House of Commons

Justice Committee

Justice issues in Europe

Seventh Report of Session 2009–10

Volume II

Oral and written evidence

Ordered by The House of Commons
to be printed 23 March 2010

HC 162–II
[Incorporating HC 54–i-iii, Session 2009–10 and
HC 1093–i-ii, Session 2008–09]
Published on 6 April 2010
by authority of the House of Commons
London: The Stationery Office Limited
£0.00

The Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

Current membership

Rt Hon Sir Alan Beith MP (*Liberal Democrat, Berwick-upon-Tweed*) (Chair)
Rosie Cooper (West Lancashire Labour)
David Heath MP (*Liberal Democrat, Somerton and Frome*)
Rt Hon Douglas Hogg MP (*Conservative, Sleaford and North Hykeham*)
Siân James MP (*Labour, Swansea East*)
Jessica Morden MP (*Labour, Newport East*)
Julie Morgan MP (*Labour, Cardiff North*)
Rt Hon Alun Michael MP (*Labour and Co-operative, Cardiff South and Penarth*)
Robert Neill MP (*Conservative, Bromley and Chislehurst*)
Dr Nick Palmer MP (*Labour, Broxtowe*)
Linda Riordan MP (*Labour and Co-operative, Halifax*)
Andrew Turner MP (*Conservative, Isle of Wight*)
Andrew Tyrie MP (*Conservative, Chichester*)
Dr Alan Whitehead MP (*Labour, Southampton Test*)

Powers

The committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via www.parliament.uk.

Publication

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House.

All publications of the Committee (including press notices) are on the internet at www.parliament.uk/justicecom

Committee staff

The current staff of the Committee are Fergus Reid (Clerk); Dr Sarah Thatcher (Second Clerk); Gemma Buckland (Committee Specialist); Hannah Stewart (Committee Legal Specialist); Ana Ferreira (Senior Committee Assistant); Sonia Draper (Committee Assistant); Henry Ayi-Hyde (Committee Support Assistant); and Jessica Bridges-Palmer (Committee Media Officer).

Contacts

Correspondence should be addressed to the Clerk of the Justice Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 8196 and the email address is justicecom@parliament.uk

Witnesses

List of written evidence

Reports from the Justice Committee since Session 2008–09

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2009–10

First Report	Cutting crime: the case for justice reinvestment	HC 94 *(Cm 7819)*
Second Report	Work of the Committee in 2008-09	HC 233 *(n/a)*
Third Report	Appointment of HM CPS Chief Inspector	HC 244
Fourth Report	Appointment of HM Chief Inspector of Prisons	HC354
Fifth Report	Constitutional processes of a general election	HC 396
Sixth Report	Draft Civil Law Reform Bill: pre-legislative scrutiny	HC300
Eighth Report	Crown Dependencies	HC 56

Session 2008–09

First Report	Crown Dependencies: evidence taken	HC 67 *(HC 323)*
Second Report	Coroners and Justice Bill	HC 185 (*HC 322)*
Third Report	The work of the Information Commissioner: appointment of a new Commissioner	HC 146 (*HC 424)*
Fourth Report	Work of the Committee in 2007–08	HC 321 (*n/a*)
Fifth Report	Devolution: a decade on	HC 529 (*Cm 7687)*
Sixth Report	Sentencing guidelines and Parliament: building a bridge	HC 715 (*Cm 7716)*
Seventh Report	Constitutional reform and renewal: Parliamentary Standards Bill	HC 791 (*HC 1017)*
Eight Report	Family legal aid reform	HC 714 (*HC 1018, and HC 161, Session 2009–10)*
Ninth Report	The Crown Prosecution Service: gatekeeper of the criminal justice system	HC 186 (*HC 244, Session 2009–10)*
Tenth Report	Draft sentencing guideline: overarching principles—sentencing youths	HC 497 (*n/a*)
Eleventh Report	Constitutional reform and renewal	HC 923 (*HC 1017)*
Twelfth Report	Role of the prison officer	HC 361 (*Cm 7783*)

Oral evidence

Taken before the Justice Committee

on Tuesday 3 November 2009

Members present

Sir Alan Beith, in the Chair

Alun Michael
Dr Nick Palmer
Mrs Linda Riordan
Mr Andrew Turner
Dr Alan Whitehead

Witnesses: **Lord Bach**, a Member of the House of Lords, Parliamentary Under-Secretary of State, Ministry of Justice, **Edwin Kilby**, Head of European Policy, Ministry of Justice, and **Emma Gibbons**, Head of EU Section, Home Office, Ministry of Justice, gave evidence.

Q1 Chairman: Lord Bach, Ms Gibbons, Mr Kilby, welcome. Here we are this afternoon discussing European issues in the justice area. It has not really been a big success area, has it, and we are looking to the Stockholm programme to fill the gap left by our inability to agree on the previous programme. Would that be a fair summary of where we are at?
Lord Bach: I think it is a little hard, Chairman. I think there have been some success stories, about which we hope to say a bit more later on this afternoon, but it is true that we are looking forward very much to the new five-year programme, the Stockholm programme, because we think inside its first draft it has some very exciting ideas that may well take this agenda forward.
Chairman: I am going to ask Andrew Turner to begin the questioning.

Q2 Mr Turner: What are the likely key impacts of the coming into force of the Lisbon Treaty?
Lord Bach: That is a very big question and one, of course, that is immensely topical, if not contemporaneous. The effect, as I know the Committee will know, is that the third pillar will collapse and the first and the third pillar will move into one chapter, and it will involve, as far as we are concerned, the move to qualified majority voting and away from unanimity. That will, obviously, be a change, but, of course, what we say is that we have protected Britain's interests considerably by establishing an opt-in, in every respect, and, in some respects, both an opt-in and also the need for unanimity. So we believe that the Lisbon Treaty will be a move forwards in terms of the European Union and that the British interest there will be protected as well, if not better, than before.

Q3 Mr Turner: It is a bit confusing, is it not, being told, on the one hand, all will remain the same but, on the other hand, these are matters for other people as well as ourselves but they are not going to apply to them. What do you really mean? What is going to come and force us to do things which we would not otherwise do?
Lord Bach: I do not think I actually said what you just quoted me back as saying. Of course, post Lisbon will not be the same as pre Lisbon, but, as far as British interests are concerned, we will be able to protect them where we need to do so in a thoroughly satisfactory way.

Q4 Mr Turner: Where are those things that you have just described? They are going to have to change but you will control them. How are you proposing to control them? Which particular projects are you not going to agree to?
Lord Bach: We will have to see what develops. We start with a positive frame of mind, which is that we will want to agree where we can agree. If it brings forward more sensible, more practical, more pragmatic, more evidence-based decisions, then, of course, we will want to agree with them, but if something offends against British interests, for example the emergence perhaps of a European public prosecutor, there is something that is built into the Treaty so that we can apply what is, I think, described technically as a double lock on it. It will need to be a unanimous decision by the Council and we will have the choice of opting in or not opting in, as the case may be. There is one example for you of where we may need to take some action.

Q5 Mr Turner: What you are suggesting—correct me if I am wrong—is those things which are going to be dangerous (and you have given an example) will be prevented from happening to the UK, all of them, or just the ones that you have mentioned and one or two others?
Lord Bach: As I say, we start off with a positive frame of mind, which is that we want to move this agenda forward. It needs to be moved forward, as the Chairman I think was implying, and that is why we are so keen on the roadmap that the Swedish Presidency is putting forward, but where there are issues that affect British interests adversely, then, of course, we will act, as any government would, in Britain's interests; but we are proud to be members of the EU and proud to be playing our part,

hopefully, in moving this very important agenda forward, and we think Lisbon is a way of doing that.

Q6 Chairman: You see Sweden as an ally in taking a cautious, careful approach to these issues?
Lord Bach: I think we see all 26 fellow EU members as allies in one sense or another, but, of course, to answer more seriously, we think the Swedish approach, particularly as represented by the draft five-year programme and one part of it, the roadmap, as being a much more sensible and perhaps British way of dealing with progress in this field than sometimes has existed before. So, yes, the answer to your question is we very much applaud what the Swedes have done up until now.

Q7 Chairman: Can I turn to the human rights area? I will start with what I think is the widest of the points, which is whether you see a danger that ECHR jurisprudence will start to be compromised by jurisprudence around European Union definitions of human rights, leading to some confusion about what rights we are trying to uphold?
Lord Bach: We think there was a real danger of that a few years ago, which is the main reason why we, with some other countries, were not prepared to accept the decision on procedural safeguards and pulled out of it, as I say, along with some other countries. We thought that what was being proposed there was too ambitious for its own good and was trying to address, all at once, in a single all-encompassing instrument, a wide range of fundamental procedural guarantees, and the framework decision would have ended up replicating, or did end up replicating ECHR rights inexactly, and we thought there was a real risk of widely diverging interpretations between the ECJ, on the one hand, and the Strasbourg Court. Our problem was with the approach. Now, with the Swedish roadmap and the way in which the framework decisions are to emerge one by one—the first having emerged really, and I was happy to speak in favour of it, on 23 October in Luxembourg—we think there is much less danger of there being two different types of human rights working in the EU context.

Q8 Chairman: What tends to matter to most ordinary citizens and constituents is whether they end up in a court in some other country of which they are not a national with unfamiliar procedures which might appear to lack some of the procedural rights that they enjoy in this country. I know that is an issue that the Magistrates' Association and Fair Trials Abroad have both been concerned about. Yet the UK declined to adopt a framework decision on procedural safeguards. Is that because there were specific defects in that framework, or do you not share this concern about citizens who find themselves caught up in the processes in other countries?
Lord Bach: No, it is an absolutely fundamental concern. As I say, I think it would be for any British Government. There is, of course, the protection of ECHR which crosses the 27 countries, but, as far as British citizens abroad are concerned who have the bad luck to have been arrested and are in foreign custody, I need to mention, of course, the excellent consular assistance that is given by our embassies. We have agreed a number of instruments within the EU already that go some way to ensuring that any UK citizen is supported. The European Supervision Order, which was agreed last year, deals, hopefully, with the unfairness and treatment that can arise from the assumption that a non-national will necessarily present a greater risk of absconding and should therefore be remanded in custody to prevent that happening. The framework decision on trials *in absentia* also seeks to improve protections for UK citizens. Let me move forward to the roadmap itself that we are talking about. That, of course, aims to improve criminal procedure across the EU in the future so that all British citizens who have the misfortune to find themselves subject to criminal proceedings will have greater protection. The first measure proposed by the roadmap, on interpretation and translation (and these are important issues for those who find themselves locked up in a foreign country) has just been agreed—that is the one I was talking about—on 23 October[1]. We are already arguing that the second one—information on rights and charges—should be brought forward by the Commission as quickly as possible, and you will know, Chairman, that the others in the roadmap are advice and legal aid, communication with relatives, employers and consular authorities, special safeguards for vulnerable suspects or accused persons and a Green Paper on pre-trial detention. This is a priority for us, and we think the Swedish approach, the roadmap approach, is a good course to go down.

Q9 Chairman: JUSTICE put it to us that the sixth element, the Green Paper on the right to review the grounds for detention before trial, could wait for some years before it emerged. Is it really going to be as slow as that?
Lord Bach: I think this is a difficult issue. I do not want to pretend to the Committee anything else. It is part of a step-by-step approach. The roadmap envisages the Green Paper, as opposed to an actual measure, so as to ensure the necessary consideration

[1] **Note by witness**: Justice Ministers reached a "General Approach" (a political agreement) on a Framework Decision on interpretation and translation in criminal proceedings, at the Justice and Home Affairs Council on 23 October. Before this Framework Decision could have been formally adopted by the Justice and Home Affairs Council, consideration would have needed to have been given to the European Parliament's opinion about the proposal followed by finalisation by legal and linguistic experts of texts of the measure in the official language of every Member State. Following the subsequent announcement of the Treaty of Lisbon's coming-into-force date—1 December 2009—it became clear that there would not be enough time to finalise the agreement before then. This means that, according to EU transitional policies surrounding the implementation of the new Treaty, the measure will have to be re-introduced under a new Treaty base as a directive under Article 82(2)(b). This could either be brought forward by the Commission, or as a Member State's initiative if the required number of co-sponsors can be reached (i.e. seven). The Government is pushing for the proposal to be re-introduced without delay.

of the relevant issues before proposals are put forward. We do believe evidence-based policy-making is better. It seems to be something the Swedish Presidency also is much in favour of. I take your point about the time that may be involved here, but I would just say that the European Supervision Order, to which I have referred already, has already partly looked at the mutual recognition of bail, and that, I think, is a step towards it. Any future measure will have to take account of the European Supervision Order, but I do not for a moment suggest that this particular issue is an easy one. It may be that one of my colleagues would like to add to that.

Q10 Chairman: We have more or less got agreement on bail, have we not? That is settled.
Lord Bach: Yes.

Q11 Chairman: So is that going to lead to a situation in which there are relatively few instances to worry about, or is there a considerable gap left where, because pre-trial detention is still more common than some people might wish it to be and bail does not work in those cases, we are in a situation that perhaps we would not be in for the same offence in this country?
Lord Bach: Undoubtedly there will be cases, of course. There are cases now, I am sure, if you went round the cities of Europe, where bail has not been deemed appropriate, the charge is so serious—

Q12 Chairman: As you said earlier, the risk of absconding is seen to be greater.
Lord Bach: Yes. Hopefully that in itself will not now be such a powerful argument as was clearly used often. Let us say it is a serious offence charged, where people will be detained: the suspect will have consular access; we hope, and the Green Paper should eventually lead to some kind of solution of that problem, although there will be difficult cases. Of course, not all countries in Europe (and I think I can say this fairly) have the same high standards that we believe we have in terms of detaining people.

Q13 Chairman: Some may be better.
Lord Bach: Yes, some may be, although I find it difficult at the moment to think of one that may be better. Some, I think, are definitely not as advanced as us in that particular way. I remind the Committee, of course, that all our colleagues in the EU are bound by ECHR-compliant policies that must apply to detention as much as it must apply to other matters of justice. Again, I do not know whether there is anything to be added.
Edwin Kilby: I do not think so.

Q14 Alun Michael: I wonder if you could help us with a difference of view that we have been given. The Working Party on Substantive Criminal Law and experts on the implementation of the European arrest warrant reported that no serious problems exist in connection with co-operation and the implication of legal provisions in the area of mutual recognition—I think I have got the terminology right—but Fair Trials International describe the problems of the European arrest warrant as significant. Which do you think is the correct view?
Lord Bach: If I were to say both had a point, I hope the Committee would understand me. We do think the European arrest warrant has brought significant benefits to the UK and we take the view that, on the whole, it is working pretty well. Can I give a couple of figures? Since entry into force five years ago, it has allowed us to extradite over 1,000 fugitives to other Member States and brought over 350 wanted criminals here to face justice, and also, perhaps even more significantly, it has reduced extradition times from around 18 months, on average, to, on average, now about 50 days. The other great advantage of it is that it requires Member States to extradite their own nationals if they are wanted for offences in other countries. We think that is very important, and I can give examples to the Committee. There was a Polish national living in the UK who committed an appalling assault and rape on a 48- year-old woman, leaving her for dead. He returned to Poland. Following the issue of a European arrest warrant, the defendant was returned here, found guilty: two life sentences.

Q15 Alun Michael: I think the illustration is useful, I think the figures are interesting, but perhaps it would be easier for us to take it in if you could supplement that in written form.
Lord Bach: I am sure we can do that.

Q16 Alun Michael: As far as the significant problems?
Lord Bach: I think there are a number of difficulties. One that sometimes arises as a difficulty with the EAW is proportionality. I think our view is that it should not be for every offence, however minor, that a European arrest warrant should be sought by the Member State, and I think there are things to be worked out there. I think that is one of the points that is made by Fair Trials International.

Q17 Alun Michael: Is work ongoing on the convergence of practice?
Lord Bach: I understand, yes. I think Emma may be able to talk more about this.
Emma Gibbons: There was a review of the operation of the arrest warrant last year—it actually ran for a couple of years—where Member States were asked how they have implemented and how they operate, and it led to a series of recommendations on how we could address some of the concerns, both from the practitioners' side and some of the issues raised by Fair Trials International. The Council, in June, adopted a report which said, "We will address those issues." Proportionality was identified as one of the priority issues. There were others. The Fair Trials International report mentions training—that was certainly mentioned in the report—and they will be pushed forward as part of the new work programme. We are lobbying the Presidency on how that should be taken forward. There are regular meetings of experts to discuss these issues. The other thing I would say is that some of the concerns raised in the

Fair Trials International evidence, we hope, will also be addressed through the roadmap—the issues around, for example, Legal Aid that they mention. Obviously, that would then be taken forward through some of the work that the Swedish Presidency will pursue in its roadmap on procedural rights.

Q18 Alun Michael: That is helpful. The framework decision on the mutual recognition of financial penalties that allows fines, compensation and court costs imposed in criminal proceedings in one Member State to be transferred and enforced in another, as I understand it, has not been implemented in the UK. Why is that? Is there a figure of the revenue that we might have lost due to failing to implement it in the UK?

Lord Bach: The Committee, I hope, will think itself fortunate that it has here a person as one of its witnesses, certainly not me, who negotiated as part of the negotiation team on this, and she can answer your question, I think, with some quite good news.

Emma Gibbons: We have now implemented. We have notified the Commission that, as of 1 October, in England, Wales and Northern Ireland we had met the requirements and, as of 12 October, Scotland had already met the requirements. So whilst we did not meet the implementation date, and we accept that, we are now ready to apply the measure. You asked about the fines, the money that might have been lost. It is not a figure we can give you, mainly because the way the framework decision operates, the fines that are collected are based on judgments in other Member States. For example, if France issues a fine against a UK national, the UK courts will secure that, assuming the individual is in the UK, and keep the money. So in order to know what sort of money we would make from this, we would have to know what fines other Members States were imposing against our nationals, and vice versa. So it is not about UK courts recovering UK fines; it is about us recovering fines on behalf of other Member States.

Q19 Chairman: And vice versa.

Emma Gibbons: And vice versa, yes.

Q20 Alun Michael: Presumably, therefore, you would be able to give some description some way down the line, but it would be impressionistic.

Emma Gibbons: Maybe when we have had some experience of implementing the measure.

Q21 Alun Michael: How are judicial authorities encouraged to make effective use of Eurojust in its capacity as, I understand it to be, the co-ordinating body?

Lord Bach: Eurojust has become, for us, an invaluable source of assistance for our authorities involved in investigating and prosecuting serious crime. You may well know, the Home Affairs Select Committee of your House concluded that Eurojust produces an excellent example of what can be done to build mutual trust.

Q22 Alun Michael: Can you give us some practical examples of positive outcomes?

Lord Bach: Yes, if I may, I will give you one called Operation Golf. The UK, in that case, was involved in a joint investigation team (I think, described as JIT) with Romania, assisted by Eurojust and Europol. The operation involved the disappearance of some 1,100 children from a single town in Romania. The children were being trafficked, often with the collusion of their parents, to Spain and to the UK for begging, shoplifting and to exploit (in the UK) our benefits system in this country. Intercepts have discovered that each child can earn up to as much as £100,000 per year for the leaders of the organised crime group. There have been 12 arrests because of Eurojust getting together, if I can call it that, 12 arrests in our country, for money laundering and conspiracy to defraud charges, with a further three suspects being sought, and the team achieved the first UK conviction involving trafficking of a child and uncovered and rescued five further victims of child exploitation as well as evidence of systematic and very widespread benefit fraud. That is one example I can give you where Eurojust played an important part. Another at the other end of the scale, an Al Qaeda-related terrorism case, Eurojust co-ordinated (because that is its skill really) the simultaneous execution of European arrest warrants in Italy, France, Romania, Portugal and the UK nearly two years ago, at the end of 2007. The suspects specialised in forging residence permits, IT cards and passports and documents were seized, including manuals for making explosives. Those are two examples of where, in a really practical way, Eurojust does seem to be able to bring some bad villains to justice.

Q23 Alun Michael: Thank you; that is helpful. Obviously the training of our judges, prosecutors and other legal professionals who are working in the field of criminal justice is important. To what extent do you feel that the EU funding that has been provided for networking and training for such professionals has improved their trust in equivalent professionals in other Member States?

Lord Bach: I wonder if I could ask Mr Kilby to answer this. This is part of his expertise.

Edwin Kilby: Chairman, we do think it has proved effective. Certainly, UK judges and prosecutors have been participating in exchanges, arranged at European level, designed to help mutual understanding of each other's legal systems. My understanding is that these have been working well and have been well received. The European Judicial Training Network has a catalogue of courses which is open to European judges, which means that judges from England and Wales can attend courses run by other countries, if they so choose, who are members of European Judicial Training Network. Also the Judicial Studies Board, which is the England and Wales judicial training college, if you like, also offers training places to judges from elsewhere in Europe. In addition to that, there are study programmes which are funded to allow, as a development opportunity, two weeks for the judiciary to spend in

other EU countries. Similarly, there are conferences and seminars across the EU arranged for prosecutors.

Q24 Alun Michael: That is helpful. Can I ask you your assessment of the potential impact of the Prisoner Transfer Agreement on the number of EU nationals detained in British prisons when it comes into force in 2011?
Lord Bach: The end of that year, I think, is the plan.

Q25 Alun Michael: At that point, what are you expecting to be the impact on numbers?
Lord Bach: We are expecting a significant reduction over a period of time following the coming into being of the framework decision. The number of EU nationals held in British prisons will diminish, will go down. We are a great believer in this. We actually think, wherever possible, foreign national prisoners should serve their sentences in their own country. We think transfer to the home country does allow for more efficient preparation for the prisoners' release and resettlement and enables families to keep in closer touch, hopefully, wherever the prisoner comes from, in order to reduce reoffending when they eventually leave their prison; but, as you say, it is the end of 2011 that the framework decision will come into force.

Q26 Alun Michael: Turning to the question of the e-Justice portal, are there any potential pitfalls there, how can e-Justice be further developed to benefit UK citizens and, associated with that, it was described by the UK Government as an area which often requires considerable financial input. Can you tell me, what is the estimated cost to the UK of current and planned e-Justice projects and is the finance provided to meet the required levels?
Lord Bach: Let me try and start, and then I will pass on to Mr Kilby, with your permission. We do support the work that is ongoing on European e-Justice because, again, it is the argument that it can deliver practical benefits to EU citizens. There are 2.2 million British citizens across the 26 other EU states at the moment, which is a very large number indeed, many of them living their lives there or working there temporarily or studying, and, of course, their knowledge of that country's laws, that country's institutions, the way people live in that country through the web can be very much improved and increased; so we are a supporter of e-Justice. Of course, the portal is the main project at the present time, a website that at its start will function as a point of access to a range of information on justice matters across the whole EU, and, in time, further other functions, we hope, will be added. The portal was due for launch in December, but we are told it is now likely to be launched in the New Year. We see a lot of potential benefits. I have mentioned one or two of them. As far as the pitfalls are concerned—I think, Mr Michael, that is the question you asked—I will ask Mr Kilby to set them out.

Q27 Alun Michael: Is he sharing out the good news and the bad news?
Lord Bach: I imagine the bad news.
Edwin Kilby: I am delighted to be the bearer of bad news! If we are talking about potential pitfalls of the e-Justice system, if I may say so, I think they are all matters which can be managed with appropriate care, but, obviously, it is only useful to have a portal designed to provide information to the general public if that information is accurate and up-to-date. So, clearly, there needs to be a certain discipline in making sure that Member States do keep that information up-to-date and provide timely amendments when they are needed. Other issues which have occurred to us are the need to ensure proper authentication processes, to ensure that information which is not meant to be in the public domain does only get provided to the people for whom it is intended—for example, information about criminal records—and, linked to that, clearly, it is important that we ensure security of the information transfer and the protection of our systems from the possibility of cyber attack.

Q28 Chairman: You tell us about all these management problems you are going to have, but this is the department which, according to the Public Accounts Committee, has wasted £41 million with cost over-runs and delays in the NOMIS computer project. Are the people running this project better than the people you have got in the department who were doing it at the time, and, even at the UK end, can the department meet its commitment to this project?
Lord Bach: We believe we can. Of course, we read the contents of the C-NOMIS report and I need hardly tell you, Chairman, that we will duly respond in full in due course to it, but as far as the e-Justice programme is concerned and the emergence of the portal, hopefully next year, early next year, yes, I think we are confident that that project is moving ahead well.

Q29 Chairman: It is a genuine question. I am not trying to throw bad news back at you. Have the European institutions involved and has the department actually got the technical skills in place to manage a big project of this kind?
Edwin Kilby: We are confident that we can and would point to some of the successes that we have already seen, one of which is the Money Claims Online process, which handles about 500 cases a day.

Q30 Chairman: How many a day?
Edwin Kilby: 500 cases a day, Money Claims Online, and there are other things as well. There is a portal for secure access to criminal cases which has been piloted in some court areas. We also make use of video conferencing, which also ought to be seen as part of e-Justice. This works well: it saves time and money in the transfer of prisoners between courts and prisons for short hearings. Perhaps I ought to just take the opportunity to point out that as far as the e-Justice portal is concerned, that is something that will be managed by the European Commission. It will not be directly managed by anybody here.

Lord Bach: I do not know whether you consider that good news or bad news.

Q31 Chairman: I did pose the question: have we got confidence that they have got the management skills available as well.
Edwin Kilby: We understand that technical experts are responsible for this, and we have no reason to believe that they are taking on more than they can chew.

Q32 Chairman: Can you just repeat that? You do not believe that they are taking—
Edwin Kilby: Forgive me. We have every confidence that they are not biting off more than they can chew.
Chairman: A phrase you could possibly live to regret, but let us move on.

Q33 Mrs Riordan: The UK's position on legal aid is seen as generous in comparison with other EU Member States, but, of course, there are significant differences in the legal systems in question. Is it not the case that the adversarial nature of the criminal courts in England and Wales dictates the level and nature of the criminal legal aid system to a large extent?
Lord Bach: Yes, it certainly has an effect. Indeed, as you may well know, there is a report that we have got on our website, an international comparative study that came out last week from the Centre for Criminal Justice, Economics and Psychology at the University of York, which had some interesting, if tentative, findings about this; but there is no doubt that the fact that our system is adversarial, as opposed to most continental systems that are not, does mean that their judge and court costs seem to be much higher, while our legal aid costs expenditure is much higher. It becomes more interesting when you compare our legal aid expenditure to that of other common law countries, such as Commonwealth countries. There still we seem to be very generous in terms of legal aid. As far as Europe is concerned, of course, legal aid is one of the measures arising out of the roadmap. We have to be concerned that we do not raise our legal aid expenditure as a consequence of this particular measure. We already spend, as you know, £2.1 billion per year on it, which is so much higher than all our European partners. In civil legal aid there is a directive that seems to, I think, work pretty well. Legal aid can be granted for access to pre-litigation advice, legal assistance and representation in court and exemption from, or assistance with, the cost of proceedings, including the cross-border nature of some case costs. There must be a means test, and the decision is taken by the relevant authority in the Member State—here by the Legal Services Commission. Criminal legal aid: different matters apply because of Article 6, of course. The right to a fair trial provides that everyone charged with a criminal offence has the right to defend himself in person or through legal assistance, and this applies across the EU, but there should be a more even system for legal aid for defendants across Europe and is certainly something the measure will have to look at very carefully. I do think, and I probably say it because I am, for my sins, the legal aid minister, that we are not only generous but the way in which we pay legal aid for criminal offences in this country is pretty good.

Q34 Mrs Riordan: But surely if we have got that adversarial nature, then that legal aid needs to be granted and perhaps needs to be higher than other EU states if their courts are different.
Lord Bach: I would accept that. I would accept that that will always be so. Making these comparisons is very difficult actually, as the academics found in both this report and previous ones, and I know the Committee will have looked at this. It is very difficult to draw great conclusions from it, but, undoubtedly, other countries in Europe spend more on their judges because their judges are playing a much earlier and more prominent part in proceedings.

Q35 Mrs Riordan: To what extent are negotiations going on through the EU about fundamental rights, with the practical issues of how those rights are going to be implemented and, finally, who should pay the bill?
Lord Bach: Legal aid is not yet on the agenda, as far as negotiations are concerned, for a measure. Its turn will come, and, indeed, on October 23 at the Luxembourg JHA it was referred to and I made the point that, as much as we like the roadmap and the measure that hopefully will follow, we ourselves are not going to be in a position to pay more legal aid than we do already. I think it will be a question of what some other countries do, even under their different legal system.

Q36 Mrs Riordan: What are the prospects for the introduction of procedures for enforcement of cross-border cases as one of the Stockholm programme priority areas?
Lord Bach: I will ask Mr Kilby to answer this.
Edwin Kilby: As far as civil cases are concerned, that is one of the things that we have sought to interest other Member States in. I think there is some recognition in that area that, although we have good rules for mutual recognition of judgments, the rules, as yet, do not allow any European mechanism to come into play when it comes to actually enforcing the judgment. I hope that answers your question.

Q37 Mrs Riordan: Thank you. To what extent is it the UK Government's responsibility to ensure that UK citizens have a better understanding of the relevant laws and penalties in other Member States, with particular reference to traffic laws?
Lord Bach: The Government does not have a responsibility to ensure that UK citizens resident in other Member States are aware of laws in those Member States. We do not have a responsibility for that. British embassies, though, do provide general information, of course, to people working or travelling abroad and, importantly, going back to the e-Justice portal now (and I made this point, I think), information on national procedures will, hopefully, soon be available on that portal. The

Foreign and Commonwealth Office's website provides travel advice and also further advice, more than travel. It contains information about what to do and assistance that is available. The European Commission, apparently, also administers a website giving information about civil and family law in all the EU Member States, and that has been useful to practitioners as well as to members of the public on both national laws and practices and relevant Community law. That website receives, apparently, several hundred thousand hits each month and will be available in due course through the new e-Justice portal itself. So whilst strictly we do not have a responsibility, it is obviously something we take an interest in.

Q38 Mrs Riordan: What can the EU do to strengthen the enforcement of these measures, in particular the driving offences, across the borders?
Edwin Kilby: We think that the framework decision on mutual recognition of financial penalties will help. That does allow for a criminal penalty imposed in one Member State to be transferred to and enforced in another, and that covers things like fines, fixed penalty notices, penalty notices for things like disorder, compensation and court costs. The only qualification is that there is a threshold of 70 euros.

Q39 Chairman: What about driving disqualifications?
Emma Gibbons: There is a convention on the mutual recognition of driving disqualifications, which was agreed in 1998, I believe. It has not entered into force, for a number of reasons, mainly because the procedures for implementing conventions are just lengthy. There has been talk about resurrecting that. I am sure it will be discussed in the context of the Stockholm work programme. At the moment there is no mechanism for recognition of disqualifications in force between Member States.

Q40 Chairman: Is that not a pretty serious problem, and are you going raise it in the Stockholm discussions, bearing in mind that most of our constituents are not very happy at the thought that disqualified drivers from other countries are driving on our roads?
Emma Gibbons: We had discussions on the Stockholm programme that actually said that we would like work pursued on a range of disqualifications, and mention is made of that in the Stockholm programme. It would be one that I can take back and explore with my colleagues. Our focus to date on disqualifications has actually been around disqualifications from working with children. That is another particularly important area where the EU has yet to act and which we think is very important given free movement arrangements.
Chairman: I think most people would be surprised that in all the words that surround this, those two issues are so far from being implemented yet.

Q41 Dr Palmer: One more point on that issue. When I moved from living in Switzerland to living in Britain, I changed over my driving licence from a Swiss one to a British one and I noticed that, firstly, I was not required to give up my Swiss driving licence and, secondly, the information on that (that it was conditional on my wearing glasses) was not transferred, probably because they could not read the German. If I was unscrupulous, I could avoid the condition and, if I had points on one licence, I could use the other licence. Would you consider taking these points into account?
Lord Bach: We certainly will do that—and more. I am going to offer, if I may, to write in due course to the Committee. This is, without of course wanting to opt out of our responsibility, a Department for Transport issue primarily, but we accept the significant points that are made about driving.

Q42 Dr Palmer: Changing the subject, the Information Commissioner's Office calls for a comprehensive EU data protection law when the Lisbon Treaty is fully ratified and for a merger of all data protection supervisory systems at European level. The UK Government also proposes a cross-pillar justice and home affairs information management and data protection strategy. How do you see the way forward on that?
Lord Bach: I am going to ask Ms Gibbons to reply to this one. It is within her expertise.
Emma Gibbons: The Commissioner did, indeed—I read his evidence—call for common data protection arrangements. We would argue there are already some common data protection arrangements in place. There is a Directive covering the first pillar business, there is a framework decision which is due to come into force which will cover the police and criminal aspects. So we think there are extensive arrangements in place which do protect individuals and data subjects in relation to EU sharing. We think there is more the EU can do on all of this. As you mentioned, we are pushing within the new work programme for a more strategic approach to both data sharing and data protection. What we would like to see is a programme, a strategy, setting out what it is we want to share and, more importantly, how we should go about it, and within that we are pushing for a very strong data protection regime to apply. That said, we do not necessarily see new legislation as the solution to that. What we are arguing for as a first stage is some practical measures, one or two which I think the Information Commissioner raises in his evidence: the idea of privacy impact assessments, for example, to accompany new proposals, which we see as tied in very tightly with other arguments we are making in relation to the Stockholm programme about better regulation, ensuring new proposals are properly prepared, accompanied by regulatory impact assessments. We have also flagged the idea of privacy by design, where new proposals incorporate from the start the idea of data protection, what the data will be used for and why. Finally, because we have all of this legislation in place, what we are saying is that we need to review it, we need to see what works. Once that evaluation has been done, we can then make an assessment about whether there should be new legislation to create a single instrument

reflecting what will be a single chapter in justice and home affairs, but we see that as further down the line. It is not necessarily the first and only solution.

Q43 Dr Palmer: So the reason that you favour that incremental approach is that you feel that if one went straight for legislation, one might not get it all right, that we are exploring the best approaches, or why do you not like the idea of a single data protection law?
Lord Bach: I have not said we do not like a single data protection law. The approach we are taking across the new work programme can basically be summarised within the phrase "look before you legislate".

Q44 Chairman: A new concept in government, I think!
Lord Bach: The argument we have said is that, where you have arrangements in place, let us see if they are working before we rush ahead with new legislation. There is legislation in place; there is a Directive in place; there is a framework decision; individual instruments have their own data protection regimes. We want to sit down and make sure that we know what works and where the gaps are. The Commission is undertaking an investigation into the challenges to be posed by data protection over the coming years with technological developments, new IT. Once we have that evidence, I think it would be far better to sit down and get this right rather than rush ahead and do something quickly and get it wrong.
Dr Whitehead: Can I enquire about victims in both the UK system and also victims of crime in other Member States? The framework decision on the standing of victims in criminal proceedings was adopted in 2001 by the UK, but how does the Government ensure that where there are victims in other Member States they are properly supported? Is it the UK Government's assumption that they will normally be supported by agencies in other Member States or is it the assumption that they will be, on the basis of UK standards, outreached by the UK Government?

Q45 Chairman: A mystified silence!
Emma Gibbons: There are pieces of European legislation in place to protect victims. As the Minister has already referred to, as a starting point we do have consular services to support UK citizens overseas anyway, whether they be suspects in proceedings or, indeed, victims. In addition to that, the EU has legislated in relation to two instruments. The first was in 2001, which was on the criminal law side, creating some rights on how victims should be treated in criminal proceedings—rights to information, for support, that sort of thing. The second was in 2004, which was about compensation for victims, ensuring that where somebody was a victim of crime in another Member State they could apply for their own country's compensation scheme and be compensated for the injury. So there is work that is already taking place, reflecting the point made earlier that we do take seriously the fact that there are UK citizens living and working in other Member States, and we think, on the whole, those measures are good things.

Q46 Dr Whitehead: In the context of new proposals and new framework decisions, one of those potential new framework decisions might, for example, be to introduce protective measures which protect victim anonymity but do not actually protect the right of the defendant to challenge their evidence. Are you happy that, as far as the impact of new framework decisions, indeed, new Member States' initiatives are concerned, that there is public consultation and impact assessment within the UK properly on those proposals?
Lord Bach: On the way in which we get public consultation on the both the issue you mention and others, we do consider it important to consult the public and practitioners, obviously, sometimes through formal consultations, such as the current one on succession and wills. We often also consult practitioners through a number of forums, such as the Advisory Committee on Private International Law, a most distinguished committee called the North Committee—Sir Peter North is the Chairman at the moment and is retiring and I have actually sat in on the North Committee which has fantastic expertise in its field—in the criminal justice field, the Judicial Co-operation Forum as well. So when civil and family law hurdles are pursued, we always consult those who have an interest in the subject matter from the judiciary, down through the legal profession, to court user groups and advice providers. I think we consult sufficiently and well on these issues. I do not know whether that helps on the question you are posing about victims. There are some new proposals that have come out about victims in the Council Conclusions of October this year.

Q47 Dr Whitehead: I was rather using the example of the possible development of framework decisions which could balance the question of victim anonymity against the right of a defendant to challenge their evidence in a way that we might find uncongenial with how we have developed that particular balance in the UK and, under those circumstances, how might consultation properly be carried out and how might impact assessments be carried out in order to ascertain what the UK's future position is on those and, particularly, to what extent might the public be involved in those proposals rather than the decisions of expert boards and, indeed, those who are more closely involved with the process perhaps at a European level?
Edwin Kilby: I think the best way for me to answer this is simply to say that we do commit to consult the public and practitioners wherever we can on whatever the proposal was. So, if a proposal of the sort you describe were to come forward, I have no doubt at all that not only would we consult those who would be likely to come across this area of business on a day-to-day basis, but I think also we would look towards some sort of wider consultation too. Obviously, one of the things that we would want

to look at is whether a public consultation was appropriate in relation to that kind of initiative, but I am sure we would examine that idea very favourably.

Q48 Dr Whitehead: In terms of the actual proposed areas of work, what areas of work do you particularly have concerns about and in what areas do you think the case for change may actually be somewhat lacking?
Lord Bach: This is in terms of the roadmap and the Directives that may flow from it.

Q49 Dr Whitehead: Indeed. I have raised the question rather more hypothetically about how consultation and impact assessments may be undertaken, but I would assume that somewhere in the department there are people thinking, "Hang on a minute. Should we do something further about these particular proposals that are coming forward?" How might those particular concerns best be flagged up within the department?
Lord Bach: Some proposals concern us more than other proposals. It is fair to say, I think, the one we are consulting on at the moment, succession and wills, is one of those that concern us, for obvious reasons which we may have time to go into or not this evening. There are other proposals. I mentioned the European public prosecutor, for example. If that were to emerge as an issue in the course of the post Lisbon era, alarm bells would be ringing and we would have strong views. We think the work programme that we hope will be adopted pretty soon now, by the end of the year—
Emma Gibbons: 30 November at the JHA Council.
Lord Bach: —will set the direction, and we will look carefully to see what it is that is going to be proposed, but we like what we see, basically, in terms of that list that I have already read out of proposed framework directions which we think lead to better procedural rights.
Emma Gibbons: I think we see the work programme as the way we can influence what emerges from the Commission and, indeed, Member States over the next five years. If we can get that work programme right, then the proposals that come out in the form of new legislation or practical initiatives we hope will support the delivery of UK objectives on a number of the issues raised. That is under negotiation. Obviously there are proposals in there that other Member States are pushing that we are not so keen on, but we have done a lot of thinking over the last year about what we want the EU to deliver. For example, we are arguing very strongly that it should include work around, as I mentioned, disqualifications and child protection so that we can ensure that we have the information we need on previous criminal convictions. Equally, we are resisting efforts to change the nature of Eurojust from a co-ordination organisation into something more of a prosecutor. As I say, the main aim for us in all of this is to get that programme right so that we then know that the work that will continue over the next five years will be mandated by that programme and the Commission and Member States will have to follow what is in that programme in bringing forward new ideas and new initiatives.

Q50 Dr Whitehead: Are you using specific research evidence, for example, to inform those sorts of positions and to look at where gaps in legislation might be?
Lord Bach: Yes; there is no doubt that we are at the forefront of those arguing for greater levels of evidence and impact assessments of course to be built into the European legislative process, and we feel, particularly at the moment, that we are winning that argument. We think that what appears in the roadmap are measures that will not go ahead unless there is evidence for them that they will actually add value to life for ordinary people in the EU, but we do employ academics to advise on particular specialist issues—in contract law, the common frame of reference, which the Committee will know about. We had an extremely distinguished academic, Professor Simon Whittaker, who prepared, I think, a leading document to analyse what was being proposed. So we use various means, but always, for us, we want the measure to be practical, rather than theoretical, and based on evidence too. This has been, of course, something of a struggle sometimes within the confines of the Council, but we think at the moment the spirit is with us.
Chairman: Lord Bach, Ms Gibbons, Mr Kilby, thank you very much indeed.

Tuesday 10 November 2009

Members present

Sir Alan Beith, in the Chair

Mr Douglas Hogg
Alun Michael
Jessica Morden
Julie Morgan
Dr Nick Palmer
Mr Andrew Turner
Dr Alan Whitehead

Witness: **Professor Steve Peers,** University of Essex, gave evidence.

Q51 Chairman: Professor Peers, you are very welcome. Although we are treating this technically as a formal session of the Committee, that is only so that we get the useful things you tell us down on paper by having a formal record, but we actually want to have a fairly informal question and answer and discussion so that you can improve our knowledge of these matters on which you have written at least one substantial paper and no doubt others. I do not know if there is anything you would like to say by way of opening or whether you would prefer to proceed to have some questions thrown at you. Is there anything you would like to say initially?
Professor Peers: Nothing in particular, Sir. I am happy to take questions.

Q52 Chairman: Fine. In that case, it might be very helpful for all of us to start with what to laymen are always the mysteries of the pillars. If I were to tell my constituents, "The third pillar and the first pillar are being merged," they would look at me in complete astonishment. Could you put into words which my constituents might more readily make sense of what this really means and whether we as a country will be affected in any particularly dramatic way by that process.
Professor Peers: It means, in a narrow sense, first of all that the decision-making rules change and that the jurisdiction of the Court of Justice changes in relation to adopting policing and criminal law measures within the framework of the European Union. The decision making changes because mostly you will have qualified majority voting in the future instead of unanimous voting, mostly you will have a bigger role for the European Parliament in terms of co-decision rather than just being consulted, and the Commission has a somewhat stronger role—not quite, though, its normal monopoly. The jurisdiction of the Court of Justice's normal rules extend to the whole of this area, meaning that any national court in this country or elsewhere can send questions on EU laws adopted in this area after the Treaty of Lisbon, whereas at the moment there is an opt-in process to the court's jurisdiction. Seventeen countries have opted in, and we are one of the ten which has opted out in relation to policing and criminal law. That is a significant change for us. Those measures will take a different form. They will be not so much intergovernmental measures, public international law measures, but what we now call community law measures which have direct effect and supremacy. That is the narrow answer. The broader answer is also that the competence in this area changes, so that things will be described more precisely in terms of what the EU can do in relation to policing and criminal law, but, also, the UK now gets an opt-out from policing and criminal law which we do not have at the moment. That obviously cannot be overlooked when describing the other changes. They might seem rather threatening from the point of view of national sovereignty if you overlook the fact that we also have an opt-out, and if you overlook some of the limitations of the competence of the European Union that will apply.

Q53 Chairman: What does that change? Given that previously these were matters entirely dependent on unanimity, moving to a situation in which we are part of the process but we have an opt-out, where does that leave the United Kingdom in these matters?
Professor Peers: It would depend on whether the government of the day is inclined to opt in or not. If we opt in, then obviously we have whatever influence we would otherwise have as a participant in the discussions. If we opt out, we cannot expect to have very much influence. Although there is a 'third way' if I may use that phrase—which the Government has tried a few times already in relation to civil law and asylum—which is opting out, hovering on the sidelines, making suggestions as to what changes might be made so that we could then opt in. That has worked on two occasions and so they are trying it a third time on an asylum proposal. I do not know how often it might get tried.

Q54 Chairman: Can you say what those two occasions were.
Professor Peers: One was in relation to the Rome regulation on conflict of laws on contract and the other was in relation to maintenance proceedings in relation to family maintenance orders—across borders in both cases. The third occasion pending is on reception conditions for asylum seekers, where the UK has said we will opt in if the rules on detention and access to employment and so on got changed.

Q55 Chairman: These are all occasions when the British Government felt that it was in Britain's interests to participate.
Professor Peers: They wanted to participate in principle because they could see that maybe there were not huge changes they wanted to make but the changes were big enough that the Government did not want to opt in without making sure that those

offending provisions were removed. It sort of stayed on the sidelines and tried to influence the negotiations in a sort of pro-British direction, as the Government defined it, and on the first two occasions it was successful. That is another option which could be tried in future, although it is a little bit risky. I do not think it would always be successful. It relies on a certain amount of goodwill from other Member States which would have to be continually earned, but it is a possibility obviously in the future in the area of policing in criminal law just as it has been applied in civil justice successfully so far.

Q56 Chairman: In what ways does the European Court of Justice's jurisdiction get extended as a result of this process?
Professor Peers: The two main ways are that, first of all, it would have jurisdiction, as I mentioned already, over all Member States' national courts and tribunals. Any magistrate in the UK and anyone who has a sufficiently judicial power who is hearing a first instance criminal proceeding or an action against the police or something like that could send a question to the Court of Justice. Obviously so could the appeal courts, the Supreme Court and so on.

Q57 Chairman: In what sort of circumstance does that arise? That is a court in this country addressing a question to the court in Brussels.
Professor Peers: In Luxembourg. The sort of examples where it has arisen already—and there have been about 20 references from other Member States which have opted in already to this first type of jurisdiction—would be, for instance, if somebody was trying to resist the execution of a European arrest warrant but there had been a series of cases already and they argued that the national implementation of the Framework Decision on the European arrest warrant is somehow defective so that therefore the arrest warrant cannot be executed.

Q58 Chairman: This might be somebody whose defence counsel was arguing that the arrest warrant should not be executed.
Professor Peers: That is right. It would be the defence in that particular example. There have been some cases where the prosecution has sought to use it. With the arrest warrant, it is a possibility that the prosecutors could seek to use it to strike down some national restriction on the arrest warrant under the national law which is not compatible with the Framework Decision. A prosecutor might decide, "Let's try to get rid of that restriction. Let's try to get it struck down."

Q59 Chairman: Are we talking there about somebody situated in another Member country whom you want to have arrested?
Professor Peers: The European arrest warrant only operates when another Member State sends an arrest warrant here or we have sent an arrest warrant somewhere else. It might be a British national of course who is sought by another Member State.

Q60 Chairman: I was thinking of the second example, where the prosecution wants to secure the operation of the arrest warrant process. We are talking there about trying to get hold of somebody who is in France, are we?
Professor Peers: Let us say a French arrest warrant has been served here and is being executed here, the defence argues, "Look at our national law, it prevents us from executing the arrest warrant in this case," but the Crown Prosecution Service might argue, "Hold on, there is a defect in the Extradition Act there, it does not comply with the Framework Decision in the arrest warrant," and that protection for the suspect, for the fugitive in this particular case, has to be suspended. It could work both ways. There have been some references to the Court of Justice on the Framework Decision on crime victims, where it is the prosecution that has been trying to use that Framework Decision in the interests of crime victims to toughen up national law from the prosecution's point of view. There are practical examples of it working both ways. But there is a second new type of jurisdiction and that is for the Commission to sue Member States for infringing the EU's criminal law legislation. It cannot do that at the moment. It will be able to do that after Lisbon. For anything adopted after Lisbon, it will be able to do that. It has to wait five years if something was adopted before Lisbon, to bring proceedings.

Q61 Chairman: It has to wait five years?
Professor Peers: Yes, there is a five-year transition period relating to the court's jurisdiction. The old rules apply to the old legislation and at the end of that period then the new rules apply to everything. In the meantime, the new rules would apply to anything adopted after Lisbon or to any of the old rules amended after Lisbon. If there is an amendment to the European arrest warrant, the new rules of the courts of jurisdiction will apply immediately. If we opt in, all British courts and tribunals, for instance, will be able to send references, and the Commission will be able to sue the UK (and of course other Member States) for non compliance. But if there is no amendment during that time, they have to wait a whole five years for those things to take place.

Q62 Julie Morgan: What do you think the impact is going to be generally on British justice of the tension for other Member States to reject UK from measures where the UK's opt-out has meant that it would be inoperable?
Professor Peers: That partly depends on what we mean by inoperable, whether that is a very low threshold or a very high threshold. I think it is a very high threshold. I like to draw an analogy with a car. Would you say your car was inoperable just because there is an odd noise which you cannot explain, there is something awkward about it, or would you say it is only inoperable if it gets to the point where it is judged unroadworthy or, indeed, it just does not function at all because you cannot even get it to start or there are no brakes or steering or something really essential that you need for a car to work? I think it should be interpreted as a very high threshold. That

works in the UK's favour to the extent that the UK wants to remain participating in existing measures but opt out of amendments to them, but works against the UK if it wanted to take the opportunity of the new rules to somehow find a way to opt out of its existing commitments. If you had a government that was looking for ways to do that, then it would want to set the concept of inoperability very low so that it was easy to get out of its existing commitments in asylum as well as criminal law.

Q63 Julie Morgan: Where you used the car example, could you transfer that to justice?

Professor Peers: There are a number of examples already in civil jurisdiction. Denmark had different rules from the rest of the EU for a number of years—because it has its own opt-out and it took five years to align the rules. It has taken about seven years to align the rules between some non Members (Norway, Iceland, Switzerland) participating in the civil jurisdiction rules as compared to when the bulk of the Member States amended those rules, and there are lots of examples, going back to the European arrest warrant, of variations in the derogations which Member States can apply. There are lots of options in all of the EU's mutual recognition measures for refusing to execute an arrest warrant or in future an evidence warrant and so on. There is lots of divergence there already. There is even divergence in relation to substantive criminal law. There are options in the EU's measures there, often on what you can criminalise or not. The Member States, for instance, do not have to criminalise child pornography where it involves adults who appear to be children or where it involves a cartoon rather than a child. They have an option whether to criminalise that or not, and there are several other examples of that. There is all that divergence there already. If the EU can live with these historical examples of divergence already and the measures have not proved to be inoperable with that divergence then I do not think that the UK opting out of some fairly modest amendments to an existing measure would make it inoperable. Maybe if they were measures that were truly fundamental you would get to the stage where you would have to consider it inoperable, but I doubt whether we will ever get to the stage of absolutely fundamental changes to the European arrest warrant. There might be tweaking of the exceptions and clarification of some provisions here and there, but I wonder if the warrant would really be inoperable if the UK simply stuck with the existing rules rather than opted into those amendments. To me that is unconvincing. However, of course, some other Member States might have a different view, and the Commission, Parliament and maybe a different British government might have a different view as to where the threshold would be considered to be.

Q64 Chairman: Where do you think the problems are likely to arise in the near future on opt-outs in the criminal justice area?

Professor Peers: I guess you can look at the draft Stockholm programme and see what the agenda is. It is partly the transformation of the existing measures into new types of Acts: Directives rather than Framework Decisions. Opt-outs would apply in those cases. The question would be whether you would amend that legislation. If you do not amend it, if the UK decided not to opt in, would we get kicked out of the existing measure? Let us say we have a Directive under the European arrest warrant which is exactly the same as the Framework Decision except you replace the words "Framework Decision" with Directive, and the UK chooses to opt out on the grounds that we do not want the jurisdiction of the Court of Justice and we do not want this to have direct effect, which it would as a Directive—

Q65 Chairman: We do not want . . . ?

Professor Peers: We do not want it to have direct effect, to apply directly in national courts. For instance, the prosecutor and defence could start to challenge legislation, like the Extradition Act, to try to strike it down in the national courts. We could take the view that we are not going to participate in that and then the question arises: Does it make the European arrest warrant inoperable? From one point of view I think it is not inoperable. Just because we apply it as a Framework Decision and everyone else applies exactly the same rules as a Directive—meaning there is jurisdiction of the Court of Justice and different legal effect—I do not think that makes something inoperable. There are other examples of that happening in the past, like the civil jurisdiction rules which apply as a 'regulation' among the Member States and as a 'treaty' with Norway and Iceland. I do not see how that is inoperable. But of course that is where the argument might be made. There is an agenda already agreed for a list of proposals on procedural rights for suspects, where the Government had some problems in the past, with proposals made five years ago, and it has agreed to a recent proposal on interpretation and translation rights, but I do not know whether it might revive its concerns about some of the subsequent proposals now that the idea is to divide their old proposal up into a series of different proposals. There are also going to be proposals on gathering and transmission and maybe admissibility of evidence which are a major part of the draft Stockholm programme, so certainly if these proposals get into the question of admissibility of evidence there is potentially more interference with the UK system. These proposals would inevitably, I think, repeal a lot of the existing measures we have, like the arrest warrant and mutual assistance rules, between Member States, and so there is the question of whether or not we could then be shut out of those existing rules or not on the basis of our non participation, in the new rules making our continued participation under the old rules inoperable for other Member States. Again I do not think the threshold would be met, because I think it is quite high, but I suspect some might argue that it is more easily met.

Q66 Alun Michael: There have been a lot of views about the role of the European Public Prosecutor, and I suppose there is always the danger of mission drift. Indeed, it seems, in a way, that is almost implied as being built in, given the capacity to add to the scope of what the prosecutor would do. It looks fairly narrow if you look at the words "Combat crimes affecting the financial interests of the Union" since that could not be interpreted as merely affecting the interests of the individual States—or even all States, I would guess—but the infrastructure of the Union itself. Could you comment on the clarity of purpose. Is it sufficiently clear, assuming it comes into being, the European Public Prosecutor would have as his or her purpose and how aims and objectives and practices would follow on from that? Do you see the point?
Professor Peers: Yes. It is probably not sufficiently clear in the Treaty but then you do not normally look to the Treaty for a detailed definition if all it is doing is providing the legal power to act. You would look to the legal act which gets adopted to look for what would hopefully be a more detailed definition. The older definitions of crimes affecting the Union's financial interests in existing conventions and protocols and so on I think would be the starting point, and perhaps it would be necessary to elaborate further on what that meant, but the scope of it might be broader than what you imagine. It could be argued that any fraud which relates to a tax collected by Member States which in some way forms the basis for an assessment of the EU's revenue is a crime against the Union's financial interests. That would cover customs duties most obviously and perhaps VAT to the extent which it is a basis for calculating the financial transfers to the Union. Equally, most obviously, it would cover things like fraud against revenue received by individual beneficiaries that has its genesis in the Community budget—things like agricultural payments obviously being the biggest single spending item but also a number of others too. People get grants to run conferences and so on, but particularly agricultural spending, I suppose, would be a big issue. Of course there are complications there because most agricultural spending passes through national ministries and has some sort of national processing. It may even be civil servants who have some role, either directly in the fraud or having failed to prevent it for whatever reason, which may be genuine or not so genuine, so there are questions of liability there. You already see the scope of it perhaps starting to expand a little bit into questions of corruption, where there are already links made in the EU's conventions about the links between corruption and fraud. You can see complications in practice, I think. During an investigation, if it appears, having investigated something for some time, that there is a link to the Union's financial interests, you obviously have a question of whether the jurisdiction changes in some way for the investigation or the prosecution and what are the impacts of that. It would be necessary to define it more precisely, although I do not think, to be honest, that issue of the European Public Prosecutor is on the imminent agenda of the European Union in anything like the way I described for the other proposals on evidence and transmission.

