Review of the
Balance of Competences

CALL FOR EVIDENCE ON THE GOVERNMENT'S REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION
Police and Criminal Justice

Open from: 01 May 2014
Closing date: 24 July 2014

INTRODUCTION

The Foreign Secretary launched the Balance of Competences Review in Parliament on 12 July 2012, taking forward the Coalition commitment to examine the balance of competences between the UK and the European Union. The review will provide an analysis of what the UK's membership of the EU means for the UK national interest. It aims to deepen public and Parliamentary understanding of the nature of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges. It will not be tasked with producing specific recommendations or looking at alternative models for Britain's overall relationship with the EU.

The review is broken down into a series of reports on specific areas of EU competence, spread over four semesters between autumn 2012 and autumn 2014. The review is led by Government but will also involve non-governmental experts, organisations and other individuals who wish to feed in their views. Foreign governments, including our EU partners and the EU Institutions, are also being invited to contribute. The process will be comprehensive, evidence-based and analytical. The progress of the review will be transparent, including in respect of the contributions submitted to it.

The review of police and criminal justice is being led jointly by the Home Office and the Ministry of Justice.

WHAT IS COMPETENCE?

For the purposes of this review, we are using a broad definition of competence. Put simply, competence in this context is about everything deriving from EU law that affects what happens in the UK. That means examining all the areas where the Treaties give the EU competence to act, including the provisions in the Treaties giving the EU institutions the power to legislate, to adopt non-legislative acts, or to take any other sort of action. But it also means examining areas where the Treaties apply directly to the Member States without needing any further action by the EU institutions.

The EU's competences are set out in the EU Treaties, which provide the basis for any actions the EU institutions take. The EU can only act within the limits of the competences conferred on it by the Treaties, and where the Treaties do not confer competences on the EU they remain with the Member States.

There are different types of competence: exclusive, shared and supporting. Only the EU can act in areas where it has exclusive competence, such as the customs union and common commercial policy. In areas of shared competence, such as the single market, environment and energy, either

the EU or the Member States may act, but the Member States may be prevented from acting once the EU has done so. In areas of supporting competence, such as culture, tourism and education, both the EU and the Member States may act, but action by the EU does not prevent the Member States from taking action of their own.

The EU must act in accordance with fundamental rights as set out in the Charter of Fundamental Rights (such as freedom of expression and non-discrimination) and with the principles of subsidiarity and proportionality. Under the principle of subsidiarity, where the EU does not have exclusive competence, it can only act if it is better placed than the Member States to do so because of the scale or effects of the proposed action. Under the principle of proportionality, the content and form of EU action must not exceed what is necessary to achieve the objectives of the EU treaties.

CALL FOR EVIDENCE

This public call for evidence sets out the scope of the review of the balance of competences in the area of police and criminal justice. We encourage input from anyone with relevant knowledge, expertise or experience. This is your opportunity to express your views.

Please send your evidence to PoliceandCriminalJusticeBoC@homeoffice.gsi.gov.uk by 24 July 2014. The contact point for related enquiries is Gemma Cook (tel: 020 7035 8729)

Your evidence should be objective, factual information about the impact or effect of the competence in your area of expertise. We will expect to publish your response and the name of your organisation unless you ask us not to (but please note that, even if you ask us to keep your contribution confidential, we might have to release it in response to a request under the Freedom of Information Act). We will not publish your own name unless you wish it included. Please base your response on answers to the questions set out on pages 9-10, 13, 16 and 20.

This is a UK wide review and we therefore encourage contributions from stakeholders from across the UK, including Scotland, Wales and Northern Ireland. We would also encourage contributions from stakeholders in Gibraltar.

SCOPE OF THE REVIEW

This review looks at the EU's competence in the field of policing and criminal justice. It will focus on measures adopted following the entry into force of the Lisbon Treaty in 2009. Police and criminal justice measures adopted prior to the Lisbon Treaty are subject to the ongoing negotiations under Protocol 36 to the Treaties, introduced by the Lisbon Treaty (the 2014 Decision) and are not being considered as part of this review.

