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Topic 3

The Area of Freedom, Security and Justice and the Information Society

United Kingdom National Report

Submitted by UK National Rapporteurs
Professor Helen Xanthaki, IALS, University of London
Maria Gaitanidou, Assistant

PART I: Harmonisation of substantive criminal law

Terrorism

Q1. What has been the impact of EU law (Framework Decisions 2002/475/JHA [2002] OJ L164/3 and 2008/919/JHA [2008] OJ L330/21) on the criminalisation of terrorism in your jurisdiction?

The deadline for the 2002 Framework Decision[1] expired on 31st December 2002.

The UK has not created terrorist offences when intentional acts[2] are performed under the circumstanced described in article 1. Instead, domestic legislation makes use of pre-existing common law offences in combination with the broad definition of terrorism in s1 Terrorism Act 2000. UK legislation does not introduce specific terrorist offences.

This has been the source of criticism by the Commission. In the fifth report of the Select Committee on European Scrutiny, Tony McNulty, the Minister of State for Security, Counter-Terrorism, Crime and Policing[3], responded expressly to such criticisms by stating that the Commission's allegations of non-implementation are not binding and that there is continuing cooperation to help the Commission understand the English legal system. In particular, it is the official position of the Minister that the provisions in the 2002 Framework Decision are already part of UK legislation in the form of Terrorism Act 2000 and 2006, and the Anti-Terrorism, Crime and Security Act 2001. There is no separate classification for terrorist offences but perpetrators are prosecuted efficiently even for the Framework Decision offences under the existing national provisions of criminal law.

The truth of the matter is that article 1(f) of the 2002 Framework Decision does form part of the UK criminal law as s43 of the Anti-Terrorism, Crime and Security Act, which amends s1 of the Biological Weapons Act 1974. Article 2 of the 2002 Framework Decision does form part of UK legal order: it was already provided for in s1 Terrorism Act 2000. What is questionable is whether article 4 has been implemented in the UK, and indeed as a separate offence. However, in view of the implementation of article 1 of the Framework Decision, it seems highly plausible to state that article 4 also applies to UK via the pre-existing criminal offences of accessorial liability and inchoate liability. As for the Decision's sentencing

[1] Framework Decision 2002/475/JHA [2002] OJ L164/3
[2] Article 1(a)-(i)
[3] Explanatory Memorandum, 29th November 2007

provisions, these seem to apply in the UK as part of the country's new sentencing policy: the Guidelines "Overarching Principles: Seriousness"[4] require that judges impose sentences in the upper range of serious factors. These may not apply distinctly to terrorist offences, but they do apply to all serious and aggravating offences of which terrorism is certainly considered to be one. Moreover, there are no specific offences implementing articles 7 and 8 of the Framework Decision in UK law. But, as purported by the Minister, instead of a separate offence there is the option of a civil claim for damages, and the Proceeds of Crime Act 2002 provides for an administrative assets recovery procedure. Finally, the former significant diversion between the UK provisions defining terrorism in UK law and in EU criminal law was eliminated with the introduction of s34 Terrorism Act 2006, which now classifies international governmental organisations as possible terrorist targets for the purposes of anti-terrorism legislation.

The amendment of the 2002 Framework Decision with the 2008 Decision replaced article 3 with new offences linked to terrorist activities. Article 3(1) (a) is included in s1 Terrorism Act 2006 as the offence of encouragement of terrorism. Article 3(1) (b) has been implemented in the UK partly via the offence of soliciting[5] and partly under the offence of training for terrorism[6].

There has been no reported case-law interpreting any of the implementing provisions. But it is interesting to note that human rights issues benefit from the application of the principle of proportionality. In *A v Secretary of State for the Home Department*[7] at para [56] the judge declares that, when assessing whether an incursion into individual rights is arbitrary or excessive, the court must ask itself whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii)the means used to impair the right or freedom are no more than is necessary to accomplish the objectives. In *Huang and others v Secretary of State for the Home Department* [8], the court held that there should be a balance stricken between the interests of the community and the rights of the individual.

[4] 16 December 2004
[5] s11,12,15-18 Terrorism Act 2000
[6] s54 Terrorism Act 2000 and s6 Terrorism Act 2006
[7] [2004] UKHL 56
[8] [2007] UKHL 11 para [19]

Cybercrime

Q 2. What has been the impact of EU law (Framework Decision 2005/222/JHA [2005] OJ L69/67) on the criminalisation of attacks against information systems in your jurisdiction?

The 2005 Framework Decision on the criminalisation of attacks against information systems[9] applies to the UK. Moreover, the government have stated that they will opt in the new draft Directive on cybercrime[10]. The rationale behind the government's decision to opt in the Draft Directive is that the Draft Directive incorporates many of the provisions contained in the 2005 Framework Decision; therefore, significant new legislation is unlikely to be necessary for the purposes of implementation[11]. The Draft Directive addresses new threats, in particular the emergence of large-scale simultaneous attacks against information systems, and the increased criminal use of botnets[12], both with a cross-border dimension. As a result, further international cooperation seems effective.

The main UK legislation on cybercrime is introduced by the Computer Misuse Act 1990 as amended by Part 5 of the Police and Justice Act 2006. The 2005 Framework Decision has been implemented in ss.35-38 of the 2006 Act. In specific: s.35 criminalises the unauthorised access to computer material; s.36 criminalises unauthorised acts with intent to impair the operation of computers; and s.37 creates the criminal offence of making, supplying or obtaining articles for use in computer misuse offences. There have not been any challenges of the legislation under the Human rights Act 1998.

The new draft Directive criminalises the illegal interception of non-public transmission of computer data to, from, or within an information system. This is already an offence in the UK under the amended Computer Misuse Act 1990. Moreover, the existing UK Serious Organised Crime Agency is considered to be compliant with the suggestions under the Draft Directive and it is the government's position to try to gather broader information on computer crime; under the Computer Misuse Act 1990, the UK already collects information on prosecutions and convictions.

[9] 5005/222/JHA [2005] OJ L69/67
[10] COM (2010) 517 final
[11] James Bekenshire-Parliamentary Under-Secretary of State for Crime Prevention, in the European Scrutiny Committee (para 13 of the Minister's Explanatory Memorandum)
[12] A botnet is a network of computers infected by a virus which can be activated without their user's knowledge, to attack information systems. It is often used to carry out large-scale attacks affecting significant numbers of information systems causing considerable damage.

