OPINION

- I am asked to advise Mr Christopher Gill whether the establishment of a European Public Prosecutor's Office ("EPPO") will significantly enlarge the circumstances in which a European Arrest Warrant ("EAW") can be issued and executed in a member State which has opted out of the EPPO project. Mr Gill is a former Member of Parliament for Ludlow and current President of the Freedom Association.

- The issue arises in the context of a contemporary debate as to whether the United Kingdom ("UK") should apply to opt into the EAW under Article 10(5) of Protocol 36 of the Treaty on European Union ("TEU"). Following the UK's decision to opt out of approximately 130 criminal justice measures in 2013, the UK's participation in the EAW is scheduled to cease on the 1st December 2014. The history of the UK's decision to opt out is related in a Home Office publication presented to Parliament in July 2014.

- More particularly, the specific questions on which I am asked to advise are:

  (a) whether the UK's opt-out from the jurisdiction of the EPPO in accordance with a resolution passed by the House of Commons on 22nd October 2013 will be rendered ineffective if participating Member States decide, as they are empowered to decide without the UK being able to stop them, to adopt *Corpus Juris* as the EPPO's rule-book, owing to the section of *Corpus Juris* which will empower the EPPO to instruct a national judge (in a State that has accepted its jurisdiction) to issue an EAW across all member States; and

  (b) if so, whether the only way for the UK to avoid this outcome is for the UK to opt out of the EAW legislation.

- In passing, I am also asked to briefly consider whether the execution of an EAW operates to curtail a court's historic jurisdiction in a case where the justification for a citizen's detention is challenged and a writ of habeas corpus is sought.

EUROPEAN ARREST WARRANT

- By way of background, the EAW was established by the European Union ("EU") in 2002 as a mechanism to replace the extradition system by requiring each Member State's criminal courts to

recognise a request for the arrest and detention of a person made by a court in another Member State.

- The innovative nature of the EAW arrangement is two-fold. First, it posits the mutual recognition of criminal court orders across Member States. Secondly, the requested Member State is required under the arrangement to surrender a person with the minimum of formalities, and most significantly, without consideration in the requested Member State of the underlying evidence alleged to give rise to reasonable grounds for suspicion that a criminal offence has been committed in the requesting Member State.

- The EAW scheme was established by means of a European Council Framework Decision which the UK implemented in Part 1 of the Extradition Act 2003. In order to be valid, the EAW needs to contain little more than a statement that the person is accused in the issuing territory of the commission of a criminal offence. The warrant must contain particulars of the person's identity, the circumstances in which the person is alleged to have committed the offence (to include the conduct alleged to constitute the offence and the time and place at which the person is alleged to have committed the offence), with a statement of the law applying in the requesting Member State under which the conduct is alleged to constitute the criminal offence in question.

- Challenges to the execution of an EAW in the High Court are difficult to pursue, since the High Court has made clear that it will give the legislation a purposive construction, reading the European provisions in the light of its objectives. In this instance, the High Court seeks to strike a balance between the application of the technical requirements and the legislative objective of simplifying extradition procedures – per Cranston J in *Ektor v National Public Prosecutor of Holland* [2007] EWHC 3106 (Admin) at paragraph 7, applied by Gross J in *Rana v Austria* [2008] EWHC 2975 (Admin) at paragraph 17 and Scott Baker LJ in *Von der Pahlen v Leoben High Court Austria* [2009] EWHC 383 (Admin) at paragraph 13.

- The approach applied by the High Court follows the legal methodology of the European Court of Justice which enforces the primacy of EU law and curtails the application of any national measure which would undermine the effectiveness of EU law in the territory of the Member State – *Melloni v Ministerio Fiscal* [2013] QB 1067 at page 1110, paragraph 59. The fact that the measure under consideration relates to criminal law or criminal procedure is none to the point. For the avoidance

of doubt, the European Court of Justice has unambiguously declared that there was an obligation to interpret national law in the light of European Framework Decisions adopted in the context of international criminal co-operation - *Criminal Proceedings against Maria Pupino* [2006] QB 83 at page 90 paragraph 23.

- Following amendments made to section 11 of the Extradition Act 2003 by section 156 in Part 12 of the Anti-social Behaviour, Crime and Policing Act 2014, an EAW will not be executed in the UK where the requesting Member State has not made a decision to prosecute the person whose surrender is sought unless the sole reason for not instituting criminal proceedings is the suspect's absence from the requesting Member State's jurisdiction.