Q67 Alun Michael: You say, quite rightly, that a lot of European legislation and indeed domestic legislation starts off by seeking to provide powers. I have always been of the view that it ought to spell out purpose before going on to spell out powers. It sounds to me as if, therefore, the purpose is not entirely clear. Would I be right in that?
Professor Peers: Hopefully, it would be clear. If there were to be legislation that was adopted, it would be rather clear exactly what crimes were to be covered and exactly on what circumstances the prosecutor is involved.

Q68 Alun Michael: Forgive me, but that is still a point of detail. You referred to the example of agricultural payments, and obviously one aspect might be wholesale, large scale cross-border fraud in that area. Another might be the way that the legislation or the rules on payments were being interpreted in different countries, and that provided some undermining of the overarching, but I am not clear what the purpose of the prosecutor would be. If it is very clearly to defend the infrastructure, that provides a much greater definition, and then that is not about individual bits of legislation; it is focused on the nature of the threats. Is that clear or not?
Professor Peers: As I say, it is a bit difficult to answer in the abstract what the purpose of the Treaty drafters is, because it is a fairly generally drafted Treaty revision and I think it must have been imagined that the public prosecutor was going to work with some more fairly precise definition of whatever crimes the prosecutor would have competence to prosecute. Probably those would be taken from and maybe adapted from what we have already set in an EU convention years ago on crimes against the Union's interest, which, as I say, is a fairly broad definition.

Q69 Mr Turner: Can Scotland opt in and England opt out?
Professor Peers: It could do that if we had an independent Scotland. But not before.

Q70 Mr Turner: Why not?
Professor Peers: Because the United Kingdom as it currently stands is a Member of the European Union. The opt-out that the UK has is drafted in respect of the United Kingdom and Ireland as a whole country; it is not in respect of parts of countries. It may be that the UK has a particular objection that relates primarily to Scottish concerns and that might motivate an opt-out, or even that its objection relates primarily to English concerns because of the differences in our justice system and that motivates an opt-out because of one region or the other having concerns and the others not. That is quite possible. But it is not possible, as such, to have a Scottish opt-out. I suppose the UK could always try to negotiate within the legislation in

question some sort of special rule relating to Scotland, which might even amount to an opt-out or a derogation in relation to the Scottish system if that proved necessary. For instance, one of the items on the agenda for suspects rights legislation is pre-trial detention, where there are very specific rules in Scotland which the UK might have an interest in defending if there were proposals to legislation which we opted into. But there is no opt-out for Scotland as such, in the sense that it has to be each Member State which opts out or in.

Q71 Mr Turner: If you had something like this Libyan business recently, that was a decision taken by Scotland and Scottish affairs which had nothing to do with the rest of the United Kingdom. But you are saying, notwithstanding that, it is a responsibility for the whole of the United Kingdom.
Professor Peers: That is right. Ultimately it is the Westminster government which will be deciding whether to opt in or out, and it makes that decision in respect of the whole of the United Kingdom, even though obviously a significant proportion of criminal law is Scottish. Equally, at the moment it is deciding to exercise its veto or not on behalf of the UK as a whole, even though you have distinctions as regards Scotland. I can imagine a certain degree of conflict might occur between the Scottish government and the Westminster government over some of these issues, but, nevertheless, that is how the rules are set out.

Q72 Alun Michael: On a completely separate point, what is your view of the road map approach to fundamental rights? I suppose one of the problems across Europe is that you have the Council of Europe that has a very strong focus on human rights and sometimes does not appear to focus on the rest of the agenda. What is your view of the road map approach?
Professor Peers: I think it is useful to have European Union rules on basic elements of criminal suspects rights, because, otherwise, there is a perception, perhaps even a practical risk, that having adopted so many measures which enable the prosecution to be more effective across borders that you have an exclusive prosecutor bias in the way in which the European Union gets involved in this field. From the point of view of criminal justice, it is hugely undesirable to have a bias towards either the prosecution or the defence, but that is the way in which the system has been developing so far. I think it is partly a problem of public perception but partly a real problem that the European Union needs to address. Since the attempt to address it by a more general measure on procedural rights was unsuccessful, it is obviously necessary to break it down and approach these issues one-by-one in a form that the road map does. I know there is a risk and a concern about conflicts in what the Council of Europe has done and the ECHR, but, by and large, the Council of Europe has been consulted both on the more general proposal of 2004 and now on the most recent proposals on interpretation and translation and it has proved possible to address any concerns that they raised. I do not think it is fundamentally problematic anyway to be setting standards which are above the ECHR, given that they are a minimum standard and given that it is obviously open to Member States and therefore presumably the European Union as a whole to set standards which are above the minimum standards in the ECHR as far as criminal law is concerned. For instance, the EU has done it in the case of data protection. You could point to various elements. The British criminal justice system is one where we go above the minimum standards in the ECHR. We do not have an ECHR requirement to tape interviews at police stations and so on but that was obviously conceived a number of years ago as something which would be very useful as a practical procedure and safeguard, also protecting the police, that we would introduce, and it has become an accepted feature of our system. Equally, other Member States have higher standards in some areas as well that they would want to keep and maybe some of these standards could be more generally applied across the European Union. I do not think there is a fundamental problem with what the European Union seeks to do.

Q73 Chairman: Is there a problem if different jurisprudence develops? Imagine yourself as a minister trying to introduce some reform of the criminal procedure and you are trying to satisfy Article 6 of the European Convention on Human Rights, the right to a fair trial. Case law which has developed in the Strasbourg Court has placed a number of conditions around what would constitute a fair trial, so you try to satisfy those conditions, and then you suddenly discover that a separate document has been interpreted by a separate court, by which you are also bound, which raises different condition, which you fail to meet because you are trying to satisfy the conditions of ECHR.
Professor Peers: If these two sets of rules in courts are heading in the same direction, if we are talking in each case about the procedural rights of criminal suspects, I do not think it is a fundamental problem. As long as both the ECHR and the EU Rules set minimum standards, if one of them turns out to be setting higher standards than the other you just comply with whichever is the highest in a particular case. It may be that the EU standards turn out to fall below what the ECHR requires according to the Strasbourg Court, the European Court of Human Rights, so you still comply with what Strasbourg says. If it is the other way round, if it has become clear from the legislation of the EU or the EU court rulings that it is the EU rulings which set a higher standard, then you would comply with them. It may be a mix, so that if you are drafting some new procedural rule there are aspects of it which have to satisfy the ECHR and aspects which have to satisfy the EU. Many Member States are more familiar with this, perhaps because they have national constitutional human rights protection which encompasses rights to a fair trial—they will have national constitutional courts ruling on this issue, so they have already had some experience maybe

reconciling the national constitutional protection with what the ECHR says—but it seems to me this is just a variation on that and you simply have to reconcile these two sources of human rights principle. As long as they are both minimum standards, it should be possible.

Q74 Alun Michael: That is fine if you are only dealing with, let us say, the rights of defendants—which it has always seemed to me we are particularly good at. (We are not always so good at dealing with the rights of, for instance, victims in the criminal justice system.) If you go to the higher level on one aspect of what is a complex system, is there not a danger of imbalance? Because these things do not come alone. We have a system, which you have reflected in what you said, of balancing the interests of the prosecution and the defence. Other jurisdictions have a more "earnest seeker after truth" approach led by the court itself, by the judge. There are big variations within the European Union, are there not?

Professor Peers: Yes. There is nothing in the way that the Lisbon Treaty is drafted which would lead the EU inevitably to run roughshod over national constitutional protections. There are national differences in respect of criminal procedure. There are several points where the Treaty refers to the need to respect different traditions and as a legal rule and a requirement to respect different legal traditions, and there is also a procedural decision-making protection, in that a Member State which does opt in can pull what is known as the 'emergency brakes' to say that there are basic elements of its criminal justice system which are being threatened on so therefore it objects to some proposal on criminal procedure on those grounds. In fact it is increasingly common already for the EU's criminal law legislation to contain within it some sort of rule or derogation relating to national criminal justice principles and national constitutional principles. In the most recent rules on Eurojust, for instance, there are some limitations on the requirements that Member States have if it is incompatible with their national systems. There has been more or less a deal and a new proposal on trafficking in people, which has a rule about anonymous witnesses but Member States do not have to apply it if it is incompatible with their national legal systems. The way to solve a lot of these concerns is what we have already seen built in and which is reflected in the Treaty, clearly suggested in the Treaty—certainly after the Treaty of Lisbon is in force—which is to make the legislation explicitly compatible with national constitutional principles and to allow that degree of divergence to take place in this area, which is obviously a fundamentally different area from legislating the content of beer or the definition of chocolate, where there are not those sorts of concerns.

Q75 Alun Michael: Could I ask about one other thing, the impact of dealing with the internet. Internet-related crime is something in which I have taken a particular interest over the last few years, both internet governance and internet-related crime. Do you think the way in which these issues are being pursued within the European Union takes sufficient account of the nature of internet-related criminal activity, and the nuisance activity, I suppose, at the lowest level? Do you think the institutions of the European Union can cope with the challenges of that new environment?

Professor Peers: I think there have been some legislative measures which are directly or implicitly about the internet. The Framework Decision on terrorism was, for instance, amended last year to reflect incitement to terrorism and information on bombing and so on—which is placed on the internet primarily, however it could take other forms. We already have this Framework Decision on child pornography which is now being amended in particular to take account of things like grooming, which has developed with Facebook and so on. It was not around when that was first adopted five years ago, but there is an attempt to take account of these developments. Equally four or five years ago there was a Framework Decision on attacks on information systems which I think the Commission wants to update quite soon. There are other community law measures already on critical infrastructure which would probably cover aspects of the basic framework of the internet. There is a certain amount of criminal law already in force. Obviously, as I say, it is being revised or being reviewed. Probably there could be more. I wrote a long report to the European Parliament a year ago on this. There are aspects of the Cybercrime Convention, Data Protection Rules relating to interference with data and so on which could be better reflected by EU law, which could be perhaps implemented in EU law, in the interests of better dealing with things like phishing and various types of scams that appear on the internet, certainly to the extent that they are emptying your bank account having tricked you into giving your password and things like that. It is worth investigating whether Member States' criminal law already deals sufficiently with this or whether there is a need to have some degree of harmonisation, given of course it is an easy thing to do on a cross-border basis. It is very easy to sit in Lithuania, which is inside the European Union, or whichever Member State, and send messages to someone in another Member State. It is far easier than travelling to Britain and robbing a bank, to be sending out hundreds of these sorts of spoof emails. The EU has done a certain amount to deal with some manifestations of cybercrime but it probably does need to do more. There are signs that it is willing to do that—probably not quite as quickly or as effectively as it might be doing, but there are certainly indications of that. It has not done very well with some jurisdiction issues which arise from cybercrime. There is a tendency in EU measures to multiply bases of jurisdictions without trying to solve effectively the problems that result from having multiple jurisdictions, given that there are already EU rules which say that you cannot prosecute twice. Once you have had a final judgment, you cannot prosecute again in another Member State. Since you have that rule, it would be best to select in advance,

to have some system for dealing effectively with choosing where to prosecute. I would argue that it should be based primarily on territoriality. Some further definition of that is necessary maybe in cybercrime cases.

Q76 Alun Michael: Is that the territoriality of the victim or the perpetrator.
Professor Peers: Exactly. It is easy to define if it is someone robbing a bank, the territory where the act took place, but with the internet you have an inevitable problem finding where the territoriality of the act took place. We have an inbuilt complication. But I do not think that is a reason to give up. You could presumably, having thought it through, come up with at least a priority jurisdiction that, in principle, you should have the jurisdiction in the place of the victim, for instance, or the place perhaps where the bank account was located or something like that, but there might be reasons on a practical level to transfer the proceedings somewhere else or to let someone else investigate. That sort of thing has not been dealt with very well.
Alun Michael: Perhaps I ought to read your paper.

Q77 Dr Whitehead: Can I get clear in my mind the implications for an EU-wide approach to justice matters that arise from the difference in codes within the EU.
Professor Peers: Criminal codes?

Q78 Dr Whitehead: That is the Napoleonic code versus the common law code. What would be the division within the European States of those codes?
Professor Peers: We have a small group of common law countries, the UK, Ireland, Malta and Cyprus, and then other countries where there are variations. I do not know the ins and outs of all the precise variations of national criminal procedures, which obviously are subject to change over time in all countries. I think the problem would arise of a conflict with these different approaches if you ever started in the EU to get into the very in-depth levels of harmonisation on criminal procedure. The Treaty talks very vaguely about powers after Lisbon to regulate issues of criminal procedure in relation to victims and suspects and evidence. You could either have a sort of very light-handed approach to this and set out a very general rule which would easily be applied without any changes in national systems—by and large, that is what the EU has done to date—or you could take the view that eventually over time there would be more in-depth harmonisation. That is where the problems would occur. Equally they would inevitably occur with the European Public Prosecutor. You have created an office. Even though it is supposed to be prosecuting in each individual national system, there would have to be a degree of procedural harmonisation and there would have to be an option for one system rather than another. Once you start defining the powers of the prosecutor, you have to make basic choices. Fundamentally, I do not think the EU should exercise those powers at all. I do not see the need for the European Public Prosecutor at all. That is just one of the reasons to cast doubt on whether we should have one. It is not even the most fundamental; I just do not see the need for it. It is not proven as compared to what you could accomplish by harmonising the law in terms of defining the crime question or what we have already done in the EU and can do in the future in terms of handing over suspects and evidence more effectively. I just do not see a problem which the European Prosecutor could solve, in my opinion. As I say, that is the most fundamental problem there. A further problem is that we would have to opt out of it because the intention would be to set up a system which reflects what the majority of Member States do—which has investigating judges and so on and invests that power in this European Public Prosecutor to call evidence and so on in the way that the CPS cannot do. I just do not think we could be participants. We would have to find some other way of continuing to contribute, nevertheless, to preventing fraud against the EU budget, which obviously we want to do as a net contributor to the budget. Those are the concerns I have. As I say, I do not think those are imminent concerns but more something medium and long term that might be a problem.

Q79 Dr Whitehead: You mentioned four clear common law States in the EU. There are 23 others that tend towards Napoleonic code with variations.
Professor Peers: I cannot give you all the details of what each Member State does, but that is my understanding of the broad divide between them, yes.

Q80 Dr Whitehead: The Scottish code would come towards Napoleonic code in that variation.
Professor Peers: Yes. There are elements of the Continental system.

Q81 Dr Whitehead: Moving jurisdiction for this from Pillar 3 to Pillar 1 means that one has QMV as far as these decisions are concerned.
Professor Peers: Except in relation to the Public Prosecutor, which is still unanimous voting.

Q82 Dr Whitehead: In other areas there has been a specific brake applied, has there not, under Lisbon, whereby you can say, "Hang on a minute, this is not what we want, put a brake on it"? But if nine States then decide they wish to go to all the institutions to say they wish to go ahead that then comes within QMV after a four-month period. Is that correct?
Professor Peers: For those participating States, yes. But the participating States cannot drag anyone along with them who does not want to be there. It is only QMV for those States. It probably would be more than nine in practice. It is unlikely they would go ahead with just nine, I think, but, as you say, it is correct to say that it could be just nine. There is no doubt that legally there could be just nine.

Q83 Dr Whitehead: To what extent do you think that there is a real issue, as opposed to a theoretical issue, with the apparent incompatibility of codes within the direction of travel that Lisbon is clearly taking as far as justice is concerned?

Professor Peers: If we got to the point in the medium and long term where we are going to be getting into further detail in terms of criminal procedure harmonisation or whether the European Public Prosecutor was seriously on the agenda, then you would, I think, end up with a scenario where either simply the UK and Ireland opted out and the others go ahead or perhaps, in addition, there would be some other Member States, like Malta and Cyprus, or you might talk to people in Hungary who do not like the idea of a Public Prosecutor either, for instance, which are not keen on the idea, even if it might be broadly compatible with their legal system, and you would end up quite often having the brake pulled on enhanced co-operation in one form or another in relation to the Public Prosecutor and in relation to criminal procedure in the medium term. That is one possible scenario. I am not sure that is necessarily the most likely scenario, but certainly it is a fairly possible scenario—not immediately, but five or ten years down the line. If there is temptation to keep coming back every few years and having a further degree of harmonisation, that is inevitably where you would end up. We are not going to be there in the first few years of implementing Lisbon, I do not think.

Q84 Dr Whitehead: If you are being tried in one particular Member State for an offence committed in another Member State and the process of your trial is being undertaken by a code which is not compatible with the code of the country in which the original offence took place, what grounds does that then give the individual who is thus been prosecuting to state that the prosecution was flawed?

Professor Peers: Normally, of course, you can only argue the prosecution is flawed on the basis of the domestic justice system which is carrying out the prosecution. You can also obviously argue the ECHR, if necessary, by bringing a claim to Strasbourg after you have been convicted. There are no jurisdictional rules related to criminal jurisdiction within the EU or at any other level, international level or Council of Europe or UN level. You cannot, as such, argue that there is some overarching jurisdictional rule which would prevent you from being prosecuted for that extraterritorial offence in the first place, so you cannot rely on that. Your argument that it is unfair would, I guess, rest on perhaps your problems with understanding the procedure, particularly given that the offence was taking place abroad and it is inappropriate to try you anyway. Your argument is going to have to rest on however national law defines the jurisdiction over the offence and on any EU measures which might be adopted in the future to deal in a little bit more detail with this issue of jurisdiction. At the moment, there does not seem much enthusiasm among Member States to restrain themselves in respect of jurisdiction over criminal law offences. They are very happy to do it across a whole area of civil law, many, many different areas of civil law, but not in respect of criminal law at all. It is not looking likely that we would have what I would say is an ideal solution to focus primarily on territorial jurisdiction, however you define it, for criminal offences. That is the most appropriate solution. As I said, the EU tends to encourage Member States more and more to have extraterritorial jurisdiction, so that risk that you are concerned about would be happening more and more often in future. In the absence of something to allocate jurisdiction, there will be more people being prosecuted outside the State in which they committed the offence, and that is a potential problem. The only way the EU can say it is dealing with it is by adopting its measures on criminal suspects defence, which would give them more information and interpretation and translation. That might help their defence somewhat, but I do not think it addresses the fundamental problem of prosecuting in what you could argue is the wrong place to have a prosecution.

Q85 Dr Whitehead: Bearing in mind that the UK is the only State in Europe which essentially has a foot in both codes, would there be circumstances under which it would be possible to envisage that a part of the UK could opt in to a common system and a part of the UK would opt out of a common system, depending on how the system was declared to be working?

Professor Peers: I have already partly answered that question. It is the UK as a whole which opts in or opts out of the legislation, but it is possible if we opted in to negotiate some sort of special rule or derogation for a part of the UK. Another scenario would be, let us say, that the UK as a whole opted out, but if the Scottish Parliament or Government were less unhappy with what was being adopted perhaps they could unilaterally adopt some compatible legislation and reach some side agreements, formal or informal, with Continental Member States. It would not amount obviously to an official opt-in to the legislation or full participation in the negotiations or anything like that or the ability of Scottish courts to send questions to the Court of Justice, the UK as a whole having opted out, but it would nevertheless be an informal type of participation if Scotland were so inclined. Perhaps it is possible to imagine that happening in the future. If the government department in Scotland is less critical of the European Union than the Westminster government, you could imagine that happening in this area. But that is a more informal approach to the issue.

Chairman: Professor Peers, thank you very much indeed.

Monday 7 December 2009

Members present

Sir Alan Beith, in the Chair

Alun Michael Mrs Linda Riordan

Witnesses: **Jonathan Faull**, Director-General, and **Claudia Hahn**, Assistant to Director-General, European Commission Directorate-General for Justice, Freedom and Security, gave evidence.

Q86 Chairman: Can I make you welcome, Mr Faull. I gather this is a valediction in your present post as you are about to move to another very important area of the Commission's work. I will just introduce my colleagues and then if I can ask you to introduce yours. My colleague on my right is Linda Riordan, who is a Labour Member of Parliament. I am a Liberal Democrat Member of Parliament and the Chairman of the Committee. On my left is Alun Michael, who is also a Labour Member of Parliament and a former Home Office Minister, amongst many other things. Fergus Reid is the Clerk and we have a shorthand writer.
Jonathan Faull: It sounds like a balance but it is not my business!

Q87 Chairman: We did try. We did however have a Conservative MEP at lunch today. If you would like to tell us who you are.
Jonathan Faull: Good afternoon. It is a pleasure for us to be here. I am Jonathan Faull, Director-General, and Claudia Hahn is my assistant.

Q88 Chairman: We are particularly pleased to have you with us. As a Committee, part of our job, as well as overseeing the work of the Ministry of Justice, is to look at European developments in the area of justice. We have had the Hague Programme operating for a number of years, but I would think most people would acknowledge that the Hague Programme, to put it mildly, underachieved its declared objectives and we are now embarked on the Stockholm Programme. Would you like to start by giving us an initial perspective, perhaps it is easier as it is a valedictory statement, as to where we have got to with Hague and where we are heading with Stockholm?
Jonathan Faull: Thank you. Yes, certainly not all the ideas and ambitions in the Hague Programme have been fulfilled. No doubt that is the way with these rather general programmes because of subsequent events and shifting priorities and the difficulty in making headway in some of these areas. I hope that in five years' time people will not be saying the same thing about Stockholm, but I rather suspect that not every last idea in it will be completely realised. We have always found it useful to have these five-year programmes because the process for adopting them first of all gives ministers, and ultimately prime ministers and presidents in the European Council, the opportunity to focus on this area and to tell us how they see things and what they want to be done. The European Council later this week, which we hope will endorse the Stockholm Programme, will set out a course for the next five years. Those five-year periods dovetail now with the general European political calendar. That is to say they come in the year of the European elections and in the year of the appointment of the new Commission and now under the Lisbon Treaty with the appointment of the new President of the European Council as well, so it is a useful technique for a lot of thinking and a lot of debating about what has happened, what has not happened and what people want to happen in the ensuing period. The programmes are turned usually six months later into action plans which are more detailed and give a much clearer indication of the precise measures which it is intended to adopt, and I expect that there will be a Stockholm Action Plan proposed by the Commission early next year and endorsed by the European Council in June of next year. That is the current plan anyway. I am a little hesitant about all these dates because again the political calendar is a complex one. The current Commission is still in office in a caretaker capacity. The new Commission, which will emerge from the Parliamentary hearings in January, will take office at the end of January/early February, one hopes, and only then will serious work on proposing the action plan get underway under the Spanish Presidency, and that will lead to the plan being adopted, I hope, before the end of the Spanish Presidency so before the end of June 2010. The other big change of course in Stockholm as opposed to Hague is that the Treaty has changed and the Stockholm Programme will be implemented in accordance with the Lisbon Treaty, which to a considerable degree in the area of justice and home affairs will change some of the ways we operate. To simplify (but I can come back to details in answer to questions if you like) the role of the European Parliament and the national parliaments will be considerably different and enhanced in comparison to what is the case today. In the Council the general rule will be voting by qualified majority as opposed to unanimity, which is still the case in some parts of the justice and home affairs agenda today. There are exceptions to what I have just said; family law is one. The other big change which I suppose I should mention of importance to the United Kingdom is that of course under the Lisbon Treaty the opt-in and opt-out situation is altered and, again to simplify, in respect of Denmark, Denmark now finds itself outside the justice and home affairs area to a very large degree and the United Kingdom and Ireland have a much more extensive opt-in facility than they had before. Those who say that Lisbon will make things easier are, I think, under-estimating the complex arrangements

to which it gives rise, but we will use that system no doubt for a very long time to come now in implementing the Stockholm Programme. Again, other people say, "Well, the Hague Programme proved difficult because it was under the old Treaty and Stockholm will be that much easier because it is under the new Treaty." I think that also underestimates the complexities which remain and the new complexities to which the new Treaty gives rise, plus of course fact that the economic situation is far worse than it was five years ago and that is bound to have an impact on the political environment in which some of these issues will have to be addressed. That was by way of introduction. If you would like me to be a little more detailed, in the last five years under the Hague Programme a lot of progress has been made in the home affairs area, but I realise that the focus today will be more on justice. I suppose the most remarkable event has been the successful extension of the Schengen area to cover, essentially, today nearly all of continental Europe. The only Member States not in the Schengen area today are the United Kingdom and Ireland, Bulgaria and Romania and Cyprus, all for different reasons, but the Schengen area has been expanded to all the other Member States which joined in 2004, and to Switzerland and very soon to Lichtenstein, with Norway and Iceland already in there as well, and this has happened with remarkably little fuss and considerable success in both organising the management of the external border collectively and in providing all the information exchanges within the Schengen area to make the free-travel area work properly. In the justice area—coming now to the details of the work of your Committee—we have, I think, made some progress in the criminal justice field, we have made some progress in the civil justice field, and we are beginning to see progress in the other main area of our work, which is to bring to bear modern technology to provide a better and more comprehensive system of administration of justice between Member States. In criminal justice the European Arrest Warrant is usually held up as the great success story, which I think it largely is. It is criticised today, in a way, for being too successful in the sense that it is used too frequently and some critics say too lightly in some circumstances, but it is used very regularly as part of the normal administration of justice in our Member States, and the time taken to surrender people across borders—we try not to use the word "extradition"—has been reduced quite significantly. In 2007 there were 2,667 effective surrenders as a result of European arrest warrants and over 1,000 were registered through the Eurojust system, and that is an increase from 192 in 2002. A lot of work has been done in that area. In the civil law field we have brought in regulations on a European small claims procedure and a European order for payment procedure and harmonised rules on the law applicable to civil liability and contracts under the so-called Rome I system. There has been a good deal of development also in the international field by the accession of the European Community as such to the Hague Conference on private international law. That is producing results. In the area of family law there has been a long saga about the applicable law in divorce cases, which has not yet led to legislation, but has led to an application by a large number of Member States for the enhanced co-operation mechanism to be used. No decision yet has been made on whether that should be done and the fact that that application was made quite some time ago shows that it is a sensitive issue which has required a great deal of careful consideration, but certainly early in the life of the next Commission a decision will have to be taken on that issue. Mutual recognition remains—and I think the Stockholm Programme and indeed the Lisbon Treaty made this very clear as well—at the heart of what we are trying to do. We do not want to harmonise civil or criminal law for the sake of it. Even if we did it would be extremely difficult. What we want to do is to take the 28 legal systems of our Member States and make them work together for the benefit of those who apply the system and for the citizens and other people who live here. The way to do that—and it is easy to say and hard to do of course—is to bring about mutual recognition so that what happens in one country is followed with little ado in all of the others. Some progress has been made towards that but it is difficult because our legal systems are very different one from the other, and as the Union has grown in size we have more legal systems, more legal families and a more complicated set-up. It used to be said (and it was only a caricature in the first place) that you had Napoleon on the one side and the common law on the other. It is not as simple as that any more, if it ever was. We have a wide range of legal systems and different legal traditions and making them all work together is not an easy task, but that is the task which the European Treaties have set for some time now—a single area of freedom, security and justice—so I think in a coherent but piece-by-piece, building block-by-building block way we have set about assisting the emergence of mutual recognition. It is always said, rightly I think, that mutual recognition requires mutual confidence, which is not always a given, and that requires a lot of work on training, a lot of work on simply explaining one legal system and its particular traditions, practices and terminology to the others, so that we all feel confident that justice abroad is as good as justice at home. Perhaps I will stop there.

Q89 Chairman: The inclusion of the Roadmap, as you know, in the Stockholm Programme, particularly when you explore what is involved, tends to suggest a rather longer implementation period than five years. Does that make a five-year programme rather a misleading concept? Is it a bit of a cop-out or an honest admission that some of these things, if they are going to be achieved, will only be achieved over a much longer period?

Jonathan Faull: I am sure that is right and that is why we acknowledge the importance of the Roadmap and we do not think it is a failure if not everything is done within five years. A lot of these issues, frankly, have been around since Tampere going back to 1999, and no doubt a little before, and a great deal of time is needed to bring them to fruition. It is not simply a

matter of proposing legislation and arguing it through Council and Parliament. A lot of these issues are not legislative at all; they are a gradual building up of mutual trust, mutual recognition and the institutions; Europol and Eurojust. I am quite sure that many of those issues will be with us in five years' time and ten years' time.

Q90 Chairman: I have another point. You might even guess the source. It was put to us that one of the problems about the Hague Programme is that it presumed the existence of the Constitution, which of course did not happen. Was that really all that significant?
Jonathan Faull: I am trying to think back to the mind-set in 2003–04. There is some truth in it. I suppose the people writing it all the way up to the top would have been reasonably confident that the Constitutional Treaty was coming and that unanimity would be largely a thing of the past, although no more, by the way, than under Lisbon because the Lisbon Treaty—and I make no political point on this—is similar to the Constitutional Treaty in its treatment of the justice and home affairs issues, with some exceptions. Yes, we may have been more optimistic and confident then, both politically and economically, than we are now.
Chairman: Linda?

Q91 Mrs Riordan: To what extent do you think that the sheer cost of e-Justice and video conferencing initiatives inhibit the progress of criminal justice co-operation?
Jonathan Faull: To a certain extent it does, but when you look at the figures and make an analysis not only of the cost of setting up e-Justice systems but of the savings it brings about, I think a happier picture emerges. We do not yet have completely full details for all our countries. I can give you some of the figures that we are working with. First of all, the initial and rather modest start that we are making to the e-Justice system, which is creating a portal which is really a sort of front door to all the systems which exist or will be developed behind it, we have a contract out for the first release of the portal for 1.5 million euros and overall, if that works—

Q92 Chairman: That is a big "if", is it not, in this field?
Jonathan Faull: Yes and no—and the various incremental improvements come, we are talking about a two million euro contract, which is a lot of money but not enormous for a big IT project. The contract with Unisys is underway. There have been some delays but we are assured by the contractor that within the next month or two we will have the first delivery of the system to show to Member States. We have asked a lot of the countries involved to provide us figures with the savings that they have made and I have some quite interesting information on that. For example, Norway—a member of the EA, a member of Schengen, a member of the European Judicial Network—ran a pilot scheme in 2006. It is a big country with a relatively small population. They are now installing equipment in 40 out of 68 courts. Usage is steadily increasing and they calculate that a video conference saves 785 euros every time it is used. That is based on an average saving of 12 hours' travel time for the people concerned. That is interesting. Austria tells us that when they installed 11 video conferencing systems in their courts back in 2002 there was an immediate saving of 80,000 euros per year and now they have installed video conferencing facilities in all courts and in many prisons as well. Of course, video conferencing has been around for some time already but it is only one very obvious feature of the application of computer technology to justice systems. What is equally important of course is making databases available, insolvency registers and that sort of thing, so a great deal of work is done on that as well. It is hard to put a single pound or euro figure on how much this will cost and how much it will save, but the general view we are getting from pretty much all Member States is that this is something that everybody is doing to a different degree and feels the need to do together in a European context because it does make justice quicker and ultimately cheaper.

Q93 Chairman: Could I turn to the European Arrest Warrant. You gave an indication earlier about the value of it and we were talking to my colleague Graham Watson earlier, who was very much involved in the earlier stages of bringing it in, and he and I share enthusiasm for the concept, but it does tend to be undermined by the cases which appear to show disproportionality and the use of the mechanism in circumstances which would not have been appropriate within the context of the nation state concerned. Should this be resolved by further legislation or in some other way?
Jonathan Faull: It is recognised as an important and serious issue. If legislation is the only way to resolve it, then legislation there will have to be. However, I do not rule out that it may be possible, rather than amending the rules, through training and sharing a common interpretation of the rules, to deal with it in that way. We have undertaken to organise a series of training sessions in Member States next year and once we have done that and taken a lot of evidence and understood better ourselves precisely where the problems arise, we will have to consider what needs to be done. If it requires a legislative proposal, no doubt there will be one, but at the moment we would like to explore all alternatives before proposing new legislation.

Q94 Chairman: And on the European Evidence Warrant, to which the Commission attaches some importance, can you help us to understand what it could achieve and what its scope might be?
Jonathan Faull: The short answer is that will depend on the result of consultation, debate and impact assessment, which we will do. The ultimate goal is to help the administration of justice by making sure that evidence located in one country is not too difficult to obtain in another where it is needed in a particular case. People often say to us that it is ironical that it is easier to move people around

Europe under the European Arrest Warrant than it is to move things in the form of evidence around Europe. At the moment we have a piece of legislation, the European Evidence Warrant Framework Decision, which is being implemented in Member States but is not yet fully implemented everywhere, and there are Council of Europe conventions alongside it which are also used to obtain evidence abroad. We are told by practitioners (but this is going to be subject to a lot of further investigation) that the current system is cumbersome and difficult and not conducive to the best possible administration of justice, so we will look at that. This is an analysis really of the current law. We remember that when the European Evidence Warrant was approved—and it required unanimity in the Council for that to happen—we ended up with a piece of legislation which contained a large number of exceptions to general principles because most Member States wanted to keep something pretty close to what they were already familiar with in their national legal systems already. There is nothing wrong with that and I do not criticise that as a starting principle, but it means that we end up with legislation which has some rather resonant principles and a large number of derogations for individual Member States to carry on applying their own procedures. It may be that that is good enough and that it works properly. We fear that it may not and we will therefore carry out, no doubt next year, a more detailed investigation before deciding whether or not to propose new legislation.

Q95 Chairman: But the scope of it is going to remain, presumably, evidence which is known to exist and therefore does not require further investigation to find, to be held by a public authority and therefore be accessible, and you are saving the cost of sending somebody out there to find it or bringing somebody over to testify in the court, or is it more than that?
Jonathan Faull: It does not exist yet so I cannot be categorical about the precise scope, but something like that could well turn out to be necessary. If we can show, and we will try very hard to find the data to do so, that there would be savings involved and not additional expenditure, that will make it, frankly, all the more likely that the legislation will be passed, so we will try very hard to be establish that.

Q96 Chairman: Being devil's advocate, I would have to say otherwise what is the point? There would be no point if you could not either gain access to evidence which you were prevented from getting into court by some international barrier or were not saving the cost of having someone come over and formally give the evidence where it can be attested in the country concerned and transmitted and accepted to be valid evidence to be put alongside the other evidence. If it is not doing either of those things, it is difficult to see that it is worth the Commission's time and effort.
Jonathan Faull: That is very persuasive.
Claudia Hahn: One of the main objectives is precisely to study the possibility of having future evidence.

Q97 Alun Michael: Could I just probe that a little further and then go on to another question. Who is it intended is going to be able to obtain evidence in this way, for instance, the prosecution, the police, or the other enforcement agencies, the defendant or the authorities or victims and their families? Who is going to be the applicant, if you like? Or all of those?
Jonathan Faull: Well again, that remains to be seen. There are arguments for a very wide, comprehensive set of beneficiaries if you like. Others may seek to limit that. However, we are carrying out a major study on the laws of evidence in each of the Member States which is about to be completed, I think.
Claudia Hahn: We published a Green Paper in November.
Jonathan Faull: And we published a Green Paper which is out for consultation. There will be a meeting of Member States on this on 9 February, and not only with Member States but with a wider group of stakeholders as well, and then we will think about what legislation and what scope it should have.

Q98 Alun Michael: Does the Green Paper make propositions on this or merely invite?
Jonathan Faull: It asks questions and invites.

Q99 Alun Michael: It asks questions rather than providing potential answers?
Jonathan Faull: Yes, it is a greenish Green Paper!
Alun Michael: Yes. The issue of proportionality has already been mentioned, but is the requirement of proportionality something that needs to be dealt with at a European level or is it something that ought to be put as a requirement for the individual state to consider when implementing, or is it a matter, more in a common law arrangement, for the judiciary to treat as we would say as a matter of course? Where should that lie? The reason for the question is obviously the critics are saying there may be excessive use in some countries and so on.
Chairman: As with the arrest warrant presumably?

Q100 Alun Michael: Yes, but the same thing could happen here.
Jonathan Faull: I think that is right. We will have learned the lessons, frankly, of the expected consequences of the arrest warrant. I do not think really people saw some of what has happened coming. It is nice to be the victim of your own success but if you are a victim there is a problem and you have to correct it. I would say the proportionality arises at two different levels. First of all, the legislation itself has to be in proportion with the objective that it sets out to achieve, and we have to meet that test, and under the new Treaty national parliaments can call us to account, particularly on proportionality grounds, and throughout the legislative process the European Parliament and the Council will have to bear that in mind as well. Then when the law is already in place the question becomes how do the judge or the other people involved apply and interpret it? Again, proportionality is a general principle of European law which should be applied at all times, but I suppose some would say the experience of the Arrest

Warrant shows that it might be more prudent to write it into the legislation to prevent over-enthusiastic use of the actual wording, so we will see, but this will be a live issue in everybody's minds.

Q101 Alun Michael: Turning to the issue of Eurojust, what practical steps can be taken to strengthen Eurojust and what are your thoughts about the relationship between Eurojust and the European Judicial Network? Does that need to be strengthened? Does it need to be closer?
Jonathan Faull: The basic Council decision creating Eurojust, setting it up and governing it has been revised and therefore Eurojust is undergoing changes and is adapting to this new situation. We still believe that the Eurojust members, who are national prosecutors appointed and paid by their national authorities to co-ordinate cross-border prosecutions, are still hampered by the fact that their powers at home, and therefore their ability to interact with their colleagues in The Hague, are very different and some level of minimum powers, which the Council decision begins to introduce, seemed to us to be necessary. They are also creating an on call co-ordination centre for 24-hour seven-day-a-week decision-making and the Treaty on the Functioning of the European Union, the new Treaty, provides that further steps could be taken if necessary. On the relationship with the European Judicial Network they should indeed have closer relationships than they do now and the co-ordination between the Eurojust national members and the contact points in the EJN should be improved so that (and if only that) there is never any question about who should do what. There should be a clear allocation of responsibilities between them, which I am afraid is not always the case now. There is scope for progress.

Q102 Alun Michael: Can I turn to the issue of data. I am carefully not saying the issue of data protection because I think there are two issues; one is data protection and the other is the sharing of data. You expressed some concerns to the Home Affairs Committee about progress on the protection of personal data in the field of justice and home affairs. Do you think a comprehensive scheme is feasible and where do you see the balance lying between the need for data to be shared for a variety of purposes, particularly the prevention of crime or the detection of crime, and the need to protect data?
Jonathan Faull: There are a number of issues there. What we have at the moment is a set of data protection rules which on the commercial side of the fence go back to 1995. The basic Data Protection Directive was set up in 1995 as an internal market measure and only last year did the Council agree on a Framework Decision for Data Protection in respect of criminal matters, essentially, so we have these two items of legislation, to put it in pillar terms, one for the first pillar, one for the third pillar, and under those two instruments a great deal of work has been done. Under the 1995 Directive each Member State has set up its own data protection authority and legislation, and we have had, particularly in the years since 11 September 2001, a lot of international experience, too, in coping not only with exchanges of data within the European Union but between the European Union countries and foreign states, the United States in particular, but not exclusively, and reconciling all of that with data protection too. Now that we have a unified Treaty, and an opportunity to look again at both everything that has happened in the commercial sector since 1995—Did we have Google in 1995? Probably not. The world has changed a lot! When I say Google, I use it as an illustration of companies.

Q103 Alun Michael: Generic like "pirate"?
Jonathan Faull: Generic, in a way, it has become "I Google; you Google". I use it as an illustration of a whole new business model which has arisen of providing what look like free services but in fact take information about us and exploit that information about us for commercial purposes. I do not say that pejoratively. That is the way it works and we all seem to submit to it in one way or another. All of that has happened since 1995 and that requires another look because there is public concern about many aspects of that. There has been, for various reasons, a growth in the collection, storage and sharing of information in Europe and between Europe and the rest of the world for law enforcement purposes, brought about by within Europe certainly the development and extension of the Schengen area, which essentially replaces border controls by information sharing between the police and other law enforcement bodies, and beyond Schengen with the UK and Ireland as well of course, and modern technology has made it that much easier for information to be collected, stored, shared, investigated and so on. There have been many calls in national parliaments in their committees and in the European Parliament, and in civil society more generally, for a fresh look at all of that. Now that we have (with all sorts of differences which remain between the ex first and the ex third pillar) one single Treaty, it seems to me that one of the tasks of the next five years is to have another look at data protection, given all we know about the world and the way it works and the way in which balances are struck.

Q104 Alun Michael: One of the areas of debate in relation to these issues is the impact of things like Cloud computing going in, which will take us into a totally new dimension again. One of the things that I am concerned about, and I may have misinterpreted what you are saying, is it seems to me that you always needs the balance between the protection of data, which is an important consideration, and the use of data in the interests of the citizen, for instance in fields like crime reduction, and for there to be a balance in that. When we had Peter Hustinx in front of us earlier he talked about moves towards an information management model, which I think is the direction we have gone in the UK, where you always have to have both the data protection and the use of data in mind. Is that at the centre? The reason I ask is because talking just about data protection sounds as if only one side of that equation is being observed.

Jonathan Faull: No, absolutely, I agree with Peter Hustinx. The work that you are doing in the UK on an information management model is very much at the heart of our thinking about what could become a European version of the same thing, because the challenges are much the same. Policing today is intelligence and information-led. Perhaps it always was but it is more obviously the case that that is so today. The needs of the police, the needs of the court system, the availability of modern technology—Cloud and whatever comes after Cloud that we cannot foresee today—plus public concern mean that we need to develop a new way of thinking about data-sharing and protection, not only as a balancing but more as a combination of the two elements, using technology which can help in this respect to protect data as well as make it easier to collect, store and share it. Where things become extremely delicate, and these are issues we face every day, is in the storing and therefore in the retention of data about presumptively innocent people so that those data are available in the event of some future investigation. It is do you keep the haystack so that the needle can be found one day? There the pressures are considerable on both sides of the debate and it is right that there should be a proper public debate about it, and since a lot of these systems are inevitably European, if not international more widely, we have to sort this out together, and that is very helpful.

Q105 Chairman: Just on data, how is a European citizen to be satisfied if he or she believes that data is held on them which may be incorrect, to check that data, to enforce that it be made accurate and the record wiped if it should not be there? What do you envisage for the future should be the process and what is it now?
Jonathan Faull: Already way back in 1995 the basic principles were set out. There is a right to access and there is a right of correction, rectification or even deletion if the data turn out to be wrong or past their retention date. People need to know that data are being held about them. There is a right to information and to provide consent, or withhold it, although withholding consent in some of these areas, particularly in the law enforcement area, is more difficult, and there is a right so you know that data are being held about you and you need to be told who is holding them, why, for what purpose, for how long and you need an address that you can go to to find out what is being held about you and correct it if mistakes are being made.

Q106 Chairman: Are you confident that the machinery exists to enforce that right now? It does not need any further machinery?
Jonathan Faull: The machinery exists. We have set up in each country an independent data protection authority with considerable statutory powers. In the UK it is called the Information Commissioner, I think.

Q107 Chairman: Yes.
Jonathan Faull: And no doubt the system is not perfect.

Q108 Chairman: We are talking trans-nationally now within Europe about the situation where for example many people in Britain receive unsolicited mail from companies based in other European countries, often the Netherlands, and they might wish to establish what the data source for this unsolicited mail was, whether it contained accurate information, and obviously there are examples of a more difficult kind where law enforcement agencies may hold incorrect information which means that you are always getting stopped going across the border. Are you content that national data protection offices can effectively initiate processes?
Jonathan Faull: Yes, I am. They are all independent and reasonably well-staffed. There is a common legal basis for their activities under the Directive which has then been passed into national law. They come together in the rather inelegantly named Article 29 Working Party but they have a collective existence and they talk to each other and they network with each other. There is Mr Hustinx, the European Data Protection Supervisor. There is the European Commission, which is ultimately responsible for making sure that these rules are properly enforced in the Member States, or we can take action in the Court of Justice. We have, and this is certainly true when you look at less satisfactory arrangements in other parts of the world, a well-functioning institutional legal system to protect people's data.

Q109 Alun Michael: Can I just ask about the victims issue. We have heard on a number of occasions the interest in developments in relation to victims. I suppose there are four different ways of highlighting the interests of victims. One is the media approach which assumes that the interests of victims are about hanging, flogging and doing nasty things to perpetrators. The second is the approach that Victim Support has argued to us as a Committee on a number of occasions, which is what victims want to know, other than not to have become a victim in the first place, is that neither they nor anybody else is going to be a victim in the future. The other issue is the way the victim is treated by the judicial system in court or as a witness, or whatever. I suppose the fourth one is the issue of restorative justice which can have benefit both for the victim and for the perpetrator in terms of crime reduction. I am not clear from the answers we have had from other people where the victim concern comes in the developments that we are likely to see over the next couple of years. It is a slightly rambling question but I have found the answers we have had up to now have not clarified it so I thought it might be as well to explain why the question is being asked.
Jonathan Faull: I will try my best. This is largely a matter for individual national criminal justice systems and has not been the subject of much attempted harmonisation across the EU. E-Justice can help. There are various initiatives, some of which we have already discussed, which can be used to help

vindicate the rights of victims. Obviously video conferencing helps victims, if only because they are not forced to confront the perpetrator of the alleged crime, and that is happening to differing extents from one country to another. Where cross-border issues arise then our e-Justice project should help a victim in one country give evidence in another without having to travel all the way and see once again the perpetrator. That can assist. The recovery of damages by a victim also can be helped by all the work we are trying to do on mutual recognition. If an award is made to a victim in one country it should not be more difficult for that award to take effect just because the victim is the other side of a border. There are various things that we can do to help. Will all of this be brought together in one great European victims policy? I do not know, frankly. If my new Commissioner asked me to pull all of this together into an statement "What can Europe do for victims of crime?" there is a lot of substance that we could explain. Maybe we should bring it together as a policy because it is something which people are rightly worried about and where I think there are some things we can justly explain as being European added-value to the national legal systems.

Q110 Chairman: Can I briefly turn to another issue which is whether there is potential for divergent jurisprudence to develop between the Charter of Fundamental Freedoms as interpreted in the Luxembourg Court and the European Convention on Human Rights in Strasbourg. We have explored one are two potential examples of it this morning. For example, the interpretation rules which it is proposed to develop under the Stockholm Programme might provide an example. It is interesting that when I put it to witnesses, they came out with two different assumptions, one assuming that the European Court rules might fall short of the Strasbourg rules and the other that they might be in excess of them, but in at least one of those cases there is a potential confusion and probably in both.
Jonathan Faull: I am reasonably sanguine about this. First of all, for decades now the European Court of Justice, Luxembourg, has been applying human rights law, both a catalogue of rights that it has developed itself but also the European Convention on Human Rights as such, and although there has often been speculation about divergence or clash between Luxembourg and Strasbourg, it has not really happened. That does not mean it will not happen in the future because the Charter is the new element of course. However, there is another new element as well which is the possible accession of the European Union as such to the European Convention. We certainly hope that will happen rather soon and the new Treaty makes it possible for that to happen, so the EU as a whole and its institutions will be bound, as its Member States are now, by the European Convention. I think that should also make divergence quite a lot less likely. I have no doubt that both Courts are well aware of the dangers of—

Q111 Chairman: But they are interpreting different documents, are they not?
Jonathan Faull: They are interpreting different documents but the Court of Justice, once the EU accedes to the European Convention, will be applying the Convention fully as well and will be bound by it and will use its interpretation of the Convention to inform its interpretation of the Charter. I do not think anybody can give you a guarantee that there will not be divergence, just as nobody can give you guarantees about the future relationship between national constitutional courts and the two European courts, but just last week the Presidents of the two Courts attended a lunch given by the justice ministers in the Council and you will not be surprised to hear—and I am not sure that I should say this on the record but it is pretty anodyne—they both said of course that every effort would be made to proceed together and not in any conflict. So who knows what the future holds, but I think both the past record and the prospect of the accession of the Union to the European Convention should mean that there will be harmonious development.

Q112 Chairman: We were given the impression by several people that this could be a rather long process. I do not think anybody disagrees with it but the sheer mechanisms—
Jonathan Faull: Of the accession?

Q113 Chairman: —And the other decisions that flow from it.
Jonathan Faull: That is true. Nobody can tell you, nobody can tell me how long the process of accession will take because it requires both our approval and the Council of Europe's approval, and even though the legal mechanics are not complicated, as you say, the political environment may be. The long relationship between Strasbourg and Luxembourg also has a vista ahead of it of years of development. There may be hiccups but, as I have said, so far this is not completely new territory. Both courts have moved essentially in a parallel way.

Q114 Chairman: And is there a timescale for the proposed Directive on transfer of proceedings in criminal cases?
Jonathan Faull: The short answer is no, if only because the pending proposal under the third pillar died on 30 November and will now have to be revived as a proposal for a Directive under the Lisbon Treaty. We will do it as fast as we can responsibly, but nobody can say exactly when it will happen.
Chairman: Thank you very much indeed, Mr Faull, and your colleagues, for joining us this afternoon. We very much appreciate the care you have taken in giving evidence to us and it has been extremely helpful to us in formulating our ideas and our response to what is happening in terms of justice co-operation. Thank you very much.

Tuesday 8 December 2009

Members present

Sir Alan Beith, in the Chair

Mr David Heath	Dr Nick Palmer
Mr Douglas Hogg	Mrs Linda Riordan
Alun Michael	Mr Andrew Turner

Witnesses: **Jodie Blackstock**, Senior Legal Officer (EU), JUSTICE, **Jago Russell**, Chief Executive, Fair Trials International, and **Nuala Mole**, Director, AIRE Centre, gave evidence.

Q115 Chairman: Welcome, Ms Blackstock, from JUSTICE, an organisation we are already familiar with, Ms Mole from AIRE. What does AIRE stand for?
Nuala Mole: Advice on Individual Rights in Europe.

Q116 Chairman: Thank you for that. And Mr Russell, whom some of us know—because when you were in the Scrutiny Unit you helped us with our inquiry into ecclesiastical appointments—
Jago Russell: Indeed, I did, yes.

Q117 Chairman: —which seemed to have some influence on subsequent events, having been at Amnesty International, I think, in between, were you not?
Jago Russell: I was at Liberty.

Q118 Chairman: I am sorry, Liberty, and now you are at Fair Trials International. The three of you are here because we are looking at justice issues in Europe. I thought I would start by asking you: do you have particular concerns about developments that will arise now that the Lisbon Treaty has come into force within the last week or so?
Nuala Mole: On the cross-border criminal justice issues?

Q119 Chairman: Yes. Our inquiry is about criminal justice issues. We are not here to discuss any of the wider or other issues about the Lisbon Treaty.
Nuala Mole: We had all hoped, rather vainly it turns out, that the Lisbon Treaty would mean that when the third pillar moved into the first pillar, or rather we lost the pillars altogether, the two new Treaties, the TEU and the TFEU (the Treaty on the European Union and the Treaty on the Functioning of the European Union), would moved into being a single unit so that everybody was involved in all the legislation. We hoped that this would mean that, unless they had specifically negotiated an opt-out, UK courts would be able to refer complex questions about the implementation of the EU cross-border justice measures to the ECJ.

Q120 Chairman: To the European Court of Justice?
Nuala Mole: Which is no longer called the European Court of Justice. Very confusingly, it is now called the CJEU, and you will probably forgive all of us if we continue to refer to it as the ECJ, because it takes a long time to get those—

Q121 Alun Michael: No!
Nuala Mole: You will not forgive us?

Q122 Alun Michael: I do not mind if you use words but not initials.
Nuala Mole: Okay; European Court of Justice.

Q123 Chairman: I have to say, some of us were in Brussels yesterday and found it was normally referred to as the European Court of Justice still, even by those in the most senior positions there.
Nuala Mole: I think it is going to take a long time for people to start calling it the CJEU.

Q124 Chairman: Tell us what CJEU stands for?
Nuala Mole: Court of Justice of the European Union.

Q125 Chairman: We are, incidentally, not blaming you for any of these initials or details, but we need clarity.
Nuala Mole: Absolutely. It is even more confusing when they have, yet again, renumbered all the Articles of the Treaties so we have to go and learn them all again. It is a bit like being a taxi driver and they have turned all the one-way streets the wrong way round. The thing that does concern us, however, is that in Protocol 36 to the Lisbon Treaty—it has many protocols, 36 being one them—Article 10 says that for the next five years those states which had not already accepted the jurisdiction of the Court in relation to cross-border criminal justice matters would not have to opt in to the jurisdiction of the Court, they could stay out for five years. At the end of those five years, if they have not opted to be regulated and adjudicated by the Court, they will have to opt out of the whole cross-border justice system altogether. The reason why we are concerned that this is happening is that this means that the decisions of the European Court, which are binding on everyone, including the UK, are made in cases which are coming from other jurisdictions and which are often not presented with the clarity and expertise that you might expect if they were coming from expert lawyers in the UK who were representing people in the House of Lords. This is, of course, not by any means true of all 27 jurisdictions, but there are some jurisdictions of the EU that have less experience in litigation in the European Court than others and less experience in the sort of litigation and the quality of litigation we are accustomed to see coming from our courts to Luxembourg.

Q126 Chairman: Is it not a bit patronising and colonialist when we say that these lesser countries do not do this properly?
Nuala Mole: Absolutely not. I have spent most of the last 15 years working in those countries and the judges and senior judges of the Supreme Courts will be the very first people agree to with me that they have less experience, particularly the ones who have only recently joined the European system. They have only had two years of the opportunity to refer cases to Luxembourg, whereas we have had 40. It is entirely to do with experience; nothing to do with being patronising.
Jago Russell: I would like to reiterate Nuala's comments about the continued inability to refer cases to the European Court of Justice from the UK. In particular, there are many questions that need to be addressed in terms of the operation of the European Arrest Warrant and questions where we could get a great deal of clarity by being able to have cases referred from the UK to the European Court, and, unfortunately, we are going to have to continue for a number or years without clarification on those questions. In particular, there are issues around proportionality and whether the European Arrest Warrant should be used for minor offences.

