Ministry of JUSTICE

Government Response to the Justice Select Committee's Report:

Justice issues in Europe

27 October 2010

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Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

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Introduction

The Government welcomes the Justice Select Committee Report: *Justice issues in Europe* and is grateful to the Committee and to all those who gave evidence in the preparation of this report.

The Committee took evidence from the previous Government, therefore, we thought it would be useful to set out at the outset that this Government intends to play a strong and positive role in the European Union, with the goal of ensuring that member states are equipped to face the challenges of the 21st Century.

The 1997 Treaty of Amsterdam, which entered into force in 1999, created an EU area of freedom, security and justice. This inquiry, timed to coincide with the development of the five-year work programme for justice and home affairs for 2009 – 2014, known as the Stockholm programme, enabled the Committee to take stock of progress to date and to look at key upcoming priorities and challenges for the UK Government as the new programme is implemented. The entry into force of the Treaty of Lisbon on 1 December 2009, during the course of the inquiry, allowed the Committee to consider the Stockholm programme in the context of the changes that the new Treaty has made to the area of justice.

The report notes that the Lisbon Treaty has made fundamental changes to the area of policing and criminal law. Almost all new legislation in this area will be determined by the ordinary legislative procedure, rather than the previous requirement that legislation must be adopted by unanimity in the Council of Ministers. Further, all new measures will be subject to the jurisdiction of the European Court of Justice, and after a five-year transitional period, all existing measures will come within the Court's jurisdiction.

Under the Lisbon Treaty the UK – and Ireland – secured an opt-in arrangement which gives the Government the right to choose whether to opt-in to each proposed measure in the field of freedom, security and justice. This Government will assess each new measure on its merits. We have a responsibility to UK citizens to put the national interest at the heart of our decision-making and we will consider each opt-in decision with a view to maximising our country's security, protecting civil liberties, preserving the integrity of our criminal justice and common law systems and controlling immigration. The Government will not opt-in to any proposal concerning a European Public Prosecutor.

The Committee's report concentrates on issues relating to the establishment of mutual trust as the cornerstone of judicial co-operation and the extent to which it is possible to strike a balance between this and the fundamental rights of EU citizens and in particular UK citizens. The report considers the following rights in detail: procedural rights in criminal proceedings; the rights of victims and the right to privacy.

The report also considers the financial implications for member states of measures in the Stockholm programme and questions how the Government will control the implementation costs.

The Government's response follows the broad structure set out by the Committee in its summary of conclusions/recommendations. In our response we have grouped some of the recommendations out of chronological order where the subject matter is related.

Response to the introduction of the report

1. We are beginning to see progress in the development of a more comprehensive system of cooperation in the administration of justice between member states, although the Hague programme undoubtedly underachieved its declared objectives. While we consider the Stockholm programme to be less ambitious, and more realistic than its predecessors, which we welcome, the complexity of arrangements under the Lisbon Treaty potentially gives rise to new challenges for the programme's implementation. (Paragraph 12)

We recognise the importance of the Stockholm programme in setting the EU agenda for work on Justice and Home Affairs over the next five years. However, this does not mean that the Government will necessarily support every aspect of it. The Stockholm programme refers, for example, to the creation of a European Public Prosecutor's Office as a possibility that could be considered, but as referred to in the Introduction, this Government does not believe that the UK should participate in it.

2. We welcome the Government's approach in favouring evidence-based practical measures and adopting a "look before you legislate" perspective and we are encouraged that this perspective has been reflected in the Stockholm programme. We hope that it will be possible for Government and the Commission to continue to pursue these ideals now that there is no longer a requirement for unanimity and that groups of member states are able to introduce their own initiatives. (Paragraph 29)

The Government agrees that any legislative measure should be based on evidence that legislation in that area is appropriate and would bring practical benefits.

When the Government assesses whether or not to opt-in to a measure we will want to be sure that there is evidence that the measure is needed and would benefit UK citizens. The Government is ready to consider member state initiatives as well as proposals from the Commission, but we would still want to see evidence provided about the need for any new measure.