However, the offence of production, sale, procurement for use, import and distribution of any device or tool for committing the offence foreseen in the Draft Directive is yet included in the domestic legislation[13]: the conduct elements of production and distribution do not lead to existing criminal offences under the 1990 Act. Therefore, an amendment in the UK legislation will be required for the implementation of the draft Directive, at least if it gets passed as it stands. Moreover, the article 10 of the draft Directive would require another amendment of UK law. The provision sets the maximum term of imprisonment to no less than five years in cases where aggravating circumstances apply, whereas current UK legislation provides for aggravating circumstances the imposition of a sentence hovering at the upper end of the current term of less than 5 years. As a result the implementation of the draft Directive would require either an increase of the level of sentencing, or the creation of a specific new offence with higher penalty.

Q 3. To what extent is there a need for new EU legislation to address gaps in legal responses to cybercrime? To what extent does the Commission proposal for a new Directive on cybercrime (COM (2010) 517 final) address such gaps?

There have been concerns regarding possible security, civil liberties and control of immigration issues. The responsible Minister has stated that the Draft Directive is unlikely to have any significant effect on those areas of public interest because the Directive is concerned with tackling criminal activity. Although the new Directive does not seek to change the balance of EU and UK competence in this area, it is agreed that EU action is justified on grounds of subsidiarity. The UK is also raising the issue of lack of clarity in some provisions; the Minister has expressed his intention to ensure more precise wording during negotiations.

Organised crime

Q 4. What has been the impact of EU law (Framework Decision 2008/841/JHA [2008] OJ L300/42) on the criminalisation of participation in a criminal organisation in your jurisdiction?

[13] Article 7 Draft Directive

The UK has ratified the Palermo Convention which includes a definition of an organised criminal group. There is no evidence to point towards the direction that the UK has opted out in the 2008 Framework Decision[14]. This recent legal instrument updates the Palermo Convention and repeals the Joint Action[15].

Once again, the UK opted for a non express implementation of the 2008 Framework Decision on the basis that pre-existing UK legal provisions already implement it adequately. For the purposes of the Framework Decision on Organised Crime the common law offences of complicity and incitement are used. In particular, article 1 of the Framework Decision provides the criminalisation of participation in a criminal organisation or, alternatively, conspiracy to commit any of the offences listed. This alternative approach to criminalisation is an attempt to harmonise the criminal laws of the member states, and to achieve a compromise amongst the common v civil law divide[16].

It must be noted that the Serious Organised Crime and Police Act 2005, which is considered the most up-to-date UK legislation on organised crime, does not include an agreed legal definition of organised crime.

Racism and xenophobia

Q 5. What has been the impact of EU law (Framework Decision 2008/913/JHA [2008] OJ L328/55) on the criminalisation of racism and xenophobia in your jurisdiction?

The UK has opted in the 2008 Framework Decision on racism and xenophobia[17]. Once again, implementation is considered to have been achieved by use of pre-existing UK legislation, and therefore no new offences have been created in this instance either.

The main UK legislation against racism and xenophobia lies within the Public Order Act 1986. Article 1 of the Framework Decision that introduces the offences of racism and xenophobia is implemented by use of s.17 of the Act. The Act includes expression offences. S.17 criminalises hatred crimes, which include hatred against a group of persons based on their colour, race, nationality (including citizenship), ethnic or national origins. There seems

[14] Framework Decision 2008/841/JHA [2008] OJ L300/42
[15] 98/783/JA
[16] V.Mitsilegas (2009)
[17] 29008/913/JHA [2008] OJ L328/55

to be limited judicial certainty regarding the definition of hatred,[18] and this has resulted in a small number of convictions for this offence.[19] However, in the majority of cases hatred is defined as behaviour having an element of hostility.[20]

Moreover, the use of offensive words or display of offensive material is criminalised under s.18 of the Act. This section seems to include the offence of article 1(a) of the Framework Decision. The section provides that a person who uses threatening, abusive or insulting words, or behaviour, or displays any written material which is threatening or abusive, is guilty of an offence if they intend to stir up racial hatred, or if racial hatred is likely to be stirred. Preceding and subsequent case-law has interpreted the wording of the section. According to *Brutus v Cozens*[21], "insulting words" is to be given its ordinary meaning; the conduct of the perpetrator needs to be taken into account and assessed regardless of whether somebody was actually resulted[22]. In *Materson v Holden*[23], the judge stated that the reasonableness test is to apply in order to examine whether words are "insulting". With the introduction of Human Rights Act 1998, s18 was initially considered to potentially violate the freedom of expression and right to privacy[24]. However, the statute excludes words, behaviour or displays which incur insider a dwelling and are not seen/heard except by other persons in that or another dwelling. Thus, it also includes telephone conversations. The mental element of the offence includes actual intention and, having regard to all the circumstances, the likelihood of racial hatred to be stirred up by the conduct of the accused. However, it does not include conduct which was not intended or where the accused was not aware.

S.19 of the Act includes the offence of article 1(b) of the Framework Decision, namely the publication or distribution of offensive material in written form. The ECRI has underlined potential conflict of this provision with the Human Rights Act 1998 as there is no specific definition of what constitutes publication or distribution of offensive materials. However, there is no reported case to be used as evidence in support of this argument.

The Racial and Religious Hatred Act 2006 attempts to fill the gap in the legislation. The existing legislation did not consider Muslims as a separate race with distinct racial

[18] Courtney Nathan, British and Unites States Hate Speech Legislation: A comparison, 19 [1993] *Brook. J. Int'l L.*, 727.
[19] European Commission against Racism and Intolerance (ECRI) report
[20] Bryan, Ian (2007) *Unpalatable in word or deed: hostility, difference and free expression.* Crimes and Misdemeanours: Deviance and the Law in Historical Perspective, 1 (2). pp. 126-153.
[21] [1973] AC 854.
[22] *R v Parkin and Norman* [1983] QB 92
[23] [1986] 3 All ER 39
[24] Article 10 and 8 of the European Convention of Human Rights

foundations as it did for Jews or Sikhs. Thus the 2006 statute tries to address this shortcoming.