This call for evidence is broken down into three themes: judicial co-operation in criminal matters; policing, customs co-operation on criminal matters, and internal security; and minimum standards in criminal procedure and law.

This call for evidence is structured as follows:

Chapter 1 sets out how EU competence in the field of Justice and Home Affairs has developed over time, from informal intergovernmental networks prior to the adoption of the treaty of Maastricht, to the inclusion of Justice and Home affairs policy in the treaty of Lisbon.

Chapters 2-4 then cover the three main themes of this call for evidence:

Chapter 2 examines EU competence in the field of judicial cooperation in criminal matters (Articles 82(1), 85 and 86 of the Treaty on the Functioning of the European Union (TFEU)).

Chapter 3 examines EU competence in the field of policing, customs cooperation in criminal matters, and internal security (Articles 71, 72, 73, 84, 87, 88, 89TFEU). It should be noted that internal security is not the same as national security. Article 4(2) of the Treaty on the European Union (TEU) states in relation to Member States that the Union 'shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'[1].

Chapter 4 examines EU competence in the field of minimum standards in criminal procedure and law (Articles 82(2) and 83 TFEU).

INTERDEPENDENCIES

Police and Criminal Justice (PCJ) is one of a number of areas of justice and home affairs (JHA) policy which sit in Title V of the TFEU, for example, immigration and asylum and civil judicial cooperation also sit within Title V and are covered in separate reviews. This review covers a number of subject areas which are linked to other reviews being undertaken by the Government as part of this balance of competences exercise. Some of these other reviews are already complete and the final reports have been published, whilst some are still underway.

In respect of JHA:

- This review covers the policing and criminal justice elements of the Schengen agreement in which the UK participates. Other issues of EU competence in relation to the **borders and visas element of the Schengen agreements** are covered in the Asylum and non-EU Migration Report;
- The **Justice and Home Affairs Opt-In** (Protocol 21 to the Treaties) is covered here in respect of PCJ matters, and it is also covered in the Asylum and non-EU Migration review and the Civil Judicial Cooperation review.

In addition:

- This review will look at customs cooperation in criminal matters, but **Customs Co-operation under Title II (Article 33) of TFEU** has been covered in the Free Movement of Goods report.
- This review will consider **financial crime**, which links to two separate reviews underway on Financial Services and the Free Movement of Capital and the EU Budget respectively.
- **Civil protection**, i.e. how the UK works through the EU in disaster prevention, preparedness and response inside and outside the EU, is covered in the Foreign Policy report; **critical infrastructure**, which is covered in this report, has links to the Transport review.
- This review will cover measures which provide for sharing data between police and other authorities. The subject of **data protection** is covered in the concurrent review on Information Rights.
- The ability of national Parliaments to issue a "**yellow card**" requiring the Commission to reconsider its proposal, as was the case with the proposal for a European Public Prosecutor's Office covered in this report, will be examined in the Subsidiarity and Proportionality review
- This review covers criminal law measures, including those which contribute to the protection of EU fundamental rights (such as the right to fair trial and the right to defence). The **EU's**

[1] See also Article 346(1)(a) TFEU and paragraph 39 of the legal annex below.

framework on fundamental rights, including the Charter, is being considered as part of the Fundamental rights review.

For further information on any of the Balance of Competence reviews above, click here.

CHAPTER 1: POLICY CONTEXT

Development of EU competence in the field of Policing and Criminal Justice, including customs cooperation

The first steps in security and justice cooperation within the EU began in 1975 when the TREVI group – an intergovernmental network outside of the then European Community - was created, composed of Member States' justice and home affairs ministers. But it was not until nearly two decades later that the EU acquired competence in the field of "justice and home affairs", through the conclusion of the Maastricht Treaty in 1992.