3. Some of the practical consequences of the Lisbon Treaty and the opt-in arrangements that the UK has negotiated remain matters of contention. (Paragraph 34)

The Committee notes (at paragraph 24) that clarification is needed on what would happen if an amending measure, to which the UK objects, is brought forward to an original measure which the UK had previously accepted. The Committee then lists the various options. As the Committee notes, the UK can accept the amending measure, or opt-out of it. If we opt-out, we will generally

remain bound by the original measure, unless it is rendered "inoperable" by our non-participation and we are ejected from it. We may also then be liable to bear the costs if there are any direct financial consequences.

7. We are encouraged that neither the Minister, nor any of our witnesses, were able to provide a convincing example of a situation in which an existing measure would be rendered inoperable as a result of the UK's decision not to participate. Nevertheless, we are concerned that the term "inoperable" is not defined in the protocol and that guidance is not available on its interpretation. (Paragraph 54)

The Government cannot foresee an example of circumstances in which an existing measure would be rendered inoperable by the UK deciding not to participate in it. We anticipate that the threshold for the inoperability test is likely to be a high one. Whether a measure was deemed inoperable, however, would depend in each case on the nature of the original measure and of the amendments to it. The Government will consider any amending measure on its merits, including weighing up the risks of participating or otherwise.

4. While the UK Government may wish to see greater emphasis on joint action and best practice rather than legislation, the proposals in the Stockholm programme and the Lisbon Treaty together give rise to the potential for a significant body of new law. (Paragraph 38)

The Government supports using non-legislative solutions to problems where they will provide real results, for example practical co-operation and sharing best practice. However, there may be instances where it is beneficial and appropriate for the UK to opt-in to measures which legislate for common minimum standards or sanctions across the EU. For example, the Government opted-in to the draft Directive on combating the sexual exploitation of children and child pornography. By agreeing common minimum standards of legislation and sanctions to protect children from such abuse, we can seek to ensure it is less attractive for potential offenders to travel between member states to take advantage of differences in legislation. In other areas, however, it will be less likely that the Government will participate in a measure introducing minimum standards or sanctions.

The opt-in protocol and revisions to existing mutual recognition instruments

5. We would welcome clarification from the Ministry of Justice on the action it is taking to deal with the predicted 250% rise in arrests pursuant to European arrest warrants in terms of the implications for the Crown Prosecution Service, Her Majesty's Courts Service and the National Offender Management Service and how it plans to meet the costs to the Department as a whole. (Paragraph 46)

The Home Office has co-ordinated work to ensure that departments, services and agencies involved in the operation of the European arrest warrant (EAW) are prepared for the predicted rise in EAWs dealt with in the UK when we connect to the Schengen Information System 2[1]. As the EAW is an international obligation entered into by the UK, individual departments will need to ensure that they are adequately resourced to deal with the predicted rise.

6. It is unfortunate that the successful use of the European arrest warrant, and the reduced time taken to process intra-EU extraditions, has been overshadowed by perceived injustices in individual cases. We welcome the conclusions of the evaluation of the warrant, adopted by the Council in June 2009, and the subsequent progress that has been made. However, we believe that the time it takes to review and reform such instruments undermines the mutual trust approach. Legislation should be used only as a last resort to resolving the issues over proportionality and we hope that the current approach bears fruit before the predicted growth in demand for European arrest warrants takes place. (Paragraph 50)

The Government is aware of the concerns that have been expressed both in relation to the individual cases cited in the report and more broadly on the operation of the EAW.

As announced in the House of Commons on 8 September, we will be carefully examining the UK's extradition arrangements, including the UK's operation of the EAW.