- Also, execution of the EAW is similarly barred where it would be incompatible with a suspect's human rights and disproportionate to execute the warrant in all the circumstances of the case. The specified matters which a court can take into account when considering proportionality are the seriousness of the conduct alleged to constitute the offence, the likely penalty that would be imposed if the person was found guilty of the offence, and the possibility of the relevant foreign authorities taking measures that would be less coercive than the person's extradition.

- It follows, therefore, that an EAW continues to be efficacious in all cases where a requesting Member State has decided to prosecute a person for the alleged commission of a criminal offence in that Member State, subject only to a Court's determination on the human rights and proportionality issues.

- Article 2(2) of the European Council Framework Decision identifies the criminal offences to which an EAW can relate. The offences must be punishable by a maximum period of at least three years imprisonment, and amongst the specified offences, corruption, fraud, money laundering and environmental crime are included.

EUROPEAN PUBLIC PROSECUTORS OFFICE

Corpus Juris

- I now turn to consider the EU's proposal to establish an EPPO. The proposal is closely associated with what is known as the *Corpus Juris* project.

- In 1997 a study relating to the harmonisation of European criminal law and procedure was published by a number of academic lawyers. The study was reconsidered at a meeting of European academic lawyers held in Florence in May 1999 and it was made clear that the proposal envisaged the establishment of a single territory with a European prosecutor for the purposes of exercising criminal jurisdiction. The text of the *Corpus Juris* document expressed the desire for a new principle of European territoriality in the following terms:

> "For the purposes of investigation, prosecution, trial and execution of sentences concerning the offences set out above (Articles 1 to 8), the territory of the Member States of the Union constitutes a single area, called the European judicial area … The EPPO brings proceedings and conducts investigations across the territory of the Union (Article 24(1)(a)); warrants issued by the Judges of Freedom (article 24(1) (b)) and judgments delivered by courts and tribunals of the Member States of the Union (Article 24(1) (c)) are enforceable throughout the territory of the Union" (Guiding Principles of *Corpus Juris*, Appendix II, New Principles, Principles of European Territoriality).

- The proposal for *Corpus Juris* was welcomed by the European Commission in a Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor published in December 2001. A proposal for a Directive of the European Parliament and of the European Council on the criminal law protection of the Community's financial interests had been published by the European Commission a few months earlier, with Article 1 making clear that the purpose of the draft Directive was to bring the Member States' legislation and procedure closer together as regards the criminal law protection of the financial interests of the Community.

Article 86, TFEU

- Today, the legal foundation for the proposed office of EPPO is to be found in Article 86 of the Treaty of the Function of the European Union ("TFEU"), as amended by the Lisbon Treaty, signed on 13th December 2007.

- Article 86(1) provides that in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish an EPPO.

- In this event, by Article 86(2) the EPPO will be responsible for investigating, prosecuting and bringing to judgment, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in Article 86(1).

- It is envisaged that in due course the EPPO's responsibility may be extended beyond the investigation and prosecution of criminal offences against the EU's financial interests to embrace other cross-border crimes. To quote Article 86(4) in full:

> "The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission".

- Article 86 is one of a number of provisions in Title V of the TFEU dealing with issues relating to freedom, security and justice. Part 4 of Title V concerns judicial co-operation in criminal matters. The EU's formalised interest in criminal matters owes its origin in the TEU signed in Maastricht in 1992. It was this treaty which articulated the three pillars on which the EU is said to be founded, the third of which concerns co-operation in the fields of justice and home affairs.

EPPO proposal, COM (2013) 534 final

- In July 2013, the European Commission published a proposal for a European Council Regulation to establish an EPPO. At the present time, the European Commission proposal is the subject of intensive consideration by the European Council and a number of amendments have been proposed. This advice proceeds on the basis of the proposed Regulation in its amended form. Further amendments to the draft Regulation are inevitable at the current stage of the European legislative process.

- The European Commission proposal explains that an EPPO is needed because criminal offences against the EU budget are not always investigated and prosecuted by national authorities, partly due to lack of resources and partly because the cross-border dimension of these offences enables offenders to escape the attention of the national authorities, Eurojust and Europol lack power to

investigate or prosecute criminal offences, and the powers given to the European Anti-Fraud Office (OLAF) are limited to administrative investigations.