Q127 Chairman: We will come to the Arrest Warrant *per se* shortly, but perhaps you could clarify what is it that is impeding our ability in this country to refer matters directly to the European Court of Justice? Can you make that point clear?
Jago Russell: Absolutely. It is rather a complicated legal point, and I think Nuala has explained it much better than I could already. Basically, for a long time there has been an opt-out from a number of countries, including the UK, on the ability to refer cases to the European Court of Justice.

Q128 Chairman: It is our choice we are talking about.
Jago Russell: And we have chosen not to use the opportunity of the Lisbon Treaty to revoke that opt-out; so it remains in place.

Q129 Chairman: What you are complaining about is not what is in the Lisbon Treaty, except that the Lisbon Treaty still enables the British Government to choose to opt out of provisions under which it could refer these issues to the European Court of Justice?
Jago Russell: That is absolutely right. One thing, on a positive note, that I would say about the Lisbon Treaty is we are very excited about the possibility of engaging with the European Parliament more on legislation, particularly in the area of fundamental defence rights, which it seems to me should be the building blocks of a system of mutual recognition across Europe. Because of the previous absence of powers of the European Parliament in those areas, they have been unable to place any pressure on Member State governments to agree these fundamentally important instruments to protect defence rights across Europe and, hopefully, now the European Parliament will have a more active role in that area.

Q130 Chairman: Do you foresee any difficulty arising from the fact that we are going to have the Strasbourg Court and our own courts enforcing the European Convention on Human Rights, or, indeed, applying the Convention to cases which are brought to them and, at the same time, the European Court of Justice applying the Charter of Fundamental Freedoms and developing a case law around that which might be different from the case law developing under ECHR?
Jodie Blackstock: I think the starting point on that is that currently that is what Luxembourg is doing anyway. The ECJ looks to Strasbourg whenever it is considering issues that might have a European Convention on Human Rights angle to them, and we saw that last year in the *Kadi* case, which was quite seminal. It was a case concerning asset freezing in relation to quite a number of organisations, in fact, that were on a UN list of potential terrorists and, therefore, the UN Resolution required the assets of those listed persons to be frozen. In the *Kadi* case it was the Grand Chamber at Strasbourg, following a decision of the Court of First Instance, which said we have to, as a European organisation dealing with European Member States (Member States of not only the EU but of the Council of Europe, look at our obligations under the European Convention on Human Rights. That obligation requires us to give people an opportunity to make representations on whether they should be listed or not. So the outcome of that hearing was that it was a breach of Convention rights—the Article 6 right to a fair trial, to a hearing being applied to the right to property contained in Article 1, Protocol 1—not to be given that opportunity. There is a whole raft of cases, which I am sure if Nuala needed to name she could, of circumstances where the Court in Luxembourg has considered the Strasbourg jurisprudence in any event. What the Charter does is list in one comprehensive place the European Convention on Human Rights, the obligations to consider human rights issues under the Treaty on the European Union and the jurisprudence that has developed within those courts. So it does not actually expand upon the Convention rights in any event. In terms of what impact that might have, certainly, in our view, the starting point for the ECJ will be to look at what the Strasbourg Court has said in terms of the minimum human rights implications of any implementation of European legislation, and then, if need be, it can build upon that. I think the thing to consider most importantly with any jurisdiction of the ECJ is that when it is looking at the Charter it is only looking at Member States implementing EU legislation and the EU institutions drafting EU legislation. So its remit cannot go wider into domestic legislation. That will still be something that remains purely within the remit of Strasbourg.

Q131 Alun Michael: For clarity, is every single reference to the ECJ to the European Court of Justice?
Jodie Blackstock: Yes, if it was Strasbourg it would be European Court of Human Rights.

Q132 Alun Michael: It just could be anything. Ever since the Rural Affairs Forum was referred to as the RAF I have felt it wise to ask what a person who uses initials is talking about!
Jodie Blackstock: I do apologise. I cannot think that ECJ could mean anything else in this context.

Q133 Alun Michael: I bet it can.
Jodie Blackstock: It might well do, but not in this context.

Q134 Chairman: Is it a potential advantage, however, that, unlike the situation in the European Convention on Human Rights where it depends on an individual case finding its way to Strasbourg or being, effectively, enforced in a national jurisdiction, within the European Court of Justice infraction proceedings could be taken against a country for failing to put in place appropriate measures and that this is a potential bite which the European Convention enforcement process does not have?
Jodie Blackstock: Historically, the European Convention process initially was for that very purpose—it was supposed to be an interstate convention—and the Court in Strasbourg still has that jurisdiction, but the reality is that Member States do not take cases against each other very regularly. When we look back over the years, there have been few cases where that has actually been the case. [To Nuala Mole—I am not sure if you are disagreeing with me?] The benefit in the European Court of Justice process is that an individual can, during the course of a domestic proceeding, seek thier national court to make a preliminary reference to the Court in Luxembourg for clarification of how a piece of European legislation should be interpreted so it occurs much sooner in the process. The problem we have with Strasbourg at the moment is that it has 108,000 cases pending before it and the average time is six years before you might get a hearing. 95% of those cases (and this is me quoting Nuala and the AIRE Centre's work anyway, and I am sure you will step in if you wish to) are refused in any event. From a UK perspective, they have been part of the EU, as opposed to the Council of Europe, in this context. You have the possibility, if you were to take this route now following the Lisbon Treaty coming into force, of having much more speedy and effective justice in terms of the timescale as to what the outcome of the Court's decision will be. That is obviously yet to be decided, but given what we have seen so far in terms of adhering to Strasbourg jurisprudence, it may well be that cases that were brought arguing the Charter will be more effective. The reality, as we have heard, is that there is the transitional protocol anyway; so if the UK does not opt in during the next five years we cannot use this process.
Nuala Mole: I think the concerns that have been expressed both in committees in this House and in committees in the House of Lords were about delays in going to the European Court, which Jodie has just referred to, but also about the European Court ruling on matters of criminal justice which, essentially, had a very national characteristic. Those are the concerns that have been voiced in relation to this. I do not share those concerns because we are, in any event, bound by the decisions of the European Court of Justice when it rules on cases that have come from other countries about the meaning of the European legislation, because that binds us even if we cannot send our own cases there for adjudication by choice. The Court of Justice has already had considerable experience from asylum and immigration work moving from the third pillar to the first pillar, and there have been a number of references to the Court of Justice and infringement proceedings being taken in that field. It is interesting that not only can British courts not refer cross border criminal cases to the European Court of Justice, (as it used to be called) in the manner we have described, but also infringement proceedings cannot be taken in the Court against the UK for its failure to comply with European legislation. The one avenue that remains open for the UK to be brought before the Court (and as Jodie Blackstock has said this is a fairly rare phenomenon) is for an interstate case to be brought, but if there was a very serious breakdown of the function of the cross-border criminal justice mechanisms, in the way that we have seen with the very serious breakdown of the cross-border asylum and immigration mechanisms, it is not out of the question that a state might take another state and, in that case, the jurisdiction of the Court would not be excluded. That has not been put in what used to be Article 35 of the old Treaty on the European Union. But I should say that there are two other things that ought to be mentioned. The Court (the ECJ) has in many cases in the last 15 years done a comprehensive review of the case law of the European Court of Human Rights and, in a recent decision called *Elgafaji*, which was about what was the meaning of "serious harm" when somebody was being returned to Iraq, the question that was put to it was (I paraphrase): did what was written in the Directive mean the same as the corresponding prohibition in the European Convention on Human Rights? And the Court went very painstakingly through all the relevant jurisprudence of the European Convention on Human Rights. But it emphasised that in interpreting a piece of community legislation it must take into account, and not divert or depart from, the jurisprudence of the Strasbourg Court, but it must, nevertheless, give a community meaning to "community provisions" because that is what it is all about; and I think it reached a very wise decision, which no-one could take exception to on the grounds that the court had thoroughly explored all avenues making sure that both legal orders were kept together. Of course, if and when the Fourteenth Protocol to the European Convention on Human Rights is ever ratified—though we were told in Strasbourg last week that it might be before Christmas—then the EU will be able to join the Council of Europe and that will bring with it its own interesting changes.

Q135 Mr Hogg: I want to be clear about this. I am only a criminal hack, so I do not experience the law at your levels, but as I understand what is being said,

it is something like this, that in respect of the matters that fall within the competence of the ECJ, Convention rights, as they have hitherto been interpreted by Strasbourg, will not prevail against a contrary opinion by the ECJ. That is what I understand you to be saying. Is that correct?
Nuala Mole: The ECJ, or the CJEU, as it is now called.

Q136 Mr Hogg: Let us call it one thing, please.
Nuala Mole: Can we call it the ECJ? The ECJ will strive strenuously—

Q137 Mr Hogg: Maybe it will, but am I right in saying that, ultimately, the ECJ has the power to overrule Strasbourg with regard to Convention rights which fall within the competence of matters which are within the jurisdiction of the ECJ?
Nuala Mole: That is a very technical lawyer's question you are asking me.

Q138 Mr Hogg: And I would like rather a technical answer, please?
Nuala Mole: The technical answer is that the judgments of the European Court on Human Rights are not binding *erga omnes*. That means they do not bind everybody. It is not like a decision of the House of Lords here, or what used to be the House of Lords in the UK, which bound every other court in the country. The decisions of the Strasbourg Court are only binding technically, legally, in the particular case in which they are held. So it would be very difficult for the ECJ to overrule a decision of the Strasbourg Court as a matter of technical lawyers' law. What is theoretically possible is that the ECJ could reach a conclusion about the interpretation of a particular right that was a different conclusion from the conclusion that would be made by the Strasbourg Court, but there would not be a general problem of conflict of case law on that, and, as I say, both Courts struggle very, very hard to ensure that there is consistency and coherence on this.

Q139 Mr Hogg: I think you are, nonetheless, agreeing with me in this context, that if there was a matter within the competence of the ECJ under the Treaty which gave rise to rights of procedure or rights of representation which would necessarily be affected by the Convention, it is at least possible for the ECJ to pronounce a view, in that context, which provides a level of right lower than that provided under the Convention as hitherto it has been interpreted by the Strasbourg Court?
Nuala Mole: I think it might be theoretically possible for this to happen, but in practice—

Q140 Mr Hogg: That is not an argument for opting out, or staying out, is it?
Nuala Mole: For staying out?

Q141 Mr Hogg: Is it not perhaps an argument for opting out, or not opting in anyway.
Nuala Mole: In my experience of 30 years of litigating in both these Courts and working with the judges from both these Courts and for the national jurisdictions, I think it is so improbable that it would happen, unless it happened *per incuriam*, inadvertently. It might happen inadvertently because somebody in Luxembourg had not got their finger on the ball of the hundreds of judgments that come out of Strasbourg, but I think it is so unlikely it is improbable. The probability is zero that the ECJ would knowingly reduce the level of rights: because in all the instruments which have been adopted at EU level the rights protected are higher and more detailed and more comprehensive than those which are guaranteed under the European Convention on Human Rights. I cannot think of a single instance. They all expressly say in their recitals that nothing in these instruments shall be interpreted in a way which will lower the protection which is given. The recitals are not actually legally binding, but they are always taken into account because of looking at the teleological purpose of the legislation that was adopted. May I make one other final point about the Court? There has now been introduced a system of speedy referrals. This is picking up the points that have been made here in the UK about delays. There was a case which was referred from Bulgaria about the Returns Directive, about sending people back when they were rejected for asylum claims and about the length of time you could keep people in detention in those cases. The case was referred to the Luxembourg Court in the second week of September and was decided last week. So that is as speedy as you might hope to get from any judicial system.

Q142 Mr Hogg: The Clerk has reminded me (and it is an important point and I had overlooked it) that the EU is seeking to become a party to the ECHR. To what extent would that affect the problem that I have just referred you to?
Nuala Mole: It is not that the Council of Europe is becoming a party to the EU.

Q143 Mr Hogg: No, the EU is becoming a party to the ECHR.
Nuala Mole: No, exactly; that is my point. The Strasbourg institutions cannot be brought before the Luxembourg Court.
Mr Hogg: No, you are not getting my point.

Q144 Chairman: The implication is the other way round, the EU acceding to ECHR.
Nuala Mole: Yes, but my point is that if the EU accedes to the ECHR, it becomes a party to the ECHR in a similar way to the individual states, which are parties, and is, therefore, subject to the jurisdiction of the Strasbourg Court and bound by the outcome of any case in which it is a party in the same way as any state is.

Q145 Mr Hogg: Does that mean to say then that a decision in Strasbourg is binding on either the European Court of Justice or the institutions of the European Union if they are once party to the ECHR?
Nuala Mole: Nobody knows yet. We spent a day and a half discussing this in Strasbourg last week.

Q146 Mr Hogg: It seems to me rather rum for us all to have entered into treaty obligations the consequences of which are not understood. It is not your fault.
Nuala Mole: To be fair, all that has happened so far is that the legal gates have been opened to enable the EU, if it decides that it wants to, to accede to the European Convention on Human Rights. No accession has yet taken place, and it will doubtless be the subject of many, many hours of detailed negotiations.
Chairman: It was clear to us yesterday in Brussels that it will take quite a long time for this to happen, if it does. Can we move on to the other issue?

Q147 Alun Michael: Can I ask a supplementary on that point? On this issue of being binding, if the EU does accede, it would then require a case against the EU or one of the EU institutions for that decision to be binding on the EU. Is that correct?
Nuala Mole: Yes.

Q148 Mr Hogg: I am interested in the European Public Prosecutor, because I have some difficulty in understanding exactly what is going to happen. I understand that the jurisdiction, if invoked, will relate to offences as against the financial interests of the European Union. So far as I am aware, that is not the subject of any definition. Question one: if it applies to the UK, do we then have to define in our own statute law what those offences are? Secondly, I can conceive of considerable overlap here. For example, money laundering. Money laundering could well be an offence against UK law and against EU interests. What law is going to prevail, how is the charge going to be drawn, what are the laws of evidence and procedure to be invoked and who is going to decide whether, within a court of the United Kingdom, the European Public Prosecutor, or, for example, the Serious Fraud Office, brings the relevant charges? I simply do not understand the answer to any of those questions.
Jago Russell: Can I pitch in and say I do not either. Really, the problem with the proposal for the European Public Prosecutor is that there is a passing reference to it in the Treaty and there is very little detail there at all. I think, before anybody can hazard an answer to any of those questions, a lot more thinking needs to be done, particularly on these questions about how the role of the European Public Prosecutor would relate to the role of prosecutors in EU Member States and which are the offences of pan-European interest which justify the European Public Prosecutor taking the case, as opposed to the domestic prosecutor. I am afraid I do not have an answer to that and, I suspect, until more work is done on it, it would be very difficult to provide an answer about how it would work in practice if, indeed, it ever materialises.
Nuala Mole: I think it was primarily a twinkle in Commissioner Frattini's eye and I do not think that it has actually got very much further than that. It is certainly not, as far as I am aware, gestating at present. I would agree with what Jago and Jodie, who are nodding, have said, but I also think that there is far more fundamental work that has got to be done in getting the existing mechanisms for cross-border criminal justice working more efficiently and effectively, and with a more rounded approach than is happening at present, before we start getting into any more new institutions like public prosecutors. I do not think any of us at this table are worrying about the public prosecutor yet.

Q149 Chairman: The evidence which we took yesterday, some of which will be published with our report, informed a similar impression. There was not much excitement about the idea. Would I be right in thinking that the likeliest course, if such a person were to come into existence at all, would be that he would be created by a smaller number of states using the more voluntary co-operation procedure, which they can do if the Council declines to go along this road?
Nuala Mole: It is Article 69E of the Treaty of Lisbon that gives the possibility to set up the Office of the Public Prosecutor, but it does not mandate the setting up; it merely, as with many other provisions of Lisbon, opens the gates towards doing something if and when everybody gets round to doing it. It is not like, "There shall be a Court of Justice." For example, the Treaty also foresees the possibility of having specialised lower courts, if you like, very similar to the Court of First Instance, which could deal with some of the more specialised areas of EU law, but that does not mean to say they are setting them up; it is just opening the possibility for them to be set up without having to have a whole new Treaty revision again.

Q150 Chairman: A lot of these Christmas presents may be left on the tree!
Nuala Mole: Absolutely.

Q151 Dr Palmer: The House of Lords Committee observed that under the present system, without a European Public Prosecutor, there is a lack of vigour in the pursuit of offences which only affect the finances of the European Union because no national body particularly cares, and yet we are all concerned and all affected by offences which reduce the income of the European Union because we end up having to pay more. Is that not a problem?
Nuala Mole: I think most of the offences that you are talking about and the Lords Committee was talking about are the kind of offences which come up before the Court of Auditors at present, and they are mostly to do with the misspending or fraudulent obtaining of EU funds. If people are found by the Court of Auditors to have misspent or fraudulently obtained EU funds, then the Court and the Commission do have the powers to recoup those funds—and they can get them back, not exactly in the way that a public prosecutor would—and, of course, they have the ultimate sanction, which is the individuals concerned can never get a penny or a euro of EU money ever again.

Q152 Dr Palmer: So you do not agree there is a problem. You think the Committee is wrong when they say that the national bodies are lacklustre on that?

Nuala Mole: I do not think that they are wrong. I just think that the Court of Auditors could be encouraged to conduct its work with more vigilance and diligence and the Commission could respond to the Court of Auditors' findings. It is probably the most efficient and expert body within the EU institutions.

Q153 Alun Michael: I would like to ask about the impact of the current development on the issue of data sharing. Again, referring to the evidence we heard during our day in Brussels yesterday, we heard quite a bit about data protection, we had references made to the concept of privacy by design, we heard from Peter Hustinx, and he referred to moves towards an information management model. Can I ask whether the three of you have views about the impact on the law and practice in respect of data sharing?

Jago Russell: My general comments would be that there does seem to be a hole in respect of data protection legislation covering data held in relation to criminal proceedings, and that is something that we have been concerned about for a long time. There have been a lot of moves in terms of sharing evidence and information held by police amongst different EU Member States, and one of the very practical concerns we have about that is the accuracy of the data that is being held. Of course, you cannot always know, and it would not be appropriate for suspects always to know when information about them is being shared by criminal justice agencies across Europe, but there are real concerns about how we then make sure that information that is held is accurate.

Q154 Alun Michael: I understand the generalised concerns, but what I am trying to get to is the implications of the changes in the Stockholm Programme, and so on, for the way in which issues of data sharing are dealt with within Europe.

Jago Russell: I would have to go away and look at those in more detail, I am afraid. As a fair trials organisation concerned with fair trial rights, the kind of issues that we come across are the general points that I have made in terms of the accuracy of criminal record information, but in terms of specific proposals—

Q155 Alun Michael: I understand where the concerns lie and, of course, the question of accuracy and the question of citizens being able to identify what is held on them, and all the rest of it, is important. The problem is that a lot of the time there is tension between the importance of data being shared because of the importance of that sharing to the citizen, or citizens in general, and there are issues of judgments to be made. I am concerned to be clear about what the implications are for the process and for balanced judgments to be made about where it is appropriate to share data and where it is not.

Nuala Mole: I think this is one area where the concerns that have already been expressed about the interface between the European Convention on Human Rights and EU law come to help us: because under Article 8 of the European Convention on Human Rights the collection, retention and dissemination of private data about an individual constitutes an interference with the right to respect for private life, and every interference—so every incident of collection, retention or dissemination—has to be justified under the second paragraph of Article 8. That means that the state, or the collectivity of states (and I will come back to that in a moment) has to show that each separate collection, retention and dissemination is justified for the purpose for which it was collected and not for any other purpose; and the Strasbourg Court has been very clear and robust in saying that states cannot hide behind the fact that there is an EU system in place to justify them violating their prior obligations under the European Convention on Human Rights, and I cannot imagine that they would take a different approach to this issue from the approach they have taken to others.

Q156 Alun Michael: I do understand that and I appreciate the importance of those protections. However, there is a tendency in practice, as we have found on a variety of occasions, for people to go to the default mechanisms, saying, essentially, "If in doubt, do not share data", which is actually the wrong conclusion. The conclusion ought to be to properly ask the questions and determine whether it is appropriate to be shared or not, particularly for the purposes of crime prevention, for example. What I am trying to tease out is what the current set of changes is likely to do in terms of that. We do hear from the Council of Europe rather a lot of the one side of the equation but not of how you get a proper judgment.

Nuala Mole: I think Eurojust has had a very, very positive experience of using shared information in order to investigate and pursue, prosecute and convict criminals in situations where it would not otherwise have been. I think, as with Jago, the concerns on this side of the table are (1) about the accuracy of the information that is stored and (2) about how do you get information which is inaccurate undone? We all have experience, I think, of having had clients who were inadvertently put on the Schengen List, after their passports had been stolen by somebody who then committed a criminal offence in their identities, and it taking literally years to get their names off the Schengen List.

Q157 Alun Michael: I understand all that. Clearly you continue to have those concerns, but my question was do you see anything in the changes in the Stockholm Programme, in any of the new arrangements that we are coming into, that is likely to either improve or lead to a deterioration in regard to those issues?

Nuala Mole: Like Jago, I would have to say I do not think I have looked into that as thoroughly as I would want to in order to give you a proper and accurate answer.

Q158 Alun Michael: I would be very interested in any supplementary comments on those issues then.
Nuala Mole: Indeed.
Jodie Blackstock: I think the only thing that I have picked up on in relation to the Stockholm Programme on data is the benefit of trying to create one data protection system. We had, in November last year, a Framework Decision on the impact for criminal justice, co-operation in criminal matters, in relation to data protection, entirely outside the other data protection instruments such that, in criminal matters, you were supposed to follow this route; whereas what do you do with all the other instruments that have been created? In none of these instruments has there been the option for the person affected by these instruments to have a role. There is more of that seen in the criminal justice instrument, but it is still very much piecemeal and optional as to whether that person can make representations, and that is the real issue that we see from a practitioner perspective: because once you are on a list it is very difficult to get off it and even to know that you are on it in the first place. That may not be an issue, necessarily, for data protection instruments from the outset; it is an issue for the instruments by which you become listed in the first place. For example, the Convention which establishes the Schengen information system and the contracting parties to that Convention does allow for people who are subjected to the flagging alerts on that system—so if you are wanted for arrest, for example, you would fall under that system—to take their case to any contracting party and argue for the amendment or removal from that list. From the UK perspective, we opt in to the process, we do not allow the representations—which, again, is a frustration like the ECJ opt-out that we have heard about. From my perspective, what might be beneficial, as this issue evolves, is to see more in the data protection instruments to afford the person affected to have a greater role in terms of making representations. The only observations we made, as, again, a criminal focused briefing on the Stockholm Programme, was a disappointment that there was not a reference to the European Data Protection Supervisor and to Peter Hustinx having an involvement in the dialogue; and it seems a frustration from his perspective, from the reports that I have read of his in the past, that it seems to be a sort of last resort to consult him on any of this process and it really should be an issue that that agency has a role in. The supervisor really should be consulted.
Chairman: I appreciate that these are complex and important issues which require quite a bit of explanation, but I am also very conscious that there are a number of other issues which it would be wrong for us not to give you the opportunity of commenting on. I am, therefore, going to switch to Linda Riordan and to a couple of other colleagues who have quite different issues which I know are within your area.

Q159 Mrs Riordan: What steps should be taken to ensure that the e-Justice portal improves fundamental rights?
Jodie Blackstock: I attended a meeting in February about the e-Justice portal at the Justice Forum in Brussels and at that meeting there were experts from many Member States and many organisations which were at that point very sceptical about the e-Justice portal as something that would work in practice. The idea is one which is a good idea, certainly in principle. How it effectively it is going to be rolled out is another matter. It was supposed to become live on 14 December. That has been put back and no date has been proposed as to when the portal might become available. From a defence perspective, and even indeed from a victim's perspective, if we are going to use those phrases, which are very EU-speak, the advantage is knowing what rights are available to you in any given Member State, what the Justice system might be if you were to become embroiled in it in any Member State. The problem with that is keeping up to date so that the information remains accurate and translating it into 23 different languages as a minimum. At that meeting the Commission did say quite optimistically that that would be something that Europe would take a role for, I think. Since then that has quietly been diluted and perhaps it might become a Member State responsibility. The idea as we understood it then was that each Member State would take responsibility for its own content and there would then be a linking system so that anyone who went onto the portal could find their way to each Member State's given information. The problem with that is that you are not going to get a representative and uniform set of principles and information about each country. It is very ambitious ultimately and perhaps it would be better—

Q160 Chairman: Courageous, as they used to say in *Yes, Minister.*
Jodie Blackstock: Yes—and perhaps it would be better to limit its reach and focus on a few fundamental issues such as if you are a suspected person what should you know about if you were to be arrested, for example, what are your rights when you are taken to a police station. Something like that would be a very good starting point from a defence perspective in our view.
Nuala Mole: The problems that we have seen in the Strasbourg institutions is that very basic concepts like a criminal charge or a suspect or a witness or an accused person are all different in all the different national legal systems and you have got to have an autonomous concept like you have for Strasbourg case law, which does not mean that you have to change your national definition of what is a suspect or what is a criminal charge; it just means that when you are applying the European Convention on Human Rights you have to apply the European Convention on Human Rights to a person who has been charged according to the autonomous concept at Strasbourg, and I do not think that can happen before the portal has had a trial run and we will see what will happen then. It should go very slowly because the slower it goes the more likely we are to iron out the wrinkles on the way.

Jago Russell: I would very briefly like to add that there could be value, obviously, in having information somewhere about your rights in another legal system, but for me the most important thing, if you are talking about defendants' rights, and defendants do not often have access to the internet when they are first arrested, is to make sure they have basic letters of rights, basic information about their rights as defendants—can they see a lawyer, can they have interpretation and translation, and those things provided to them at the time of arrest or as soon as they arrive at a police station. In practical terms for defendants that is far more important than information on a website, however brilliant the information is.

Jodie Blackstock: Rather than focusing on that being in some kind of technological portal, we should focus on what is going to be proposed very shortly as Measure B on the Road Map, which you might be aware is one of the issues raised in our set of questions that you might consider, the Road Map being the Swedish Presidency's Resolution 4 for, action on procedural safeguards for suspects in criminal proceedings. We have just had the interpretation and translation proposal, which is Measure A. That has had a general approach agreed within the Justice and Home Affairs Council. That means essentially that all Member States agreed with the idea and the content of the proposal (it currently is a framework decision; it will be a directive) going forward. Measure B is notification of rights and notification of the charge, so the idea with Measure B is what we have referred to as a letter of rights. In the UK, wherever you are arrested, you are informed of what your rights are. You can have a lawyer, you can have a phone call, you are told that you have the right to remain silent, and, obviously, you have your inferences if you do remain silent. You do not get that in most Member States and it is quite surprising. Things such as consular assistance also are very important if you are arrested in another Member State because with consular assistance—

Chairman: It looks like you are widening the question now. In order not to miss out on it, I wanted to get onto issues around recognition and the European arrest warrant, so I am going to switch to Dr Palmer.

Q161 Dr Palmer: The Law Society suggested that a proportionality test should be introduced for the issuance of a European arrest warrant. There are obviously two aspects here. On the one hand we do not want, in times of increasing geographical mobility, all kinds of relatively minor crimes which will be simply skipped because we cannot be bothered to issue a warrant. On the other hand, we do not want to clog up the system. What is your view?

Jago Russell: Can I link that question to this question of the Road Map and procedural rights because I do not think you can separate them? I think mutual recognition and instruments like the European arrest warrant were built on the idea that across Europe suspects and defendants would be guaranteed basic rights. In my view they have put the cart before the horse somewhat in passing the European arrest warrant and using that before these minimum procedural rights have been put in place. While I support the idea of co-operation across Europe to bring people to justice, it seems to me that if you are going to recognise in a "no questions asked" way decisions of other courts you also have to have confidence that those courts in those countries are indeed respecting basic rights. On the European arrest warrant and the question of proportionality, I think that Member States themselves have been taken aback by the number of warrants that have been issued; I think over 13,000 were issued across Europe in 2008. In a meeting a couple of weeks ago organised by the European Commission on the question of proportionality an Irish judge said that the average cost per arrest warrant case in Ireland was €25,000, so it is not surprising to me that Member States are starting to raise concerns about European arrest warrants being used for minor offences, but from a human rights perspective there are also major concerns about that because you have to think about the impact of extradition. It is called "surrender" but in reality it is extradition and for the suspect it is exactly the same thing. You get arrested, torn from your home and shipped off to a foreign country. To put somebody through that for a very minor offence where there could be other alternatives to bring that person to justice or to demand a fine or something like that is a completely disproportionate interference with their right to respect for private and family life. I think that if faith in the European arrest warrant scheme is to be maintained, that is one of a number of issues that really needs to be addressed—

Q162 Chairman: You understand why the British Government was so opposed to the idea of proportionality being on the face of the European arrest warrant.

Jago Russell: I know now that there is major concern in many EU Member States, including the UK, and the Commission, on the question of re-opening the framework decision on the European arrest warrant at all, is terrified that if amendments are made now to the European arrest warrant legislation, to the framework decision, the whole thing will unravel because this is not the only area where there are problems with how it is operating. I can see from a political point of view that there could be problems if you completely reopened the framework decision on the European arrest warrant. The principled argument is who are we in the UK to say what is or is not an appropriate crime for which a warrant should be issued in another country, so the kind of case we see hundreds of in the UK, things like people being extradited for stealing chickens. Three weeks ago there was a decision. A guy was extradited to Romania for stealing ten chickens. That is not what the European arrest warrant was designed for, but the Romanian government would say, "Actually, stealing chickens is quite a serious thing in Romania and therefore we think it is completely appropriate to issue a warrant for it". I think ultimately, unless there is some common agreement reached amongst EU Member States about what it is appropriate to use this very coercive measure for, then the whole thing could well unravel.

Q163 Dr Palmer: Is there not a distinction between the point, which I understand as entirely legitimate, that people should be informed of their rights if they are subject to an arrest warrant and the issue of whether, if that were to be the case, arrest warrants should in some way be subject to some sort of semi-arbitrary test where the country in which the suspect resides says, "I do not think that is a very important offence"? Within Britain that certainly would not apply. If somebody steals chickens in Bognor Regis and the case comes up in Hastings it certainly would not be up to the people in Hastings to say, "I think this is not very important". Why should we be able to do that across borders?
Jodie Blackstock: It would be a CPS decision. In this country we have the prosecutor test. We have to establish whether it is in the public interest to bring a case and we have to establish an evidential test that there is a realistic prospect of conviction in any case that is considered. In a lot of Member States there is not that threshold to pass. If a complaint is made by a member of the public it has to be prosecuted. That is why we find disproportionately a large number of the requests to this country come from Poland because they do not have that test. This year there were 516 people surrendered from the UK on arrest warrants. There is not a breakdown as to the percentage of those that come from each Member State but that is a large amount of surrenders for an instrument that was designed originally to combat the concerns of terrorism as a result of the 9/11 attacks.

Q164 Chairman: I do not think it was ever suggested that the European arrest warrant was to be confined to terrorists.
Jodie Blackstock: It was not to be confined to terrorists but it was to be confined to serious offences, and it passed through much quicker than any other piece of legislation in this area because of those concerns. At the time the European Parliament was assured that an instrument in relation to defence safeguards would closely follow this instrument and that has not happened. The primary concern when we talk about proportionality is the issue of a public interest test. There was another case last month, just as an example, where a person was returned to the Czech Republic for failing to send their children to school. All of them were residing in the UK. One of the arguments raised was an Article 8 right to family life, what would happen to the children if they were returned to the Czech Republic to serve their sentence in prison under an offence which here would be a summary offence, arguably. The court said, "There are people here that could look after the children". Whilst there may well be someone it will not be the mother. A large problem with this instrument is the mutual recognition aspect of it where our courts, and any court within the European Union, has to defer to the Member State which is seeking the warrant, and there are very few cases, no matter which issue you argue, where our courts are prepared to consider those arguments as a bar to the surrender of a person to another EU Member State.

Q165 Dr Palmer: Can I be sure that I have understood correctly what you are saying? You are saying that there are Member States where any complaint, however frivolous, however implausible, must lead to an arrest warrant?
Nuala Mole: In many Member States, particularly in central and eastern Europe, the prosecutor is obliged to take action when a member of the public deposits a complaint alleging that a criminal offence has been committed. The prosecutor is not obliged to issue a European arrest warrant to catch that person. Under the old system there were about 52 extradition requests a year dealt with in Bow Street Magistrates Court, and between January and August 2009 there were 635 EAWs, 50% of those coming from Poland. There were still only 59 extradition cases from the rest of the world to the UK. There is a lady a colleague of mine told me about this afternoon sitting in Holloway at the moment being returned to the Baltic States under a European arrest warrant for having obtained a mobile phone—one mobile phone—by deception. She is seven months' pregnant and by the time they manage to deal with the arrest warrant she will be due to give birth to the baby and will have completed enough time in detention in Holloway to have served her sentence, but she has got to be put through the whole process because the problem with the European arrest warrant is that it leaves no flexibility. This is one of the reasons why we are very concerned about the UK's opt-out of the Court of Justice, because our courts and particularly down the road in Horseferry Road in the Westminster Magistrates Court where they process them all would really appreciate it if they could say to the Court of Justice, "Do we really have automatically to execute a European arrest warrant when it is for half a gram of cannabis or three Ecstasy tablets or two car tyres, because we go through £25,000 worth of work in order to detain these people in prison before the arrest warrant is executed?".

Q166 Chairman: I think that is clear now and unfortunately—
Nuala Mole: May I just make one very final point?

Q167 Chairman: No; I am afraid we have run out time.
Nuala Mole: One tiny final point?

Q168 Chairman: I am afraid we are running out of time in this session. You have made the point very clearly indeed. You have lots of things you wanted to tell us. We are very grateful for your evidence.
Nuala Mole: Is it going to be possible for us to give you some further submissions in writing?
Chairman: Yes, by all means.

Q169 Alun Michael: Could we ask that other issues such as the victims issue, which we have not touched on at all, could be part of that supplementary evidence?
Nuala Mole: Yes.
Chairman: Yes. Thank you.

Tuesday 5 January 2010

Members present

Sir Alan Beith, in the Chair

Mr David Heath
Julie Morgan
Alun Michael

Witness: **Mike Kennedy CBE**, Chief Operating Officer, CPS and former President of Eurojust, gave evidence.

Q170 Chairman: Mr Kennedy, thank you very much for coming in early. We were not expecting to see you until 4.15 but we have some practical problems this afternoon, some of which arise from snow and some from a clash of meetings affecting both witnesses and members of the Committee and therefore as the evidence sub-committee we hope to take the opportunity to ask you some questions between now and 4.30 and then we will see the Data Protection Commissioner at 4.30. Recently Mr Michael and I were both present at a visit to Brussels to look at how things like Eurojust function and how these things are developing, where your name is well-known. Can you give us a thumbnail indication of how the CPS and other prosecutors in the UK interact with Eurojust?

Mike Kennedy: First of all, the UK representation at Eurojust has been made up on a rolling basis of employees of the Crown Prosecution Service and indeed of other prosecution agencies both within the English and Welsh jurisdiction and the Scottish jurisdiction. So there has been first my own appointment as the UK representative, and subsequently when I was elected as President, a prosecutor from the Revenue & Customs Prosecution Office was appointed to assist me. At the same time the Scots also appointed a representative to come and work with the UK team as my assistant who was a prosecutor from the Crown Office in Scotland, who spent three days a week working in The Hague and then two days a week working back in the Crown Office in Edinburgh. There has also been a series of periods of secondments of so-called "national experts"—that is the European term—but in fact these have been prosecutors from the Crown Prosecution Service and from the Revenue & Customs Prosecution Office. For example at the moment there is a prosecutor from the CPS in Kent who is on secondment for a year working with the UK national team which comprises a CPS prosecutor, who is seconded there as a national member, a Scottish representative again, and a Crown Prosecution Service prosecutor who is the assistant to the national member for the United Kingdom. There is this sort of regular representation of the prosecution services at Eurojust but in addition to that those representatives come back to the United Kingdom on a regular basis and meet with colleagues both within the Crown Prosecution Service and with Scottish counterparts. They give presentations and they meet also with investigating authorities—the Serious Organised Crime Agency and police forces across England and Wales—to make Eurojust better known and to offer advice about the facilities and the ability that Eurojust has to help co-ordinate investigations and prosecutions of a trans-national nature.

Q171 Chairman: The Lisbon Treaty confers an obligation that judicial co-operation in criminal matters should be based on the principle of mutual recognition of judgments and judicial decisions. Do you foresee much difficulty in giving that practical effect?

Mike Kennedy: There is always going to be difficulty in that sort of arrangement but it is the best arrangement and it is, in effect, relatively simple in terms of concept. Actually making it work in practice can be quite challenging but in fact experience has been extremely positive in relation to a number of Framework Decisions that have implemented the mutual recognition arrangements, in particular in relation to the European Arrest Warrant but also in relation to the mutual recognition of financial penalties in relation to confiscation orders in respect of assets and a whole series of orders that when made in one jurisdiction are recognised in another jurisdiction. As I am sure you understand, the concept is based on the essential basic stepping stones of the criminal justice investigation and prosecution process which, although different and perhaps described differently within the different jurisdictions of the European Union, are stepping stones that can be recognised and can be used to make a comparator and to have a counterpart decision or counterpart stepping stone within every criminal justice process. At the beginning of any process a crime will be committed, whether it is in Lithuania or Portugal or the UK. That crime will be committed at a particular point. Then there will be an investigation launched. Hopefully, there will be the gathering of evidence, there will be an arrest, there will be a decision made about bail, there will be a decision made as to whether to charge. Then there will be a criminal process gone through, decisions about bail, decisions on guilt or innocence ultimately and then a sentencing process. Along the way additional processes have developed in most jurisdictions to do for example with confiscation of criminal assets and so on. By recognising the particular stepping stone as part of the process in each of the jurisdictions it does enable much better co-operation and the alternatives of course are far more complex and would be far more difficult to implement.

Q172 Chairman: Will you ever have to make ad hoc judgments as the CPS that a particular country is not fulfilling one of these steps on a basis which allows us to treat it as one of complete mutual recognition?

Mike Kennedy: If a judgment or a decision has been made in accordance with the arrangements of the Framework Decision on mutual recognition then

the commitment and understanding of the Framework Decision and the arrangements on mutual decision is that that decision is recognised as a lawful decision in that particular country, so, for example, the issuance of a European arrest warrant in respect of a suspect would be something that would be recognised and would be acted upon by the Crown Prosecution Service, but if there was a clear and obvious defect in it, then the Crown Prosecution Service would have to make decisions on whether or not to proceed with that particular case.

Q173 Chairman: So it would be a decision that was so defective that it did not satisfy the conditions for mutual recognition?
Mike Kennedy: Yes.

Q174 Chairman: That option exists, does it?
Mike Kennedy: As far as I understand it does, yes. For example, with the European arrest warrant, the form is long and detailed and complex and if part of that form was not completed, if there was insufficient information on the face of it for it to be recognised as an effective warrant, then questions would be asked about it. As the Crown Prosecution Service we would be expected to act on behalf of the country that was seeking the return of the individual and we would have to make decisions and advise that country on the validity or the chances of success in gaining the surrender of that individual through the means of the warrant.

Q175 Julie Morgan: Is there any evidence of the need for a European Public Prosecutor and, if so, what role do you think that person should play and how would it relate to the role of the prosecutors in the EU Member States?
Mike Kennedy: There has been a lot of talk for many years now about the possibility of there being a European Public Prosecutor and the suggestion has been on the basis of theory. I do not think there has really been any detailed analysis of what the benefits might be and indeed simply the mention of a European Public Prosecutor raises questions about exactly what this might mean and how it might operate. Would there be a universal jurisdiction across the whole of the EU for example? Would that prosecutor simply prosecute cases in that new jurisdiction? Would it be an office set up to prosecute cases within one of the 30 jurisdictions? So all sorts of questions need to be asked about what this really means but from a practical point of view I did not see any real benefit during my time working at Eurojust for there to be a European Public Prosecutor. In my view, the effectiveness of Eurojust should negate the need for a European Public Prosecutor. If there were a need for a European Public Prosecutor one would have expected a huge number of case referrals from an organisation called OLAF, of which I am sure you have heard, l'Office européen de Lutte Anti-Fraude. It is a French acronym. That organisation has the responsibility for investigating administrative misdemeanours and particularly financial irregularities relating to the use of the European Union's budget. It is an organisation that does not have any criminal investigative powers nor powers to prosecute but one would have expected, I would have expected there to be a lot of cases referred by that organisation to Eurojust had there been a need for, as it were, cross-European co-operative action. Such an instrument, such an organisation would be hugely expensive and the benefits are minimal. I do not think there has ever been any cost-benefit analysis because there simply do not seem to be the cases referred and although people do talk one never actually gets the specifics as to what this might mean.

Q176 Julie Morgan: So as far as you are concerned there is no evidence of the need?
Mike Kennedy: I did not see any evidence of the need. In theory, if one were starting with a blank sheet of paper and we did not have any European Union jurisdictions it might be something that would be worth considering but, in my view, if Eurojust works effectively, if it works with the Member States and the investigating and prosecuting authorities in the Member States to co-ordinate the investigations and the prosecutions subsequently, then there should be no need for a European Public Prosecutor.

Q177 Chairman: And no need for Eurojust itself to have any sort of initiating powers for criminal proceedings?
Mike Kennedy: It depends what we really mean by "initiating powers". The benefit of Eurojust is that it does not have the authority or the capacity to make directional, mandatory orders or requests. It can simply make requests and put pressure subtly and indirectly on Member States to take action in particular cases. My experience was that even though we had this power when I was there it was rarely used formally. The threat or the possibility of it being used or discussions suggesting that it might be used were often sufficient to persuade authorities to take investigative or prosecutorial action.

Q178 Alun Michael: I wonder if we could look at the European Arrest Warrant. Do you think there are problems that need to be addressed through further legislation in terms of the way that the European Arrest Warrant works?
Mike Kennedy: The experience has been extremely positive. I worked ten or 15 years ago in the Crown Prosecution Service international section and the time it took to return fugitives through extradition arrangements in the 1990s was horrendously long. A number of countries would often not surrender fugitives for many years. Now the arrangements under the European Arrest Warrant have resulted in the surrender of fugitives within a matter of months and I think the deadlines that have been put in place by the warrant are hugely beneficial. We have seen numerous cases where fugitives have been returned within 50 or 60 days of the request being made, including a case that I am sure you have been told about, the Osman case to do with the July 2005 attempted bombings in London. There are a wide range of similar examples that can be quoted and I

think that is hugely beneficial. There have been some problems with proportionality in that some countries have decided to issue warrants in respect of relatively small amounts and I think that is being tackled. In my view, it is a hugely useful and beneficial instrument.

Q179 Alun Michael: Can you just develop that a little bit further? Are you saying that the issue of proportionality is being addressed and you think this will reach a satisfactory point without the need for legislation?
Mike Kennedy: I would hope it would reach a satisfactory conclusion without the need for legislation but I cannot say whether that is ultimately going to be the answer.

Q180 Alun Michael: What sort of time horizon would you place on that?
Mike Kennedy: I would like to see it done within the next 18 months. This instrument was one that was introduced extremely quickly in light, effectively, of the 9/11 bombings in the United States. The introduction with a time deadline for the instrument to be not only agreed but actually ratified and put into Member States' legislation by the beginning of January 2004 was an extremely tight deadline which was met by the majority of countries at the beginning of January. Others came later, but nonetheless this was a significant achievement and has resulted in a much more rapid return of fugitives who are wanted either to serve sentences or to face prosecution in the Member States.

Q181 Alun Michael: Are you satisfied that in those places where perhaps there is a disproportionate use—to look at the problem areas rather than the positives, which I accept—that that can be addressed satisfactorily in a sufficiently short timescale to be satisfactory from our perspective in the UK?
Mike Kennedy: Yes, I would hope so, and I think in the initial stages of the warrant there was experience in the UK of warrants being issued in cases where perhaps we ourselves as United Kingdom prosecutors would not have sought to issue warrants, and we have had a number of difficulties, and through Eurojust we were able to arrange to have officials and prosecutors from jurisdictions come together to talk about issues and problems that they had, either on a multi-lateral basis or indeed on an individual basis. For example, we were having a number of problems with the Polish authorities and they thought they were having problems with the UK authorities, and so we arranged a meeting to bring together two or three officials from each side with prosecutors and practitioners, effectively to bring their problem cases and talk them through with translation facilities in The Hague. I would not say we solved all the problems but a lot of mutual understanding and development of mutual trust helped to resolve a number of those cases.

Q182 Alun Michael: On an associated point we have had the comment from the Commission that the Union is seeking to establish a comprehensive system for obtaining evidence in cross-border cases and that this should include what has been described as a "real European Evidence Warrant" to replace existing legal instruments. What is your view on that?
Mike Kennedy: There has been, as it were, phase one of the European Evidence Warrant introduced already but, in fact, my view on this instrument is that it is—and it is a personal view—not actually as powerful as the 1959 Convention which has been in existence for 40 years now. I think that it will be difficult to develop a comprehensive European Evidence Warrant. That does not mean to say that attempts should not be made to negotiate an instrument of that sort. The difficulties often arise in relation to the admissibility of the evidence that is gathered and it is really important that if such an instrument is successfully agreed that it does address those sorts of problems because of course we have 30 different legal systems across the European Union and the rules of admissibility are quite different in each of those jurisdictions, and to cater for what is required by prosecutors in each of those jurisdictions will require a fairly complex piece of legal machinery to ensure that the evidence gathered can be used.

Q183 Alun Michael: Given the difficulty of going down that road what is the evidence of the need for such a step?
Mike Kennedy: The amount of cross-border crime in the European Union now is phenomenal. Of course we do not have a land border save with the Republic of Ireland, in the same way that for example prosecutor colleagues would in Luxembourg or Belgium where there are huge numbers of population living very close to the frontiers and crossing frontiers both to work on a daily basis but also perhaps to commit crime on a daily basis, so there is a need because there has been a huge growth in cross-border crime. I had a colleague in the Metropolitan Police recently tell me that nearly 80% of the non-domestic homicide cases that the Metropolitan Police investigated had some sort of element from outside the jurisdiction.

Q184 Alun Michael: What percentage, sorry?
Mike Kennedy: I think it was 80% he told me of non-domestic violence-type homicide cases had a link, whether it was a defendant or a witness or some evidence lodged outside the United Kingdom. There is a need on a very regular basis to gather evidence from abroad and so anything that would make that happen more smoothly and more effectively would be welcomed.

Q185 Alun Michael: But that demonstrates considerable evidence of the need for evidence cross-border. Is there evidence that a complete European framework of whatever sort is needed in order to facilitate that process?
Mike Kennedy: The existing arrangements are under the mutual legal assistance arrangements which are based on the initial and main Convention of 1959 which is a Council of Europe Convention. There have been some developments since then. The

European Union itself had a Convention on Mutual Legal Assistance that was introduced in 2000. I think there is a need to improve these relatively ad hoc arrangements and if something could be agreed pan-European Union so that there was a standard way of gathering evidence, it would offer certainty to investigators and prosecutors so that they would be able to say, "Look, I know I can get this evidence from Lithuania, Italy, wherever it might be, because there is a treaty and there are arrangements and I can go and talk to my counterparts in those countries and they have made a commitment to deliver material in this way," rather than at the moment the often rather ad hoc arrangements in writing letters of request that are sent off with a prayer hoping that they will work and not necessarily having any guarantee of success.

Q186 Alun Michael: What I am not clear from what you are saying is whether there is a need to make the existing system somewhat more robust and to improve it incrementally and to make it more comprehensive or whether there is a need to approach it from the other end of creating a fresh pan-European structure with the proposed European Evidence Warrant as a key element in that.
Mike Kennedy: Yes, ultimately, if that could be made to work then I think it would offer more certainty and would be a better arrangement than the current series of conventions.

Q187 Alun Michael: If that is the road to go down what lessons can be learned from the operation of the European Arrest Warrant for the way that that might be developed?
Mike Kennedy: I would hope that those drafting the legislation would listen to their practitioners and learn the lessons that have been learned through perhaps talking closely and making sure that things such as the proportionality issue that I mentioned are addressed effectively. I know certainly my own organisation, the Crown Prosecution Service, engages actively and regularly with both the Home Office and Ministry of Justice to ensure that those negotiating these arrangements are aware of the practical issues and problems and we hope to continue to do that.

Q188 Chairman: Mr Kennedy, you had a couple of points you thought you ought to draw to our attention, I think?
Mike Kennedy: I would obviously—and I would say this would I not—that investigating and prosecuting organisations within the United Kingdom should make the maximum use of Eurojust. I have just got some figures in preparation for this hearing from colleagues at Eurojust and it is interesting to see that the United Kingdom referred more cases to Eurojust than any other jurisdiction in the EU.

Q189 Chairman: If you could let us have those figures that would be very helpful.
Mike Kennedy: Yes, I would be happy to do that. It is the first time that that has happened and secondly, on the other side of the fence, as it were, the European Union Member States made more requests to the United Kingdom for assistance than any other jurisdiction, so not the maximum perhaps but very good use is being made of Eurojust by the UK and by Member States, and Eurojust itself has increased the number of case referrals on a regular basis since it started, often by as much as 40% or 50% on the previous year's case referrals. One point I did really want to make is I think it is really important that the other constituent organisations set up under the justice and home affairs arrangements within the EU—and I have already mentioned OLAF but also Europol—work effectively together. They were set up at slightly different times and with different arrangements in place and although there have been co-operation agreements reached between Eurojust and those two other bodies, the key to success for bringing criminals to justice is the effective co-operation between these organisations which have relatively different responsibilities but actually have a huge capacity which is not being developed to the fullest.

Q190 Chairman: Thank you very much indeed. If you could let us have those figures.
Mike Kennedy: I was going to make another point about confiscation of assets too because the Crown Prosecution Service is involved in the restraint and confiscation orders in respect of criminal assets. A lot of those assets are based abroad and I think that better use could be made of Eurojust in relation to the confiscation particularly of assets that are based abroad by using counterpart investigators and prosecutors to enforce orders made in this country in jurisdictions within the EU. There is a big fund out there that is not being used or is not being confiscated.

Q191 Chairman: That is a very helpful point and, as I say, also with the figures that you are going to provide us with we might well want to make use of that material as we continue our inquiry.
Mike Kennedy: By all means. Eurojust produces an annual report with these figures in and I suspect people are actually writing the report at this minute and incorporating those figures into it, but I can certainly send your Clerks copies of that information that I received a few days ago.
Chairman: Mr Kennedy, thank you very much indeed.

Witnesses: **Christopher Graham**, Information Commissioner, and **Stephen McCartney**, Head of Data Protection promotion, Information Commissioner's Office, gave evidence.

Chairman: Mr Graham, welcome. You will gather from earlier comment that we had to re-organise our proceedings but we are beginning our short session this afternoon with some questions about data protection in Europe for an inquiry we are carrying out and there are some other issues of which we have given you notice that we will talk about a little later. Mr Michael?

Q192 Alun Michael: The data protection Framework Decision adopted in June 2008 is due to be implemented later this year and the purpose is to enhance, as I understand it, data protection for individuals and improve information exchange between law enforcement authorities. How confident are you about the way that that is going to work?

Christopher Graham: I am something of a novice in this area, as you know. I started six months ago and I have only attended one meeting of the Article 29; group so my colleague Stephen McCartney is probably going to be more use to you in this part of the session. Before I ask Stephen who is head of our data protection promotion and works on the various sub-committees—Europol, Schengen, customs information, Eurodac, the working party on police and justice—to comment, perhaps I could offer a general observation. I think the approach to data protection in the justice sector in Europe has basically grown like topsy and it suffers from having no underpinning data protection legislation across the piece. It is the product of history, the third pillar and so on; you know all about it. One would hope that the European Union would take the opportunity of getting back to first principles. I think it is one of the seven habits of highly effective people to begin with the end in mind and, quite honestly, the end in mind should in this area be better law enforcement rather than getting into the nitty-gritty of means rather than ends. The best possible flow of data is not an end in itself. Possibly our colleagues in Europe would want to adopt the good French principle of *reculer pour mieux sauter*. If we can step back a bit and then take a good jump at the problem, we would come up with a more satisfactory solution. The document to which you referred seems to be trying to improve things from where we are now. Instead of saying things are changing, we have got to take a fundamental look. We have a patchwork, it is piecemeal, it is ad hoc, it is highly complex, it is deeply opaque, and, quite frankly, rather ineffective. We ought to take the opportunity not just of the Lisbon Treaty and the opportunity of taking the ex-third pillar into a proper decision-making process, but also to look at the impact of the information society, globalisation, the Single Market and the single European Union, joint citizenship and the major concerns about security to take holistic view of this thing rather than tinkering at the edges. That would be my general view.

Q193 Alun Michael: I suppose taking one step back and then taking a big jump forward is a good idea depending how close to the edge of the top of the cliff you are! With the discussions that we had when we were discussing with representatives in Europe recently, my concern at one stage was that the titles are all about data protection whereas there is always a judgment between protecting data and appropriate sharing of data which implies a judgment to be made in pretty well all circumstances. Some may be very clear; others may be more difficult to judge. I had the feeling—and I do not know whether the Chairman and others would agree—during the evidence session that actually the situation was more nuanced than that but nevertheless the language is very much of data protection not of data management. Is that a concern?

Christopher Graham: I think there are differences of view within the European Union and some of my colleagues, some of the data protection authorities take not just a purist view but see it as their role to stop things happening; whereas I think in the UK we take a more practical approach where we say here are tremendous opportunities provided by modern technology and the question is finding the balance between getting the best out of the opportunities that the technology provides and the necessary protection of privacy. If you simply begin by saying privacy is an absolute and we must stop things in the name of privacy, you do not get anything done. It is much more of a challenge to come up with that balance between getting the utility from technology while protecting privacy.

Q194 Alun Michael: I very much agree with that approach. The question is really whether there is a gap between that approach—a balanced approach if you like that the Information Commissioner's role has developed in the UK—and the general situation in Europe?

Christopher Graham: Yes, there is certainly a difference of emphasis and some of my colleagues would be much more purist and be driving very strictly on the privacy side and stopping things happening in a way which I do not think is helpful. However, in the same way we are sometimes characterised in the UK as being unnecessarily pragmatic and not taking enough notice of the privacy dimension, and that is not true. One must not caricature either point of view. There is a balance to be struck. Our worry in the Information Commissioner's Office is that the current structure of data protection within the European Union so far as justice matters are concerned is such a patchwork quilt that it is very difficult to get those very practical decisions taken because it is so bitty. I do not know whether my colleague would like to comment on that.

