in the past.

CONCLUSION

So much has been achieved in the Justice and Home Affairs field since the Tampere Programme adopted in 1999. Similarly, there have been significant developments in migration and asylum, in particular with the development of a CEAS consisting of common rules and common practices. The asylum related priorities in the New JHA Programme 2015-2019 should focus on implementation and consolidation of the CEAS, which contrary to popular believe, is a living framework that needs to be flexible enough to respond to a constantly evolving context. Consequently, the second phase of the CEAS is certainly not the last phase and therefore new legislative/non-legislative measures might need to be put in place over the coming years. The EU should become a single genuine area of protection for those who need it and therefore MS should be supported to fulfill their obligations within a common framework characterized by the principles of responsibility, mutual trust and solidarity with an element of subsidiarty and proportionality that are at the core of EU treaties.

10 October 2013

Europol—Written evidence

1. Should there be a fourth JHA programme? If so what should its content, focus and purpose be, with reference to the previous programmes and evaluations thereof?

According to article 68 TFEU, the strategic **guidelines for the legislative and operational planning** in the area of freedom, security and justice (AFSJ) shall be defined by the European Council.

On 27-28 June, the European Council decided to hold a discussion at its June 2014 meeting, precisely to define strategic guidelines for legislative and operational planning in the AFSJ. In preparation for that meeting, the incoming Presidencies were invited to begin a **process of reflection within the Council**. The Commission was also invited to present appropriate contributions to this process.

This reflection process has already started and Member States have already circulated a series of ideas and non-papers on the matter in various fora.

The **Commission** intends to launch an open and inclusive debate involving relevant stakeholders in a conference at the beginning of 2014. It will also present its ideas in a Communication on "the future European Agenda for Home Affairs" planned for the beginning of 2014, which will go hand in hand with a Commission Communication on the future priorities on Justice.

From Europol's perspective, there are **three main arguments** in favour of a fourth JHA programme:

1. A legal and organisational requirement to set the main strategic guidelines for the EU home affairs agenda over the mid to long term.
2. The need to finalise the implementation of the Stockholm programme on the basis of recent evaluations carried out (e.g. by the Council and Parliament), as well as to consolidate the important *acquis* of legislative action and operational developments of the last few years, in particular by enhancing overall policy coherence.
3. To provide a long-term vision for this policy field in the context of a continuously changing strategic environment.

While we are still at an early stage in our reflection, a number of key issues can already be identified in the area of internal security, which constitutes Europol's remit.
The new JHA programme should give **adequate attention to serious and organised crime**, whose importance and impact on societies and the economy is often underestimated when compared to other security threats, such as terrorism. In this regard, it could give a more prominent role to the Policy Cycle, which is based on Europol's Serious Organised Crime and Threat Assessment (SOCTA) and determines the establishment of EU priorities in the fight against organised crime. For example, by maximising SOCTA's baseline threat assessment to include policy objectives and recommendations to facilitate effective interventions in the fight against organised crime.

The JHA programme could address the **impact of OC on the economy** to give a conceptual underpinning to policy proposals in the area of economic crime, in particular in areas such as detection and tracing of criminal proceeds, counterfeiting and infringements of property rights, the development of EU standards on financial investigations or the fight against corruption.

The JHA programme could enhance policy coherence in the area of **cyber-security**, one of the major challenges facing the EU internal security. The EU legislative framework has not kept up with technological developments and the exponential growth of cyber-criminality, which has created a number of vulnerabilities. In particular, the JHA programme could enhance cross-government and public-private cooperation. It should also provide clear support to the European Cyber-crime Centre.

The **private sector** has become a key actor of internal security in the EU and there is a need to identify ways of involving it in a more systematic way, both in policy development in the JHA area and in the implementation phase.

The new programme will most likely coincide with the adoption of the **new Europol Regulation**, already foreseen in the previous Stockholm programme. The latter should consolidate Europol as the operational centre for the coordination of police cooperation throughout the EU.

In view of the growing complexity and sophistication of organised crime, there is a need to provide a more sophisticated EU response and to **modernise the EU intelligence sharing structure and information management architecture**. One area where the new programme could be instrumental is a revitalised approach towards ensuring effective trans-border exchange of information on security, building on the Commission's European Information Exchange Model (EXIM). In this regard, there is a need for greater integration of systems around a single central hub at Europol, in order to avoid overlapping of systems and duplication of activity and more alignment of all agencies activities. This could complement the Integrated Data Management Concept (IDMC) proposed in the new Europol Regulation to answer Member States' operational needs and ensure flexibility in the future.

Counter-terrorism will remain a core task of Member States, but the JHA programme could give some orientations on the ancillary EU role in this domain, for example in areas such as prevention and countering radicalisation, which require a more comprehensive and multi-actor response.

Finally, further efforts are needed to ensure synergy between the **internal and external aspects of security**, especially as the European External Action Service did not exist when the Stockholm Programme was adopted. One relevant aspect is providing a framework to facilitate a "technical" security dialogue on common threats between EU security actors, including EU agencies and third countries, in particular as regards organised crime.

Here, while many of the challenges to the EU internal security still derive from the EU neighbourhood, it is important that the JHA programme does not adopt an overly narrow geographical perspective, but rather takes due account of the combined effects of globalisation and the increasingly dynamic and complex nature of organised crime. The relevance of transatlantic security partnerships should be properly valued in this respect.

2. What is the relevance of the political context? For example, how relevant will the debates and controversies surrounding the free movement of persons, privacy (the Prism programme in the US, as well as similar programmes in some Member States) and the negotiation of a US-EU free trade agreement be?

Undeniably, the **political context** will be relevant for the preparation of the next JHA programme, although it is difficult to assess the precise effect on its final outcome.

In this regard, 2014 will be marked by important **institutional changes at EU level**: European Parliament elections, appointment of the new Commission, the new President of the European Council and new High Representative. This will involve new political priorities which will also have to feed into the reflections on the future of the JHA area.

National political calendars (recent election in Germany, parliamentary elections in Belgium, local elections in France, the UK opt-out, the Scottish referendum, etc.) may also have an impact on the content of the JHA programme.

Recent developments related to **data protection and privacy rights** are relevant in this context. There is a growing concern in civil society and the public opinion about data protection and privacy issues, which needs to be taken into account when developing policies. The new home affairs agenda will have to ensure that the principle of proportionality is respected, finding a proper balance between ensuring citizens' protection and security and upholding fundamental rights. In other words the EU will have to reach a lasting political consensus on the balance between security and freedom, something which has become more challenging in the context of serious criminality operating online and across borders to a greater extent than ever before.

The next JHA agenda will also have to acknowledge the rapid changes in civil society, in particular the ever growing e-dimension of society, and the force of inclusion, as technology is shifting power to individuals who want more participation in decision-making.
For Europol, especially in the context of its new Regulation, this will mean maintaining the principle of "purpose limitation" in the implementation of its mandate as well as the **highest levels of data protection**. The Treaty of Lisbon has reinforced the overall legal framework of data protection and contains clear provisions in this area (Article 16 TFEU). Europol is proud of the reputation it has earned for having the most robust and effective data protection regime of any police agency in Europe. It is therefore important that it retains the key elements of a data protection regime that has worked very well for over 15 years, in particular the application of a tailor-made regime to ensure that data protection principles can be applied effectively whilst meeting the unique requirements of law enforcement to access personal data.

Therefore, while addressing data protection and privacy issues, it is crucial for the future of European internal security that the new JHA programme takes into account the specific requirements of the law enforcement community.

No less important than the political context will be the effect of the economic crisis and the changing security environment on the future JHA programme.

The deep and sustained **economic crisis** has made European societies more vulnerable to security threats and has affected European governments' capacity to invest in security. The effects of globalisation in society and business have facilitated the emergence of significant **new variations in criminal activity**: commodity counterfeiting, intellectual property rights infringements, tax frauds (e.g. VAT fraud in the carbon credits market or cigarette smuggling), payment card fraud, etc. In a deregulated market context, organised crime groups exploit loopholes and inconsistencies in legislation and enforcement as well as the possibilities offered by the Internet to generate illicit profits at low risk.

In this context, it is important that the next JHA programme provides a clear understanding of the EU security weaknesses and anticipates future evolutions to better define and adapt policies and strategies. It should emphasise the importance of risk and threat analyses, such as Europol's Serious and Organised Crime Threat Assessment (SOCTA) or the EU Terrorism Situation & Trend Report (Te-SAT) as a prerequisite for any effective internal security strategy.

It could also seek to associate security policies with actions aimed at securing an effective economic recovery, such as a strong focus on the fight against economic and financial crime. The harmonisation of legislation to prevent further expansion of organised crime will also be important.

3. What lessons from the application of the Stockholm Programme could usefully be reflected in the next JHA Programme? Did the Stockholm Programme involve too much or too little legislation and what were its tangible outputs? How successful have some of these outputs, such as the Standing Committee on Operational Cooperation on Internal Security (COSI), been and are they working as intended?

The ambition of the Stockholm Programme was to create a more secure and more open Europe where the rights of individuals are protected and cooperation focuses on measures that provide added value for citizens' life.

In the face of serious cross-border security challenges in the areas of organised crime and terrorism, the Stockholm Programme called for a **coordinated approach to police cooperation** and border management, and for a more efficient use of existing EU instruments in the fight against organised crime, in particular to facilitate the exchange of information and remove technical or legal obstacles to effective law enforcement cooperation.

The **role of EU justice and home affairs agencies**, including Europol, was also underlined with a view to give them the powers and resources necessary to achieve their goals and improve inter-agency cooperation.

In terms of **implementation** over the last three years, the Stockholm Programme offers a mixed balance. Clearly, a number of important steps have been taken and objectives fulfilled. There is a now a robust body of EU legislation in the JHA domain and a considerable number of initiatives have been adopted in the following areas: tackling crime profit, trafficking in human beings, the establishment of the European Cyber-crime Centre (EC3), preventing radicalisation though the Internet, pooling of resources, etc. Obviously, other proposals are yet to be developed or have not yet reaped their full potential, either because of their recent adoption or for lack of implementation. The European Parliament noted in

July 2013 that further progress needs to be made, for example, in the fields of cybercrime, protection of critical infrastructure, the fight against corruption, money laundering, funding of terrorism and the trade in illegal firearms.

Of particular relevance has been the establishment of the **Standing Committee on Operational Cooperation on Internal Security (COSI)**, which has considerably enriched the opportunities for EU-level coordination in the field of internal security. COSI has improved the joint use of strategic resources and expertise on organised crime to inform policy-making, especially through the adoption of the "EU policy cycle on serious and organised crime" to which Europol makes a key contribution. The implementation of the Policy Cycle and, in particular, of the Multi-Annual Strategic Plans and Operational Action Plans could be further enhanced by addressing certain shortcomings, such as funding, Member States' involvement and the lack of awareness regarding the Policy Cycle. Again, the JHA programme could highlight the relevance of the Policy Cycle to improve the quality of the decision-making process in the fight against organised crime.

In general, there is still room for improving effective operational cooperation within COSI. In this regard, a more active presence and role for law enforcement agencies could be envisaged.

4. Should the EU's focus be on consolidating existing JHA cooperation before embarking upon further EU legislative proposals and initiatives? The UK Government, in particular, has emphasised in the past that the EU should focus on practical cooperation, which does not necessarily require a legislative underpinning.

Europol is an **operationally-oriented organisation**, whose objective is to provide support to Member States investigations in the fight against organised crime and terrorism. Europol provides direct operational support functions, in terms of intelligence and information sharing, operational analysis and investigative leads, coordination of cross-border operations (including Joint Investigation Teams) and concrete field support through forensic and technical expertise (drug labs, counterfeit currency print shops, computer hardware, etc.).

Therefore, **practical cooperation** is at the core of Europol activities and that should also be the focus of the JHA programme from Europol's perspective. This said, in certain areas of police cooperation, an additional legislative underpinning may be required. This is the case for the fight against cybercrime where often the legislative framework has not kept up with technological developments. Legislative harmonisation and standardisation of law enforcement practices across EU Member States can also help levelling the playing field for practitioners and eliminate unnecessary differences between jurisdictions, which on the other hand, offer vulnerabilities that can be exploited by criminals (e.g. in synthetic drugs regulation).

In any case, as noted under question one, the new JHA programme should set the main strategic guidelines for the EU home affairs agenda, but also **finalise the implementation** of the Stockholm programme and consolidate existing JHA legislation and cooperation.

In this context, **implementation should be prioritised against new legislation**. There is indeed a need to properly implement the enormous amount of already existing and

upcoming legislation (e.g. Europol Regulation) rather than adopting new rules in order to fulfil the strategic guidelines and objectives.

The European Parliament recently noted that the current landscape of the different instruments, channels and tools is complicated and scattered, leading to an inefficient use of instruments available, therefore offering another argument in favour of consolidation, coherence and cohesiveness of the new package.

The Commission has also identified an important lesson learned from the implementation of the Stockholm Programme, which puts the emphasis on ensuring transposition and implementation of the justice and home affairs *acquis*. There is indeed a need to ensure timely and full transposition into national law and harmonised practical implementation across the EU of all existing legislative instruments. This is not just a matter of formal compliance, but of effective operational implementation, which can be supported by the strategic use of the new EU funding in this area.

5. Should the Programme include a timeline for repealing and/or consolidating existing JHA legislation where necessary?

Given the likely nature of the next JHA Programme (see answer to question 6) it may not be the most suitable document to include a timeline for repealing or consolidating existing legislation.

The need to repeal or consolidate existing legislation is very much linked to the issue of **strengthening the evaluation of JHA instruments and policies**. This is best done by monitoring the implementation of existing rules, from a legal and practical perspective; by using article 70 TFEU to conduct objective and impartial evaluations of the implementation of the Union policies; by following-up on the implementation of measures; and by assessing the cost of implementation.

6. What should be the format of the next JHA Programme? For example, should it comprise a concise set of principles or contain a longer, and more detailed, set of initiatives as per the previous programmes?

It is unlikely that next JHA Programme will contain a long and detailed list or catalogue of deliverables and concrete outcomes in the different thematic areas for the next five years. It would rather be a more concise set of principles, providing a more strategic approach and flexible enough to adapt to a fast moving environment and evolving societal challenges. So, in terms of format, the future JHA guidelines would probably be different from the Stockholm Programme and more in the spirit of the Tampere conclusions.
This does not exclude that a number of priorities are identified to underpin EU action. This could involve implementing identified policy objectives in three ways: through legislative action and legislative consolidation, practical cooperation, and the strategic use of funds

7. What role should the European Parliament and national parliaments play, if any, in defining the content of the next JHA Programme?

Home affairs are no longer part of a separate intergovernmental setting after the changes introduced by the Lisbon Treaty. They have become a mainstream EU policy area, based on

the Treaty procedures for conducting the legislative work and ensuring accountability and democratic control.

Article 68 TFEU does not foresee any role for the European Parliament in defining the strategic guidelines for the legislative and operational planning in the area of freedom, security and justice. The June 2013 European Council conclusions also remain silent regarding the involvement of other institutions, in particular the European Parliament. However, the European parliament is an important stakeholder and in line with the new institutional framework set by the Lisbon Treaty, it should have a particular say in defining JHA policies and should be fully involved in the discussions on the future of the JHA area.

8. Is the funding allocated to JHA activity in the Multiannual Financial Framework for the period 2014-2020 sufficient to achieve existing aims?

The overall share of the EU budget given to JHA policies is very small: about 0.77% of the total EU budget (heading 3a of the 2007-2013 Multiannual Financial Framework - MFF) amounting to 6.449 M euro. As things stand now, the Multiannual Financial Framework (MFF) makes an appropriation of 3.318 M euro for the Internal Security Fund programme and of 2.780,3 M euros for the Asylum and Migration Fund programme for the entire period 2014-2020. Altogether, the Commission proposes to allocate €8.2 billion for the period 2014-2020 in the area of home affairs.

While this represents an important effort in times of austerity, from Europol's perspective, the funding allocated is not reflective of the size and scale of the security threats and problems facing the EU.

Precisely because the funding allocated to JHA activity is and will continue to be limited, the emphasis of the new JHA Programme must be on promoting collaborative options and avoid duplication. In this regard, international cooperation must play an essential part in any effective strategy to fight organized crime and terrorism.

As a multilateral hub for law enforcement cooperation, Europol is a good example of useful and cost-effective solutions. Europol provides a direct access to effective police cooperation mechanisms, through a law enforcement community of about 150 liaison officers from almost 40 countries (including Europol's third-country partners: United States, Australia, Norway, Switzerland, etc.). It also offers direct operational support to Member States in the conduct of national investigations. This is important as EU Member States are progressively reviewing their bilateral police cooperation networks and closing bilateral police liaison officer posts and transferring that work to their respective Europol Liaison Bureaux.

9. What are the potential implications of further EU Treaty change for JHA cooperation, including the position of the UK?

Previous JHA multiannual programmes were linked to major treaty changes: the Tampere conclusions followed the adoption of the Amsterdam Treaty; the Hague Programme was linked to the process leading to the adoption of the "EU Constitution"; and the Stockholm Programme came along the entry into force of the Lisbon Treaty.

However, it is very **unlikely that the forthcoming phase will be linked to such major Treaty change**. It is perhaps the first time in the last 15 years that this policy field is not

subject to a fundamental modification, notwithstanding some changes deriving from the application of Protocol 36 on transitional provisions, including the UK opt-out.

10. What form could or should the UK's future participation in JHA matters take beyond the 2014 opt-out decision? What are the priority areas for potential cooperation in this respect, assuming that the UK will end up participating less in this area than it does at present? Will exercising the opt-out undermine the UK's ability to influence the content of the next JHA Programme?

Traditionally, the UK law enforcement community has always been at the forefront of EU police cooperation. The UK has also made an invaluable contribution to policy-making in EU internal security and has been one of the most influential Member States in shaping European internal security legislations. Overall, the UK often sets the EU agenda in the AFSJ domain. Europol expects that it will continue to do so, including with regards to the next JHA Programme.

A UK exit from Europol or other key policies and measures in the AFSJ domain would have a considerable impact on the UK's ability to influence and participate in policy development in the area of law enforcement and the next JHA programme in particular.

From Europol's perspective it is important that the UK continues to be a primary player and driver in international police cooperation and a leading partner in the fight against organised crime and terrorism, in particular by maintaining and even increasing its current level of engagement with Europol.

Other areas for potential cooperation of particular relevance from a law enforcement perspective are the Joint Investigation Teams, the Schengen information System or the European Criminal Records Information System.

For more details on Europol's views on the potential impact of the UK exercising the opt-out, reference is made to three sets of written evidence submitted by Europol to the House of Lords inquiry into the UK's 2014 opt-out decision on 18 December 2012, 14 February 2013 and 11 September 2013.

15 October 2013

Fair Trials International—Written evidence

Further to the call for evidence on the Future Justice and Home Affairs Programme (2015-2019), we write to make a delayed submission to the enquiry. As oral evidence is still being taken, we hope you may take into consideration this email and attachments [not printed here] which formed the basis of Fair Trials International's submission to the EU Commission's consultation on the future programme as part of the Assises de la Justice.

Fair Trials International is a non-governmental human rights organisation which works for fair trials according to internationally recognised standards of justice. We do this by helping defendants to understand and exercise their fair trial rights; providing training and networking opportunities to legal experts; and through advocacy work to tackle the underlying causes of injustice. Based on conclusions reached in consultation over the past four years with our network of over 120 criminal justice experts from 28 Member States – the Legal Experts Advisory Panel (LEAP) – we have established the following priorities for future EU work in the area of criminal justice:

1. **Effective implementation of adopted directives**: Recognising the achievement of the European Commission, Council and Parliament in adopting the first three directives under the Procedural Rights Roadmap, we call upon the EU institutions to ensure that these important protections of defence rights are implemented effectively by working closely with Member States as they transpose them into domestic law.

2. **Completion of the Roadmap**: Given the interdependent nature of the rights set out in the the Roadmap, we call upon the EU institutions to adopt and implement the other envisaged measures on procedural rights, including through robust legislative measures on legal aid and vulnerable suspects.

3. **Minimum standards on pre-trial detention:** The existence and application of appropriate safeguards relating to the use of pre-trial detention are key factors in the fair operation of, and public trust in, existing mutual recognition measures. We therefore urge the EU institutions to continue their work on pre-trial detention in the EU by committing to revisit the case for legislative action which we believe is necessary.

4. **Reform of the European Arrest Warrant:** Since 2009, Fair Trials and LEAP have raised concerns about suspects being extradited under European Arrest Warrants to face trial or serve sentences for minor offences, spending months in pre-trial detention waiting for trial and subjected to serious violations of their fundamental rights. We continue to call for EU-wide safeguards to prevent abuse of the European Arrest Warrant and to protect defence rights within its operation.

We attach the following three joint letters [not printed here], coordinated by Fair Trials and addressed to Vice-President Viviane Reding, which further elaborate upon the priorities listed above:

(i) Joint letter on the European Arrest Warrant, submitted by Fair Trials and leading defence practitioners from the LEAP network in October 2010;

(ii) Joint letter on the future of defence rights in Europe, submitted by Fair Trials and four other NGOs in July 2013; and

(iii) Joint letter on the need for further action on pre-trial detention, submitted by Fair Trials and 21 other NGOs in September 2013.

We also attach a brochure which further highlights our priorities for future EU work in the area of criminal justice [not printed here].

19 November 2013

Professor Elspeth Guild, Professor Steve Peers, Professor John Spencer—Oral evidence (QQ1-14)

Evidence Session No. 1 *Heard in Public* *Questions 1 - 14*

WEDNESDAY 20 NOVEMBER 2013

Members present

Lord Hannay of Chiswick (Chairman)
Lord Blencathra
Viscount Bridgeman
Baroness Corston
Lord Dykes
Baroness Eccles of Moulton
Lord Judd
Lord Morris of Handsworth
Lord Sharkey
Lord Tomlinson
Lord Wasserman

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Examination of Witnesses

Professor John Spencer, Centre for European Legal Studies, and University of Cambridge, **Professor Steve Peers**, University of Essex, and **Professor Elspeth Guild**, Queen Mary University London.

Q1 The Chairman: Good morning. Just before starting our evidence session, I look behind the panel and welcome the Members of the Serbian Parliament who are with us this morning to have some idea of the way in which the House of Lords European Union Select Committee, in this case its sub-committee that deals with home affairs, health and education and scrutinises European policy, but also in this case is taking evidence on the possible content of the next justice and home affairs programme, which is likely to be adopted by the European Council towards the end of next year but which will be the subject of lively debate and negotiation during 2014. We are aiming to produce a report on that by next March or April so that it will help to shape the views of our own Government, we would hope, and of

other Governments, too, on the content of this programme. I say that because it is perhaps useful for our panellists also to hear that introduction.