- In these circumstances, the European Commission believes that in the light of Article 86 of the TFEU, the EU has not only the competence but also the obligation to act by establishing a new EU-level prosecution system. Indeed, in the European Commission's view, the protection of the EU's financial interests can only be achieved at EU level by reason of the scale and effect of the criminal offending which is involved.

- The proposal will create the EPPO as a "body of the Union" with a separate legal personality, with the prosecution function carried out in the criminal courts of the Member States. The EPPO will be headed by a central European Public Prosecutor, assisted by Deputies and a staff. In each Member State there would be at least one European Delegated Prosecutor who would be an integral part of the EPPO. The EPPO would be able to choose the jurisdiction in which to prosecute a case and the European Designated Prosecutor would have the same powers as national prosecutors in that country.

- Article 25(1) of the proposed Regulation establishes the EPP's territorial jurisdiction by providing that for the purpose of investigations and prosecutions the territory of the EU's Member States shall be considered a "single legal area in which the European Public Prosecutor's Office may exercise its competence."

- The cross-border theme is re-enforced in Article 25(2) by the express stipulation that where an offence is partly or wholly committed outside the territory of the Member State in which the investigation is taking place, the EPPO will be able to obtain the exchange of strategic information and investigative assistance pursuant to the provisions in Article 59 of the draft Regulation which reference international agreements on legal co-operation in criminal matters and extradition.

- This provision is a necessary consequence of the extra-territorial element inherent in the EPPO's jurisdiction, as set out in the amended text for Article 19(1) of the draft Regulation which provides that the EPPO may exercise its competence to investigate and prosecute any criminal offence affecting the financial interests of the EU where such offence was wholly or partly committed on the territory of one or several Member States, or when committed outside of these territories, by a

national of a Member State, or by an EU staff member or member of the institutions, provided that a Member State, according to its law, has jurisdiction for such offences when committed outside its territory.

EPPO powers, the EAW arrangement and Corpus Juris

The EPPO's investigation powers are described in Article 26 of the draft Regulation, and there is specific reference in Article 26(7) to the obtaining of an EAW. Citing the text of Article 26(7) in full, it provides that:

> "The European Public Prosecutor's Office may request from the competent judicial authority the arrest or pre-trial detention of the suspected person in accordance with national law".

- This provision is unsurprising since the EAW was originally conceived, not as a standalone measure, but as an integral part of the *Corpus Juris* project. Article 20(3)(g) of Appendix III of *Corpus Juris*, entitled The Criminal Law (Special Part) made clear that the EPPO could make requests for a person's remand in custody or judicial control.

- This provision on *Corpus Juris* was supplemented by the explanatory text for Article 20(3)(g) which provides that requests for an arrest warrant or for judicial control must be in written form and duly motivated. The request must be addressed to the competent Judge of Freedoms [the competent judicial authority designated for this purpose], in accordance with the relevant procedure set out in Article 25 which specifically references the EAW. Article 25(4) confirmed that an EAW is valid upon the whole territory of the EU.

- The explanatory text drew attention to the extensive nature of this proposed jurisdiction in so far as national sovereignty was concerned. To quote the explanatory text *verbatim*:

> "By reason of its particularly innovative character, Article 25 … requires adjustments to national law, in order to ensure that the principle of European territoriality, within the meaning given to it in the *Corpus*, is respected. In particular, it requires that the rule prohibiting the extradition of own nationals be interpreted in a manner compatible with the principle of European territoriality. This principle must be considered to suppress, at the level of the Member States of the European Union, the concept of extradition for the offences defined in the *Corpus*".

The EPPO's jurisdictional competence

It is quite clear that the EPPO's legislative purpose is to investigate and prosecute criminal offences affecting the financial interests of the EU, in accordance with the terms of Article 86(1) of the TFEU as already noted.

- Article 2 (c) of the proposed Regulation defines the financial interests of the EU to mean:

> "all revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them".

- As regards criminal offences affecting the financial services of the EU, Article 2(b) and Article 17 of the proposed Regulation contemplate that these offences will be specified in an EC Directive which is yet to be made.