Q195 Chairman: Welcome by the way, Mr McCartney.

Stephen McCartney: Thank you very much. What I would say is I think that if you are going to do data protection well then you need to be considering the purposes for which data will be used. In fact, that is

a fundamental principle of data protection both at European level and at national level here in the UK. I think some of the differences that I have certainly experienced having worked within Europe and worked in the UK in data protection are that in Europe the fact that they work under a civil law system actually does lead to quite a different approach to data protection. You will notice that the conditions for processing, just as one example—and I do not want to get too boring and legalistic about it—are quite codified, a very European almost Germanic way of looking at information management, whereas here in the UK being a common law system we have a very different approach. Sometimes that leads to an expression of how data protection should be done that can come across as quite absolutist. Generally we find that within Europe we are a lot of the time dancing on the heads of pins in terms of the differences between us. Yes, we can have some quite heated debates about the width of the heads of those pins but I think generally it is more how these things are expressed rather than an actual gap or genuine difference or widely diverging difference in approach.

Q196 Alun Michael: You mean they are philosophical differences rather than practical differences?
Stephen McCartney: Sometimes, yes, very much so.

Q197 Chairman: Can I put a practical question then: are there areas in which it is desirable, say for public protection, to exchange data which we are either not doing because we are aware of some countries whose data protection is not good enough to risk sharing data or, conversely, are we doing so and taking rather too great a risk with data that would be protected here?
Stephen McCartney: Within Europe no. Certainly you will remember the Thomas/Walport data sharing review that was done. It was completed last year and they actually looked at this question in some depth and took a lot of evidence from a number of different parties about whether data protection law is hampering genuine, necessary, proportionate, sensible information sharing across a range of sectors, not just in the area of policing and justice, and they find that it is not actually within Europe and certainly not within the UK a problem that we are not sharing the information that needs to be shared. I think what you would probably find is that this would not be a data protection issue. This would probably be more about how intelligence and policing services approach the information that they are going to exchange and receive and the marking that they would put on the information and the substance that they would give the intelligence that they are both sharing and receiving.

Q198 Chairman: That is slightly misleading, is it not, because obviously bodies which collect intelligence are going to put very severe caveats on the use of intelligence to protect their sources but bodies which exchange information about you and me in the pursuit of some legitimate purpose might be careless as to whether the level of data protection we have come to expect here will be applied in some of the countries with which it is being shared. We do not quite expect the same degree of zeal from organisations as those who are frightened that they might lose their intelligence sources.
Christopher Graham: We very much want to see across the European Union rules and regulations that are based on the data protection principles that are set out in the Directive. If everybody in the European Union is only collecting as much information as they need, being careful with that information, not losing it, getting rid of it when it is out-of-date and so on and so on, all of the eight principles that are set out in the Data Protection Directive, one would have greater confidence that we could do business where it was needed. We think it is putting the cart before the horse for the Stockholm Programme to just talk about ensuring the best possible flow of data within European-wide networks when you have not actually done the fundamental thing of making sure that the data that is retained is being processed lawfully under the Directive. That is why we say you have to step back and get that right first and then build whatever structure you feel it is appropriate to build. We are in danger of tinkering with a lot of specifics instead of getting to a fundamental problem which is that the data protection principles do not adequately apply across the European Union.

Q199 Chairman: Politically—using that in the broad sense—how is this going to be addressed? You are asking for us to step back and then take a bigger leap when we have worked out collectively across Europe a proper framework to achieve the objectives we all have. How is that going to be addressed given that the Stockholm Programme is already underway and the Treaty is almost happening?
Christopher Graham: I think there is an appetite. We have been doing some work in the Information Commissioner's Office in leading the debate towards a revision of the Directive. A year ago we had a very successful conference in Edinburgh and we produced the consultants' report by Rand Europe discussing how the Directive could be updated to deal with the 21st century and the modern world. I think also the fact that the Parliament is now involved is a helpful development because the Chairman of the appropriate committee is a Spaniard who I met in Madrid at a recent conference and there is a great appetite there to get on and pass the necessary legislation to bring third pillar institutions into a proper constitutional relationship. I think perhaps if this Committee can add to the chorus saying we need some fundamental changes rather than just tinkering, that would be a very good outcome.
Chairman: Thank you very much. In a rapid change of gear I am going to ask Julie Morgan to do another subject which actually you yourself have raised in the House today by laying a report about the blocking of minutes of a Cabinet committee relating to devolution in 1997. Julie Morgan?

Q200 Julie Morgan: Why do you think Jack Straw used the section 53 veto on the release of Cabinet papers relating to devolution?
Christopher Graham: The Secretary of State has the right under the Freedom of Information Act to substitute his judgment for the Commissioner's under certain circumstances. He set out his reasons in the decision notice. If you wanted to go further I think you would have to ask the Secretary of State himself. I am on the record as saying I think it was unfortunate for three reasons, if I can just summarise. The first is that the issue should have gone to the Information Tribunal. There was a date set, 25 January I think, and basically the decision notice from the Secretary of State says no more than the pleadings to the Information Tribunal. I think the Secretary of State, for whatever reasons he has, has jumped the gun. Secondly, I think the Information Tribunal might well have tidied up the decision notice. It might well have been that some minutes of some meetings were felt to be too sensitive to release and perhaps some parts of some minutes might have been redacted. I was not expecting that we would get 100%. I think it would have been better if it had gone to the Tribunal for a less blanket approach to emerge. My third concern is what is supposed to be exceptional is in danger of becoming routine. This is the second veto we have had in less than a year around Cabinet minutes and I cannot see from the Secretary of State's argument where the exceptional point arises. The law is what the law is. There is not an absolute protection of Cabinet committee minutes. I know there is some suggestion that there should be but until Parliament changes the law, the law is what I am administering. We were in the slightly surreal situation of a Secretary of State's certificate to me being accompanied by the Government policy statement of the circumstances in which the veto might be applied and the policy statement says of course this has never happened. Well it had. It happened back in February and it was happening again. The argument is all about how this is deeply exceptional and it really will not happen, and here it has happened twice within a year. So I have continued the precedent set by my predecessor of making a formal report to Parliament when the veto is exercised. And I felt it was particularly important to flag something which the Secretary of State did not mention in his stated reasons, that the issue had not even gone to the Tribunal.

Q201 Chairman: I did ask Mr Straw this afternoon in the House what was exceptional about this case, or in his other phrase "particularly pressing", trying to get at whether there was something in the content which made it different in character from other Cabinet committee minutes. I have to say he did not answer that question. Is it apparent to you from your knowledge of the circumstances—and I am not asking you to disclose any content—that there is some area within the content that might merit the "exceptional" designation?
Christopher Graham: I cannot see it and if I had been able to see it we would not have come to that decision. It was a decision of my predecessor but I entirely support it. The argument that the Secretary of State makes very strongly in favour of collective Cabinet responsibility is of course one of the factors that we took into account. That particular section of the Act says the Information Commissioner has to make a judgment about where the balance of public interest lies, and I am not infallible, that is what the Information Tribunal is for. But the argument the Secretary of State makes about the convention of collective Cabinet responsibility makes it almost seem as if the convention only works provided nobody believes that there was ever any disagreement. I cannot believe that is what any sensible person thinks. We all know that grown-up politicians debate things and have disagreements. My understanding of the convention is that once a decision has been taken everyone sticks to it or they get out of the Government. I cannot myself see the problem with publishing those minutes. It is now 12 years after the event. Admittedly, we took a long time to arrive at our decision so let us say you have to take a view about what the damage would have been in 2005. But, even so, the legislation is through, the National Assembly of Wales is up and running, the Scottish Parliament is up and running. I cannot see it.

Q202 Chairman: Just to clarify something, is it apparent from the minutes themselves what views individuals held or are the minutes that you looked at written in such a way that they do not do that?
Christopher Graham: As I say, it was a decision of my predecessor but I believe that views are attributed to named individuals. I suppose the Information Tribunal might have said we want some names redacted or those particular minutes should not be published. This is a whole series of minutes. It is all the proceedings of the committee for 1997. And then very late in the day, after the decision notice had been issued but in preparation for the Information Tribunal hearing that was to take place on 25 January, the Cabinet Office suddenly discovered a whole load more minutes from 1998. They were not of course covered by the decision notice because we did not know they existed. The Cabinet Office had not told us about them. I really believe this is something that should have been sorted out at the Information Tribunal but it was not to be.

Q203 Mr Heath: Even if one were to accept—and I am not sure that I do but I am not party to the contents of the papers—that there are reasonable grounds for the Secretary of State to apply the section 53 veto to certain contents, would it be your view that to use it as a blanket veto on all of the information is consistent with the spirit of the legislation which I had a part in passing?
Christopher Graham: I think we are getting a bit muddled between the legislation as it is and the legislation that the Government might wish it to be, in view of the fact that there is some business in train at the moment, following the Dacre Review, where

the Prime Minister has said that he feels there should be stronger protection for correspondence involving the Royal Family and some Cabinet material, however defined. I feel as if ministers very much have what they would like to be the case in view when they are looking at decisions like this because I simply cannot get to the justification for exceptional intervention from the material that we have seen and the law as it now stands.

Q204 Mr Heath: So is it your view that it would be the act of a reasonable Secretary of State to apply a blanket veto to all of the information even if there were an argument for some of it under section 53 as it stands?
Christopher Graham: I simply say that the Information Tribunal was established by Parliament in its role in relation to the Freedom of Information Act specifically to deal with matters like this. I am disappointed that the Information Tribunal did not have a look.

Q205 Chairman: One final area we wanted to cover in the shortened session this afternoon is the backlog. One of our colleagues, Gordon Prentice, had an adjournment debate about that the other day. It is an issue that we raised with you in your appointment hearing and you indicated at the time that you would not be happy to take on the post if you were not satisfied that resources were going to be available to clear the backlog. You quote a one-third reduction in the number of cases which have waited more than a year as being progress and obviously it is, but is it not still an unacceptable backlog?
Christopher Graham: We are dealing with a very heavy caseload. I was very careful at my previous appearance not to say that I would not take up the job unless I got the resources because, if you remember, I said I did not know enough about the operation of the Information Commissioner's Office to understand what the problem was. Over the past six months we have put great priority on clearing the backlog and the figures are more encouraging than the figures that the Minister quoted in the debate simply because the thing is accelerating like a train so the latest figures are better. If I can help the Committee, despite the fact that receipts of appeals to the Information Commissioner's Office are markedly up over the same period last year, in the period April to December 2009 compared with 2008 we have had a 21% increase in business, at the same time we have had a 43% increase in closures. We have been issuing decision notices and clearing up cases. We have already closed more cases in the first nine months of the financial year than in the whole of 2008–09. Overall since April our caseload has dropped by 30% and the cases over a year old are now down by 52%. The very old cases, which is what we prioritised to get rid of, those cases over two years old are down by 70% and when perhaps later on I am able to come and talk about our Annual Report I think I will have an even more encouraging picture to show. I do not say that it is satisfactory that we are in the position that we are in, but we are making great strides in clearing the backlog which I said to the Committee was a priority because, if you remember, I said unless we can demonstrate that we are an effective body we will not be listened to on any other issue.

Q206 Chairman: In a letter you sent to me you indicated that of course some of the problems are not caused by your office; they are caused by repeatedly having to go back to departments to get information but there is a more robust attitude—I paraphrase slightly—to that process which might assist in speeding up the outcomes. Have you had any success in indicating to partners they have got to get a move on?
Christopher Graham: Yes. I think public authorities in general have got the message that the Information Commissioner's Office is speeding up and we are on to their case. If I can give you an example of a decision notice we took about land acquisitions for the Olympics, the London Development Agency understood from us that unless they could answer our questions and put up their best case we would take a decision based on the information we had to hand and that is what we did. I think that message gets across. I have been invited to address permanent secretaries at Sir Gus O'Donnell's Wednesday meeting on 20 January and the message that I will be putting is that we are generally being a tougher partner to deal with. As we wire through the backlog, we are getting on to cases more quickly, I think the message will get across and we should be able to speed up generally. I think it is very important to recognise that it is not just whether or not the Information Commissioner's Office is getting through the work. It is whether the public authorities are responding promptly enough either in the first place to freedom of information enquiries or to our enquiries in the course of an investigation.
Chairman: I think, Mr Graham, we would probably like to put in a freedom of information request for the minutes of that meeting of the permanent secretaries, but on the basis of undertakings I have given to Members I would draw the meeting to a close at that point and thank you very much for the trouble you have taken today.

Tuesday 19 January 2010

Members present

Sir Alan Beith, in the Chair

Mrs Siân C James Alun Michael

Witnesses: **Professor Juliet Lodge,** Director of the Jean Monnet European Centre of Excellence, University of Leeds, and **James Michael,** Editor, Privacy Laws and Business International Newsletter, gave evidence.

Chairman: Professor Lodge, Director of the Jean Monnet Centre, welcome. Mr Michael, Editor of Privacy Laws and Business International Newsletter, welcome. I know those titles do not sum up the extent of your knowledge of these matters but we are very glad to have you with us this afternoon. I am going to ask Alun Michael to ask our first questions.

Q207 Alun Michael: There has been a discussion about significant divergence in the standards of data protection in the area of justice and law enforcement. Can you give us some illustrations of what you see as the issues?
Professor Lodge: I think one of the big issues is discrepancies between the different systems that use either biometric data or data which identifies individuals for border control, the entry/exit systems; the Visa Information System, the Schengen Information System and the delays that have been encountered in upgrading that system to a central system, the central Schengen system. Where you have incompatibilities in the technology, you also have incompatibilities in the implementability of the regulations that exist and, therefore, whereas one might hope that there would be a uniform application of very high standards of data protection, in practice these can be compromised.

Q208 Alun Michael: Are you saying they are compromised by the technology rather than by protection or regulation?
Professor Lodge: I think they are by both and I think we run the danger very often of underestimating the difficulties and the discrepancies in all manner of technological applications: the systems that are used, the way in which they store the data, the way in which the data degrades, even in some very good systems within a period of five years, and the way in which there is sometimes very sloppy handling of that data.

Q209 Alun Michael: Can you give us some practical examples?
Professor Lodge: If you have enrolled biometric data for identity cards in a given Member State and at the time it is enrolled it is of a high quality but over a period of time degrades (not because the storage has been poor but just because technology moves on so fast) then the question of whether or not you can interrogate that data or use it to verify and authenticate people's claims to be who they say they are is compromised by the technology, so the reader of that technology might not have equipment that is compatible or the enrolment of that original biometric might have been done at a stage which was in its infancy and, therefore, you have problems in that. In terms of what I said about sloppy data handling or management of data, I think there is a huge need for training of the people who input the data, who are often very often very poorly paid. There is a problem that arises specifically because data management is outsourced, whether beyond our own borders or to private companies, which is often the case made for efficiency gains, and where these companies may then re-outsource the handling of the data. So we start off with high data protection standards perhaps in one state but then it becomes unravelled as the data is perhaps mined, chopped and sent somewhere else.

Q210 Alun Michael: It sounds quite theoretical. Can you give examples of where that has then had consequential impact, a direct impact?
Professor Lodge: I can send you details of that.

Q211 Alun Michael: That would be helpful, thank you.
James Michael: If I could add one point, until the first of December the first and third pillar structure meant that the European Data Protection Supervisor, Peter Hustinx, had to give his advice on an ad hoc basis so that there was no overall, overarching system of data protection that applied to all European Union activities. With the entry into force of the Lisbon Treaty on 1 December there is certainly an opportunity—perhaps even a requirement—that that be done. That could be done either through a revision of the Framework for data protection, which would involve the Parliament now, or it could be a revision of the Data Protection Directive, which was under the first pillar and now could be extended to include justice and law enforcement.

Q212 Alun Michael: By implication you are telling us that it is not clear that that is going to happen or how it is going to happen, if it is going to happen.
James Michael: It is not clear. It is, in my opinion, very likely that something will need to be done.

Q213 Alun Michael: Who would need to do that? Would that lie with the Data Commissioner in the new arrangements?
James Michael: I suspect the initiative would come from the Commission.

Q214 Alun Michael: Rather than the Data Commissioner.
James Michael: I suspect that legally the initiative will come from the Commission. Peter Hustinx will probably give an opinion on the subject fairly soon. He already gave an opinion last July on the Framework.

Q215 Alun Michael: You mean an opinion that is designed to stimulate the Commission's activities.
James Michael: Yes, exactly. If I could just give one other example of how these things happen. Just two weeks ago the Data Protection Supervisor issued a tactfully worded opinion about a draft Directive on exchange of information for tax enforcement, pointing out that he should have been consulted on this at an early stage, but was not consulted at all because they simply did not think there were any data protection issues at all. He suggested several that they might consider.

Q216 Alun Michael: In the light of your comments there, how confident are you that the Data Protection Framework Decision, adopted in June 2008, which is due to be implemented later this year, will enhance data protection for the individual and improve information exchanges between law enforcement authorities? Those are always the two pieces of tension, are they not, the protection of the individual and ensuring that appropriate exchange of data does happen.
James Michael: I think it will help in harmonising data protection in activities of the European Union by the institutions because it will give them, however abstractly phrased, a common set of standards. Whether those will be carried out in practice is another question because one of the problems with the Framework is a relative absence of remedies, that is to say the Supervisor can give his opinions but in terms of whether these standards are actually met or not the remedies are, under European Union law, fairly cumbersome. People can complain to the Ombudsman or can take action before the European Court of Justice (what is now called the General Court or the Court). That is still fairly cumbersome and legalistic.

Q217 Chairman: The EU high-level advisory group on the future of justice policy, which relates to the Stockholm Programme, identified key requirements for the effective protection of data. Did they identify the right priorities?
James Michael: I think they did, although they were phrased in very general terms. I think they could have come out more strongly in favour of a single set of data protection rules for all areas rather than the existing system of still relatively ad hoc procedures for different bodies. The problem with statements like that of the high-level group is that they are necessarily at a high level of abstraction and when it comes down to actually deciding whether to keep information or not and whether to transfer information or not there is sometimes a gap between the theory and the practice, especially when the practice is being carried out by very different institutions in very different countries.

Q218 Chairman: Is there any way that you can develop a strategy? Bearing in mind the UK Government's reservations, which seem to centre on the need for a clearer strategy, is it possible to develop one?
James Michael: I think it is possible; whether it is probable is another matter. A lot will depend on impetus from the Parliament and also from the Commissioner for Human Rights. Those might be two sources of influence, shall I say, and perhaps initiative.

Q219 Mrs James: Is it possible to set thresholds for the quality of the evidence base for new policies with data protection implications where interference with the right to privacy might be justified?
James Michael: I think the procedures in the Framework agreement went some way towards providing a method by which a government which had received a request for information from another country could refuse that request if they thought that the quality of the information was not proportionate, that is to say the reason for the request for information was not really sufficient to justify the kind of information they were asking for.

Q220 Mrs James: Given that each Member State has its own rules and regulations in this and sets its own standards, to what extent do you think data protection laws in those Member States accord with EU standards? Do they have well-functioning data protection authorities?
Professor Lodge: I think the data protection authorities vary greatly, as you would expect, and there is a lot of rhetoric about conformity, but I think we are sometimes trapped by the idea that if we have legislation on data protection everything is going to be in the interests of the citizen and data is going to be protected, when one should actually look at the reality of what happens with data exchange for criminal and civil purposes, and there is an increasing movement towards automated interrogation across borders which means there is no human judgment made as to whether or not that data should be exchanged, what the quality of that data is and whether or not we trust the person who is asking for that particular piece of data. I think that is an issue that needs to be looked at in far more detail than just looking at whether we have appropriate authority matches, concerns whether it matches the criteria that we wish to have observed, and do we have some evidence that it does. I think most data protection authorities would claim they do, and it is not just a question of the public authorities' claims and the degree to which they abide by those claims but it is a question of what happens in practice when some public bodies sell information which a citizen has provided for one purpose and is then used for another purpose. Once it is re-used then it becomes subject perhaps to different rules and regulations within different states.

I think three areas where the European Parliament is very concerned relate to passport, visa and also car registration data which is to be managed more centrally in future, I believe, by the Netherlands, which is a country promoting a more centralised system so that everybody can access a centralised system. That is very controversial.

Q221 Mrs James: So those deficiencies of the quality of the provision in the Member States call into question the safety of the information, the whole issue about how reliable it is and how it is used. I am particularly concerned about the European Criminal Records Information System. How confident are you that that is working properly?
James Michael: There is a tendency—and it is not limited to data protection—to formalistic box ticking, that is to say if the country has a data protection statute and it has a data protection authority, then that is okay, it is adequate. There is a reluctance—perhaps understandable—to actually examine what the law does in practice, what kind of information is actually stored and communicated and whether it is kept longer than it is needed. Partly this is because that kind of interrogation takes detailed investigation, and also because it can very easily get into sensitive areas when you get down to cases.

Q222 Mrs James: The Information Commissioner has called for a merger of all the supervisory systems at a European level. Do you think this is practically feasible?
Professor Lodge: I think there would be a lot of political and legal objections to that. To come back to your question about the European Criminal Records System another aspect relates to the way in which the data is categorised in order to put it into a central file. There may be all kinds of nuances that are not possible to put into that and therefore reduce the utility of that records system. There are also issues around the taking of evidence, the sharing of evidence, the roles of the other bodies and agencies like Europol and Eurojust and their relationships with national corresponding agencies, and the issue of redress. We often talk as though the only person who is likely to be affected might be an able-bodied, relatively articulate person when there is a large number of socially excluded and handicapped people who have no ability to interrogate their own data, to give conformed consent, to understand what it means for that data to be shared for criminal purposes or for other purposes such as the momentum for sharing health records, in particular in the EU. These things can be linked up in ways we do not necessarily anticipate at this stage.

Q223 Mrs James: I was very interested in the nuances you talked about. Can you give us an example of what you mean?
Professor Lodge: I think part of this comes back to being very clear with the people who create the system what kind of data one wants to put in and it is very easy to say '[put in] name, date of birth, place of registration' or whatever, but the way in which these things are recorded in national systems historically may not be compatible with, say, the way in which someone from Venus would write out the forms, and what we might define as one term might not be defined in the same way in another country and, therefore, you have immediately got an inability to interrogate the system effectively.

Q224 Chairman: What did you mean by "baking in security"? A nice homely image.
Professor Lodge: One of the major issues is that we often say to people who are creating the systems to exchange information either automatically or on the basis of a human intervention requesting something from the system, "We want it to do X, Y and Z". We do not establish as a first principle a right to privacy or to make sure that it is very difficult indeed for that data to be looked at by anybody else without some kind of prior consent. If you talk to the developers of the systems they are very clear that security concerns and privacy concerns can come a very poor ninth in a category of what their objectives may be.

Q225 Chairman: How far have either of identified in the work that you have done the use of information illegitimately for another purpose as opposed to a kind of carelessness or lack of proper procedures which is just generally undesirable, but the actual use of information for a purpose for which it was not shared in the first place?
Professor Lodge: I think there are examples at local authority level of bailiffs, of local civil servants being able to access, say, databases which were primarily set up for criminal law enforcement purposes and being able to get information about citizens which enable them to be tagged, identified, located and so on for purposes other than the original purpose for which the data was collected. I think there are plenty of examples of that around.
James Michael: I like the expression "baked in"; it is much better than "hard wired" and I fully intend to use it. It is a common observation in the field that some of the problems created by technology are better solved by more technology than by law. A good cryptographic programme is probably more effective for encryption in protecting the privacy of communications than a data protection act and a remedy. There are other technological devices apart from encryption. One would be—this has been suggested—that certain kinds of information when recorded should have a baked in delete date and that after, say, a one year period or a two year period, it be deleted and disappear automatically, with override only allowed in very unusual circumstances.

Q226 Chairman: What about sharing with third countries beyond Europe, especially in relation to passenger data in the United States? It is a wider problem even than that, is it not?
James Michael: I can just summarise it as briefly as I can. The Passenger Name Record system—PNR system—was an agreement between the European Union and the United States for the exchange of passenger information. Actually it was for the

provision of passenger information to the US, and one of the objections was a relative absence of reciprocity. The European Parliament did not like it much; the European Parliament took the Commission to the European Court of Justice. The European Court of Justice said the whole agreement was void because it was for law enforcement and the Commission then had no competence in law enforcement. The result was that it was simply kicked upstairs to the Council of Ministers; and the Council of Ministers then entered into an agreement with the United States, which ended up with more passenger information being provided and kept for a longer time. The SWIFT affair was when the US Treasury got a secret subpoena to order the Society for Worldwide Interbank Financial Telecommunications to be monitored by the US Treasury. This became public in American newspapers in 2006. The European data protection authorities were unhappy because they did not even know about it. There were various developments, including an announcement by SWIFT that they were setting up an operating centre in Switzerland for European financial transactions, to begin in January 2010. Last summer the United States began confidential negotiations with the European Union and on 30 November a new agreement was signed between the European Union and the United States saying that SWIFT would continue to be under US scrutiny, and with something that sounded like grinding teeth SWIFT said they would obey whatever legal requirement there is, having spent their ?150 million to avoid US scrutiny.

Q227 Chairman: Your view is that this is not a satisfactory state of affairs?
James Michael: I thought the developments were very interesting. I thought the decision to enter into the agreement on 30 November avoiding the participation of Parliament when Lisbon went into effect on 1 December was assertive. The German representative said that he was not happy about it. Four countries abstained from the decision but that did not affect the requirement of unanimity. It is only for ten months and goes into effect in February and I suspect the next stage will be for Parliament to become involved.

Q228 Chairman: Do you mean the European Parliament?
James Michael: Yes, the European Parliament. I suspect that in the end the agreement will be somewhat modified if Parliament has its way, but we will know that in another ten months.

Q229 Chairman: Clearly there are major issues of concern around terrorism that are driving this, but is the EU as an organisation or as a structure a vehicle capable of arriving at satisfactory arrangements for data protection in such a context?
James Michael: I think they are in a better position than individual countries are because individual countries, especially individual countries that are not party to the visa waiver system, have a great incentive to provide the United States with whatever information they want. When the EU acts collectively it is in a stronger bargaining position, but there is still difficulty in resisting the United States when it says it wants the information and it needs the information and it must have the information to prevent terrorist incidents.

Q230 Mrs James: I just want to go back to Juliet Lodge on the issue of data mining and data linkage. I am very concerned about people not knowing when this information is being used and I am keen to find out what Member States should do to ensure that citizens are more fully aware of what is actually happening, what happens to that data they provide and where it goes to.
Professor Lodge: I think you are right to have that concern. The Commission sent out a communication very recently saying that there should be a public awareness building campaign, which I think is much too late. The data mining, data slicing and regeneration of new data which then becomes the property of a third company, who knows where, is a huge danger and citizens do not realise how dangerous it potentially is. We tend to focus too much on what governments are doing in the exchange of information, often for very good operational reasons associated with security, but the way in which that data is then moved around creates potential difficulties for citizens. I know at the local level that policing organisations do a lot of information campaigns with children on Facebook and social networking sites, but there is an issue around who has access to the data. If you are on your computer you can be tracked and be flogged advertising or products that you may not want; also on your phone and your mobile. Increasingly if one talks about what might happen, in five years' time in an ambient intelligent environment a little chip in a shop front window would be able to see what you are actually looking at in the window and begin to track what you might want to buy, will make suggestions, log onto your phone and send you automatic information. There are huge technical advances coming on stream very, very fast and one of the issues that has been raised in connection with the data protection issues and how you preserve your privacy is whether or not one should have a right to say that privacy is now to be concerned with the individual saying what kind of data about themselves might be allowed to go out. Otherwise it has to be made inaccessible or have a very quick sunset baked in delete for children for young people in particular and those who really are not aware of the way data is linked up from, say, a travel site to insurance or medical data and so on, I think there are some very big issues which have to be confronted and I would very much value a political debate conducted by national parliaments in conjunction with the European Parliament, possibly with civil liberties committees and people like the European Data Protection Supervisor.
Chairman: That is a very helpful note on which to conclude this part of our session. There is, I think, going to be a division in the House very shortly and

therefore I propose to thank you both very much indeed. If you feel there is a point that we missed that ought to be drawn to our attention do feel free to contact us. We regard you as a very helpful source of guidance in this area and we share your desire to encourage a wider public discussion about how we resolve these issues. Thank you both very much indeed.

Tuesday 2 March 2010

Members present

Sir Alan Beith, in the Chair

Rosie Cooper	Julie Morgan
Mr Douglas Hogg	Mrs Linda Riordan
Mrs Siân C James	Mr Andrew Turner
Alun Michael	Dr Alan Whitehead

Witnesses: **Lord Bach**, a Member of the House of Lords, Parliamentary Under-Secretary of State, **Mr Daniel Denman**, Assistant Director, Information and Human Rights Team, Legal Directorate, **Mr Edwin Kilby**, Head of European Policy, Ministry of Justice and **Ms Emma Gibbons**, Head of EU Section, Home Office, gave evidence.

Q231 Chairman: To save time I will quickly welcome Mr Denman, who is Assistant Director for the Information and Human Rights Team in the Legal Directorate; Mr Kilby, who is Head of European Policy at the Ministry of Justice; Ms Gibbons, who is Head of EU Section, Home Office. Welcome to you all. Lord Bach, everybody else changes but you remain. At a recent European Commission conference the Parliamentary Under-Secretary, Meg Hillier, claimed that the UK Government "punches above its weight" in justice and home affairs. Can you quickly illustrate how we do that?

Lord Bach: I will do my best. I think she was absolutely right. The conference was organised by the European Commission in conjunction with King's College and the flier for the conference rather provocatively perhaps argued that the UK was ambivalent about justice and home affairs, a context in which the Minister argued in her speech that this was not the case and that in fact we are firm enthusiasts and we wish to be at the heart of JHA (justice and home affairs). There are examples which we can certainly give where we can argue that we have punched above our weight. There have been notable results in the context of negotiation, and we will come to the Stockholm Programme perhaps a bit later on. Can I just give some more specific examples? We advocated a European Small Claims Procedure for many years and gave priority to its negotiations during our own Presidency in 2005; that came into effect last year. We think it does help citizens conduct business across borders. We have helped to ensure that financial penalties are enforced across the EU Member States by leading on a proposal for a framework decision on the mutual recognition of financial penalties. We have influenced the EU's counter-terrorism agenda and the UK's initiative for a global approach to migration too now sets the framework for EU working in partnership with third countries on issues of migration. Finally—and seriously too—our engagement is demonstrated by the fact that the head officials of two of the EU's most important criminal justice agencies are from the UK. The Committee will know that the Director of Europol is Mr Rob Wainwright and I am happy to be able to announce that the newly elected President of Eurojust is Mr Aled Williams. I hope that brief account shows that Meg Hillier certainly was not exaggerating; she was putting it in very modest terms.

Q232 Chairman: Can I turn to what would be the general principles which will govern the UK's decision to opt into or out of future proposals in this area?

Lord Bach: I will start by saying that we wish to play a full part in JHA affairs in the EU, subject of course to safeguarding our national interest and the retention of border controls. We look at each proposal positively. Jack Straw is on record as having said that we will opt into the maximum extent consistent with our national interest. With 2.2 million British citizens living in other Member States and almost the same number of EU citizens from outside the UK living in the UK, it is in the interests of all Member States to participate in as many justice measures as possible. That is our starting point. However, there will be times when, despite wanting to participate, we may be unable to. An example of course was Rome 1 which was not compatible with our legal system and with our economy.

Q233 Chairman: Can you just remind me what that was?

Lord Bach: That is the choice of law in contract issue. After the proposal was issued interested parties expressed their concerns. It was believed it could lead to significant levels of legal uncertainty in complex multi-party international contracts. It would not have affected just us but the EU and the most likely beneficiary would have been New York whose law would have been preferred in matters of contract. It is a difficult decision always not to opt in since we recognise the benefits of a regulation in that area. We negotiated and played an active part in that, secured amendments, greatly improved the proposal and we opted into the final regulation. More recently there has been the proposal on succession and wills which the Committee will know about. This is another area where we believe action at EU level can bring real benefits for those who increasingly live and work in other EU countries. Following a lot of consultation we decided that the proposal as drafted would lead to significant legal uncertainty and would create major difficulties for recipients of lifetime gifts, in particular charities. It was decided that in the national interest we should not opt in at the start of negotiations. Again it was not an easy decision but, as one of the people who made the decision, I think it was the right one.

Q234 Chairman: We have this quite complicated situation where, if an existing framework decision is repealed or amended by a future Directive we can opt out because it moves in a direction we are no longer happy with. If that happens would you expect us to suffer sanctions as a consequence?
Mr Kilby: Under the terms of the Lisbon Treaty, as you rightly say, one of the matters that was secured was an amendment to our opt-in protocol making it clear that the protocol applied to amending measures so that the UK in future will have a clear option whether to participate in a measure amending an existing measure. If we decide not to participate in an amending measure and, as a result, the Council takes the view that our failure to participate renders the measure inoperable for the other Member States, then we can be ejected from the underlying measure (I am afraid I cannot think of a better word for it). What I would say is that the word "inoperable", although it is not defined in the protocol, is something which we think is actually quite a high threshold. It does not just mean that the other Member States do not like the idea that they have to operate it without us. We think it means something which is technical inoperability and in support of that I can say that we respectfully share the opinion that was expressed in the House of Lords in the Scrutiny Committee's inquiry on the Treaty of Lisbon entitled *The Treaty of Lisbon: an Impact Assessment*. They also thought it was a high threshold. There is another step before we would be required to bear financial consequences which is what I think you asked about. It would be necessary to demonstrate not only that the matter was inoperable for the other Members States but also that there were financial consequences flowing directly from our failure to participate. So there is a two-stage process required there. We think that is likely to happen very rarely, if at all.

Q235 Mr Hogg: Why should our failure to participate render something inoperable in other Member States?
Mr Kilby: I think if there were a system of rules built up on something like jurisdiction—which country's court should have jurisdiction in a cross-border contract for example—if we failed to participate in something which made significant amendments to those rules it might over complicate the rules for everybody else too much.

Q236 Mr Hogg: It strikes me that there is a hole in the net which means the net is not comprehensive. I do not see so far as other countries non-participation by the UK renders something inoperable.
Mr Kilby: I absolutely agree and this is why I was saying that I think that the threshold for inoperable is a very high one.

Q237 Chairman: This is something for which no-one has as yet found a convincing example. If you find when you get back to the office that you can give us an example perhaps you can let us know.
Mr Kilby: If I may say so, that is a good thing, is it not, because it means we are less likely to be ejected if we do not participate in the amending measure.

Q238 Chairman: On a quite different point, Article 83 of the Treaty identifies a series of crimes for which minimum sanctions could be devised at European level. It is quite difficult to approximate sanctions and what challenges do you foresee in the UK Government's ability or willingness to opt into such legislation which could of course impinge on our whole domestic approach to these things?
Lord Bach: I will start by saying bluntly that we are not going to have a harmonised code of criminal law throughout Europe. Like every other country in the EU we have our own system of criminal law with its unique features.

Q239 Chairman: We have two systems; there is one in Scotland
Lord Bach: You are absolutely right, I mean in England and Wales. We do not intend to give that up in the same way as I doubt the French are likely to give up the *Code Napoléon*. However, we do support the EU in setting common minimum standards in relation to serious cross-border crimes. Those are the ones listed in Article 83: trafficking in human beings, sexual exploitation of women and children and illicit drug trafficking. We do believe, and experience bears this out, that serious cross-border crimes are most effectively dealt with when Member States work collaboratively to prevent them, otherwise it is clear that criminals would move from one country to another. It makes sense that serious offences with this cross-border dimension should be treated broadly similarly everywhere in Europe, so some level of approximation on the definition perhaps of the offences and the minimum level of maximum sentences—if that makes sense—so a maximum sentence has to be of a certain amount as a minimum is therefore appropriate, although we examine everything very carefully in this particular field.

Q240 Mr Hogg: Is there a judicial discretion as regards to the minimum?
Lord Bach: No. I do not think minimum sentences are touched. This is a maximum sentence but it is the very least a maximum sentence can be.

Q241 Chairman: In other words it should be possible to inflict a punishment up to a certain maximum but there is no minimum.
Ms Gibbons: That is correct. The general approach that has been taken to date is that all Member States must have in their law the availability of a sentence. It is then down to the judge in an individual case to exercise his discretion whether to use that in the individual circumstances.

Q242 Chairman: Turning to one last point on the European Court of Justice, we get involved in the European Court of Justice as a state from time to time. The question as to whether individuals and parties get involved is one thing into which we have not opted, as I understand it. What is the

Government's position about the possibility of opting into the jurisdiction of the European Court of Justice within the five-year window which the Lisbon Treaty provides? I appreciate the five-year window raises interesting possibilities about governance, but what is the present Government's position on this?
Lord Bach: We think we ought to wait and see is the way I would put it. The worst thing we could do at the moment is to jump in and make a decision either way on this.

Q243 Chairman: What are you waiting to see?
Lord Bach: I think we are waiting to see what new measures there are or may be proposed. We are waiting to see how the existing measures work out.
Ms Gibbons: I do not think there is much to add to that. One of the things we negotiated was to have that period to consider whether or not we would wish to accept ECJ jurisdiction. I believe we have until June 2014 to make that decision and therefore we would want to see, not least for example, how the Stockholm Programme influences the direction of the EU measures in this area where for example some of the existing measures may be repealed and replaced in that period, where our individual opt-in will apply and we can consider then whether we would wish to participate in those new measures.

Q244 Dr Whitehead: The Stockholm Programme has been described as "sensible and ambitious". What do you think are the most ambitious aspects of the programme? Is it sensible that a programme should be quite so ambitious?
Lord Bach: One of the reasons that we are such supporters of the Stockholm Programme and the Roadmap that flows from it is because it does not have the sort of ambition—the sort of ambition that we occasionally I think see in the EU context—which is great pronouncements and great attempts at legislation in fields where perhaps there is not an evidence base for it and we are delighted because we think it is practical and down to earth, and deals with real issues for citizens in the EU. I hope it is not boasting to say that we did have quite an influence in pushing forward this kind of programme, one that lived in the real world and was practical. It contains, as you know, a number of proposals to ensure that children are safe. It ensures that all EU states prioritise practical action to prevent radicalisation and develop and improve systems to counter terrorist activities; adopt an organised crime strategy; gain access to civil justice in another Member State; work towards mutual recognition of judicial decisions. It is particularly important that there should be practical measures. I talked about the 2.2 million British people in other EU Member States and the 2.12 million people living in the UK who were born in another Member State, but I have come across a figure I did not realise before which is that London is apparently the fourth largest Swedish city as well as of course it being one of the largest French-speaking cities in the world. It is because of these factors that I have to say we are very pleased with the Stockholm Programme.

Q245 Dr Whitehead: What would you say were the biggest wins for the UK in that Programme?
Lord Bach: There are a number of them, and of course we have to see how it plays out in the next number of years. It includes a whole chapter devoted to external relations for the EU; the importance of EU work with Pakistan, Afghanistan and West Africa, to name a few, in fields that are very important to us in this country like illegal immigration, crimes and drugs. Secondly, there is a commitment to implement the Roadmap on criminal procedural rights. It is really an essential issue with so many Britons abroad that their interests are protected when they go abroad and when they get themselves potentially into trouble of some kind. The Programme contains a commitment to an information model for the JHA underpinned by strong data protection arrangements which makes links between the work of various bodies—immigration officials, law enforcement and justice agencies—so that information can be shared to strengthen public protection arrangements while respecting citizens' rights to privacy. We think all of that is very much in our interests. In civil justice, commitment to take forward work on enforcement; there has been a huge amount on judgments but what value are judgments to any citizen unless they can actually be enforced? We also succeeded in ensuring that the reference to contract law did not include the possibility of a European code. The last point I would make is flexibility needed to maintain national control of our borders. If I am pleased it is for those reasons and we will have to see over the course of the next five years whether my optimism bears fruit.

Q246 Dr Whitehead: We have the description "putting the citizen at the heart of co-operation" which the Stockholm agreement is described as doing, how would you interpret that from the UK's point of view?
Lord Bach: I hope in the manner I have tried to describe. I think the Roadmap on criminal procedural rights is very important on that.
Ms Gibbons: From our perspective it was very much about looking at what practical outcomes there could be for citizens on the ground. A lot of this feels somewhat detached at times and it was about re-focusing on really bringing those benefits and saying that this is going to help people, whether that is from the public protection angle or facilitating those who wish to work overseas. One of the major things, for example, the UK pushed for and was focused on as regards citizens' lives was the child protection agenda and the mechanisms for ensuring we could get information on convictions, we could react in cases of abduction and deal with people who are disqualified from working with children. There were numerous others. Obviously the idea of legitimate travel, supporting people who want to work overseas with some of the practical measures—for example, as the Minister has already mentioned, around enforcement of judgements—to help people who wish to take advantage of the right to free movement across the EU.

Q247 Dr Whitehead: Is there not a criticism of all these really quite rapid developments of mutual recognition and cooperation levels that is going to lead to exponential escalation of costs? Is it right that these measures should be pursued regardless of costs, particularly in a period where, across Europe, costs will be a substantial factor in the years to come? How will the British Government deal with that problem of quite likely escalating costs?
Lord Bach: It is a very important question. As far as the Roadmap is concerned, dealing with procedural rights, we believe that our legal system really has some pretty high standards. I can say that with some clarity I hope. We do not expect the implementation of the Roadmap to necessitate significant costs for the UK. We will have to consider each proposal as it comes forward. The Directive on interpretation and translation, for example—the first one that came through but, because of Lisbon, disappeared and has now come back again—enshrines much of the practice we have here actually here in the UK and we do not think that there will be significant cost. In fact a study concluded on behalf of the Commission suggested that we are leading the way in this area and are very much seen as a source of good practice. The next measure on the Roadmap—and we want to see it as soon as possible—is providing defendants with information on rights and charges. Again we think we are strong on procedural rights. For us the costs, at least of the Roadmap, do not seem to be too intense. However, I repeat it is a very fair point and we have to look carefully to make sure it can be implemented.

Q248 Dr Whitehead: You mentioned that we were ahead of the game in terms of standards of detention, for example. Does that imply that the Roadmap does not go far enough in protecting those fundamental rights for suspects and defendants?
Lord Bach: We think the Roadmap as it stands in the Stockholm Programme can make real improvements in protecting defendants' rights across the EU. We do like the step-by-step approach of the Roadmap; we consider each area of procedural rights in much greater detail than some grand scheme of the kind we have sometimes experienced before. We also believe that the measures in the Roadmap cover areas where the EU could bring real benefits to defendants. Research shows clearly what I think we already knew, that there are large discrepancies between how Member States have implemented fair trials rights under ECHR and the safeguards they provide by promoting minimum standards in areas like interpretation and legal advice and that should protect defendants' rights better. We welcome the Roadmap as the basis for future action, but we do not rule out—this is answering your question—procedural rights measures in other areas as well; we will consider them on merit of course. We would, for example, support sharing best practice in recording defendants' statements by the police, which is not something I believe is in the Roadmap at the present time. We have not shut the door.

Q249 Chairman: Did you say you would or would not support sharing best practice?
Lord Bach: We would support sharing best practice. We would look to try to add that if that was appropriate.

Q250 Mr Turner: What is the amount in cash that your entry in the Stockholm Programme cost?
Mr Kilby: It is impossible to cost the entire Programme; you need to look at it measure by measure. When you consider that under the terms of the Lisbon Treaty the UK has to decide whether to opt into every new proposal quantifying it at this stage would be quite impossible. You need to look at each individual proposal and consider a cost/benefit analysis on each one.

Q251 Mr Turner: So we do not even know whether it would be in favour or against us, as it were?
Mr Kilby: As the Minister has said, the content of the Stockholm Programme is something which the Government has welcomed. We think there are a lot of measures in there which, had the UK been writing the Programme itself, we probably would have asked to go in there. I think there are a lot of good points about better regulation, for example, near the beginning of the Stockholm Programme, if you look at it and, as I say, cost/benefit analysis in relation to each proposal.
Mr Hogg: It does have a net cost in terms of public expenditure and a net cost across the private sector. All Andrew is asking is what sort of figure it is.

Q252 Mr Turner: Perhaps we do not know.
Mr Kilby: As I say, I think it is impossible to cost the entire Programme. We do not know, for example, the extent to which the UK will participate.

Q253 Mr Hogg: Let us have the bits you do know.
Mr Kilby: What we are saying in relation to the Roadmap on criminal procedural rights is that we consider that to a very large extent—and possibly in total—the procedural rights for criminal defendants that we have in place in this country lead the way in Europe and it is highly likely that the UK will not need to incur any costs let alone significant costs.
Mr Hogg: Did Lord Bach, when he got his submissions from officials advising him as to the net cost of signing into A, B and C, have or not have an assessment of the net costs to the Department?

Q254 Chairman: You have not opted into anything yet.
Mr Kilby: Not yet, but watch this space.

Q255 Chairman: It is a perfectly good question. In the original opting-in proposal would you have an impact assessment which includes costs?
Mr Kilby: Presumably there will be an impact assessment.
Ms Gibbons: Certainly at the moment when we decide whether or not to opt into legislative proposals that fell out, for example, of the last work programme—the Hague Work Programme—in each case we would make an assessment of the financial

costs, the impact on legislation et cetera and that would all be weighed up in the decision as to whether or not we participated. I think when each of them is provided to Parliament under normal scrutiny arrangements there is a section which asks for financial implications so we have to give a sense of it there as well.

Q256 Alun Michael: Could I ask a couple of questions about the European Arrest Warrant which we have taken some interest in and have taken some evidence on? Are you satisfied with the current situation, particularly in relation to proportionality?
Lord Bach: There has not been a formal review of the Extradition Act.

Q257 Alun Michael: I was asking about the arrest warrant.
Lord Bach: One issue around the European arrest warrant is the issue of proportionality and we are still concerned really in relation to one country, Poland; that is the issue of proportionality that we are concerned about, otherwise we are pretty content I think that it works pretty satisfactorily.

Q258 Alun Michael: Including proportionality as regards costs? I know you were not able to give us an estimate when we last asked about this, but there have been figures that have been given, for instance an Irish judge, Jago Russell, gave an estimate of about 25,500 euros per case.
Ms Gibbons: Certainly when I have spoken to my colleagues we have not got the figures on how much each arrest warrant costs to enforce, mainly because there are so many factors involved in making that decision. Obviously it involves various elements of the criminal justice system. I am afraid I cannot comment on that figure. We looked into this and we have not managed to come up with our own figure for the European arrest warrant. On the issue of proportionality itself, as the Minister said it is the one issue that continues to cause us concern and we are seeking to deal with it proactively through the Council and with the Commission.

Q259 Alun Michael: Part of the problem seems to be the difficulty in getting comparability so that you have proportionality across a variety of different legal systems.
Ms Gibbons: I think the operation of the arrest warrant within legal systems seems to have been what has generated the specific proportionality issue we are seeking to deal with where, as the Minister has alluded to, Poland have a legal system which seems to require them to send arrest warrants for issues that we would not consider appropriate and it is getting to the heart of that issue and seeking to educate people on when the arrest warrant should and should not be used.

Q260 Alun Michael: Is that the sort of concern that you would want to see addressed if the framework decision on the European arrest warrant were to be amended, and have you any other concerns that you would seek to be addressed that way?
Ms Gibbons: I think that would be our principal issue. We do not actually think that the best way to address it is to re-open or re-negotiate the framework decision. That was an option that was considered with other Member States in the Council and most conceded that it was not the appropriate course of action at this point in time, there were other solutions we could use. If the Commission were to bring forward a proposal then I think that would be an issue we would push to be resolved.

Q261 Alun Michael: What is the answer? Is it a question of individual countries addressing their own issues of proportionality?
Ms Gibbons: Yes. It is making sure that when Member States are issuing arrest warrants through their prosecutors and their judges there is an understanding about what is appropriate and when the European arrest warrant should be used.

Q262 Alun Michael: Does that come down to the UK expressing concern on a bilateral basis, or is there some initiative by the Commission to try to get consistency where there are concerns in relation to particular states?
Ms Gibbons: We are pursuing both channels. There have been bilateral discussions and work within the Council across Member States.

Q263 Alun Michael: Has there been any evaluation or review of the Extradition Act 2003? I am thinking of the provision for category one territories such as the EU and Gibraltar?
Ms Gibbons: There has not been a formal review. Our estimate is that the Extradition Act actually works very well. That said, there was considerable parliamentary scrutiny of the Extradition Act last year. There was a small amendment to it made in the Policing and Crime Act 2009. It was also debated on the half-day Opposition debate in the context of the UK-US Extradition Treaty. I believe the Home Affairs Select Committee has also taken evidence on it recently. So whilst we have not actually formally sat down and reviewed it, there has been considerable consideration of it.

Q264 Alun Michael: There has been a lot of reviewing rather than a review?
Ms Gibbons: Yes.

Q265 Alun Michael: Has the Government made any projections on the likely demand for European arrest warrants over the next five years?
Ms Gibbons: I certainly am not aware of that but I can check back with the Department.

Q266 Alun Michael: If there were to be any increases that would have an implication for resources. Have you made any plans to cope with the possibility of an increase in use of the warrant?
Ms Gibbons: I am not aware that there is any projection that the use will go up. As I say, I would have to check back with my colleagues on that and we can certainly write if that is the case.

Q267 Alun Michael: If you could clarify that it would be helpful. You referred earlier to the question of review, do you have any specific concerns about adopting a new measure to replace the European evidence warrant? I am asking that because there appear to be a couple of initiatives at the moment such as the European Commission Green Paper on the gathering and admission of evidence and there is also the likelihood of the Belgians leading a Member States' initiative on the introduction of a European investigation order. Does that lead to any concerns?
Ms Gibbons: We are certainly expecting a proposal which will repeal and replace to some extent the existing evidence warrant and other mutual legal assistance arrangements across Europe. We believe the Belgian proposal will be out fairly soon; we are still talking to them about the exact timetable. Obviously we will need to decide whether to exercise the opt-in in relation to that proposal, taking into account all the factors that have been mentioned earlier in the session.
Lord Bach: I spoke to the Belgian Minister in an informal bilateral last Friday in Brussels on the prospect at the same time as I spoke to him about the outrageous comments about his country made in the European Parliament a bit earlier that week.

Q268 Alun Michael: I am sure you encouraged him in that exchange; did he encourage you?
Lord Bach: We both encouraged each other.

Q269 Alun Michael: I believe that you called for an information management and data protection strategy. Do the proposals in the Stockholm Programme for a data protection strategy strike the right balance between data protection and data management and utility from technology and the protection of privacy? When we had a session with the European Data Protection Commissioner we did end up the session feeling that it was rather more of information management than the title would suggest and therefore closer to what in general the UK would be looking for, but that was not necessarily reflected in the title.
Lord Bach: Let me just say what the top lines for data protection and information exchange are for us (these will be fairly clear and obvious to the Committee): duty to protect the public as well as privacy and there is no reason why we cannot do both. The second point is that better information sharing is key to a secure EU and at the heart of preventing, detecting and investigating serious crime and protecting our borders. Thirdly, where it is necessary and proportionate to share data for public protection purposes then it cannot take place without appropriate data protection safeguards. We have a real duty to exchange information safely and responsibly.
Mr Denman: On the Stockholm Programme our position is that we fully support the emphasis that is placed in the Stockholm Programme on having more co-ordinated information exchanges. As the Minister says, it is also very important to make sure that the correct balance is struck between, on the one hand, having co-ordinated information exchange and, on the other hand, ensuring that better data protection is respected and promoted. The United Kingdom's position is that we will continue to lobby for co-ordinated European action on data sharing.

Q270 Alun Michael: We would understand that as the UK's position. Do you think a revision of the Data Protection Directive it is more likely following the implementation of the Lisbon Treaty?
Mr Denman: We are aware that a proposal for a revision of the Data Protection Directive is likely to happen. As I think you have heard from the Minister before, the United Kingdom's position is that any change to it should be based on evidence about what works and what does not work. The Government is very open to considering what the proposals might contain and what might be improved. There are opportunities to try and streamline some of the proposals.

Q271 Alun Michael: In that context do you think the EU currently places too much weight on technological safeguards to ensure that personal information gathered for one purpose is not used illegitimately for another purpose?
Mr Denman: Our position is that the core provisions and the core principles in the Data Protection Directive and the Data Protection Framework Decision should work across all technologies and they have largely stood the test of time. It may occasionally be necessary to introduce new provisions in order to deal with particular technological advances but again it is very much on the basis of considering the evidence and ensuring that those provisions continue to work in a technologically neutral way. We are very open to considering what changes may be proposed and how those changes might help to streamline provisions, but we need to be convinced that there is evidence of gaps and difficulties in the present provisions before we get to that stage.

Q272 Alun Michael: You probably saw the outcome of the discussions that we had with the European Data Protection Supervisor, Peter Hustinx. Would it be beneficial or feasible to merge the existing supervisory systems for data protection at a European level, especially in the light of your comment about being neutral across different technologies?
Mr Denman: We have spoken to the Information Commissioner's Office on this issue. As we understand it, he was not talking about a merger of all data protection authorities across Europe; his point was that the new power in the Lisbon Treaty creates an opportunity for a measure that brings together the existing measures. At the moment there is a measure in the first pillar and a measure in the third pillar and it will be possible for a measure to bring those two aspects together. There may also be a possibility for more co-ordinated supervision. We are open to those sorts of proposals and suggestions because at the moment the supervisory systems are piecemeal. That is different from saying that they are inadequate but each measure and each instrument

includes its own provisions and supervisory mechanisms and it may be there is room for trying to bring some more order to those areas and we would support any proposal to do that sort of thing but again on the basis of considering what evidence there is, but there are defects in the existing provisions.

Q273 Alun Michael: It is a process you are actively supporting?
Mr Denman: If a proposal comes forward. For example, one possibility is the working party under Article 29 of the Data Protection Directive and that working party can only consider matters falling within the first pillar because that is the remit of the Data Protection Directive. There is no equivalent in the Data Protection Framework Decision although there are other possibilities for supervisory arrangements and if it were possible to create a single supervisory mechanism that could look across all of those areas then that is something we would be open to in principle.

Q274 Alun Michael: You may be open to it, but are you arguing for it?
Mr Denman: We would support any proposal that would ensure that there are more harmonised, effective and streamlined mechanisms for supervision at European level.
Lord Bach: We would give it cautious support.
Alun Michael: I was thinking you did sound a little cautious. If that is an aspect that our witnesses would like to supplement, I think it would be of some interest.