The final relevant piece of legislation is the Racially Motivated Crimes- Racially Aggravated Sentencing Crime and Disorder Act 1998. This piece of legislation uses the existing offences under ordinary criminal law and adds the aggravating factor. However, according to Malik[25], the legislation is more significant than that: the new aggravating offences are aimed at conduct that causes qualitatively different type of aggravating circumstances to that caused included in the basic offences. Thus, the new racially aggravated offences are offences under ordinary criminal law where, at the time of the offence or immediately before or after, the offender demonstrates hostility based on the victim's membership (or presumed membership) of a racial group; or the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group. According to *R v Rogers*[26], a racial group is defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins. The focus is more on the racist motivation of the attacker and less on the racial or ethnic identity of the victim. Thus, the definition is broad: it extends beyond groups defined by colour, race or ethnic origin. In *Attorney General's Reference No 4 of 2004 (Attorney General v D)*[27] the example of the normally non race relevant concept of an immigrant is used to illustrate the broad interpretation applied by the judiciary: an immigrant is a person who is not British, a characteristic which suffices to render the description of the person specific enough to warrant the constitution of a racial group. In terms of the substantive racially aggravated offences, s. 29 of the 1998 Act criminalises racially aggravated assault: the elements of the offence are the actus reus and mens rea of malicious wounding, Grievous Bodily Harm (GBH), Actual Bodily Harm (ABH), or common assault and the racially aggravated factor. Similarly, the offence of racially aggravated criminal damage (s.30) criminalises damage of property. Most importantly, s. 31 includes the offence of racially aggravated public order which seems to complete the full coverage of all the offences created by article 1 of the 2008 Framework Decision.

S.82 of the Crime and Disorder 1998 Act provides that, where a court is considering the seriousness of an offence other than one provided for in ss.29-32, and the offence is racially aggravated, the court must treat that as an aggravating factor, and state in open court

[25] *Race Crime: Racially Aggravated Offences in the Crime and Disorder Act Part II* (1999) 62 Mod L Rev 409
[26] [2007] UKHL 8
[27] [2005] EWCA Crim 889

that the offence was so aggravated. The Sentencing Advisory Panel produced a document *Racially Aggravated Offences: Advice to the Court of Appeal*[28] where it advised on when a court is considering aggravating a sentence under s.82 and under ss. 29-32 of the Act. The Court of Appeal considered this advice in the case of *R v Kelly and Donnelly.*[29] The Court accepted that the sentencing decision should be given in two stages: initially without the racial aggravation and then with the aggravating factor included. However, while the Panel were quite prescriptive on the amount by which each sentence should be increased, the Court of Appeal declined to accept this particular recommendation, preferring to leave it to the discretion of each individual sentencing court to determine the amount by which the sentence should be increased due to the aggravating factor.

Part 12 of the Criminal Justice Act 2003 sets out the general provisions on sentencing that apply to England and Wales. S.142 sets out a legislative statement on the purpose of sentencing,[30] and s.143 sets out how a court must consider the seriousness of an offence. S.144 provides for a reduction in sentences for guilty pleas. Of more direct relevance for this Report are the contents of s.145 which specifically requires a trial judge to treat as an aggravating factor for the purpose of sentencing the fact that the offence was racially aggravated. It stipulates that in cases of racially or religiously aggravated offences the court must treat this mere fact as an aggravating factor, and that it must state in open court that the offence was so aggravated.

PART II: Judicial cooperation in criminal matters via mutual recognition

Q 6. What have been the main challenges for the legal systems of EU Member States in implementing the EU acquis in the field of mutual recognition in criminal matters?

[28] Sentencing Advisory Panel *Racially Aggravated Offences: Advice to the Court of Appeal* (Home Office 2000).
Available at http://www.sentencing-guidelines.gov.uk/docs/offences_racially.pdf
[29] [2001] 2 Cr App R (S) 341.
[30] Section 142(1) states: "Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing: (a) the punishment of offenders; (b) the reduction of crime (including its reduction by deterrence); (c) the reform and rehabilitation of offenders; (d) the protection of the public; and (e) the making of reparation by offenders to persons affected by their offences."

The UK was one of the main delegations that pressured for clear conclusions in Tampere. The House of Lords European Scrutiny Committee[31] has underlined that approximation is necessary so far as it facilitates mutual recognition; however, the Committee has said that the adoption of the principles of mutual recognition in the area of criminal matter poses a significant challenge to the national sovereignty and has a strong impact on the Member States' legal cultures. What the UK sees as a possible solution for many of the problems and challenges posed by mutual recognition is the adoption of minimum standards rather than pure harmonisation. In a consultation with the Law Society, the Government has cautioned that mutual recognition should not be used as a means by which to introduce harmonisation of substantive law and procedures through the back door. On the other hand, JUSTICE has repeatedly proclaimed that approximation is necessary in order to legitimise and facilitate the EU's mutual recognition program. In spite of all the political support, the Law Society has drawn the European Scrutiny Committee's attention to the legal challenges and inefficiencies of the agreed mutual recognition program.

Overall, there have not been significant challenges of the EU standards; for example in the areas of self-incrimination and the agreed minimum standards of burden of proof seem to be in accordance with the English legal standards. However, the EU acquis on the admissibility of evidence[32] seem to raise many objections; the Committee has discussed the issue of admissibility as falling under the principle of subsidiarity and thus should be dealt with caution. Another issue that was raised was the lack of protection for civil rights and liberties; in particular, the European Scrutiny Committee is of the opinion that the European Arrest Warrant (EAW) in particular does not show proper respect to the rights of the defendants. The Law Society and JUSTICE have suggested that the adoption of effective monitoring and reporting practices to ensure mutual trust. One of the main problems is the lack of trust and confidence between the judicial guarantees of one Member States' authorities and adherence to high standards in the administration of justice. Along those lines, after the introduction of the Human Rights Act 1998, the United Kingdom seeks independent monitoring and evaluation of compliance of the EU acquis with the ECHR and other international human rights instruments. Baroness Ashton has underlined that despite the obvious necessity for impartial assessment, there are no concrete proposals. The only reservation of the government is that the EU program on mutual recognition in criminal

[31] Chapter 8:Tenth Report
[32] COM 2009 (624),final, Brussels 11 November 2009

matters may have an impact on the independence of the judiciary unless common minimum standards are adopted.

But of course the main challenge for the UK has been, and continues to be, the half hearted and fragmented participation in selected aspects of EU criminal policy. In cases C-176/03 and C-44/05 the court has held that the UK can opt out only if article 83(2) supersedes the common law power established by these judgements.

Q7. What are the limits of mutual trust in the execution of European Arrest Warrants?

The legal instrument which provides for the European Arrest Warrant in the UK is Part 1 of the Extradition Act 2004, which came into force on 1 January 2004. Part 1 deals with extradition procedures to category 1 territories[33].