- There is, however, a draft Directive known as the *Protection des Interests Financiers* ("PIF") Directive available for consideration, and again the text has been – and continues to be - subject to heavy amendment in recent times. The draft Directive was published in July 2012, with proposed amendments presented by the European Council in April 2014. The European Council has made clear it envisages that the text of the PIF Directive will define the scope of action of the future EPPO.

- Article 2 of the PIF Directive describes what constitutes the EU's financial interests and broadly replicates the definition put forward in the draft Regulation for the establishment of the EPPO.

- The definition of fraud affecting the EU's financial interests is contained in Article 3. It is widely expressed and reads as follows:

> (a) in respect of expenditure, any act or omission relating to:
>
> (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the Union budget or budgets managed by the Union, or on its behalf,
>
> (ii) non-disclosure of information in violation of a specific obligation, with the same effect, or
>
> (iii) the misapplication of liabilities or expenditure for purposes other than those for which they were granted;

(b) in respect of revenue, any act or omission relating to:

(i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf,

(ii) non-disclosure of information in violation of a specific obligation, with the same effect, or

(iii) misapplication of a legally obtained benefit, with the same effect.

- In addition, Article 4 of the PIF specifies further fraud offences which are said to be related criminal offences affecting the EU's financial interests. Again, in order to convey the width of the EPPO's potential jurisdictional competence, I set out the amended text in full:

> 1. Member States shall take the necessary measures to ensure that any provision of information, or failure to provide such information, to contracting or grant awarding entities or authorities in a public procurement or grant procedure involving the Union's financial interests, by candidates or tenderers, or by persons responsible for or involved in the preparation of replies to calls for tenders or grant applications of such participants, when committed intentionally and with the aim of circumventing or skewing the application of the eligibility, exclusion, selection or award criteria, or of distorting or destroying natural competition among bidders, is punishable as a criminal offence.
>
> 2. Member States shall take the necessary measures to ensure that money laundering as defined in Article 1(2) of Directive 2005/60/EC of the European Parliament and of the Council involving property or income derived from the offences covered by this Directive is punishable as a criminal offence.
>
> 3. Member States shall take the necessary measures to ensure that passive corruption and active corruption, when committed intentionally, are punishable as criminal offences.
>
> (a) For the purposes of this Directive, passive corruption shall consist of the action of a public official, who, directly or through an intermediary, requests or accepts in advance advantages of any kind whatsoever or a promise of such an advantage, for himself or for a third party, for acting, delaying action or refraining from acting in accordance with his duty or in the exercise of his functions, whether or not in breach of his official obligations, in a way which damages or is likely to damage the Union's financial interests.
>
> (b) For the purposes of this Directive, active corruption shall consist of the action of whosoever promises, offers or gives, directly or through an intermediary, an advantage of any kind whatsoever to a public official for himself or for a third party for him to act, to delay action or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests, or for having performed those conducts in the past.

> 4. Member States shall take the necessary measures to ensure that misappropriation, when committed intentionally, is punishable as a criminal offence. For the purposes of this Directive, misappropriation shall consist of an act by a public official to commit or disburse funds, or appropriate or use assets, contrary to the purpose for which they were intended, and which damages the Union's financial interests.
>
> 5. For the purpose of this Article, 'public official' means:
>
> (a) any Union or national official, including any national official of another Member State and any national official of a third country.
>
> (b) any other person assigned and exercising a public service function involving the management of, or decisions concerning, the Union's financial interests in Member States or third countries.

Ancillary Offences

- Article 13 of the draft Regulation establishing the EPPO contains a provision to ensure that the EPPO's jurisdiction is not restricted where criminal offences affecting the financial interests of the EU are associated with other criminal offences not technically defined under national law as offences affecting the EU's financial interests.

- In such cases, as explained in Recital 22 of the draft Regulation, where the offence affecting the EU's financial interests is preponderant, the competence of the EPPO should be exercised after consultation with the competent authorities of the Member State concerned. Preponderance is to be established on the basis of criteria such as the offences' financial impact for the EU, for national budgets, the number of victims or other circumstances related to the offences' gravity, or the applicable penalties.