I now welcome all three of you. Two of you at least are very familiar to the Committee because you gave us very valuable evidence in the context of the Protocol 36 inquiry that we did on the block opt-out. This, as you know, is a session in public. It is being broadcast. A transcript is being taken and a copy of the transcript will be sent to you, to give you an opportunity to make minor corrections to it, although it will be published online in an uncorrected form. If you would like to make any opening remarks, that would be entirely welcome to the Committee, but if you would prefer to move straight into questions, that would equally be welcome to us. Do you have any views on that?

Professor Steve Peers: I will if I may make a brief opening remark, a criticism of the timing of the plans to come up with a new programme. It would make sense to come up with a new programme, if one is needed at all, in 2015 after there is a new Commission in place and after the European Parliament and the President of the European Council have fresh mandates, rather than at the very end with a lame-duck Commissioner and the European Parliament about to be re-elected, probably with half its Members turned over as usual. It seems a bit precipitate. This timing also weakens the UK's position. We have this intention to opt back into key legislation, but that cannot be put into place until 1 December 2014 at the earliest. Perhaps after that point our participation would look more solid. At the moment, however, we have just opted out of everything pre-Lisbon relating to police and criminal law, having not yet accomplished our intended opt back in. It seems to me that our influence is bound to be weaker because of this timing.

The Chairman: Yes. I think your desire is probably not going to be met for a number of reasons. One, of course, is that the present Stockholm Programme runs out and some people certainly want to see continuity. The other is that it is not going to be adopted in any

case, as is my understanding, in the first half of next year but in the second half of next year, under the Italian presidency, which is why it is sometimes called the Rome Programme, although we are not allowed to call it that. The Lisbon Treaty, as you know, puts the requirement on the European Council to give strategic guidance in this matter to the Commission, the Parliament and all other institutions. The European Council, although its members are often being elected or re-elected at various different moments, will not be so prevented from acting next year. I just add that. I gather that this Commission is now thought likely to produce a communication on it in about March. I do not think that we will have quite the lacuna that you fear. Would other of your colleagues like to make an opening statement?

Professor John Spencer: No thank you.

Q2 The Chairman: If that is okay, I will start the questions. By no means are any or all of you answering each of the questions. That would be very welcome to us, but it is not obligatory that all three of you answer all of them. Could each of you give a brief overview of your view of the UK's involvement in the development of the European Union's justice and home affairs programmes to date, the sequence that runs from Tampere, through the Hague through to Stockholm?

Professor John Spencer: My area is EU criminal law and criminal justice. Viewed from my perspective, the main contribution that the UK has made was inventing and selling the notion of mutual recognition in criminal cases, which was an idea that it put forward as an alternative to attempting to harmonise the law across the different Member States. We took the lead in that for many years. We also took a significant lead in matters of police co-operation, sharing of information and so forth. Less happily, we put a spoke in the wheel in the mid-2000s of the development of an EU programme on defence rights, as to which I am very sorry. Nobody knows what the UK actually did to feed into the original programmes

when they were proclaimed by the European Council, but in terms of what we have done, leadership in the two areas that I have mentioned is the most important contribution, I think.

Professor Elspeth Guild: Thank you very much Lord Chairman and Members of the Committee. It is indeed a pleasure to be here. It has been some time since I have appeared before you. My field of expertise is borders, immigration and asylum. I will leave my colleagues to discuss the issues of criminal justice. As regards the role of the United Kingdom in respect of EU policy on border controls and prisons, the UK has been out of step with the rest of the European Union since 1985 and the signing of the Schengen agreement. The introduction into the Single European Act of the objective of the abolition of internal border controls in the European Union was the subject of a declaration inserted at the request of the United Kingdom not to participate in that project. Since that time, the UK's position has been consistently opposed to participation in both the abolition of internal border controls in the European Union and the refusal to participate in the external border control activities, with a number of exceptions, where the UK has sought to participate, for instance in FRONTEX. This has been challenged by the Council, and the Court of Justice has found that the UK, as it does not participate in border controls, cannot participate in those parts of EU border controls where the UK Government has perceived this to be in its interests. As regards border controls, the UK remains very much outside and has been since the EU began to develop a common border control policy.

In respect of a common immigration and asylum policy, there is a slightly different scenario. After the introduction of competences in 1999 for the European Union to adopt legislation in the field, the United Kingdom has participated in the development of the common European asylum system and in all the measures in the first phase. However, the second-phase measures, the last of which were adopted in July this year, have been quite a different

matter. On the second-phase measures, the UK has opted out of all except two, the Dublin III and Eurodac regulations.

On immigration, from 2000, the United Kingdom notified the Council that it would not be participating in the family reunification Directive. It has not participated in the long-term residence Directive, or in EU measures on students, researchers, employees and labour migration. So the UK has remained consistently outside all the measures on EU immigration. On the fight against irregular migration, the UK has participated in some of the marginal measures, carrier sanctions being one of them, but remains outside the major measures, the EU returns Directive in particular. Thus the role of the UK in respect of borders, from the perspective of the European Union, has been consistently negative, if I can put it that strongly. On the development of a common immigration policy, it has been, as seen from the perspective of the other Member States, ambivalent, to put it at its strongest. In respect of the common European asylum system, again from the perspective of the other Member States, the UK has been unhelpful, particularly to the extent of having opted into the first-stage legislation and not into the recast legislation. Thank you very much for your attention.

Q3 The Chairman: You did not mention, which is perhaps worth mentioning, that the UK gives very broad support to the activities of FRONTEX, and indeed subscribes to some of their costs. It was stated in our own national security directive review that the effectiveness of FRONTEX was in our national interests. The UK has also made a huge investment in the Schengen Information System, which is due to come on stream fairly soon and which the British are seeking to rejoin after the block opt-out. I mention those because they surely offset to some extent the negative view that you have taken.

Professor Elspeth Guild: I would clarify to some extent the FRONTEX question. The Court of Justice of the European Union found in 2007, when the UK challenged its exclusion from participation in FRONTEX, that, indeed, under the terms of the UK's opt-out, it is not

entitled to participate. This may explain why the UK authorities have expressed such interest in practical co-operation. The degree to which practical co-operation is indeed lawful, following the judgment of the Court of Justice of the European Union, is a matter that may eventually require clarification by the court. There is certainly a question as to whether practical co-operation is lawful if the legality of participation has been excluded. As regards the Schengen Information System, the UK is of course excluded from all parts of it that relate to the signalling of persons to be refused admission to the European Union. The majority of the information on the Schengen Information System II is in fact information on third-country nationals to be excluded from entry into the Schengen area. The UK cannot have access to that part of the database because it does not participate in the borders policy.

Professor Steve Peers: I think I would answer the question from the perspective of the process of drafting these programmes. On all three occasions I have looked in detail at the drafts of these programmes as they were being negotiated, and commented on them on the Statewatch website and so on. With Tampere, it is very clear that there was a different process. That was a programme that the European Council was the author of: the Member States, heads of state and Governments. There was little input beforehand from national ministries of justice and home affairs. What is interesting with Tampere is that, although it is usually supposed to be just the heads of state and Governments, plus maybe Foreign Ministers who meet in the European Council, on that occasion our Home Secretary, Jack Straw, went out to Finland somewhat unofficially to participate. That shows you that we had a genuine impact. I remember some of the changes that were made at the UK's behest. It was supposed to be called the uniform European asylum system, and Jack Straw insisted it be the common European asylum system. As Professor Spencer said, it was certainly the British Government's intervention at Tampere that made sure that mutual recognition became the centrepiece of both criminal and civil law as well. It dates back to the British presidency of

1998 when the mutual recognition principle first began to be developed. This was a kind of continuation, but if you look at the subsequent two programmes, the Hague and Stockholm Programmes, the European Council's role has in practice been nominal. It is the official author of the text of these programmes, but you could say that they have in a way been ghost-written by the officials of the ministries of justice and home affairs of the Member States holding intensive meetings and, mainly, the presidency of the Council, which took the lead in the drafting and redrafting in each of these two cases. It is hard to find an individual Member State's influence. Just from what I can remember from looking at all these drafts, it was almost entirely the presidency that was doing the drafting work. You do not see a lot of evidence of papers and comments from other member states. It was probably happening, but it is hard to trace back exactly what the UK's Government's influence was. It was bound to be less in 2004 and 2009, because by then we were using our opt-out and by 2009 is was just then being expanded as the Lisbon Treaty entered into force to cover policing and criminal law, whereas in 1999 the Amsterdam Treaty had just entered into force. We had not used it yet. We had applied to join parts of Schengen and so on, so the Government had to give much more favourable statements towards participation in this EU policy. As we detached ourselves more, our influence has inevitably become less. Although that jumps ahead to your question 8, it is useful in answering question 1 as well.

Q4 Lord Sharkey: Can you tell us what value these EU programmes actually add, and to what extent the Stockholm Programme governed or influenced the Commission's approach to freedom, security and justice matters?

Professor Steve Peers: They set a sort of agenda which the Commission and to some extent Member States, where they have legislative and administrative power, take some account of. You can find quite a lot of account of it being taken over the years, but that has its limits. The Commission has proposed a European public prosecutor, for instance, which

was not mentioned in the Stockholm Programme. The Council itself does not always follow the Tampere programme, for instance. The Tampere programme included a statement that it was urgent that the EU have extensive legislation on legal migration. The Commission made an extensive proposal in 2001, and Member States were not at all interested in it. It took years before we started to have EU legislation on legal migration, in a piecemeal fashion. Equally, in 2004, the Hague programme talked about the second phase of the common European asylum system going ahead, and it took some years for that to come to fruition. Those deadlines were extended and the second deadline was missed for the creation of the common European asylum system. I think you can find cases where to some extent they have been followed and cases where to some extent they have not. Certainly, the Tampere programme had a bigger influence. Some of the text of the Tampere programme got written into the Lisbon Treaty, such as the concept of a common European asylum system and the central importance of mutual recognition. That is all now written into the treaty text, not just a political declaration but a legally binding set of rules. Certainly, in criminal law, you can see in the early years after Tampere quite a strong adherence to the idea that mutual recognition ought to be the rule. With the arrest warrant and other measures, that was the predominant approach for a number of years, until we started to have defence rights measures after the Stockholm Programme, which was one of the things that pushed defence rights. You can see that there is a significant degree of influence, but you can also find exceptions where the programmes have not really been implemented, either by the Commission or by the Council, in the way that was intended in the text.

Professor John Spencer: The value of these programmes is that they are an affirmation of political will to attempt to do something about a particular issue or particular issues. The problem is that they are just a statement of aspiration, and where laws are later needed to actually do something, the legislative process has to be followed. The fact that the aspiration

was stated earlier does not mean that there will later be the necessary consent to produce the legislation, but at least they give a signal of political will for something to be done and hence an encouragement to the Commission and other bodies to work in that direction.

On the extent to which the Stockholm Programme governed the Commission's approach and so forth, there is a problem. The Stockholm Programme has never been the subject of a thorough and official evaluation. As the Committee will be well aware, this has been a matter of complaint by the European Parliament. Until there is a thorough and independent examination of what the Stockholm Programme has actually achieved, it surely makes less sense to start formulating another programme to follow it.

Professor Elspeth Guild: I would add, in respect of border controls, that the various programmes have not added a tremendous amount to the position of the European Union, which was formulated between 1985 and 1987 as being characterised by the objective of the abolition of internal border controls among the Member States and common external border measures. Thus the programmes had little to add in setting the objectives. In the field of immigration, the matter is quite different. When the powers were granted to the European Union to adopt legislation in the field of immigration in 1999, they were written as powers. There were no directly effective rights. The Tampere programme was particularly important for all the legislative actors to know what the political will was towards the development of a common European immigration policy. That was particularly important in the beginning, and it gave body and a direction to the legislative programme that then followed. Now that we have a legislative programme, we have adopted all the main lines of a common European immigration policy. It is less clear what purpose there is in these programmes.

On asylum, I agree very much with Steve Peers. The position of the programmes is somewhat more ambiguous because the common European asylum system was stated from

the beginning as being intended to give full effect to the international obligations of Member States in respect of the UN Convention relating to the Status of Refugees and its protocol, the UN Convention against Torture and of course the Council of Europe obligations under the European Convention on Human Rights. Asylum is a field in which the Member States are engaged at the international level in a variety of domains. Thus the objectives set out in such programmes are slightly more limited because the scope for action is indeed more limited.

Q5 The Chairman: None of you has mentioned either Europol or Eurojust which—I think there is common ground on this—are an extremely important development of recent years. That is reflected in the Government's decision to wish to rejoin both those organisations. To what extent were they given impulse or momentum by these various programmes? Can any of you cast any light on that?

Professor Steve Peers: The genesis of Eurojust was in the Tampere programme, if I recall correctly. Europol goes back earlier. There was an agreement back in 1991 for an informal programme on justice and home affairs that was adopted at the Maastricht European Council at the same time as the Treaty that talks about Europol, and of course it was referred to in the Treaty. Now they are both referred to in the Treaties. But I do not think too much subsequent development of those measures has found its way into the programmes. There was a bit in the Stockholm Programme about new measures which the Commission has proposed that develop those agencies, but I do not think that there is too much in the way of detail about how they should develop in the Stockholm Programme. It is a little political impetus to use the powers to advise these agencies, but nothing much more than that. The principal importance was those initial conclusions, which defined the idea of Eurojust as a kind of central feature of judicial co-operation in criminal matters within the European Union.

Professor John Spencer: I was looking at the Hague Programme in preparation for this evidence giving, and I see that there is a bit in there about the importance of bolstering Eurojust and furthering mutual recognition. I suppose the Hague Programme helped to consolidate the position of Eurojust.

Q6 Lord Wasserman: Looking forward rather than back, although I very much take Professor Spencer's point about the programme never having been evaluated—it is difficult to learn lessons unless one has actually tried to evaluate a programme objectively afterwards—what lessons from the application of these previous programmes could or should be reflected in any new programme? I also take Professor Peers' point that we may not need one, but if we are going to have one, what lessons can we learn about the application and usefulness of these programmes, and what they ought to contain to ensure that we can say that they are useful?

Professor Steve Peers: I suppose it is partly about checking to see whether what the programme says is being accomplished is actually being accomplished in terms of which legislative and non-legislative Acts have been passed that were planned to be. It is also partly about seeing the effect of those measures once they have been adopted, which is a much bigger undertaking and has to be done on a case by case basis—to see what FRONTEX is doing, for example. There are a whole series of evaluations of EU agencies and information systems, and assessments of legislation planned at different times, depending on when the legislation was adopted. I suppose you could somehow try to bring that all together in some kind of linked synthesis as part of your assessment of what the next programme should do. It is useful to have a kind of ongoing assessment, which used to happen with Tampere. Every six months, the Commission produced a scoreboard to see what was actually happening. That kind of approach to monitoring output seems to have been dropped entirely. It might be useful to have at least some modest version of that built in, as well as a broader

evaluation of how much of the Stockholm Programme was accomplished, were there good reasons, or not so good reasons, why parts of it were not accomplished and how that leads into what we want to accomplish in the future. Those are the sorts of things that should be taken into consideration.

Lord Wasserman: That is one lesson. What other lessons are there for future programmes? There is no point in writing an enormous number of papers for the sake of writing papers, although having been a civil servant I understand the value of writing enormous documents—it is fun and interesting. At the end of the day, what do we want to see in this programme? If we had a programme that was really useful, what would it look like?

Professor Elspeth Guild: I will answer that. The key to any effective and influential programme will be coherence and consistency. If there are two things that have been lacking as the programmes have developed from Tampere to The Hague to Stockholm, they are illustrated by the tendency to be blown off course by political events that then get written into these documents, which are clearly unhelpful to the consistency and coherence of the programmes. That of course leads us to where we are with the Stockholm Programme, the refusal of the Commission to carry out an evaluation, the production of two separate work programmes and the Council's refusal to validate the Commission's work programme. Does that not mean that the Stockholm was actually irrelevant? Part of the problem is the lack of consistency and coherence.

Q7 Lord Judd: As the exchanges have been going so far, one question seems to me fundamental. Do you agree that the issues with which we are dealing simply demand as essential an international approach? Would you say that on the experience so far, the EU has proved itself a sensible and relevant institution for tackling this, or do you believe that there should be some other arrangement?

Professor John Spencer: I find very helpful an evaluation of the Stockholm programme carried out by my French academic colleague Professor Labayle for the European Parliament. He and his co-author have criticised the Stockholm programme for being too big and too windy in certain respects, saying sarcastically at the beginning that it was, "Davantage guidé par des considérations de marketing administratif et politique que par un souci d'efficacité". More constructively, this study looks at the pluses and the minuses, the things that have been a success and the things that have been less of a success. I commend this report to the Committee because there is a lot of detailed examination of the different initiatives that have been useful and things that have been lacking.

The Chairman: That is very valuable. Thank you very much for that advice. We will certainly have a more detailed look at that report. I am sure that it is entirely capable of being used in our own findings. Rounding off this discussion about evaluation, am I right in getting the feeling that all three of you believe that there ought to be a proper evaluation of each of these programmes at some point in them before moving on to the next one? Secondly, are you saying that that should come in the last year of the existing programme, or should it be a kind of mid-course one, in the middle of the four-year period? It would help if you could give a view on those two points.

Professor Steve Peers: I think it might be useful to have both a mid-term review to say what is going right and wrong so far and to ask whether the priorities need changing or adding to, and to have an end of programme review to draw the lessons that might be useful for drawing up the next one. Those two stages of review would serve quite different purposes.

The Chairman: You are getting very close to the painting the Forth Bridge syndrome, are you not?

Professor Steve Peers: I guess so. If you have these reports several years apart and they are clearly focused on different sorts of things, I do not think that they are being written for the sake of it. They in each case provide a useful contribution.

Lord Sharkey: In the business world, any such long-term proposal would contain in itself a method of evaluation right from the start. Would you think that this would be a good idea?

Professor Elspeth Guild: There is a counterposition on this. I have a certain sympathy with the reluctance of the European Commission at these times of very tight resources, when its budget has been cut, to being requested or required to a substantial amount of time and energy evaluating a programme that does not appear to be having a substantial impact in the development of EU policy.

Lord Sharkey: I think that was rather my point.

Lord Blencathra: I understand how one can evaluate a strategic plan, or a detailed programme, but if this, as a Member of the Committee has said, is more like a ministerial wish list, I do not know how one could evaluate that, even if it were to be implemented.

Professor John Spencer: I think the lesson surely is that you need a more concrete programme that is capable of evaluation. Then you need to build the mechanism of evaluating it into the programme, and to do the evaluation at two levels. You need to evaluate what the European Union has done to produce any necessary instruments to achieve the objects. Secondly, you also need to evaluate how far the member states have actually carried out their obligations under those instruments.

Q8 Viscount Bridgeman: In the light of that very interesting reply, particularly the last point about the behaviour of Members States under the future programme, what balance should be struck between encouraging practical co-operation and bringing forward new legislative proposals in the future programme? Own Government's approach suggests that the Council should replace the Stockholm Programme with a set of strategic guidelines that

set out the overriding principles governing JHA co-operation, rather than with a new programme of potential legislation. What are you views? I link that with question 6: is there likely to be a tension between the Commission and the Council Member States on the development of the new programme?

Professor John Spencer: I am suspicious of encouraging practical co-operation as an alternative to providing a legal basis for doing things, if the things that are to be done are going to affect the civil rights of individuals. When I saw question 4,[2] I thought back to what used to happen years ago in the days of extradition. We had an extremely garantiste law of extradition which nobody could use. It was evaded wholesale by networks of practical co-operation between the Metropolitan Police and police forces in other countries, under which they used to just phone each other up and say, "Would you mind arresting X please and putting him on a plane with a one-way ticket to Heathrow?", where, surprise surprise, the Metropolitan Police would be waiting with handcuffs. It was frankly a shocking abuse and the House of Lords in its judicial capacity condemned it in ex parte Bennett, and quite right, too. From that point onwards we had to refashion a workable extradition law. It is because of things like that that I feel that we need a proper legal basis on which to undertake measures that are likely to affect the rights of individuals.

Professor Steve Peers: Data protection is another example of that, where the processing of personal data has to be prescribed by law. A very strong version of that principle has been developed by the European Court of Human Rights. We could not be exchanging personal data unless we have a legal basis for that. If we are going to have an information system at European Union level, or a system of exchanging specific types of personal data such as fingerprints or DNA profiles on certain groups of people, you need a legal basis in place. It would make sense for it to be EU-wide basis if it is going to be some sort of EU-wide

[2] Witnesses received a list of likely questions in advance.

process or system. If we are going to have more of those systems, which we do not necessarily have to have—it might be better not to have any more for a while—they have to have a legal basis, there has to be legislation.

I do agree, although perhaps this is not what the Government mean, that it might be useful to have a programme that, like Tampere, is largely a 10-page statement of principle that says not very much about specific legislation but leaves it to the EU institutions to work out what legislation might be needed. That might be less legislation than we have had in the previous programmes, but legislation would still be likely to be needed. A lot of it would be amending existing legislation. Tampere was before the EU had done almost anything in this field. There have been conventions such as Dublin, Brussels and Europol, but very little else. There was no European Arrest Warrant. There was no legislation on legal migration. There was nothing on asylum besides the Dublin convention, and nothing much on civil law. Since then, of course, we have had a tremendous amount, some of which works quite well and some of which does not. A lot of the focus should be on seeing which of that legislation works well and perhaps has to be left alone, which of it has flaws and should therefore be amended either to encourage its use or in the case of the European Arrest Warrant to restrict its abuse, and what needs to be codified: some parts of the Stockholm Programme that were not implemented talk about codifying immigration law, a police code and the EU's private international law measures. To what extent would that be useful? Do we really need three fast-track civil law systems of enforcing judgments now that the main jurisdiction regulation has simplified the mutual recognition process of civil law judgments? Some of that is happening already. There is a proposal that is very much focused on practical improvements to the EU's insolvency regulation. There was a new one yesterday on small claims. We do not have enough of that. There are a lot of obsolete measures and a lot of obscure bits of law floating around from the pre-Lisbon era. The Schengen convention is like a piece of

paper that has had shreds ripped out of it but is still vaguely hanging together, because there are bits of the convention and some of the measures implanted that are still in force, none of which necessarily holds together. In what the EU has done on firearms, there are bits of the Schengen convention, bits of a directive that has been amended, and some separate international commitments, and the Commission wants to review it again. A lot of the focus ought to be on improving the legislative quality. You already have a paper on that from Helen Xanthaki, with which I agree. I give you those as concrete examples of getting rid of obsolete text, bringing together in a codified and coherent way as much as you can the families of legislation, so that it is relatively easy to work out what the EU has regulated. It does not necessarily mean that the EU has to regulate much more than it is doing already in this area, because it is regulating quite a lot now, but it has to focus on doing it better and on legislation being improved not only in a technical sense, although that is important, but in a qualitative sense and reflecting what is happening on the ground, trying to avoid miscarriages of justice with the arrest warrant and issues like that.

