Ministry of JUSTICE

Government Response to the House of Lords European Union Committee 30th Report of Session 2010–12:

The European Union's Policy on Criminal Procedure

June 2012

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The European Union's Policy on Criminal Procedure

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

June 2012

Cm 8382 £6.25

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This publication is available for download at www.official-documents.gov.uk and on our website at www.justice.gov.uk

ISBN: 9780101838221

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office
ID 2498407 06/12

Printed on paper containing 75% recycled fibre content minimum.

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Introduction

The Government welcomes the House of Lords Justice and Institutions European Union Sub-Committee Report: *The European Union's Policy on Criminal Procedure* and is grateful to the Committee and to all those who gave evidence in the preparation of this report.

Criminal procedural rights reflect long traditions which have been developed very carefully and with close consideration by both the courts and Parliament (and now the devolved assemblies). They reflect matters of considerable public policy concern, ensuring that offences can be properly and effectively investigated and that proceedings are fair. They are of significant importance to communities and individuals.

The Government does not think that it is necessary or desirable to have harmonised EU-wide criminal procedural law given the differing legal traditions between Member States, however, we agree with the Committee that benefit can be gained from EU legislation setting minimum rights for defendants and victims where necessary. Such minimum standards can be of benefit for British citizens travelling within the EU.

As the Committee notes, legislative measures in this area are an important means of supporting instruments of mutual recognition in place across the EU, which oblige Member States to accept and act upon decisions and judgments made in other Member States. These measures can build greater trust among the competent authorities of EU Member States, who are charged with acting upon decisions made in other Member States, by giving them greater confidence that those decisions were made against the background of minimum standards that can be robustly enforced.

The Government's approach to EU legislation in the area of criminal justice is set out in the Coalition Agreement[1] which states: "We will approach forthcoming legislation in the area of criminal justice on a case-by-case basis, with a view to maximising our country's security, protecting Britain's civil liberties and preserving the integrity of our criminal justice system". As such, the Government expects all Commission proposals in this area to respect the Treaties and to be drafted on the basis of clear evidence. In particular, proposals must take into account the individual criminal justice systems of Member States.

The Government's response follows the broad structure set out by the Committee in its summary of conclusions/recommendations.

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[1] The Government's Coalition Agreement, "The Coalition: A Programme for Government" was published on 20 May 2010.

The development of criminal procedure law

1. The legislation that has been adopted for mutual recognition in criminal matters has been subject to some justified criticism, and its implementation by Member States has been poor. Nevertheless mutual recognition is a practical necessity in order to combat cross-border crime and has already demonstrated its potential benefit as an effective tool to fight cross-border crime. However for that potential to be fully realised there must be confidence, on the part of the judicial authorities and also of the general public, that giving effect to judicial decisions made in other Member States will not result in injustice or unfairness (paragraph 25).

2. The Lisbon Treaty changes have facilitated and given impetus to the adoption of EU criminal procedure legislation (paragraph 30).

The Government believes that in principle, minimum rules concerning the rights of individuals in criminal procedure and the rights of victims of crime can facilitate judicial co-operation and mutual recognition by building trust and confidence between Member States. However, it is important that EU legislation should only be brought forward in accordance with the Treaties, where there is a convincing evidence base for the need for such legislation and it is a proportionate response to an identified problem. We believe that this approach is important to ensure that all legislation in this area is appropriate and effective. The Government agrees that it is important that the judicial authorities and the general public have confidence that giving effect to judicial decisions made in other Member States will not result in injustice or unfairness.

The Government has only opted into measures which it considers benefit the UK, in line with the Coalition Agreement. Any future proposals in this area will be considered in line with the Coalition Agreement to consider these on a case-by case-basis.

The UK opt-in

3. In practice the case by case approach to the UK opt-in set out in the Coalition Agreement has resulted in the Government opting in to proposals for criminal procedure legislation. We agree that the UK should opt in to proposals for criminal procedure legislation at an early stage unless there is clear justification for not doing so (paragraph 40).

4. It is notable that the emergency brake has not yet been used by any Member State in relation to criminal procedure legislation (paragraph 42).

The Government has committed to approach new proposals for legislation in the area of criminal procedural justice on a case-by-case basis in accordance with the Coalition agreement, as set out above. As the Committee notes the only measures in this area that the UK did not opt into at an early stage of negotiations were the proposal for access to a lawyer[2] and the proposal on human trafficking[3] for the reasons set out in the Ministry of Justice's written evidence.

Article 82(3) of the Treaty on the Functioning of the European Union provides an "emergency brake" which allows a Member State to request that a proposal be referred to the European Council if it considers the draft legislation to affect "fundamental aspects of its criminal justice system". As the Committee notes the emergency brake has not been used to date by any Member State. However, if a fundamental aspect of our criminal justice systems were at stake, the Government would of course consider using every tool at its disposal to prevent damage to our systems.

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2 Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest.