- Further, it is envisaged that the EPPO's interests would take priority over those of the Member State. This aspect is covered by Article 13(4) of the draft Regulation, which is illuminated by Recital 23 which states as follows:

> "The competence of the European Public Prosecutor's Office regarding offences affecting the financial interests of the Union should take priority over national claims of jurisdiction so that it can ensure consistency and provide steering of investigations and prosecutions at Union level, with regard to these offences the authorities of Member States should only act at the request of the European Public Prosecutor's Office, unless urgent measures are required".

- More significantly, the proposed Regulation contemplates that in due course the EPPO's jurisdiction may be extended beyond offences affecting the EU's financial interests to other cross-border criminal offences. The extension is foreshadowed in Recital 21 of the draft Regulation which provides that:

> "The material scope of competence of the European Public Prosecutor's Office should be limited to criminal offences affecting the financial interests of the Union. Any extension of this competence to include serious crimes having a cross-border dimension would require a unanimous decision of the European Council".

UK as a non-participating Member State

- The UK has declared that it will not participate in the project to establish the EPPO. The Coalition Agreement made in May 2010 between the Conservative Party and the Liberal Democrat Party expressly provided that "Britain will not participate in the establishment of *any* European Public Prosecutor" (*emphasis provided*). On 22nd October 2013, the House of Commons resolved that the draft Regulation on the establishment of an EPPO did not comply with the principle of subsidiarity. The House of Commons sent a Reasoned Opinion to the EU to this effect. An objection on the principle of subsidiarity is known as a "yellow card", and a total of 19 Member States have taken this stance.

- As the Under-Secretary for the Home Office explained, it has been the long-standing position of the Coalition Government not to participate in the establishment of any EPPO. Whilst the Minister recognised that fraud must be tackled at all levels, including when it involves funds that form part of the EU budget, the Coalition Government did not agree that the establishment of an EPPO was the right approach. This is because:

> "the [European] Commission's proposal would establish a new supranational EU body with responsibility for criminal offences affecting the financial interests of the Union, as well as so-called ancillary offences within participating member states. The EPPO would exercise the function of a prosecutor within the courts of the participating member states for these offences and instruct their national authorities over the conduct of investigations. This proposal is unnecessary, unsubstantiated and unwelcome. In the Government's view, the best way to tackle EU fraud is through prevention. The UK has a zero-tolerance approach to fraud, with robust management controls and payment systems in place that seek to prevent incidences of EU fraud. Additionally we should continue efforts already happening to strengthen the current system".

- The UK's decision to reject participation in the EPPO is consistent with the approach taken by the House of Lords European Communities Committee in May 1999 when it published its Ninth Report 1998-9 on "Prosecuting Fraud on the Communities' Finances - The *Corpus Juris*". The Committee concluded, *inter alia*, that –

    - *Corpus Juris* would involve major departures from the criminal laws and procedures of the United Kingdom. New offences would be created, some more extensive than existing provisions. In particular, the notion of fraud would be enlarged from the existing concept, which is that of conscious dishonesty, to encompass negligent acts and recklessness (paragraph 111);
    - The approaches taken in the United Kingdom to the investigation and prosecution of crime are quite different in several respects from those in other Member States and the model proposed in the *Corpus Juris*. Under the latter, for example, the functions of investigation and prosecution of offences and execution of sentences would be combined in the hands of an EPPO (paragraph 111);
    - The *Corpus Juris* would ensure that the EPPO has control over all cases involving a *Corpus Juris* offence (paragraph 120);
    - There were certain significant shortcomings in the *Corpus Juris*. In particular, there is the position of the EPPO, described by one of the authors as the "key point" of the proposal. "The *Corpus Juris* would invest enormous power in the hands of the EPPO. He … would be able to exercise substantial coercive powers in relation to the citizen and in doing so would be independent of national governments and the Community institutions" (paragraph 123).

- The issue of *Corpus Juris* was subsequently mentioned in the House of Commons during Home Office questions on 9th April 2001. When asked about the then Government's policy on *Corpus Juris*, the Home Office Minister of State (Mrs Barbara Roche) responded that the way forward for judicial co-operation in Europe did not lie in *Corpus Juris*, and she confirmed that there was absolutely no intention of having a common EU legal system.

ADVICE

- In the light of these matters, I shall now address the matters on which my advice has been sought.

An ineffective opt-out

- With regard to the question of whether the UK's opt-out from the jurisdiction of the EPPO will be rendered ineffective owing to the ability of the EPPO to initiate the issue of an EAW and secure its execution in the UK, it is quite clear that it would.