Before Maastricht co-operation in police and criminal justice matters between Member States largely existed under Council of Europe adopted Conventions, for example the 1957 extradition and 1959 mutual legal assistance Conventions. While many Member States had ratified and were operating one or both of these Conventions they were not EU agreements. Many bilateral treaties were also in place.

Customs cooperation between Member States also took place prior to the adoption of the Maastricht Treaty. For example, on 23 January 1974, the UK acceded to the original 1967 Naples Convention between the Member States on the provision of mutual assistance by their customs authorities.

The Maastricht Treaty

The Maastricht Treaty established JHA as one of the EU's 'three pillars' – the Third Pillar - and provided for Member States to "cooperate" in a number of areas including asylum, immigration, border controls, civil and criminal judicial cooperation, customs co-operation, and police cooperation. The Commission and European Parliament had very limited involvement.

EU action in PCJ was limited to the adoption of joint positions and joint action, and to recommending cooperation between Member States. This was not binding legislation. Equally, there was no general jurisdiction for the Court of Justice of the European Union (ECJ) over these measures and the Commission did not have any enforcement powers.

The Amsterdam Treaty

Following the establishment of EU competence in JHA under the Maastricht Treaty, the 1997 Amsterdam Treaty marked the next significant development. It stated that the EU must

> *"maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."*

The Amsterdam Treaty also led to a differentiated approach to the various elements of JHA. It transferred the areas of asylum, immigration and judicial cooperation in civil matters from the Third Pillar to the European Community Pillar (the First Pillar), with the remainder being renamed Police and Judicial Co-operation in Criminal Matters and remaining in the Third Pillar.

The Amsterdam Treaty meant that for the first time the EU was able to legislate, either through Framework Decisions or Council Decisions, in the field of Police and Judicial Co-operation in Criminal

Matters. However, unlike other areas of the European Community, Member States retained a right of initiative alongside the Commission. Any Commission proposals had to be agreed by unanimity in Council. In practice, therefore, individual Member States could block the passage of legislation in this field.

The field of Police and Judicial Co-operation in Criminal Matters not only covered matters that related to cooperation but also minimum rules on criminal law in certain areas, including terrorism and organised crime.

Member States could also elect to subject themselves to the preliminary ruling jurisdiction of the ECJ as concerned PCJ measures. The UK did not avail itself of this possibility but a number of Member States did so.

One of the most significant policy developments to occur during this period was not foreseen by the Amsterdam Treaty. This was the adoption of 'mutual recognition' as a key principle for facilitating cooperation in this area.

Mutual Recognition and Dual Criminality.

Mutual recognition of judicial decisions is a process by which a decision taken by a judicial authority in one EU country is recognised and, where necessary, enforced by other EU countries as if it were taken by the judicial authorities of that other country.

The principle of mutual recognition as the cornerstone of EU judicial co-operation was established at a special meeting of the European Council in Tampere in October 1999. In its **Tampere Declaration**, the European Council agreed that:

"Enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgments and to other decisions of judicial authorities."

The aim of adopting mutual recognition as a key principle was to avoid the need to harmonise Member States' distinct legal systems, but to allow cooperation to proceed with the minimum number of obstacles possible.

This principle of mutual recognition as the basis for judicial co-operation in the EU was recognised in the **Lisbon Treaty**.

A key element of mutual recognition has been the limitation of the requirement for a 'dual criminality' test to be satisfied as the basis for cross border judicial cooperation. The principle of 'dual criminality' requires that the conduct for which assistance is being sought must be criminalised in both the State seeking assistance and in the requested State. This dual criminality test was previously applied across all forms of judicial cooperation, but has been limited in relation to a list of around 32 specific offences. For those offences, Member States are required to provide assistance subject to the offence being punishable in the issuing State by a custodial sentence or detention order of at least three years in that State. Removing the requirement to establish dual criminality for these 32 offences is designed to make the process more swift and efficient. This inclusion of the list offences is now standard practice in mutual recognition measures, such as the European

Investigation Order (EIO).