The Chairman: Am I right that one of the things you are saying is that the European Union ought to get rid of some bits of defunct or improperly functioning measures, something that the European Union is extremely bad at doing and which the Government have certainly identified as one of the things that they would like to pursue? You are saying that that would be one sensible objective. Perhaps you can confirm that both of you are so far saying that this question of the juxtaposition of strengthening operational co-operation and new laws is a both/and, not an either/or. Have I got that right?

Professor Steve Peers: Of course.

Q9 Viscount Bridgeman: Following that, with your practical knowledge of the behaviour of the collective European animal, do you envisage tension between Member States and the Commission?

Professor Elspeth Guild: In the field of border controls, the question for the European Union at the moment is how to ensure the correct application of existing legislation rather than the introduction of new legislation, and perhaps the most important challenge is to ensure the correct application of the Charter of Fundamental Rights in the application of EU border controls. This is an issue we will probably come back to towards the end. In the field of migration, my colleagues who have submitted evidence to this Committee and also to the Commission's Meijers committee have indicated that they are in favour, I think with good reason, of the idea of consolidating the EU immigration measures into an immigration code. There are too many different measures in too many different areas that should be consolidated into one so that a common set of rules applies. Of course this is not of particular interest to the UK, nor is the UK's view likely to be particularly important in that context, as the UK has not participated in that process at all. On asylum, we have just adopted the second-stage common European asylum system. The UK has of course remained outside all the measures except Dublin III and Eurodac, so at this point it would probably be counterproductive to commence a whole new legislative process.

Professor John Spencer: To answer the question, at a high level of abstraction, of whether there is likely to be tension between the Commission and the Council on the development of a programme, well, yes. It has happened before and it is likely to happen again. However, does it really matter? Is that a reason for not trying to have a programme? No, because it is inevitable in any body that attempts to be democratic that different bits will occasionally disagree with other bits and that robust discussions will take place. So, yes, probably, but it is something that has to be faced and may not be altogether harmful.

Lord Morris of Handsworth: Please forgive me, but listening to the responses I detected a degree of mild dissidence about how the issues have been dealt with over the period. On a sector by sector basis, are there additions or omissions from the previous programme that

in your view the United Kingdom should see? Would a mid-term review be desirable, in your view?

Professor John Spencer: Yes. My shopping list of things that I would I like to see attended includes a new look at the European Arrest Warrant. It is a most important and valuable instrument, and it is a good thing that we have it. It would be a bad thing to lose it. At the same time and in certain ways, it can act unsatisfactorily. There should be a review of it at a European level to see whether some of the more troublesome features of it can be cured. Secondly, there should be action of some sort to try to create, or if it already exists actually to make work, a mechanism for the enforcement of criminal law across borders in minor cases. The European Arrest Warrant was designed to deal, I suppose, with organised crime, but we have the smaller problem of disorganised crime. On the one hand, of course it is not acceptable if somebody has committed a shoplifting offence in Warsaw that they end up removed by a European Arrest Warrant, which is a very drastic mechanism. On the other hand, it is not satisfactory if somebody who committed a shoplifting offence in Warsaw then escapes justice by coming to England and staying here. Underneath the European Arrest Warrant, we need a better mechanism for dealing with less important cases by a more informal method, by enforcement across borders of fines between the Member States, on which there is a framework decision, although I understand that it is very rarely used. Third on my shopping list, and in this I am pushed forward by a number of people with whom I have spoken in preparation for giving evidence, the UK should push for further work in the area of EU defence rights. Part of the trouble with the European Arrest Warrant is the quality of justice in certain member states when people are surrendered there. That was really the problem with the Symeou case, which has been used as a stick to beat the European Arrest Warrant. However, it was not unreasonable for the Greeks to want Symeou back and try him. What was grossly unreasonable was for Greece to take two years

to try him when it got him back and to keep him in prison for one of them when he need not have been in prison at all. The UK most regrettably opposed EU defence rights in the mid-2000s. It then fortunately changed its position and went along with the road map of defence measures, although it has been a little reticent about it since. This is a shame, because if there is one part of English criminal procedure of which I am proud, it is the way in which we handle the pre-trial phase in criminal proceedings nowadays. We used not to do it well, but we cleaned it up with the Police and Criminal Evidence Act 1984, which put clear limits on the powers of what the police can do to individuals and on the length of time people can be detained for questioning, and above all gave the defendant the right to legal advice while he is being detained for questioning and imposed a duty on the police to tape record the interviews. When I see that package, it makes me proud to be British. Instead of being reticent in case our system gets contaminated by contact with Europe, we should be in the front, trying to persuade Europe to accept our values and our ways of doing it in this area. Pre-trial detention in particular is something else that we manage well on the whole in this country. Although we are always worried about the length of time it takes to bring people to trial and the length of time people sometimes spend in detention pending trial, we do it very well compared with many other countries. A Green Paper was published as part of the road map programme on pre-trial detention in the different Member States. The question was raised at to whether there should be some thought of EU legislation on the topic, and the UK Government's official response was, "No, this is not an area for legislation. This is an area for a sort of osmosis of good practice". But I strongly feel that nothing is ever likely to happen in the countries that have bad practices of detaining people pre- trial for unnecessarily long periods unless there is some legislation. That is the shopping list of measures that I would like to see added to a programme.

Q10 The Chairman: To what extent is that last one dealt with by the European Supervision Order which the Government are now, extremely belatedly, saying they wish to bring into effect?

Professor John Spencer: To some extent it is, but the European Supervision Order does not give the wanted person any right to come back to spend his time on remand in the relevant Member State. It is also disappointing how few Member States have actually implemented the European Supervision Order to date.

Professor Steve Peers: It is a fairly small number.

The Chairman: One other thing on the European Arrest Warrant. When we were taking evidence in the Protocol 36 inquiry, particularly in Brussels from the Commission, it drew a very clear distinction between attempting to improve the operation of the European Arrest Warrant and, as it were, opening up the basic decision. Do you recognise that distinction as being valid, or do you have ambitions to go further than looking into the operation of it?

Professor John Spencer: I think we should do both. It is partly a question of education. I am pleased to remind the Committee that there is a study working on the European Arrest Warrant, paid for by the European Union. The UK judiciary is one of the bodies that with others is running the study with a view to trying to disseminate better practice in relation to it. It is also a question of looking again at the instrument. It contains no overt peg upon which to hang the right of a Member State to refuse to hand somebody over in the case of possible infringement of human rights, and it would probably be desirable to include that. There is also a question raised by Fair Trials International about the problem of successive European Arrest Warrants issued by different Member States where there has been a refusal in one. There is also the thorny question of proportionality. These things probably require some consideration of the text of the instrument itself and not simply an attempt to try to make everybody behave sanely and rationally in the context of the existing instrument.

The Chairman: Do either of the other two members of the panel have any additions to Professor Spencer's shopping list?

Professor Steve Peers: Partly in response to a previous question, in which we were asked to do a shopping list of law reform and codification of existing laws, the sort of things which I think should be added do not make a long list. I agree entirely that the regulation of pre-trial detention has to be addressed, along with reforming the European Arrest Warrant in particular, which I have mentioned already. In terms of legal migration, the EU has already picked out various areas. Apart from codifying the law, it would be useful to have some sort of measure regulating the encouragement of migration from people who are likely to come and make job-creating investments in the European Union. There should be something to try to restrain the more tawdry things that some Member States are doing, such as selling their citizenship. It would make more sense to regulate that in a way that requires someone to prove that they are going to invest a certain amount of money and create a certain number of jobs before they get a fast-track admission to the territory. Something like that that is very much focused on the EU's economic problems—many of its Member States have very high unemployment—would be particularly useful to address. As I said, however, there is no need for an enormous list of new things that the EU should do. It has done a lot of the things that it probably should be doing already. The focus should be largely on trying to do them better.

The Chairman: But presumably the British Government would not be well placed to press for the one you have just mentioned, since it is almost inconceivable that they would actually opt into it.

Professor Steve Peers: Well, the British Government are in a particularly awkward position on justice and home affairs because they have opted out of so much and are in the midst of this process of opting back into some key measures, which, as I said, they have not

completed. They are in a particularly weak position on things like the European Arrest Warrant, having not yet completed the process of being bound by it after 1 December. It would seem odd to be talking about reforming it. However, to the extent that we can have some influence it would be useful, although I sometimes wonder whether any idea put forward by the United Kingdom might even be toxic. It might be better coming from somebody else. Perhaps we should be encouraging our friends in Ireland, or the Netherlands or whichever Member States are on a wavelength with the UK to be putting forward ideas that we have, and not claiming authorship of them ourselves, because the mere fact that we are authors or even co-authors of a suggestion might generate a negative reaction. If another member state has an idea and we want to join them, they might say, "Please do not join us, you are going to damage our credibility". It might come to that during negotiations in this area. Subject to this awkwardness of the UK's position in the process, those are all objectives that we should put forward.

Professor Elspeth Guild: I put forward a perhaps slightly dissonant view. In the field with which I am concerned, borders, immigration and asylum, we do not need another programme. We need to spend our time and resources, which are limited at the European level, on ensuring that there is implementation of the legislation that has already been adopted, and that it is applied in a fully consistent manner with the Charter of Fundamental Rights. That is where the nub is, not in spending the Commission's time on drafting, revising, implementing and reviewing new programmes.

Q11 Lord Blencathra: Coming back to Viscount Bridgeman's point to Professor Spencer, one of the British Government's criticisms is that the Stockholm programme was a shopping list, and the Commission picked its favourite items and ignored the rest. If we present it with a new shopping list, again its members may just run with their pet subjects.

That is where the Government seem to be keen on some general guiding principles. How would you answer that point?

Professor John Spencer: The shopping list was too long. If it had fewer items on it, it would have been harder to pick and choose.

The Chairman: The Government's main criticism, if I understood it rightly, about how the Commission had implemented Stockholm was that it had come forward with a proposal for the European public prosecutor, which was not called for in the Stockholm Programme. But since they have actually precipitated a yellow-card procedure—the full yellow-card procedure has now come into effect, and we do not know yet what the reaction to that will be and what the next stages are—I would have thought that that was more a lesson to the Commission not to step outside these broad strategic guidelines, rather than saying that mentioning specifics in the programmes is necessarily a bad thing. We will have to take evidence from a number of people, including the Government, and they have already given us written evidence on that.

Q12 Lord Judd: Looking at some of the most significant security and humanitarian issues facing Ministers and Governments in the community, do you think that the revelations about US surveillance of communications in the European Union, or the death of migrants trying to reach the EU, are likely to influence the development of the strategy? Indeed, should they?

Professor Steve Peers: I tend to think that they should, but I have my doubts as to whether they will. Already, even in the midst of the furore over the spying issue, one of the issues at the last summit meeting of the European Council was an attempt to delay discussions on EU data protection legislation for another year. At least, that is how the Government suggested its position has been agreed. It is not quite clear whether it was. So rather than seeing this as a chance to address this as a matter of urgency, given that we have had proposals on the table since January 2012, exactly the opposite conclusion was come to: that we needed to

defer it. Equally, on the tragedies of the loss of migrants' lives at sea, the immediate response from the member states in the Mediterranean was to say, as a red line, that they would refuse to negotiate on the parts of a proposal already on the table that dealt with maritime interception and search and rescue and that were most directly concerned with saving lives, or with disembarkation and what happens to the people you do save and where they go afterwards. Instead, the Italian Government have set forward this idea that there should be a military operation, even as an EU measure somehow. From a legal point of view it is obviously rather suspect that the EU could adopt a military act in the field of migration just outside its external borders. That is questionable. Of course it would also, if you take this approach, avoid the application of that legislation I mentioned, even if it is adopted, because it only deals with operations co-ordinated through FRONTEX. A purely military operation would probably not be co-ordinated by FRONTEX. I am a little cynical about the effectiveness of the EU's response to these sorts of issues so far. I wish that I could say something more positive, but I do not think that is possible. I would hope that there is a more positive response to these issues in the next programme, but the immediate reaction does not suggest that there will be.

Q13 Lord Judd: Do you have any specific suggestions on how, if it were to respond, it should respond?

Professor Steve Peers: On maritime interception, you already have that proposal on the table, which tries to go into some detail about search and rescue issues and about disembarkation. That could be improved upon, but a lot of the details there are already quite sensible and could simply be taken more or less as they are, like expanding the scope of that proposal so that it covers all maritime interceptions, not just those applied by FRONTEX. There are issues about what members states do in preventing people leaving the territorial waters of third countries and issues like that, which perhaps ought to be addressed as well,

because that may contribute to these sorts of tragedies. Perhaps the EU should be more engaged in the sources of these problems, in trying to deal with the Syrian refugees in Turkey and Lebanon, for instance, trying to develop more resources for the situation there and to help the people who are there to have a better life for the duration of that conflict, and resettling a much more significant number of them into the European Union in a coherent way. Those are the sorts of solutions there.

The situation with the United States is a slightly more awkward question, because purely national security issues are not directly within the EU's competence, so we would have to look at it in some detail to see exactly where there is an impact upon EU law and exactly how EU law could address these issues. One power the EU does have is to adopt a foreign policy measure dealing with data protection issues. That is not part of the package of the two proposals that the Commission made in 2012. One of them is about data protection in the civilian context of websites, search engines and so on, and the other is about law enforcement agencies and data protection. It is not technically a justice and home affairs matter to have a measure dealing with foreign policy and data protection that would perhaps try to address some of the issues about spying, although I have a certain amount of cynicism about what you can do with a third country, especially one as powerful as the United States rather than a small country trying to join the EU and dependent on it for money. There is a certain limit to what we can expect and demand of the United States. How can you really stop the United States from spying on people if it really wants to? Even if it agrees not to do so, do you really think that it will not? I have a certain amount of fatalism, I am afraid, on that point. However, at least something could be attempted in the area of foreign policy measures on data protection.

Professor Elspeth Guild: Can I add to that? Dr Hein de Haas at Oxford University has undertaken extensive research on loss of life in the Mediterranean. He notes that before

1991 and the introduction of mandatory visas on the countries of the southern shores of the Mediterranean, there was no problem of loss of life in the Mediterranean. It was the accession of the southern Mediterranean countries—Spain, Portugal and Greece—and the application to them and the sub-Saharan countries of the Schengen rules on visa requirements that led to the transformation of the Mediterranean from a place of people moving back and forth in a fairly free manner to one where you have people dying.

The second aspect which he notes in respect of death in the Mediterranean is the passing of the Bossi-Fini law in Italy, where a presumption is created that any captain of a boat—fishing boats, et cetera—that recues people at sea and brings them to Italian harbours are traffickers or smugglers in human beings. Their boats are confiscated and charges are brought against them. They may subsequently be dropped because the captain is able to show that he or she was acting for humanitarian reasons to save people from drowning, but the consequence of this kind of legislation is to exclude the private sector, in practice, from saving people at sea. There is a tremendous amount of boat traffic in the Mediterranean, and tremendous commercial activities that take place by boat. If those boats were encouraged to assist people who are risk of drowning at sea and were not punished for complying with their state obligations in respect of the law of the sea, we would not have people dying in the Mediterranean. The state authorities have taken a monopoly for rescuing people at sea, and the result is that there are not enough Guardia di Finanza boats to rescue everyone.

The Parliamentary Assembly of the Council of Europe carried out a detailed inquiry called Death at Sea in respect of the failure of NATO military ships, just before the Libya campaign, to rescue a boat of people, the majority of whom subsequently died due to lack of water and starvation, in the Mediterranean. The Parliamentary Assembly in its report came to the conclusion that, yes, the military warships were aware of the people in the boat but their job was other than rescuing people at sea. I do not think that a military solution will result in

fewer deaths at sea. We know what the answers are. We know in the European Union how we put into place the legislation that has resulted in the deaths at sea. Now, rather than to repeal that legislation and go back to a situation where people do not drown in the Mediterranean, we are seeking a technological fix through EUROSUR, the military and whatever, somehow to find some other kind of solution. I would put this in a context of scale. According to the FRONTEX risk analysis 2013, just fewer than 25,000 persons entered the EU by sea irregularly in the preceding 12 months. According to a data collection operation carried out by the Council over the first week of September 2009, over 500,000 persons enter and leave the EU by sea per week. We have a problem of scale in which we are able to deal with 500,000 people entering and leaving the European Union by sea per week, and yet somehow we cannot deal with 25,000 arriving irregularly by sea. We have a very serious problem of scale in which fundamental rights are not being taken into account.

Q14 The Chairman: I think Lord Blencathra's question has been answered by Professor Peers already, but I want to ask Professor Spencer and Professor Guild whether they have anything to add to what Professor Peers said about whether the UK's decision to exercise the block opt-out was likely to affect its negotiating influence in the context of this new justice and home affairs programme.

Professor John Spencer: It will adversely affect its position. Before saying that, I took thought as to what evidence I had for that. I am an academic, and I spend my life in a university where I never have to negotiate anything with anybody, happily. However, I know some people in this country and other countries who either are likely to be involved in negotiations or who were involved in negotiations in the past. I also have academic colleagues who have spoken to other people in other countries, who have spoken to similar people in other countries. The impression I have is that people who know about this in the other Member States have reacted with surprise and irritation at our exercising this block

opt-out, because they cannot see any intelligible reason for our doing so, a view that will not surprise this Committee because that was its view in its report on whether the UK should exercise the opt-out. So they think that in the process of our trying to opt back in again, we are wasting a lot of people's time on something that need not be done, and that means time that cannot be spent on other things. There is also a feeling that it shows a position whereby we do not really want to join this or that in the end anyway, so why make concessions to us in the hope that we will? It is also a question of the perceived attitude of the UK in relation to Europe at the moment. We chose to join these measures we have block opted-out of, and that includes the ones into which we do not propose to opt back in. Our European partners often think, "You had the choice to join these measures, and now you are trying to get out of it. What game are you playing?". Previously, we have been a leader in the justice and home affairs area, or certain parts of it, and I am afraid that in consequence of this ill advised decision we are no longer in a position to be so.

Professor Elspeth Guild: I would only add that as regards EU border control policy, the UK has not had any influence since its decision not to join the Schengen area. As regards immigration policy, its capacity to have any influence has diminished dramatically since the decision in 2000 not to join the EU measures on a common European immigration policy. As regards EU asylum policy, the UK had a fair degree of influence up until about 2005-06. In the second-phase common European asylum system negotiations, however, the UK's influence diminished dramatically as it announced that it would not opt into the new measures.

The Chairman: Thank you very much for that full and comprehensive run around the course, if I may describe it that way. That will be very valuable to the Committee. Thank you for coming and sparing your time for us, and bringing us your huge experience and wisdom. Thank you very much.

Professor John Spencer: Thank you, Lord Chairman. Thank you, my Lords. We are very pleased to be able to help you.

Matthew Heenan—Written evidence

JHA to consider;
An addition to the Schengen Agreement that non-signatory European Countries (the UK) can sign agreeing Schengen signatory citizens carrying prescribed medicinal cannabis, to transit UK with their medicine.
Enabling UK citizens access to medicinal cannabis Bedrocan[3] prescribed in a Schengen signatory Country and return to the UK with that medicine.

Why?
Permitting transit of medicinal cannabis into UK will harmonise the legal status of medicinal cannabis across Europe and enable UK citizens access to quality controlled medicinal cannabis.

This submission is relevant to JHA Programme in the following policy areas:

- Schengen area, borders and visas
- Internal security
- Police cooperation
- Criminal justice
- Civil justice
- Drug control policy
- Relations with third countries on JHA matters

Declared Interests
The respondent uses cannabis for medicine reason and would likely meet criteria to be prescribed Bedrocan[4] in a Schengen Signatory State. Access to quality controlled medicinal grade cannabis is impossible under current prohibited status of medicinal cannabis in UK. Therefore, it is in the respondents own interests for medical cannabis to be legally obtainable to avoid persecution.
The respondent is submitting this evidence on his own behalf.

26 August 2013

[3] Bedrocan - Since the first of March 2005 Bedrocan BV is the only company contracted by the Ministry of Health, Welfare and Sport for the growth and production of medicinal Cannabis. Cannabis Flos Bedrocan®, Bedrobinol®, Bediol® and Bedica® can be prescribed by doctors for both humans and animals.
Web: www.bedrocan.nl

[4] Netherlands Office for Medicinal Cannabis: The Healthcare Inspectorate can issue a Schengen Certificate enabling transit carrying medicinal cannabis.
Web: www.cannabisbureau.nl

Immigration Law Practitioners' Association—Written evidence

1. The Immigration Law Practitioners' Association (ILPA) is a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government, including Home Office, and other consultative and advisory groups.

2. ILPA welcomes the opportunity to submit some considerations in respect of this inquiry of the House of Lords Select Committee into the EU's forthcoming agenda for the area of freedom, security and justice.

3. As the Committee rightly points out, assuming that there will indeed be a fourth multi-annual programme for the development of the EU area of freedom, security and justice, work will begin shortly or has in some cases already begun on what that programme should look like.

4. There are two main issues which we will develop in this submission: firstly, is there a need for a new five-year agenda for the development of the area? Secondly, is there a role for the UK in the development of the EU area of freedom, security or justice?

5. Regarding the first question, our comments are limited to the area of border controls, immigration and asylum within the EU's area of freedom security and justice. As our expertise is in this field we will not comment on cooperation in criminal or civil justice.

6. The purpose of multiannual programmes for the development of the area of freedom, security and justice is to highlight the policy priorities of the Council in the field. The first of these programmes, the Tampere Conclusions[5] in 1999, were particularly important because of the way in which competence for the area was passed to the EU, with many powers to adopt legislation but little guidance on where to start[6].

7. The EU Member States transferred powers to the EU in the Amsterdam Treaty[7], which entered into force in 1999, regarding the adoption of common measures on border controls immigration and asylum. However, those powers lack clear definition and certainly are not able to carry direct effect. The result was the need for political impetus to give definition to the initial area of freedom security and justice.

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[5] The Tampere European Council, 15-16 October 1999, conclusions 16/10/1999 - Nr: 200/1/99.
[6] See *Whose freedom, security and justice? EU immigration and Asylum Law and Policy,* Guild, E., A Baldaccini and H Toner, Hart Publishing , June 2007.
[7] The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Amsterdam, 2 October 1997.

8. In 1999, as the Select Committee is well aware through its inquiries, the UK negotiated the inclusion of a protocol[8] which permits it to remain outside the EU common system of border controls (the Schengen acquis[9]) and to choose whether to participate or not in measures in the fields of immigration and asylum.