The grounds for refusal are provided for in s.11 of the Act. Thus, UK legislation provides for the rule against double jeopardy[34] to be a bar to extradition; similarly the Framework Decision states that this should be a ground for optional non-execution of the EAW[35]. Moreover, time considerations are grounds in both domestic implementing legislation and the relevant Framework Decision. If the passage of time if it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence or since he is alleged to have become unlawfully at large[36]. A similar provision can be found in article 4(4) of the Framework Decision; the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law. Furthermore, the age of criminal responsibility can be a bar to extradition; both the UK legislation and the European Council legislative instrument consider that a warrant can be refused on grounds of the age of the person and thus he cannot be guilty of an extradition offence[37]. Additionally, ss.16-19 include the grounds of hostage-taking considerations[38]; speciality[39]; the person's earlier extradition to the UK from another category 1 territory[40]; the person's earlier extradition to the UK from a non-

[33] EU countries operating the EAW, or more accurately countries which have been designated by the Home Secretary.
[34] s 12 Extradition Act 2003(EA 2003)
[35] Article 4(2) Framework Decision
[36] s 14 EA 2003
[37] s 15 EA 2003 and art3(3) Framework Decision
[38] s 16 EA 2003
[39] s 17 EA 2003
[40] s 18 EA 2003

category 1 territory[41]. Along the same lines are the Framework Decision articles 3(2), 4(3), 4(5) and 4(6).

But there is no distinction between mandatory and optional grounds although the Framework Decision[42] has adopted such a structure. Moreover, a ground for refusal that it is not included in the Framework Decision is extraneous considerations[43]; the competent authorities of the extraditing Member State may refuse the execution of the EAW if it appears that the warrant has been issued for the purpose of prosecuting or punishing the person in question on account of his race, religion, nationality, gender, sexual orientation or political opinions; or, if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions. Furthermore, the Extradition Act 2003 does not seem to include a similar provision to article 3(1) - a mandatory ground for mandatory non-execution of the EAW; if the offence is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law.

Finally, the UK legislation provides for respect of the Convention rights according to Human Rights Act 1998[44]. This provision has been considered to be superfluous as all European countries, and indeed now the EU, are signatories to the ECHR. It is suggested that this section reflects the Parliament's idea that other criminal justice systems do not ensure adequate protection of the minimum standards of the Convention[45]. As far as the use of the grounds is concerned, the rights which are mainly invoked are article 6 (right to a fair trial in front of an independent and impartial tribunal) and article 8(right to respect for private and family life). In *Symeou v Public Prosecutor's Office, Patras*[46], the court held that a mistake carried out by the police authorities and not the prosecutorial services could constitute an abuse of process; however, there was no violation of article 6 and thus the EAW was not to be refused. In *Hunt v Court of First Instance*[47], a delay of 8 years was considered to be a valid ground to refuse to execute the EAW. Professor J. R. Spencer considers the threshold for the above grounds hard to satisfy[48]. On the other hand, the case-law reveals that courts have been less reluctant to refuse an EAW on grounds of potential conflict with article 8 of

[41] s 19 EA 2003
[42] 2002/584/JHA
[43] s 13 EA 2003
[44] s 21 EA 2003
[45] Nicola Padfield *The implementation of the European Arrest Warrant in England and Wales* (2007) 3(2) E.C.L Review 253
[46] [2009] EWHC 897, [2009] 1 WLR 2384
[47] [2006] EWHC 165, [2006] 2 All E.R. 735
[48] *Fair Trial and the European Arrest Warrant* [2010] 69(2) C.L.J 225

the ECHR. In *R (on the application of HH) v Westminster City Magistrates* [49], the court considered an appeal of a two spouses. It was held that the execution of the EAW regarding both parents would leave the children to be cared for by the social services. Although the best interests of the affected children are the primary consideration in extradition cases, generally such considerations cannot override the public interest in effective extradition procedures[50]. Indeed there must be an exceptionally compelling feature in the case which gives rise to the gravest effects of interference[51]. In this case, the court did not identify ant pressing features which would justify the refusal of execution of the EAW issued for both parents[52]. In the high profile case of Julian Assange[53], the UK judicial authorities considered that although the person in question did not have significant ties with the community, he was not a fugitive and thus the use of the EAW was not justified; the conduct under examination was not a extradition offence, but Assange had merely been interviews by the Swedish authorities.

Currently, there is no proportionality test when assessing the validity of a European Arrest Warrant. However, politically, it seems that there have been many calls for the introduction of such a test. The United Kingdom and Germany receive the largest number of EAW. In 2009, the UK issued 6% (220) of the number of warrants it received. There is case-law which reveals that the EAW process is being abused by MS in order to prosecute petty crimes. There are a number of unreported cases which points towards this direction. For example, the case of the case of a retired schoolteacher and grandfather facing extradition to Poland for going over his overdraft limit more than 10 years ago. The entire debt was repaid to the bank but he is still being sought to face trial for "theft", although he has suffered three strokes and is in fragile health.

The Extradition Act 2003 covers issues of territorial jurisdiction by way of setting a test of what constitutes an extradition offence. The relevant section is s64 and in particular ss3, ss4 and ss5. In a recent case, the dual criminality requirement[54] was reaffirmed; in *Sitek v Circuit Court in Swidnica, Poland*[55], the offences concerned were said to be offences of acquiring or possessing criminal property. For two of them, the conduct alleged included

[49] [2011] EWHC 1145
[50] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 W.L.R. 148
[51] *Norris v United States* [2010] UKSC 9, [2010] 2 A.C. 487
[52] Similarly, *C v Poland (aka C v Circuit Court in Poznan Poland)*[2010] EWHC 2262
[53] *Swedish Judicial Authority v Julian Assange* [2010] EWHC 2262
[54] s64(3)(b) EA 2033
[55] **[2011] EWHC 1378 (Admin)**

matters that had not been capable of sustaining the necessary finding of knowledge or suspicion for the purposes of the relevant offence in English law[56].

In *Dabas v Spain*[57], the House of Lords approved excision of the conduct in question in order to limit the time period when assessing the extradition offence. In a similar case, in compliance with s.64(5) EA 2003, the judges concurred that a judge was entitled to limit the conduct alleging the offence to that which took place outside the UK[58].

However, in *King's Prosecutor (Brussels) v Armas*[59], the House of Lords considered s 65[60]. The issue that arose in this case was that part of the conduct of the appellant specified in the arrest warrant took place in the United Kingdom; under s 65(2), the AEW should have been refused, but under s.65(3) it did not matter that the conduct took place not only in Belgium but also in the UK.