- This is because, simply put, there is no bar to the execution of an EAW in these circumstances – assuming that the procedural requirements for the issue and execution of the warrant have been met.

Some practical implications

- In my view, the implications which flow from this conclusion are significant. It would follow that an EAW could be issued and executed in the UK against a citizen charged with a criminal offence which affected the financial interests of the EU. As noted, this category of criminal offence is defined extremely widely, and with the language of the PIF Directive following the approach taken in the *Corpus Juris*, the concern articulated by the House of Lords European Communities Committee in May 1999 concerning major departures from the UK's substantive criminal law remains apposite.

- In this context, the range of commercial activities undertaken by individual citizens and corporations in the UK referable to the EU's "revenues, expenditures and assets" should not be overlooked. For example, for the years 2014 to 2020 the UK has been allocated around EUR 11.8 billion in Cohesion Policy.

- The EU also provides a broad range of funding in the UK. One example would be the JEREMIE programme in Wales which has provided £96 million in debt and equity finance to over 430 businesses since 2009, drawn from the European Regional Development Fund.

- The EU also finances larger projects such as the European Marine Energy Centre (Scotland) a test centre for wave and tidal energy testing. The total cost of the project was £15 million with a contribution of 7.3 million.

- It follows that if there was any dealing by an individual citizen in relation to any of these matters which had an adverse effect on the EU finances but was not committed dishonestly, the citizen would be exposed to the issue and execution of an EAW at the instigation of the EPPO,

notwithstanding the clear rejection by Parliament of the exercise of EPPO jurisdiction in these circumstances.

- In written evidence to the House of Lords European Union Sub-Committee on Justice, Institutions and Consumer Protection, the Law Society expressed concern about the intersection between the establishment of an EPPO and the exercise of EAW powers in the following terms:

> "Although the UK would not be a participant, its criminal justice system would nevertheless be affected by EPPO operations. UK citizens would be directly exposed to the jurisdiction of the EPPO in respect of any qualifying conduct allegedly committed in whole or in part in a participating Member State. The EPPO's competence would also extend to acts committed in the UK by nationals of a participating Member State, or staff or members of EU institutions. Defendants in EPPO prosecutions or suspects in EPPO investigations could, when present in the UK, be the subject of European Arrest Warrants (and in due course to European Investigation Orders), to be executed by UK police forces under the supervision of the UK courts. Such persons (and their UK legal advisers) would find themselves in the position of challenging requests made by a body of which the UK is not a member, but with whom UK public bodies might nevertheless cooperate – and might even be obliged to cooperate in accordance with mutual legal assistance arrangements".

- It is the inextricable linkage between the EAW arrangement, the EPPO and the *Corpus Juris* project which would underpin this outcome.

An extended jurisdiction

- As already noted, if the EPPO is established in accordance with the terms of the draft Regulation, the extension of the EPPO's jurisdiction beyond criminal offences affecting the financial interests of the EU to all types of serious criminal offences is clearly contemplated. Today, almost all serious criminal offences will involve the cross-border laundering of monies, whether derived from drug-trafficking, people-trafficking or any other form of criminal activity. If offences involving money laundering were included, the potential jurisdiction of the EPPO would be extended to capture all types of criminal conduct from which criminal benefit is derived.

- This development would be consistent with the arrangements contemplated in the *Corpus Juris* project for pan-European enforcement of criminal offences which would not be limited to conduct which adversely affected the EU's financial interests.

Conceptual issues

- In addition, the linkage between the EAW arrangement, the proposed EPPO and the *Corpus Juris* project raise some interesting conceptual issues.

- The introduction of the EPPO will not only enlarge the EAW jurisdiction by enabling an EAW to be obtained and executed in the territory of a Member State which had not given its prior agreement to this outcome. The introduction of the EPPO will presage the ability of an EU institutional authority to trigger the criminal process and initiate the curtailment of individual liberty in a non-EPPO participating Member State.

- In this way, the non-participating country can be said to have lost exclusive control over the instances when criminal jurisdiction can be exercised within its borders, since by virtue of the EAW procedure the EPPO will have been able to arrest a citizen in the non-participating country in circumstances where the latter will not have desired this outcome.

