Memorandum 1

Submission from the Magistrates Association, Judicial Policy & Practice Committee

Justice Issues in Europe

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.

June 2009

Annex

THE MAGISTRATES' ASSOCIATION

JUDICIAL POLICY & PRACTICE COMMITTEE

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
- 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.
- 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 (e.g. 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 e.g. "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 e.g. 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, e.g. while the other language speaker is not being addressed, to allow the interpreter to keep up
- 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 e.g. 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
- alert the bench to a possible missed cultural inference i.e. 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, e.g. bail form, and suggest a copy is kept on file with the original English text
- Thank the interpreter, preferably by name.

December 2008

THE MAGISTRATES' ASSOCIATION

JUDICIAL POLICY & PRACTICE COMMITTEE

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 2

Submission from 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 15th and 16th 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 2005-2010. 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 September 11th 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 26th and 27th 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, 12th 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 does not in many circumstances guarantee the rights as envisaged in the Proposal. Difference 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 2007/2008, 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 2008/2009.[1] 37% of those received in 2007/2008 were for minor offences from Poland.[2]

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[1] 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.

[2] *Ibid.*

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 the 10th 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 the 8th 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.

June 2009

Memorandum 3

Supplementary submission from 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 8th 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

Memorandum 4

Submission from the National Society for the Prevention of Cruelty to Children

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'[3]. 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

[3] 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

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) [4] as well as a number of briefings over recent years[5].

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, 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[6].

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[4] http://www.nspcc.org.uk/Inform/research/Findings/protectingchildrenfromsexualabuseineurope_wda51227.html

[5] Please see www.nspcc.org.uk/europe to download relevant briefings

[6] NSPCC position on protecting victims of trafficking in the EU (November 2006) http://www.nspcc.org.uk/Inform/policyandpublicaffairs/Europe/Briefings/NSPCCpositionontrafficking_wdf57918.pdf

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 2007-2013 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)[7].

5. Ensuring children's rights and protection are integrated across policies in the Justice field

A priority for 2010 – 2014 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[8], 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"[9]. 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

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[7] http://www.violencestudy.org/r25

[8] 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

[9] COM (2006) 367 final

Fundamental Rights, Article 24 of which concerns children's rights. All 27 EU Member States have ratified the UNCRC[10].

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)"

July 2009

[10] In addition, the as yet unratified Lisbon Treaty includes children's rights as one of the EU's objectives.

Memorandum 5

Submission from the Information Commissioner's Office

Justice issues in Europe

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[11] (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[12] (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[13] 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.

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

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[11] 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.

[12] 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.

[13] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, published by the Council of Europe, Strasbourg, 28.I.1981

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.

July 2009

Memorandum 6

Submission from the Law Society of England and Wales

Justice issues in Europe

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[14] and the Presidency Roadmap on procedural rights dated 1 July[15] 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;
    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

[14] COM (2009) 262 final, 10.06.2009 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0262:FIN:EN:PDF

[15] Presidency Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings dated 1 July 2009 11457/09.

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.
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 ten 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 2014,16 the Society calls on them to ensure that it is an area in which fundamental rights are respected.

5. Binding minimum procedural rights

[16] 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 (2010-2014) December 2008 at http://international.lawsociety.org.uk/files/LSEW%20response%20to%20Commission%20consultation%204%20December.pdf

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

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,[17] with legal aid for those who cannot afford it;

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[17] 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.

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;[18]
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,[19] 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

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[18] 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

[19] 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.

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.

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 project20 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

[20] Council Multi-Annual European e-Justice Action Plan 2009-2013, 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

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 matters21 is not fully satisfactory. This is particularly pertinent not least in the context of the European e-Justice project.22
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.

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

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[21] 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

[22] 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

9.1. For example, in relation to the European Arrest Warrant,23 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 Warrant24 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 adopted25 a report26 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 Warrant27 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)).

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23 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

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

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

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

27 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

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.

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.[28]

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.29

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

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

12.3. In its position on the proposal dated 26 February 200930 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

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

(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.31

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 (e.g. 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 legislation32 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

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[31] 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 (2010-2014) 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.

[32] 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

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

Memorandum 7
Submission from Fair Trials International

Justice Issues in Europe

About Fair Trials International

Fair Trials International (FTI) is a UK-based NGO that works for fair trials according to international standards of justice and defends the rights of those facing charges in a country other than their own.

FTI pursues its mission by providing individual legal assistance through its expert casework practice. It also addresses the root causes of injustice through broader research and campaigning and builds local legal capacity through targeted training, mentoring and network activities.