Q275 Chairman: The UK Government is currently up before the Committee of Ministers regarding the failure to act on the European Court of Human Rights ruling relating to denying prisoners the vote which is regarded as a breach of the European Convention on Human Rights. What position is the Government taking in these discussions? Is it having some difficulty in explaining the progress it has made during the last five years on this issue?
Lord Bach: I do not think it is having much difficulty in explaining its position. We remain committed to implementing the judgment. As you will know, we completed the second stage of a two-stage consultation at the very end of September last year which set out a range of options for prisoner enfranchisement based on sentence length as well as of course difficult questions on the practical aspects of how you implement such a policy. We are considering our responses to the second stage consultation and then we will consider the next steps towards implementing the judgement in legislation. We do think this is a matter for primary legislation. It is a matter of great concern to people in the country and we think the only way of properly dealing with it is primary legislation to see what the House of Commons and Parliament generally think about it. I must say that the judgement itself did recognise that the UK had a wide margin of appreciation in deciding where to draw the line as to which prisoners should get the vote and which should be barred from voting. The judgment recognised that national legislatures—Parliament obviously in our case—in each Member State should have the opportunity to consider and debate the legislation restricting prisoners' voting rights. We think Parliament should decide on an issue as important as this.

Q276 Chairman: It would be the next Parliament and not this one I take it.
Lord Bach: There is not likely to be enough time for legislation to go through Parliament before a general election has to be called.
Chairman: Thank you very much Lord Bach and your colleagues.

Written evidence

Memorandum submitted by Mr Mike Kennedy of the Crown Prosecution Service

Question 1: *What is the nature of the relationship between Eurojust and the European Judicial network? Is there a need for a closer relationship between Eurojust and the European Judicial network? If so, how might this be brought about?*

Question 2: *Where does any confusion in responsibilities between Eurojust and the European Judicial network currently arise? How should these areas be clarified? Does the European Judicial network have sufficient capacity to take on less complex cases?*

If I may I should like to address these related questions together.

The European Judicial Network (EJN) was established in 1998 by a Joint Action of EU member states. It is an informal network of prosecutors and judicial investigators nominated by the member states who have experience in Mutual Legal Assistance (MLA) and/or extradition within their own legal systems. The members of the EJN are known as contact points (CPs) and are based in the own home states and most have some responsibility for MLA. All member states have appointed CPs some on the basis of their function and individual responsibilities of the role they have in their state in MLA matters. Others (eg France and Italy) have appointed on a regional basis with one CP for each geographical or administrative area. The UK has 12-15 CPs but others have appointed more. For example Italy has over 50 CPs.

A number of associate CPs have also been appointed from neighbouring or linked non-EU states with whom EU states do MLA business regularly. These include CPs from Switzerland, Norway, Turkey, Croatia, FYROM, and other Balkan states.

A number of the CPs, usually one from each member state, meet four times each year. Prior to the Lisbon Treaty there were usually two such business meetings each year both held in Brussels one under each six monthly EU Presidency. Additionally the EU state holding the Presidency would host an EJN training conference attended by two or three CPs from each member state. There would be training focus to these meetings dealing typically with developments in EU Justice and Home Affairs issues; with MLA problems; and, explanations of the mechanics of how the host states criminal system works.

These conferences were also networking opportunities to help build trust and confidence amongst the CPs that is a vital ingredient for the successful operation of such a network.

The EJN has developed a very useful website which is accessible to anyone and which also has a restricted area for members only. The website lists all CPs with their function, telephone, fax, email and postal addresses. It also lists the languages in which the CPs profess to be able to work.

The website is one of the great strengths of the EJN as it contains a range of practical aids and tools. These include:

(i) The "Fiches Belges", literally the "Belgian files", which are detailed explanatory answers to questions about each member states' criminal justice MLA and extradition systems. They are extremely useful and provide for example details of requirements for a search warrant to be issued and how criminal assets may be frozen confiscated etc.

(ii) The "Atlas", a tool that enables the user to identify the locally competent authority to which a request for mutual legal assistance can be sent, according to the legal measure requested. This provides prosecutors in the UK with a fast and efficient channel for the direct transmission of their requests.

(iii) The "Contact Points", enables UK practitioners, either directly or via the UK contact points, to email counterparts throughout the EU for advice on mutual legal assistance; a simply and quick way to get expert guidance on the law and procedures in other Member States.

(iv) The website also has a facility to enable the CPs to open debates and exchange ideas and thoughts with each other through a discussion board.

The EJN has a small secretariat which comprises a Secretary General, who is an experienced prosecutor, a webmaster whose role is to maintain, improve and develop the website and one or two support staff.

The relationship between Eurojust and the EJN is close and they are often referred as "privileged partners". The Council Decision of 2002 which established Eurojust stipulated that the EJN Secretariat should be located in the Eurojust administration. The EJN has a funding stream drawn from the Eurojust budget. The relationship between the two organisations is positive. Many Eurojust national members have served as EJN contact points. Eurojust nominates two or three national members to attend each of the EJN's training conferences.

Many cases are referred to Eurojust because they cannot be resolved by the EJN. The concept is that the EJN should be used for the straightforward bilateral cases requiring simple information, whilst Eurojust should be used for the more complex multi lateral cases where co-ordination is required by investigation and prosecution authorities in several member states and in cases involving countries outside the EU. Eurojust has a range of agreements with non-EU states which permit the exchange of personal data in compliance with the EU data protection regime.

This distinction of EJN for bilateral cases and Eurojust for the complex multi lateral co-ordination cases is a desire and not something that is set out legislatively in mandatory form. The EJN works well in many member states but not always efficiently or consistently across all the member states of the whole EU.

The essential difference is the EJN is an informal non accountable network with minimal resources which relies on the commitment, goodwill and time of its contact points. By contrast the national members of Eurojust form a permanent network located in one place and with ready access to each other and the capacity to provide answers quickly and where necessary offer secure meetings, either face to face or by video conference link, with translation facilities for up to seven languages. The permanent availability of a prosecutor at Eurojust in The Hague now mandated by the Eurojust Decision of December 2008 means that prosecutors have immediate access to advice and assistance through their national member who in turn has access to his/her 26 colleagues and indeed also to the prosecutors from USA and Norway who have appointed representatives to be based at Eurojust.

For many, and especially the smaller countries, whose proportionate investment in locating a permanent Eurojust national member in the Hague is significant, the immediacy of response and certainty of access to others tends to mean that Eurojust is the first port of call for answers even in the simple bilateral cases. This will be all the more likely when experience of the EJN route has not been positive.

Very few of the EJN CPs are employed full time in MLA matters. Most are prosecutors or investigating judges dealing with domestic cases in their national courts. For many MLA is not a priority and often the fact that handling MLA issues are not personal performance measures or an objective, means that MLA is not always treated as a priority.

There are sometimes availability issues with CPs and on occasion the level of linguistic expertise is not sufficient to resolve issues effectively.

There is a standing team of Eurojust national members and nominated CPs from the EJN are constantly looking at ways of improving co-operation and collaboration and providing a better service to investigators and prosecutors in the EU.

Question 3: *The Law Society has suggested that there is a need for the consolidation of mutual recognition instruments. Do you agree? If so, please can you give us some examples which illustrate where the differences between them require clarification or consolidation?*

Obtaining evidence from other EU states is principally undertaken via the issue of letters of request pursuant to the Crime (International Cooperation) Act 2003. Within the EU, two distinct mechanisms enable this process to occur, Mutual Legal Assistance (MLA) and mutual recognition tools.

The principal MLA tool is the EU Convention on Mutual Assistance in Criminal Matters of 29 May 2000. To date, the convention has been ratified by 24 Member States. The convention supplements the Council of Europe's European Convention on Mutual Assistance in Criminal Matters of 1959, which all 27 EU Member States have ratified (in addition to other members of the Council of Europe). CPS letters of request to Member States are issued in reliance on these conventions.

Mutual recognition tools have been introduced via framework decisions. The most effective mutual recognition tool introduced has been the European Arrest Warrant, greatly simplifying and speeding up extradition within the EU since its introduction in January 2004.

To be effective, any reform of these tools must consider both the MLA and mutual recognition routes. I would welcome the introduction of a new single instrument in principle that addressed both MLA and mutual recognition, as one instrument would make the obtaining of evidence from another EU state less confusing for prosecutors and ensure consistency across the EU.

For example, the recently adopted mutual recognition tool, the European Evidence Warrant (EEW) which is due for implementation in January 2011, is limited to a request for pre-existing evidence only. As such, once implemented, a prosecutor who issues an EEW will often also have to issue a letter of request in order to obtain new evidence, eg to take witness statements. As such, prosecutors may simply decide to issue a letter of request to obtain all the evidence. It is clear that the effectiveness of the EEW will be greatly diminished due to its limited scope and overlap with the current MLA mechanism.

Similarly, via mutual recognition, in the UK a police officer can apply to the court to obtain a freezing order to preserve evidence overseas; however, such an application is dependant on a letter of request having already been issued or if a letter of request 'is about to be issued'. Given that requirement, UK officers may prefer to request that CPS issue a letter of request straight away. Although the obligations on Member States to preserve evidence is enhanced in the mutual recognition route, once again, overlap of mutual recognition and MLA mechanisms leads to confusion amongst practitioners on the best route to take.

Other examples of mutual recognition have simply been implemented poorly, ie late or not at all, and merely in part. In a communication to the European Parliament and Council on 20 November 2008 the Commission noted with regard to framework decisions within the context of "Proceeds of Organised Crime", ie relating to restraint, confiscation, freezing of evidence and assets: "In conclusion, the existing legal texts are only partially transposed. Some provisions of the Framework Decisions are not very clear with the result that transposition into national legislation is patchy."

As such, consolidation and simplification of the current MLA and mutual recognition routes, applicable to all forms of evidence, would be of benefit to practitioners, and would also make the processes involved easier to understand for all participants in the criminal justice field.

The success of single unifying instrument however would largely depend on its construction and scope.

Such an instrument must acknowledge that certain forms of cooperation are best regulated via MLA rather than mutual recognition, for example JITs and covert investigations. Additionally it would be necessary to include specific rules for some types of evidence such as interception of communications.

It is important that any new instrument should retain the elements from the current instruments that are proven to work effectively and overcome the problems experienced by practitioners with the existing instruments. Legal remedies should be available for the interested parties in accordance with national law. I would also hope that in respecting different legal systems, any new instrument allows for a request to be refused by a central authority as an alternative to a court or prosecutor and that proportionality is incorporated as a ground for refusal.

Question 5: *Could you elaborate on some of the ways in which Eurojust could work more effectively with OLAF and Europol?*

I will consider how Eurojust could work more effectively with Europol first and then move onto OLAF.

Eurojust-Europol

A legal agreement was signed by Eurojust and Europol in October 2009 and came into force on 1 January 2010.

The Agreement aims to strengthen both strategic and operational co-operation by, amongst other things: facilitating information exchange, particularly in relation to Analysis Work Files (AWFs); temporary exchange of staff; and mutual attendance at casework meetings where appropriate. A joint taskforce has been established to ensure that the provisions of the agreement are fully implemented; however, to date there remain room for improvement in some areas.

Information Exchange

The September 2008 Memorandum of Understanding on a table of equivalence between Eurojust and Europol provides that classified information between Eurojust and Europol can only be exchanged up to the level of "restricted". Measures that allow for information exchange at a higher level of classification could be undertaken with input from a joint working group.

In 2007 a secure communication link became operational between Eurojust and Europol, but this does not currently cater for purely bilateral exchange between a Eurojust national desk and a Europol Liaison Bureau. Pragmatic use of the secure communication link would help to ensure effective working. Co-ordination meetings at Eurojust and Europol provide the basis for effective cross-border action. Eurojust already provides information about its casework meetings and about 30% of them have participation from Europol; however, the relationship would benefit from a more comprehensive approach to exchanging information on operational meetings.

AWFs

Europol analyses material on crime areas in AWFs. Files have been opened on 20 crime areas, ranging from cocaine trafficking to international terrorism. Eurojust is now associated with 12 AWFs and provides the platform for co-ordinating "judicial follow-up" of Europol's analyses. There have been many successes from Europol analysis and Eurojust co-ordination of prosecutorial action.

However, Eurojust is not yet associated with terrorist related files and other AWFs of strategic importance for the fight against serious crime. Eurojust and Europol should jointly encourage Eurojust association in AWFs by: using provisions in the Agreement which require a refusal of Eurojust association to be reasoned; ensuring that Member States (MS) are aware of Eurojust security practices; ensuring that MS are fully aware of Eurojust's value from its co-ordination meetings; and by better dissemination of joint reference documents such as the "Frequently Asked Questions on AWFs".

In addition to the 2009 Agreement the implementation of the Stockholm Programme will allow greater scope for effective working between Eurojust and Europol. Eurojust regularly attends the meetings of the Heads of Europol National Units (HENUs) and the meetings of the European Police Chiefs Task Force (PCTF), which are useful for sharing information at the EU level.

THE STOCKHOLM PROGRAMME

The Stockholm Programme calls for the full implementation of the new Eurojust Council Decision, which includes the establishment of a Eurojust National Coordination System (ENCS) tasked with maintaining close relations with the Europol National Unit. At EU level, Eurojust should build on its participation in PCTF projects. At national level the opportunity under the new Eurojust Decision Article 12.5.d for involving Europol National Units in the ENCS should be developed for early collaboration between law enforcement officials and prosecutors.

Another priority in the Stockholm Programme concerns the systematic cooperation between Eurojust and Europol in Joint Investigation Teams (JITs). JITs allow investigators and prosecutors from different MS to work together for mutual benefit on cross-border cases. Eurojust and Europol already promote JITs by maintaining a manual and guide for practitioners and by hosting meetings of experts from Member States. However, Eurojust could work more effectively with Europol on JITs by:

— Using the Secretariat of the Joint Investigation Team Network to facilitate cooperation between law enforcement and prosecution experts, with Europol support (to be based at Eurojust per Eurojust Decision Art. 25a.2);

— Using the financial incentive to involve Eurojust in JITs as a platform for Europol involvement where appropriate (National Members must be invited to participate in a JIT where community funding is provided per Eurojust decision 9f);

— Both Eurojust and Europol should ensure that the obligation in the Agreement to share information on JIT formation has operational effect; and

— Eurojust and Europol could collaborate in bringing their experience to the revision of the Model JIT Agreement proposed in the Stockholm Programme.

Eurojust and Europol collaborated to produce a manual on JITs and a guide to the legislation on JITs for practitioners. This type of joint production should be extended to other cross border topics, such as the law and practice on controlled deliveries.

The Stockholm Programme also recognises the need to develop the Organised Crime Threat Assessment (OCTA). Eurojust contributes to Europol's OCTA report from findings based on its casework; its perspective is focused on judicial issues in the organised crime area. Eurojust could contribute more effectively by analysing the problems of judicial cooperation in the various priority areas and by analysis of judgements in EU organised crime cases, as is currently done by Eurojust in its contribution to the EU Terrorism Situation and Trend Report (TESAT). Eurojust could also help to raise awareness of the OCTA priorities through the provision of practitioner input and input to Council Conclusions on the OCTA priorities.

EUROJUST-OLAF

For various reasons, practical cooperation between OLAF and Eurojust has been limited, and clearly could be improved. The main areas for co-operation are set out in the 2008 'Practical Agreement on Arrangements of Cooperation between Eurojust and OLAF', which replaces a 2003 memorandum of understanding. In essence, the programme consists of: instituting a system of contact points between the two organisations; exchanging case summaries on cases involving fraud against the financial interests of the EU; exchanging strategic and operational data; exchanging information about JITs; allowing OLAF participation in Eurojust co-ordination meetings when appropriate; and cooperation in training programmes. Effective working between OLAF and Eurojust should be built upon the programme set out Agreement.

Question 6: *You ask if we can give an estimate of the amount of criminal assets that could be seized from across the EU member states if restraint and confiscation orders made in the UK were properly enforced.*

An International Asset Recovery subgroup of the Asset Recovery Working Group, chaired by the National Policing Improvement Agency, was set up in September 2009 to address the lack of co-ordinated activity in respect of international asset recovery. The subgroup is examining and enhancing the data currently available on international asset recovery to provide accurate data reporting to ARWG. This work is at an early stage and presently there are no accurate criminal justice system or CPS figures for the value of criminal assets overseas and their location by country or region.

Recent analysis of Proceeds of Crime Unit confiscation orders reveals that the total balance outstanding is £440.9 million of which £121.7 million relates to overseas assets. Although it is not possible to say how much of the £121.7 million relates to assets in European MS (as we have not historically captured this data) worldwide there are clearly significant assets that could be realised if confiscation orders made in the UK were fully enforced.

This is not for want of trying. Cases where the offender has sent his assets overseas present their own problems. This is because prosecutors are ultimately dependent on the authorities in the countries concerned being willing to act to give effect to the order. Whilst some jurisdictions are helpful, others are not. Financially astute offenders know which jurisdictions fall into each camp and move their money accordingly.

Mike Kennedy
Chief Operating Officer

3 March 2010

Memorandum submitted by the European Commission

I am pleased to learn that the Justice Committee is carrying out an inquiry into Justice Issues in Europe for which you have invited submissions of written evidence.

As the Committee is aware, the Commission on 10 June published its proposals for Europe's priorities in the area of justice and home affairs in the next five years, alongside an extensive evaluation of the last multi-annual programme. Our two communications, "An area of freedom, security and justice serving the citizen: Wider freedom in a safer environment" and "Justice, Freedom and Security since 2005: An evaluation of the Hague Programme and Action Plan", form the basis for a debate which is now underway in the European Council and the European Parliament and which will lead to the adoption of the Stockholm Programme by the end of the year. How we implement this new programme will be set out in an action plan to be drawn up in 2010.

The Commission believes that the needs and expectations of the citizen must be at the centre of a European justice agenda which strikes the right balance between our security needs and the protection of fundamental rights. Our proposals for the Stockholm Programme therefore seek to serve four main priorities.

— *Promoting citizen's rights*. In creating a Europe of rights, the area of justice, freedom and security must be a single area in which fundamental rights are protected. We propose, for example, the establishment of a comprehensive data protection scheme and examination of the possibility of a European certification scheme for "privacy-aware" technologies, products and services.

— *Making people's lives easier*. In a Europe of justice, citizens must be informed of and be able to exercise their rights throughout the Union. Our proposals include providing easier access to justice by using modern technologies to the full.

— *A Europe that protects*. We propose, for example, more integrated border management including a one-stop-shop for border checks and a stronger coordination role for the Frontex agency.

— *Promoting a more integrated society*. On immigration and asylum, our proposals include the development of a global approach towards the concerted management of migration in partnership with third countries.

The UK at present, along with Ireland, may opt-into any individual proposals on immigration, asylum and civil law. Should the Lisbon Treaty come into force, the UK would be able to opt into a wider range of Union justice and home affairs law, and it would be able to decide not to opt into an amendment to a measure in which it has previously participated. The UK (like Ireland) currently does not take part in all Schengen rules but may participate in some of them provided that it takes part automatically in any subsequent measure building on the rules in question. Under the Lisbon Treaty, the UK would continue to be able to opt out from any of these Schengen-building measures, subject to certain conditions.

Learning from our experience with the Hague Programme, the Commission has identified five main tools for implementing the new programme.

— Joined-up thinking and action ensuring that justice and home affairs policies complement each other and the wider range of Union activity.

— Greater attention to implementation at national level, including practical support and awareness-raising.

— Better quality Union legislation and assessment of its potential impact on citizens, the economy and the environment.

— Improved use of evaluation of effectiveness of existing Union measures.

— Allocation of adequate financial resources to support our policy ambitions on the basis of evaluation of existing activities.

I hope you find this information useful for your enquiry. I should of course be very happy to meet the Committee to discuss the Commission's proposals and any issues that are of particular interest to you and your colleagues.

Jonathan Faull
Director General, Justice, Freedom and Security

16 July 2009

Memorandum submitted by Fair Trials International (FTI)

1. Introduction

1.1 FTI welcomes this opportunity to provide our views to the House of Commons Justice Select Committee on the Stockholm Programme and on how action taken at EU level has affected people, particularly in the area of criminal justice and the procedural rights of accused persons.

1.2 This paper will look at the opportunities presented by the Stockholm Programme and present arguments and case studies supporting the need to back the Swedish Presidency's efforts to prioritise minimum procedural defence safeguards for all EU citizens.

1.3 The paper will also show, again based on FTI's own casework, that certain enhancements could be made to EU mutual cooperation measures such as the European Arrest Warrant to ensure they deliver justice in combating and punishing serious cross-border crime, as originally intended, without undermining the core EU values of upholding the rule of law and guaranteeing the right to a fair trial for all citizens.

2. Executive Summary

2.1 During the last 10 years the EU has actively sought to build an area of justice, freedom and security within Europe. The dominant theme has been for member states to cooperate more effectively to bring to justice those convicted or suspected of criminal activity. The most notable development has been the creation of a fast-track system of extradition within Europe (the European Arrest Warrant or EAW). We believe this increased cooperation has resulted in real improvements in some areas of criminal justice, cutting down delays, increasing efficiency, and enabling serious organized crime that crosses national borders, such as human trafficking, money laundering and cyber-crime, to be tackled more effectively. These are laudable achievements.

2.2 We are, however, concerned that European cooperation in the fight against crime has forged ahead with insufficient regard for basic principles of justice and fairness. The Stockholm Programme must address this to enable member states to trust each other's systems to deliver justice to the necessary standard.

2.3 The Stockholm Programme aims to build on progress to date and go on increasing mutual cooperation in a highly diversified Union where over 500 million citizens live and over 8 million of them currently reside in another member state than that of their nationality. Clearly this presents challenges for justice and home affairs policy and makes mutual cooperation a necessity. However, it must not be at the expense of basic principles of fairness and justice. Sadly, there has been insufficient assessment of the human costs of existing measures such as the EAW and their potential misuse.

2.4 The EAW system has been in place long enough to demonstrate some of the dangers that can arise from mutual cooperation, where mutual trust is not yet in place. FTI wants to see the EAW system and other mutual cooperation instruments work properly, so that they uphold rather than undermine the justice, freedom and security that lie at the core of the EU's mandate. We suggest a number of concrete ways in which the EAW system could be strengthened to deliver greater justice without detracting from suspects' fundamental rights and without allowing the system to be abused through the issuance of unreasonable or improper extradition requests. We illustrate our suggestions with a selection of case studies.

2.5 The injustices we encounter in our own casework show us that more must be done under the Stockholm Programme to improve the delivery of justice for the benefit of all EU citizens, wherever they happen to live, work, study or travel within the Union. In particular, our cases illustrate the importance of minimum procedural defence rights being guaranteed. In practice, it can often be more difficult for non-nationals than nationals to receive a fair trial.

3. European Arrest Warrant

3.1 The EAW fulfils an important aim in ensuring mutual recognition of judicial decisions between states and enabling simpler extradition procedures within the European area of free movement. However, in order for the scheme to be deemed a real success it must be just and fair and respect the principle of proportionality and the rule of law. Below is a non-exhaustive list of the significant problems being encountered under the EAW system.

3.2 *Main problems with the European Arrest Warrant*

3.2.1 Authorities in some member states are not taking enough account of the burdensome effects of extradition on individuals. As a result there is an absence of sufficient safeguards against extradition on the basis of weak evidence or with respect to very minor offences. Domestic procedures to issue and execute warrants do not always respect the principle of proportionality.

3.2.2 The rules regarding the availability of legal aid for individuals subject to an EAW are unclear and vary from state to state. Legal aid to support legal representation (in both the requesting state and the executing state) is often limited. Given the serious impact extradition can have on an individual's personal and family life and the likely problems individuals will face in following the proceedings in another language and culture, it is essential they should have representation and that if necessary this should be paid for by legal aid. This is all the more so given the abolition of the requirement on issuing states to show a *prima facie* case when issuing an EAW.

3.2.3 It is unacceptable that individuals in many EU countries have no means of ensuring EAW alerts against them are removed after a decision has been taken in one Member State to refuse to execute an EAW. This is particularly unacceptable in cases where the execution of an EAW has been refused due to passage of time, the mental or physical health of a defendant or one of the mandatory grounds for refusal as laid out in the Framework Decision on the EAW.

3.3 *Suggestions for improvement to the European Arrest Warrant*

The following is a non-exhaustive list of improvements needed:

3.3.1 Checks should be implemented to ensure EAWs are only issued when proportionate to the offence and in the interests of justice.

3.3.2 Domestic courts should be equipped with greater powers to refuse to execute a warrant where: execution will result in a breach of human rights; or the procedures leading to the EAW being issued were unfair, illegal or resulted from misconduct by police or investigating authorities.

3.3.3 The EU should introduce common rules on the provision of legal aid in relation to criminal proceedings, especially those relating to EAWs. Legal aid should be made available for legal representation in both the requesting and the executing state. Individuals should usually have lawyers representing them in both countries. The duty to provide legal aid to individuals subject to an EAW should be appropriately shared by the requesting and executing state.

3.3.4 The system for *removing* EAW alerts from the Schengen Information System, Europol and Eurojust must be as efficient and reliable as the system for *issuing* EAW alerts.

3.4 *FTI Case Studies on EAW*

Fair Trials International has worked with many clients who have suffered injustice under the EAW system. Below are some summaries of FTI cases illustrating how the scheme has operated unfairly in ways which the above recommended changes would help to prevent. More information on many of these cases can be found at http://www.fairtrials.net/cases/.

Andrew Symeou

In 2007, Andrew, then a university student of exemplary character with a bright future ahead of him, was on holiday with friends in Zante, Greece. One night while Andrew was in Zante, another young Briton was assaulted and fell off an unguarded stage in a night-club, tragically dying two days later from his head injury. Andrew insists he was not even in the club at the time—and many witnesses have since confirmed this. He was never sought for questioning at the time, and knew nothing about the incident when he flew home at the end of his holiday.

A year later, he was served with an EAW seeking his extradition to Greece to stand trial for murder. Only during the course of his legal challenge has it emerged that the EAW is based on completely flawed evidence, much of it extracted through the brutal mistreatment of two witnesses who have since retracted their (word-for-word identical) statements. Our concern in this case is not only about Andrew's fate: if the Greek authorities had acted legally and diligently, the true assailant (who witnesses have described as bearing no resemblance at all to Andrew—although a friend who was with this person that night does closely resemble Andrew) could be brought to justice.

Joseph Mendy

JM was just 18 when he went on holiday to Spain with two friends. While there, all three were arrested in connection with counterfeit euros. JM himself had no counterfeit currency on him or in his belongings when arrested and has no idea how the notes came to be on his two friends and in their rented apartment—in total, the police found 100 euros in two notes of 50. The boys were held in a cell for three nights, then on the fourth day they appeared in court and had a hearing lasting less than an hour, at the end of which they were told they were free to leave but might receive a letter from the authorities later.

They returned to the UK and heard no more about it until four years later when, as JM was studying in his room at university, officers from the Serious Organized Crime Agency arrested him on an EAW.

JM was extradited to Spain and held on remand in a maximum security prison in Madrid. Other inmates told him he might be in prison for up to two years waiting for a trial. Under immense pressure and fearing for his future, he decided to plead guilty, even though several grounds of defence were available and he would have preferred to fight the case on home ground, on bail, and with a good lawyer he could communicate with in English. None of this was possible, and he ended up spending nine weeks in prison before coming home to commence his university career, his future blighted by a criminal record.

This is an example of how EAWs are being issued in a disproportionate way, wasteful of costs and having an unduly harsh effect on individuals' personal lives.

Lee Yarrow and Michael Tonge

Michael Tonge and Lee Yarrow were arrested on holiday in Crete in 1999 after a nightclub fight in which Michael sustained injuries. Lee was released from police custody after four days but Michael was held on remand for four months, during which he was beaten, kicked, flogged with rope and denied food and medical treatment. He was then released and came back to England, only for both men to receive EAWs in 2005, with no explanation for the delay. At their eventual trial in Greece, charges were dropped against Lee. Michael was convicted of assault, served a short sentence in Greece and was released and returned to the UK in August 2007.

Once again, an EAW was executed despite serious police misconduct and abuse and following unreasonable delay. The English Court should have been empowered to refuse extradition on the basis of justice, fairness and the rule of law, but under the new system it held that it had no discretion to refuse.

Michael and Brian Hill

In 1997 the Human Rights Committee of the UN reported that Michael and Brian Hill had been denied a fair trial in Spain following their arrest in 1985 and were entitled to a remedy "entailing compensation" as a result. But Spain failed to comply with this ruling. Instead, it issued an EAW seeking the brothers' extradition to Spain. In October 2005, Michael Hill was arrested in Portugal and extradited to Spain where he served seven months for breach of parole conditions. They had already served three years in prison in Spain.

This is a clear abuse of process. Courts of executing states should be empowered to refuse extradition in such cases, rather than perpetuating the injustice of the original trial.

Ms X (anonymity requested)

In 1989, British citizen Ms X was arrested in France on suspicion of drug-related offences and held in custody. Her trial took place later in 1989. The court acquitted her of all charges, finding she had been set up by her then partner. She returned to the UK thinking that was the end of it.

But unbeknown to Ms X, her case was appealed by the French prosecution. She was not notified and the appeal went ahead without her knowledge in 1990. No lawyer represented her. The Appeal Court overturned the original verdict and sentenced Ms X to seven years imprisonment. Again, she was not informed.

In April 2005, an EAW was issued by the French authorities for Ms X to be returned to serve her sentence. Unaware of this, in 2008 she travelled to Spain and to her horror was arrested and taken into custody there pending extradition to France. Ms X refused to consent and spent a month in custody—away from her daughter and grand-children in England—waiting for an extradition hearing. Eventually the Spanish court refused to extradite her, given that 19 years had passed since the alleged offences.

Ms X was released and flew home to the UK—only to be re-arrested on the same EAW by the British police at Gatwick airport. The City of Westminster Magistrates' Court refused the extradition in April 2009 given the passage of time.

This could happen again and again, until France removes Ms X's EAW from the EU-wide system. Ms X is virtually a prisoner in her own country, as any trip abroad could result in her arrest. She wants to visit her sick and elderly father in Spain but cannot risk it for the sake of her family.

Garry Mann—covered below in Section

4. Context of the Stockholm Programme and Roadmap

4.1 On 1 July the Swedish Presidency published a "*Roadmap with a view to fostering the protection of suspected and accused persons in criminal proceedings*" (Roadmap), a positive step which FTI welcomes.

4.2 In our day-to-day experience of cross-border EU criminal investigations and proceedings, we frequently see instances of injustice caused by an absence of adequate standards of fairness in defence procedures across member states. During the past ten years, EU legislation and policy has been geared towards mutual recognition and cooperation, with no adequate simultaneous measures to protect individuals' rights to a fair trial. Once the rule of law and the right to a fair trial are called into question, so

too is the legitimacy of the ever stronger powers the EU and member states give to police and judicial authorities. If the Swedish Presidency is truly ambitious for change in this field, it (and the Working Group which has been set up to push forward on these safeguards) must ensure that the minimum rights contained in the Roadmap now receive the legislative attention they urgently require. Those efforts should receive the UK's full support.

4.3 Previous attempts to build a sound basis for mutual trust between member states have notably failed. Instead of ensuring minimum fair trial standards across the Union, states have placed too much faith in the capacity of other legal systems in Europe to deliver justice. Part of the problem is the lack of public engagement in the area of defence rights and the almost total absence of political debate on the subject, particularly since the Madrid and London terrorist attacks. Recent emphasis has been on strengthening security and building cooperation in the fight against terrorism and serious crime. The fundamental rights of citizens have received almost no attention, but there is now an opportunity to put this right, with the UK's backing.

4.4 The Roadmap document contains strong arguments for introducing minimum procedural safeguards. Pointing to the fact that the removal of internal borders has increased cross-border criminality and that as a result more individuals are finding themselves involved in foreign proceedings, the Roadmap acknowledges that this results in suspects knowing less about their rights than they would if arrested at home, as well as language barriers making meaningful participation in their defence more difficult. It also points out that introducing basic EU standards for the protection of procedural rights will enhance mutual trust in other states' systems, thus improving mutual cooperation.

5. FTI's Concerns over Roadmap and Stockholm Programme

5.1 The European Commission's proposals for the Stockholm Programme published on 10 June highlight the need to put ordinary citizens' interests at the heart of the project but contain few concrete proposals about how to achieve this in the criminal justice context.

5.2 The Presidency's 23 June Work Programme also contains no detail on this point, referring to its "ambition to balance effective crime fighting with measures that guarantee the rights of individuals [emphasis in original]" and the need for the Programme to "strik[e] a better balance between measures to safeguard security and measures to preserve the rights of the individual".

5.3 While FTI welcomes the Swedish presidency's acceptance that more must be done in this area, what is needed is more than a *re-balancing* exercise. We fully accept the need for cross-border cooperation in the fight against crime, but there must be no "trade-off" between fundamental rights and the need to fight crime. The very cornerstone of EU values is the right of all within the EU to be treated fairly in criminal investigations and proceedings. This entails citizens being allowed a full opportunity to defend themselves and participate meaningfully in their trial. These rights are not variables, to be weighed in the balance with other policy considerations. They are universal rights, which should now be restored to the centre of criminal justice policy.

5.4 This point is best made by looking at cases involving real people. This is done in section 6 below, which deals with various of the Roadmap's measures in turn. A single case often suffers multiple failures to respect basic rights, with for example the lack of access to a lawyer or legal aid being exacerbated by the lack of information on rights or on the prosecution case, or the lack of a quality interpreter or translations of important documents, or the inability of suspects to contact friends, family or consular officials as quickly as possible to help them avail themselves of these other basic measures quickly enough not to have their position irrevocably prejudiced.

5.5 This indicates that these minimum rights should be developed in a mutually coherent way, even though the Roadmap envisages a "right-by-right" approach so that "*focused attention can be paid to each individual measure, so as to enable problems to be identified and addressed in a way that will give added value to each measure*".

5.6 FTI is concerned at the absence of detail in the Roadmap about how or when legislation on minimum defence rights will be introduced. It is also concerning that it has not been expressly stated that the Roadmap safeguards will be developed within the framework of the Stockholm Programme. It seems the intention may be to run this project on a parallel track. On the other hand, the Programme is quite detailed and specific when dealing with, for example, increasing the powers of police and justice agencies even further to gather evidence across borders, strengthening support measures and training for judges and prosecutors, and for the principle of mutual recognition to apply at all stages of criminal procedure.

5.7 FTI's cases suggest that although these rights are enshrined in the European Convention on Human Rights and Fundamental Freedoms, they require further legislative force in order to become tangible for ordinary citizens. Only then can individuals depend on them with confidence wherever they happen to be in the Union, whether in their home state or another member state. This is implicitly recognised by the Swedish

Presidency's statement in the Roadmap that "*there is room for further action of the European Union to ensure full implementation and respect of Convention standards, as well as, where appropriate, to expand existing standards or to make their application more uniform*".

5.8 We believe detailed and binding legislation on each measure is the best way to ensure this important aim is achieved.

6. Cases Illustrating Immediate Need for Legislation on Roadmap's Measures

Translation and Interpretation

Case study: Teresa Daniels (TD), British national arrested in Spain

In 1997, TD and her companion AB were arrested at Gran Canaria Airport: almost four kilos of cocaine was found in two suitcases belonging to AB. On arrest, AB told police that TD had no knowledge of the drugs. No drugs were found on her person or in her luggage. At the trial (less than three months after her arrest), TD was asked a few questions and after 1½ hours was told she could leave. She assumed throughout the trial that she was there as a witness. No interpreter was present to assist her and she could not follow the proceedings. AB maintained throughout the trial that TD had known nothing about his activities.

In a judgment issued six months later, TD was sentenced to 10 years. AB received the same sentence and was taken to prison to start his sentence; TD was allowed to go free pending her appeal. She was not sent the judgment or an English translation of it. She heard nothing further and was unaware that her appeal was in fact unsuccessful and her sentence had been reconfirmed. A letter from the Spanish authorities in response to a query from her MP suggested she had been discharged. However, an extradition request was later made by Spain and granted in October 2005 by the UK, resulting in TD's extradition, to serve her sentence in a Madrid jail. She was ultimately granted a royal pardon and released in January 2009.

When we became involved in the case (after the appeal) it became clear that the court had based its decision on a single entry in TD's personal diary about an expected payment she was looking forward to receiving. This in fact referred to a few thousand pounds' compensation for a personal injury claim relating to a car accident she had suffered, as she could have established if she had had a fair trial. The court relied on its own unofficial "translation" of the relevant entry, which was later shown to be largely inaccurate. An official translation of the diary, carried out by a qualified translator, was also supplied to the court prior to trial, yet inferences were made by the prosecution and the court to the detriment of the defence based on the first, unreliable, translation. The official, accurate, translation was ruled inadmissible for being adduced out of time. The appeal court upheld the original decision in full.

In this case, having an interpreter at court throughout trial and being allowed to insist on official translations of key prosecution evidence in good time before the trial could well have prevented a gross miscarriage of justice.

(See also cases of the Stow brothers and of Garry Mann below. These cases also involved significant damage to the individuals' trials, caused by lack of interpreters and translations.)

Information on Rights and Information about the Charges

Case study: Andrew and Graham Stow (A and G), British nationals arrested in Portugal

A and G were considering opening a diving school. In July 1999 their dive boat was subjected to a thorough routine search by Portuguese customs officers in Faro and nothing was discovered. A few days later the Harbour Master in Faro asked the brothers to move their boat 250 metres down the wharf to make way for a larger boat. The next day one of the men dived below the boat and discovered boxes scattered over the sea bed. He began bringing the boxes up and around 15 minutes later officers from the Policia Judici¬ria arrived. A and G assisted the police in bringing up the boxes. They maintain they were completely unaware of their contents. Shortly thereafter they were arrested at gunpoint and accused of importing hashish into the harbour.

Immediately after their arrest, they were interrogated in Portuguese with no interpreter or legal adviser present. They were pressurised into signing confessions in Portuguese.

They did not see the charges against them in writing until a whole year after their arrest. The charges were in Portuguese. As their defence lawyer did not speak English, A and G had to rely on other remand prisoners to help them understand the document. Throughout the trial, the court-appointed lawyer only worked for the benefit of the court; the court proceedings were not translated for A and G; and only their responses to the judge were translated into Portuguese.

They eventually won a retrial only for the appeal to uphold the original decision. They served six years in jail in Portugal and nine months in a British prison following a transfer. They are now awaiting a decision from the European Court of Human Rights under Article 6.

Spanish cases

A number of our clients facing charges in Spain have complained about the *Sumário Secreto procedure whereby the prosecution does not have to disclose any details about their investigation until as late as 10 days before the closure of the investigation. This seriously hampers the preparation of the defence. In many cases it results in the refusal of bail applications and the loss of any chance to prepare a defence case in good time, for example, by taking witness statements from possible defence witnesses while their recollection is still good, or adducing other evidence which could assist the defence.*

Access to basic information about the charges and the prosecution's case must be given at a much earlier stage than this. Often the damage is done by the time the person knows his/her rights, particularly where lengthy pre-trial detention is a feature of the relevant member state's system, as is the case in Spain. It is also impossible to make proper bail applications without this basic information.

(See also under Garry Mann's case below regarding the damage caused by not being informed of legal rights, for example the right to seek a stay of proceedings in order to prepare a defence.)

Legal Aid and Legal Advice

Case study: Garry Mann (GM), British national detained in Portugal

On 15 June 2004 GM, a British national, was with friends in a bar in Albufeira, Portugal, when a riot took place in a nearby street. GM was arrested along with other suspects some four hours after the alleged offences. He was tried and convicted—along with 13 other defendants—less than 24 hours after his arrest. He had been attending the Euro 2004 football tournament and was arrested under temporary legislation in place at the time. The object of the legislation had been to allow for a fast track procedure to convict and deport foreign nationals caught "red-handed". This was clearly inappropriate in GM's case, where identification was in issue.

GM was sentenced to two years imprisonment on 16 June 2004 but, two days later, voluntarily agreed to be deported after being told he would not have to serve his sentence provided he did not return to Portugal for a year.

The trial was grossly unfair in a number of ways but perhaps the most striking is that GM had no time to prepare his defence, instruct a lawyer of his own choosing, or seek legal aid to help pay for his own lawyer or interpreter. Unbeknown to GM at the time, it now appears, based on information from the Portuguese ministry of justice, that the temporary legislation contained a provision allowing suspects to request a one month stay of the proceedings to prepare their defence. Had a lawyer informed him of this, he could have taken advantage of it.

There were only two court-appointed lawyers for the 14 defendants and they were not given the time or opportunity either to cross-examine prosecution witnesses or to call witnesses for their own clients who could support their alibis and offer character evidence. The court-appointed interpreter translated for all 14 defendants, communicating with one, who would then convey the information to the others as best he could.

Garry Mann's EAW

For reasons that are entirely unclear, GM is now threatened with extradition to serve his sentence, having been served with a European Arrest Warrant in March 2009, despite never having returned to Portugal and having been in no trouble since. He is challenging his extradition.

In part because of his inability to instruct his own lawyer properly in good time before his trial and his unawareness of his legal right to a one month stay of proceedings, GM now faces a real risk of having to serve a jail sentence in Portugal for a crime he did not commit. His conviction was branded by District Judge Stephen Day[1] as having been "obtained in circumstances that are so unfair as to be incompatible with the Respondents' right to a fair trial under Article 6 . . . [*inter alia*, because he and the other respondents] . . . had inadequate time to instruct lawyers to conduct their defence appropriately".

FTI believes that extradition in these circumstances would amount to an abuse of process. The extradition hearing will take place on 29 July 2009 at 2.00 pm at the City of Westminster Magistrates Court.

Communication with Relatives, Employers and Consular Authorities

In a number of cases we have seen unacceptable delays in allowing suspects to speak to family or consular officials. This causes prejudice to their ability to organise legal representation as well as unnecessary vulnerability to them and concern to their relatives. If they are absent from employment without explanation this can also cause problems for them. It is important to remember in this context that suspects are just that: they are entitled to a presumption of innocence and denying them basic communication rights is not consistent with this.

[1] In an unsuccessful application for a football banning order brought by the Commissioner of Police against Garry Mann in July 2005.

Green Paper on the Right to Review of the Grounds for Detention

Case study 1: Klaas Jan Bolt (KB), Dutch national detained in France

KB, a lorry driver, was hired by a Dutch transport company to make several trips between Spain and Netherlands in late 2004 and early 2005. During one such journey, he noticed he was being followed by a van. He stopped, checked his load and found cannabis hidden inside one of the containers. He immediately notified the Spanish police but was unable to make himself understood. He next telephoned his wife, who contacted the Dutch police. They advised him to abandon the lorry and return to the Netherlands and he followed their advice. Meanwhile, KB's former boss was arrested in France for possession of four tons of cannabis. Subsequently, KB was arrested in the Netherlands under a European Arrest Warrant and was extradited to France in the spring of 2005, having been falsely accused by his former boss of being part of the drug-smuggling operation. His accuser has since admitted he lied about KB's involvement in letters of apology written to KB's family, but this has unfortunately not led to KB's release.

Having been extradited to France in Spring of 2005, KB's trial was not conducted until Spring 2008. During this three year period he was remanded in custody, hundreds of miles from his family and unable to earn a living or provide for them. (He was ultimately convicted and sentenced to five years: there were serious concerns expressed over the adequacy of interpreting and legal representation.)

Case study 2: Joseph Mendy (JM), British national detained in Spain

The case of JM, referred to above in the context of the EAW, is another example of how suspects' personal lives can be severely blighted by the threat of needlessly lengthy pre-trial detention: in this young man's case, leading to pressure to plead guilty when he would have preferred to fight the charges.

Conclusion

FTI is grateful for this opportunity to provide our initial views on the Stockholm Programme and illustrate them with some of our clients' experiences. We would be delighted to deal with any queries on this submission.

9 July 2009

Memorandum submitted by the Information Commissioner's Office

1. The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 and the Freedom of Information Act 2000. He is independent from government and promotes access to official information and the protection of personal information. The Commissioner does this by providing guidance to individuals and organisations, solving problems where he can, and taking appropriate action where the law is broken. The comments in this additional evidence are primarily from the data protection perspective.

2. Justice issues in the European Union are currently not covered by a comprehensive data protection law. The European Data Protection Directive[2] (the DP Directive) explicitly states that it shall not apply to a number of areas, most relevantly the activities of the State in the areas of criminal law. While the Lisbon Treaty is being presented as an instrument which will remove the traditional "pillars" of European Community law, it will not mean that the DP Directive will automatically apply to justice issues once the Treaty is implemented.

3. At the same time, the recently introduced Data Protection Framework Decision[3] (DPFD) only covers personal data transmitted or made available between European Community Member States, or between Member States and third countries. It does not provide a comprehensive data protection law covering activities in the justice area within Member States. At European Union level, the approach to data protection is piecemeal, with specific provisions being introduced at the level of an organisation, such as Eurojust, or for a specific database, such as the Schengen Information System. This means that there are a number of Joint Supervisory Authorities/Bodies made up data protection authorities from Member States, each with a very specific remit.

4. There is no comprehensive data law or supervisory body at European Union level which covers all third pillar activities. While the Council of Europe Convention 108[4] applies to all automated processing of personal data, including in areas of justice, the European Union felt it necessary to bring forward the DP Directive and provide for further, albeit piecemeal, protection in the third pillar.

---

[2] Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data.

[3] Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, adopted 24 June 2008.

[4] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, published by the Council of Europe, Strasbourg, 28.1.1981.

5. This approach to law does not follow standard good practice within European law-making of producing a general law (lex generalis) to provide a consistent high level of protection, and then a suite of laws specific to certain areas (lex specialis) where the general law requires a more precise application. Nor is it consistent with good regulatory practice, where the law must be clear and accessible. This means that there can be a significant divergence in the standards of data protection in the area of justice and law enforcement across Europe, as well as a degree of confusion as to which standard applies at any given opportunity. This is particularly evident in issues such as transfers of passenger or financial data within the EEA and beyond for law enforcement use.

6. The UK Data Protection Act 1998 discharges the UK's obligations in relation to both the EU Data Protection Directive and Council of Europe Convention 108 and therefore applies to all areas of activity in the UK, including the justice system. It is though subject to certain limited exemptions such as where the application of some safeguards may prejudice law enforcement purposes.

7. The European Union's current Hague programme which fosters cooperation between member states in the areas of law enforcement and justice will soon be superseded. The incoming Swedish Presidency will conclude what has become known as the "Stockholm Programme" and this is now being developed. It was discouraging to see that one of the key reports that will inform this programme, "Freedom, Security, Privacy—European Home Affairs in an Open World", did not adequately address the lack of comprehensive EU data protection law in the third pillar. This was particularly disappointing when the report claimed that one of the challenges was balancing privacy against mobility and security and that a key aim was to "ensure the best possible flow of data within European-wide networks". This is mistaken. The aim is surely better law enforcement across Europe. Information sharing can and should be used as a tool where this is proportionate and serves an identified justice need, but information sharing is not, and should not be, an end in itself.

8. The Information Commissioner sees the need for a comprehensive set of data protection laws in the area of Justice and Home Affairs at European Union level if and when the Lisbon Treaty is fully ratified by all Member States. The current arrangement will soon become an anachronism as the new systems of legislating come into force. But even without the changes, the need for a merger of all supervisory systems at European level is necessary in the context of better regulation, consistency and clarity. It is the foundation of the UK's own better regulation agenda.

9. The Information Commissioner is also concerned that all too often measures are introduced at European level on the basis that a solution has been identified, often where the evidence for a problem existing is not fully articulated, such as recent effort to allow law enforcement access to the Eurodac database. On too many occasions the proposed surveillance, information sharing or data collection led solution does not actually address an identified problem and has been introduced on the basis of "something must be done". Issues of proportionality seem complex at times, but it is a very basic principle that if surveillance, information sharing or data collection will not actually address the problem it is meant to solve, it is by very definition disproportionate. Proposed solutions must not only address the problem in question but must be successful enough in addressing the problem concerned that any interference in the right to privacy is justified. Any solution that has data protection implications must be designed to meet a genuine need in the area of justice.

10. The Information Commissioner's Office has been encouraging UK organisations to carry out a Privacy Impact Assessment (PIA) on privacy intrusive systems when they are being designed and has produced a handbook to assist this process. PIAs help to identify the risks to privacy in new projects, and then identify ways of mitigating those risks, such as minimising the amount of personal information collected or shared or looking at less intrusive alternatives. Several European Member States are now looking at this model to see how it can be implemented at national level and there are other versions of privacy impact assessments being used worldwide. The ICO would recommend that this becomes standard practice at European Union level.

11. As we move into the new legislative procedures that the Lisbon Treaty will apply, it is important that those who hold the keys to policy making in the areas of justice and law enforcement in the European Union do more than pay lip service to data protection principles. Policy makers must demonstrate that the European Union is committed to striking a proper balance between legitimate justice needs and the needs to protect the privacy of individuals. This means the development of clear and consistent data protection law, a merger of supervisory measures and adequate mechanisms for ensuring that privacy rights are safeguarded.

9 July 2009

Memorandum submitted by the Judiciary of England and Wales

In response to a request from the House of Commons Justice Select Committee for a memorandum on the impact of EU moves on judicial cooperation, mutual recognition of judgments and enlarged jurisdiction of the ECJ, as well as any other aspects of the terms of reference for the inquiry into Justice Issues in Europe.

Her Majesty's Government leads on negotiations with the European Union on matters of Justice and Home Affairs, such as the Stockholm Programme setting out the work programme for the next five years. The judiciary are, on an increasing basis, consulted on those aspects of negotiations where their experience of the UK judicial system would enable them to provide a unique perspective on the practical and technical implications of the proposals, and in those cases where responsibility rests with the judiciary themselves, such as judicial training, a more active role.

A specific example of successful regular consultation is the Standing Committee on Private International Law which was chaired until recently by Sir Peter North (new chairman still to be appointed). The Committee consists of heavy weight legal practitioners, members of the judiciary, and academics. They are consulted regularly on developments in Private International Law such as European proposals on Succession and Wills, Maintenance, and Rome I, II and III. The Committee offers advice to ministers and officials throughout the whole of the UK on proposals of this kind.

On the enlarged jurisdiction of the ECJ by the Lisbon Treaty, we anticipate that we will continue to be consulted about developments in Justice and Home Affairs and will be able to provide advice on the practical and technical implications of ECJ jurisdiction in future legislative proposals in Justice and Home Affairs.

On judicial cooperation across Europe, the judiciary has direct involvement in a number of different areas, some of which are outlined below.

1. Network of the Presidents of the Supreme Judicial Courts of the EU

The Network of the Presidents provides a forum through which European institutions are given an opportunity to request the opinions of Supreme Courts and to bring them closer by encouraging discussion and the exchange of ideas. The members meet to discuss matters of common interest.

Since 2005, internships have been organized for the Members of the Supreme Courts, as part of the Exchange Programme of European judicial authorities with the support of the European Judicial Training Network.

In 2006, the Network developed a Common Portal of jurisprudence which allows its members to search national case law databases, with the financial support of the European Commission.

2. The Network of Councils of State and Supreme Administrative Jurisdictions of the EU

The Lord Chief Justice is a member of this Network. He is represented at meetings and events by a member of the senior judiciary. The members meet two or three times a year and arrange seminars and conferences for judges across Europe to discuss topics relating to administrative law. The most recent conference was on judicial appraisal. There is also an online research facility managed by the Association which provides judges with access to European case law.

This forum is particularly beneficial in sharing best practice on judicial independence, integrity and rule of law with Member States for whom these ideas may not yet be second nature. It is also committed to offering new Member States the best possible assistance in getting to know the European legal system.

3. European Network of Councils for the Judiciary (ENCJ)

I am currently the President of the ENCJ, which was formally established in 2004 and consists of national institutions in the member states of the European Union which are independent of the executive and legislature, and which are responsible for the support of the Judiciaries in the independent delivery of justice.

The ENCJ proposes to act as a mediator between the institutions of the European Union and the national judiciaries and it has formulated a number of objectives within the framework of the creation of the European Area of freedom, security and justice.

The ENCJ supports co-operation between members on the following subjects:

— analysis of and information on the structures and competencies of members;

— exchange of experience in relation to how the judiciary is organised and how it functions;

— issues pertaining to the independence of the Judiciary and other issues of common interest; and

— provision of expertise, experience and proposals to European Union institutions and other national and international organisations.

The Network is currently engaged on a number of projects including quality and access to justice, judicial ethics, mutual confidence and evaluation, the status of judges and public confidence.

4. European Judicial Training Network (EJTN)

The EJTN is the principal platform and promoter for the development, training and exchange of knowledge and competence of the EU judiciary.

Founded in 2000, EJTN develops training standards and curriculum, coordinates judicial training exchanges and programmes and fosters cooperation between EU national training bodies.

Judge Victor Hall has been Secretary General of the EJTN since March 2008, prior to which he was Director of Studies at the Judicial Studies Board.

5. Criminal Justice

European Arrest Warrant: The EAW was adopted by the Council of the European Union on 13 June 2002 and has replaced formal extradition practice within the EU between its 27 Member States. As the first measure applying the principle of mutual recognition to foreign judicial decisions and judgments in criminal matters, it has been a key development in the creation of a European Area of Freedom, Security and Justice. The success of the European Union's mutual recognition programme hinges on the existence of genuine trust between Member States, and especially between all actors in the criminal justice process. Judges have attended a number of conferences for this purpose.

Previous convictions: One very practical example of the impact of EU legislation on the work of the courts and the judiciary is the Council Framework 2008/675/JHA on taking account of convictions in the Member States of the EU, implemented by the Coroners and Justice Act 2009. Although the relevant provisions are yet to be commenced, it is clear that the requirements of the Act are potentially of great significance. While the judiciary were not involved in the negotiation of the Framework Decision itself, they have been involved in the practical implementation of the Framework Decision at an operational level.

The 2009 Act requires a domestic court, when presented with an EU Certificate of Conviction, to verify the Certificate by considering matters including whether it has been signed by the "proper officer of the court" of the EU country. The "proper officer of the court" is defined by the Act[5] as "a person who would be the proper officer of the EU court if that court were in the United Kingdom", which will require the domestic court to have details of the roles and nomenclature of the EU court.

A related issue is whether the Certificate of Conviction will contain sufficient details about the EU offence (both the ingredients of the offence and the factual basis of the conviction) for it to be of material value to the domestic proceedings.

Such details will not necessarily be easy to obtain, which may necessitate the party adducing the conviction to take additional steps to provide the domestic court with sufficient evidence, all of which will take time and resources, for the court and the parties.

To meet these concerns, the judiciary are involved in work being undertaken by the Office for Criminal Justice Reform and the Home Office to ensure that that the implementation of the Framework Decision does not hinder the operation of the courts.