The Amsterdam Treaty also incorporated the Schengen Agreements into the laws of the European Union.

The Schengen Agreements

Under the Schengen Agreement of 1985 and the 1990 Convention implementing that agreement (the Schengen Acquis), several European countries agreed to lift border controls amongst them, creating an area of unrestricted travel known as the Schengen Area. The Schengen Acquis contains policing and judicial cooperation measures, aimed at compensating for the loss of border controls i.e. to facilitate cross-border cooperation between the law enforcement and judicial authorities within the Schengen area. These include provisions on the Schengen Information System (which enables all participating States to share real-time information on persons and objects of interest to law enforcement via a series of "Alerts"), cross-border surveillance and hot pursuit, mutual legal assistance in criminal matters and combating drug trafficking.

The Schengen Acquis was integrated into the framework of the EU by the 1997 Amsterdam Treaty, but also extends to Iceland, Liechtenstein, Norway and Switzerland. The European Council agreed that the UK could participate in the majority of the police and judicial cooperation elements of the Schengen Acquis in 2000. This does not affect UK retention of border controls.

Prior to the entry into force of the Lisbon Treaty on 1 December 2009, the UK was bound by any Schengen legislation which built upon the part of the Schengen Acquis in which we participate. But as all Member States had to vote in favour of Schengen legislation for its adoption, the UK could have blocked Schengen legislation if it chose to.

The Lisbon Treaty

The Lisbon Treaty, which came into force in December 2009, abolished the previous three-pillar structure and made some significant changes. In particular, almost all PCJ measures adopted post-Lisbon are now subject to qualified majority voting in the Council (PCJ measures previously had to be agreed unanimously). And under Lisbon, almost all PCJ measures need to be agreed in conjunction with the European Parliament through the ordinary legislative procedure. The exceptions to both are measures to agree a European Public Prosecutor (Article 86 TEFU), family law (Article 81(3) TFEU) and operational police cooperation (Article 89 TFEU), as well as provisions concerning passports, identity documents, residence permits or similar documents (Article 77(3) TEFU). In addition, ECJ jurisdiction has been extended to include police and criminal justice matters, where previously it was more limited. The ECJ may not however rule on the proportionality of national police operations, or on the exercise of Member States' responsibilities in relation to internal security matters.

Article 76 of the Treaty gives equal power to the Commission and a quarter of Member States to initiate legislation. In practice, this power is almost exclusively exercised by the Commission. Where a quarter of Member States do initiate legislation – a so called 'Member State Initiative' – there is no formal role for the Commission, but legislation still needs to be agreed with the European Parliament. An example of a Member State Initiative is the European Investigation Order, which is discussed in more detail on page 12.

When the Commission proposes legislation, it is then passed to the Council and the European Parliament, who are able to amend the text before they reach agreement. If the Commission does

not support the Council's amendments to the text the Council must agree to the changes unanimously.

Before the Treaty of Lisbon, the European Union (as opposed to the European Community) was able to conclude international agreements in relation to police and judicial co-operation in criminal matters under Articles 24 and 38 of the TEU. Under the Lisbon Treaty, the European Union also has competence to act externally on its own behalf, in particular by entering into binding agreements under international law. For example, it has concluded Passenger Name Records Agreements with Australia, Canada and the United States of America, as well as the Terrorist Finance Tracking Programme with the United States of America. The EU has also become a party to the UN firearms protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.

One of the key features of the Lisbon Treaty is that the UK (and Ireland) has the right to decide whether or not to participate in any new legislation in this field.

The Justice and Home Affairs (JHA) opt-in and Schengen opt-out

The JHA opt-in, and the Schengen opt-out are distinct from the UK's opt-out under the 2014 Decision. The 2014 decision is not being considered as part of this review.