9. The choice of the UK government of the time and subsequent governments to remain outside the Schengen border control free system has resulted in the UK being excluded also from measures regarding border security even in circumstances where the UK authorities have sought to participate.[10] The maintenance of UK border controls with other EU Member States and indeed, the UK's application of additional border controls on persons travelling by train from Brussels to London has shown the UK authorities' determination to remain outside of the Schengen common travel area.

10. The first Schengen agreement was signed in 1985 followed by a second in 1990 and the abolition of border controls on the movement of persons among the Schengen states from 25 March 1995 (with some exceptions as regards France). The EUROSTAT statistical series, Crime and Criminal Justice[11], commenced in 2007. The reports show that since the abolition of border controls among most EU states in 1995 there has been a stagnation of total crime reported by the police from 1995 with a small peak in some countries in 2002. Thereafter there are continuing substantial drops in total crime rates up to and including 2009. In the years following the big enlargements of the EU, 2005 and 2008, the EUROSTAT statistics show a continuing drop in total crime and a dramatic drop in motor vehicle theft.[12] These statistics appear to indicate that crime rates do not rise when border controls on persons are abandoned.

11. Nonetheless, the UK authorities appear committed to maintaining border controls on persons arriving in the UK from a destination other than the Republic of Ireland.

12. A one-off data collection effort by the Council in 2009 which only measured movement of people into and out of the EU as a whole during one week (31 August – 6 September 2009) revealed that there were 2,130,256 entries and exits by non-visa third country nationals and 1,464,660 entries and exits by visa nationals.[13] This indicates that there are probably more than 182 million entries and exits by third country nationals into and out of the EU annually. According to the latest published FRONTEX data, in the first quarter of 2013, EU border guards refused admission to 27,911 persons at the external borders.[14] This information appears to indicate that EU borders guards are not overwhelmed by numbers of third country nationals seeking to enter the EU in circumstances where they do not fulfil the criteria. The

[8] 12008M/PRO/19 Consolidated version of the Treaty on European Union Protocol (No 19) on the Schengen Official Journal 115 , 09/05/2008 P. 0290 – 0292. See Council Decision 2000/365/EC.
[9] See Council Decisions 1999/435/EC and 1999/436/EC of 20 May 1999.
[10] See for instance the Court of Justice decision C-137/05 *UK v Council* judgment 18 December 2007 on biometric information in passports or C-77/05 *UK v Council* judgment 18 December 2007 on participation in the EU external border agency, FRONTEX.
[11] See http://epp.eurostat.ec.europa.eu/portal/page/portal/crime/introduction (accessed 2 October 2013).
[12] EUROSTAT, Statistics in Focus, Crime and Criminal Justice 15/2007, 58, 2010 and 6/2012.
[13] Council Document 13267/09, 22 September 2009.
[14] FRONTEX FRAN Quarterly, Quarter 1, January – March 2013.

FRONTEX data indicates that over the same quarter only 9,717 persons were apprehended irregularly crossing an external EU border. This data does not reveal a picture of urgent problems in the control of the EU's external borders.

13. In respect of the EU's development of law on the control of its external frontiers, the key measures have now been adopted, the Schengen Borders Code[15] and the Visa Code[16]. It is not clear that there is any evidence based need for a substantial political impetus to the law on the control of the EU's external borders. The main challenges to the control practices at the EU's external borders have come in the form of allegations of human rights abuses and decisions of the European Court of Human Rights finding human rights abuses in some practices such as the push backs of little boats to Libya.[17] The amendment of the FRONTEX regulation to include a fundamental rights competence was adopted in 2011[18]. The implementation of the new competence is at issue but this is a matter of consistency with the EU Charter of Fundamental Rights.

14. In respect of the adoption of EU legislation in the field of immigration – this is proceeding in accordance with the initial programme set out in the Tampere Conclusions. As regards asylum, the second generation Common European Asylum System measures were adopted in June 2013[19]. It is now a matter of implementing the new legislation correctly.

15. In sum, the need for a new multi-annual programme in the field of border controls, immigration or asylum has not been made out, in our opinion. The field has been subject to substantial legislative measures over the past ten years and it is now time to ensure their correct application, allow the courts to interpret their provisions and enable all institutions to incorporate their fundamental rights obligations fully in the field.

16. Regarding our second question, is there a role for the UK in the development of the area of freedom security and justice, as we have noted above, the UK chose not to participate at all in the development of the Schengen area of common border controls. As measures were put forward by the Commission (and initially also the Member States) in the area of immigration, the UK chose to opt into to very few of them[20]. It has remained outside all measures since 2004. In the field of asylum, while the UK opted into the Common European Asylum System measures in their first phase, in the negotiations towards the second phase instruments it has chosen to

[15] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).
[16] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).
[17] *Hirsi Jamaa v Italy* (Application no. 27765/09) 23 February 2012.
[18] Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.
[19] See European Commission - MEMO/13/532 12/06/2013.
[20] See most recently Cm 8541, Third Annual Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) ("the Treaties") in Relation to EU Justice and Home Affairs (JHA) matters (1 December 2011 – 30 November 2012) April 2013.

remain outside all measures except the Dublin III Regulation[21] on the division of responsibility for asylum applicants.

17. In light of the UK's increasingly distant relationship with the area of freedom security and justice as regards border controls, immigration and asylum, even if the EU decides to adopt a new programme, there is no role for the UK in determining the priorities of the area.

2 October 2013

[21] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

Mike Kennedy, Professor Estella Baker, Law Society of England and Wales—Oral evidence (QQ15-28)

Transcript to be found under Professor Estella Baker

Law Society of England and Wales—Written evidence

1. The Law Society of England and Wales (the Law Society) is the independent professional body, established for solicitors in England and Wales in 1825, that works globally to support and represent its 166,000 members, promoting the highest professional standards and the rule of law.

2. The Law Society welcomes this opportunity to provide evidence to the Home Affairs, Health and Education Sub-Committee of the European Union Select Committee in relation to the EU's next five year agenda for justice and home affairs (JHA). This evidence reflects the Law Society's initial views.

Question 1: Should there be a fourth JHA programme? If so what should its content, focus and purpose be, with reference to the previous programmes and evaluations thereof?

3. Yes - the Law Society believes that the previous JHA programmes have been valuable in setting a direction for the work of the European institutions and highlighting the priority fields of work that the Member States would support.

4. One example of the value of the current Stockholm Programme can be seen following the inclusion of references to the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings, which invited the European Commission to put forward proposals in this field during its current mandate. The Law Society believes that the minimum standards so far agreed (the Directives on: the right to interpretation and translation; the right to information; and the right of access to a lawyer) could be of significant benefit to EU citizens suspected or accused of having committed a criminal offence, including British nationals in other Member States. While the Commission may have decided to issue proposals in this field in any case, the Stockholm Programme encouraged work on the Roadmap as a priority issue, indicating that such proposals from the Commission would be welcomed by the Council.

5. The Law Society would support a new Programme that provides for continued work on the remaining measures in the Roadmap to improve procedural rights in criminal proceedings. From a civil justice perspective, we would like to see more practical measures to improve the ease of service of documents. We would also like to see progress made towards the EU's ratification of the Hague Choice of Court Convention concerning international cases in which an exclusive choice of court agreement is applicable (see further our response to Question 9 below). From a practical perspective, we hope that progress can be made to appoint further judges to the General Court at the Court of Justice of the European Union (CJEU) and have commented further on possible changes to improve the functioning of the CJEU.[22] Some practitioners would also favour the establishment of a specialist commercial bench at the CJEU to deal with references in commercial disputes. An approach of greater specialism at the CJEU may also be helpful in other areas.

[22] See the Law Society's response to the House of Lords' EU Select Committee's follow up inquiry into the workload of the Court of Justice of the European Union, volume of evidence, pages 57-63: http://www.parliament.uk/documents/lords-committees/eu-sub-com-e/FollowupworkloadCJEU/CJEU-Follow-upWrittenOralevidence290413.pdf

Question 2: What is the relevance of the political context? For example, how relevant will the debates and controversies surrounding the free movement of persons, privacy (the Prism programme in the US, as well as similar programmes in some Member States) and the negotiation of a US-EU free trade agreement be?

6. While the Law Society is not able to comment in detail on the political context, it is of course important. Part of the value of the JHA programmes, which last for 5 years, is to be able to take account of longer-term goals in the field of JHA. Where the political context is taken into account, it should be developments or likely developments that will shape policy-making in the longer-term that are considered.

7. The US-EU free trade agreement is unlikely to be of direct significance to the JHA Programme. Nevertheless, increasing the free movement of goods and services between the US and the EU may create ancillary legal issues or considerations at a more general level, for example, in relation to migration or data protection.

8. In addition, some practitioners have expressed the view that the system of free movement of persons should be given judicial support if there is any danger that it could gradually become compromised.

Question 3: What lessons from the application of the Stockholm Programme could usefully be reflected in the next JHA Programme? Did the Stockholm Programme involve too much or too little legislation and what were its tangible outputs? How successful have some of these outputs, such as the Standing Committee on Operational Cooperation on Internal Security (COSI), been and are they working as intended?

9. The Law Society has a particular interest in the justice elements of the Stockholm Programme.

Civil justice and private international law

10. From the Stockholm Programme, the Law Society has seen a number of helpful developments including:

- the conclusion of the negotiations on the recast of the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I'), which have amended the *lis pendens* rules (reversing the 'first in time' rule where there is a jurisdiction clause), enhanced the arbitration exclusion and abolishing the use of exequatur;[23]
- consideration of how to improve the service of documents and also specific instruments including the European Small Claims Procedure;
- in an international context, the Stockholm Programme promoted engagement with the Hague Conference on Private International Law. The Law Society understands that discussions are underway within the Hague Conference on the 'Judgments Project' concerning jurisdiction, recognition and enforcement in civil and commercial

[23] For further information, please refer to the Law Society's response to the Review of the Balance of Competences between the UK and the EU: Civil Judicial Co-operation, August 2013, page 2: http://www.lawsociety.org.uk/representation/policy-discussion/documents/balance-of-competences-review-civil-judicial-cooperation/

matters. The Law Society has previously commented on the value that the EU will be able to add to the negotiations in this field, particularly following the conclusion of the negotiations on Brussels I.[24] As noted above, the Law Society also sees ratification by the EU of the Hague Choice of Court Convention as something that would be a positive move. This measure remains important because the negotiations on Brussels I did not address the position in respect of jurisdiction clauses in favour of a non-EU (third) state court.

Criminal justice

11. In relation to criminal justice:

- the Law Society believes that the measures adopted from the procedural rights Roadmap for those suspected or accused of having committed a criminal offence (see above) will deliver real tangible benefits as they begin to be implemented. The Law Society has supported the introduction of these minimum procedural rules across the EU and further particularly supports work towards an instrument concerning pre-trial detention (also included in the Roadmap);
- in relation to evidence-gathering, the Law Society has also followed the negotiations concerning the European Investigation Order and is pleased to see that a proportionality principle has been included in this instrument;
- prosecutors are supportive of the role played by Eurojust as mentioned in the Programme.

Training

12. The Law Society is supportive of the efforts that have been made to improve the provision for the training of judges and also legal practitioners in relation to EU instruments. We explain in our response to Question 8 below why we believe that it is important for the UK to opt in to the EU Justice Programme.

13. As a general observation, by participating in pan-EU training events English lawyers/judges are often able to explain and present the common law perspective on issues, thereby developing a greater understanding and awareness of our system in continental (civil law) Europe.

Question 4: Should the EU's focus be on consolidating existing JHA cooperation before embarking upon further EU legislative proposals and initiatives? The UK Government, in particular, has emphasised in the past that the EU should focus on practical cooperation, which does not necessarily require a legislative underpinning.

Criminal justice

14. The Law Society believes that in some fields further EU legislative proposals are justified. For example, we believe that there could be a particular value in taking forward further measures relating to minimum procedural rights in criminal proceedings listed in the Roadmap, for example, in the case of vulnerable suspects and for pre-trial detention.

[24] *Ibid,* page 19.

We think that these initiatives are important and should be taken forward, particularly given that they could assist in improving the procedural rights of those who are, for example, subject to a European Arrest Warrant. The Law Society regards a legislative underpinning for minimum rules relating to procedural rights as an important means of ensuring that such rights are respected.

15. In other areas of EU criminal justice, the Law Society is not always convinced that further EU initiatives are necessary at this stage. For example, we are not convinced of the need for a European Public Prosecutor's Office. A period of consolidation of existing measures, at least until further minimum procedural rights have been introduced, could prove useful. In general, working within the existing framework and ensuring practical collaboration to make full use of existing powers should be the first step, before any further legislation is considered.

Civil justice and private international law

16. In the field of civil justice, the Law Society would like to see further legislative initiatives to improve the functioning of practical civil justice measures, for example, the European Small Claims Procedure.[25] A period of consolidation could however prove useful in other areas. For example, we have seen recent changes in respect of a number of private international law instruments, such as the new Brussels I Regulation, which is due to be implemented by the start of 2015, Regulation 593/2008 on the law applicable to contractual obligations (Rome I) and Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II) (though we understand that some changes are already being considered to the latter instrument in relation to limitations periods in cases involving a road traffic accident). The Commission is also currently pressing ahead with a new Regulation to introduce pan-European freezing orders. The radical changes to the patent world with the institution of the Unified Patent Court should be monitored closely.

Question 5: Should the Programme include a timeline for repealing and/or consolidating existing JHA legislation where necessary?

17. While a timeline for repealing and/or consolidating JHA legislation would be useful, the Law Society does not regard this as a priority issue for solicitors with experience of cross-border cases in the civil or criminal justice field.

Question 6: What should be the format of the next JHA Programme? For example, should it comprise a concise set of principles or contain a longer, and more detailed, set of initiatives as per the previous programmes?

18. The Law Society can see that either approach set out in the question could be useful. On the one hand, some general principles could have a general value in guiding the work of the other European institutions, without being too prescriptive. On the other hand, a tangible list of measures contained in a future programme could present a greater chance of them coming to fruition. One option might be to combine the approaches suggested

[25] See the Law Society's response to the European Commission's consultation on the European Small Claims Procedure, June 2013: http://international.lawsociety.org.uk/files/LawSociety_response_Consultation_European_small_claims_procedure_June2013.pdf

in the question by agreeing a set of principles and a non-exhaustive list of some key initiatives to be taken forward in relation to each principle.

19. The Law Society would support a shorter document than the current Stockholm Programme.

Question 7: What role should the European Parliament and national parliaments play, if any, in defining the content of the next JHA Programme?

20. The Law Society believes that it is useful to receive input from different perspectives on the future programme. We believe that it is important that views from the different legal traditions and systems are taken into account. In this connection, involving national parliaments in the consultation process would be a positive step with a view to obtaining their commitment to the development of EU policy in this field, and ultimately to take responsibility for implementing at domestic level the legislative measures that they support.

Question 8: Is the funding allocated to JHA activity in the Multiannual Financial Framework for the period 2014-2020 sufficient to achieve existing aims?

21. The Law Society is not able to comment directly on this question. Nevertheless, we would add - as is highlighted in our response to the Review of the Balance of Competences between the UK and EU in relation to Civil Judicial Co-operation - that we believe that it is vitally important that UK opts in to the Regulation establishing for the period 2014 to 2020 the Justice Programme. As EU law develops, lawyers, judges and parties making use of EU law in the UK must have access to adequate training. This Regulation aims to encourage a more consistent application of EU legislation in the field of judicial cooperation in civil and criminal matters. We understand that the final text will provide for funding for training activities from which legal practitioners, as well as judges, will be able to benefit.

22. While a failure by the UK to opt in would not prevent legal professionals from the UK from taking part in co-financed training, they would be required to bear the costs themselves without any reimbursement. It is clear that these additional costs may be prohibitive for many practitioners and that all but a few legal professionals from the UK would be unable to attend such training courses on EU legislation. This could result in a position where specialist up-to-date EU law advice could only be obtained from firms that can afford to fund such training. It might also put UK litigants and those subject to criminal proceedings with a cross-border element at a disadvantage to their counterparts in other Member States as they may receive less advice on EU instruments that could assist them. Conceivably if our lawyers and judges are not properly trained it may also result in more references to the CJEU.

23. The Law Society further understands that, based on the funding of 2007-2012, 11.48% of the funded applications under the three programmes (Civil Justice, Criminal Justice and Drug Prevention and Information Programme) were granted to UK organisations (at a time when the UK was one out of 27 Member States). The current Justice Programme has therefore provided clear benefits to the UK. The new programme would provide

significant benefits for legal professionals from the UK wishing to receive training on EU instruments and we urge the UK Government to opt in.

Question 9: What are the potential implications of further EU Treaty change for JHA cooperation, including the position of the UK?

24. The Law Society is not able to comment in detail on this question at this stage and is not aware of plans for changes to the Treaty in the near future; however, we hope that these initial comments assist. Title V of the Treaty on the Functioning of the European Union (TFEU) sets out provisions relating to the Area of Freedom, Security and Justice, including the measures in the field of judicial co-operation in civil and criminal matters. Protocol 21 enables the UK and Ireland to decide whether to opt in to new proposals. It may be that a future Treaty would envisage changes in this field.

Civil Justice

25. As the Law Society has highlighted,[26] there are some advantages but also a number of significant disadvantages to the opt-in rights offered by Protocol 21. On the one hand, if measures are proposed under the Article 81, TFEU, legal basis (civil judicial cooperation), it can enable the UK to stand aside from EU measures which are not compatible with its law or traditions, such as in the case of the matrimonial property regime. However, the Law Society believes that decisions not to opt in should be made only where truly necessary and as sparingly as possible. The risk of having a 'default position' not to opt in at the beginning of negotiations is that, overall, the common law loses influence. The incentive to accommodate the common law in legislative proposals diminishes with the expectation that the UK is unlikely to opt in.

26. However, in the field of civil justice, Article 81, TFEU, seems to be becoming less important as a basis for legislation than it once was. The Law Society would like to highlight that the choice of legal basis for some legislative proposals can be controversial. As an example, the Law Society does not agree that Article 114, TFEU, is the appropriate legal basis for the Common European Sales Law. There is a risk that, were the UK (and Ireland) to decide regularly not to opt in to proposals under Article 81, TFEU, then this could lessen the attractiveness of using that legal basis for those preparing proposals as, without the UK (and Ireland), any gains from legislation across the EU are likely to be lessened.

Criminal justice

27. In the field of criminal justice, Article 82, TFEU, is still regularly used for new initiatives. While the Law Society accepts that the right to decide whether to opt in afforded by Protocol 21 may sometimes be useful and should be retained in any future Treaty negotiation if possible, we also have the same concerns expressed above about ensuring that common law principles are promoted and that the UK participates where it is able to. For example, the Law Society believes that the UK should participate in the Directive on the right of access to a lawyer (the third, recently-approved measure in the Roadmap).

[26] The Law Society's Response to Balance of Competences: Civil Judicial Co-operation, *op. cit.,* pages 13-14.

28. A further provision of the TFEU is Protocol 36, which enables the UK to opt out of EU criminal justice and police measures concluded prior to the Treaty of Lisbon. As the UK is widely expected to go ahead with the opt-out, this provision would be unlikely to feature in any future Treaty debate. (However, please see our response to Question 10 concerning the loss of influence in the JHA field due to the opt-out.)

Question 10: What form could or should the UK's future participation in JHA matters take beyond the 2014 opt-out decision? What are the priority areas for potential cooperation in this respect, assuming that the UK will end up participating less in this area than it does at present? Will exercising the opt-out undermine the UK's ability to influence the content of the next JHA Programme?

29. The Law Society refers the Committee to its previous responses to your initial and follow-up inquiries concerning the opt-out. We view the opt-out as unnecessary, potentially costly and do not regard any of the measures concerned as harmful. We believe that the UK should try to opt back into a broad range of the measures concerned (with the exception of those that are now obsolete).

30. We believe that the exercise of the opt-out will undermine the UK's influence, at least to some extent, in this field. While the opt-out relates to EU criminal justice and police measures, the Law Society believes that the UK is gradually losing the goodwill of other EU policymakers through failing to opt in / opting out of significant measures in the field of JHA as a whole. This has a knock on effect on its influence on important future developments.

31. In the field of criminal justice, the effect is more acute. It is possible that the existing framework, based largely on mutual recognition and respect for different legal systems, will be gradually replaced by an approach where more EU proposals are made in relation to procedural and substantive law. While the Law Society is supportive of such an approach in some fields, for example, in establishing minimum procedural rights across the EU for those suspected or accused of having committed a criminal offence, we do not see a need for initiatives such as a European Public Prosecutor. Of course, these developments may have happened with or without the exercise of the opt-out, but the ability of the UK to influence the development of this field as it used to seems to be dissipating.

32. The Law Society believes that there are a number of areas where the UK must remain actively engaged in the JHA field. These include the measures in the fields of civil justice and private international law and, in the field of criminal justice:

- the continuing work on the Roadmap on procedural rights;
- the measures that we identified of particular value in the opt-out debate;[27]

[27] See the Law Societies' written evidence to the Committee's follow-up inquiry, pages 55 to 58: http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/Protocol36OptOut/p36followup/p36followupevidence.pdf

- further measures aimed at training and improving contacts between judges and legal professionals in the Member States.

33. In the longer term, if the UK remains outside significant legislative developments, it will become more difficult to influence the future development of EU law in the JHA field, even if that would be of benefit to British nationals or the functioning of cross-border legal practice. The Law Society recommends that, while recognising the value of the common law, the UK Government should also consider how civil law jurisdictions, including the Scottish legal system, may offer different and potentially interesting approaches to civil and criminal justice to those used in the current system in place in England and Wales. By fully participating in the shaping of the future JHA agenda to improve civil and criminal justice in the EU, the UK's own legal systems could profit from the opportunities to improve civil and criminal procedure in ways that will improve access to justice for UK and EU citizens in a more efficient and cost-effective manner.

29 October 2013

Law Society of England and Wales, Mike Kennedy, Professor Estella Baker—Oral evidence (QQ15-28)

Transcript to be found under Professor Estella Baker

Law Society of England and Wales—Supplementary written evidence

Thank you very much for the opportunity to appear before the EU Sub-Committee on 27 November 2013 to give evidence on behalf of the Law Society of England and Wales (the **Law Society**) with regard to the EU Commission's future five-year programme. I apologise for the slight delay in sending this letter to you.

As requested by the sub-Committee, I summarise below certain areas where the Law Society believes it would be helpful for the Commission to do further work, now or in the course of the next five years. I also highlight certain areas where the Law Society would recommend a period of evaluation and consolidation by the Commission in the next five-year period. I would be happy to elaborate upon any of the issues raised below, or provide further clarification, as required. As with my evidence before the Sub-Committee, the issues summarised below focus on civil law matters, not criminal law.