6. International Family Justice

It is essential that family law judges across the world are supported as much as possible to facilitate International Family Justice. Lord Justice Thorpe is the Head of International Family Justice for England and Wales. As such he deals with requests for advice and assistance from both domestic and international judges in relation to international family law matters, such as specific issues arising under the Brussels regulations and the Hague Convention. He also attends and speaks at many international family law conferences and teaches less experienced judges how to deal with International family cases. Thorpe LJ is the designated specialist family judge for the Hague Network of Liaison Judges which has been instrumental in forging greater cooperation between jurisdictions in matters of child abduction.

In addition a network of specialist family judges was created under the auspices of the EJN for civil and commercial judicial cooperation. The Network has been instrumental in assisting in the progress of complex cross-border family cases.

[5] Paragraph 13(4)(b) of Schedule 17 to the Coroners and Justice Act 2009.

Information on developments and innovations in international family law is publicised as much as possible, including dissemination to professionals, government officials and judges through committees such as the International Family Law Committee. In addition, Thorpe LJ initiates international judicial conferences to promote, sustain and improve understanding and cooperation between many different jurisdictions.

8. Administrative and Civil Justice

(a) *Patents*

Members of the judiciary work with the UK Intellectual Property Office, the European Patent Office and judicial colleagues throughout the world to try to harmonise patent law aas far as is possible. In addition to regular informal contact they attend the biennial International Patents Symposium, the biennial Venice Patents Conference and many other international conferences and meetings throughout the year. There are also regular meetings in Brussels with judges from across the EU, the European Commission and industry representatives advising on the ongoing project of a European Patent Court.

The Judges also regularly attend the biannual European trade mark judges symposia at OHIM (the Office for the Harmonisation of the Internal Market) in Alicante

Current EU intellectual property legislation is fragmented and poorly drafted. The defects in the drafting of the Trademark Directive have resulted in many references to the ECJ which struggles with commercial disputes and has not performed well in trade marks. The EU has commissioned a study by the Max Plank Institute into the working of the Trade Marks Directive and Regulation which may lead to changes but it is very difficult to change a situation where there are vested rights. It is probable that the more recent Designs Regulation, which is also poorly drafted, will attract similar problems.

The judiciary have regular informal contact (by email) with judges in other countries, such as Holland and Germany. The difficulty is that the standard of drafting is so poor; everyone is doing different things in an area that should provide Community wide rights.

The EU should consult much more widely on the drafting of these measures and not just on the policy behind them. It is indeed doing so in relation to the proposed European Court—really the first time this has ever been done.

On 4 December 2009, the Council adopted conclusions on an enhanced patent system in Europe which resolves some (but far from all) major elements to bring about a single EU patent and establish a new patent court in the EU.

(b) *The European Commercial Judges Forum*

The ECJF was established under the Framework Programme for Judicial Cooperation in Civil Matters 2002, chaired by Mr Justice Colman under the very active support of the then Lord Chancellor Lord Irvine. The inaugural meeting was in June 2003 in London which had as its subject *New approaches to efficient management by the court of commercial litigation*.

Subsequent meetings covering a range of topics have taken place in 2005 in Karlsruhe, 2006 in Hamburg, 2007 in The Hague and 2009 in Dublin. The topics for Dublin, for example, included the independence of the judiciary, cross border insolvency and Regulation 44. The next meeting is due to take place in Rome in June 2010.

The other members of the committee are judges from Germany, France, Italy, Ireland and the Netherlands. Delegates are drawn from the commercial court judiciary of all EU countries.

(c) *EU Forum of Judges for the environment*

The Forum meets annually to promote the enforcement of national, European and international environmental law by contributing to a better knowledge by judges of environmental law, by exchanging judicial decisions and by sharing experience in the area of training in environmental law.

(d) *The European Association of Labour Court Judges*

An independent body of judges and academic lawyers committed to the promotion of information and contacts in the field of employment law and judicial practice. Membership is open to all countries of the European Union and European Economic Area.

(e) *Association of European Competition Law Judges*

A forum for the exchange of knowledge and experience in the field of competition law amongst the judiciary of the Member States of the EU. Its aim is to promote consistency of approach in the application of Articles 81 and 82. It was founded in Luxembourg in 2002 by a group of judges from 15 Member States and its focus is to hold conferences and seminars. It is open to all who act in a judicial capacity in connection with competition law. Its EU Commission contact is the Competition DG

(f) *The International Association of Refugee Law Judges*

The association seeks to foster recognition that protection from persecution on account of race, religion, nationality, membership in a particular social group, or political opinion is an individual right established under international law, and that the determination of refugee status and its cessation should be subject to the rule of law. Its European chapter plays a significant role in dealing with asylum issues in Europe. They meet annually for the European chapter and bi-annually for the international chapter.

Rt Hon Lord Justice Thomas
Vice-President of the Queen's Bench Division and Deputy Head of Criminal Justice

January 2010

Memorandum submitted by JUSTICE

Introduction

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

2. The Committee sought responses to key areas in which European cooperation on justice issues could add value to the experiences and rights of the individual for the next five years of the justice and home affairs programme. This response will focus on the issue of procedural rights of the accused, which will return to the Justice and Home Affairs agenda during the Swedish Presidency. The approach will be right-by-right rather than a mutli-right proposal for a framework decision. Whilst JUSTICE has concerns that the approach will not exert any obligation upon the Member States to continue to act in this area subsequent to the Swedish Presidency, we welcome the renewed action and alternative approach which may at least manage to obtain agreement on basic minimum guarantees. Once the principle of protection binds Member States through focussed framework decisions, it will be possible to develop the practical content through pressure to follow best practice guidance and case law before the European Court of Justice.

Procedural Rights of the Accused

3. The Swedish Presidency formally announced at the European Commission organised meeting of experts at the end of March 2009 that it intended to re-visit the issue of procedural safeguards for defendants in criminal proceedings.

Background

4. The Tampere European Council Presidency Conclusions on 15 and 16 October 1999 (http://www.europarl.europa.eu/summits/tam_en.htm#b). requested the Council and Commission to adopt a programme of measures to include work on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, while respecting the fundamental legal principles of the Member States. Paragraph 40 observed as follows:

> The high level of safety in the area of freedom, security and justice presupposes an efficient and comprehensive approach in the fight against all forms of crime. A balanced development of unionwide measures against crime should be achieved while protecting the freedom and legal rights of individuals and economic operators.

5. This was endorsed in the Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters OJ C 12, 15.1.2001, p 10, which provided that this programme should include "mechanisms for safeguarding the rights of [. . .] suspects" (parameter 3) and "the definition of common minimum standards necessary to facilitate the application of the principle of mutual recognition" (parameter 4).

6. The successor to Tampere, the Hague Programme, adopted by the European Council on 4 November 2004, set out the objectives for the area of freedom, security and justice for the period 2005–10. It contained the following declaration at paragraph 3.3.1:

> The further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions. In this context, the draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union should be adopted by the end of 2005.

7. These objectives came in the context of the adoption of the Council Framework Decision establishing the European Arrest Warrant (2002/584/JHA), OJ L 190/1 18.7.2002, p 1, the Council Decision setting up Eurojust (2002/187/JHA), OJ L 63, 6.3.2002, p 1, and the Council Framework Decision on combating terrorism (2002/475/JHA), OJ L 164, 22.6.2002, p 3. The European Parliament and interest groups had

called for the protection of defence rights in the European Arrest Warrant instrument. JUSTICE prepared a paper in 2002 to address the imbalance of prosecution orientated instruments, *Draft Framework Decision on the rights of the individual in criminal proceedings involving international judicial co-operation*, A JUSTICE Proposal, January 2002, http://www.justice.org.uk/ourwork/eu/index.html. In this we acknowledged the context in which these instruments were proposed, following the 11 September terrorist attacks in Washington and New York and aims at increasing efficiency of investigations and prosecutions while removing procedural hurdles in international co-operation. To this end we said, and we maintain:

> . . . [T]here is a real need for formal and binding codification of rights in the context of international judicial co-operation in criminal matters. The complexities of law and procedure involved in cross-border investigations and prosecutions require specific and detailed procedural safeguards to be in place.

8. Some minimum rights are contained within the European Arrest Warrant (EAW) Framework Decision, JUSTICE, together with many NGOs, academic institutions, the European Commission and the Civil Liberties, Justice and Home Affairs (LIBE) Committee of the European Parliament consider that these alone are insufficient. Furthermore, it is necessary given the eleven prosecution focussed instruments that have now been adopted within the Justice and Home Affairs (JHA) Council, for a stand alone instrument containing rights which must be guaranteed in any activity pursuant to future instruments. The JHA Council indicated that action would be taken by way of a separate instrument to protect defence rights at the time that the EAW Framework Decision was being concluded.

9. The European Commission communicated a Green Paper in 2003 on what they termed to be *Certain Procedural Safeguards for suspects and defendants in criminal proceedings throughout the European Union*, COM(2003) 75 final, Brussels, 19.2.2003. There followed the Proposal COM(2004) 328 final, Brussels, 28.4.2004 (the Proposal) which was presented by the Commission in April 2004. Its aims were to ensure access to legal representation both before and at trial, access to interpretation and translation, protection of vulnerable suspects and defendants, consular assistance for foreign detainees, and the notification of suspects and defendants as to their rights. Its explanatory memorandum considered it incumbent upon the Member States to ensure that proper care is taken of the growing number of EU citizens who could find themselves involved in criminal proceedings in a Member State other than their own, given the increasing number of people exercising their right to freedom of movement.

10. The Proposal had a turbulent passage through the JHA Council until it was shelved at the final meeting of the German Presidency in 2007. The stated reason for the failure was that six Member States (UK, Ireland, Czech Republic, Slovakia, Cyprus and Malta) declined to adopt the framework decision. Since the original draft was proposed in 2004 it had been substantially altered, rights had been removed and only cross border action was envisaged, in an effort at compromise. A number of Members States had questioned the legal basis for action in this area, whether there was in principle competency and whether the subsidiarity principle allowed action. This issue remained unresolved for some Member States at the point of failure of the Proposal, whilst others accepted the advice received from the Council Legal Service Opinion, Council Doc. Brussels, 30 September 2004, 12902/04, LIMITE, COPEN 117. Concerns were raised, which the UK shared, that the Proposal duplicated rights contained in the European Convention on Human Rights. The Working Party on Substantive Criminal Law and experts on the implementation of the European arrest warrant when requested to consider the need for a framework decision reported that no serious problems existed in connection with cooperation and the application of legal acts in the area of mutual recognition. Disagreement on the detail and extent of each right also continued until the Proposal was shelved. The discussion and outcome of the meetings are recorded in the public register on the Council website, http://www.consilium.europa.eu/showPage.aspx?id = 245&lang = EN

11. There remains scepticism in some Member States, indicated at the Experts Meeting organised by the Commission at the end of March. Some Member States indicated that they had not yet been convinced that there was a need to act in this area. The Czech Republic in particular indicated that it did not believe there was a legal basis to act in domestic proceedings, but may be open to consider the prospect of cross border action, although it continued to be of the position that the ECHR was sufficient. JUSTICE prepared a joint submission on the *legal basis for a framework decision on procedural rights in criminal proceedings for the experts meeting 26 and 27 March 2009*, in an attempt to resolve the competency issue. In that we clarified that the development of the law within the institutions and case law of the European Court of Justice was such that there was clear competency to adopt a framework decision in the area of procedural safeguards, and that a cross border approach would frustrate the attempt of mutual cooperation.

Need for Procedural Safeguards

12. In order to address the argument that there was no need for action in this area, numerous studies were commenced with Commission funding to provide an up to date position. The study *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, T Spronken and M Attinger, University of Maastrict, EC, DG JLS, 12 December 2005, http://ec.europa.eu/justice_home/doc_centre/criminal/recognition/docs/report_proc_safeguards_en.pdf, examined replies to a Commission questionnaire which had been sent during consultation for the Proposal. The analysis focuses on the five rights contained in the Proposal. The majority of Member States do provide some level of safeguard, this varies widely but does not in many circumstances guarantee the rights as envisaged in the Proposal. Differences are apparent

in the point when legal representation may be made available, whether a lawyer will be present in the interview, on what basis legal aid can be provided, whether interpreters or translators require qualification, whether and what provision is made for vulnerable persons and what type is recognised. Pointedly, provision varies even between England and Wales, Scotland and Ireland, notwithstanding the newer Member States.

13. JUSTICE, together with the Open Society Justice Initiative, University of the West of England and the University of Maastricht, is currently conducting a study on Effective Criminal Defence Rights, http://www.unimaas.nl/default.asp?template=werkveld.htm&id=2FU733SN1NG53C6JS7D5&taal=en. The research seeks to identify a set of specific minimum "practical and effective" safeguards required of any state to meet the underlying principles of a fair trial as developed by the European Court of Human Rights. It compares the provision of defence safeguards across nine countries: two new member states (Poland and Hungary); three old member states where data suggest that there may be an issue about compliance with ECHR with regard to indigent defendants (France, Italy and Germany); two old member states where no issues of compliance appear to arise (England and Wales and Finland) and an accession state (Turkey). The study will produce detailed reports on the criminal justice system of each country and present its findings in book form during 2010. Thus far, initial comprehensive reports on Hungary, Belgium and the UK, are available on the website.

14. Professor Ed Cape from the University of Westminster presented some of these findings at the Commission Expert's Meeting in March 2009. A copy of that presentation can be made available if required. The 2008 updated findings of the *Existing Level of Safeguards* study presentation at the same meeting are available on the European Criminal Bar Association website, http://www.ecba.org/extdocserv/projects/ps/PresStudyProcedRights_EU.pdf. These show that there is little early provision for access to a lawyer in Belgium, Netherlands and Hungary. Notwithstanding the cases of *Salduz v Turkey* 27 November 2008 Case No. 3691/02 and *Panovits v Cyprus*, 11 December 2008 Case No. 4268/04 before the European Court of Human Rights which stated that Article 6(1) as a rule requires access to a lawyer from the first interrogation, the Netherlands is interpreting this as requiring consultation, but not presence of a lawyer during the interview. Belgium considers decisions from Strasbourg to only be persuasive unless the case is Belgian (the position the UK adopts, though access to a lawyer in interview is provided in the UK). Other studies have been commissioned on the provision of legal aid and pre-trial detention.

15. It is all the more clear that there is an increasing need for provision of procedural safeguards following the "successful" uptake of the EAW and the increasing numbers of requests for surrender under this scheme. According to the study by Nadja Long, *Implementation of the European Arrest Warrant and Joint Investigation Teams at EU and National Level*, European Parliament, DG Internal Policies of the Union, Policy Dept C, Citizen's Rights and Constitutional Affairs, January 2009, PE 410.67 which was requested by LIBE, 6,900 arrest warrants were issued in 2005. In 2007 this had increased to 9,413, issued by 18 Member States. Germany, France and Poland issued the most EAWs in 2007, at 1,785, 1,028 and 3,473 respectively. In both years, 22% of those requested were actually surrendered. The most requests honoured were those issued by the UK at 99 of 185. The fewest requests complied with were those issued by Poland at 434 of 3,473. In the UK in the fiscal year 2007–08, 1,274 EAWs were received by the Serious Organised Crime Agency. As of 27 August 2008, it had already received 1,255 for the year 2008–09.[(i)] 37% of those received in 2007/2008 were for minor offences from Poland.[(ii)]

Current Position

16. The Swedish Presidency has produced a road map which, once published, will confirm their intention to take a right-by-right approach to the issue of procedural safeguards. This is hoped to remove some of the complexity that frustrated the previous attempt at action in this area. The aim is for the Justice and Home Affairs Council to agree the content of this road map during the course of the Swedish Presidency. It will propose agreement to develop consensus on: interpretation and translation, legal aid, legal representation, information on rights, and length of pre-trial detention. It will be a non-exhaustive list to be built upon by way of future action. There is no time frame set out in this road map for the completion of the full set of rights or indication as to whether the rights will be considered consecutively or concurrently. This is to afford flexibility to the Council and Commission during deliberations. It is not envisaged that the road map will form part of the Stockholm Programme, rather it will be a separate and self contained process. JUSTICE considers this disappointing. Whilst the Stockholm Programme will be no more binding, and indeed a number of objectives in the Hague Programme, including this one have not been fulfilled, the Programme will set out the priorities for future action on judicial cooperation. If procedural safeguards are not detailed in the context of this road map, there is a possibility that they will be marginalised in favour of working through the goals set out in the Stockholm Programme. We will seek inclusion of the road map before the Programme is finally adopted, which is expected to be in the final JHA Council of the Swedish Presidency around November.

17. The positions of Spain and Belgium as the next Presidencies will be of equal importance in retaining focus on the road map. Both have committed to the principle and furthering the process, though what this means in practice will remain to be seen. We will call for the road map to remain on the JHA Council agenda throughout each Presidency until such time as defence rights are made available. The Stockholm Programme will be presented on 10 June. At that time the prominence or lack thereof of procedural safeguards will be apparent.

Interpretation and Translation

18. It has been confirmed that the first area for action will be Interpretation and Translation, since this is deemed to be the least controversial right. The Commission is currently finalising the proposal which will be presented on 8 July. This will consist of recording the principle right to be protected in a binding framework decision. The instrument will be accompanied by best practice guidance, which in the area of interpretation has received consideration by the Directorate General Interpretation, whose report will be relied upon as an example of best practice. Should the Proposal be adopted, subsequent action will be by way of proposal for a framework decision on legal aid and legal representation. There will be a green paper on length of detention and a call to the Commission for action on information on rights.

19. JUSTICE awaits with interest the content of the Proposal. Whilst the principle of a right to free interpretation and translation cannot be denied, once the details begin to be considered it is apparent that this will be as controversial as any other right. When will the service be required to be made available? What documents will need to be translated? How does this accord with obligations of disclosure? What are the costs implications?

20. In the original Proposal, Articles 6 to 9 were concerned with interpretation and translation and provided the right to free interpretation, free translation of relevant documents, accuracy of translation and interpretation and recording of proceedings.

21. The CPS in giving evidence before the House of Lords EU Select Committee, *Procedural Rights in Criminal Proceedings Report with Evidence*, 1st Report of Session 2004–05, made the following observations about the UK practice and resources:

> A number of types of documents (exhibits, procedural information, bail notices, charge sheets, legal aid notices etc) are currently not routinely translated. Under Article 7 it would be for the competent authorities to decide in the first instance which documents were relevant and needed translating, but the suspect's legal representative could also ask for further documents to be translated. The CPS noted: "the implications are considerable, particularly when the current system can only just supply the present demand". They also pointed to the practical resource implications for Article 9. Proceedings in magistrates' courts were not recorded in audio or video format and transcriptions were in English, not in the language spoken by the witness or the language of the defendant. If sign language were used in any part of the process then a video recording would be required (p 108).

22. The UK will continue to have these concerns under the new proposal, particularly with the increasing number of EAW requests. Other Member States have varying provision, most with less than the UK in practice. The House of Lords recommended that the Commission should revisit its original idea pursued in the Green Paper of each Member State having a system of training and a national register of accredited and certified practitioners. This is likely to form one of the best practice goals.

23. The use of the best practice guidance to accompany the basic requirements may ensure that the areas of disagreement do not affect the adoption of the binding framework decision. To this end, the proposed means of action is welcomed by JUSTICE. Whilst it is not satisfactory that the detail will be left to non-binding guidance which can be ignored in favour of budget and policy arguments, basic consensus will give a starting point upon which to build and may allow the development of binding principles through case law brought to the European Court of Justice.

24. Whilst JUSTICE is disappointed that the road map and proposal will not contain higher obligations upon the Member States, we recognise that agreement on the principle of protection of certain defence rights is a major step forward to address the current imbalance in favour of prosecution.

References

(i) Figures provided by SOCA in R Davidson, *A Sledgehammer to Crack a Nut? Should there be a Bar to Triviality in European Arrest Warrant Cases?* Crim LR 1 [2009] 31, 35 at footnote 14.

(ii) *Ibid.*

June 2009

Supplementary memorandum submitted by JUSTICE

Introduction

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

2. JUSTICE submitted a response to the Justice Select Committee on 5 June 2009 focussing on the issue of procedural rights of the accused. Since 5 June there have been a number of developments in this area and JUSTICE therefore welcomes the opportunity to add to our earlier response.

Recent Activity

3. On 10 June the European Commission issued a "Communication to the European Parliament and Council on an area of freedom, security and justice serving the citizen" (Commission Communication), which will provide the basis upon which the European Council adopts the Stockholm Programme at the end of the Swedish Presidency (http://www.statewatch.org/news/2009/jun/eu-com-stockholm-prog.pdf). JUSTICE issued a press release on 11 June expressing our disappointment at the Commission's failure to prioritise the adoption of defence safeguards in the Stockholm Programme. In 34 pages of detailed recommendations, only 4 lines were given to consideration of minimum defence safeguards in criminal prosecutions:

> [T]he rights of the defence will have to be strengthened. Progress is vital not only to uphold individuals' rights, but also to maintain mutual trust between Member States and public confidence in the EU. Under an action plan setting out a thematic approach, the work on common minimum guarantees could be extended to protection of the presumption of innocence and to pre-trial detention (duration and revision of the grounds for detention).

4. Similarly, in the Swedish Presidency's 44-page Work Programme for 1 July to 31 December 2009, published on 23 June 2009 (http://www.se2009.eu/polopoly_fs/1.6248!menu/standard/file/Work%20Programme%20for%20the%20Swedish%20Presidency%201%20July%20-%2031%20Dec%202009.pdf), rights of suspects in criminal proceedings are given only a cursory mention:

> The Presidency's ambition is to balance effective crime fighting with measures that guarantee the rights of individuals. EU cooperation must have even greater focus on measures for individuals, covering both the rights of a person who is the victim of a crime and of a person who is suspected of a crime.

5. On 1 July the Swedish Presidency presented a Note to the Justice and Home Affairs Council (JHA) delegations titled a "*Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings*" (http://register.consilium.europa.eu/pdf/en/09/st11/st11457.en09.pdf). The Note acknowledges that a lot of progress has been made in the area of judicial and police cooperation on measures that facilitate prosecution. It underlines the importance of redressing the balance by focusing on the protection of procedural rights of the individual. The Roadmap confirms their intention to address procedural rights using a step-by-step approach.

6. The Roadmap sets out six measures, each with a short explanation. These encompass: interpretation and translation, information on rights and information about the charges, legal aid and legal advice, communication with relatives, employers and consular authorities, special safeguards for vulnerable persons, and grounds for detention.

7. JUSTICE is relieved to see that the Roadmap replicates the priority rights in the original Proposal since these rights are fundamental in the provision of safeguards for suspects.

8. Surprisingly, the sixth measure seeks a Green Paper on the right to review of the grounds for detention before trial. JUSTICE is concerned that this controversial issue could subvert the agreement to the Roadmap within the JHA Council. Equally, it would in our view be more appropriate to consider this concurrently with the question of bail, for which a proposal for a framework decision is already before the Council. Whereas, the Roadmap envisages consecutive action which may delay consideration of detention for some years.

9. A Council Working Group consisting of civil servants from the permanent representatives of each Member State has been formed and held its initial meeting on 8 July to discuss the content of the Roadmap. We met in advance of this meeting with the UK's representative, Rosalind Campion of the Office for Criminal Justice Reform. We agreed that the Roadmap raised a number of questions as to definitions of rights and procedural application. She confirmed that Ministers are however conscious of the need for higher standards across Europe in order for meaningful mutual trust and recognition to develop. JUSTICE, together with other prominent NGOs, prepared a position statement on procedural safeguards in readiness for the Working Group meeting in which we emphasise the need for the Roadmap to be incorporated into the Stockholm Programme and for legally binding instruments to be adopted for each right under consideration (http://www.justice.org.uk/inthenews/index.html).

10. On 8 July the Commission presented a Proposal for a Council Framework Decision on the right to interpretation and translation in criminal proceedings (the Proposal). The Explanatory Memorandum sets out clearly the need for action in this area and the developments of caselaw before the European Court of Human Rights (EctHR) which clarifies that the right to interpretation and translation provided in Articles 5 and 6 of the European Convention on Human Rights (ECHR) should be provided free of charge, to pre-trial proceedings and of competent quality. The Proposal seeks to enhance these developments with practical detail. Article 2 confirms that the right to interpretation attaches to investigative as well as judicial proceedings, including police questioning and the provision of advice by the suspect's lawyer. In a somewhat

circular fashion Article 3(2) provides "[t]he essential documents to be translated shall include the detention order depriving the person of his liberty, the charge/indictment, essential documentary evidence and the judgment." Article 4 confirms that the State shall cover the costs of the service. Article 5 is headed "Quality of the Interpretation and Translation" and requires the service be provided in such a way as to ensure that the suspect is fully able to exercise his rights, and that the profession is trained in ensuring this is the case.

11. There is no best practice guidance accompanying the Proposal. However, the Explanatory Memorandum refers to the Reflection Forum on Multilingualism and Interpreter Training Report prepared for the Directorate General Interpretation which recommends, inter alia, having a Curriculum in Legal Interpreting and a system of accreditation, certification and registration for legal interpreters, (http://ec.europa.eu/commission_barroso/orban/docs/FinalL_Reflection_Forum_Report_en.pdf). It seems that this document is envisaged to provide a basis for the development of best practice guidance.

12. On 15 to 17 July there will be an informal meeting of the JHA Council. This will be devoted entirely to the Stockholm Programme. Member States have been asked to send their comments on the Commission Comunication to the Presidency. On 23 October 2009 there will be a formal meeting. We hope that the question of inclusion of the Roadmap in the Stockholm Programme will form part of these discussions.

July 2009

Further supplementary memorandum submitted by JUSTICE

Introduction

1. JUSTICE is pleased to answer the additional questions posed by the Justice Select Committee in the course of its enquiries into Justice Issues in Europe. We answer the questions raised under the question headings as follows:

Q134 *Are there any relevant cases where Member states have taken cases against each other to the ECHR?*

2. As indicated in the hearing, there have been few occasions to resort to this mechanism, particularly in recent years. The member states are reluctant to bring cases against each other due to the diplomatic considerations involved. Since it was set up in 1959, the European Court of Human Rights (the Court) has delivered judgment in only three inter-state cases (in comparison with over 10,000 judgments by way of individual petition): *Ireland v the United Kingdom (1978)*; *Denmark v Turkey (2000)* and *Cyprus v Turkey (2001)*. A further 17 inter-state applications were dealt with by the former European Commission of Human Rights, which ceased to exist in 1999.[6] The cases that have been brought have involved gross and systemic violations of the Convention. There have been four major relevant instances where these have occurred:

(i) Torture in Greece following the military coup d'etat in 1967. The case was brought before the Commission by *Denmark, Norway, Sweden, Netherlands*, 1969. In addition, articles 5, 6, 8, 9, 10, 11, 13, 14 were violated: the Greek colonel's military regime resulted in the suspension of the constitution, prohibition on political parties and parliamentary elections, extraordinary courts martial, imprisonment without being taken before a competent legal authority, censorship of press and private communications. The case led to Greece being excluded from the Council of Europe (although it chose to leave in any event, before re-joining in 1974). It also instigated the Council of Europe Convention for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment in 1987, and its unique monitoring committee, the European Commission for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

(ii) Interrogation techniques inflicted on prisoners in Northern Ireland whilst not amounting to torture, were inhuman or degrading treatment under Article 3. *Ireland v the United Kingdom, 18 January 1978*.

(iii) Political killings and disappearances following the Turkish occupation of Cyprus, and lack of effective investigation violated Article 2 right to life and trials of civilians by military courts in northern Cyprus violated Article 6 right to a fair hearing. *Cyprus v Turkey, 10 May 2001*.

(iv) Widespread practice of torture of detainees in Turkey since the military coup d'etat there in 1980. *Denmark, France, the Netherlands, Norway, and* Sweden filed applications in 1982. The Commission approved a friendly settlement in 1985. In 1997 *Demmark* brought a further case as a result of torture of a Danish citizen in Turkey, detained upon his arrival into the country and asking for investigation by the Commission of whether interrogation techniques in Turkey still involved torture. The Court approved a further friendly settlement, *5 April 2000*.

[6] See the Commissioner for Human Rights website, www.commissioner.coe.int

Q134 *Are there any relevant examples where the UK is not adhering to ECHR jurisprudence?*

3. The UK is not bound by ECHR jurisprudence *per se*. It need only take account of this in cases where it is not a party (see Article 46 "*Binding force and Execution of Judgments*"—(1) *The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties*). The Committee of Ministers (CM) supervises execution of judgments (Art 46(2)).

4. There are two important instances in particular where the UK is not adhering to judgments of the Court and execution remains the focus of the CM:

(i) Hirst No 2, judgment of 06/10/2005—Grand Chamber. In Hirst the Court has in two judgments repeated that blanket disenfranchisement of prisoners is incompatible with Article 3 of Protocol 1 to the Convention. In Interim Resolution CM/ResDH(2009)160[7] the CM:

EXPRESSES SERIOUS CONCERN that the substantial delay in implementing the judgment has given rise to a significant risk that the next United Kingdom general election, which must take place by June 2010, will be performed in a way that fails to comply with the Convention; URGES the respondent state, following the end of the second stage consultation period, to rapidly adopt the measures necessary to implement the judgment of the Court;

DECIDES to resume consideration of this case at their 1078th meeting (March 2010) (DH), in the light of further information to be provided by the authorities on general measures.

(ii) S and Marper, judgment of 04/12/2008—Grand Chamber

The Committee will know that the Crime and Security Bill proposes amendments to the retention of DNA and fingerprint samples. Unfortunately, the proposed replacement measures contained in this Bill are only a marginal improvement on the existing regime: those arrested but not charged or convicted may still have their DNA profile kept on the National DNA Database (NDNAD) for at least six years and as many as eight. In JUSTICE's view, retaining the DNA profile of an innocent person for six years is excessive and unnecessary. The government has failed to follow the much more proportionate retention model provided by the Scottish Criminal Procedure Act 1995, under which the DNA of persons arrested but not convicted is destroyed following an acquittal or a decision not to charge.[8] If enacted, the government's proposals would replace the existing "blanket and indiscriminate" retention policy with one that is only slightly less sweeping but still disproportionate.[9]

5. Furthermore, whilst the UK is not bound by decisions to which they are not contracting parties, where a clear principle is elucidated by the Court, it is expected that the principle will be adhered to. The recent jurisprudence of the Court in relation to the right to representation in a police station is of real importance to the UK. England, Wales and Northern Ireland adhere to the Police and Criminal Evidence Act 1984[10] which requires, unless in specified circumstances, for suspects to have access to a legal representative in the police station and in interview upon request. In Scotland however, this right is not recognised. Rather, a suspect "shall be entitled to have intimation of his detention and of the police station or other premises or place sent to a solicitor and to one other person reasonably named by him".[11]

6. Last year the Court extended its Article 6, right to a fair trial, jurisprudence in a line of cases can be taken to confirm that there is a right of access to a lawyer upon arrest in the police station and to representation in interview.[12] However, in *McLean v HM Advocate*[13] the High Court of Justiciary (HCJ) did not interpret *Salduz* (being the only one of the four cases drawn to its attention) to require a change to the Scottish system. Nor did it consider these decisions binding upon it. Rather, a judgment of the Supreme Court would be required in order to bind the HCJ. Following this decision, Mr McLean pleaded guilty to the charge, so the opportunity for a Supreme Court ruling was not available, though an application for leave is expected in another case, "Cadder", in May, before a seven-judge Court. The issue is of relevance to the commitment in the Stockholm Programme to procedural safeguards and the adoption of rights in accordance with the Roadmap. Measure C concerns legal representation. A proposal is envisaged in June 2011. The instrument will consider the right of access to a lawyer from the first stages of suspicion that a criminal offence has been committed.

---

7 Adopted by the Committee of Ministers on 3 December 2009 at the 1072nd meeting of the Ministers' Deputies.

8 The 1995 Act as amended does allow for the retention of a suspect's DNA profile for up to three years where the person was arrested in relation to a violent or sexual offence. Additionally in such cases, Sheriffs may authorise retention for an additional two years on application by a Chief Constable.

9 See further, JUSTICE, "Crime and Security Bill: Briefing on Second Reading, House of Commons", January 2010, available here
http://www.justice.org.uk/images/pdfs/
JUSTICE%20briefing%20on%20Crime%20and%20Security%20Bill%20Commons%2 02R%20jan%2010.pdf

10 Police & Criminal Evidence (Northern Ireland) Order 1989, as amended by the 2007 Order.

11 Section 15 Criminal Procedure (Scotland) Act 1995.

12 *Salduz v Turkey* (application no. 36391/02), judgment of 27 November 2008, *Panovits v Cyprus* (application n. 4268/04), judgment of 11 December 2008, *Pishchalnikov v Russia* (application no 7025/04), judgment of 24 September 2009, *Dayanan v Turkey* (application no 7377/03), judgment of 13 October 2009.

13 [2009] HCJAC 97.

Q159 *Which aspects of the e-Justice portal were experts most sceptical/concerned about?*

7. The primary observation about the e-Justice portal is the ambitious nature of the project from the portal as an information providing tool, to the portal as a means of communication between practitioners in the justice system. As such, the concerns raised at the experts meeting in Brussels last February contemplated wide ranging issues. Those identified below are the priority issues:

(i) Interoperability of legal terms in translation and interpretation.

(ii) Quality of translation and limitations of automatic translation technology and the need for review by human translator.

(iii) Technology in videoconferencing, in particular in transmitting evidence (sound and image quality, nuances of evidence lost in transmission) and consent of witness/defendant prior to its use.

(iv) Data protection in relation to details about cases, where information was to be transmitted through the portal on cross border matters, including previous convictions of suspects/defendants.

(v) Incompatibility of different member states' systems, for the purpose of interaction of portals.

(vi) Ensuring the information contained on the all the sites the portal links to remain accurate and relevant.

(vii) Accuracy of search facilities.

(viii) Registers of services (eg interpreters, lawyers) must ensure quality of those listed.

(ix) Resource implications of all of the above and in particular the translation costs of such provision.

8. The report of the meeting and project documents can be provided should these be deemed useful.

Q169 *Alun Michael asked for your perspectives on progress that has been made in relation to victims of crime and the proposals for strengthening the rights of victims in the Stockholm programme*

9. Strengthening the rights of victims was a priority identified in the JHA Council Conclusions[14] and replicated in the Stockholm Programme. There are instruments in force for the benefit of victims[15] and instruments proposed which would benefit these categories, namely the framework decisions on combating human trafficking and combating sexual exploitation of children which will be reissued as initiatives for directives in the near future. These instruments aim at providing specific assistance to vulnerable victims of cross border crime. The Commission reported last year[16] on implementation of the 2001 Framework Decision, as follows:

> *The implementation of this Framework Decision is not satisfactory. The national legislation sent to the Commission contains numerous omissions. Moreover, it largely reflects existing practice prior to adoption of the Framework Decision. The aim of harmonising legislation in this field has not been achieved owing to the wide disparity in national laws. Many provisions have been implemented by way of non-binding guidelines, charters and recommendations. The Commission cannot assess whether these are adhered to in practice.*

10. As such, the Commission has commenced a wide ranging impact assessment in order to consider what legislative and practical measures to take in 2011 to further improve the position of victims. The process will consider the effectiveness of current legislative instruments as well as scope and content of legislation. Any future legislation will be adopted under the post Lisbon ordinary legislative procedure, passed either as a directive (binding as to its nature and purpose but mechanism left to the member states) or a resolution (having immediate and direct effect once adopted) and engage the jurisdiction of the European Court of Justice.

11. There is already a lot of statistical and anecdotal evidence available, which will be expanded during the consultation process. A review of the 2001 framework decision carried out with European Commission funding[17] has shown that the terminology used in the framework decision is broad, resulting in wide discrepancies between member states as to fundamental concepts such as "victim", "right to be heard", "questioning", "special attention" and "penal mediation". Conversely, all member states had some measure of allowing victims to participate,[18] special considerations in relation to questioning child victims or those with mental disabilities (though less widespread for victims of sexual or domestic violence),[19]provision of information about the case (though information about release of the defendant is not widespread, and rarely considered to be disseminated in a timely manner or to provide sufficient information in practice),[20]

[14] Council Conclusions on a strategy to ensure fulfilment of the rights of and improve support to persons who fall victim to crime in the European Union, 2969th Justice and Home Affairs Council meeting Luxembourg, 23 October 2009.

[15] Council Framework Decision (2001/220/JHA) of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82/1, 22.03.2001 and Council Decision (2004/80/EC) of 29 April 2004 relating to compensation to crime victims on compensation for crime victims, OJ L 261/15, 06.08.2004, and indirectly Council Framework Decision (2002/475/JHA) of 13 June 2002 on combating terrorism, OJ L 164/3, 22.06.2002.

[16] Report from the Commission pursuant to *Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings* (2001/220/JHA), COM(2009) 166 final of 20 April 2009.

[17] Victims in Europe, APAV/Interdict, December 2009.

[18] Article 3: right to be heard.

[19] Article 3: questioning.

[20] Article 4.

mechanisms to aid interpretation and translation (though considered under resourced,[21] expenses (though some reimburse if witnesses only, and the application process can be confusing with insufficient resources and delays).[22] Protection of victims in court proceedings is largely in the discretion of the court rather than mandatory, all had protection measures in place, some more than others, but almost no member states provide separate waiting areas.[23] Almost all member states have protection orders but the legal status differs. Most member states provide for the possibility of compensation from the offender (though few actually engage in enforcement of this, resulting in inadequate and untimely payment).[24] Rarely is legal advice provided to victims free of charge based on the fact that they are victims.[25] Most member states have some sort of mediation for less severe cases.[26] Few member states allow for victims of crime in another country to report the crime once they return home, unless that country also has jurisdiction.[27] The provision of victim support services varied, but the article only requires member states to "promote" or "encourage" provision in this regard.[28]

12. The Spanish Presidency of the EU has also made it a priority of its Presidency to agree a European protection order,[29] the aim of which is to ensure that where a person who has obtained an order as a result of domestic violence or harassment in one member state, wishes to travel to another member state, they will continue to have the protection of the order.

13. The UK Ministry of Justice is currently conducting an informal consultation exercise on the merits of this instrument and whether there is an evidence base to show a problem in this area. Initial enquiries made by JUSTICE with Victim Support Europe have confirmed that there is very little statistical data available about those who are protected by such an order and the lack of protection whereupon they move to a new member state. There are a small number of anecdotal responses however which do indicate that there have been reprisals for victims who have attempted to escape to another member state for which there was inadequate protection. A study is required in order to reach any attempt at a cost benefit analysis of the proposed order, or whether alternative protection measures may adequately assist.

14. JUSTICE has been invited to attend an experts meeting convened by the Commission to consult on the issue of victims to be held on 18th and 19th February. There is a lot more work required to promote the rights of victims in Europe and we will be pleased to participate in the process.

February 2010

Memorandum submitted by the Law Society of England and Wales

1. The Law Society of England and Wales (the Society) is the representative body of over 135,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representation towards regulators and government in both the domestic and European arena. The Society welcomes this opportunity to respond to the House of Commons Justice Committee call for evidence on Justice Issues in Europe dated 13 May 2009 and set out its position on key areas in which European cooperation on justice issues could add value to the experiences and rights of the individual. The Society does this in light of the European Commission Communication on "An area of freedom, security and justice serving the citizen" dated 10 June[30] and the Presidency Roadmap on procedural rights dated 1 July[31] and European cooperation to date.

2. This position comprises an Executive Summary followed by a detailed analysis.

Executive Summary

3. The Society highlights the importance of the EU introducing binding minimum procedural rights in criminal matters throughout the EU for suspects and defendants at all stages of the criminal process from investigation, including for example the right to:

(a) legal advice and legal representation, with legal aid for those who cannot afford it;

(b) consult the lawyer in private and receive legal advice in the strictest confidence;

---

[21] Article 5.
[22] Article 7.
[23] Article 8.
[24] Article 9.
[25] Article 6.
[26] Article 10.
[27] Article 11.
[28] Article 13.
[29] Initiative for a Directive of the European Parliament and of the Council on the European Protection Order, Council of the European Union, 17513/09, (Brussels, 5 January 2010).
[30] COM (2009) 262 final, 10.06.2009 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0262:FIN:EN:PDF
[31] Presidency Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings dated 1 July 2009 11457/09.

(c) access to all relevant information held by the investigatory and prosecuting agencies to enable the suspect and defence to prepare from pre-charge onwards;

(d) silence and not to incriminate oneself;

(e) interpretation and translation;

(f) audio recording of interviews;

(g) the maintenance of a written custody record accessible to the suspect and defendant;

(h) be present at all hearings in person;

(i) consular assistance and the right to communicate to a family member, employers and consular authorities the fact of being in detention;

(j) be notified of information on rights, the charge, and the procedure at the police station, during detention, and beyond orally, and in writing in the suspect's own language;

(k) proper protection of vulnerable suspects and defendants, for example children and mentally ill people; and

(l) minimum standards for detention conditions and minimum rights in respect of grounds, review and length of pre-trial detention. The Society also emphasises the importance of mutual recognition of reporting, residence and curfew conditions.

Moreover:

(m) the EU must ensure that the minimum procedural rights never lead to a level of protection lower than that guaranteed by the European Convention of Human Rights, which as a living instrument, will continue to be interpreted;

(n) provision must be made in the legislation for evaluation and monitoring of compliance mechanisms, taking into account, among other things, the findings and activities of the European Court of Human Rights and the Council of Europe;

(o) the Council should make a commitment in its roadmap on procedural rights to adopt legislation for each of the above rights in a specific time frame in the 2010 to 2014 period. The Stockholm Programme and Action Plan should also include such a commitment; and

(p) in the meantime, European Institutions must hold Member States accountable for human rights violations and ensure that situations incompatible with human rights are remedied swiftly and effectively.

3.2 Ensuring that the European e-Justice project respects fundamental rights, including for example, by ensuring that:

(a) it does not encroach on the entitlement to be present at all hearings in person;

(b) the right to interpretation and translation is not watered down by the European e-Justice project;

(c) automated translations and standardised forms with predetermined text and terminology should not be relied on in criminal matters. Criminal records must be translated with a full explanation of the meaning of sentences, and the court process, whether summary, intermediate or appeal;

(d) the right to privacy is respected in full; and

(e) information on means of redress is available.

3.3 Providing EU funding for networking and training for all legal professionals in the criminal justice field, not just judges and prosecutors, and providing information and education to ensure that all people understand their rights.

3.4 Addressing fundamental deficiencies in current legislation:

(a) focusing not only on implementation but also reflecting on the fundamental reasons for lack of accurate implementation;

(b) introducing a proportionality test in the European Arrest Warrant as a matter of urgency; and

(c) implementing the European Evidence Warrant to respect fundamental rights including Article 8 (Right to respect for private and family life) and the need for an effective remedy including in the executing state (Article 13 (Right to an effective remedy) of the European Convention on Human Rights)) and providing for defence access.

3.5 Ensuring public consultation and impact assessments on all proposals, including Member State initiatives.

3.6 Consolidating mutual recognition instruments, reducing the differences between them and making it easier for everyone to understand and apply them.

3.7 Not pursuing closer alignment of substantive law including common definitions and penalties as it is not necessary to enhance mutual trust and mutual recognition. Moreover, differences including in terms of sentencing practices between different countries are dependant upon a huge variety of factors including cultural and social economic conditions within these countries and the principle of subsidiarity must be respected.

3.8 Ensuring that procedural safeguards are respected including in police cooperation.

3.9 Conducting an evaluation of the European Criminal Records and Information Exchange System, not only in terms of how the exchange of information operates but also in terms of how the information exchanged is used.

3.10 Providing implementation assistance for Member States on the transfer of convictions legislation and indeed on all EU legislation to ensure, among other things, that safeguards are respected.

3.11 Adopting a balanced approach to mutual recognition, including in relation to victims, to also ensure that defendant's rights are respected.

3.12 Ensuring that victims of trafficking are treated as such and are not victimised twice over.

Detailed Analysis

4. *Background*

4.1 It has been 10 years since Member States agreed that their police and judges should work together to fight crime and in parallel that individual rights should be protected. During this time they have forged ahead with co-operation in the law enforcement area but have failed to take sufficient action to protect individual rights. As a result holiday makers and others could find themselves alone in a foreign country without any assistance and unable to understand or follow an investigation against them.

4.2 As the European Institutions set out their vision for the type of area of "freedom, security and justice" that would bring real benefit to the citizens of Europe in 2010 to 2014,[32] the Society calls on them to ensure that it is an area in which fundamental rights are respected.

5. *Binding minimum procedural rights*

5.1 The Commission Communication acknowledges that there are differences in the level of protection in criminal proceedings (page 3). It asserts that the European judicial area must allow citizens to assert their rights anywhere in the EU by facilitating access to justice (page 10). It asserts that the EU must have a legal framework on minimum procedural guarantees (page 32) to uphold individual's rights and maintain mutual trust and confidence in the EU (page 18). It refers to the then upcoming Council action plan (roadmap) in this area on common minimum guarantees and refers to extending it, for example to pre-trial detention, but it does not set out a list of rights that should be addressed (page 17).

5.2 The Society highlights the importance of the EU introducing binding minimum procedural rights in criminal matters throughout the EU. Minimum procedural rights must provide effective, accessible and timely means of redress for individuals at national level and not just EU level. They must apply to both cross-border and domestic cases to avoid dual standards and enhance mutual trust in each others' legal systems. Such minimum procedural rights should not be based on the lowest common denominator, which would risk watering down protection already afforded, for example, by the European Convention on Human Rights protections which Member States must already uphold. The EU must ensure that the minimum procedural rights never lead to a level of protection lower than that guaranteed by the European Convention of Human Rights, which as a living instrument, will continue to be interpreted. Provision must also be made in the legislation for evaluation and monitoring of compliance mechanisms, taking into account, among other things, the findings and activities of the European Court of Human Rights and the Council of Europe.

5.3 The EU Institutions and Member States must continue to ensure the observance of human rights within the Union and that situations incompatible with such rights are remedied swiftly and effectively.

[32] Commission Communication: An area of freedom, security and justice serving the citizen, COM (2009) 262 final, 10.06.2009 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0262:FIN:EN:PDF and Law Society of England and Wales Response to Freedom, Security and Justice: What will be the future? European Commission consultation on priorities for the next five years (2010–14) December 2008 at http://international.lawsociety.org.uk/files/LSEW%20response%20to%20Commission%20consultation%204%20December.pdf

5.4 The Society highlights the importance of introducing binding minimum procedural rights for suspects and defendants at all stages in the criminal process from investigation, including the right to:

(a) legal advice and legal representation,[33] with legal aid for those who cannot afford it;

(b) consult the lawyer in private and to receive legal advice in the strictest confidence ("legal professional privilege"). The Society is concerned by recent moves to undermine the basic principle of legal professional privilege;[34]

(c) access to all relevant information held by the investigatory and prosecuting agencies to enable the suspect and defence to prepare from pre-charge onwards;

(d) silence and not to incriminate oneself;

(e) interpretation and translation;

(f) audio recording of interviews;

(g) the maintenance of a written custody record accessible to the suspect and defendant to focus the minds of custodians and to reduce inadvertent law breaking and cases within cases;

(h) be present at all hearings in person. To the extent that the defendant unequivocally expressly waives this entitlement of his own free will and the circumstances are such that it would not be contrary to the notion of a fair trial or other rights for the court to hold the hearing in the specific case by video-conference,[35] it must be ensured that the defendant is able to follow the proceedings and to be heard without technical impediments, and effective and confidential communication with a lawyer must be provided for;

(i) proper protection of vulnerable suspects and defendants, for example, children and mentally ill people;

(j) consular assistance and the right to communicate to a family member, employers and consular authorities the fact of being in detention;

(k) be notified in their own language in writing of their rights in a "Letter of Rights" and in writing and orally of what they are accused of;

(l) be notified in their own language in writing of the procedure at the police station, during detention, and beyond;

(m) be notified in their own language by video of their rights and the procedure at the police station, during detention, and beyond. Not all people are able to read and when asked may not admit this. A video would be a simple measure to address this concern. Moreover, a video on procedure at the police station, during detention, and beyond, a procedural roadmap, should enable suspects and defendants to understand in basic terms what will happen to them, from questioning to detention conditions and beyond; and

(n) minimum standards for detention conditions and minimum rights in relation to grounds, review and length of pre-trial detention. The Society also emphasises the importance of mutual recognition of reporting, residence and curfew conditions.

5.5 The Society also emphasises that the Council should make a commitment in its roadmap on procedural rights to adopt legislation for each of the above rights in a specific time frame in the 2010 to 2014 period. The Stockholm Programme and Action Plan should also include such a commitment.

---

[33] In *Salduz v Turkey* (application no 36391/02) Grand Chamber Judgment 27 November 2008, the European Court of Human Rights found that in order for the right to a fair trial to remain sufficiently "practical and effective" access to a lawyer should be provided as from the first interrogation of a suspect by the police (paragraph 55). http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=36391/02&sessionid=21465389&skin=hudoc-en.
In *Panovits v Cyprus* (application no 4268/04) Chamber Judgment 11 December 2008 the European Court of Human Rights observed that the lack of legal assistance during an applicant's interrogation would constitute a restriction of his defence rights in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings (paragraph 66). http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=4268/04&sessionid=21465389&skin=hudoc-en.
The Report to the Portuguese Government on the visit to Portugal carried out by the Council of Europe European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 25 January 2008, Strasbourg, 19 March 2009 at http://www.cpt.coe.int/documents/prt/2009-13-inf-eng.pdf emphasises that the right of access to a lawyer must include the possibility to meet with the lawyer in private and to have a lawyer present during any interrogation.

[34] For example the House of Lords recently decided that covert surveillance of communications between lawyers and their clients, covered by legal professional privilege, was permitted under the Regulation of Investigatory Powers Act 2000, notwithstanding any statutory rights of persons in custody to consult their lawyers in private. *Re McE (Northern Ireland) [2009] UKHL 15* at http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090311/mce-1.htm

[35] The Society draws attention for example to the Council of Europe European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) report to the UK Government published on 1 October 2008 at http://www.cpt.coe.int/documents/gbr/2008-27-inf-eng.pdf. In relation to extensions of pre-charge detention by video-link it emphasises that the physical presence of a detainee should be seen as an obligation, not as an option open to the judicial authority. It emphasises that from the point of view of making an accurate assessment of the physical and psychological state of a detainee, nothing can replace bringing the person concerned into the direct physical presence of a judge. Further, it explains that it will be more difficult to conduct a hearing in such a way that a person who may have been the victim of ill-treatment feels free to disclose this fact if the contact between the judge and the detained person is via a video-conferencing link.

6. *European e-Justice*

6.1 As the European Institutions prepare for the launch of the European e-Justice portal in December 2009 and continue their work on the European e-Justice project[36] the Society calls for ensuring that the European e-Justice portal and project respects fundamental rights, including for example, by ensuring:

(a) that a person charged with a criminal offence should, as a general principle based on the notion of a fair trial and other rights, be entitled to be present at his hearing. It is concerning that the Commission Communication asserts that better use should be made of videoconferences for example to spare the victims the effort of needless travel without having any regard to this (page 13). The Commission also asserts that a European order for bringing persons to court that takes account of the opportunities offered by videoconferences should be explored (page 17). The Society emphasises that it is also necessary to consider the drawbacks, not least in terms of fundamental rights;

(b) that the right to interpretation and translation is not watered down by European e-Justice. The Commission Communication calls for improving the quality of and the pooling of legal interpretation and translation resources or the possible use of remote interpreting by videoconference (page 13). The Society acknowledges that there are fundamental issues concerning the availability and quality of translation and interpretation facilities in the field of criminal justice, which the European e-Justice programme attempts to tackle. The Society emphasises that such considerations must not weaken the proposals on procedural safeguards and access to justice;

(c) automated translations are not relied on in criminal matters. It is very concerning that the Commission cites machine translations as a means to overcome language barriers (page 13). The Society emphasises, for example, that criminal records must be translated with a full explanation of the meaning of sentences, and the court process, whether summary, intermediate or appeal. The Society equally cautions against the use of standardised dynamic forms with predetermined text and terminology. This is particularly pertinent not least in the context of the interconnection of criminal records. The Society has serious concerns about various issues arising from the interconnection of criminal records. These include the accuracy, access, use and understanding of the information stored and as to how any errors or misunderstandings can be rectified. The Society has serious concerns regarding the ways information gathered for one purpose can be used for another purpose, arising from the principle of availability and moves towards interoperability of databases;

(d) the right to privacy is respected in full. European e-Justice must not develop in a data protection vacuum nor be governed by a patchwork of different national data protection rules, as this is an area in which fundamental rights are at stake. Even the European Data Protection Supervisor has observed that the level of data protection achieved in the new Framework Decision on data protection in police and judicial cooperation in criminal matters[37] is not fully satisfactory. This is particularly pertinent not least in the context of the European e-Justice project;[38] and

(e) that information is included on what to do if something goes wrong, legally, technically or otherwise, with the European e-Justice portal or linked web-sites, including who to contact and means of redress. It will be important to consider how this will be addressed on the European e-Justice portal and linked web-sites.

7. *Networking, training and education*

7.1 The Commission acknowledges that the enforcement of instruments needs to be better supported in the professional sphere. Among other things, it calls for the EU's support for networks of professionals to be strengthened, coordinated and better structured. It also calls for systematic training for all legal professionals and developing e-Learning programmes (page 11). However, it is by no means clear that it envisages its assistance to extend beyond the judiciary and prosecution.

7.2 The Society emphasises the importance of EU funding for networking and training for all legal professionals in the criminal justice field, not just judges and prosecutors. The Society also calls for information provision and education to ensure that all people understand their rights.

[36] *Council Multi-Annual European e-Justice Action Plan 2009–13*, Official Journal of the European Union C 75/1, 31.03.2009 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:075:0001:0012:EN:PDF

[37] *Council Framework Decision 2008/977/JHA of 27 November 2008* on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, Official Journal of the European Union L350/60, 30.12.2008 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:350:0060:0071:EN:PDF

[38] *European Data Protection Supervisor in his Opinion* dated 19 December 2008 on the European Commission Communication Towards a European e-Justice Strategy, Official Journal of the European Union C128/13, 6.6.2009 at http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2008/08-12-19_eJustice_EN.pdf

8. *Addressing fundamental deficiencies in current legislation*

8.1 The Commission acknowledges that there has to be evaluation of the effectiveness of the legal and political instruments adopted at Community level (page 11).

8.2 The Society welcomes a period of stocktaking, not only in terms of focusing on implementation of EU instruments but also to consider and reflect on the fundamental reasons for lack of accurate implementation of EU instruments.