- Again, it is the juxtaposition of the EAW procedure with the establishment of the EPPO which produces this result. Plainly, such loss of control would not be enough to obviate recognition of the non-participating country's statehood, but nonetheless it would represent an interference with the latter's sovereignty.

Alternative arrangements

- I am asked whether the only way for the UK to avoid this outcome is for the UK to opt out of the EAW arrangement.

- Certainly, it is correct to say that this outcome would be avoided if the UK were to opt out of the EAW, and viewed with reference to the problems which have been identified, opting out of the EAW would represent the simplest solution.

- However, whether opting out is the only way to avoid this outcome is another matter. Conceivably, the concerns identified in the Opinion could be assuaged by the inclusion or a recital or protocol in the draft Regulation for the establishment of the EPPO which prohibited a national Court from issuing an EAW on the application of the EPPO where the suspect is located in a non-participating EPPO Member State. A narrower formulation could refer to the situation which identifies the UK as the non-participating Member State in question.

- Whether the UK would wish to follow this direction of travel is a matter for the Government to consider. Also, whether the UK would have significant leverage in the EPPO negotiations to achieve this outcome is a factor which the Government would wish to take into consideration.

- I do not believe that the protections afforded to the UK by Article 327 and Article 2 of Protocol No 21 to the TFEU which are intended to prevent the unilateral imposition of measures on a Member State would be engaged in this case. This is because the root of the problem articulated in this Opinion would have arisen by virtue of the UK's participation in the EAW arrangement which pre-dates the measure which would have established the EPPO.

- In its written evidence to the House of Lords European Union Sub-Committee on Justice, Institutions and Consumer Protection the Home Office referred to these protections, noting the possibility that these protections would be meaningless in practice if new provisions or rules could be introduced for non-participating EPPO Member States through the back door. The Home Office noted in this connection that the current draft of the EPPO contains no information or detail on the relationship between the EPPO as an EU body and the non-participating Member States.

HABEAS CORPUS

- Finally, turning to consider the impact of the EAW on a citizen's ability to obtain the historic writ of *habeas corpus*, it is clear that in the ordinary course of events where an EAW is executed there is no consideration of the underlying evidence by an English court. Therefore, to this extent the EAW does not sit happily with the fundamental principles which underpin *habeas corpus*.

- As Lord Reed explained in *Rahmatullah* v *Secretary of State for Defence*:

> "… the writ of *habeas corpus* requires a respondent who is detaining a person ("the prisoner") to produce him before the court and to justify his detention. If the respondent cannot justify his detention of the prisoner he will be ordered to release him."

The contemporary narrative

- However, although the EAW derogates from this understanding, the contemporary narrative relates that the present position is not unconstitutional and inimical to the Rule of the Law. There

are various safeguards which seek to protect the citizen against arbitrary arrest. I have already mentioned the amendments to the Extradition Act 2003 by the Anti-Social Behaviour, Crime and Policing Act 2014, and the writ of *habeas corpus* can be issued where an extradition request or an EAW fails to observe any of the procedural requirements laid down by statute. Moreover, it is often said that the underlying evidence is considered by the requesting court at the time when the EAW is issued.

- The level of protection afforded to citizens facing an application for extradition was recently considered at length in a report by the Right Honourable Sir Scott Baker at the request of the Home Secretary. The report was presented to the Home Secretary on 30th September 2010 and its headline conclusion was that the EAW arrangements were neither unfair nor oppressive in their operation.

- Whether Sir Scott Baker would reach the same conclusion today is a matter for conjecture. The proposed establishment of the EPPO was not envisaged at the time when the UK became a party to the EAW arrangement, and the potential reach of the EPPO could not have been contemplated.