Q 8. To what extent are there gaps in the protection of fundamental rights in Member States of an AFSJ based on the mutual recognition of judicial decisions in criminal matters?

Mutual recognition in criminal matters may create possible conflicts with the right to a fair trial[61]; there is no possibility to review evidence gathered abroad and thus the task of assessing the fairness of a judicial process is hindered[62].

Additionally, the lack of specific grounds for refusal of an EAW has caused friction among the Member States; it is expected that the European Court of Justice can only address those issues. However, it is submitted that this criticism has no bearing on the United Kingdom as under the Human Rights Act 1998[63] and the Extradition Act 2003[64], human rights form part of the considerations of the exercise of an EAW[65].

However, the United Kingdom has repeatedly argued that the lack of common minimum standards on the Area of Freedom Security and Justice (AFSJ) creates inequalities,

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[56] Paras [27], [31-32], [37]
[57] [2007] UKHL 6, [2007] 2 A.C.
[58] *Osunta v Germany* [2007] EWHC 1562 (Admin); [2008] Q.B. 785; [2008] 3 W.L.R. 26
[59] [2005] UKHL 67; [2006] 2 A.C. 1; [2005] 3 W.L.R. 1079; appeal against [2004] EWHC 2019, [2005] 1 W.L.R. 1389
[60] Extradition Act 2003
[61] Article 6 European Convention of Human Rights (1950)
[62] A.Klip- 'European integration and harmonisation and criminal law', in D.M. Curtin et al (eds.)., European Integration and Law (Intersentia METRO, Antwerpen-Oxford 2006) 134; J.R.Spencer- 'Why is the harmonisation of penal law necessary?', in A.Klip, H. van der Wilt (eds.), supra, 43
[63] s3 HRA 1998
[64] s21 EA 2003

1.1 [65] Massimo Fichera, *The European arrest warrant and the sovereign state: a marriage of convenience?* [2009] 15(1) E.L.J 70

as UK nationals do not enjoy the same protection as foreigners in the UK as far as human rights issues are concerned[66].

Q9. To what extent is it necessary for the EU to adopt minimum standards on the rights of the defendant in order to accompany the operation of the European Arrest Warrant system?

The UK has expressed its support for the measures attached in the Annex O the Council Roadmap for strengthening procedural rights[67]. Lord Bach's[68] testimony in the House of Commons Justice Select Committee assesses the efficiency of the suggestions of the Roadmap[69]. The UK is of the opinion that the Roadmap manages to create a minimum standard of protection of the fundamental rights and addresses to an extent the deficiencies of the previous situation.

However, mutual recognition is based on the principles of trust and confidence in the legal systems of other Member States. Therefore, the lack of such sentiments by the British Government is worrying; what the Committee concurred is that there is still an imbalance in the protection of human rights between British nationals residing or travelling abroad and foreigners residing or travelling in the UK. It is submitted that the UK already provides high standards of procedural rights-for example the standards of detention and access to legal aid. Thus, although the Roadmap is the first step towards the adoption of common minimum standards, the UK is convinced that there will be many practical problems in its implementation and operation; in particular, financial difficulties may hinder the provision of legal aid.

The Law Society, JUSTICE and Fair Trials International submitted their independent opinions as evidence in the Commons Justice Select Committee. They raised fears that the Member States are not committing to this program as The Roadmap forms part of a step-by-step approach. JUSTICE also adds that that measure F[70] is a tangible proposal, yet it is time-consuming and in the mean-time creates an imbalance among Member States.

[66] House of Lords European Scrutiny Committee, Chapter 8:Tenth Report
[67] [2009] OJ C295/1
[68] Parliamentary Under-Secretary of State at the Ministry of Justice
[69] Justice Committee Seventh Report; chapter 3
[70] Green Paper on Pre-Trial Detention

The Law Society has addressed another concern regarding substantive fundamental rights; there is a concern that The Roadmap does not balance the victim's rights with the rights of the defendant. Although it is accepted that the Roadmap provides substantial protection to article 6 rights of the defendant, the Law Society dears that there is a fine line between protecting the victim by providing anonymity and the right of the defendant to challenge evidence against him/her. Similarly, it should be important to resist the introduction of a system where prosecutorial discretion is used to downgrade criminal charges or discontinue a case.

As far as the new Directive[71] is concerned, the European Scrutiny Committee[72] welcomes this Directive as the first step of procedural rights Roadmap. The Directive has received the full support of the UK government as expressed by the Secretary of State for Justice in his Explanatory Memorandum[73].

The UK's human rights standards are guided by the Human Rights Act 1998, which brings the ECHR jurisprudence to the UK legal order. As a result, the only challenge for the domestic legal order is the clarification of the relationship between the Directive and ECHR as both regulate the same area[74]. Apart from this request for clarity, the United Kingdom believes that the implementation of the Directive will be smooth and will help eliminate any discrepancies between the way that Member States have implemented article 5[75] and article 6[76] ECHR. Thus the existing varying standards will be replaced by common minimum standards that ensure full compliance with the ECHR.

Part III: Data Collection and exchange and data protection

Q10. What has been the impact of the EC data retention Directive (Directive 2006/24/EC [2006] OJ L105/54) on the legal orders of EU Member States?

[71] Directive 2010/64/EU [2010] OJ L280/1
[72] House of Commons, European Scrutiny Committee; session 2010-2011;First report; chapter 79
[73] Kenneth Clarke on 9th June 2010
[74] Article 3(2) of the Directive
[75] Art5 (1) Everyone has the right to liberty and security of person.
[76] Article 6(1)In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The European legislation on Data Retention[77] was first implemented in the UK legal order by the Data Retention (EC Directive) Regulations 2007, which mainly concerned fixed network and mobile telephony. However, in 2009, the new Regulations revoked the 2007 Statutory Instrument. The Data Retention (EC Directive) Regulations 2009 implement the provisions in the retention of data generated or processed in connection with the provision of publicly available electronic communications, services or of public communication networks.

It is important to state that the UK has declared that pursuant to article 15.3 of the Data Retention Directive it would postpone the application of the Directive to the Retention of communications data relating to the internet access, internet telephony and internet email. In addition, Part 11 of the Anti-terrorism, Crime and Security Act 2001, which applies to all communication networks, provides for a Code of Practice for Voluntary Retention of Communications Data ("The Code").

According to regulation 2 of the 2009 Statutory Instrument, public communication providers are required to retain categories of communications specified in the annexed Schedule. According to Kosta and Valcke[78], this regulation is consistent with the wide discretion that has been [provided to Member States under the 2006 Directive[79]. Regulation 10 regulates public communication providers.