3 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

The scope of EU criminal procedure legislation

5. The Treaty requirement that the EU should only legislate on criminal procedure to the extent necessary to facilitate mutual recognition is an important limitation on competence. However, it does not go so far as to require a criminal procedure measure to demonstrate that it facilitates a specific mutual recognition measure. It is enough that the criminal procedure measure provides support for the operation, generally, of mutual recognition (paragraph 49).

We agree with the Committee's analysis. In order for the EU to legislate to provide minimum rules in criminal procedure, it is not a Treaty requirement that there be a specific link with a particular aspect of mutual recognition. The key limitation as set out in the Treaty is that the EU can only legislate "to the extent necessary" to support mutual recognition and that the EU can only establish minimum rules. The Government examines each proposal in this area when deciding whether or not to participate and particular attention is paid to issues relating to competence.

6. We accept the evidence given to us that it is not practical or strictly necessary for EU criminal procedure legislation to be limited to cross-border offences (paragraph 53).

We agree with the Committee. Article 82(2) TFEU allows the EU to establish minimum rules regarding the rights of individuals in criminal procedure, to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters "having a cross-border dimension". The key point here is that the EU can only legislate to the extent necessary to facilitate mutual recognition – that is a clear limitation.

7. Although, strictly, a legal test, compliance with subsidiarity involves an assessment by the legislator on a case by case basis of the added value of legislating at an EU level. In relation to the criminal procedure proposals brought forward for scrutiny to date we have not yet found it necessary to raise a subsidiarity objection, but we shall continue to scrutinise this aspect of any future proposals (paragraph 55).

The Government welcomes the scrutiny that the Committee undertakes regarding the compliance of EU proposals with the principle of subsidiarity.

The value of EU criminal procedure legislation

8. There are legitimate concerns that the EU citizens who find themselves involved in the criminal justice system of another Member State, either as defendants or as victims of crime, are disadvantaged and, in the case of British citizens, may find themselves with fewer rights than they would expect in their own country. Having minimum rules operable throughout the EU can materially improve their position (paragraph 62).

9. Current EU legislation, subject as it is to the Charter of Fundamental Rights, does permit the court of a Member State to refuse mutual recognition on human rights grounds in justified cases. However there is reluctance by judicial authorities to do so. If such refusal became widespread there is a risk of undermining mutual trust because it calls into question the human rights protection provided by the Member State requesting mutual recognition. EU legislation setting down minimum rights can help avoid this risk (paragraph 69).

The Government agrees with the Committee that having minimum rules can improve the position of UK citizens who may find themselves involved in the criminal justice system of another Member State where they may be lower than the standards that we have in the UK.

The Government is of the view that minimum standards of criminal procedural rights in certain areas can be helpful in improving mutual trust and thus support the instruments of mutual recognition. Such minimum standards can allow authorities such as prosecutors and judges charged with implementing decisions made in other Member States to have confidence that the decisions have respected fundamental rights. EU legislation in this area can be helpful in ensuring that there are effective and robust minimum standards in all Member States. However, such legislation must be brought forward in accordance with the Treaties, on a clear evidence base and as a proportionate response to identified problems.

10. EU legislation brings a considerable added value over the ECHR in that it can be effectively enforced by individuals directly in all national courts and by the Commission through infringement proceedings. It also can cover matters not adequately covered by the ECHR and is more flexible (paragraph 78).

We agree with the Committee that EU legislation can bring added value over the ECHR. EU legislation can build upon the foundation of the ECHR and flesh out what the rights mean in practice. For example the ECHR does not specify that suspects or accused persons in custody must be informed of their basic rights. Once implemented, Measure B of the Procedural Rights Roadmap – the Directive on the right to information in criminal proceedings,

will ensure those individuals are told about the charge and case against them and that they are informed of their basic rights.

11. Whilst non-legislative actions, such as improved judicial training and improvements to Eurojust and the European Judicial Network, are helpful in building mutual trust between judicial authorities, they can only complement, not replace, EU legislation setting minimum rights for defendants and victims (paragraph 84).

The Government believes that it is not always the case that EU instruments are the appropriate solution for protecting the rights of citizens in criminal proceedings across Member States. Practical co-operation between Member States and training can also be important means of protecting standards. It is important to examine each situation on a case-by-case basis.

EU legislation and national law

12. As the example of the proposal for access to a lawyer demonstrates, EU minimum rules for criminal procedure can present a significant risk to the functioning of national criminal law systems. That risk can be greatly reduced by firmly grounding such legislation in the principles of the ECHR and other international law norms (paragraph 98).

13. We agree with the Government that the proposal for access to a lawyer, in the form put forward by the Commission, would be too disruptive for the UK criminal justice systems and therefore support the Government's decision not to opt in. However, even in this exceptional case, we remain hopeful that the outcome of negotiations may be legislation to which the UK could opt in (paragraph 99).

The Government is grateful for the detailed scrutiny that the Committee has undertaken on this proposal and for its support of our decision not to opt in at the start of negotiations. We agree with the Committee that it is important that EU legislation on minimum rules for criminal procedure should be firmly grounded in the principles of the ECHR. In our view, a number of provisions in the proposal, as published by the European Commission, were not firmly grounded in the principles of the ECHR and some of these provisions would have had an adverse impact on our ability to investigate and prosecute offences effectively and fairly.