The Government is confident that the review will provide an effective means of assessing the UK's extradition relations with EU member states. It is vital that

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[1] The Schengen Information System is a pan European database which operates to maintain and exchange information between Member States. The UK does not operate this system. A second generation system (SIS 2) is currently under development. In the future, it is envisaged that this will be the system by which the UK issues and receives EAWs, replacing the current bi-lateral transmission of warrants between the UK and Member States.

the UK's extradition arrangements operate both effectively and in the interests of justice – this review will ensure that we meet that objective.

On the issue of proportionality, the Government is committed to addressing this issue in partnership with other EU member states and through the European Commission. We look forward to continuing this work in the coming months.

8. While the Government may wish the EU to adopt a "look before you legislate" approach, the ability of member states to present their own initiatives may pre-empt more considered approaches by the European Commission. We agree with the Government that, if the European evidence warrant is revised or replaced, lessons should be learned from the operation of the European arrest warrant by incorporating safeguards into the legislation to minimise the potential for disproportionate use. (Paragraph 60)

The Government recognises that the EAW has sometimes been used in relatively trivial cases. We believe, and support the Committee's recommendation, that lessons must be learnt from that in any future legislation in the field of judicial co-operation. Having opted-in to the European Investigation Order, which replaces the European Evidence Warrant, we certainly wish to have safeguards included that will minimise the potential for disproportionate use and will be negotiating on this basis.

Safeguarding fundamental rights

9. We are encouraged by progress made in implementing the "road map" thus far, notwithstanding the delays caused by the introduction of the Lisbon Treaty. Some countries have given a strong signal that this is a priority by introducing the directive on interpretation and translation as a member state initiative. We consider it wise to begin with the easiest elements and to approach these with a renewed sense of optimism, but it is also important not to be complacent about the potential for setbacks. Very practical difficulties related to language may be more easily resolved with equally pragmatic solutions but other issues will undoubtedly be more complex to resolve. We fear that the current pace of progress may not be sustained and therefore have concerns about the implications of the continued imbalances in the system for UK citizens. As the number of European arrest warrants is predicted to rise, there is a real risk that many more citizens will experience the dire consequences of the lack of adequate safeguards afforded to them when they find themselves caught up in cross-European judicial processes. (Paragraph 72)

The Directive on Interpretation and Translation is an example of a measure that will make a real and practical difference to defendants' rights. Current indications show that the measures set out within the "road map" appear to be on track and a proposal for a Directive on a Letter of Rights was published in July. The Government has opted-in to that measure.

10. Monitoring of compliance with existing procedural rights will be all the more necessary if the "road map" measures take a long time to agree. (Paragraph 75)

All EU member states are party to the European Convention on Human Rights, Article 6 of which contains substantial fair trial guarantees for every person within the jurisdiction of a contracting party. Many of these guarantees specifically relate to the determination of a criminal charge, including specific rights to be informed in a suitable language about the accusation, to have adequate time and facilities to prepare a defence, to be able to examine witnesses, and to have free legal assistance, if needed, and interpretation.

The compliance by member states with these rights is of course subject to the scrutiny of the European Court of Human Rights, before which any person within a state's jurisdiction may bring proceedings and, if appropriate, be awarded a specific binding remedy. In addition, specific topics of concern may be raised by the Council of Europe's Commissioner for Human Rights.

11. The Commission should develop best practice guidance to accompany each of the proposals created under the "road map". In the first instance such guidance should be produced to complement the forthcoming directive on interpretation and translation in criminal proceedings, drawing on existing good practice in other member states, for example, the guidance note and checklist devised by the Magistrates' Association. (Paragraph 83)

The original Member State initiative on the right to interpretation and to translation in criminal proceedings was brought forward as a Framework Decision in July 2009. The Presidency also drafted a proposal for a non-binding Resolution regarding the implementation of the Framework Decision which described how member states should provide interpretation and translation effectively in practice.