Those areas where the Law Society considers that the Commission could usefully make progress in the next programme period include:

1. **Service**: In practice, it still takes too long to serve proceedings and other legal documents on defendants domiciled in other Member States. For example, it can take as long as five months to serve proceedings in Spain. The process can involve layers of bureaucracy. It would be helpful if the Commission could carry out an assessment of cross-border service in Member States to gather reliable data as to the time it takes to serve proceedings and documents upon parties in other Member States and identify any particular problems that arise in this process. Whilst it is obviously important to ensure due process is observed, proposals such as serving corporates by registered post (or equivalent) could be usefully explored. A more user-friendly official accompanying manual could be produced which provides clear guidance as to service in Member States. The Commission could also re-examine precisely which documents need to be translated as part of the service process. For example, is it necessary to translate entire contracts referred to in a claim form in circumstances where companies have contracted in English in the first place?

   Happily, it appears the Commission is taking steps in this regard. Its recently published report on the application of the Service Regulation,[28] gathers some data about the time-frame for service of documents via transmitting agencies in some (but not all) Member States. The report suggests that provision for electronic service may be considered, as well as other measures to improve the speed of service, including improvements within the transmitting agencies. The Law Society encourages this process of review and reform.

2. **Court of Justice of the EU (CJEU) reform**: Some practitioners would like to see the CJEU reformed further. The CJEU is comprised of several institutions: the most frequently utilised is the Court of Justice, but there is also the General Court (formerly the Court of First Instance), and other specialised bodies (tribunals). The case conclusion

[28] Published 4/12/2013, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0858:FIN:EN:PDF

figures from the CJEU Annual Report for 2012[29] for the Court of Justice show that it takes more than 15 months for a reference for a preliminary ruling, more than 19 months for direct actions, and, again, more than 15 months for appeals against General Court rulings. The situation is worse in the General Court, with figures for the duration of proceedings ranging between 16.8 months for appeals to 48.4 months for competition matters. References to the CJEU will frequently be made by the highest courts in a Member State after several years of litigation before those courts. Delays before the CJEU can give rise to serious consequences for litigants who may have been seeking to resolve their disputes for years. These delays may also have an adverse impact more widely businesses and individuals may be awaiting a ruling on a particular point of EU law before proceeding with a transaction or exercising certain rights.

Further, given the recent progress towards a Banking Union and the strong emphasis on the regulation of the financial sector in many new European instruments, some practitioners suggest that it is increasingly important to promote justices to the CJEU who have background experience in commercial and financial law. Another suggestion is to explore the creation of a "commercial bench" within the CJEU.

3. **Hague Choice of Court Convention**: The Law Society strongly supports the EU in taking steps to progress the ratification of the Hague Convention on Choice of Court Agreements 2005 (the **Hague Convention**). Given the increase in cross-border trade globally, commercial parties will increasingly have to look to enforce their judgments against counterparties with assets outside the EU. Practitioners note that the lack of effective enforceability of judgments issued by the English (and other EU) courts in third (non-EU) states can cause difficulties. They may be left with a "paper judgment" with the defendant's assets out of reach.

   The widespread acceptance of the Hague Convention could improve the efficient enforcement of court judgments worldwide. It could potentially create a worldwide framework for rules in respect of choice of court (jurisdiction) agreements in civil and commercial matters and for the recognition and for enforcement of judgments by the courts of contracting states pursuant to such jurisdiction agreements. It could create comparable enforceability options for court judgments made pursuant to choice-of-court agreements in contracting states such as those which exist for arbitral awards under the New York Convention 1958, which has almost 150 signatories.

   The creation of such a regime may well encourage investment in contracting states and promote growth of UK businesses overseas. The ability to enforce judgments (or awards in the case of arbitration) in a country is often a threshold question for businesses contemplating an investment in that country.

   The Hague Convention has so far been acceded to by Mexico and signed (but not yet ratified) by the U.S. and the EU. If the EU ratifies this Convention, it seems likely that this would provide an incentive to other jurisdictions to sign and ratify the Convention. This would undoubtedly be a beneficial development for commercial parties operating across borders. It will give commercial parties the certainty that any judgment they obtain in the

[29] The report is available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685_2012_6020_cdj_ra_2012_en_proof_01.pdf . In 2012, the figures show that a reference for a preliminary ruling takes on average 15.7 months; direct actions 19.7 months; and appeals 15.3 months to reach a conclusion.

chosen court will be enforceable in the jurisdiction in which a counterparty has assets. As noted above, this may boost trade. Such a development may also provide a further incentive for parties to negotiate jurisdiction clauses in favour of the English courts (and select English law to govern their contracts) because it will mean English judgments made pursuant to English jurisdiction clauses will be enforceable in contracting states. It may also reduce the legal costs of transactions, as the parties would be less likely to need local law advice about enforcement risks in contracting states. For all of these reasons, the Law Society suggests that this initiative should be prioritised.

4. **Hague Judgments Project**: The Law Society would encourage the EU to engage positively in discussions on the "Judgments Project". This project is tasked with considering common jurisdiction and enforcement principles which, in a global economy, may be a beneficial development for businesses and individuals operating across borders. It is hoped that the EU will take an active lead in these discussions.

5. **Immunity**: While eight Member States have ratified the European Convention on State Immunity,[30] many Member States have not.[31] Without seeking to expand areas of competence, the Commission may wish to explore whether other Member States may wish to sign up to the Convention so that the position with regard to the immunity of foreign states is broadly consistent across the EU. Immunity issues are becoming more important in the commercial sphere as sovereigns engage in more commercial activities, including, for example, through sovereign wealth funds.

6. **Lugano Convention**: The Law Society would encourage the EU to explore whether there might be further signatories to this Convention. This may help promote trade with third States as businesses will have greater legal certainty that their jurisdiction agreements will be respected and any resulting judgments enforced in contracting states. It would also be helpful if the EU looked to update the existing Convention as per the recast Brussels Regulation, in particular in relation to its *lis pendens* rules so as to address concerns about tactical litigation.

7. **Amendments to the European Small Claims Regulation**: Broadly, the Law Society supports this measure and the Commission's attempts to encourage litigants to use this procedure to resolve applicable disputes.

8. **The "recast" Brussels Regulation**: Overall, the reforms introduced to this key European instrument on jurisdiction and enforcement of judgments by this recast were helpful. In particular, the Law Society was pleased the Commission sought to tackle "the Italian torpedo" and amend the *lis pendens* rules (reversing the "first in time" rule where there is a jurisdiction clause). Unfortunately, the recast Brussels Regulation does not address the position in respect of jurisdiction clauses in favour of non-EU (third) state courts (but the Law Society recognises that progress on the Hague Convention may assist in this context – see above). Nor does it deal adequately with the thorny issue of what discretion (if any) a Member State court should have when proceedings are started before that court but the matter should properly be brought in a third state court. The Law Society would support further consideration of this important issue by the Commission.

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30 Signed at Basel on 16 May 1972.

31 Ratifications: Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland, the United Kingdom. Portugal has signed the Convention, but not yet ratified it.

9. **Database of decisions on EU law given by CJEU and Member State courts**: The Law Society would encourage the Commission to take steps to improve free access to decisions on EU law given by the CJEU and Member State courts. Bailli provides free access to English court judgments and is a wonderful resource for litigants, lawyers and judges. To keep costs down, the Commission could consider options whereby only the *ratio decidendi* of certain judgments was translated into English.

As noted above, there are others areas where the Law Society considers that a period of consolidation, reflection or review would be appropriate before further initiatives are introduced. These areas include:

10. **European Account Preservation Orders**: The UK has currently opted out of this Regulation and, depending on the final version of that text, may well remain outside its scope. However, given the potential impact this legislation may have on UK-based organisations operating across Member States and any UK litigants before Member State courts, the terms of this Regulation and its practical impact should be closely monitored. The Law Society had concerns about the initial draft text (July 2011), which it considered was too "pro-claimant" and did not sufficiently protect prospective defendants. The Law Society was concerned that a claimant might be able to secure such a draconian order in circumstances where there had been only a limited review of the claimant's papers by a Member State court and where there was no real risk of a dissipation of a defendant's assets. Given the risk that such an order might have a severe impact on a defendant's business and livelihood, the Society felt the correct balance had not been achieved. Related to this, the Law Society was also concerned that setting aside or varying such an order might be difficult for a defendant – giving rise to the potential for injustice. There are also concerns about the impact and costs of this instrument upon third parties, for example banks.

11. **A Common European Sales Law (CESL)**: The Law Society is aware that the Commission has focussed much effort and resource on this measure, however, it remains unconvinced that this is a necessary or desirable initiative. One concern is the legal basis. The Commission relies on Article 114 of the Treaty on the Functioning of the European Union, claiming a CESL is necessary "for the approximation of the provisions laid down by law … which have as their object the establishment and functioning of the internal market". The Law Society does not accept that this test has been met. The legal footing matters because measures under Article 114 do not require unanimity and progress by way of qualified majority vote. [32] Further, there are concerns about the evidence that the Commission relies on in support of its reliance on Article 114. Separately in December 2011, the House of Commons submitted a formal reasoned opinion to the European Parliament, Council and Commission that it did not consider a CESL to comply with the principles of subsidiarity and proportionality. Finally, the Law Society has a technical concern in relation to the interaction between CESL and the Rome I Regulation[33] (the EU instrument which concerns the governing law of contracts). The point is nuanced but the question is whether CESL requires (or effects) an

[32] It has been suggested that the proper legal basis for this measure is either Article 81 (which deals with civil justice measures) or Article 352 (which is a "fall back" provision if no other legal basis is appropriate). Unlike measures brought in under Article 114, the UK is entitled to 'opt in' to measures proposed under Article 81 and Article 352 requires unanimity (rather than qualified majority voting).

[33] EC No 598/2008.

amendment to Rome I. The Commission says it does not. The Law Society (and others) disagree.

12. **European Insurance Contract Law**: The Commission is now examining whether there should be a European Insurance Contract Law which would fit under or draw from a CESL. It is important that the UK keeps a watching brief on this initiative, not least because of the importance of the London insurance market. The proposal throws up many complex issues and the Law Society does not currently consider that this is an initiative that the Commission should prioritise.

13. **Unified Patent Court**: This initiative represents a significant "once-in-a-lifetime" change in the resolution of patent disputes. In moving from a country-by-country to a unified litigation system the Unified Patent Court aims to increase the efficiency and certainty of patent protection and enforcement in Europe, as well as the competitiveness of the European legal market with the U.S. and Asia. The Law Society suggests that the performance of this new system should be closely monitored, as well as the impact it has on existing national patent courts.

Sarah Garvey
20 December 2013

Law Society of Scotland—Written evidence

The Law Society of Scotland's Criminal Law Committee (the Committee), welcomes the opportunity to respond to the above call for evidence and has the following comments to make.

The Committee confines itself to the criminal justice aspects of the EU's 5 Year Agenda for EU Justice and Home Affairs activity (2015 – 2019) but believes that there should be a fourth JHA programme.

In particular, the Committee welcomes the progress made by the EU procedural rights roadmap which aims to introduce minimum procedural rights across the EU Member States which have now been approved, namely, the right to interpretation and translation, the right to information in criminal proceedings and the right to access to a lawyer and to communicate upon arrest.

The Committee notes that the next measures due to be proposed will relate to legal aid and the rights of vulnerable suspects.

The Committee recognises that the consolidation of existing JHA co-operation should be considered but does welcome further EU legislative proposals and initiatives in this area.

With regard to the format of the next JHA programme, the Committee believes that the format should comprise a concise set of principles as opposed to a longer and more detailed set of initiatives as per the previous programme as it is better to consider in some detail what principles underpin any detailed set of initiatives.

Regarding the JHA activity in the multi-annual financial framework, the Committee believes that the UK should opt-in to the Justice Programme (2014 – 2020), currently being negotiated.

The Committee should like to take this opportunity to refer to its previous response to the House of Lords Select Committee on the European Union with regard to the UK Government's 2014 Opt-out decision (Protocol 36) at which the Committee expressed concerns regarding inter alia the European Arrest Warrant. The Committee remains concerned that this disengagement from JHA matters rather than attempts to reform difficulties which exist at present with European Arrest Warrant procedure will result in harming the interests of UK citizens living elsewhere in Europe. The Committee remains concerned that exercising the opt-out will undermine the UK's ability to influence the content of the next JHA Programme. The Committee also remains concerned that exercising the opt-out is likely to create tensions with other Member States where law enforcement agencies will be hampered in assisting them.

I trust that these comments are of some assistance to the Sub- Committee.

11 October 2013

Claudio Matera, Asser Institute—Written evidence

1. Should there be a fourth JHA programme? If so what should its content, focus and purpose be, with reference to the previous programmes and evaluations thereof?

1. With the entry into force of the Lisbon treaty, the role of the European Council in shaping EU policies and their agendas has gained importance. Indeed, Article 15 Treaty on the European Union (hereinafter TEU) affirms "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof "; moreover, this provision must be read in conjunction with Article 68 Treaty on the Functioning of the European Union (hereinafter TFEU). Article 68 TFEU affirms the following: "The European Council *shall define the strategic guidelines for legislative and operational planning* within the area of freedom, security and justice"(emphasis added). It appears from the foregoing that since the entry into force of the Lisbon treaty the convention according to which the European Council sets the policy agenda for the area of freedom, security an justice (hereinafter AFSJ) has been codified with the effect of imposing to this institution an obligation to provide the Union with an agenda for the development of the EU as an AFSJ.

2. The treaties do not provide guidance concerning the temporal framework in which the European Council's strategic guidelines must be implemented. However, in this respect the praxis seems to link -albeit informally- the AFSJ agenda with the term in office of the Commission and the European Parliament. It should be emphasized that the JHA field is the only one in which the European Council sets a clear operational agenda whereby objectives and means are clearly enumerated so as to guide action by the Commission and the Council. At the same time, the primacy of the European Council in setting the JHA programme has provoked tensions between the European Council, the Council and the Commission when the Commission presented its implementing action plan in 2010: an action plan that was deemed not to comply with what was asked by the European Council and written down in the Stockholm programme.[34]

3. The Stockholm Programme was a comprehensive document that built upon the experiences gained by the institutions during the implementation of the previous programme (the so-called Hague programme). Therefore the Stockholm Programme called upon the Commission to develop instruments (and pay attention) to monitoring the implementation of AFSJ instruments. It is submitted by the present author that that last issue is still relevant, especially if one considers that to this date, no mid-term evaluation has been provided by

[34] See "Draft Council Conclusions on the Commission Communication "Delivering an area of freedom, security and justice for Europe's citizens - Action Plan Implementing the Stockholm Programme" (COM (2010) 171 final)" of 19 May 2010, Council doc. 9935/10. Especially at page 3: "Emphasizes strongly that the Stockholm Programme is the only guiding frame of reference for the political and operational agenda of the European Union in the Area of Justice, Security and Freedom. Takes note of the Commission's Communication "Delivering an area of freedom, security and justice for Europe's citizens - Action Plan Implementing the Stockholm Programme" (doc. 8995/10), presenting the initiatives that Commission is intending to take with a view to contributing to the implementation of the Stockholm Programme. Notes however that some of the actions proposed by the Commission are not in line with the Stockholm Programme and that others, being included in the Stockholm Programme, are not reflected in the Communication of the Commission.

either of the directorates of the Commission in charge for JHA, i.e. DG Justice and DG Home Affairs.[35]

4. For the first time the Stockholm Programme provided a comprehensive programme pertaining to the so-called external dimension of the AFSJ, the new policy programme should build on the experience gained and develop new means to combine the consolidation of the EU as a global security actor in the JHA fields with other foreign policy objectives. Moreover it should consider ways to avoid inter-institutional litigation pertaining to the external dimension of the JHA whenever the latter is related to actions adopted under the Common Foreign Policy and Common Security and Defence Policy of the EU, i.e. the so-called second pillar. However, the new phrasing of Article 40 TEU has repealed the pre-existing "non-affectation clause' of Article 47 TEU (pre-Lisbon) and has created a legal imbroglio whereby it is almost impossible to choose between a CFSP-based action or a external AFSJ one without being capable of arguing against it: the issue is currently pending in front of the Court of Justice in relation to the surrender of suspected pirates arrested in the framework of operation Atalanta to a third country.[36]

2. What is the relevance of the political context? For example, how relevant will the debates and controversies surrounding the free movement of persons, privacy (the Prism programme in the US, as well as similar programmes in some Member States) and the negotiation of a US-EU free trade agreement be?

1. Because the policies that compose the AFSJ belong to the heart of State sovereignty, the political context in which the JHA policy programme is elaborated has an important impact on the actual JHA agenda. In The Hague programme of 2004 the reaction to international terrorism and organized crime were two strong push factors in this respect. Possibly, the Stockholm programme was particularly ambitious in relation to the finalization of the Common Asylum System.

2. As far as the new JHA policy programme is concerned, it is very likely that the data protection and privacy issues will play an important role. However, while that European Council and the Council in the past were keen to accommodate the positions advanced by the US (first PNR agreement, SWIFT), after the PRISM and NSA Surveillance scandals the position of many EU governments has changed. In this respect it is likely that the Prism programme will lead the new JHA programme to demand legislative instruments aiming to securitize personal data and protect the privacy of citizens against uncontrolled external use.

3. In any case, it should be borne in mind that the dossiers related to the EU–US trade agreement were decided before the Prism affair; therefore, it is unlikely that security/privacy dossiers will directly affect the content of the trade deal. Indeed the EU would not be able, by virtue of its strict constitutional rules on conferral of competences and choice of the appropriate legal basis to include topics that do not relate to trade while negotiating under the Common Commercial Policy.

4. Parallel to those observations, it is further submitted by the present author that an element capable of influencing the end result of the JHA policy programme is linked to the

[35] On this issue
[36] Case C-658/11 pending

Italian presidency of the Council at the time of the finalization of the document. In this respect, and in the light of the tragedies occurred near the coasts of Italy with migrants/asylum seekers losing their life at sea, it is likely that the new programme will call upon for a recast of the Dublin II Regulation and/or for a recast of the powers conferred to Frontex, the EU agency on borders control. Lastly, the external dimension of the JHA policy programme will inevitably be influenced by the on-going turmoil of the EU's neighbours. In relation to north African countries two priorities can be identified: one is border controls and the second is establishing police and judicial cooperation mechanisms so as to finally have instruments to fight emergencies such as the threat posed by foreign fighters travelling from the EU and north African states towards Syria. In the east neighbourhood of the EU the focus will still be on border controls measures on the one side and the fight against organised crime on the other.

5. Lastly, while the implementation of the Stockholm Programme has been marked by the difficulties linked with the entry into force of the Lisbon treaty, it should be emphasised that the development of the EU as an AFSJ has also been affected by a number of initiatives an instruments that have raised inter-institutional disputes (e.g. PNR case) as well as challenges by individuals claiming that the application of EU measures was in breach of human rights (smart sanctions against individuals suspected of financing terrorism). All in all it emerged that the development of the EU AFSJ agenda has raised a number of conflicts essentially pertaining to the respect of the rule of law. The new policy document should make an effort in providing guidelines so as to avoid the amount of litigations connected to the implementing instruments of the Stockholm Programme.

3. What lessons from the application of the Stockholm Programme could usefully be reflected in the next JHA Programme? Did the Stockholm Programme involve too much or too little legislation and what were its tangible outputs? How successful have some of these outputs, such as the Standing Committee on Operational Cooperation on Internal Security (COSI), been and are they working as intended?

1. The Stockholm Programme was an ambitious programme. However, in this respect it should be borne in mind that the new programme ought to emphasize more on the need to develop accurate tools to monitor and evaluate the transposition and the application of EU norms in the Member States. Between 2010 and 2011 the Commission has initiated a number of infringement proceedings against some member states, but it will be only after December 2014 that JHA legislation adopted before the entry into force of Lisbon treaty will fall under the full scope of powers of the Commission and the Court of Justice in relation to infringements. The overall results in monitoring the impact, the implementation and application of EU measures in the JHA field are disappointing and the new policy programme should make an effort in finding a solution to these problems either by attributing tasks to agencies such as Eurojust, or by developing systems such as the SOLVIT system operating in the context of the internal market.[37] A solution n these matters should be developed in line with the specific mandate provided by the treaties in Article 70TFEU.

2. The Stockholm Programme was the first JHA programme to operate under the new treaties. The inter-institutional cooperation is of pivotal importance for an effective and efficient implementation of the programme as well as to guarantee the coherence and

[37] http://ec.europa.eu/solvit/site/about/index_en.htm

consistency of JHA instruments with the policy programme and with the treaties. However, not only the implementation of the Stockholm programme has led to tensions between the Council and the Commission, but also the introduction of COSI cannot be assessed as entirely positive. Indeed the functioning of this committee lacks transparency and accountability and as a consequence it is difficult to assess its (negative or positive) impact on the implementation of the Stockholm Programme since it only publishes some reports and is responsible only to the Council; with the latter having the duty to keep in formed the European parliament.[38] The reports published thus far[39] suggest that the committee operates more as an intelligence tool and operational support service rather than as a body that can contribute to the implementation of the programme in the strict sense.

4. Should the EU's focus be on consolidating existing JHA cooperation before embarking upon further EU legislative proposals and initiatives? The UK Government, in particular, has emphasised in the past that the EU should focus on practical cooperation, which does not necessarily require a legislative underpinning.

1. In this regard it should be emphasized that nothing in the treaties suggests that the role of the European Council ex Article 68 TFEU concerning the development of the legislative planning for the AFSJ and, as a consequence, the new policy programme that will succeed the Stockholm one, must solely concern new legislative proposals. Indeed according to the Article 68 TFEU action of the European Council must also define guidelines for operational planning and legislation; this formulation clearly places the monitoring and consolidation of legislation at the same level of legislative proposals.

2. However, legislative proposals and initiatives may be necessary so as to enhance and facilitate operational cooperation. Practical cooperation, operational cooperation at the JHA level often requires legislative approximation: this may be the case because of the field in which cooperation is to take place (e.g. criminal law, investigations and procedural issues), or simply because national authorities would not manage to cooperate with the existing normative setting. Therefore, notwithstanding the scope of Article 73 TFEU on administrative cooperation, legislative intervention by the EU may emerge as necessary in order to bridge the 28 national legal systems and make practical cooperation possible under the same conditions for the whole of the EU, thus avoiding any discriminatory outcome.