9. *Lack of proportionality*

9.1 For example, in relation to the European Arrest Warrant,[39] the Society highlights that the absence of a proportionality test discredits mutual trust. It is striking in this regard that to date this fundamental issue has been considered in a non-binding European handbook on how to issue a European Arrest Warrant[40] published by the Presidency on 18 June instead of being addressed in legislation.

9.2 On 4 to 5 June 2009 the Justice and Home Affairs Council adopted[41] a report[42] on mutual evaluations concerning the practical application of the European Arrest Warrant. The report acknowledges that the way in which proportionality is dealt with in the Member States varies greatly. It asserts that some Member States apply a proportionality test in every case, often unevenly concerning the circumstances to be taken into consideration and the criteria to be applied, whereas others consider it superfluous. The Society observes that some consider the principle of legality an obstacle to considerations of proportionality. The report recommends that the Council instructs its preparatory bodies to continue discussing the issue of the institution of a proportionality requirement for the issuance of any European Arrest Warrant with a view to reaching a coherent solution at EU level as a matter of priority.

9.3 The Society calls on the EU to introduce a proportionality test as a matter of urgency. It is wholly unsatisfactory that it was not addressed in the original legislation, which continues despite this fundamental shortcoming.

10. *Effective remedy*

10.1 The Society observes that under the European Evidence Warrant[43] the issuing authority must be satisfied that obtaining the objects, documents or data sought is necessary and proportionate for the purposes of proceedings for which an European Evidence Warrant may be issued (Article 7(a) and Article 5).

10.2 The Society emphasises that the issuing state must provide an explanation of how the European Evidence Warrant is necessary and proportionate in order to satisfy the executing state that that is the case. Otherwise the executing state will be unable to comply with its obligations under Article 8 of the European Convention on Human Rights (Right to respect for private and family life) and the need for an effective remedy including in the executing state (Article 13 (Right to an effective remedy)).

10.3 Moreover, it will be essential to ensure that necessity and proportionality is applied in practice, so that the European Arrest Warrant experience is not repeated.

11. *Lack of defence access*

11.1 The Commission calls for a complete European framework for taking evidence (page 32). It calls for a real European evidence warrant to replace all existing instruments. It asserts that it would be automatically recognised and applicable throughout the Union and limit as far as possible the grounds for rejection.

11.2 The Society believes that the EU should instead focus on adopting balanced legislation in which equality of arms is respected. The Society emphasises that suspects and defendants must also be able to apply for a European Evidence Warrant. The Society is concerned that this is not made explicit in the current legislation and calls on Member States to implement it to respect equality of arms.

11.3 The Society calls on the Commission to clarify exactly what is meant by a "real European evidence warrant." The Society would be concerned by moves to expand the scope of the current European Evidence Warrant and to further remove safeguards without time to see how the framework decision is implemented and how it works in practice.

---

[39] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Official Journal of the European Union L190/1, 18.7.2002 at http://eur-lex.europa.eu/pri/en/oj/dat/2002/l_190/l_19020020718en00010018.pdf

[40] http://register.consilium.europa.eu/pdf/en/08/st08/st08216-re02.en08.pdf

[41] http://www.consilium.europa.eu/App/NewsRoom/loadDocument.aspx?id=352&lang=EN&directory=en/jha/&fileName=108356.pdf

[42] http://register.consilium.europa.eu/pdf/en/09/st08/st08302-re04.en09.pdf

[43] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, Official Journal of the European Union L350/72, 30.12.2008 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:350:0072:0092:EN:PDF

11.4 The Commission also asserts that a European legal framework on electronic evidence should be explored and that minimum principles to facilitate the mutual admissibility of evidence between countries, including scientific evidence should be explored (page 17). The Society looks forward to playing an active role in the consultation on evidence further to the EU funded project on safeguarding expert evidence in which it participated.[44]

12. *Public consultation and impact assessment*

12.1 The Commission asserts that priority should be given to improving the quality of European legislation. It asserts that from the time when proposals are first sketched out, thought must be given to the potential impact on citizens and their fundamental rights (page 6).

12.2 The Society calls for public consultation and impact assessment on all proposals, including Member State initiatives. The Society observes in this regard the lack of public consultation and impact assessment on the 20 January 2009 proposal for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings published at the initiative of the Czech Republic, Poland, Slovenia, the Slovak Republic and Sweden.[45]

12.3 In its position on the proposal dated 26 February 2009[46] the Society emphasised that it is essential that procedural safeguards are in place to protect the rights of the suspect or defendant at all stages of the choice of criminal jurisdiction process. The proposal fails to address this central issue.

13. *Consolidation of existing measures*

13.1 The Commission asserts that the substantial progress in the justice field in past years needs to be consolidated (page 10).

13.2 The Society observes that mutual recognition instruments reduce both the grounds for refusal and the time to execute requests. The Society calls for consolidation of mutual recognition instruments, reducing the differences between them and making it easier for everyone to understand and apply them.

14. *Harmonisation of substantive law not necessary*

14.1 The Commission asserts that the principle of mutual recognition is the cornerstone of European integration in the field of justice (page 10). However, it also asserts that the development of the European judicial area requires a certain level of alignment of Member States' laws and regulations. It calls for closer alignment of substantive law in relation to serious crimes, generally of a cross-border nature, which require common definitions and penalties. It asserts that such alignment will help to extend mutual recognition and, in some cases almost completely abolish the grounds for refusal to recognise other Member States' judgments (page 12).

14.2 The Society is opposed to pursuing harmonisation of definitions and penalties. The Society is concerned by attempts to do so under the guise of a mutual recognition agenda. Mutual recognition must not be used as a means by which to introduce the harmonisation of substantive law through the back door in this respect. Closer alignment of substantive law in this respect is not necessary to enhance mutual trust and mutual recognition. Moreover, differences including in terms of sentencing practices between different countries are dependant on a huge variety of factors including the cultural and social economic conditions within these countries and the principle of subsidiarity must be respected.

14.3 The Commission also asserts that thought should be given to a Community programme to finance pilot schemes in the Member States testing alternatives to imprisonment (page 18). The Society welcomes funding in this important area but notes that again this is an area in which the principle of subsidiarity must be respected.

15. *Police cooperation*

15.1 The Commission calls for pilot action against organised crime involving systematic exchange of information, widespread use of European investigative tools and where necessary the development of common investigative and prevention techniques (page 20). It cites operational effectiveness as a key criterion in preventing criminals from exploiting the frontier-free area to evade investigation and prosecution (page 17).

15.2 The Society emphasises that operational effectiveness is not the only criterion. Procedural safeguards are essential and must be respected.[47]

---

[44] See report on safeguarding expert evidence in the European Union published 11 June http://international.lawsociety.org.uk/node/6234

[45] http://register.consilium.europa.eu/pdf/en/09/st05/st05208.en09.pdf

[46] http://international.lawsociety.org.uk/node/5795

[47] The Society notes in this regard page 10 of its response to Freedom, Security and Justice: What will be the future? European Commission Consultation on priorities for the next five years (2010–14) December 2008 at http://international.lawsociety.org.uk/files/LSEW%20response%20to%20Commission%20consultation%204%20December.pdf, which explains that the Society is strongly opposed to replacing procedural safeguards with "more flexible" "simplified formalities" or such like set out in the Future Group on Home Affairs report titled Freedom, Security, Privacy—European Home Affairs in an open world.

16. *Otherwise extending mutual recognition*

16.1 The Commission asserts that in criminal matters, the principle of mutual recognition must apply at all stages of the procedure. It must extend to other types of judgment, which may be criminal or administrative depending on the Member State. For example, special protection measures for witnesses or victims of crime; implementing certain fines between countries including to improve road safety; and the mutual recognition of judgments imposing some kind of disqualification and encouraging the systematic exchange of information between Member States to this end (page 10 to 11). The Commission also calls for further work on the European Criminal Records Information System (ECRIS) including an evaluation of how the exchange of information operates. It asserts that the networking of criminal records should make it possible to prevent offences being committed (eg checks on access to certain jobs, particularly those relating to children). It asserts that ECRIS will also have to be expanded to cover nationals of non-EU countries who have been sentenced in the EU (page 17).

16.2 The Society welcomes an evaluation of ECRIS, not only in terms of how the exchange of information operates but also in terms of how the information exchanged is used. The Society also calls for implementation assistance to be given to Member States on the transfer of convictions legislation[48] and indeed on all EU legislation to ensure, among other things, that safeguards are respected. Not least to ensure that the implementing legislation does not enable previous convictions to be taken into account in circumstances where a national conviction would not have been possible for the act for which the previous conviction had been imposed.

16.3 The Society can see the merits in a sentencing judge in one Member State having information on previous convictions for recidivism purposes. However, the Society is concerned that the use of the information may be prejudicial in determining guilt if there is no context provided in terms of the conviction and sentence imposed. There is a need to be able to understand what a criminal offence from a different Member State means, the relevance of a conviction and the level and significance of a sentence, bearing in mind the very different sentencing regimes in different EU Member States, so that a judge can decide if it is appropriate and proportionate to take it into consideration. It is too crude to automatically impose a higher penalty for a repeat offence. Further consideration should also be given to the rehabilitation of offenders and where a conviction is spent.

16.4 The Society also emphasises the need for effective data protection. An efficient and robust procedure for challenging inaccuracies must also be established and the criminal record should be translated with a full explanation of the meaning, and the court process, whether summary, intermediate, or appeal.

16.5 The Society welcomes the extension of ECRIS to nationals of non-EU countries sentenced in the EU. The Society emphasises the importance of equal treatment of nationals and non-nationals in this regard.

16.6 The Society calls for a balanced approach to mutual recognition, including in relation to victims, in order to also respect defendant's rights. It will be important to resist any attempts, albeit not explicitly referred to, to introduce a system of victims' rights in which prosecutorial discretion to discontinue a case or downgrade a criminal charge would be subject to the victim's input or consent or that of the victim's advisor; or to introduce protective measures to afford witness anonymity that do not adequately protect the right of a defendant to challenge their evidence. The Society would be concerned if it is proposed that witness anonymity be used other than in wholly exceptional cases subject to safeguards. It is also important to have regard to the different nature of the Common Law adversarial system and the Civil Law inquisitorial system.

17. *Trafficking*

17.1 The Commission asserts that human trafficking victims must be protected and helped by various measures including for example immunity from criminal prosecution and regularisation of their stay.

17.2 The Society welcomes this so that victims of trafficking are treated as such and are not victimised twice over, once by the trafficking and once by action taken against them in respect of their illegal entry or stay.

July 2009

---

[48] Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, Official Journal of the European Union L220/32, 15.8.2008 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:220:0032:0034:EN:PDF

Memorandum submitted by the Magistrates Association Judicial Policy and Practice Committee

The Magistrates Association welcomes the opportunity to submit evidence to the committee.

1. Existing Legislation

1.1 *Hearings in Absence*

The initiative to rationalise the arrangements for dealing with defendants in their absence reflect procedures generally in operation in the UK already. It is important that cases are not delayed due to continued adjournment so that in the interest of justice victims do not have to wait excessive periods of time for their cases to be heard. On the other hand it is important that defendants have a clear knowledge of proceedings and that courts have the assurance that defendants have been notified of trial hearings.

The regulations agreed in this area provide this assurance.

1.2 *Mutual Recognition of Financial Penalties*

The European Union (EU) Framework Decision (FD) on the Mutual Recognition of Financial Penalties (MRFP) allows fines and certain other financial penalties that are imposed in one Member State to be transferred and enforced in another. It applies to fines, compensation and court costs imposed by a court or certain other authorities in criminal proceedings, including road traffic offences.

This decision has not been implemented in the UK so that penalties for offences committed in the UK may not be recovered. It is important that these arrangements are implemented across the whole of Europe so that all citizens are treated equally and fairly.

2. Proposals

2.1 *Interpretation*

The increasing movement of people throughout the European Union with a wide range of languages requires a professional approach for interpretation in all the stages of the criminal justice process. This includes the period from initial interviews at the police station through to the court proceedings including trial and sentencing. Defendants and other court users must be given every opportunity to ensure they fully understand all the proceedings and decisions made at every stage of the process.

Much progress has been made in recent times to apply the guidance agreed between the various parties operating in the CJS. There is a need across Europe for a common approach so that all who may become involved in the CJS are able to understand and provide relevant evidence to any case without disadvantage due to language.

Some problems remain due to the availability of qualified interpreters.

The Magistrates' Association has prepared a practical Guidance Note for use in Magistrates' Courts to ensure procedures are followed to the benefit of all. A copy is attached to this submission.

2.2 *Control of Heavy Goods Vehicles (HGVs)*

The increased movement of goods across national borders in Europe has generated considerable concern over road safety. The Vehicle and Operator Services Agency (VOSA) monitors roadworthiness of commercial vehicles. It is important that all such vehicles are operated to a common standard and regulation and that the penalties imposed for offences committed are equivalent across the whole of Europe.

The restrictions that apply to drivers' hours should be operated uniformly including all cross-border journeys within the Union.

2.3 *Road Traffic Penalties*

There should be movement towards mutual recognition of driving disqualifications and a uniform system of penalty points.

1 June 2009

APPENDIX

GUIDANCE ON USING INTERPRETERS IN COURT

Magistrates do not have the responsibility of making arrangements for the services of interpreters but it is important that they should know what the correct procedures are and assure themselves that these are followed in:

— criminal investigations leading to cases they are hearing;

— hearings in magistrates' courts including the preparation of pre-sentence and other reports; and

— the implementation of any sentence which may be decided upon by them.

It should also be remembered by all parties that the interpreter is not acting for a defendant or a witness but for the court. Arrangements should therefore be made to ensure that they are not treated as friends or associates of the defendant or witness either inside or outside the courtroom.

The interpreter arranged for court should not be the same person who interpreted at the police station either for the police or the defendants solicitors at any stage prior to the court appearance. If however it is not possible to find another interpreter (for example, where the language is rare) then the court and all parties must be notified of the intention to use the same interpreter for the court proceedings. This should be announced in open court and agreement obtained from all parties.

Pre-hearing

An interpreter should be both competent and appropriate for the task. The court chairman should therefore check beforehand with the Legal Adviser that:

— the interpreter is a member of the National Register of Public Service Interpreters or the Directory of CACDP sign language interpreters or, where this has not been possible to arrange, is of equivalent professional standard and observes the professional code of ethics. (NRSPI interpreters carry an ID card which shows their photograph, NRPSI number and name. The card can be examined and their number should be recorded);

— if an unregistered interpreter is being used that they are suitable for the hearing;

— the interpreter has been properly briefed in advance;

— there is a language match between the non-English speaker's best language/dialect and that of the interpreter.

The chairman should also check with the Legal Adviser that sufficient time has been allowed for a hearing where an interpreter is being used and that time has been allowed for the interpreter to take regular breaks outside the court room of 15 minutes every hour, or otherwise agreed.

In the Courtroom

The chairman should ensure that:

— the advocates and others involved understand what they must do to accommodate the interpreting process and cross cultural nature of the situation;

— the interpreter is situated appropriately in the court room particularly when a sign language interpreter is being used; and

— the interpreter takes their oath according to his/her religious beliefs and also interprets it into the other language.

All parties should be aware throughout the proceedings that the non-English speaker may be unfamiliar with the English legal system, its organisations (eg probation) and procedures and may need further explanations. It is important that even if an interpreter's knowledge of criminal justice processes is good, they should not give any such explanations of these processes themselves, but instead interpret any explanation given by the court.

There should be no conversations in one language, where the content is not communicated to the speakers of the other language present.

To accommodate the interpreting process during the hearing, the chairman should ensure that everyone:

— uses simple, unambiguous language;

— uses direct speech eg "what happened on Friday" rather than (to the interpreter) "Ask him what happened on Friday";

— pauses at suitable points for interpreting to take place consecutively during exchanges eg after two or three sentences and not in the middle of a sentence;

— checks the pace when simultaneous interpreting (at the same time as the speaker) is being used, eg while the other language speaker is not being addressed, to allow the interpreter to keep up; and

— listens intelligently and ask for clarification, when needed, from the non-English speaker via the interpreter but not from the interpreter himself.

The chairman should also respond to any interventions from the interpreter, which are permissible when he or she has a need to:

— seek clarification of something that has been said in order to understand it fully before interpreting it;

— ask for accommodation of the interpreting process eg if someone speaking too quickly or is inaudible;

— alert the bench that, in spite of accurate interpreting, one of the parties may not have understood something; and

— alert the bench to a possible missed cultural inference ie when it may have been wrongly assumed that a fact is within someone's frame of reference.

OTHER POINTS TO NOTE

— The interpreter may take notes as an aide memoire. If this happens, any confidential information should later be destroyed or left at court with a court official or legal adviser.

— Do not make assumptions about non-verbal signals. Expressions, gestures, degree of eye contact, tone or body language can denote different messages in different cultures. Be careful about your own, which might also be misunderstood.

— When giving reasons for any decision, accommodate the other-language-speakers' background and understanding.

— At the end of the proceedings, take time to summarise the conclusions and any next steps to be taken and satisfy yourself that this has been understood.

— Ask the interpreter to translate any essential documentation, eg bail form, and suggest a copy is kept on file with the original English text.

— Thank the interpreter, preferably by name.

CHECKLIST ON USING INTERPRETERS IN COURT

1.	Is the Interpreter NRPSI or CACDP registered?	
2.	Has their membership been verified	
3.	Is the Interpreter agreed by everyone	
4.	Has the Interpreters name been noted	
4.	Has the Interpreter been properly briefed?	
5.	If the hearing is a trial, has enough time been allowed	
6.	Check the Interpreter's location in court. Is it suitable?	
7.	Check that the Interpreter is not paraphrasing	
8.	Are people speaking at an appropriate speed	
9.	Is the language of the court simple and unambiguous	
10.	In a trial, take regular breaks.	
10.	Are notes being taken by the interpreter (if so, they should remain at court)	
11.	Summarise frequently and ensure that everything is being understood by all parties	
12.	Different cultures employ different non-verbal signals so don't make assumptions	
13.	After the proceeding are completed, thank the interpreter by name	

December 2008

Memorandum submitted by the Ministry of Justice

EXECUTIVE SUMMARY

1. The Government welcomes this opportunity to share our views with the Committee about EU measures in the justice area that have worked well and to outline what we would like to see included in the next EU five-year programme for Justice and Home Affairs, the "Stockholm Programme."

2. On 10 June 2009 the European Commission issued an evaluation of the current five-year work programme in Justice and Home Affairs, the Hague Programme, and their initial proposals for priorities in the next work programme the Stockholm Programme. The Government submitted Explanatory Memoranda about these Communications to Parliament on 1 July 2009.

3. The Government believes that practical action taken at an EU level has the potential to make it easier for citizens to live, work, study, holiday and conduct business across EU borders, with the confidence that they will have the same access to justice as they have in their own Member State in the event that something goes wrong. EU level action can also ensure that the public in all EU Member States can enjoy the highest level of protection from criminal activity, and each Member State has a criminal justice system that puts the victims of crime and law-abiding citizens first, whilst at the same time ensuring that the rights of those charged with criminal offences are fully respected.

4. The Government believes that mutual recognition should continue to be the cornerstone of judicial co-operation in civil, family and criminal matters. A wide range of legislative and non-legislative measures to facilitate mutual recognition and judicial co-operation have had a positive effect on people's lives. This memorandum seeks to highlight some of those measures. It will also touch on certain areas where action has not been as effective as it could have been.

5. The Government sent a paper to the Commission in October 2008 setting out UK priorities for inclusion in the Stockholm Programme. The paper is attached at Annex A. This memorandum outlines some of those priorities, which include the areas that the Committee identified as being of interest, notably data protection and criminal procedural rights.

6. Part One: How Action at a European Level on Justice Issues has Affected People

(a) *What has worked well*

Eurojust and the European Judicial Network in criminal matters

The European Arrest Warrant.

Exchange of Criminal Records.

Framework Decision on Standing of Victims.

The European Judicial Network in civil and commercial matters.

Procedures for obtaining civil judgments in croos-border cases.

(a) *What has not worked well*

The European Enforcement Order.

Proposed Framework Decision on Criminal Procedural Rights.

Part Two: Key Areas in which European Co-operation on Justice Issues could Add Value to Experiences of and Rights of Individuals

(a) *Measures agreed but not yet in force*

Prisoner Transfer Agreement.

Trials in Absences.

Environmental Crime.

Data Protection Framework Decision.

(b) *Looking further ahead: Stockholm Programme*

Information exchange and data protection.

Criminal Procedural rights.

Cross-border enforcement of judgments in civil matters.

E-Justice.

(c) *Would not add value*

Harmonisation of Member States laws and regulations.

7. Eurojust was established in 2002[49] and is now based in The Hague as the first permanent network of judicial authorities anywhere in the world. It provides a valuable resource for prosecutors in the UK in co-ordinating investigations and prosecutions among competent Member States authorities, facilitating mutual legal assistance and the execution of European Arrest Warrants.

8. The Government hopes that the implementation of the recently adopted Council Decision for Eurojust[50] (which took effect on 4 June 2009) will increase its effectiveness both by improving practical arrangements, such as establishing a 24 hour on-call service, national co-ordination systems for Eurojust in Member States and in clarifying the relationship with the Criminal European Judicial Network in Criminal Matters (EJN) to avoid duplication between the two of them.

[49] 2002/187/JHA: Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime: (Official Journal L 063, 06/03/2002 P 0001–0013).

[50] Council Decision on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime (Official Journal L 183, 04/06/2009).

9. Eurojust's case-load has increased six-fold since it was established (from 202 cases in 2002 to 1,193 in 2008). The main added value of Eurojust lies in its co-ordination meetings, where investigators and prosecutors from Member States meet to plan action in specific organised crime cases and to resolve legal and jurisdictional problems. An example in 2008 was Eurojust co-ordination of 75 arrests and house searches across 8 Member States (including the UK) to break a ring smuggling immigrants into the EU, primarily from Iraq. 132 such meetings were held in 2008, with the UK participating in just under 40% of them.

10. Eurojust has worked well so far, but needs to increase its involvement with complex cases, which currently form under 20% of its overall caseload. Increased information flows from Member States under the new Council Decision should facilitate this. At the same time, Eurojust needs to ensure that its handling of information flows does not duplicate the analytical work of Europol, and that less complex cases are allocated to the EJN.

11. For the longer term, the new Council Decision allows Eurojust to station liaison magistrates outside the EU, and requires its participation in joint investigation teams where European Commission funding is involved. The former element provides an opportunity to combat external crime threats to Member States at source, and the latter ensures Eurojust plays a full operational part in major cross-border crime cases.

The European Judicial Network in Criminal Matters (EJN)

12. The EJN[51] is a network of mutual legal assistance practitioners aimed at enhancing judicial cooperation throughout the EU. It facilitates communication and contact between the practitioners as well as providing information on the systems operating in each country. It has proven to be useful in resolving a high number of Mutual Legal Assistance (MLA) cases and the individual contacts established through the EJN are extremely valuable to the UK. The EJN could be improved with greater support from the Commission and its Secretariat. This would allow a more practitioner focused, interactive website with increased information available to practitioners on the requirements of each country and allow for guidance to be produced on soon to be introduced MLA instruments such as the European Evidence Warrant.

The European Arrest Warrant (EAW)

13. Since its introduction in 2004 the EAW[52] has transformed extradition arrangements between EU Member States and has played an important role in the UK's fight against international and trans-national criminality. It has, for example, introduced measures which have meant that countries can no longer refuse to surrender fugitives on the basis that the subject of the EAW is a national of the Member State concerned, and has reduced the time taken to surrender fugitives from an average of 18 months under previous extradition arrangements to around 50 days under the EAW.

14. It also contains a number of robust safeguards to protect those who are the subject of EAW requests. These safeguards concern double jeopardy, the passage of time and the age of the subject of the Arrest Warrant. In addition, a request for an EAW has to be agreed by a District Judge who must be confident that ordering the extradition would not be a breach of the subject's human rights.

15. Since 2004 the EAW has enabled the UK to extradite over 1000 fugitives to other EU Member States. The number of fugitives surrendered to law enforcement agencies in the UK, subject to a EAW, also continues to rise. In 2008, for instance just under 100 wanted persons were surrendered back to the UK to face criminal proceedings.

16. Although the EAW is working very well, there are areas where we think the Framework Decision could work even better. There are occasions, for example, where EAWs are issued for low-level offences which, while extraditable under the terms of the EAW Framework Decision, would have been likely to lead to a fine if prosecuted in the UK. The UK has consistently lobbied on this point and the Council, with significant support from a number of Member States, has agreed to address the issue of proportionality as matter of urgency.

Council Decision on the Exchange of Criminal Records

17. Brought into force in 2006 this Council Decision[53] has significantly improved the flow of criminal record information between Member States. We now obtain significantly more information on UK nationals' offending behaviour across Europe, which can be used by the police for public protection, by the courts in sentencing and by the Criminal Records Bureau for criminal record checks. We are also, for criminal proceedings, able to obtain criminal record information about EU nationals which can be used to support prosecutions and, if a person is found guilty, to ensure they are sentenced with a full understanding of their criminal past.

[51] Joint Action 98/428/JHA of 29 June 1998, adopted by the Council, on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network. (Official Journal L 191, 7.7.1998).

[52] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States—Statements made by certain Member States on the adoption of the Framework Decision (Official Journal L 190, 18/07/2002 P 0001–0020).

[53] *Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record* (Official Journal L 322, 09/12/2005 P 0033–0037).

18. While these increased information flows have been very useful, there are limitations on our ability to use information obtained in relation to EU nationals for any purpose other than the criminal proceedings for which they have been requested. As part of our work to develop the Stockholm Programme of future EU work we will be looking to ensure that we are able to share criminal records information across the EU where it can protect children and vulnerable adults through employment vetting and barring. Also in the context of developing an integrated data sharing strategy across Justice and Home Affairs, we would also hope that information exchanged in relation to criminal proceedings might be used by the police to protect the public where it is proportionate and necessary to do so, such as when it discloses a history of very serious violent or sexual offending.

Framework Decision on the standing of victims in criminal proceedings

19. The Framework Decision on the standing of victims in criminal proceedings was adopted in 2001.[54] In the UK, the agreement of the FD has been the starting point for a significant set of reforms to the way victims are supported and kept informed about their case. Since 2001, we have responded to the Framework Decision by changing criminal justice processes and overhauling the support services that victims are entitled to. This has resulted in significant improvements in victim satisfaction with the criminal justice system—for example in England and Wales the level of victim satisfaction is currently 82% (April to December 2008) compared to 75% in 2005–06.

European Judicial Network in civil and commercial matters

20. The establishment of the European Judicial Network in civil and commercial matters[55] has improved co-operation between Member States.

21. The Network acts as a platform for general discussion of practical and legal problems through which best practice can be shared. Through its contact points it also deals with queries from national judicial or court authorities on practical problems that have arisen on individual cases. While it is not involved with judicial decisions in specific cases it can be used to resolve problems with, for example, serving documents in other countries or setting up hearings to examine witnesses.

22. The Network also has a website which provides a valuable source of information to the public and legal practitioners on national laws and practices. The website receives several hundred thousand "hits" each month. A survey in 2005 found that most users of the website had used it once or twice (43%), 20% used it regularly and 18% very often. 68% of users judged the website as excellent or good and 92% would recommend it as an information source.

EU procedures for obtaining civil judgments in cross-border cases

23. Within the last six months, two Regulations have been introduced which provide single EU-wide procedures to allow creditors to obtain judgments in cross-border civil matters which are automatically recognised in all Member States. The European Order for Payment[56] provides a procedure for uncontested claims and the European Small Claims Regulation[57] is for claims up to €2,000. The advantage of both procedures is that they are standard throughout the EU, so a creditor can understand the procedure in his/her own language. Specific time limits apply to the courts, ensuring there is legal certainty for all involved and, for the Small Claims Regulation, the procedures for hearings and taking of evidence are simplified to ensure that costs are proportionate to the value of the claim. Within these first six months, there have been 46 outgoing and 110 incoming Small Claims cases from/to England and Wales and 18 outgoing and five incoming European Orders for Payment.

What has not worked well?

Proposal for a Framework Decision on criminal procedural rights

24. The Government is of the view that it is important to drive up criminal procedural standards across Europe and hopes that this will help to enhance the operation of mutual recognition by increasing trust amongst Member States. The European Commission's proposal for a Framework Decision on Procedural Rights in 2004[58] was aimed at achieving this. However Member States spent over three years negotiating this proposal, to no avail. Ultimately this proposal foundered, partly because of the opposition of the UK and five other Member States. Towards the end of the negotiations, we believed that the proposal was limited to replicating rights that were already enshrined in the European Convention of Human Rights, hence

[54] Council Framework Decision of 15 March 2001/220/JHA on the standing of victims in criminal proceedings (Official Journal L82 of 22 March 2001 p 1).

[55] 2001/470/EC: Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters: Official Journal L 174, 27/06/2001 P 0025–0031.

[56] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure : Official Journal L 399, 30/12/2006 P 0001–0032.

[57] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 12 July 2007 establishing a European Small Claims Procedure: Official Journal:L:2007:199:0001:0022.

[58] Brussels, 28.4.2004 COM(2004) 328 final 2004/0113 (CNS) Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (presented by the Commission) {SEC(2004) 491.

carrying the risk of confusion between their interpretation by the Strasbourg and Luxembourg courts. The Swedish Presidency have now suggested a different approach in this area, which the Government welcomes. (See Paragraph 35.)

European Enforcement Order (EEO)

25. There has been a disappointingly low take-up of the EEO[59]—a procedure which allows national court judgments in uncontested claims from one Member State to be automatically recognised in the courts of another Member State. Since the Regulation was applied in October 2005 there have been only 12 outgoing cases from England and Wales and 107 incoming, and no cases either from or to Scotland. One suggested reason for this—provided by enforcement agents—is the difficulties creditors have in enforcing their judgments. For this reason the Government has recommended that one of the priorities of the Stockholm Programme should be the introduction of European procedures for enforcement of cross-border cases.

Part Two: Key Areas in which European Co-operation on Justice Issues could Add Value to Experiences of and Rights of Individuals

(a) *Measures agreed but not yet in force*

Prisoner Transfer Agreement

26. The Government strongly supports the Council Framework Decision on prisoner transfers[60] that was agreed in November 2007 and is due to enter into force on 5 December 2011. It will ensure the mutual recognition of custodial sentences, enabling prisoners to be transferred back to their state of habitual residence without their consent. It will also facilitate the return of prisoners extradited in accordance with the EAW. This should result in a reduction in the number of EU nationals detained in British prisons.

Trials in absence

27. The Government believes that the EU should take action in the area of criminal procedural law where there is evidence of a real problem, provided that action would enhance cross-border co-operation and add value to the European Convention of Human Rights. The Council's agreement in 2009 to the Framework Decision on trials in absence[61] fulfilled that criteria. Action was needed to provide clarity regarding the circumstances in which a Member State will recognise the decision of another Member State that was rendered in the absence of the defendant. In particular, it clarifies criteria for determining when a defendant has been adequately notified about his trial.

Environmental Crime

28. The Government is committed to protecting the environment and ensuring that those who commit serious environmental offences face appropriate penalties, including, where necessary, criminal penalties. Therefore we were happy to support the Environmental Crime Directive that was adopted by the European Council on 24 October 2008.[62] We were also happy to support it because it is clearly within EU competence as confirmed by the European Court of Justice.[63] The Directive sets clear European standards for a proportionate criminal law response to breaches of European Community environmental rules. Similarly, we are pleased to be able to support the proposed Ship Source Pollution Directive[64] as an important means of protecting the maritime environment from intentional, reckless or seriously negligent discharges of polluting substances. This Directive is due to be formally adopted by the Council soon.

Data Protection Framework Decision (DPFD)

29. The Government supports the DPFD[65] which was adopted in Council on 28 November 2008. The DPFD ensures appropriate standards of data protection are in place when data is exchanged between Member States in the field of police and judicial co-operation. Once implemented in 2010 it will enhance data protection and improve information exchange between law enforcement authorities.

---

[59] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims Official Journal L 143, 30/04/2004 P 0015–0039.

[60] Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (Official Journal L 327, 5 December 2008, p 27).

[61] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (Official Journal L 81, 27 March 2009, p 24).

[62] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law: Official Journal L 328, 6.12.2008, p 28–37.

[63] Environmental Penalties case
Case C-176/03 Commission v Council (environmental penalties) [2005] ECR I-7879.

[64] Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements (not yet published).

[65] Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters. (Official Journal L 350, 30 December 2008, p 60).

(b) *Looking further ahead: Stockholm programme*

30. The Government takes the view that the EU has made significant progress in the justice field but we acknowledge that more needs to be done. The Government would like the next five-year work programme to focus on the implementation and evaluation of agreed measures. It is important that the EU understands the impact of legislation before pursuing further activity. We would also like the Commission to improve further the analysis that they provide before new legislative and non-legislative proposals are presented. There should, over the course of the next five years, be an emphasis on practical action and legislative proposals should only be bought forward where there is a realistic chance of agreement and where they will add value.

Information exchange and data protection

31. The ability to exchange and use information between Member States and third counties has the potential to provide significant benefits for EU citizens. These include: more effective and efficient action to combat terrorism and crime; quicker and safer travel and immigration procedures, and better experiences for citizens living, working, studying or doing business abroad.

32. The UK believes that the EU should clearly state the principles underpinning the cross-border use of personal information for the whole of the field of Justice and Home Affairs. Such a statement would help provide citizens with a better understanding of how the EU will ensure personal information can be used to the benefit of the public while respecting individual rights. These principles should recognise:

— The benefits of sharing personal information.

— The importance of striking the correct balance between private and public interests.

— The fact that information exchange is not an end in itself, but a means of working towards providing greater public benefit.

— The importance of appropriate data protection safeguards as a prerequisite for information sharing.

— The importance of transparency about the collection, retention and use of personal information.

33. The EU should also commit to ensuring effective delivery of information sharing and data protection arrangements that already exist, are planned, or are currently being implemented. This includes the DPFD, due to be implemented in 2010. The Government would also wish to see further work on the review of the Data Protection Directive.[66]

34. In principle, the Government welcomes the intention set out in the European Commission's communication on the Stockholm Programme to establish a framework for information exchange within the EU. The UK has led the way in pressing the European Union to evaluate existing information exchange agreements and designing an information exchange and data protection strategy to steer the direction of future proposals.

Criminal Procedural Rights

35. As stated at paragraph 24, the Government believes that it is important to drive up criminal procedural standards across Europe, and hopes that this will help to enhance the operation of mutual recognition by increasing trust among Member States. We believe that the underlying aim of such action should be to make a real difference to the lives of our citizens. Action needs to be tailored to solving real problems that are identified at EU level, and should improve cross-border co-operation. We therefore agree with the Commission's call in their Communication for a thematic action plan and welcome in principle the "road map" which the Swedish Presidency have proposed and the first element of work in that road-map—action in the area of interpretation and translation.

Cross-border enforcement of judgments in civil matters

36. In recent years the European Union has successfully agreed a number of instruments which provide procedures that allow judgments given in one Member State to be recognised in another. The Brussels I,[67] Brussels IIa[68] and the European Enforcement Order Regulations, and European procedures such as the Order for Payment or Small Claims, provide creditors in Europe with a greater opportunity than ever before to obtain an enforceable court decision. However they still have to use national procedures to enforce these judgments. This creates a barrier to the internal market because they will not necessarily know how long the procedure will take or how effective it will be, what it will cost or what kind of service they can expect. The Government believes these creditors will benefit from the introduction of European procedures for enforcement of cross-border cases.

[66] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Official Journal L 281/31 23/11/1995).

[67] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Official Journal L 12/1 16/01/2001.

[68] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Official Journal L 338, 23/12/2003 P 0001–0029).

37. The European Commission, in its recent Communication on the Stockholm Programme, has agreed to take forward work on enforcement following Green Papers in recent years on the attachment of bank accounts and the transparency of debtors' assets. The Government welcomes this commitment as a good start, but would like the Commission also to consider other methods of enforcement such as attachment of earnings.

E-Justice

38. European e-Justice work aims to maximise the value of IT to facilitate communication of information among the justice systems of the EU Member States, and to improve access to justice for both citizens and businesses. It covers both civil and criminal justice. The top priority of this work has been the establishment of a European e-Justice portal—the first release of which is planned for December 2009.

39. We already experience the benefits of national e-Justice systems: the Money Claims On Line (MCOL) system in England and Wales often handles more than 3000 claims a week. We also make use of video-conferencing to save time and money in the transfer of prisoners between court and prison for short hearings.

40. As well as the provision of information, the e-Justice portal will, in due course, also provide a single point of access to national commercial and business registers, and to land registers. It is also hoped that there will be electronic access to a number of EU civil law procedures—including the small claims procedure.

41. There has also been work aimed at facilitating the use of videoconference technology for communication in cross-border proceedings—in particular for taking of evidence and interpretation. We believe there can be significant benefits if interpretation is provided via videoconference—particularly if interpreters from countries with less frequently spoken languages can be used from the country concerned.

(c) *What would not add value*

Harmonisation of Member States laws and regulations

42. The Government believes that mutual recognition should continue to be the cornerstone of judicial co-operation in civil and criminal matters. The Government would have serious reservations about any proposed moves to align Member States' laws and regulations without safeguards to ensure that they remain within the competence of the EU, are necessary and appropriate, and respect traditions in areas such as prosecutorial and judicial discretion, for example, in relation to criminal sanctions. The Government recognises that there may benefit in a degree of approximation of substantive law in relation to some serious crimes, generally of a cross-border nature, but we would need to consider any such proposals very carefully and on a case by case basis.

20 July 2009

Annex

UK CONTRIBUTION TO THE EU'S NEW MULTI-ANNUAL JHA WORK PROGRAMME—OCTOBER 2008

The demands placed on the governments of Member States to ensure the security and safety of their citizens have never been higher. To harness the benefits and meet the increasingly complex and inter-related challenges that JHA issues pose, Member States will need to find innovative ways to collaborate to deliver practical results and real benefits for their citizens, as well as ensuring that work that is undertaken delivers the desired outcomes.

General Principles for the Next Justice and Home Affairs Work Programme

To support this, all proposals should be evidence based and subject to impact assessments. They should only be pursued if they are negotiable and deliverable in a reasonable time—recent experience has shown that it is highly desirable to avoid issues that are very political and contentious within or between Member States. Proposals should also respect the principles of proportionality and subsidiarity. Non-legislative options should always be considered, and are often to be preferred because they can be more effective at addressing the real problems that people experience, and can often be agreed and implemented more speedily than legislation. The EU should consider methods to simplify current legislation before looking to introduce new legislation. Where legislation is necessary, the approach adopted should be to seek to address the problems identified with the least possible degree of legislative intervention.

Including an item in the work programme should not create an assumption that it will proceed to implementation (whether legislative or not). The impact assessment should be developed and the case for change kept under review throughout the process. Accordingly, the decision about whether to take forward into the new programme any outstanding items from the Hague Programme should not be automatic and should follow the same kind of assessment. These "better regulation" principles should be expressly reflected in the new programme.

A Toolkit for Legislators

The EU should develop a toolkit to improve the process by which decisions about whether and how to legislate in a particular area are considered. Use of the toolkit should help to identify the best solution to an identified problem, including decisions on whether it would be better to start with a less ambitious proposal and build on it in stages. It should also facilitate the development of a proper business case for legislative or non-legislative measures. The toolkit should include:

(i) Full consideration of how a proposal will act with and respect the different legal systems of the Member States—including the impact on common law systems. It should also have regard to the different political and cultural perspectives of the Member States. This will facilitate consistency and improve the likelihood of agreement.

(ii) A checklist of issues to be considered including: an impact assessment; e-Justice compatibility; achievability based on assessment of likely positions of Member States; alternative solutions; proportionality; justification for EU action in light of the subsidiarity principle; accountability; consistency of approach; and best practice in, for example, forms design.

Proposals for Inclusion in the New Programme

With the above in mind, the UK believes that the EU's new multi-annual JHA work programme should place significant emphasis on the following areas:

Fundamental Rights and Citizenship

Data-sharing

The ability to exchange and use information, subject always to robust data protection safeguards, is fundamental to the achievement of significant benefits for EU citizens, businesses and the public sector. These include: more effective and efficient action to combat terrorism and crime; quicker and safer travel and immigration procedures; better experiences for citizens living, working, studying or doing business abroad, including by ensuring they are able to prove their identity when necessary; and better functioning global markets. In this regard, the EU should:

— ensure early adoption and implementation of key instruments promoting the exchange and protection of personal data within the EU and with third countries. These must include: adoption of the Data Protection Framework Decision; implementation of the Prm Council Decision within 3 years of its publication in August 2008; quick but effective migration to SIS II ; and a formal EU-US agreement on data protection in the field of law enforcement, building on the work of the High Level Contact Group; and

— develop a cross-pillar JHA Information Management and Data Protection Strategy—a comprehensive, coherent, inward and outward-facing EU-level strategy that:

  — consolidates, simplifies and modernises data protection rules as they apply to data exchange in all pillars, including in respect of third countries;

  — identifies, on the basis of a clear assessment of necessity, proportionality and operational need, the long-term information requirements of Member States' police, justice, customs and immigration authorities;

  — identifies the most efficient and effective way of delivering those information requirements, including through appropriate use of ICT and interoperable systems; and

  — seeks to improve information flows and data protection between the EU and third countries, including by building on the work of the High Level Contact Group and extending this approach to other sectors and other priority countries.

With a strategic approach to data sharing and data protection in place, the ability of Member States to take a more consistent and coherent approach to data sharing initiatives, including a clear "across the board" view of benefits and potential impact on privacy rights, should be enhanced.

Child Protection

The EU needs to improve child protection arrangements across the EU, as well as consolidate existing arrangements for exchange of criminal record information. The EU should:

— set up a single EU hotline for child abuse images on the internet and integrate information held by Member States on child abuse websites;

— agree common standards for eradicating child pornographic content on the internet and develop an "EU quality" seal for parental control software;

— set up arrangements to monitor sex offenders crossing borders and systems to share information on movement of sex offenders through the EU, including notifications for relevant authorities when known child sex offenders are moving or travelling to other Member States; and

— allow the sharing of criminal record information for the purposes of pre-employment checks.

Drugs

As regards tackling drugs, the EU should:

— encourage the coordination and focus of European drugs research on both the demand and supply (technology and methods) sides;

— examine ways to better encourage reintegration of drug users during and post-treatment, including via better coordination between Member States;

— help to embed an intelligence-led approach in drugs investigations, develop a system of individual country national threat assessment exchange, and encourage the adoption of a common form of debriefing on seizures;

— present an EU common position in the high level segment of the 52nd UN Commission on Narcotic Drugs (CND), follow up the ten year action plan agreed at UNGASS 1998, and ensure improved coordination between the Horizontal working group on drugs and EU Member State delegations to the CND;

— extend work with source and transit countries to tackle drug trafficking, including developing "bridge" operations (akin to "Operation Airbridge" in Jamaica and "Operation Westbridge" in Ghana) at the main source/transit points for class A drugs into Europe;

— develop common threat assessments with third countries along the lines of the Russian Organised Crime Threat Assessment (ROCTA); and

— ensure increased EU support and assistance to third countries (including Jamaica and Afghanistan) and regions (including West Africa and South America) to help combat and disrupt drug production and trafficking through their counter-narcotics efforts; and provide development assistance to reduce the incentive to produce.

SECURITY

EU Member States face similar complex and interconnected security risks, including threats from international terrorism and organised crime. There is further scope for the UK to work with other Member States, for example to increase the efficient exchange of information between Member States on criminal activities to enable the pursuit and prosecution of criminals (including terrorists) and the targeting of their financing and assets.

Counter-terrorism

The EU can play an important role in the fight against terrorism and needs to continue ensuring concerted action on counter-terrorism at EU level, complementing action at national level. The EU should:

— give a renewed EU focus to Prevent, placing countering radicalisation (for example in prisons) at the heart of the EU's CT policy. This means ensuring better EU awareness and understanding of the threat, a clearer idea of the importance of Prevent in a comprehensive CT strategy, and agreement on what further action the EU, and its Member States, will take;

— ensure higher standards across the EU on Protect, taking action to reduce vulnerability to attack, particularly through tighter control on the movement of hazardous substances, and more coordinated sharing of best practice on dealing with security of critical infrastructure and crowded places;

— continue activity to Pursue terrorists and to Prepare for the consequences of a terrorist attack through incremental improvements to EU sanction and listing systems and ensuring EU institutions have contingency plans in place;

— beyond the EU's borders, work to ensure that the Prevent agenda is mainstreamed across all geographic EU funding programmes in CT priority countries, and that the EU and its Member States work together, through the common lexicon and coordinated action in other fora, to further the spread of an anti-terrorism global consensus; and

— consider the scope for enhancing mutual assistance in emergencies within and outside the EU, based on existing assets of Member States and within the current framework of the EU Civil Protection Mechanism: the consequences of terrorist attacks, or other man-made and natural disasters, require the generic emergency management methods of civil protection.

Organised crime

The EU must also continue supporting practical cooperation on fighting cross-border organised crime. The EU should:

— increase cooperation and information sharing to improve seizure of criminals' assets and to combat money laundering and terrorist financing, as well as increase use of recovered asset sharing agreements amongst Member States and better use of the surrender mechanism, particularly to combat money laundering;

— work with industry and internet service providers to prevent cybercrime;

— improve sharing of law enforcement information and criminal intelligence, including with countries outside the EU;

— promote properly directed research to ensure we know enough about the organised crimes which affect us and how best to tackle them;

— take action to prevent movement of prohibited weapons including firearms;

— continue to combat human trafficking into and within the EU through co-operation amongst Member States and implementation of the 2005 EU Action Plan on Human Trafficking;

— make more effective use of operational collaboration between Member States through joint investigation teams or other means, for example extension of the MAOC(N) model; and

— encourage UN Member States to ratify the UN Convention on Transnational Organised Crime.

Policing

On law enforcement, the EU should:

— agree a common approach on tackling the abuse of the right to free movement, looking at how we manage the negative impact or criminal exploitation of EEA migration while upholding the principle of free movement;

— make police forces across the EU more aware of legal and policing systems as well as practices eg through use of CEPOL;

— improve assistance for victims of crime, including by encouraging minimum standards and helping facilitate longer-term support to assist victims in getting their lives back on track; supporting the sharing of best practice between civil society and NGOs involved in victim care; use opportunities to assist witnesses (including victims) give their best evidence in criminal proceedings, such as via live-links; and consider the introduction of compensation schemes and programmes throughout the EU for victims of crime;

— implement intelligence-led policing more consistently, for example by embedding threat assessments as part of national strategy setting; and

— share expertise, information and research between Member States concerning neighbourhood policing, including developing ideas on cooperation in the field of community policing.

JUSTICE

The EU needs to ensure that individuals and organisations can and do have confidence in the EU as an area to live, work, study, travel and do business by ensuring consistent high standards of justice and protection of fundamental rights. The EU should also aim to ensure that the public enjoys the highest level of protection from criminal activity, whilst at the same time ensuring that the rights of those charged with criminal offences are fully respected. Mutual recognition should continue to be the cornerstone of judicial cooperation in civil and criminal matters, in keeping with the Tampere conclusions of 1999 and The Hague Programme which recognised mutual recognition as a main priority.

Priority should be given to practical measures to address real problems within the existing legal framework. The EU could help implement the following practical measures in Member States facilitated by the use of Community funds.

E-Justice

Regarding e-Justice, e-technology should be used to facilitate justice processes, thereby improving access to justice for citizens. There is a lot of potential in the development of the e-Justice portal, both as a means of providing information, and in facilitating ways of accessing judicial systems. Video conferencing for interpreters should also be explored. The current lack of interpreters for all EU languages presents a clear, practical problem, and yet one which appears readily capable of solution using such electronic means. However, e-Justice should be cost effective, proportional and reduce duplication by ensuring that EU e-Justice projects take proper account of other IT work in the justice field—eg the linking of land registers through EULIS.

More attention should be given to defining the strategic direction of the e-justice programme and giving the work some focus for the next five years and beyond, building on the recent Communication. This should include:

— comprehensive analysis of the current funding streams, to ensure that they are used effectively to support the e-Justice strategy. E-Justice is one of the areas where implementation often requires considerable financial input—there should be a clear basis on which EU funding for e-Justice projects is made available;

— considering the impact on/of other non-Justice IT related measures; and

— work to ensure that, where possible, all new measures and systems are e-Justice compatible.

Priorities in the area of e-Justice should be:

— setting up electronic means of translation and interpretation, including video conferencing for interpreters to facilitate cross border procedures;

— consideration of compatibility standards;

— creation of the e-Justice portal, including the linking of registers, such as insolvency registers and land registers; and

— consideration of electronic processes such as that for the European Order for Payment.

Civil Judicial Cooperation

As regards the European Judicial Network (EJN) on the civil law side, the EU should consider methods of increasing the service to citizens. Many of the problems that citizens face when they are living, travelling or working in a country other than their own could be avoided if they had a greater understanding of the relevant law of that other country. This greater understanding could be facilitated by practical measures, such as improved information in the relevant languages. In the event that problems are encountered, this would also improve access to justice, as people will be better able to find redress or resolve a dispute once they know how to go about it.

The Network's website is likely to continue to be the most valuable source of information for the public. Citizens should be able to find as much information as possible to enable them to make informed decisions when deciding whether to undertake cross-border litigation—eg how long the process is likely to take and what kind of costs can be expected. Information on mediation and other forms of alternative dispute resolution should also be made available.

To this end, the EU should consider:

— what other information should be provided—eg the information about the law governing transactions in other countries, such as the legal consequences of buying property abroad;

— regular evaluation of the content of the site and research to ensure that the most useful information is being provided in the most user-friendly way;

— how to make it easier for citizens to find the website—eg links to the website from relevant domestic information sources; and

— how to enhance the ways the Network facilitates contact between practising judges to allow them to seek information from their peers in other Member States on a case by case basis within established rules—eg through the appointment of liaison judges in specific types of law or meetings on specific subjects at which specialist judges can participate.

In order to improve the operation of justice systems in a cross border context, the EU should consider methods to further develop the sharing of best practice, so that Member States could learn from the experiences and systems of other Member States. The EU should:

— further develop Best Practice Guides that have shown to be useful in other International fora, such as The Hague, and just started to be produced by the EU; and

— consider more systematic use of the Council of Europe's Standing Commission on the Efficiency of Justice (CEPEJ) and the proposed network for legislative co-operation for sharing information and best practice.

In terms of possible legislative initiatives, the EU should consider development of the following areas:

— Priority should be given to enforcement: the EU has agreed a number of measures that either produce European court decisions in cross-border cases or allow for national court decisions to be recognised in another Member State. Once a court decision is obtained, parties face the uncertainty and cost of using existing national enforcement procedures. The introduction of European enforcement measures—strictly limited to cross-border cases—are likely to make it easier for citizens and businesses to enforce court decisions in other EU countries. Generally the ideas set out in the green papers on freezing of bank accounts and transparency of debtors' assets should be supported, and further work in this area should be developed in a coherent way. The EU should move on to investigate how attachment of earnings systems can be better enforced across Europe. The EU should also explore what other methods of enforcement across borders could be made more easily accessible.

— The extension of the abolition of exequatur should be considered: Priority should be given to the abolition of exequatur for contested judgments in civil and commercial matters for claims with a value greater than €2,000 (claims under €2,000 are provided for by the European Small Claims Procedure). There is no necessary link between abolition of exequatur and the harmonisation of applicable law rules and the EU should resist such a link. The principle of mutual recognition should mean that Member States can take on trust that other Member States have laws (including applicable law rules) that respect basic common standards like human rights and procedural justice, and that their judgments will not throw up offensive results.

— High priority should be given to the programme of regular reviews of existing instruments such as the Brussels I Regulation. The EU should be ready to take appropriate action in the light of such reviews, including reform, repeal or replacement of measures.

— Interaction among existing measures should be considered as a key part of this work. For example, no provision was made for interaction between the recent Regulations creating a European Order for Payment and Small Claims procedures. That means that at present a claimant who initiates a claim for less than €2,000 under the European Order for Payment in the belief that it will be uncontested must initiate separate proceedings under the small claims Regulation if the debtor defends the claim. It would be more helpful if the case could move automatically.

Criminal Judicial Cooperation

In the field of criminal justice, the EU should:

— develop a mechanism for sharing country information for the European Evidence Warrant in a timely manner (prior to its introduction): this should be modelled on the current EAW Atlas and provide practitioners with the contact details and procedural knowledge required to ensure EEWs are both formulated and transmitted correctly in order to smooth its introduction. Realism will be needed about the level of detail that can be provided prior to the system going live;

— make the EJN more practitioner focussed: this could be done through updating the EJN Atlas to include the relevant domestic legislation. It would also be of more use to practitioners through a raised profile, and one way of doing this may be to host more meetings regionally;

— aim to discourage judicial authorities from issuing European Arrest Warrants for offences which, while extraditable, are likely in practice to be punished by way of a fine;

— ensure swift implementation of the newly agreed Eurojust Council Decision which will enhance practical cooperation, provide clarity on the role of National Members and the College, and strengthen Eurojust's role in fighting cross-border crime;

— aim to learn more from best practice elsewhere: Eurojust should produce briefing and notes on best practice from around the world and suggest how this could affect the manner in which we operate both internally at EU level but also externally with third parties;

— aim to establish a more coherent and joined up approach to tackling fraud and corruption through Eurojust: the intelligence gathered could then be used for education, prevention, disruption, to identify patterns, and ultimately for evidence gathering for prosecution and confiscation;

— take a measured approach to driving up criminal procedure standards and promoting fair trials across Europe, in particular recognising the difficulties that would be posed by a general measure on criminal procedural law. There is fertile ground for agreement here, but we need to recognise the existence and ongoing utility of the ECHR, and avoid overly ambitious language on harmonisation. Work in this area should be focused and evidence-based—and might include legislation; the recent Framework Decision on enforcement of decisions rendered in absentia is a good example. Areas for action may include:

  — the principle of *ne bis in idem*;

  — promoting the provision of a letter of rights to suspects;

  — promoting the provision of legal assistance for suspects;

  — promoting the audio-recording of interviews with suspects in police stations; and

  — considering issues relating to interpretation and consider how these can be addressed by both Member States and the Commission.