As the Committee is aware, the Framework Decision and the accompanying Resolution lapsed when the Lisbon Treaty came into force on 1 December 2009. The Directive on Interpretation and Translation in criminal proceedings, which replaced the Framework Decision, has now been agreed and was adopted on 7 October 2010. The Council may adopt a Recommendation, with content similar to the previous Resolution, at a later stage. This would not preclude member states from additionally using more detailed best practice guidance, tailored to their national criminal justice system, such as the Magistrates' Association guidance note, as used in England and Wales.

The Directive was the first step of the Roadmap on Procedural Rights. Where the UK opts-in to future measures, we will consider whether it would be appropriate to lobby the Commission to publish best practice guidance.

12. We welcome the proposed consolidation of instruments to promote the rights of victims of crime. The existence of compensation schemes could be promoted relatively easily through the forthcoming e-justice portal—which will function as a point of access to information on justice matters across the EU—with appropriate signposting from domestic agencies that come into contact with victims from other member states. We seek clarification from the Government as to when it intends fully to transpose the outstanding articles of the framework decision on the rights of victims in criminal proceedings. (Paragraph 90)

The Government agrees that the e-justice portal, which was launched on 16 July 2010, provides a good opportunity to promote the existence of compensation schemes across the EU. The Committee will note that the first version of the portal already contains some information about these schemes through links to other websites. Further information will be provided as the portal develops.

The Government notes that Victim Support has identified areas for improvement in relation to the UK Government's implementation of the *2001 Framework Decision on the standing of victims*. The Government believes that we are fully compliant with the Framework Decision. In England and Wales

much of it is implemented through the statutory Code of Practice for Victims of Crime made under section 32 of the Domestic Violence, Crime and Victims Act 2004. The Code requires criminal justice agencies to provide specific services for victims. Other obligations are implemented elsewhere, for example through the Criminal Procedure Rules and through administrative processes within the respective administrations' criminal justice systems.

14. The Government should make every effort to publicise the e-justice portal. This is particularly important for victims, who should be able to gain access via the police and Victim Support, and for suspects, who should be notified by the police. (Paragraph 107)

We agree that the e-justice portal is a valuable resource for UK citizens. The European Commission will be preparing messages for different target groups, translated into all languages. We want to ensure a consistent, coherent approach is taken, and will therefore work with the Commission to determine effective methods of promotion.

The portal will also be a valuable tool for legal practitioners. We will continue to engage and work with the Law Society, Bar Council and other key parties to publicise e-justice work.

Information management and data protection

13. We urge the Ministry of Justice and the Information Commissioner to work towards a resolution of the current divergence in views on existing EU data protection legislation for the field of justice. We welcome the European Commission's consultation on the 1995 Data protection directive. If the directive is revised, the opportunity should be taken to bring all EU law enforcement agencies under the aegis of the European Data Protection Supervisor for data protection purposes. (Paragraph 102)

The Government is committed to enhancing civil liberties and we want to play a full and constructive part in EU work on this matter. The Government looks forward to the publication of the new legislative proposal by the European Commission next year.

Technology has moved on and a new instrument is needed to reflect these advances. We are currently undertaking a careful evaluation of the UK's data protection legislative framework. This includes a 'Call for Evidence' which asked interested parties to provide evidence on how the current data protection legislation is working and a Post Implementation Review of the 1998 Data Protection Act. The 'Call for Evidence' will inform the Government's response to negotiations for a new instrument for data protection.

15. While we support the need for clear statements of purpose on data protection, what happens in practice is more important. Technology undoubtedly offers tremendous opportunities for both transferring data quickly and building in safeguards for privacy. Nevertheless data protection standards can be compromised by technology as well as by regulation. Although the Government advocates "privacy by design", we were surprised to learn that utility is given far greater weight than the incorporation of fundamental security measures in the development of some EU information management systems. We urge the Government to be more conscious of this in its discussions regarding developments in e-justice. (Paragraph 112)

Just as technology offers huge benefits, it also raises important concerns about privacy. The Government believes that the data protection principles have proven flexible enough to deal with most challenges we have faced so far, but it is important that data protection legislation continues to be sufficiently adaptable to deal with fast paced technological developments in the future. The concept of "privacy by design" promotes an evaluation of the safeguards for the protection of personal data from the outset in the design of a system and does not give greater weight to one aspect over another.