3. In relation to the external dimension of the AFSJ it should be borne in mind that many agreements concluded at bilateral level by the EU find their basis on other instruments of EU external relations such as Association Agreements. However, some of the Association Agreements that the EU uses as a catalyst to conclude AFSJ-related agreements are old -and predate not only the entry into force of the Lisbon treaty, but also The Hague programme. As a result of this, these old agreements do not always provide sufficient leverage for the EU to conclude bilateral agreements on JHA matters. The new policy programme should consider this. Lastly, the part dedicated to the external dimension of JHA should provide guidelines and a road map so as to reconcile the necessity to insert AFSJ-related clauses in agreements with third countries and international organisations that are not solely concerned with AFSJ objectives; this is particularly important in relation to CFSP actions

[38] Article 6 of the COSI decision, OJ L 52 3.03.2010

[39] E.g. Standing Committee on operational cooperation on internal security (COSI) - Summary of discussions held on 2 October 2012, Council doc. 15584/1/12 of 31.10.2012

linked to AFSJ objectives because this has proved to be a context in which many inter-institutional disputes have raised.

5.Should the Programme include a timeline for repealing and/or consolidating existing JHA legislation where necessary?

1. This could be a welcome innovation to the new programme. Such innovation could be inserted in the programme and probably should be introduced as a parcel of a broader normative instrument aiming to implement Article 70 TFEU.[40] Moreover, taking into consideration that some of the existing legislative instruments have been adopted before the entry into force of the Lisbon and will require amendments by the end of 2014 or immediately after, such innovation should be welcome. Lastly, there are instruments that have been repeatedly changed over the past years (e.g. Frontex founding regulation) that lack an official consolidated version and that should be considered as negatively affecting legal certainty.

6. What should be the format of the next JHA Programme? For example, should it comprise a concise set of principles or contain a longer, and more detailed, set of initiatives as per the previous programmes?

1. The new JHA programme should be adopted following the same format of the Stockholm one, but preferably more concise. As a policy manifesto of the European Council with a view to cover roughly 4 years & ½ this programme the document cannot be expected to be exhaustive. Parallel to these observations, it should also be borne in mind that the document must respect the horizontal distribution of competences between institutions and that it should not affect the discretion and prerogatives of the Commission, of Member States (when they operate at Council level) and of the European parliament.

7.What role should the European Parliament and national parliaments play, if any, in defining the content of the next JHA Programme?

1. This question largely depends on the definition of the relationship between the JHA policy programme and Article 68 TFEU. If one interprets the JHA policy programme as an act adopted on the basis of the Article 68 TFEU, then neither the European parliament nor national parliaments need to have a role on the adoption of the programme. However, taking into consideration that the European Parliament is a co-legislator in the JHA fields and that the JHA policy programme are usually adopted shortly after the entry into force of a newly elected parliament, the principle of loyal cooperation between institutions should impose the establishment of means of cooperation between the EP and the European Council. In relation to national parliaments, nothing in the treaties suggests that their cooperation should be sought at the time of adopting the JHA policy programme; possibly, having to engage in dialogue with 28 parliaments would also negatively the efficiency of the decision making process at this stage and is probably better to maintain their role related to the scrutiny of legislative proposals.

[40] Article 70 TEFU: Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

8.Is the funding allocated to JHA activity in the Multiannual Financial Framework for the period 2014-2020 sufficient to achieve existing aims?
9.What are the potential implications of further EU Treaty change for JHA cooperation, including the position of the UK?

10.What form could or should the UK's future participation in JHA matters take beyond the 2014 opt-out decision? What are the priority areas for potential cooperation in this respect, assuming that the UK will end up participating less in this area than it does at present? Will exercising the opt-out undermine the UK's ability to influence the content of the next JHA Programme?

1. As a fully fledged Member States, the UK participates to the works of the European Council and the adoption of the JHA policy programme ex article 68 TFEU: nothing in the treaties and in Protocol 21 on the position of the UK in respect of the AFSJ suggests that the opt-out regime also covers the adoption of the policy programme. Articles 1 and 3 of Protocol 21 seem to exclusively refer to binding instruments adopted pursuant to Title V Part Three of the TFEU.

2. The opt-out decision of the UK (see Article 10 (4) Protocol 36 on Transitional provisions) will necessarily come into play in the JHA policy programme because the latter will have to be adopted after the UK is supposed to declare whether it wishes to make use of its total opt-out. As a result of this, the policy programme will have to take this into consideration and eventually demand the institutions to adopt the necessary amendments to give effect to the UK's position.

3. Assuming that the UK will participate less in the JHA domains than it does at present, the main focus will have to be in the police and criminal cooperation fields. The UK has directly benefitted from EU–based instruments such as the European Arrest Warrant in the aftermath of the London bombings of 2005 when one of the then suspects was swiftly surrendered from Italy to the UK without having to go through the traditional extradition proceedings. Should the UK opt-out of these instruments the JHA policy programme will have to include instructions pertaining to the conclusions of EU-UK framework agreements so as to re-introduce mechanisms of cooperation, possibly making use of the numerous Council of Europe conventions existing on these matters. Another field in which, potentially, the exercise of the opt-out prerogative of the UK would demand the adoption of new measures pertains to the fields of private international law (conflict of laws). Inevitably, opting-out from the AFSJ in the terms of Protocol 36 will undermine the ability of the UK to influence the content of the different measures and the decision–making process at the Council level, but not at the European Parliament one: here the MEPs from the UK will continue to participate in the adoption of any of the JHA measure.

4. In relation to he external dimension of the AFSJ and the position of the UK it should be borne in mind that AFSJ-based agreements with third countries references to the UK opt-out regime are inconsistent and will have to be amended where appropriate so as to take into consideration the total opt-out on a case-by-case basis. Also in relation to other types of agreements (e.g. Association agreements) with AFSJ clauses the praxis is not coherent and because these agreements have been concluded at different times -including before the entry into force of the Lisbon treaty- the effects and procedures connected to the UK's opt-out decision of 2014 will have to be assed on a case-by-case basis. However, in this respect one last observation can be made: AFSJ clauses inserted in broad external action instruments are

mostly 'habilitating clauses' and not executive provisions; therefore, AFSJ clauses in these types of instruments should be interpreted as the first step prior to the conclusion of sector-specific agreements. As a consequence of this, the UK could consider whether it is really necessary to revisit AFSJ-related clauses that merely call upon the parties to cooperate and eventually conclude ad-hoc agreements.[41]

1 December 2013

[41] E.g. Article 84 of the Euromed Association Agreement with Algeria on readmission of illegal migrants, Euromed Agreement Algeria OJ 10.10.2005 L265, p. 2 See C. Matera, *Much ado about "opt-outs"? The impact of 'Variable geometry' in the AFSJ on the EU as a Global Security Actor, in* S Blockmans and B van Vooren *(eds.) How to legally accommodate variable geometry in EU External action*, forthcoming 2014 CEPS Publications, Brussels.

Meijers Committee—Written evidence

1. Fundamental Rights

The Meijers Committee urges the Council as well as the European Union in general to continue to develop a coherent human rights policy. Important steps have been taken over the last years, for instance in the Area of Freedom, Security and Justice (AFSJ), with respect to guaranteeing European citizens an equivalent level of human rights protection throughout the EU. Those efforts will facilitate the goals set out in Article 3(2) TEU.

As EU policies are mostly implemented and enforced through the legal orders of the Member States, loyal cooperation between the Member States amongst each other, and cooperation with the EU is vital. The Meijers Committee invites the Council, the other EU institutions and national governments to develop legislative initiatives that ensure the implementation of human rights standards into the framework of transnational cooperation between national authorities. The articles concerning *ne bis in idem* (54-58) of the Convention Implementing the Schengen Agreement are a fine example of how legislative initiatives foster the protection of fundamental right standards, also in transnational cases. The Meijers Committee invites the Council and other stakeholders to develop further initiatives in the area of transnational cooperation and cooperation between national and European authorities (for instance, the European public prosecutor). In particular, it considers the matter of access to justice on the European territory – and a system of European forum choice, guaranteeing a proper administration of justice – to be a very important issue, particularly in the area of migration law and criminal law.

The Meijers Committee suggests to develop a system of monitoring the follow-up actions of Member States on critical observations in the reports of UN and Council of Europe supervisory treaty bodies to the extent those observations pertain to areas covered by Union law.

In order to allow the Union to act in case of serious or systematic human rights violation in a Member State, the Meijers Committee proposes to consider:

- extending the mandate of the European Union Agency for Fundamental Rights (FRA) or involving the Council of Europe Commissioner of Human Rights in fact finding in cases of serious human rights violations in a Member State in order to provide the European Commission with the necessary information before it decides on a possible infraction procedure, and
- granting individuals, in the case of systematic human rights violations in a Member State (in a purely internal situation), the possibility to seek redress on the basis of EU law before both national courts and the European Court of Justice.

The latter proposal would require amending the TFEU at a next Intergovernmental Conference, the former proposal already can be realized within the framework of the current Treaties.

2. Evaluation and implementation

The Meijers Committee notes with concern that various proposals for new Union law have been made without proper evaluation and implementation of existing instruments. For example, the Smart Borders proposals were published at a time when the Visa Information

System (VIS) was not yet fully implemented and the Schengen Information System (SIS II) just had become operational. The Meijers Committee believes that the next multiannual programme should focus on full and effective implementation, enforcement and evaluation of existing instruments. Accordingly, new initiatives for monitoring and implementation should be proposed. The Meijers Committee invites the European Council to consider adopting the following measures:

- new tools in order to stimulate the enforcement of the EU Charter of fundamental rights in Member States should be developed;
- the use of Article 70 TFEU to conduct objective and impartial evaluations of the implementation of Union instruments in the field of asylum and immigration, similar to the Schengen evaluation mechanism.
- new centralised European databases should only be created on the basis of studies that have shown their added value, as previously stated in the Hague Programme.

3. Institutional affairs

The conclusions of the European Council of 27 and 28 June 2013 do not mention a role for the European Parliament in the decision making process on the next multiannual programme. Both the EP and the national parliaments should have an explicit role in the adoption of the programme.

The working practices of the Committee of Internal Security (COSI) should allow for:

- a greater degree of transparency of its work as coordinator of operational cooperation in the AFJS;
- greater scrutiny of the European Parliament and national parliaments by handing them more tools thereto;
- consultation of EU bodies and agencies such as the FRA and the European Data Protection Supervisor (EDPS), to avoid a focus on security and negligence of human rights issues.

The adoption of priorities in the framework of the EU's Internal Security Strategy and the multi-annual policy cycle requires the input and consultation of all institutional actors, most importantly the European Parliament.

The activities of independent agencies in the field of Justice and Home Affairs should take place in full compliance with fundamental rights and should be subject to democratic scrutiny and the possibility of judicial review.

4. Judicial criminal cooperation and strengthening of procedural rights

The Meijers Committee believes that the Council should focus on implementing the "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings", taking into account the costs for the Member States in the implementation of these rights. Particularly in cooperation cases, certain rights may carry a high financial burden (e.g. translation and interpretation) and a subsequent unwillingness on part of the executing Member States to afford these rights to individuals. To counter this incentive, the Meijers Committee would welcome legislation that provides for a fair distribution of costs between issuing and executing Member States.

In line with the Report of the LIBE Committee of the European Parliament on an EU Approach on criminal law,[42] the Meijers Committee underscores that substantive criminal law provisions should only be developed when there is added value in a common EU approach. The next multiannual programme should initiate the development of a checklist on the criminalisation of conduct on EU level, assessing subsidiarity and proportionality, added value, compliance with fundamental rights and enforcement possibilities.

The Meijers Committee supports the proposal of the United Kingdom to limit the application of the European Arrest Warrant to serious crime only. The next multiannual programme should contain a proposal to limit the definition of crimes covered by the European Arrest Warrant.

5. Data protection

Before adopting new proposals on data processing and exchange, including the Smart Borders proposals, the next multiannual programme should call upon a systematic EU wide evaluation of:

- the discriminatory effects of the use of large-scale migration databases (Eurodac, VIS, SIS II) for law enforcement purposes and the added value of this use for the prosecution of crimes;
- the quality of the collection and processing of fingerprints and other biometric data in databases and the added value of the use of these data for identification- and verification purposes;
- compliance with the principle of purpose limitation by national and EU authorities, including an assessment of national rules and decisions, effectively prohibiting and sanctioning the use of EU databases by Member States for other purposes than for which they were established.[43]

6. Non-discrimination

The new multiannual programme should address the increased use of profiling by public and private authorities and its possible discriminatory consequences for ethnic and religious minorities, specifically for the Roma community.

The Meijers Committee notes an increase of hate speech and incitement to discrimination and hatred in the Member States. It advises the Commission to evaluate the Framework Decision 2008/913/JHA of 28 November 2008 on combating racism and xenophobia, with special attention to discrimination of Roma.

The Meijers Committee is also concerned with the position of nationals of Member States that acceded to the Union in 2004 or 2007 and who reside or intend to reside in another Member State. There is a tendency among certain Member States to restrict the access to their labour market for nationals from the new Member States. The principle of free movement of workers should be guaranteed for citizens of all Member States and discrimination on grounds of nationality should effectively be banned.

7. Immigration

[42] Committee on Civil Liberties, Justice and Home Affairs, *Report on an EU approach on criminal law*, 24 April 2012, (2010/2310(INI)).

[43] See, for example, the judgment of VG Wiesbaden, 4 April 2013, prohibiting the use of VIS information for the rejection of an asylum application and ordering the deletion of this data.

The Meijers Committee invites the Council to pay particular attention to the existing inconsistencies in EU immigration legislation. Rather than making proposals for further harmonisation, the next multiannual programme should initiate the streamlining of EU immigration legislation, for example by proposing an EU Immigration Code. Particular attention should be paid to inconsistencies such as between the SIS-alert (SIS II) and the Entry Ban (Returns Directive) and the grounds for and conditions of detention in various directives and to make explicit the right of third country nationals to enter and stay in the EU when the conditions are met, as this is insufficiently guaranteed in current Schengen Borders Code (Regulation (EC) No. 562/2006).

The Meijers Committee considers that harmonisation of national legislation in the field of labour migration has been difficult. Directives that have been adopted so far are hardly functioning. The next multiannual programme should ensure that EU labour migration is only proposed or adopted when it does not lead to fragmented, inefficient legislation.

8. Asylum

The full implementation of the recently adopted second phase of the Common European Asylum System in accordance with international law and the general principles of community law, and the effective monitoring thereof should be a key priority in the field of asylum. In this context, the new "early warning, preparedness and management of asylum crisis" system (EWS) could be used as an important source of information, since it should provide information on the quality of decision making, reception conditions and asylum procedures. The EWS should function as a transparent 'permanent health and quality check' on the basis on periodic country reports as well as information from civil society and asylum experts.

The Meijers Committee also invites the Council to pursue the implementation of some highly relevant proposals which were included in the Stockholm Programme but are not yet executed and/or finalised:

- creating a framework for the transfer of protection of beneficiaries of international protection when exercising their acquired residence rights under Union law should be considered;
- publication of the EC study on the feasibility and legal and practical implications to establish joint processing of asylum applications and introduction of new proposals on the basis thereof;
- consideration of the accession of the European Union to the 1951 Refugee Convention.

9. External Dimension

The programme should emphasise that the external dimension of the AFJS cannot adversely impact the level of human rights protection in third countries. To this effect the EU should, in the adoption of internal instruments, such as the amendment to the Visa Regulation, assess the possible consequences for the level of protection of fundamental rights in non-Member States.

Similarly, the possible consequences for the level of protection of fundamental rights in non-Member States should be carefully assessed prior to any form of cooperation or the conclusion of formal relations with third countries in Justice and Home Affairs matters. The protection of fundamental rights should be a central element in the relations with third countries on these matters and compliance should be continuously monitored.

The external dimension of the AFSJ should focus on the strengthening of the rule of law in third countries. It should aim to enhance capacities for border, migration and asylum management in those countries as an addition and not substitute for the EU's efforts in these fields.

The cooperation between agencies in the field of Justice and Home Affairs and the relevant administrative authorities of third countries should take place in full compliance with fundamental rights and should be subject to democratic scrutiny and the possibility of judicial review.

5 November 2013

Migration Policy Institute Europe—Written evidence

I. Overview

The march toward a common, EU-level immigration and asylum policy has been nothing less than remarkable. Since the 1999 Tampere European Council, the establishment and continuous expansion of the Schengen area and the Common European Asylum System have been signal achievements, but they are not the only important accomplishments. Equally central, if less well known, has been the corpus of shared goals and milestones agreed to and achieved during each of the five-year Justice and Home Affairs (JHA) programmes since Tampere. Among them are the development of a series of policy frameworks that have propelled the migration and asylum portfolios forward, the establishment of a common policy 'language' within EU institutions, and a stronger, if uneven, sense of mutual trust and understanding between the Member States themselves.

The current five-year programme, however, is widely considered to have been less effective than its predecessors. This is only partly the result of its content and design; a number of internal (within the EU) and external factors have also interfered with achieving the Stockholm Programme's policy ambitions. The global recession (and the fiscal and labour market crises that it spawned), the Arab Spring, the Lisbon Treaty's effect on EU decision-making, and shifting national priorities have all called into question whether the format and scope of the JHA five-year programme is still the most appropriate and effective tool to manage today's challenges. This submission sets out some initial thoughts on these issues and puts forward a set of considerations for a fruitful post-Stockholm process, with specific reference to the areas of immigration, asylum and border management.

II. Lessons Learned from Tampere

Among the most important things to understand about previous JHA programmes is the context in which each was developed and implemented. The origin of the Tampere Programme is the right starting point of this exercise and the source of several lessons.

Tampere occurred at a unique moment and for an exceptional purpose. First, it was intended to support the embedding of a brand new policy area, Justice and Home Affairs (JHA), in the EU context. As such, Tampere had to articulate a bold vision of what could be possible within the EU framework. Second, national policymakers found themselves building common policy from a vast range of perspectives and experiences. Some of the core goals in fact meant different things to those signing up to them: a single concept had to be adapted to 15 different contexts and, as a result, interpreted in 15 different ways. And as a third-pillar policy area, the nature of collaboration was markedly different than it is today, not least the need for unanimous agreement between Member States. As such, Tampere needed to set broad and ambitious goals that would spur the development of policy measures to achieve them, while steering clear of sensitive areas of sovereignty.

Fourteen years later, certain elements of the Tampere blueprint may appear dated but the appeal of a grand vision remains as attractive as ever. The first lesson is that it is far easier to agree on broad goals—and then flesh out the processes for achieving them—than to hone in

directly on the details.[44] Concepts developed during the in the Hague Programme, such as 'circular migration' and the belief that integration is a 'two-way process', begin to crumble in the face of serious scrutiny. In fact, the messy realities of policymaking in immigration and asylum areas have taken their toll on the ambitions of both protagonists and supporting actors alike. Finding common ground, and the common denominator that would allow for policy agreement, has proved very difficult. It has taken more than three years to agree legislation to harmonise rules for immigrant seasonal workers between the EU institutions (it has been eight years since the idea was originally set down), whilst negotiations on rules for intra-corporate transferees still continue. This may appear to be somewhat paradoxical given that immigration policies across Europe bear striking overall similarities. The devil is always in the details (which reflect the varying sensitivities and priorities of Member States) and particularly in implementation. Over the past couple of years, concerns about implementation of EU legislation – notably the asylum acquis – has led policy-makers and observers alike to question the value of the overall process.

Second, the first decade of common policy development in the area of immigration and asylum focused on establishing baseline policy; because such policy tends to be more general, perhaps even abstract, there are often fewer political obstacles to overcome. Now, however, the EU institutions are looking toward more sophisticated, and thus more difficult, initiatives, which at times amend and/or build upon first-generation policies. For example, the usefulness of informational databases such as the Schengen and Visa Information Systems hinge not only on the consistent application of the Schengen Visa Code by each visa-issuing Member State, but also on the interoperability of national information systems. If it was hard to establish general principles in an era of near collegial common ownership of the European project, and very energetic leadership, today the European Commission is involved in pursuing more complex policy in an environment that is more hostile to certain types and forms of immigration, with a greater number of diverging opinions.

Third, the number of actors involved has proliferated. The enlargements of 2004 and 2007 have almost doubled the number of governments who must both agree and then effectively implement policy, and has broadened the overall range of experience at the negotiating table. For some of the newer Member States, implementing EU immigration policies in countries with relatively few actual immigrants is an abstract process, and the development of strong national positions on these policies has been slow. Indeed, EU policy has heavily influenced the development of national systems in these countries, even in non-legislative areas such as migrant integration policy. Meanwhile, the new role of the European Parliament has lengthened the policy process. Considering the intermittent friction with the European Parliament, reinvigorating the sense of constructive collaboration between EU institutions must be an implicit, yet critical, element of any new programme. Finally, the development of EU agencies focused on aspects of the immigration portfolio, from the Fundamental Rights Agency to Frontex and the European Asylum Support Office, means that new voices are joining an increasingly dissonant chorus.

It should also be noted that, outside the EU institutional framework, developing national governance of immigration has both helped and hindered the progress of EU policy in this area. At the time of Tampere, unlike today, only a few European governments (such as France, the Netherlands, and in some important ways the United Kingdom), had in place

[44] For an in-depth review of policy development up to 2010, see E.Collett, *Beyond Stockholm, overcoming the inconsistencies of immigration policy*, European Policy Centre, December 2009.
http://www.epc.eu/documents/uploads/954588169_EPC%20Working%20Paper%2032%20Beyond%20Stockholm.pdf

anything approaching a comprehensive immigration *system*. As each Member State has developed a national policy framework post-Tampere, there has been an attendant effect on—even tension with—their approach toward the development of a European-level system. And perhaps more importantly, the experience of pursuing the expansion of EU immigration policy has revealed that, while policies may be "easy" to transfer, developing the institutional infrastructure needed to apply and administer policy effectively, and as intended, is a much more complex matter.

III. Context Matters...A Lot

The current five-year JHA Programme, which will come to an end in 2014, has been also handicapped to various degrees by the changing environment within which it has had to operate. As a result, the Stockholm Programme has had far less impact than its predecessors. Less ambitious from the outset, the current programme has also been hampered by shifting economic and political priorities, and from the new, more complicated decision-making process ushered in by the Lisbon Treaty. This environment will also affect future policy development, dealt with in the next section.

Much of the work of the Stockholm Programme has focused on reviewing and reforming existing legislation, rather than on developing new policy frameworks. Efforts to recast directives within the Common European Asylum System highlight both the modest ambitions of the Programme and sense of fatigue that is becoming more commonplace as g to, the implementation of first-generation policies by some Member States, and a more noticeable gap between the form of legislation and its function in practice. The interpretation of agreed legislation is not always consistent with either the letter or, more important, the spirit of such legislation. As a result, some argue that rather than pursue further policy development, the Commission should focus on working *with* Member States toward the successful transfer and execution of existing policies.