The Government considers that a European Directive in this area is a good idea in principle. We believe that it could benefit UK nationals who become subject to the criminal justice systems of other Member States. Such a Directive could also help build greater trust and confidence among the competent authorities across EU Member States who may be expected to accept and act upon decisions or judgments made in other Member States. Therefore, we are working closely with our European partners to develop a text which takes greater account of the practical realities of, and the flexibility which Member States need for, the investigation and prosecution of crime in a way which meets the requirements of the ECHR and which respects the differences between the legal traditions and systems of Member States.

A General Approach on the text was agreed at the Justice and Home Affairs Council on 8 June 2012. In our view this text takes greater account of the realities of investigating and prosecuting crime. In the event that the text that is subsequently agreed with the European Parliament is satisfactory, we will consider carefully whether we should apply to opt in to it once it has been adopted, as our Protocol to the Treaty on the Functioning of the European Union allows. We will consult Parliament about any decision to do so.

Future developments

14. We agree that no new proposal for mutual recognition should be brought forward until the current proposals for legislation under the two Roadmaps have been put in place and have had time to make an impact. In particular, very good justification is needed before further legislation on the admissibility of evidence is proposed (paragraph 107).

In our view, proposals should only be brought forward in accordance with the Treaties and where there is a clear evidence base for doing so. The Government agrees with the Committee in that it is not persuaded that an instrument on admissibility of evidence is necessary for the functioning of mutual recognition instruments. There is wide variation of rules on admissibility throughout the EU, and given the rules of admissibility of evidence work as part of a legal system as a whole, it could be difficult, and it may be unproductive, to change rules on admissibility in isolation to the rest of a Member State's legal system.

15. Overall, existing EU criminal procedure legislation and current proposals provide benefits to British citizens travelling abroad, and to law enforcement authorities (paragraph 108).

We agree with the Committee that EU criminal procedure legislation in certain areas can be of real practical benefit to UK nationals travelling abroad and to law enforcement authorities. For example, once the first two agreed measures on the Procedural Rights Roadmap come into force, a UK national travelling abroad who becomes subject to the criminal justice system of another Member State will be provided with interpretation and translation in criminal proceedings and will be given a letter of rights on arrest. Another example where we expect practical benefit to result is the draft Victims' Directive. This remains under negotiation but we anticipate that once it has come into force it will ensure British citizens who are victims of crime within the EU will be afforded minimum rights, support and protection similar to that already provided to victims of crime committed in the UK.

16. The Government should therefore continue to look favourably, in principle, at opting in to further Roadmap legislation bearing in mind particularly the influence that the UK can bring in raising standards across the EU to the benefit of travelling UK citizens, and the risk, if we do not opt in, that the trust placed in the UK criminal justice systems by judges of other Member States will be diminished (paragraph 109).

In accordance with the Coalition Agreement, the Government will approach forthcoming legislation in the area of criminal justice on a case-by-case basis, as set out above. We will continue to take this approach to future Roadmap legislation.

17. Although the decision whether to opt out of pre-Lisbon third pillar legislation is unlikely to involve any significant EU criminal procedure legislation, there is nevertheless likely to be a significant body of subsisting EU mutual recognition legislation which will be involved. Opting out of this legislation would have significant repercussions on UK criminal enforcement. We share the scepticism that it will be possible for the UK to "pick and mix" by opting out of all the subsisting pre-Lisbon legislation and immediately opting back in to some only (paragraph 115).

18. We welcome the Government's assurance that the opt-out decision will be subject to debate and vote in both Houses of Parliament. The questions raised by Protocol 36 are wider than the subject of this Report and we plan to undertake an inquiry by this Committee in 2013, so that the Government have our views well in advance of the deadline of May 2014 (paragraph 116).

On 21 December 2011, the Government provided a list of the 133 measures that fall within the scope of the decision of whether to opt out of pre-Lisbon third pillar legislation. We are analysing all of the measures to ensure we have a thorough evidence base on which to make a decision. We are also examining carefully the implications of all the options in light of the provisions in Protocol 36 to the Lisbon Treaties. The Protocol permits the UK to opt out and then to apply to rejoin individual measures. In the case of such an application the Protocol on the Schengen *acquis* integrated into the framework of the EU or the Protocol on the position of the UK and Ireland in respect of the area of freedom security and justice would apply.

The Government welcomes the Committee's interest in the decision and looks forward to considering and responding to the findings of its planned inquiry into the matter. The Minister for Europe's Written Ministerial Statement of 20 January 2011 gave a commitment to a vote in both Houses of Parliament before the Government makes a formal decision on whether we wish to opt out. The Government intends to consult the European Scrutiny Committees, and the Commons and Lords Home Affairs and Justice Select Committees about the arrangements for this vote and a further announcement will be made in due course.

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ISBN 978-0-10-183822-1