The first version of the European e-justice portal has now launched. This first release concentrates on the provision of information – e.g. how the legal systems in each member state work, and links to websites of most relevant

interest to citizens and lawyers. As the portal develops it will provide a single point of access to national registers of participating member states, such as on company and insolvency matters. As these additional functionalities develop we recognise the need to ensure proper authentication processes for sharing information. With the future possibility of using the portal to share sensitive information, such as criminal records, between authorised national authorities it is also imperative to ensure compliance with data protection rules. To that end officials working on European e-justice issues work closely with those responsible for data protection policy.

In addition the European Data Protection Supervisor was consulted during the development of this work. He was supportive and indicated that the purposes for which data were available were defined very well.

16. We are concerned that people caught up in EU criminal justice processes often do not know when information about them is being used or stored, or how it will be shared. We support the Commission's calls for a public awareness campaign to ensure that EU citizens are more fully aware of what happens to the data they provide and where it goes to. The Government must also have a role in this; for example, by being clear to the public about the kind of data protection safeguards it is seeking from the EU with respect to the privacy of UK citizens. The performance of the EU in this regard should be subject to the closest scrutiny by national parliaments in conjunction with the European Parliament and national and European data protection authorities. (Paragraph 117)

The Government agrees that the performance of the EU with regard to the privacy of UK citizens should be subject to the closest scrutiny possible.

The Government believes that the privacy of the citizens' information should be protected properly and personal data should, as much as possible, be controlled by individual citizens themselves.

Any new proposal where personal data is processed by the state that involves data collection or sharing, should be accompanied by a Privacy Impact Assessment which identifies the information to be collected, how it is to be used, and the steps to be taken to mitigate the risks to citizens' privacy.

Cost and benefits for UK citizens

17. The Government does not seem clear about how it will control costs if the UK opts-in to "road map" measures that create obligations on the Government to provide costly services implementing new rights and protections. As more information is made available to EU citizens, so they will be more aware of their rights when they are suspected of committing an offence. (Paragraph 119)

The Government will take into account the implementation costs of any draft proposal when developing its general position and where appropriate will negotiate in such a way as to minimise those costs.

19. We accept that costing the entire Stockholm programme is very difficult, but we are surprised that the Government has been unable to give us at least an indication of the cost implications of key measures contained within it. (Paragraph 125)

Costing the Stockholm programme as a whole is, as the Committee recognised in its report, difficult. Firstly, the costs may well be influenced by the form the draft proposals take when they are brought forward; although we may be able to predict whether a measure on a particular subject is likely to be high or low cost for the UK, it may be difficult to make a more detailed estimate of costs where we do not yet have a draft. Secondly, the cost of the Stockholm programme as a whole to the UK will depend on which measures the Government decides that the UK should participate in. We will carry out a suitable assessment on any proposal before we decide whether or not to opt-in to it, and the financial implications will form an important part of our decision.

18. We agree with the Government's proposal that comprehensive analysis of current EU funding streams should be undertaken, to ensure that they are used effectively to support the e-justice strategy. (Paragraph 123)

20. We believe that, while the cost of these e-justice technologies may inhibit speedy progress, the Commission should seek to consolidate funding for e-justice projects in order to ensure that the best can be made of innovative technology in the interests of all member states and their citizens. (Paragraph 126)

A key factor in the success of e-justice projects is that they are funded appropriately. The majority of project work has and will continue to be funded by the Commission. This includes the creation of the e-justice portal and development of translation and interpreting tools. E-justice has been listed as a general priority of the current Civil Justice and Criminal Justice annual work programmes. The possibility of a single cross justice programme for future funding cycles has been raised and we support this move. We are waiting to see if or how the Commission will take this forward.

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