Although FTI usually works on behalf of people facing criminal trials outside of their own country, we have a keen interest in criminal justice and fair trial rights issues more generally. We are active in the field of EU Criminal Justice policy and, through our expert casework practice, we are uniquely placed to provide evidence on how policy initiatives affect defendants throughout the EU.

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 ten 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

3.2.4 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 4 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 9 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 4 days but Michael was held on remand for 4 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 7 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 7 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 nineteen 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 6

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 4 kilos of cocaine was found in 2 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 1 ½ 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 Judiciária 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 4 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 2 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[33] 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 2pm 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.

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 4 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 3 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

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

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: contact details are provided on page 2.

July 2009

MEMORANDUM 8

Submission from the Ministry of Justice

Justice issues in Europe

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. **The structure of this memorandum is as follows:**

Part One: How action at a European level on justice issues has affected citizens

(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 cross-border cases

(b) 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 Absence

Environmental Crime

Data Protection Framework Decision

(b)Looking further ahead: Stockholm Programme

Information exchange and data protection

Criminal procedural rights

Cross-border enforcement of judgements in civil matters

E-Justice

(c)Would not add value

Harmonisation of Member States laws and regulations.

Part One: How action at a European level on justice issues has affected people

(a) What has worked well

Eurojust

7. Eurojust was established in 2002[34] 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[35] (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.

9. Eurojust's case-load has increased six-fold since it was established (from 202 cases in 2002 to 1193 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*

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[34] 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)

[35] 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).

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[36] 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[37] 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.

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[36] 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)

[37] 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)

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[38] 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.

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

[38] *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)

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[39]. 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-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[40] 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

[39] 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)

[40] 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

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[41] provides a procedure for uncontested claims and the European Small Claims Regulation[42] is for claims up to €2000. 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 5 incoming European Orders for Payment.

What has not worked well?

Proposal for a Framework Decision on criminal procedural rights

23. 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[43] was aimed at achieving this. However Member States spent over 3 years negotiating this

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[41] 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

[42] 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

[43] 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

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 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 34.)

European Enforcement Order (EEO)

24. There has been a disappointingly low take-up of the EEO[44] – 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

[44] 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

Prisoner Transfer Agreement

25. The Government strongly supports the Council Framework Decision on prisoner transfers[45] 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

26. 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[46] 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

27. 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

[45] 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)

[46] Council Framework Decision 2009/299/JHA of 26 Feb 09 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)

October 2008[47]. We were also happy to support it because it is clearly within EU competence as confirmed by the European Court of Justice.[48] 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[49] 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)

28. The Government supports the DPFD[50] 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.

(b)Looking further ahead: Stockholm programme

29. 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

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[47] 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

[48] Environmental Penalties case
Case C-176/03 Commission v Council (environmental penalties) [2005] ECR I-7879

[49] 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)

[50] 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)

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

30. 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.

31. 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.

32. 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[51].

[51] 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)

33. 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

34. As stated at paragraph 23, 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

35. 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[52], Brussels IIa[53] 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

[52] 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

[53] 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)*

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.

36. 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

37. 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.

38. 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. 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.

39. 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.

40. 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.

July 2009

Annex A

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 Prüm 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 e.g. 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 – e.g. 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 – e.g. 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 – e.g. 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 – e.g. 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 – e.g. 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.
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- 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 €2000 (claims under €2000 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.
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- 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.
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- 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 €2000 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 – 2020 period;
    - allowing more flexible reallocation of the €5m 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 €2000;
- 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.

Memorandum 9

Submission from Jonathan Faull, Director General, European Commission Directorate-General for Justice, Freedom and Security

I am pleased to learn that the Justice Committee is carrying out an inquiry into Justice Issues in Europe for which it has 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.

July 2009

Memorandum 10

Supplementary submission from the National Society for the Prevention of Cruelty to Children

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) [54] as well as a number of briefings over recent years[55]. 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"[56]. 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[57]. 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
10. the 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.

November 2009

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[54] http://www.nspcc.org.uk/Inform/research/Findings/protectingchildrenfromsexualabuseineurope_wda51227.html

[55] Please see www.nspcc.org.uk/europe to download relevant briefings

[56] COM (2006) 367 final

[57] In addition, the as yet unratified Lisbon Treaty includes children's rights as one of the EU's objectives.

Memorandum 11

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

MEMORANDUM

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 2 or 3 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[58] 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.

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

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.

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.

7. 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 the 4th December 09, 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.

January 2010