Against this point of view is the argument that, as EU common policies are in mid-construction, a prolonged hiatus might lead to policy atrophy, and even regression. Indeed, the European Union has spent much of the past several years preventing backsliding in policy areas as varied as visa facilitation, the Schengen system, and the full use of the Dublin Convention. External events, such as the Arab Spring, had unexpected subsidiary effects within the European Union, precipitating a crisis in confidence in the Schengen System, exposing the fragility of intra-EU cooperation (even in areas long-considered settled), and revealing fundamental weaknesses in the ability of the Union to respond effectively to a crisis in its own immediate neighbourhood. In the absence of a complete, and robust, EU immigration and asylum policy—a longer-term objective that must also be put under the rigors of a full and perhaps independent review—EU policymakers would best serve the interests of the Union and be true to their specific portfolios by shoring up the implementation of *existing policy* while continuing to pursue more sustainable policy that is capable of reinforcing the interests and priorities of Member States. This will be no easy task. The recent tragedy in the Mediterranean, including hundreds of deaths in the Mediterranean, revealed both the high stakes of EU policy, and the deep *entrenchment* of the various national and EU institutional policy positions.

The impact of external factors on policy is not new for the European Union. The terrorist attacks in New York, Madrid, and London had a profound effect on the Tampere and Hague agendas. More recent events affecting immigration and asylum policy development have been

perhaps even more consequential. First, the global economic crisis that began in 2008 did not just affect the design of the Stockholm Programme; it was also very consequential for the (lack of) realisation of the Programme's content. Policymakers at both the national and EU levels have been distracted by the serious disruption to the European economy and society, aggravated further by the fiscal and euro crises and the resulting relentless growth in unemployment and underemployment. Moreover, governments no longer have the fiscal flexibility to implement broad-ranging initiatives at the national level. While this is seen most clearly in Ireland and all along the southern part of the Union, virtually all Member States are under pressure to reduce spending while still living up to their EU commitments. Even if the economic crisis lifts over the next few years, its effects will linger for a considerably longer period of time. Immigration policy development is also affected by failures in other policy domains. For example, the lacklustre EU response to the Arab Spring weakened the role that DG Home could play in promoting the Global Approach to Migration and Mobility. Weaknesses in the design and implementation of employment and training, education, foreign affairs and trade policy, among other policy domains, could negatively affect the future development of immigration policy.

A second, subtler shift has also gained momentum over the past few years, that of populist politics and a more sceptical stance by many toward immigration in several Member States. Whether positively disposed toward immigrants or not, a significant proportion of voters across Europe believes their governments have lost control of the immigration portfolio, and are no longer able to manage immigration flows effectively. Populist parties, from the Netherlands to Greece, have capitalised on this uncertainty and have influenced national policy primarily by forcing government to address some of their concerns in an effort to deny populists the political space on which they thrive. The European Union's position in this debate is complicated in many instances by negative public opinion toward its own role, which is further fuelled by the ever-present Eurosceptic narratives. As a result, many national governments have retreated from pan-European collaborative positions on immigration at the negotiating table, which has, in turn, negatively affected the possibility of further policy development in this domain.

Thus, future policy planning in the JHA area will not only have to set out realistic goals that take into account European economic constraints, but will have to push harder to connect with citizens and weave a common immigration narrative. At the same time, future programming will have to include measures to reasonably 'insulate' common policy development from internal and external geopolitical events—be they pressures at Europe's Southern external border, or political upheavals in the Maghreb. But before this, there is a need to rebuild consensus between constituencies in three directions through the careful construction of mutual trust: between the EU institutions, between the institutions and the citizenry, and between Member States with sharply divergent interests in immigration. This is a slow, painstaking process that requires consummate political skill and will need to begin as soon as possible.

IV. Establishing a Broader and Longer Policy Horizon

Many of the more ambitious areas of EU collaboration, such as the Common European Asylum System, have come to the end of their planned policy cycles, and the Stockholm Programme offers few pointers for policymakers responsible for developing the next tranche of policy initiatives. In order to construct a programme that advances new ideas, it is necessary to understand and show greater appreciation for the challenges Member States

face—and think actively of the opportunities that may exist to resolve them. But even before this, it is important to reflect upon whether the format and scope of the JHA five-year programme is still the most appropriate and effective timeframe. There are two aspects to this point.

First, programming in five-year increments sets its sights primarily on the near term and turns its back to the opportunity to frame a long-term vision for common EU policy. One of the key advantages of Tampere was the fact that it was able to articulate a long-term vision and then combine it with a set of shorter-term goals designed to make progress toward that vision. This aspect of JHA programming has been lost in the flurry of primarily instrumental goals and reflexive reactions to internal and external challenges. A case in point: The Stockholm Programme set out a series of action points without even articulating the Programme's ambitions. Such instrumentalism may be understandable in that finding common ground on an ambitious agenda would have been very difficult; hence the choice to focus on smaller, more incremental, steps. Yet, such choices merely postpone the more important conversations that must be had on such critical issues as 'burden-sharing' and 'solidarity'—concepts whose meaning has degraded to the point of near empty rhetoric—or establishing the 'end-game' for common immigration policy and the Common European Asylum System.

Shifting instead to a programme with a slightly longer time horizon may not resolve all problems. However, there is significant value in reflecting upon what the expectations are within the EU institutions for policy outcomes in the next 12-15 years. What would success look like in 2025, and what architecture will need to be put in place to achieve it? This thought-project would not only lay the groundwork for the next five-year programme—by forcing all protagonists to work backwards from 2025 and asking what the European Commission needs to put in place first. It would also clarify where the commonalities and differences in vision exist without requiring immediate political commitment. And as the Stockholm Programme approaches the end of its policy cycle, this may be the perfect moment to conduct a candid audit of successes and failures, alongside a deep exploration with the Member States as to desirable, and feasible, long-term goals.

A host of ideas and initiatives must be considered before they are narrowed down into a workable programme to guide the EU institutions starting in 2015. The proposed 'strategic guidelines', expected as part of the June 2014 European Council, will be concise and, as such, unable to incorporate much detail. Thus, the work to flesh out a plan of action is likely to fall to the European Commission during second half of the year. But this does not mean the guidelines are not critical to the process. While content is key, without a strong political framework to which all Member States and institutions can commit, little of it may be effectively realised. This requires intense collaboration between Member States to identify common ground, and shared goals. The dynamic nature of immigration policy at the national level, and the enduring political sensitivities it gives rise to, suggest that the process to develop the next programme will need to be transparent, honest (in terms of both the assumptions on which the proposals rest and its implications for Europe's future), respectful of Member State sensibilities, collaborative, and creative in order to agree on a programme that will build a solid foundation for the next generation of EU immigration policy.

Second, it is worth considering how much further a common immigration policy can be successfully developed within a broader JHA framework, and whether the policy area is now mature enough to deserve its own, more cross-cutting, programme. Managing human

mobility has become a whole-of-government matter. Whilst interior ministries are responsible for border controls and the regulation of entries and stays, there are a multitude of other policies to consider that deal with the international and local effects of immigration, from employment and education policies, through trade policy and *all* economic policy portfolios, to foreign affairs. In fact, in several countries, both within and outside the European Union, the initiative on immigration policy is shared increasingly with labour ministries, while immigration is increasingly a feature of trade and foreign policy discussions. Indeed, the development of an external dimension to the Home Affairs portfolio – the Global Approach to Migration and Mobility – exemplifies this spill over into other, critical policy areas, including development aid and even maritime policy.

In such an evolving policy framework, the role of JHA is also likely to move more in the direction of becoming a policy coordinator as much as that of policy initiator, taking on the much more important, and difficult, task of assuring that the policies pursued within any one portfolio are consistent with the broader policy's overall goals—and thus moving the entire policy domain toward the agreed-upon common purpose. Increasingly, the fact that non-directly-JHA concerns can be incorporated into other DGs' programmes in only a limited way (highlighted by the sometimes awkward positioning of the external dimension of both JHA and immigration within the Stockholm Programme), is restricting how far JHA officials can effectively balance the broad range of concerns that must be considered when drafting proposals. Most European governments have experimented with different methods of governance and coordination of immigration over the past decade, including those who have created stand-alone immigration portfolios. Such stand-alone ministries may be politically premature within the European Commission, but establishing a separate programme for immigration may enable the European Commission to avoid carving up the portfolio by articulating a set of proposals that can more adequately incorporate the crosscutting aspects of the issue. The JHA programme has become particularly unwieldy, and few policymakers have the requisite comprehensive expertise and understanding of the whole portfolio. Splitting it into manageable themes may enable policymakers to focus better on the key concerns in each.

Finally, DG Home is in need of much greater human and financial resources if it is to achieve its many goals. Governments across the globe have learned that lesson and have increased the budgets of their migration agencies, often dramatically. And the issue of funds may in fact be partly ameliorated by the new budget cycle, and the creation of a larger amalgamated Asylum and Migration Fund, and the intention to allow more flexible and responsive spending. But while additional funds may build the DG's capacity to perform a very complex and always growing portfolio better, it is also necessary to consider the skill-set of the DG's professional classes, which may also need to diversify to meet expanding and constantly evolving demands. To date, much of the work has been legislative in nature, but this is slowly changing. Are new officials capable of undertaking the type of soft policy negotiation and diplomatic engagement that emerging policy areas such as the Global Approach to Migration and Mobility require? How far can legal experts address the socioeconomic and cultural dimensions of immigrant integration? And how can they incorporate into their proposals always changing economic and labour market realities while also understanding the nuances of demographic change?

While it is important to understand where opportunities exist in the current policymaking climate, it is also critical to incorporate new and emerging challenges that will confront the European Union and its Member States in the decades ahead. As global demographic,

political, and economic shifts occur in often unexpected ways over the next 20 years, how should EU perspectives and priorities adapt, and how might the EU and its Member States begin to prepare the groundwork for proving equal to the new challenges while being able to benefit from new opportunities?

For example, while demographic change is oft cited as a core rationale for opening up to immigration at the national level, the nuance and complexity of demographic change is typically ignored in most decision-making circles. This is not to argue for more or less immigration. Rather, it is intended as a statement in favour of deeper thinking—and better planning—about migration, population, and social and economic infrastructure needs of sub-national regions facing demographic decline, and harnessing the strategic analytical resources of JHA to use all the tools it, and other DGs, possess to understand better how they can incorporate new developments into their thinking, such as the far greater intra-EU mobility the economic crisis has unleashed, and to devise, together with Member States, incentives and disincentives that encourage certain types of migration toward underperforming, and less attractive, regions.[45]

Europe, at all levels of governance, will have different needs and vastly different capacities to target immigration toward where it is most needed—making the "one-size-fits-all" approach to immigration increasingly less responsive to needs and hence less effective. And as the European Union and Member States indeed move toward more a refined application of 'selective' migration, and its potential importance for regional development, the current understanding of 'common' immigration policy will also evolve, allowing the European Union to play a different, but still critical role. Effective *common* policy does not need to mean *identical* policy for all. This is all the more relevant at a time when economic and demographic forces playing out in other parts of the world will deeply affect Europe's own experiences with in- and out-migration.

What is the policy lesson here? Understanding well, *and modelling accurately,* Europe's evolving place in the mobility hierarchy at all times requires complex analyses and projections of changing demographics; internal, intra-European, and international migration trends; estimates of out-migration from the European Union (by immigrants, persons of immigrant origin, and EU citizens); the migration behaviour of emerging economies; the effects of policies adopted elsewhere; and not a little alchemy. This is very significant with respect to European policymaking. The assumption that the European Union is, and will remain, attractive to immigrants across the world affects the basis upon which policymakers at the European and Member State levels decide whether to promote or limit immigration to Europe.

V. The Future UK-EU Relationship on JHA Issues

The UK has always taken an 'added value' approach to EU policy on immigration and asylum. Over the past year, this position has hardened in a number of ways. First, across Europe, Member States are demonstrating greater reluctance to participate in immigration and asylum. Second, the UK coalition government's decision to hold a referendum on the future of EU membership, means that there is a 'freeze' on any big decisions about UK participation until at least the end of the Balance of Competences Review. However, there are guiding

[45] See E. Collett, Facing 2020: Developing a new European agenda for immigration and asylum policy, Migration Policy Institute Europe, February 2013, http://www.migrationpolicy.org/pubs/MPIEurope-Facing2020.pdf

reasons for the UK to engage more deeply in future policy development on immigration, asylum and border management.

The UK has long had an exceptional relationship with the EU, in that it is capable of choosing when, and how, to participate. Of most significance is the fact that the UK has chosen not to participate in the Schengen area of free movement (removal of internal borders), and concomitant external border management cooperation. As a result, the UK maintains separate border and visa policies, though it has opted in to some areas, notably police and judicial cooperation, and limited participation in *operational* border management initiatives, notably Frontex and Eurosur. In addition, the UK has opted out of the 'recast' versions of the asylum Directives, with the exception of the reformed Dublin Convention and Eurodac (as both are deemed core to minimizing fraud within the asylum system), though the UK remains bound by the other four directives in their original formulation. Finally, while the UK has opted out of all legislation related to the development of a common immigration policy, the government has signed up to EU readmission agreements, and participates in three of the four EU funds, the European Migration Network, the Network of National Contact Points for Integration, and the exploratory work falling under the umbrella of the Global Approach to Migration and Mobility.

To date, the UK's relative expertise and sophisticated approach to migration management has helped the government maintain a consistent level of engagement in EU policy development despite frequent use of the opt-out, as it may be called upon for advice and support. But EU collaboration is changing in several ways that may affect the UK's value calculation regarding EU policy, and the perception of the UK government within the EU institutions. The soft power of the UK is increasingly compromised by the spectre of the opt-out, and its use. This has been further compounded by the proposed referendum on UK membership, as other Member States see little long-term value in compromising their positions vis-à-vis UK interests when the UK government may be withdrawing from some, or all, of its EU obligations. Thus, the UK currently has far less traction with respect to setting future policy agendas, and EU Member States may be less willing to bow to the 'expertise' presented by the UK government.

Does this matter? Arguably, legislative harmonisation has reached a plateau in the area of immigration and asylum. Beyond those proposals currently under discussion, little more is envisaged. On the one hand, this means that the UK's formal opt-out of legislation will have less intrinsic value in the future. On the other hand, greater focus and energy is being place on fostering practical operational cooperation, from integrating IT systems for the exchange of critical information, to joint operations in the Mediterranean and personnel training exercises. Regardless of whether the UK has an interest in joining the Schengen area, the UK government has an interest in a) ensuring strong borders are maintained throughout the EU area, and b) gaining all available information that might strengthen management of the UK's own borders. However, the UK is currently unable to fully participate in the information sharing engendered by the Schengen Information System, or the Visa Information System, or any of the additional information exchange systems that have built out from this. This may, in the future, represent a substantial loss of value for the UK. Finding some path which allows the UK to remain outside Schengen, yet participate in the valuable supporting machinery would require both active diplomacy and no small amount of good will on the part of the other Member States (good will that is currently in short supply).

The areas of policy in which the UK has an interest are those where EU collaboration offers added value, and where failure to collaborate across Europe has external reverberations. For example, with some of the fundamental imbalances between Northern and Southern Member States unresolved, and continuing humanitarian pressures to the South and Southeast, further asylum crises are likely. Some serious thought will have to be given to the UK's role in resolving such crises, and future participation in common solutions. Other areas for the UK to consider its role include returns and border security. For example, returning unauthorised migrants is an enduring challenge for all Member States, with both numbers and procedures falling far short of political promises made across Europe. Setting aside legislative developments, it may behove the UK government to investigate future collaborative opportunities to improve return, beyond joint return flights and readmission agreements.

In 2013, the EU is coming to the end of the current Commission, Parliament, seven-year budget cycle, and JHA five-year programme (Stockholm). This confluence means there is both a vacuum of political influence in Brussels at a time of great deal of uncertainty regarding the future direction of the JHA portfolio, irrespective of the UK government's own relationship with the EU. Thus, it is critical that the UK engage deeply in the development of strategic guidelines for future immigration and asylum policy, and consider the points of added value that European Union cooperation can provide. There are opportunities for a forward-looking, pro-European UK government to carve a deeper path of cooperation within the European Union, whilst retaining some of the exceptionalism that British publics have become familiar with.

3 December 2013

Northern Ireland Executive—Written evidence

I welcome the opportunity to submit evidence to the Committee on its inquiry on the EU's five-year agenda for EU Justice and Home Affairs activity (2015-2019).
My Department has a committed interest in European Justice and Home Affairs (JHA) matters and is fully supportive of a fourth JHA programme. My officials continue to ensure the successful implementation of the devolved elements of the Stockholm Programme, however, it is fair to say there has been a heavy focus of late on negotiating and implementing European proposals, one can't help but wonder if it would be more beneficial to direct resources to ensuring a consolidated approach to existing proposals, before embarking upon further legislative proposals.

Given the devolved nature of justice in Northern Ireland, my Department is mostly concerned with further developing policy areas such as: organised crime and human trafficking; police cooperation; and criminal and civil justice matters, to name a few. You have acknowledged these areas as likely topics to be covered in the next programme, however, I am also keen to further explore judicial co-operation (to enhance Eurojust proposals touched upon in the Stockholm Programme).

On the whole, I believe that a more strategic approach should be taken to Justice and Home Affairs priorities post-2014, to help direct focus towards areas which will be of most benefit to the UK as a whole.

I look forward to reading the ensuing report from this inquiry.

DAVID FORD MLA
Minister of Justice

19 November 2013

Professor Steve Peers, Professor John Spencer, Professor Elspeth Guild—Oral evidence (QQ1-14)

Transcript to be found under Professor Elspeth Guild

Scottish Government—Written evidence

I would like to thank the Committee for offering the Scottish Government the opportunity to respond to its inquiry into the EU's next five year agenda in the area of Justice & Home Affairs. This agenda will set out the priorities for the EU and form the basis for future action, accordingly we think it is of the utmost importance. Much of the subject matter is within devolved competence and those areas within reserved competence also have a significant and sometimes distinct impact in Scotland. As a starting point, we would like to encourage the UK Government to engage fully in this process as a positive EU partner.

The past 15 years, under the Tampere, Hague and Stockholm Work Programmes respectively, have seen considerable progress in developing the area of 'freedom, security and justice' from a low base, mainly through mutual recognition initiatives and with a focus on legislative measures. These programmes have led to considerable benefit for our citizens across a range of areas, from closer cooperation in combating organised crime, to better recognition of judgements in civil and commercial law.

However, I generally agree with the view that it is perhaps timely for the EU to now pause and reflect on progress. Where these provisions can be improved then we should look to do so, including where necessary by further legislation; but after a period of intensive development, the Scottish Government is of the view that the EU should now place an emphasis on implementation, on quality and effectiveness of enforcement and on ways of consolidating the progress that has already been made.

The Stockholm Programme, at 134 pages covering 88 different themes, was an ambitious document. However, it did leave significant scope for the Commission to pick and choose which measures it wanted to focus on. There have been some notable successes from the Stockholm Programme, such as the Victims Package. By contrast there have also been some proposals which have caused concern, notably the recent proposal to establish a European Public Prosecutor and the related proposals to reform Eurojust.

I agree that it is appropriate for Member States to seek to exercise the powers envisaged by Article 68 TFEU. In that context I also reflect that Article 67, which sets the scene for Title V measures, provides that the Union, inter alia '*shall respect the different legal systems and traditions of the Member States*'. This is an interesting reflection point not only for us in the UK, with our different legal systems, but also in the specific EU context, where from time to time Commission proposals would benefit from taking full account of this stipulation.

I would welcome a new Programme which sets out a strategic approach to JHA. This might be achieved from a starting point of thorough assessment and mapping of both the current EU legislative and practical cooperation landscapes as they have developed over the past 15 years to determine, for example, whether there are in fact gaps, or duplication, or indeed provision which is now obsolete. This should not be restricted to an academic 'at table' exercise, but in concert with practitioners and Member States.

If further provision is thought necessary, it is however essential to assess first whether non-legislative measures can achieve the desired objectives. Where legislation is necessary it should be accompanied by comprehensive impact assessments.

Particular areas of interest to the Scottish Government and where we would welcome future EU cooperation include improving the exchange of criminal records amongst Member States, taking practical steps to tackle serious organised crime, combatting trafficking of human beings, police cooperation, the general areas of criminal and civil justice and a focus on consolidating the already good work across the field of JHA.

You mention the potential impact of the UK '3rd Pillar' opt out on future JHA cooperation in your list of questions. It would be unfortunate if this opt out decision indicates a possible future unwillingness or reluctance by the UK to participate in JHA measures. It would also be unfortunate if it undermined the UK's ability to influence the next JHA programme. It is my understanding that the justice systems of the UK and Scotland are held in high regard by our Member State counterparts and accordingly our views are generally seen as being influential and authoritative. The Scottish Government is therefore of the view that constructive engagement on strategic priorities for the coming 5 years represents a welcome opportunity for the UK to project a positive future profile.

I would like to thank the Committee again for giving the Scottish Government the opportunity to contribute to their discussions. I look forward to having sight of the report produced in due course.

Kenny MacAskill MSP
Cabinet Secretary for Justice

27 November 2013

Professor John Spencer, Professor Elspeth Guild, Professor Steve Peers—Oral evidence (QQ1-14)

Transcript to be found under Professor Elspeth Guild

UK Government—Written evidence

Should there be a fourth JHA Programme? If so, what should its content, focus and purpose be, with reference to the previous programmes and evaluations thereof?

1. Article 68 of the Treaty on the Functioning of the European Union (TFEU) requires the European Council to "define the strategic guidelines for legislative and operational cooperation within the area of freedom, security and justice." This was the legal basis for the Stockholm Programme itself.

2. The Commission has the sole right to initiate legislation in the great majority of JHA areas, but in the view of the Government, the effect of Article 68 is that this right should be exercised within the strategic framework that the European Council lays down. JHA cooperation affects core aspects of national sovereignty, such as immigration, border control and criminal law. It is therefore right that the Member States, working with the Commission in the European Council, set the overall strategic direction for this cooperation.

3. The Government's position is, therefore, that the European Council should replace the Stockholm Programme with new strategic guidance. We are pleased that, at its meeting in June 2013, the European Council agreed that it would consider such guidelines next June. This provides the Member States with an important opportunity to set the agenda for JHA cooperation over the years to come.

4. However, in the Government's view this guidance should not repeat the format of the Stockholm Programme, with its detailed list of proposed measures. While the European Council can agree the most important issues that that cooperation should address, it is very difficult for it to predict now the exact measures that might be needed to deal with a particular question in four or five years' time. Trying to agree a precise set of measures is likely to distract the European Council from its main task of setting strategic direction.

5. A detailed programme may also reduce the practical impact of the European Council's guidelines by allowing the Commission to pick and choose the measures that it wishes to implement. This has happened to an extent with the Stockholm Programme, where the Commission has pushed forward those items that suit its agenda, such as the recent proposal for a European Public Prosecutor's Office, while doing little on other commitments such as reducing the abuse of free movement rights.