As far as the periods of retention are concerned[80], Regulation 5 provides that data should be retained for 12 months. Access to data is regulated by Regulation 7, which requires that access should only be granted in specific cases and in circumstances in which disclosure of the data is permitted or required by law. Regulation 8 implements article 8 of the Directive on data storage. Article 7 of the Directive has been implemented in the 2009 Regulations under Regulation 6; additionally, regulation 6(2) provides for the monitoring of the application of the Regulations by the Information Commissioner, in accordance with article 9 of the 2006 Directive. Article 10 of the Directive, concerning the collection of statistics for the European Commission, is implemented under Regulation 9; A public communications provider must provide the Secretary of State, as soon as practicable after 31st March in any year with information specifies in Reg9(2) in respect of the period of twelve months ending with that date. An additional element of the 2009 Regulations provides for the reimbursement

[77] Directive 2006/24/EC [2006] OJ L105/54
[78] 2006
[79] Article 5(1)
[80] Article 6 of 2006 Directive

of any expenses of public communications providers in complying with the Regulations by the Secretary of State[81].

There seems to be no reported case-law under either the 2007 or the 2009 Regulations. There is one challenge of the procedure under the Freedom of Information Act 2000, however it is not relevant to the way that the Directive has been implemented in the UK legal order.

The UK has argued that the 2006 Directive is concerned with the traffic and the location of data of legal entities and natural persons and any related data necessary to identify a subscriber or a registered user. Thus, the retention of content of electronic communications seems to be outside the scope of the Directive and the implemented domestic legislation.

The government has also stated that the Statutory Instruments of 2007 and 2009 engage article 8 ECHR however they can be justifies under article 8(2) and satisfy the requirement of proportionality. It is the use rather than the collection of personal data that engages article 8. However, this view has been rejected by the Strasbourg Court in *S and Marper v UK*[82]. The ECtHR has specifically said that the blanket and indiscriminate powers of retention of data of persons suspected and not convicted does not constitute a fair balance[83]; the Member State overstepped its margin of appreciation[84].

The 2007 and 2009 Regulations have been implemented under s2(2) European Communities Act 1972; they constitute secondary legislation. As a consequence, there is a problem as there is no primary legislation which sets out the Government powers. In addition, the existing primary legislation is significantly narrowed down, but the extent remains unknown as there is no specific provision which clarifies how conflicts of jurisdiction are to be resolved.

During the debate of the 2009 Regulations in the House of Lords, Lord West Spithead was concerned about this issue and about possible violations of Human rights[85]. It is important to note that under the Human rights Act 1998, the UK courts have an obligation to interpret primary and subordinate legislation in a way that it is compatible with Convention rights[86]. Also, if the court is satisfied that the provision is incompatible with a Convention

[81] Regulation 11
[82] [2008] ECHR 1581
[83] The case concerned DNA data however it is submitted that the rationale of the case can be applied in the area of electronic communications data by way of analogy.
[84] Para 125
[85] Lord West of Spithead, Under-Secretary of State for the Home Office; 11th February 2009, House of Lords Hansard, Vol No 709, Part No 53
[86] Section 3 HRA 1998

right, it may make a declaration of that incompatibility[87]. There is no case-law to indicate that the courts have considered the possibility of issuing a declaration of incompatibility.

As far as human rights are concerned, another issue that has been considered is regulation 7 of the 2009 Statutory Instrument[88]; the circumstances in which data may be retained and accessed are not restricted to serious cases as explained in the Explanatory Memorandum issued by the Home Office. The Regulations simple provide that retained data may be accessed only in specific case and in circumstances in which disclosure of the data is permitted or required by law.

Moreover, there is no restriction on 3rd parties who are seeking to access data[89] in civil proceedings. By seeking an order against a CSP to disclose data under the Civil Procedure Rule 31.17 or by using the Norwich Pharmaceutical Principles[90], a 3rs party may be have access to such data and thus potential conflicts with article 8 ECHR may arise.

Exchange of Information between National Authorities

Q11. What has been the impact of EU measures facilitating the exchange of personal data between national police and judicial authorities on the legal orders of EU Member States?

The mechanisms of exchange of personal data between national authorities have posed challenges to the protection of fundamental rights[91]. The mechanisms provide that personal data will only be used for the purpose requested and only in a way that serves the legitimate public interests and ensures proportionality. It is accepted that the system of exchange of such sensitively personal data engages article 8 ECHR, however it is a question of proportionality and justification. It can be argued that the principle of availability and the system of collection, retention and storage of data may violate article 8 rights[92].

The Data Protection Act 1998 provides for the retention and process of personal data. There is concern that the way in which police are handling personal data is not always in accordance with the DPA 1998. For example, concerns have been voiced that the police breaches the DPA by retaining the records of a number of individuals who have committed

[87] Section 4 HRA 1998

[88] Access to data retained in accordance with these Regulations may be obtained only—(a)in specific cases, and (b)in circumstances in which disclosure of the data is permitted or required by law.

[89] For example the location and recipient of phone call may be relevant in civil cases

[90] *Norwich Pharmaceutical v CCE* [1974] AC 133

[91] European Convention of Human Rights(ECHR 1950) and Human Rights Act 1998 (HRA 1998)

[92] The United Kingdom does not have a freestanding right to privacy

quite minor offences in the distant past, or when the individuals were very young, or when the individuals have not reoffended or troubled the police since. In *S and Marper v UK*, the ECtHR found that the indefinite retention of fingerprints and DNA from people that had not been convicted of criminal offences was disproportionate and a violation of article 8.

The challenge that the system of exchanging information has mainly posed is that the United Kingdom has a lower threshold for collection and retention of personal data than other Member States. The Prum Decision[93] increases the cooperation in criminal matters between the law enforcement authorities, primarily related to exchange of fingerprint, DNA (both on a hit no-hit basis) and vehicle registration (direct access via Eucaris system) data[94]. The Decision has its roots on the Prum Convention[95]. The UK is not a treaty signatory, however the UK Government is considering joining the Treaty on the basis that they will be offered a special regime that would take into account the specific difficulties invoked by some of its provisions: the UK has a lower threshold for the collection and retention of DNA data in databases, and the government is concerned that there will be implications if such exchanges were allowed under the existing standards[96]. At this point, the deadline for implementation of the Decision has not expired and there is no evidence that the UK has implemented the provisions of the Decision in the domestic legal order.