The flaw in the contemporary narrative

- There is, however, a significant flaw in the contemporary narrative. Whilst it is true that the amendment to section 11 of the Extradition Act 2003 was intended to ensure that an EAW would not be executed in the UK in circumstances where a citizen would not be held in custody for a lengthy period before there was judicial consideration of the evidence, this outcome will not necessarily follow. This is because the new bar to extradition fixes on the making of a decision to initiate a criminal prosecution and not a consideration of the sufficiency of the underlying evidence. The former is essentially an administrative act, in contrast to the latter which is inherently judicial in nature.
- It is because the making of a decision to prosecute is an administrative act that English courts are extremely reluctant to judicially review a prosecutor's decision and will do so "only in highly exceptional cases" – per Lord Bingham in *R (Corner House Research) v Serious Fraud Office)* [2009] 1 AC 756 at page 840F to 841 D, paragraphs 30 to 32, applied by Munby LJ in *R. (E) v Director of Public Prosecutions R. (S and R) v Same* [2011] EWHC 1465 (Admin), paragraphs 37 to 39:

> "… the polycentric character of official decision-making in such matters including policy and public interest considerations" is not susceptible to judicial review since "it is within neither the constitutional function nor the practical competence of the courts to assess their merits" – per Lord Bingham

- When considered against this background, the theoretical – and practical – gap between the new protection introduced by the amendment of section 11 of the Extradition Act 2003 and the historic protection afforded by the writ of *habeas corpus* becomes apparent.
- Clarifying the effect of the section 11 amendment during the Committee Stage of the Anti-social Behaviour, Crime and Policing Bill, the Minister of State (Damien Green) indicated that after the amendment had been passed –

> "UK courts will be able to bar surrender of the subject of the EAW where the issuing state has not taken both a decision to charge and a decision to try the person, unless the person's presence in that country is required in order to do so. It will ensure that extradition takes place only where the issuing state is truly ready to prosecute and, accordingly, it will help to prevent people from spending potentially long periods in pre-trial detention following their extradition while the issuing state continues to investigate the offence. It may very well have prevented the extradition of Andrew Symeou, at least at the stage when he was extradited, and quite possibly altogether".

- To explain the case reference, Mr Symeou was extradited from the UK to Greece following execution of an EAW. He was suspected of committing manslaughter but subsequently acquitted after spending over ten months in what have been described as appalling Greek prison conditions and following his release he was unable to return to the UK pending his trial. Liberty commented on the case in the following terms:

> "The shocking story of Andrew Symeou highlights the injustice of instant extradition. No one should be plucked from their home and dragged across the world without even basic evidence shown in a local court. We must rectify the whole extradition system which leaves everyone in Britain vulnerable to abuse."

- The Minister returned to My Symeou's case a little later in the debate:

> "New clause 24 [introducing the bar to extradition] …deals with the technical issues that have prevented the appropriate issuing of EAWs in the past. That has been particularly emotive in the case of Andrew Symeou, who was held for many months in a foreign country. His case was the subject of a large amount of campaigning by parliamentarians in this country, and rightly so. The purpose of new clause 24 is to try to stop that".

- The theoretical gap between section 11 of the Extradition Act 2003 as amended and the protection afforded by *habeas corpus* can now be readily appreciated, since a decision by a prosecuting authority

to initiate criminal process falls far short of an assessment of the sufficiency of evidence made by a judicial authority which is the minimum safeguard protected by *habeas corpus*.

- In so far as the practical gap between section 11 as amended and *habeas corpus* is concerned, this will depend upon the criminal procedure operating in the country to which a UK citizen has been extradited. In this context, it is trite to observe that criminal procedure varies enormously amongst EU Member States, and the differences between common law systems and continental / civil law systems have been well documented.
- In short, the protection afforded by the amendment to section 11 of the Extradition Act 2003 does nothing to meet the requirement enshrined in the historical writ of *habeas corpus* that where challenged to justify an arrest sufficiency of evidence will be considered by an independent judicial authority – domestic or foreign – in a public hearing within a reasonable period – days rather than weeks – after an EAW has been executed in the UK.
- In this connection, the Minister of State's lack of confidence is noted. When explaining the impact of the amendment, the Minister stopped short of an assertion that the problems in the extradition of Andrew Symeou would not be repeated but rather carefully saying that the purpose of the new legislation was "to *try* to stop" repetition of a situation where a UK citizen is remanded in custody in an EU Member State for a lengthy period before the sufficiency of evidence is judicially considered (*emphasis added*).
- These aspects, together with the significant impact of the establishment of the EPPO and its ability to make use of the EAW arrangement as outlined in this Opinion will be matters which Parliament will almost certainly wish to take into account when determining whether it wishes to apply to opt into the EAW arrangement from the 1st December 2014 in the light of this new development.
- In the meantime, those instructing me should not hesitate to make contact if I can be of any further assistance.

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