— improve and facilitate the exchange of information and best practice on protecting the public, reducing re-offending and the particular problems of youth crime. This may help to identify further areas for EU action and areas where practical measures, rather than legislative, would be more appropriate. We need to recognise that a one-size-fits-all approach can be counter-productive, and there should be room for agility in how information is shared between Member States;

— subject to the entry into force of the Lisbon Treaty and Protocol 14 to the ECHR, promote EU accession to the ECHR to minimise the risk of inconsistencies between the European Court of Human Rights and the European Court of Justice;

— ensure that the Council of Europe's European Convention on Human Rights (ECHR) forms the basis for any EU action on rights. It is the basis for human rights in all EU Member States and the Convention is complemented by a wealth of sophisticated case-law; and

— also subject to the entry into force of the Lisbon Treaty, consider some properly targeted minimum rules on criminal offences and penalties where they are necessary to ensure the effective enforcement of EU policy rules.

External Aspects of Justice

As regards the external aspects of justice, the EU should:

— provide financial support for further work with third countries on the protection of children (through the Hague convention and other instruments);

— persuade Russia to sign Protocol 14 to the European Convention on Human Rights to streamline the working of the Strasbourg Court, and—subject to Lisbon entering into force—to allow the EU to accede to the ECHR;

— work to raise procedural and prison standards in third countries to facilitate the extradition of suspects and repatriation of prisoners; and

— continue work on future bi-lateral agreements with third countries in the area of civil judicial cooperation, especially in relation to recognition and enforcement of judgements in civil and commercial matters and the service of judicial and extra judicial documents.

Immigration, Asylum and Borders

In line with the EU Migration Pact, EU action should focus on the broad aims of managing legal migration and tackling illegal immigration, making border controls more effective, improving EU co-operation on asylum and developing effective partnerships with countries of origin or transit.

Immigration Control

To this end, the EU should prioritise modernisation and effective cooperation between Member States' immigration control systems, encompassing the development of an EU strategy to strengthen Member States' border controls, based on latest technology, data-sharing and interoperable systems. The EU should:

— develop an EU e-Borders system through cooperation between neighbouring Member States, using passenger name records;

— ensure extensive sharing of data held on EU databases (SIS II and VIS), subject to data protection principles;

— develop an EU identity management strategy based on biometric passports and visas, Eurodac and other elements;

— enhance the role of Frontex to develop a 24/7 capability and high quality intelligence collection and analysis; and

— ensure effective and robust Schengen Evaluations.

Practical cooperation

The EU should also continue to improve practical cooperation between Member States using EU structures such as Frontex, GDISC and CIREFI. This should include:

— on asylum: better enforcement of existing directives, extension of Eurodac fingerprint matching to successful asylum claimants;

— on returns: extend range of agreements with third countries, either EC or bilateral with EU support;

— on people trafficking: effective sharing of intelligence, co-operation on false documents and visa fraud; and

— building on the "Global Approach": use EU collective leverage to achieve stronger practical cooperation with source and transit countries on migration issues, especially on returns and readmission.

JHA Funding

In line with the UK's contribution to the Commission consultation on the fundamental review of the EU budget, EU JHA spending should be targeted and delivered to achieve maximum benefits, giving citizens the confidence that money is being well spent. A principled approach will help to ensure that choices are made with rigour and consistency. The following three principles below provide a framework for designing a future EU budget:

— first, the EU should only act where there are clear additional benefits from collective efforts or "EU added value", compared with action by Member States, either individually or in co-operation;

— second, where EU-level action is appropriate, it should be proportionate and flexible; and

— third, there must be sound financial management at all times, including the highest standards of financial control and independent audit, and greater focus on delivery of outcomes in programme design and evaluation. It will be important to maintain budget discipline.

With regard to action, Framework Partner and operating grant funding, the Commission should ensure that the consultation process with Member States on the award of funding is open and transparent, and that there are appropriate channels for Member States to relay their approval or concern about draft award decisions. Sufficient time should be built into the programmes' time schedules to evaluate the previous year's funding round, and also to allow bidders adequate time to complete applications and find partners for their bids. More support should be offered to bidders through Information Days, clearly worded guidance documents and prompt responses to individual queries.

The EU should steer away from legislative proposals being the default option for JHA spending, and instead focus on operational cooperation between Member States on specific projects.

More specifically, on Solidarity and Management of Migration Flows funding, the EU should:

— increase the level and flexibility of funding available for capacity building and other initiatives in third countries, including:

  — considering a stand alone Thematic Funding Programme for migration for the 2014–20 period;

  — allowing more flexible reallocation of the €5 million Thematic Programme contingency fund for 2008 and in subsequent years if unspent on emergencies;

— concentrate funding on legal migration, illegal migration and development, focusing particularly on Assisted Voluntary Returns; and

— develop a funding programme to succeed the Solidarity Mechanism Funds (European Refugee Fund, European Integration Fund, European Return Fund, and External Border Fund) which finish in 2013.

On Security and Safeguarding Liberties, the EU should ensure that a full and rigorous evaluation is undertaken before the "Prevention of and fight against crime" and "Preparedness" programmes finish in 2013; this learning should be fully utilised in the development of the successor funds.

To improve child protection arrangements, the EU should consider providing support to states to establish registration mechanisms for convicted sex offenders with a view to linking up national mechanisms in the future.

On the fight against violence and providing assistance and protection to address violence against children, young people, women and those who are vulnerable, the EU should continue to provide a flexible funding programme to support initiatives in this field when the Daphne III Programme finishes in 2013.

In the field of civil judicial co-operation the EU needs to ensure that funding is concentrated on the areas which will bring real added value to citizens and businesses who live, work, study and travel across borders. That means:

— improving the provision of information to enable individuals and companies to make informed decisions about whether to undertake cross-border litigation;

— enhancing mutual recognition—starting with the abolition of exequatur for contested civil and commercial claims valued at more than €2,000;

— introducing European enforcement measures to ensure that there is an easier procedure to allow creditors to enforce cross-border judgments; and

— improving the implementation of existing legislation, including through the sharing of best practice.

The work undertaken on e-Justice is a valuable tool in improving access to justice for citizens and co-operation between national authorities. The EU should ensure that, where possible, all new measures and systems are e-justice compatible. As this is an area which often requires considerable financial input the UK believes:

— projects should be cost effective, proportional and reduce duplication;

— they should be created so as to be technically compatible; and

— there should be a clear basis on which funding is made available—especially as the projects can cover both civil and criminal justice.

Regarding external funding, the EU should continue to use the Instrument for Stability (SI) to address key counter-terrorism and organised crime objectives in specific regions, and the Instrument for Pre-Accession (IPA) to support law enforcement and judicial reform to tackle serious organised crime and corruption, illegal migration and (to a lesser extent) terrorism. Turkey and the Western Balkans should be prioritised under the IPA because of the role they play in the well established "Western Balkans transit route" for organised crime. Although the primary objectives of the European Neighbourhood and Partnership Instrument (ENPI) and Development Cooperation Instrument (DCI) are poverty reduction and sustainable development, further consideration should be given to the positive impact that these Instruments can have on JHA objectives.

Supplementary memorandum submitted by the Ministry of Justice

1. *Please can we have a list of existing justice measures that the UK has opted-in to and whether the Government has any plans to opt-in to other measures following the entry into force of the Lisbon treaty*

The Committee will be aware that all EU criminal justice measures adopted prior to the entry into force of the Lisbon Treaty were not subject to a UK opt-in. The UK therefore participated in all measures adopted pursuant to what was Title VI of the Treaty on the European Union (known as the third pillar). Measures on civil justice have been subject to an opt-in since the Amsterdam Treaty came into effect in 1999.

Following the entry into force of the Lisbon Treaty the UK now has the right to choose whether to opt-in to any EU justice measure in either the criminal or civil justice arena.

In the area of civil judicial cooperation the following main instruments (three of which have been revised as detailed below) have been adopted. The UK has decided to participate in all, either at the start of negotiations or after adoption. All are in force unless otherwise indicated. For clarity, the list excludes minor amendments to these instruments which have been agreed via further legislative instruments; comitology agreements (again emerging from these instruments); measures on the financial programmes in this area; legislative instruments giving effect to international agreements such as The Hague Convention on Private International Law; or matters related to bilateral agreements with non-EU countries.

Council Regulation (EC) 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (adopted 29/05/2000)—subsequently repealed by Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matter (adopted 13/11/2007).

Council Regulation (EC) 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses ("Brussels II") (adopted 29/05/2000) revised as Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ("Brussels IIa") (adopted 27/11/2003).

Council Regulation (EC) 1346/2000 on insolvency proceedings (adopted 29/05/2000).

Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I") (adopted 22/12/2000).

Council Regulation (EC) 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (adopted 28/05/2001).

Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters (adopted 28/05/2001) subsequently amended by Decision 568/2009/EC (adopted 18/6/2009) which comes into force on 1 January 2011.

Council Directive 2002/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (adopted 27/01/2003).

Council Directive 2004/80/EC relating to compensation to crime victims (adopted 29/04/2004).

Regulation (EC) 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims (adopted 21/04/2004).

Regulation (EC) 1896/2006 of the European Parliament and of the Council creating a European Order for Payment Procedure (adopted 12/12/2006).

Regulation (EC) 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure (adopted 11/07/2007).

Regulation (EC) 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") (adopted 11/07/2007).

Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of Mediation in civil and commercial matters (adopted 21/05/2008). Member States must comply with this Directive by 21 May 2011.

Regulation (EC) 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations ("Rome I") (adopted 17/06/2008). The UK did not opt in at the start of negotiations but did after it was adopted.

Council Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (adopted 18/12/2008). The UK did not opt in at the start of negotiations but has done so now that it has been adopted. It is due to enter into force on 18 June 2011.

We have not yet exercised the opt-in in relation to an EU criminal justice issue, but are considering whether to participate in proposals for:

Negotiations on an initiative for a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings.

Negotiations on an initiative for a Directive of the European Parliament and of the Council on the European Protection Order.

2. *Please can we have figures on the use of the European Arrest Warrant by the UK and on UK nationals living in other Member states since it was implemented, including some measure of the seriousness of alleged offences.*

The number of people surrendered under the European Arrest Warrant (EAW) Procedure from the UK (excluding Scotland) to other EU member states from 1 January 2004—31 December 2008 is as follows:

	Number
2004	24
2005	77
2006	151
2007	332
2008	515

The number of people surrendered to the UK from other member states under the EAW procedure between 1 January 2004 and 31 December 2008 is as follows:

	Number
2004	19
2005	63
2006	76
2007	99
2008	96

The Serious Organised Crime Agency (SOCA) and the Crown Office and Procurator Fiscal Service (for Scotland) are the designated authorities for the receipt and transmission for European arrest warrants (EAWs) in the UK. It is not possible from current systems to provide data broken down by nationality, category of offence or member state of destination. This would require a manual examination of all files.

3. *Please can we have a copy of the 2008 review of the operation of the European Arrest Warrant mentioned in Q17*

The Final report on the fourth round of mutual evaluations on the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States was adopted by the Justice and Home Affairs Council in June 2009. I have attached a copy of the report for the Committee's information.

4. *Please can we have an indication of the average cost per European arrest warrant case in the UK*

The Home Office does not retain data on the average cost of administering the European Arrest Warrant. Given the wide scope of costs linked to the operation of the European Arrest Warrant including the financial burden on the police, SOCA, and the courts, to name but a few, it would be a significantly complex task to establish a reliable average as to how much it costs to operate the EAW.

5. *What estimate has been made of the impact of the implementation of the European Supervision Order in terms of any reduction in the level of remands in custody for EU nationals in the UK?*

This is a difficult question to assess as there are so many factors which will influence a court's decision when it is considering the remand status. The Bail Act 1976 requires the court to consider various factors when making the remand decision, although the court may only remand in custody if it believes it is necessary to prevent absconding, offending or interference with witnesses or otherwise obstructing the course of justice.

As at 30 June 2009, around 600 EU nationals were being held on untried remand in prisons in England and Wales. It is not possible to know how many would be affected by the introduction of the ESO since the defendant's state of residence is by no means the only factor a court will take into account when deciding whether to order pre-trial custody. We have estimated that the remand population could be reduced by a maximum of 125 (if the courts were to release 50% of EU nationals, and none of them subsequently breached the order). The actual impact would be expected to be lower than this maximum as these decisions are at the discretion of the courts and, furthermore, it is likely that a proportion of those defendants released under an ESO will breach the order, and we are not able to quantify the likely breach rate.

6. *Are there any figures available which would provide a reflection of the extent to which Eurojust has benefited UK citizens?*

There are no figures available, but in general Eurojust provides benefit to UK citizens by ensuring that serious cases of cross-border crime can be investigated and prosecuted effectively. Cases handled at Eurojust give some indication of the extent to which Eurojust is used by UK investigating and prosecuting authorities to tackle serious and organised crime. In 2009, the UK Desk at Eurojust both issued and received more requests for cross-border assistance in serious crime cases than any other Member State.

This casework activity involved supporting cross-border investigations and prosecutions, in securing foreign evidence for the prosecution of serious cases and in ensuring that legal difficulties which might prevent the extradition of dangerous criminals were resolved. The UK took part in one of every three coordination meetings at Eurojust in 2009 (where strategic and tactical decisions in serious cases are taken), a figure equalled by only one other Member State.

Notable examples of where Eurojust provided assistance to the UK include:

— *Operation Boiler Room*: UK Eurojust coordinated action involving Spain, Malta, Slovakia, Austria, Cyprus, Switzerland and Ireland, in a case where criminals defrauded investors of £28 million. There were several thousand UK victims of the fraud. As a result of the co-ordinated action, seven individuals were arrested in 2009 and the activities of an organised crime group targeting the UK were disrupted.

— *Operation Baghdad*: In June 2008, Eurojust used its powers to help co-ordinate 75 arrests in the UK and seven other Member States of an organised crime group smuggling immigrants into the EU, primarily from Iraq. Eurojust further facilitated agreements over where prosecutions were to take place and on the issue of European Arrest Warrants, so that UK courts could take appropriate decisions on the surrender of organised criminals to face trial in other Member States.

— *Operation Golf*: The UK is involved in a Joint Investigation Team (JIT) with Romania assisted by Eurojust and Europol, where Eurojust now acts as a centre to facilitate the funding of joint team projects. The operation involves the disappearance of some 1,100 children from a single town in Romania. The children are being trafficked, often with the collusion of their parents, to Spain and the UK for begging, shoplifting and to exploit the UK benefits system for criminal gain. Intercepts have discovered that each child can earn up to £100,000 per annum for the leaders of the organised crime group. To date there have been 12 arrests in the UK, for money laundering and conspiracy to defraud charges, with a further three suspects being sought. The team also achieved the first UK conviction involving trafficking of a child, and uncovered, and rescued, five further victims of child exploitation, as well as evidence of systematic and widespread benefit fraud.

— *Operation Greensea*: Eurojust assisted the co-ordination of arrests and searches against Chinese and Turkish people smuggling networks with assistance from six other Member States and Europol. Chinese nationals were paying over £20,000 each to be smuggled into the UK when arrests were made in 2008. An organized crime network using the UK as its target destination was disrupted.

— *Operation Decan*: Eurojust assisted in the dismantling of an international skimming ring (credit card cloning), which led to house searches in the UK and five other Member States in late 2008. Investigations were also undertaken outside the EU in Australia, Canada, with Eurojust facilitating co-ordination through meetings and video conferencing.

— In an Al Qaeda-related terrorism case, Eurojust co-ordinated the simultaneous execution of European Arrest Warrants in Italy, France, Romania, Portugal and the UK at the end of 2007. The suspects specialised in forging residence permits, ID cards and passports. Documents seized included manuals for making explosives.

Eurojust also assists with rapid provision of evidence which would otherwise have not been available. Two recent examples in 2009:

— A rapist in the UK was to be sentenced on the basis that he was of previous good character, despite his having a similar matter recorded against him in Lithuania. Through Eurojust, the necessary evidence was obtained in time for the UK court to sentence appropriately a dangerous rapist who would otherwise have been treated as having no previous convictions.

— In a similar case with Portugal, an individual was charged with rape of a minor. The judge could only impose a sentence under the "Dangerous Offenders Provisions" if various conditions were satisfied and account taken of other offences of which the offender was convicted "by a court anywhere in the world". Through Eurojust intervention with the Portuguese authorities' evidentially admissible material was provided to allow the court the full range of sentencing possibilities.

7. *What is the estimated cost to the UK of current and planned e-justice projects?*

The provision of technology can require significant investment. However, for e-Justice these costs have not, as yet, fallen to Member States so it is not possible to provide figures for specific projects. Most of the project work is being funded by the European Commission. This includes the creation of the European e-justice portal. Member States which take forward initiatives such as the pilot to link up insolvency registers have themselves funded such work. Funding for any future projects will be covered either through applications for specific EU project funding or again by Member States who wish to take the work forward.

The scope of the work so far has been quite limited. As the e-Justice project develops costs will obviously increase. The level of increase will depend on the scope of individual projects as determined by the Council. However, there is no compulsion for Member States to take part in all projects. The UK's participation in specific projects will depend on an analysis of the costs of participation and likely savings or added value that would be achieved by joining the project, on a case by case basis. The decision about whether or not the UK will fund participation in particular projects will be taken by the appropriate budget holding Department.

While the costs involved in such projects can be significant, there is potential to save money as well as deliver a better service to the citizen. For example, greater use of videoconferencing in cross-border cases will mean parties or witnesses do not have to travel to other countries to provide evidence in cases etc. In addition, it can be difficult to find interpreters in some languages in the United Kingdom, so it would be useful to allow interpretation via videoconference. As explained in answer to question 8, video-conferencing facilities are already widely available in UK courts.

One issue on funding that needs to be resolved is how to make it easier for projects to gain access to the current separate Commission funding schemes on civil and criminal justice. As many e-Justice projects cut across both the civil and criminal justice areas the Commission has recognised that the funding programmes need to be amended to cover such matters. We hope this will be possible soon.

8. *To what extent are facilities available in courts, prisons and other criminal justice agencies to facilitate greater use of video-conferencing across the EU?*

Each UK jurisdiction has a wide range of video-conferencing facilities as detailed below. Most of these can be used in cross-border situations in accordance with relevant national and EU legislation. The use of video-conferencing between the UK and other Member States has to date been fairly limited; however, as capacity increases it is anticipated that so will its use.

England and Wales

— Over 40% of Crown and Magistrates' Courts have videoconferencing facilities.

— 389 Crown Court rooms have videoconferencing facilities in 85 sites.

— 468 Magistrates' Court rooms have videoconferencing facilities in 274 sites.

— There are video-conferencing links in 58 of 218 County Court sites.

— 28 prisons have a total of 38 video links which could be used in cross-border situations—this is in addition to the Prison Court Video Link network which connects 151 Magistrates' and 30 Crown Courts with 66 prisons and young offender institutions (where the facilities are for domestic use only).

— It is expected that equipment will be deployed to all 139 prison establishments in future.

— 160 National Probation Service sites have a total of 172 video links.

— 42 prisons and 38 probation sites will have 99 IP video links by the end of March 2010.

While the early roll out of video-conferencing facilities focused on connecting prisons and courts, in England and Wales we encourage the use of available facilities and are in the process of increasing the capacity of available equipment and modernising the underlying technology.

Scotland

— The Scottish Court Service has a total of 56 video-conferencing units within Scotland. Some mobile equipment is also available.

— All sheriff courts have videoconferencing facilities (with the exception of three locations, which are not manned on a full time basis).

— Parliament House and all High Court locations are likewise equipped. The Court of Session in particular has made good use of international links in recent times.

— International links can also be accessed from 6 remote sites throughout the country, which are available to facilitate the giving of evidence by children and vulnerable adult witnesses. If being used for the purposes of giving evidence these sites would only accommodate the giving of evidence to an external court (and not the converse).

— All 16 Scottish prisons have fixed video-conferencing facilities (although most of these are for operational management use only). Further facilities are available in the Scottish Prison Service Headquarters and a college.

Northern Ireland

Videoconferencing equipment is available:

— in 22 court rooms across 13 Crown Court sites;

— in 19 court rooms across 17 Magistrates' Court sites;

— in three court rooms in the High Court;

— across the jurisdiction in various court buildings for various Criminal Courts, Civil & Family Courts, Family Care Courts, and Family Proceeding Courts; and

— in four prison locations and various police stations.

Most equipment is capable of outside connection and could therefore be used within the EU. Videoconferencing resources are shared between all Criminal Justice Agencies in Northern Ireland.

19 February 2010

Further supplementary memorandum submitted by the Ministry of Justice

ANSWERS TO THE JUSTICE SELECT COMMITTEE'S QUESTIONS FOLLOWING LORD BACH'S APPEARANCE TO GIVE EVIDENCE ABOUT JUSTICE ISSUES IN EUROPE

Q237: *If you find an example of why the UK's failure to participate in an amending measure would make it inoperable for other Member States, please let us know?*

As was said in the hearing, the threshold of a measure being made inoperable will be very high and we are unaware of any likely amendments where we can envisage not being able to remain in the original measure. Any hypothesising on measures being made inoperable may be counterproductive at this stage as, in each case, it would depend on the precise nature of any amendments to the original measure.

Q265 and 266: *Has the Government made any projections on the likely demand for EAW requests over the next five years? If you've projected that the number of cases will go up, have you made any plans to cope with the increase?*

It is envisaged that the UK will connect to the Schengen Information System 2 (SIS 2) in 2011. It is believed that this could result in a 250% increase in the number of arrests made pursuant to EAWs when the UK connects to the system.

The Home Office has co-ordinated work, since 2008, to plan what action should be taken by departments, agencies and services involved in the operation of the European Arrest Warrant to deal with the envisaged rise. Recommendations have since been made to these stakeholders and meetings are held regularly to review progress.

For further information on the work undertaken by the Home Office to plan for the impact of SIS 2 on the operation of the European Arrest Warrant, please see:http://www.homeoffice.gov.uk/documents/ia-police-crime-bill-08/ia-schengen-amendments2835.pdf?view = Binary

March 2010

Memorandum submitted by Professor Valsamis Mitsilegas

1. Thank you for the invitation to submit evidence to the Justice Committee for this important and timely inquiry. I was asked to comment primarily on the impact of the entry into force of the Lisbon Treaty and the adoption of the Stockholm Programme on the development of EU criminal justice measures. In this context, I will focus in particular on the position of the United Kingdom with regard to the criminal justice provisions of the Lisbon Treaty and analyse the implications of this position for future institutional and substantive developments in the field at EU level.

Criminal Justice in the Lisbon Treaty and the Position of the United Kingdom

2. The entry into force of the Lisbon Treaty marked the end of the "third pillar" in the Union constitutional architecture. This means in practice that decision-making in the field of criminal justice at EU level has in principle become "communitarised", or more supranational: legislation is adopted under qualified majority (and not unanimity) in the Council; the European Parliament is co-legislator with the Council (in theory it thus has the right to veto texts agreed by Member States' governments); and the Commission and the Court of Justice have assumed their full powers in the field (these include in particular infringement proceedings brought by the Commission against Member States deemed not to have implemented Union law before the Court of Justice; and full jurisdiction of the Court to give preliminary rulings on questions on the interpretation of Union law put forward by national courts). At the same time, in parallel to these institutional changes, EU competence to legislate in criminal matters has been both clarified and expanded (to now include in particular, as will be seen below, express competence to legislate in certain areas of fundamental rights/criminal procedure).

3. These far-reaching changes have caused a number of concerns with regard to the impact of EU law on state sovereignty in the field of criminal justice. These concerns have led to the introduction in the Lisbon Treaty (more precisely in the "Treaty on the Functioning of the European Union"-TFEU) of provisions establishing a so-called "emergency brake" in the adoption of Directives in the fields of criminal procedure and substantive criminal law. Under the "emergency brake" procedure, (established in Articles Article 82(3) TFEU for criminal procedure and in Article 83(3) TFEU for substantive criminal law), in cases where a Member State considers that a draft directive in the field "would affect fundamental aspects of its criminal justice system", it may request that the draft directive be referred to the European Council—leading to the suspension of the ordinary legislative procedure. After discussions in the European Council, in case of consensus, the proposal is sent back to the Council of Ministers for the resumption of negotiations. In case of disagreement, authorisation for Member States who wish to proceed with the proposal under enhanced co-operation is deemed to be granted. In this manner, reluctant Member States which may be in the minority may ensure that they do not take part in the measure, while allowing those in favour to proceed with its adoption.

4. In addition to the "emergency brake" provision, which can be triggered by any concerned Member State, there are two further instances where exceptions to the rules have been established in Protocols accompanying the Lisbon Treaty. Protocol No 21 "on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice" extends the right of the UK and Ireland not to participate in measures on EU immigration and asylum to now include non-participation in measures adopted under Title V TFEU on the "Area of Freedom, Security and Justice", including non-participation in EU criminal law measures tabled after the entry into force of the Lisbon Treaty.[69] The right not to participate also extends to legislation amending existing third pillar measures which are binding upon the UK and Ireland.[70] In such cases, the period in which the UK and Ireland must notify their participation is extended if the Council determines that their non-participation makes the measure inoperable in other Member States.[71] Non-participation of these countries in legislation amending an existing measure by which they are bound may lead to them bearing the direct financial consequences resulting from such non-participation.[72]

5. A potentially more far-reaching exception is provided by Protocol No 36 "on transitional provisions". The Protocol delays the application of the "full" Community effect to measures adopted under the old third pillar until they are amended after the entry into force of the Lisbon Treaty,[73] and in any case for a period up to five years after the entry into force of the Treaty.[74] At the end of the five year transitional period, the UK has the option not to accept the "Community" powers of the institutions with regard to old third pillar law, in which case such legislation will cease to apply to the UK.[75] This is an unprecedented move, allowing a Member State to withdraw from measures which are already legally binding upon it. The combination of

[69] Note that Ireland has declared its "firm intention" to exercise its right to participate to Title V measures, in particular to participate "to the maximum possible extent" in measures in the field of police co-operation (Declaration 56 annexed to the Final Act of the Lisbon Treaty). The UK has declared its intention to participate in restrictive counter-terrorism measures under Article 75 TFEU (Declaration 65 annexed to the Final Act of the Lisbon Treaty).

[70] Article 4a(1).

[71] Article 4a(2). See also Declaration 26 annexed to the Final Act of the Lisbon Treaty stating that, where a Member State opts not to participate in a Title V measure the Council will hold a "full discussion" on the possible implications and effects of such non-participation.

[72] Article 4a(3).

[73] Article 10(2).

[74] Article 10(3).

[75] Article 10(4)- which also states that the Council may adopt a decision determining that the UK may bear the direct financial consequences incurred because of the cessation of its participation.

the two Protocols is intended to lead to a situation where the UK has the option not to participate in any "new" or amending criminal justice measure adopted post-Lisbon and to refuse to be bound by "old" third pillar measures when they will become subject to the full scrutiny of EU institutions. However, as will be seen below, the legal, constitutional and policy reality post-Lisbon may prove to be more complex than this prima facie assessment.

The Growing Momentum Towards the Adoption of New Legislation at EU Level

6. The entry into force of a new Treaty, combined with the adoption of a fresh five-year action plan in Justice and Home Affairs, will inevitably lead to a momentum for the adoption of new EU legislation in criminal matters. However, it is submitted that such momentum is paradoxically boosted further by attempts towards exceptionalism in the field, as exemplified in the mechanisms described in the paragraphs above. The application of the emergency brake procedure may lead to speedier action by willing Member States under enhanced co-operation. Moreover, the way in which the transitional arrangement Protocol is drafted may actually have the effect of boosting the EU legislative production in criminal matters post-Lisbon. Already the Stockholm Programme has indicated the need to act further in a number of criminal justice fields, and has hinted at the possibility of consolidation of existing legislation by adopting a "horizontal" approach in criminal justice (paragraph 3.1.1). The emphasis on the possibility of amending existing third pillar law (which accompanies the transitional provisions Protocol)[76] may create a significant momentum towards the further development of existing EU criminal law, in order to bring about the supranational effects of the Lisbon Treaty speedily. This strategy may lead to the amendment or replacement of important third pillar instruments, such as the Framework Decision on the European Arrest Warrant, by Directives in the near future.[77]

Interdependence between Criminal Justice and Other Fields of EU Law and Policy post-Lisbon

7. The "pick-and-choose" approach of Member States, in particular the UK, in combination with the contested provisions defining Union competence in criminal matters, may also lead to a high degree of legal complexity with regard to the application of EU criminal law to Member States with "opt-outs". This is in particular the case in the light of the subordination of EU criminal procedure measures under the logic of mutual recognition. To take the example of EU standards on defence rights: the UK Government has in the past opposed the adoption of a far-reaching legally binding third pillar measure in the field.[78] At the same time, the UK has been an enthusiastic supporter of the European Arrest Warrant, a prime example of mutual recognition which the defence rights proposal aims partly to complement. As said above, the United Kingdom has under Lisbon the option of not opting into Title V measures, including measures on criminal procedure. The position is not clear however in situations where the UK has participated or wishes to take part in future mutual recognition measures (such as the European Arrest Warrant and its amending legislation post-Lisbon) but does not wish to participate in accompanying criminal procedure measures (such as the rights of the defendant) which are deemed necessary to facilitate such mutual recognition. Article 82(2) TFEU expressly confers to the Union the competence to adopt, under the legislative procedure, minimum rules in criminal procedure (concerning mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure and the rights of the victims of crime) if such measures are necessary to facilitate mutual recognition of judgments and police and judicial co-operation in criminal matters. While the Lisbon Treaty indicates that the UK has the option not to participate in such measures if the Government so wishes, the political and practical repercussions of such a decision may be significant. In the case where the EU has adopted minimum standards on the rights of the defendant and the UK has not opted into this measure, the viability of the operation of the European Arrest Warrant in the UK may be seriously questioned. After all, any future EU legislation on defence rights will only be adopted if justified as necessary to facilitate the operation of mutual recognition in general and the European Arrest Warrant in particular.

8. This awkward situation with regard to UK participation may also arise in the context of future Union law on evidence in criminal proceedings. A Framework Decision on the European Evidence Warrant has been adopted pre-Lisbon, while both Member States and the Commission are currently working on post-Lisbon proposals for mutual recognition instruments in the field (evidence in criminal proceedings being also a Stockholm priority). It may be difficult in practice for the UK to opt into a mutual recognition instrument facilitating the collection and transfer of evidence, while at the same time opting out of a parallel instrument concerning the establishment of minimum standards with regard to the mutual admissibility of evidence. These choices may become increasingly difficult for the UK negotiators in Brussels if the Commission adopts a strategy of consolidation, with future instruments including both mutual recognition and approximation elements.

---

[76] See also the Declaration concerning Article 10 of the Protocol on transitional provisions, where EU institutions are invited to adopt, in appropriate cases and as far as possible within the five year period set out in the Protocol, legal acts amending or replacing existing measures.

[77] See in this context also Declaration No 50 concerning Article 10 of the transitional provisions Protocol, whereby EU institutions are invited to seek to adopt, 'in appropriate cases' and as far as possible within the five-year period referred to in Article 10(3) of the Protocol legal acts amending or replacing existing third pillar law.

[78] For an overview of the development of the UK position, see House of Lords European Union Committee, *Breaking the Deadlock: What Future for EU procedural Rights?*, 2nd Report, session 2006–07, HL Paper 20.

9. The growing interdependence between EU criminal justice and other EU policies is also evident with regard to the determination of Union competence in the field of substantive criminal law. The scope of the Union's competence to act in criminal matters is expanded by Article 83(2) TFEU, which, mirroring to a great extent the ECJ environmental crime and ship-source pollution rulings, grants the Union competence to approximate criminal laws and regulations if such approximation proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures. Again in this context it will be increasingly difficult for the United Kingdom not to participate in a criminal law measure in the field, without undermining the operation of the underlying Union policy (such as the functioning of the internal market, or competition law), for the implementation of which criminalisation is deemed essential, and in which the UK participates fully. The extent to which the UK will wish to stay out of important developments in EU criminal law in the light of these complexities remains to be seen. In an increasingly integrated European Union, the UK 'pick and choose' approach on EU home affairs may prove much harder to sustain.

School of Law, Queen Mary University of London

24 February 2010

Memorandum submitted by the National Society for the Prevention of Cruelty to Children (NSPCC)

INTRODUCTION

The NSPCC welcomes the inquiry of the Justice Committee into "Justice Issues in Europe". From our work, we are aware that some aspects of child sexual abuse and sexual exploitation have European or international dimensions and can no longer only be effectively tackled by individual governments acting alone. For a number of years we have highlighted the need for improved EU cooperation to address child protection issues where there is a cross-border dimension, to complement and add value to national actions. In particular, this work has focused on the risks to children resulting from greater movement of people across borders, as well as in the rapidly changing online world and the threats posed to children.

Many of these issues fall within the justice domain. These include initiatives to prevent and protect children from sexual abuse, as well as combating child trafficking and protecting child victims. In addition, we note that the new five-year "Stockholm Programme" will also cover fundamental rights issues, including children's rights.

In this submission the NSPCC draws the attention of the Justice Committee to some areas which we consider should be included in the Stockholm Programme. To support our submission we are also attaching some supplementary evidence.

1. *Combating child sexual abuse and child abuse images*

The European Commission has recently published a proposal for a Council Framework Decision "on combating child sexual abuse, sexual exploitation and child abuse images".[79] It is important that reaching agreement on this proposal is prioritised under the Swedish as well as subsequent EU Presidencies. In the NSPCC's view the proposal contains a number of elements which will add to the protection of children through enhancing cross-border cooperation and ensuring a unified European response to child sexual abuse where there is a transnational dimension, such as combating online images of child abuse, and protecting children from convicted sex offenders. Following adoption of the proposal, implementation should be monitored, and Member States should exchange best practice and continue to improve cooperation on these issues.

The NSPCC has produced a detailed position paper on elements which we consider should be included in an EU Framework Decision and would be happy to provide this on request.

2. *Safer recruitment of workers in a border-free Europe*

The NSPCC has highlighted over a number of years the need to ensure that information on convicted child sex offenders can be exchanged between Member States, including for use in recruitment of persons to positions working with children. This question is considered in detail in our report "*Protecting children from sexual abuse in Europe: safer recruitment of workers in a border-free Europe*" (NSPCC, 2007)[80] as well as a number of briefings over recent years.[81]

We are encouraging Member States to ensure that the revised Framework Decision mentioned above includes provisions which would contribute to resolving this problem, based on the European Commission's proposals. We expect that there will be a need to continue to prioritise the issue over the coming five years,

[79] Proposal for a Council Framework Decision "on combating the sexual abuse, sexual exploitation of children and child abuse images, repealing Framework Decision 2004/68/JHA" COM(2009)135final, 25.3.2009.
[80] http://www.nspcc.org.uk/Inform/research/Findings/protectingchildrenfromsexualabuseineurope_wda51227.html
[81] Please see www.nspcc.org.uk/europe to download relevant briefings

both through improving criminal record information exchange (and ensuring it can be used for safe recruitment purposes) as well as exchanging best practice between Member States on keeping children safe in organisations working with them.

3. *Child trafficking*

The NSPCC is encouraging the EU Institutions to keep the issue of child trafficking high on its priority list for the years 2010—2014. This remains a significant problem and trafficked children are among the most vulnerable in our societies. In particular we would like to see a children's rights and child protection focus in all actions relating to child trafficking. A priority must be to ensure that EU immigration and asylum legislation and policies are designed taking into account the best interests of the child. Child victims of trafficking are often made more vulnerable due to insecure immigration status and being treated as illegal immigrants, rather than vulnerable children.[82]

4. *Protection of children from violence*

The NSPCC notes that the Daphne Programme which aims "to combat violence against children, young people and women" has funded a host of valuable research and other projects. We welcome the adoption of the Daphne III programme for the period 2007–13 and encourage the EU to ensure that the programme continues to support a range of projects related to the implementation of children's right to protection from all forms of violence, and that the learning from these projects is gathered and disseminated. This is a useful contribution from the EU to the implementation of the recommendations of the UN's global study on violence against children (2006).[83]

5. *Ensuring children's rights and protection are integrated across policies in the Justice field*

A priority for 2010–14 should be ensuring that children's rights, including the best interests of the child (Article 3, UN Convention on the Rights of the Child) are systematically taken into account throughout policies in this area, as many of them affect children. For example, policies on protection of crime victims must ensure that child-specific provisions are included, and that cross-cutting provisions are not detrimental to children who are victims of crime. Another example is policies on the protection of personal data, where it is essential that these take into account the need for protection of children's data,[84] as well as the importance of being able to access certain data for the protection of children from sex offenders, for example.

6. *Children's rights strategy*

Many areas of EU policy-making affect children, as noted in the Commission's 2006 Communication "Towards a European strategy on the rights of the child".[85] It is essential that the EU ensure that its activities are in line with children's fundamental rights, as set out in the UN Convention on the Rights of the Child (UNCRC), as well as in the EU's Charter of Fundamental Rights, Article 24 of which concerns children's rights. All 27 EU Member States have ratified the UNCRC.[86]

We welcome the work done by the current Commission to develop an EU strategy on the rights of the child, based on the 2006 Communication. The adoption and implementation of the strategy should be prioritised for 2010. It is important to note that while DG Freedom, Security and Justice has been given the primary responsibility for taking forward the European Commission's work on children's rights, children are affected by other areas of the Commission's work. The strategy should play a key role in ensuring that children's rights, interests and needs are taken into account across policy areas. The EU institutions' first steps towards taking children's views into account in developing EU policies should also be built upon over the next five-year period, in line with Article 12 of the UNCRC on child participation.

Supplementary evidence

- "Protecting children from sexual abuse in Europe: safer recruitment of workers in a border-free Europe" (NSPCC, 2007).
- Save the Children Europe Group and the National Society for Prevention of Cruelty to Children (NSPCC) "Statement to EU Member States on the proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA.(COM (2009)135 final)".

June 2009

---

[82] NSPCC position on protecting victims of trafficking in the EU (November 2006) http://www.nspcc.org.uk/Inform/policyandpublicaffairs/Europe/Briefings/NSPCCpositionontrafficking_wdf57918.pdf

[83] http://www.violencestudy.org/r25

[84] See the NSPCC response to Working Document 1/2008 on the protection of children's personal data (General guidelines and the special case of schools) of the EU Article 29 Data Protection Working Party: http://www.nspcc.org.uk/Inform/policyandpublicaffairs/Europe/Briefings/PersonalData_wdf58292.pdf

[85] COM (2006) 367 final.

[86] In addition, the as yet unratified Lisbon Treaty includes children's rights as one of the EU's objectives.

Supplementary memorandum by the National Society for the Prevention of Cruelty to Children (NSPCC)

1. The NSPCC welcomes the opportunity to respond to the Justice Committee's inquiry into "Justice Issues in Europe—the Stockholm Programme". The NSPCC will aim in its submission to make comments of a general and of a specific nature on the provisions of the Stockholm programme on issues related to the protection of children and the implementation of children's rights.

2. The NSPCC considers that some aspects of child sexual abuse and exploitation have European or international dimensions, and can no longer only be effectively tackled by individual governments acting alone. We have been campaigning on the need for improved EU cooperation to protect children from sexual abuse and exploitation to complement and add value to national actions. In particular, this work has focused on the risks to children resulting from greater movement of people across borders, as well as in the rapidly changing online world and the threats that that poses to children.

3. In this regard, the NSPCC welcomes the draft Stockholm programme that was published by the Swedish Presidency on 16 October 2009. The programme contains a number of significant and positive proposals in relation to child protection and we will closely monitor the Commission's legislative Work Programme of 2010 to ensure that the proposals are followed up.

General Comments

4. The NSPCC notes and endorses the Council's recommendation that the European Commission ("the Commission") submits an action plan in 2010 on the implementation of the Stockholm Programme. In this regard, we will be working with the Commission to ensure the proposed action plan has a clear timetable and implementation procedure for the children's rights element of the programme. As stated in the draft programme, we expect the Commission to consult with children's rights NGOs on the relevant aspects of the programme.

Specific Provisions in Relation to Child Protection

5. Of particular significance for the NSPCC is the call for the European Council to adopt the Commission's proposal on combating sexual abuse, sexual exploitation of children and child pornography. The NSPCC considers this proposal to be a necessary move in order to enhance the protection from abuse provided to children in the UK and beyond. Achieving agreement on this Framework Decision (Framework Directive when Lisbon is adopted) which has as its primary focus the implementation of children's right to protection from abuse, must be prioritised in 2010. The NSPCC calls on the UK government to work with the Commission and other member states to ensure that a Framework Decision is agreed by 2010, with its new legal basis.

6. The NSPCC has highlighted over a number of years the need to ensure that information on convicted child sex offenders can be exchanged between EU Member States, including for use in recruitment of persons to positions working with children. This question is considered in detail in our report "*Protecting children from sexual abuse in Europe: safer recruitment of workers in a border-free Europe*" (NSPCC, 2007)[87] as well as a number of briefings over recent years.[88] We therefore welcome the Council's recommendation that the European Criminal Records Information System (ECRIS) is evaluated with particular reference to introducing vetting measures for those who work for children.

7. The NSPCC also welcomes the reference to some harmonisation of criminal sanctions for cross-border crimes of sexual exploitation of children. We hope to work with the Commission, drawing on good practice from the UK to establish common definitions and penalties in this area.

8. It is disappointing that the draft strategy does not explicitly call for the EU to adopt a strategy on children's rights. Many areas of EU policy-making affect children, as noted in the Commission's 2006 Communication "Towards a European strategy on the rights of the child".[89] It is essential that the EU ensure that its activities are in line with children's rights, as set out in the UN Convention on the Rights of the Child (UNCRC), as well as in the EU's Charter of Fundamental Rights, Article 24 of which concerns children's rights. All 27 EU Member States have ratified the UNCRC.[90] The NSPCC considers that the adoption and implementation of the children rights strategy must be a priority for the new European Commission.

9. Finally, the NSPCC is encouraged to see a number of positive measures in relation to child trafficking. Trafficked children are amongst the most vulnerable in our societies and in this regard we welcome the proposal to establish an EU Anti-Trafficking Coordinator (ATC). We would like to see the

[87] http://www.nspcc.org.uk/Inform/research/Findings/protectingchildrenfromsexualabuseineurope_wda51227.html
[88] Please see www.nspcc.org.uk/europe to download relevant briefings.
[89] COM (2006) 367 final.
[90] In addition, the as yet unratified Lisbon Treaty includes children's rights as one of the EU's objectives.

ATC have a clear mandate on protecting trafficked children. Furthermore, in relation to the safe return of trafficked children, we wish to highlight that particular attention should be paid to the process in which a decision is made to return an unaccompanied minor whose asylum application has failed. The making of such a decision should seek to balance the immigration considerations (failed asylum claim) and the best interests of the individual child. This includes consideration of child specific forms of persecution in the country of origin.

Naureen Khan
European Advisor, on behalf of the NSPCC

2 November 2009

Memorandum submitted by Victim Support

Victim Support is the national charity for people affected by crime. Staff and volunteers offer free and confidential information and support for victims of any crime, whether or not it has been reported and regardless of when it happened. Victim Support works to increase awareness of the effects of crime and to achieve greater recognition of victims' and witnesses' rights. The organisation also operates the Witness Service and the Victim Supportline (0845 30 30 900).

Justice Committee inquiry into Justice issues in Europe into Justice issues in Europe

EVIDENCE FROM VICTIM SUPPORT

Executive Summary

1. Victim Support welcomes the opportunity to provide evidence to this inquiry. Victim Support has been involved in the debate about victim issues at EU level for a number of years, and is represented, by Chief Executive, Gillian Guy, on the Executive Board of Victim Support Europe (formerly the European Forum for Victim Services). Victim Support Europe is a network of non-governmental organisations providing assistance and information to victims of crime.

2. Noting the speed with which Member States appear to have implemented existing EU instruments, depending on their status as "directive" or "framework decision", we are hopeful that the ratification of the Lisbon Treaty will provide the impetus required to achieve parity for victims across the EU, at least in terms of victims' standing in criminal proceedings (Framework Decision, 2001). While we recognise that the UK, and specifically England and Wales, has a relatively strong track record in transposing the articles of the 2001 Framework Decision, we have highlighted areas for improvement and suggest that the forthcoming consultation on the Code of Practice for Victims of Crime might be a suitable opportunity to address these.

3. Victim Support welcomes the current enthusiasm shown at EU level for addressing issues affecting victims of crime, expressed in both the Stockholm Programme and the recent Council Conclusions. However we urge caution in identifying priority groups of victims for attention. We appreciate that those victims of crime perpetrated across borders should demand particular support from the EU. However, our experience of supporting all victims of all crime types tells us that where universal services are not in place for all victims, it is the most vulnerable victims, such as those identified by the Stockholm Programme, who tend to suffer most.

4. We are pleased to note the progress of the Commission in applying pressure to those Member States which have proved slow to implement the 2004 directive regarding compensation for victims. We are however concerned that work now needs to be done to ensure that victims are made fully aware of the enhanced opportunity to seek compensation that this directive has achieved.

1. *How has action taken at European level on justice issues affected people?*

Victim Support believes that provision for victims (and witnesses) has improved significantly in recent years and would cite such initiatives as the Code of Practice for Victims of Crime, No Witness No Justice and the introduction, with financial support from government, of Victim Support Plus as key steps forward. While it is not possible to say to what degree action at European level has influenced these changes it is encouraging that both national and European level developments appear to be moving in similar directions.

2. Victim Support welcomes the current enthusiasm shown in recent EU documents including the Stockholm Programme (December 2009) and the Council Conclusions (October 2009), which highlight, respectively, the central role that victims of crime need to play in EU policy and the specific areas which the EU and its member states need to address to meet their existing obligations to victims of crime.

3. *Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings*

We await with interest the impact on victim policy in England and Wales of both the ratification of the Lisbon Treaty and the forthcoming revision of the Code of Practice for Victims of Crime. While the former could potentially lead to the UK government being forced to implement the outstanding articles in the Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, the revision of the Code of Practice may offer the opportunity for making these changes relatively soon.

4. Victim Support has followed with interest the degree to which Member States have, since 2001, transposed the articles in the Framework Decision, and notes that improvement does appear to have taken place. Our position on the Framework Decision, since it was taken, has been one of regret that it did not enjoy the status of a Directive. Because of this, we are hopeful that the ratification of the Lisbon Treaty will provide the Framework Decision with the "teeth" it has hitherto lacked.

5. There are two perspectives from which Victim Support would like to see the 2001 Framework Decision more rigorously enforced. One perspective is that of those individuals who are resident in England and Wales but are victims of crimes committed in other Member States. Because we support all victims of crime, whether or not they have reported to the police, we are often approached for advice about or practical support in accessing justice abroad. Unfortunately, on some occasions, when, due to a Member State's failure to meet the requirements of the Framework Decision (Greece being notable example and a popular destination for British travellers), we have no way of referring the victim to an organisation which can offer assistance. Without the funds to accompany individual victims, in person, to a court case in another country, we are left with no option but to refuse support.

6. The main perspective from which we have an interest in the Framework Decision is however that of victims of crimes committed in England and Wales. These victims represent the bulk of our clients and we believe their experience could be greatly improved if the following articles were fully transposed:

6.1 *Article 4—(Right to receive information)*

Paragraph 3 of article 4 states that "member states shall take the necessary measures to ensure that, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released, a decision may be taken to notify the victim if necessary".

This article is not fully transposed as victims in England & Wales are only entitled to information on the offender's release in relation to certain offences, and if the sentence is at least 12 months.

6.2 *Article 5—(Communication safeguards)*

This article states that Member States must ensure that they take measures to minimise communication difficulties for witnesses in criminal proceedings.

The Youth Justice and Criminal Evidence Act 1999 introduced special measures for certain victims who appear as witnesses and are classified as vulnerable and intimidated witnesses (VIWs). However, access to special measures is subject to VIWs being correctly identified by either the police or the Witness Care Unit, a (timely) application being made by the prosecutor, consent being given by the judge and the facilities being available in the court. Victim Support is aware of many cases in which one or more of these conditions are not met.

6.3 *Article 8—(Right to protection)*

Paragraph 3 of article 8 states that each Member State will ensure that "contact between victims and offenders within court premises may be avoided, unless criminal proceedings require such contact. Where appropriate for that purpose, each Member State shall progressively provide that court premises have special waiting areas for victims".

Most crown courts do have separate waiting areas but they are only required to provide these, according to the Code of Practice for Victims of Crime, "as far as possible". Victim Support takes issue with the inclusion of this caveat as it has encountered such arguments as a court being housed in a listed building as justification for separate waiting areas not being possible. Victim Support is of the view that if victims cannot be spared the indignity of having to await a case in the same room as the defendant's family and friends, the trial should be held in premises that can provide this security.

6.4 *Article 9—(Right to compensation in the course of criminal proceedings)*

Paragraph 3 of this article states that "Unless urgently required for the purpose of criminal proceedings, recoverable property belonging to victims which is seized in the course of criminal proceedings shall be returned to them without delay".

The arrangement for this in England and Wales is non statutory, and therefore this article is not fully transposed.

6.5 *Article 10—(Penal mediation in the course of criminal proceedings)*

This article states that "Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account".

The inclusion of reparation in the purposes of sentencing and the placing of restorative cautioning by police on a statutory footing (both Criminal Justice Act 2003) could be argued to have fulfilled this article. However, Victim Support has concerns that, in practice, restorative justice remains available to victims in a relatively small number of cases, generally where the perpetrator is a young offender. This may be related to an offender-driven, rather than victim-driven interpretation of which cases are considered "appropriate" for this measure.

6.6 *Article 11—(Victims resident in another Member State)*

This article relates to victims who are resident in a State other than that where the offence occurred. It states that authorities should be able to decide whether the victim can make a statement immediately after the offence, and that video conferencing and telephone conference calls should be available. Further, if the victim is not able to make a complaint in the country where the offence occurred they should be able to do so in the Member State in which they are resident. That Member State will then inform the competent authority in the territory in which the offence was committed.

This article has not been fully transposed.

6.7 *Article 12—(Cooperation between Member States)*

This requires all Member State to foster, develop and improve cooperation between them with the aim of protecting victims' interests more effectively, "whether in the form of networks directly linked to the judicial system or of links between victim support organisations".

We would not say that this article had been fully transposed: cooperation at EU level is, in our experience, generally led by the victim support organisations, which are largely NGOs.

6.8 *Article 14—(Training for personnel involved in proceedings or otherwise in contact with victims)*

This article states that personnel who come into contact with victims should have suitable training.

Many personnel who come into contact with victims, in the criminal justice system although not consistently in other public services, eg health, do receive training, and Victim Support is sometimes involved in developing and delivering this. All Victim Support personnel are fully trained before working directly with victims. However the training for personnel in public services is not, as yet, provided on a statutory basis.

7. Council Conclusions

The Council Conclusions (October 2009) give a welcome boost to the victims' agenda. We are particularly pleased that the need for increased support for Victim Support services, greater awareness of these services, and training for professionals working with victims have been included.

8. We also welcome the helpful analysis provided by the Council Conclusions of the impact of EU instruments for victims of crime. As the list of Council Conclusions points out, evaluation both the 2001 Framework Decision and the Council Directive relating to compensation to victims of crime in cross-border situations (2004) indicate that fulfilment of the obligations these documents place on member states remains incomplete. The rallying cry to the EU and its members to take these issues more seriously is timely as we consider the impact of the Lisbon Treaty on the potential for this challenge to be met.

9. The Stockholm Programme

The Stockholm Programme goes some way towards responding to the call of the Council Conclusions. We are particularly pleased to see victim issues expressly highlighted in the Stockholm Programme, which explicitly states that "[a]n important issue is how to offer better support to victims, possibly through European networks that provide practical help".

10. The detail of the Stockholm Programme focuses on particular groups of victims, including victims of gender based violence and child exploitation, trafficking, terrorism and "cyber crime".

11. Victim Support applauds the commitment expressed in the Stockholm Programme to respond to the needs of the unintended victims of increased cross-border cooperation. We are currently particularly concerned by the growing problem of fraud crimes, many of which are facilitated by the Internet, and on which it is not always clear where the jurisdiction for investigation—if indeed there is an investigation—lies. One of the reasons for our concern about this group of victims is that without an investigation, participation in criminal proceedings becomes a purely academic prospect.

12. We are concerned however, that this focus on certain groups of victims could result in a "two-tier" approach to victim policy in Member States, particularly those without an established infrastructure of victim support. Victim Support endorses the conclusions of the recent report by the Victims' Champion that the support needs of victims cannot be determined by the crime type alone: while there may be specific needs arising from being a victim of, say, sexual violence, everyone's reaction to being a victim of crime will be highly individual. Moreover, our experience shows that where provision for victims—all victims—is lacking, this affects the most vulnerable victims disproportionately. Victim Support practitioners will, for example, regularly cite rape victims as those most traumatised by failures by representatives if the criminal justice system to follow procedure correctly and sensitively.

13. *Council Directive relating to compensation to victims of crime in cross-border situations (2004)*

Victim Support welcomed the introduction of this Council Directive, and was particularly pleased that it was afforded the status of a directive, for the reasons outlined above in the context of the Framework Decision. We note with interest both the 2008 Matrix study[91] and the 2009 report, from the Commission itself,[92] into the impact of the Directive.

14. It is encouraging that almost all Member States have responded to the Directive by putting processes in place for victims to make applications for compensation across national borders. We are also encouraged that action has been taken and, in the case of Greece, continues to be taken, against those Member States which have failed to comply with the Directive.

15. We are however concerned to note that despite the arrangements that have been made in most Member States to allow victims to apply for compensation in cross-border situations, take-up of this opportunity has, to date, been low. We agree with the possible explanations put forward for this in the Commission's report, including perceived language barriers, absences of a central source of information and the involvement of two agencies. However in our experience the greatest barrier to compensation, whether at home or in another Member State is victims' lack of awareness of the existence of the provision.

16. We agree with the Commission's position not to propose amendments to the Directive at the current time: the priority ought to be to ensure that arrangements are in place in all Member States first. However we would welcome in future the opportunity to review the reach of the Directive, measured by numbers of victims helped: it is critical that the structural investment in applying this Directive is not wasted for want of effective publicity of compensation opportunities to victims.

17. The Commission's 2009 report provides a useful insight into some of the differences between the compensation schemes in Member States. For example, it highlights that the UK is, for example, in the minority in reserving the right to reduce a victim's compensation on the basis of previous convictions, a characteristic which Victim Support has always believed to be unfair. We would therefore be interested, at some point in the future, to explore what opportunities exist, in this period of renewed EU-level interest in victims, to replicate the best practices of individual schemes in all Member States.

January 2010

---

[91] http://www.matrixknowledge.com/wp-content/uploads/study_compensation_to_crime_victims_en.pdf
[92] http://www.asser.nl/eurowarrant-webroot/documents/cms_eaw_id1897_1_52009DC0170.pdf

Printed in the United Kingdom by The Stationery Office Limited
4/2010 443002/1699 19585