The 2005 Decision on the exchange of criminal records[97] was to be implemented by 21 May 2006. The UK met this deadline by appointing a Central Authority; the UK Central Authority for the exchange of criminal records (UKCA-ECR) was established under this EU Framework Decision. It is funded by the Home Office and managed by the ACPO Criminal Records Office (ACRO). As far as ECRIS[98] is concerned, the deadline for the implementation of the relevant Framework Decision[99] has not expired yet, and will expire on 7 April 2012.[100]

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[93] Decision 2008/615/JHA [2008] L210/1

[94] UK Home Office: Explanatory Memorandum: Council Decision on stepping up cross-border cooperation, especially in combating terrorism and cross border crime- (transposing the Prum Treaty provisions, 5 March 2007)

[95] Convention on the stepping up of cross border cooperation, particularly in combating terrorism, cross border crime and illegal migration signed on 27 May 2005 by Germany, Spain, France, Luxembourg, Netherlands, Austria and Belgium

[96] European Union Committee-18th Report of session 2006-2007-*Prum: an effective weapon against terrorism and crime?*

[97] Decision 2005/876/JHA [2005] L322/33

[98] European Criminal Records Information System

[99] Framework Decision 2009/135/JHA [2009] L93/33 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA

[100] Article 8(1)

On the other hand, the UK and 10 more Member States take part in the pilot project which laid the foundations for ECRIS. The "Network of Judicial Registers" pilot project provides for the exchange of information on criminal records electronically among the participating Member States.

Passenger Name Records

Q12. To what extent is the collection and transfer of passenger name records (PNR) compatible with the protection of the rights to private life and the protection of personal data?

The EU-US Agreement on the transfer of PNR[101] has been widely criticised for the protection it provides to Convention Rights. The main challenge with the Agreement concerns the proportionality of the measures taken to the purpose intended. It has been argued that the provisions of the Agreement aim at protecting the US borders instead of preventing terrorist attacks and criminal conduct. This is evident from the overreaching extent of the measures that cover both serious and minor offences. Thus the proportionality and necessity of the violation of article 8 ECHR right is questionable.[102] It is clear that the Agreement engages article 8, but it is submitted that the provisions are legitimate.[103] Therefore, it only comes down to proportionality and necessity checks applicable on an ad hoc basis.

The recent proposal of the European Commission for an EU PNR Directive[104] has also been put under scrutiny for its compliance with fundamental rights. The long retention period of data has been criticised for being far too long (5 years) and thus disproportionate.[105] Statewatch Director Tony Bunyan has stated that the lack of judicial redress to data subjects or any guarantee of independent oversight pose significant challenges to article 8 ECHR. The European Union Agency for Fundamental Rights (FRA) has also expressed its concerns for the way the new proposal limits fundamental rights. The need for an independent supervisory authority has been underlined several times; this impartial body will be acting in compliance with right to protection of personal data safeguards. Another point raised is that under the

[101] [2007] OJ L204/18
[102] Panos Koutrakos, *The European Union's internal security strategy* [2011] 36 E.L.Rev 1-2
[103] *EDPS criticises planned PNR measure*[2008]233 EU Focus 7-8
[104] COM(2011) 32 final
[105] Letter of the Legal Service of the European Commission to the Director-General of DG Home Affairs on 16 May 2011

proposal, carriers will be able to transmit personal data that could potentially be used with prejudice. It should be noted that the draft Directive allows for intelligence surveillance of *all* passengers; therefore, it establishes generalised surveillance operation. It is precisely this point that raises concern about the significant limitations on privacy and data protection rights.[106]

Data Protection

Q13. To what extent does EU law and its implementation currently provide sufficient safeguards to ensure that the right to private life (as enshrined in the ECHR and the Charter of Fundamental Rights) and the right to data protection (as enshrined in the Charter) is fully protected in the development of the EU as an AFSJ?

The Framework Decision on data protection[107] was to be implemented by November 2010. According to the Ministry of Justice[108] the UK has met the deadline as most of the provisions were already in place. Consultations revealed that the Data Protection Act 1998 provided minimum data protection safeguards in accordance with the Framework Decision. Indeed, the UK has incorporated the Framework Decision in the UK legal order with a combination of the Data Protection Act 1998 provisions and principles, and a number of administrative measures and safeguards[109] that apply to all public authorities and ensure compliance with Convention and Charter rights.

Thus, the Framework Decision does not extend to all personal information but it is restricted to personal data complying with the following criteria: a. only personal data that has been received from another European Economic Area (EEA) Member State; b. only personal data that is being processed for the purpose of law enforcement and judicial cooperation; and c. only data that is not related to National Security. It is thought that UK law protects all types of personal data and as a result is wider in its scope of application. Moreover, Article 5 provides for the establishment of time-limits for erasure and review; there is a lot of discretion allowed to Member States as there is no specifically agreed duration of the mentioned time-limits. The UK has argued that its existing measures satisfy

[106] Valsamis Mitsilegas *The transformation of border controls in an era of security: UK and EU systems converging?* [2010] 24(3) J.I.A.N.L. 233-245
[107] Framework Decision 2008/977/JHA OJ L350/60
[108] Circular 2011/01, 25 January 2011
[109] s6 Human Rights Act 1998

the Decision provisions. For example the Data Protection Act 1998 sets out data retention schedules and leaves data controllers to decide the period by taking into account the Data Protection Principles[110]. In addition, erasure of data is regulated by s.14 of the 1998 Act. Furthermore, the UK has put in place procedures that ensure the protection of the right to private life and the right to data protection. The use of Privacy Impact Assessments (PIA) was mandated by the Government Data Handling Review of June 2008; PIA is used across central Government when a new measure is likely to involve the use/access to personal data. In case PIA highlights a risk, the Information Commissioner is notified and consulted by the Competent Authorities. Furthermore, Article 11 of the Decision is considered to be met by the domestic legislation through the Data Protection Principles already. It must be noted that the strict requirement for transfers to Equivalent Authorities in third States or to international bodies is not included in the Data Protection Act. However, the Decision provides Member States with discretion on how they obtain consent; it is submitted that UK Competent Authorities are largely compliant through the terms of data sharing agreements regarding police and judicial authorities.