6. Rather than a detailed new programme, the Government therefore considers that the European Council should agree strategic guidelines that set out the overriding principles governing JHA cooperation. This should:
    a. set out the priority areas for action. In the Government's view, the most important of these should be:
        i. preventing the abuse of free movement rights,
        ii. strengthening the EU's external border,
        iii. action against human trafficking,
        iv. the more effective return of prisoners to their country of origin, and

v. improved exchange of criminal records.

b. set out how we expect the Commission and Member States to work together to address these problems. The Government's guiding principle here is that the EU should achieve its objectives wherever possible through practical cooperation rather than legislation. The guidelines should also explain where we do not expect the Commission to act; for example by recalling that national security remains a Member State competence and asserting the principles of subsidiarity and proportionality;

c. ensure that proposals that come from the Commission, in particular in the area of civil law, always take into account costs and burdens to both private sector organisations and public bodies;

d. give the Council responsibility for monitoring the way in which the guidance is applied in practice. This should include monitoring the extent to which Commission legislative proposals (where these are necessary) comply with it; and

e. start the process of tidying the European statute book; the UK's Protocol 36 decision has highlighted a significant number of European measures in the JHA field which are defunct or obsolete, and repealing them would be a positive move.

What is the relevance of the political context? For example, how relevant will the debates and controversies surrounding the free movement of persons, privacy (the Prism programme in the US, as well as similar programmes in some Member States) and the negotiations of a US-EU free trade agreement be?

7. The Government's approach is that the new guidelines should lay down the strategic priorities for JHA cooperation for several years to come. Current political controversies may influence aspects of the negotiations, but it is important that the European Council does not allow these to act as an impediment to long-term strategic thinking. The Government will continue to support and participate in the EU-US free trade agreement, but it must also not act as a distraction or impediment to sensible strategic thinking in the area of JHA. It is important that Member States are able to share personal data lawfully and proportionately both with each other and with appropriate third countries (including the United States) in order to deal with security threats including terrorism and serious crime.

8. Recent concerns about the ending of transitional controls for Bulgarian and Romanian workers have given Free Movement rights a higher profile. However, the abuse of these rights is a separate and much wider problem which the new guidance should address.

What lessons from the application of the Stockholm Programme could usefully be reflected in the next JHA Programme? Did the Stockholm Programme involve too much or too little legislation and what were its

tangible outputs? How successful have some of these outputs, such as the Standing Committee on Operational Cooperation on Internal Security (COSI), been and are they working as intended?

9. As set out previously, the Government's view is that the Stockholm Programme focused too closely on the specific legislative and practical measures to be delivered at the expense of defining the overall direction of EU cooperation in this area. This meant that it acted as a list of legislative measures for the Commission to choose from and did not lead to the outcomes most desired by Member States.

10. The Stockholm Programme was agreed under the previous Government, and we have always been clear that we do not support all the proposals in it. We did not agree, for example, with the creation of a common asylum system based on closer legislative harmonisation. Nor do we support the creation of the European Public Prosecutor's Office (EPPO).

11. Along with many other Member States, the Government's view is that the scope for further JHA legislation is limited. The EU's priorities over the years to come should be implementing existing measures effectively and developing more effective practical cooperation to deal with shared threats and genuine common problems.

12. In this area, the Stockholm Programme does provide material on which we can build. It called on Member States and the Commission to take action against the abuse of free movement rights. The Government is disappointed that the Commission has not acted on this request with any urgency, but believes that the new guidelines should amplify this request and that the Council should monitor the Commission's compliance with it rigorously. Similarly, Stockholm called for the EU to develop an Internal Security Strategy (ISS), and this has provided a generally effective strategic framework for Member States to work together on issues such as counter terrorism, organised crime and human trafficking. Successful measures that have flowed from the ISS include the creation of the new European Cybercrime Centre at Europol, the EU Strategy against Trafficking in Human Beings and the Radicalisation Awareness Network.

13. The Stockholm Programme did not establish COSI, which has its legal basis in Article 71 of the TFEU, but it did give it the task of monitoring and implementing the ISS. The Government considers that COSI has contributed positively to this work, especially in identifying the EU's priorities for cooperation against organised crime under the Policy Cycle. However, we believe that COSI could supervise the implementation of other areas of the ISS more effectively, and should give a higher priority to monitoring the delivery of individual projects, holding Member States more accountable for the work they have undertaken to do.

Should the EU's focus be on consolidating existing JHA cooperation before embarking upon further EU legislative proposals and initiatives? The UK Government, in particular, has emphasised in the past that the EU should focus on practical cooperation, which does not necessarily require a legislative underpinning.

14. The Government remains of the view that practical cooperation on JHA issues is generally likely to be far more effective than legislation. The EU has adopted a great deal of legislation in the JHA field in recent years. Instead of adding more legislation, the EU should focus on the full and effective implementation of measures that have already been adopted, and deeper practical cooperation in priority areas such as abuse of free movement rights, illegal migration, people trafficking, prisoner transfers and the exchange of criminal records.

15. Where further legislation is considered necessary, it should only be introduced after the most rigorous impact assessment, including a full analysis of its costs and likely benefits.

Should the Programme include a timeline for repealing and/or consolidating existing JHA legislation where necessary?

16. The Government agrees that it is important to keep all legislation under review to ensure that it is meeting its objectives, and to repeal or amend it if it is not. A timeline could be an effective way of achieving this objective. The Government also supports the consolidation and simplification of legislation in the JHA field; for example the proposed merger of the six existing sources of JHA funding from the EU into two: the Asylum and Migration Fund and the Internal Security Fund.

17. The UK's 2014 opt-out decision as laid out in Protocol 36 to the Treaties has identified a number of pieces of EU legislation that are defunct and should be considered for repeal. This is a necessary activity before continuing with new initiatives, in particular due to the upcoming extension of European Court of Justice (ECJ) jurisdiction over these measures. Having extant legislation over which Member States could be infracted, but which serves no useful purpose, is not a good practice.

What should be the format of the next JHA Programme? For example, should it comprise a concise set of principles or contain a longer, and more detailed, set of initiatives as per the previous programmes?

18. For the reasons set out above, the Government, along with many other Member States, considers that the European Council should set out high level strategic guidelines, including the priority areas for JHA cooperation in the period it covers. Areas where Member States do not feel that further EU action is necessary may also be set out.

19. It should also set out some of the broad steps that should be taken to address these issues, focusing on practical cooperation and the effective implementation of existing legislation. It should have a focus on better regulation, for instance more robust and independent impact assessments. Finally, the guidance should make the Council responsible for monitoring its implementation, for instance assessing legislative proposals against the strategic direction that has been set.

What role should the European Parliament and national Parliaments play, if any, in defining the content of the next JHA Programme?

20. Article 68 of the TFEU makes the European Council responsible for drawing up the strategic guidelines. Nevertheless, we expect the European Parliament to make its views known through an "own initiative" report before the end of the year. The Government welcomes this, along with representations from other interested parties, but notes that the final decision on the guidelines rests with the European Council.

21. National Parliaments can also influence the guidelines through enquiries such as this one, and by scrutinising their own Governments' negotiation of them. The Government strongly welcomes this inquiry. The guidelines will also be subject to Parliamentary Scrutiny in the normal way, and we will also deposit the Commission's Communication on them, currently expected in March, with an Explanatory Memorandum.

Is the funding allocated to JHA activity in the Multiannual Financial Framework for the period 2014-2020 sufficient to achieve existing aims?

22. The Government believes the funding allocated to be sufficient, and considers that administrative savings can help make JHA funding more effective without the need to increase it further. Although JHA only amounts to approximately 1% of the EU's total spending, the amount allocated to it under the 2014-2020 Multiannual Financial Framework (MFF) is higher than that available from 2007-2013.

23. Not all of this funding will be available to the UK. We are excluded from the Internal Security Fund (Borders) because it builds on those parts of the Schengen system in which we do not participate, and we have not opted in to the Internal Security Fund (Police) or the Justice Programme, though we do have the option of applying to participate once the Regulations establishing them have been adopted and have undertaken to review our participation at that time.

24. The Government is pleased that Member States will have more scope to spend JHA funding in accordance with national priorities than was the case previously, as both the ISF and Asylum and Migration Funds will include national allocations to participating Member States.

What are the potential implications of further EU Treaty change for JHA cooperation, including the position of the UK?

25. While there have been some recent calls for Treaty change in this area, the Government has not been made aware of any firm proposals. The new JHA guidelines will need to be drawn up under the current legal bases for that form of cooperation. Should those legal bases be amended by future Treaty change, the Government believes that the European Council would need to issue further strategic guidelines under Article 68 TFEU.

26. The Government is strongly committed to the UK's right to choose whether to participate in new and amended EU JHA proposals and would seek to safeguard these arrangements in any negotiations around future Treaty change.

What form could or should the UK's future participation on JHA matters take beyond the 2014 opt-out decision? What are the priority areas for potential cooperation in this respect, assuming that the UK will end up participating less in this area than it does at present? Will exercising the opt-out undermine the UK's ability to influence the content of the next JHA Programme?

27. It is important to make clear that the 2014 decision was granted to the UK by the Treaty of Lisbon and we are therefore obliged to make it. It is a specific decision about a specific set of measures and does not represent a change in policy by the Government towards the JHA area as a whole. In effect it enables the UK to apply the current opt-in arrangements to the pre-Lisbon instruments, which were agreed before ECJ jurisdiction and Commission infringement powers applied. Furthermore, the decision relates specifically to crime and policing measures; it does not apply to the whole JHA area such as civil justice measures or migration and asylum measures.

28. The Government's future participation in JHA matters will continue to be on the terms set out in the Coalition agreement. All new proposals in this area will be assessed on a case-by-case basis. We put the national interest and the benefits to our citizens and businesses at the heart of our decision making. We consider each opt-in decision with a view to maximising our country's security; protecting civil liberties; preserving the integrity of our criminal justice and common law systems and control of immigration. The Government will not opt in to a proposal concerning a European Public Prosecutor and has no intention of joining Schengen measures that involve the abolition of border controls. We will continue this approach and it will guide our approach to the forthcoming JHA programme.

29. The Government's position on the 2014 decision is consistent with this general approach. After a careful assessment of the measures within scope we concluded that we should withdraw from them all and seek only to rejoin those that are in the national interest. The Government set out those 35 measures in Command Paper 8671 and considers that they include all the tools which are important to ensure we maintain operational EU police and judicial cooperation. Notably that package includes the European Arrest Warrant, Europol, the European Criminal Records Information Exchange, the European Supervision Order, the data protection framework decision and other measures that contribute significantly to our security and that of our EU partners as well as protecting the rights of citizens. Both Houses voted to agree with the Government's approach here and the relevant Parliamentary Committees, including this one, are currently holding inquiries relating to the measures that we are seeking to rejoin. The Government looks forward to considering the outcome of these inquiries.

30. Due to the consistency of our approach to JHA we do not believe the 2014 opt-out will seriously affect our ability to influence the new JHA guidelines. In terms of our approach to the forthcoming Programme, we favour a shorter, more strategic programme focussing on practical cooperation and the consolidation and implementation of existing legislation. Many other Member States agree with this approach and we are confident that we will be able to influence the new guidelines effectively, in partnership with like minded partners.

11 November 2013

Professor Helen Xanthaki—Written evidence

1. I am a Professor of Law and Legislative Studies, and the Academic Director of the Sir William Dale Centre for Legislative Studies at the Institute of Advanced Legal Studies of the University of London. My main area of research is legislative studies, with specific of focus on legislative quality at the national, international and EU levels. My field of substantive law research is the Area of Freedom Security and Justice, which I also use as a source of conceptual analysis for law reform project and legislative quality assessment.

2. I am delighted to respond to your call for evidence, as it offers an excellent opportunity to shed light to the AFSJ from a rather ignored focus, that of regulatory and legislative quality. The full analysis of the theoretical background for my assessment of the AFSJ can be found in the records of my Oral Evidence at the Public Hearing at the Legal Affairs Committee of the European Parliament, where I was asked to report on the EU's Smart Regulation agenda. My evidence to you applies my conclusions from my evidence there to the area of AFSJ.

3. What the reasons behind the need to assess AFSJ from the point of view of regulatory and legislative quality? The evidence from the EU is that in the area of AFSJ implementation of the EU legislative texts by member states is problematic. Member states seems to be disengaged, possibly due to the subject matter of criminal law where willingness to integrate is at its weakest, but also because of the user unfriendly style of EU legislation produced in the field.

4. So far the European Union, with the European Commission at the lead, have focused on post legislative scrutiny of EU legislation in the AFSJ. But what about the legislative product itself? Before one proceeds with the post facto assessment of the effectiveness of EU legislation already produced by the EU, is it not wise to look at the regulatory framework of the policy as a whole in order to identify possible holistic weaknesses that may burden individual measures of the past and, more importantly, the future?

5. The idea of assessing the regulatory framework of each policy as a whole is not novel. The October 2010 Commission Communication on Smart Regulation constitutes the formal passing from the Better Regulation Agenda of the previous decade to the new Smart Regulation Agenda.

6. The Smart Regulation Agenda identifies the following five requirements for regulatory quality with reference to EU policies:

    - Simplification of EU law via a reduction of administrative burdens;
    - Evaluation of law effectiveness + efficiency ex ante, via fitness checks on key areas and via strategic general policy evaluations;
    - Selection of the "the best possible" legislation, through Impact Assessment;
    - Improvement of implementation record, via post legislative scrutiny, SOLVIT, and EU Pilot; and
    - Achieving clearer and accessible legislation, via simple language, consolidation, recasting, and e-access

7. I have expressed my grave concerns on the uninspired, flat content of Smart Regulation in the past. What is surprising, and rather concerning to me, is that even the minimum requirements of Smart Regulation have not been applied on the AFSJ: not formally by the EU, not even *de facto* as evidenced by the many analyses on the haphazardness of measures already produced by the EU within that policy area. Allow me to address each point, firstly on the basis of the minimum standards introduced by Smart Regulation and secondly on the basis of what I would expect and hope for as best practice.

8. Simplification has not touched the AFSJ. It is imperative to identify which are the "administrative burdens" imposed by EU legislation in the field, and how these can be curtailed. One example: the introduction of the framework for the exchange of criminal data between member states and the European Evidence Warrant proved to be such burdensome measures (administratively and financially) that both were later abandoned.

9. But, at the level of best practice, simplification may also extend to simple regulatory means [not necessarily law]; the use of simple language; straight forward enforcement methods; simple national implementing measures; and simple methods of pre- and post-legislative scrutiny?

10. Evaluation of law effectiveness + efficiency ex ante has not applied to the AFSJ. It is imperative that the policy is assessed as a whole. There is a pressing need for a holistic evaluation of the AFSJ. What is it that the EU are pursuing? And how can the aims be achieved?

    a. In the near past the EU seemed to respond to a need for a robust response to terrorist threats, which touched cruelly our nation as well. Is this the main policy aim right now? If this what the member states want the AFSJ and pursue? Let us agree on this goal, or identify a different goal, but let us do so formally and expressly. Only then can member states, including the UK, assess the EU's vision for the future of the AFSJ. Only then can member states consciously, knowingly, and legitimately decide whether they wish to offer the AFSJ clear legitimacy and support (which in my mind is currently either hesitant or non-existent).

    b. Having agreed on the super goal of the AFSJ, the EU and member states can then assess each of the past and future measures for their fitness for purpose, as demanded by Smart Regulation. And this will finally promote:

        i. regulation only when necessary, rather than when there happens to be agreement for a measure on a fragmented basis; and

        ii. regulatory measures that contribute with synergy towards the super goal, and function harmoniously together within the same policy, rather than measures that compete with each other or disregard each other thus leading to the current well documented mal-interpretation and mal-implementation.

11. At the level of best practice,

a. the EU need to define what is effectiveness in the AFSJ: what criteria can be used for each specific legislative text; are these included in purpose clauses; will these be used for post legislative scrutiny; how will ineffectiveness be addressed; and how will MS national implementation measures contribute to effectiveness;

b. the EU need to define what is efficiency in the AFSJ; does social impact count in the AFSJ; which disciplines of expertise are involved in ex ante evaluation in the AFSJ.

12. Applying the above to the AFSJ can lead to the improvement of the implementation record. Allowing member states to share the true, and clear super goal of the AFSJ can offer them the opportunity to decide whether they share the vision and wish to participate, or whether (and this is an equally legitimate option for the UK) they simply want out.

13. Applying the above to the AFSJ can then inform the EU to the selection of the "the best possible" legislation, as demanded by Smart Regulation. At the moment the AFSJ offers one of the strictest regimes of post-legislative monitoring of legislation. But the effort, commendable as it is on paper, seems to be wasted on an exercise that lacks a super goal against which the success of the legislative text can be achieved; lacks clear assessment criteria in the objectives clauses of the legislation (which at the moment are plagued by general wishes of political intent); lacks engagement between the EU and that national implementing measures; and lacks decisive enforcement mechanisms for non compliant member states.

14. Having offered my approach to a holistic regulatory focus for the AFSJ let me attempt to answer directly some of the questions in the current Call for Evidence.

15. "Should there be a fourth JHA programme? If so what should its content, focus and purpose be, with reference to the previous programmes and evaluations thereof?" I have no hesitation to respond positively to this question: as a committed Europhile, I firmly believe that there is a need for a fourth JHA programme. But it is difficult to answer the rest of the question, in view of the current lack of a vision, a super goal for the AFSJ. Its name seems to offer emphasis on the terrorist and security aspects of the policy. But, in view of the Lisbon Treaty and the constitutional shift from the single market to the establishment of a Union supporting democracy, peace, and human rights, I wonder whether the AFSJ is out of tune with the post-Lisbon EU identity. My personal preference would be for a parallel shift of focus from security and justice to freedom, and the creation of an environment where democracy, piece, and human rights share equal space with security and justice. And so I would suggest that the fourth programme would pause to take account of what areas have been regulated, whether regulation has been successful, and how it can be made successful. With specific emphasis on adding a human and humane dimension to the AFSJ. And example would come from my current work on the implementation of the Framework Decision on victims' rights in criminal trials within the member states.

16. "Should the EU's focus be on consolidating existing JHA cooperation before embarking upon further EU legislative proposals and initiatives? The UK Government, in particular, has emphasised in the past that the EU should focus on practical cooperation, which does not necessarily require a legislative underpinning." I believe that the current state of regulation in the AFSJ is at a terrible state. Attempting to

build further on such weak foundations can only lead to an ultimate collapse. The EU must repair the current state of regulation by, at least, applying the Smart Regulation principle on the AFSJ. After all, criminal law is the one policy that requires careful and stringent regulation and legislation. Part of Smart Regulation is about alternatives to legislation as a regulatory tool.

17. "Should the Programme include a timeline for repealing and/or consolidating existing JHA legislation where necessary?" The task of tidying up the statute book is a thankless one, especially for non lawyers. Any attempt to impose its undertaking, especially via a timeline, would be commendable.

18. "What should be the format of the next JHA Programme? For example, should it comprise a concise set of principles or contain a longer, and more detailed, set of initiatives as per the previous programmes?" In view of the well documented lack of trust between the legal systems of the member states, a combination of principles and precise measures would be ideal. Principles can finally reflect the super goal of the AFSJ, and demonstrate the objective and desired scope of the particular measures. It would make sense to use the particular measures in the list as case studies of the manner in which the EU intend to put the principles to effect. One suggestion: the necessity test for EU legislation would require that the undertaking to legislate a specific measure is introduced in the programme subject to the five Sutherland criteria for EU legislation.

19. "What role should the European Parliament and national parliaments play, if any, in defining the content of the next JHA Programme?" Parliaments represent the interests of the people. The EP and this House have, by their public hearings, shown evidence of concern over the regulatory goal and effectiveness of the policy and legislative measures at the EU level. Extending this to the AFSJ is of course a step in the right direction. Further informed guidance to the EU would serve the people no end. As the House know, the EU has established a multi-annual policy cycle[46] with regard to serious international and organised crime in order to tackle the most important criminal threats in a coherent and methodological manner through optimum cooperation between the relevant services of the MS, EU Institutions and EU Agencies as well as relevant third countries and organisations. This EU policy cycle for serious international and organised crime was adopted by Council in December 2010. The starting point of this EU policy cycle is the SOCTA in which Europol will deliver analytical findings that can be translated into political priorities, strategic goals and operational action plans in order to implement EU policy. The link between the SOCTA conclusions and the definition of priorities is very important. Taking this step in an intelligence-led way ensures that analysis directly informs political decision-making, and that the most relevant threats in the EU are addressed. The EP and this House must follow very closely this very first attempt of the EU for evidence based regulation. If utilised appropriately, this evidence based method of regulation can provide adequate responses to all concerns expressed in my evidence.

20. "What form could or should the UK's future participation in JHA matters take beyond the 2014 opt-out decision? What are the priority areas for potential

[46] Council Conclusions on the creation and implementation of an EU policy cycle for organised and serious international crime, doc. 15358/10 COSI 69 ENFOPOL 298 CRIMORG 185 ENFOCUSTOM 94.

cooperation in this respect, assuming that the UK will end up participating less in this area than it does at present? Will exercising the opt-out undermine the UK's ability to influence the content of the next JHA Programme?" This is a matter very close to my heart. On the basis of my thoughts already expressed here, it is evident that I can see why the UK would be reluctant to continue participating in the AFSJ. But opting-out seems to me to be a wasted opportunity. The UK have one of the most effective systems of regulation and legislation worldwide: policies are thoroughly considered by use of evidence based research; put into substantive law concepts by expert legal officers; and translated into legislative expression by highly trained legislative counsel. The UK have led most regulatory innovations in the EU: from the Sutherland report onwards most advances in the field of my expertise were led and supported by the UK and its Presidencies. I would be very sad to see this expertise leave the AFSJ. I view this time as a unique opportunity for the UK to take part from within the policy in order to rectify what has been done wrongly. I believe that the expertise of the UK civil service can act as a catalyst to a holistic, prioritised programme of cathartic purification in the AFSJ by leading the way to a re-assessment of effectiveness of EU instruments.

21. Please allow me some suggestions in brief:
    a. The AFSJ requires holistic reform.
    b. The EU need to identify a clear and agreed super goal on the basis of the EP's Cornelius de Young Report.
    c. The EU's statute book in the AFSJ needs to be tidied up as a matter of priority and extreme urgency, perhaps on the basis of the Model Guidelines for the EU in relation to standard provisions to Criminal Law issued a week before Lisbon.
    d. Criminal law requires clear, precise, and unambiguous legislation that simply cannot be produced at the EU level (due to the number of member states, the inherent differences in the legal systems, the procedures for passing legislation and the indirect continued tyranny of unanimity etc).
    e. Legislating by anything other than Directives in the AFSJ is a recipe for disaster.
    f. Member states need discretion in the manner in which implementation takes place.

22. I hope that my thought may be of assistance to the Committee and I remain at your disposal.

13 August 2013