The 1995 Directive[111] has been implemented in the UK legal order by the Data Protection Act 1998 and the Information Commissioner's Office (ICO), the UK data protection authority, is competent for monitoring the compliance of UK legislation with the EC Directive. The main ideas included in the Directive can be found in the 1998 Act Principles of Data Protection. However, the Commission has criticised the UK for its lack of implementation of the Directive. The Commission considers that the UK Data Protection Act does not meet the requirements of the EU's Data Protection Directive; the provisions concerned are Articles 2, 3, 8, 10, 11, 12, 13, 22, 23, 25 and 28 of that Directive[112]. In particular, the European Commission considers that the UK has shown discrepancies in the way it protects article 8 through its legislation; UK law does not set the proper standards in relation to the processing of sensitive personal data concerning to criminal offences. The Commission is considering infringement proceedings on the basis that the implementation of Directive 95/46 EC through the Data Protection Act is flawed and narrows down the scope of the Directive. The Court of Appeal in *Durant v Financial Services Authority*[113] considered the meaning of the term 'personal data'. It held that 'personal data' did not necessarily mean any and every document which has the data subjects name on it but the overriding test is

[110] Schedule 1, Data Protection Act 1998
[111] Directive 95/46/ EC [1995] OJ L281/31
[112] Letter dated 16 February 2011 of the Commission
[113] [2003] EWCA Civ 1746 also referring to the Lindqvist Case C-101/01

whether the information in question affects a person's privacy, whether in his personal or family life, business or professional capacity; thus it includes computerised personal data and manual data if it allows personal data to be readily acceptable[114]. Subsequently, the Information Commissioner issued a Guidance Note in early February 2004 focusing on what makes data "personal" within the meaning of "personal data"; and, what is meant by a "relevant filing system". The Court of Appeal in Durant held that the 1998 Act faithfully transposes the provision of the Directive into UK law.[115] The 1998 Act does not mention the right to private life (article 8) but following the Human Rights Act 1998, courts are required to interpret UK legislation in accordance with ECHR[116].

PART IV: Constitutional aspects

Q14. To what extent have domestic courts used general principles of EU law (in particular indirect effect in the light of Pupino) when interpreting national legislation implementing EU criminal law?

The case of *Pupino*[117] established the obligation of national courts to try to achieve consistency with 3rd Pillar Framework Decisions when interpreting national law (principle of indirect effect or of harmonious interpretation). The ECJ held that this principle derives from the notion of loyal cooperation. Although it is not mentioned anywhere in the EU Treaty, the ECJ considered indirect effect "indispensable"[118]. The scope of the Pupino judgement remains vague after the Adeneler[119] ruling.

The problem that many commentators have identified with the principle of indirect effect is that judges are asked to engage in different legal standards and rules with which they are possibly unfamiliar, in order to give effect to the rights and objectives contained in Framework Decisions[120]. During the *Pupino* proceedings, the UK Government was adamant

[114] Para 25
[115] Para 26
[116] s3 HRA 1998
[117] C-105/03 *Criminal Proceedings against Maria Pupino,* ECJ of 16 June, 2005
[118] Para 42
[119] Case C-212/*04 Konstantinos Adeneler et al. v Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057 at [116]
[120] Dorota Leczykiewicz *Constitutional conflicts and the third pillar* [2008] 33 E.L.Rev 230

in requesting from the Court to make a distinction between supremacy of EU law[121] and the principle of indirect effect; the ECJ did not refer to supremacy.[122] It is evident that UK was showing early signs of resistance in utilising another EU law principle that would integrate 3rd pillar legislation into the domestic legal order. Similar signs of resistance[123] have been shown in the past with the Marleasing principle[124] in *White v White and the Motor Insurers' Bureau* [125], and the Van Colson principle of indirect effect[126] especially where it involved interpreting a statute that was not specifically enacted to implement Community law[127]. However, over the years, the attitude has changed and the UK courts have become more receptive.[128] Is it possible that the UK will bow down to Pupino as was the case with Van Colson and Marleasing? The subject matter of Pupino would suggest otherwise: after all, this is criminal law, and the UK [both government and courts] are expected to be less inclined to import the opt-out policy through the back door. In EAW cases the House of Lords have shown a negative attitude towards the Pupino ruling, which -instead of providing protection for fundamental rights and procedural safeguards-[129] gave the court the opportunity to make use of the statutory deficiencies of the EAW Framework Decision.[130] In particular, following the rule *nullem crimen sine lege*[131] the doctrine of indirect effect cannot be used to impose criminal liability or to aggravate punishment.[132]

Q15. To what extent does the entry into force of the Lisbon Treaty address deficits in the implementation of Union law and the protection of fundamental rights in the development of the EU as an AFSJ?

[121] *Costa v ENEL* [1964] ECR 585 (6/64)
[122] Maria Fletcher Extending *"indirect effect" to the 3rd pillar: the significance of Pupino?* [2005] 30 E.L.Rev 862
[123] Sara Drake *Twenty years after Van Colson: the impact of "indirect effect"on the protection of the individual's community rights* [2005] 30 E.L.Rev 329
[124] *Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C106-89
[125] [2001] UKHL 9, [2001] 2 C.M.L.R 1
[126] *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* Case 14/83 [1984] ECR 1891
[127] *Duke v G.E.C Reliance* [1988] 2 W.L.R. 359 (HL), *Finnegan v Clowney Youth Training Program* [1990] 2 CMLR 859 (HL)
[128] *Pickstone v Freemans Plc* [1988] 2 All ER 803, [1988] 3 WLR 265 (HL), *Litster v Forth Dry Dock and Engineering Co Ltd* [1988] UKHL 10 reported at [1989] ICR 341
[129] *Office of the King's Prosecutor* v. *Cando Armas* [2005] UKHL 67
[130] 2002/584/JHA [2002 OJ L190/1
[131] Guaranteed by article 7 European Convention of Human Rights
[132] Estella Baker *The European Union's "Area of Freedom, Security and (Criminal) Justice" ten year on* [2009] 12 Crim.L.R. 833; and Alicia Hinajeros *The Lisbon Treaty versus standing still: a view from the third pillar* [2009] 5 E.C.L.Rev 99.

What is the UK's future within EU criminal law and policy? One would expect a continuing selectivity in participation. The opt-out of the UK, indeed both from the policy itself and the Charter of Fundamental Rights, are sure signs that for the UK this is the end of the line. Recent choices of opting in show that the UK will only proceed with EU instruments that are already in compliance with existing legislation, or where compliance can be achieved painlessly. Does this lead to a separate route for the UK? The UK is not alone in its concerns about the rapid progress in EU criminal policy. It is therefore interesting to see whether the policy will indeed progress much further, or whether the UK concerns might lead to a fruitful pause for thought as to how the policy can be put to effect via increased effectiveness in existing measures rather than a speedy embarkation on further instruments. From the point of view of the UK one would hope for the second choice.