The JHA opt-in was originally introduced by the Treaty of Amsterdam, covering proposals for EU legislation on asylum, immigration and border controls, as well as judicial cooperation in civil and family matters.

The Treaty of Lisbon extended the JHA opt-in to proposed EU legislation covering police and criminal justice matters. Under the terms of the JHA opt-in (Protocol 21 to the Treaties) from the point a draft proposal for new or amended EU JHA legislation is presented to the Council, the UK has three months to decide whether to opt in to that proposal. We can also apply to opt in to EU JHA legislation once it has been adopted.

Under the terms of the Lisbon Treaty, the UK was also given the right to opt out of legislation building on the parts of the Schengen acquis in which we participate (broadly, the police and judicial cooperation elements - but not those that relate to border controls).

The Schengen opt-out (set out in Article 5 of Protocol 19 to the Treaties) works in much the same way as the JHA opt-in. Under its terms, from the point a draft proposal for new or amended legislation building on the police and judicial cooperation elements of the Schengen acquis is presented to the Council, the UK has three months to decide whether to exercise the opt-out. In the event we exercise the opt-out, the Council may adopt a decision to the effect that the relevant underlying part of the acquis also does not apply to the UK, if the practical operability of the acquis is seriously affected or its coherence is undermined.

<u>The Court of Justice of the European Union (ECJ)</u>

In general, the ECJ has jurisdiction over the interpretation and application of legislation adopted under Title V TFEU, in the same way that it does for other EU legislation. This includes measures in the field of police and criminal justice adopted since the entry into force of the Lisbon Treaty.

There are limits to what the ECJ may rule on. Article 276 TFEU restricts the ECJ's jurisdiction so that it may not rule on the proportionality of national police operations, or on the exercise of Member States' responsibilities in relation to internal security matters

The JHA work programme

The Council has long had a role in setting out priorities for the EU in the field of JHA through a succession of multiannual work programmes. The first such programme was the Tampere Programme, which was adopted in 1999. In a special session of the European Council the 15 EU heads of government met to 'kick start' the EU's JHA programme. The Tampere Programme was built around four milestones: common EU asylum and migration policy (including achieving the first phase of a Common European Asylum System), a genuine European area of justice, the Union-wide fight against crime and stronger external action.

This was followed by the Hague Programme, which was adopted in 2004 and focused not only on legislation, but also on sharing responsibility and on solidarity, including the establishment of three large financial framework programmes - the General Programme "Solidarity and the Management of Migration Flows", the Specific Programme "Prevention, Preparedness and Consequence Management of Terrorism and other Security-related Risks" (CIPS) and the Specific Programme "Prevention of and Fight against Crime" (ISEC).

The EU's current JHA Work Programme (the Stockholm Programme) sets out EU's priorities for the area of justice, freedom and security for the period 2010-14. The Stockholm Programme is structured around key themes –fundamental rights, access to Justice, protecting citizens from organised crime and terrorism, facilitating legal access to Europe while ensuring internal security, developing a comprehensive and flexible migration policy, and strengthening cooperation with non-EU countries.

The EU is shortly to produce a new JHA Work Programme and the European Council will be setting out its views on priorities in June 2014. This is done in accordance with Article 68 TFEU.

Other external influences

PCJ work has evolved in response to events in Member States and the wider world, most notably the terrorist attacks in the US in September 2001, in Madrid in 2003/2004, and in London in July 2005. These events resulted in Council conclusions (either from the European Council or the Justice and Home Affairs Council) agreeing an EU response in support of Member States.

General Questions

1. Has the development of EU police and criminal justice competence over the years led to improved cross-border co-operation?

2. What are the advantages and disadvantages arising from the UK's ability to opt in to new or amended EU policing and criminal justice legislation, and opt-out individually of new policing and criminal justice measures in relation to Schengen?

3. Are there any areas where the EU is looking to expand its competence (either by legislating or by other means) beyond the treaty?

4. Has the development of EU police and criminal justice competence helped or impeded the

effectiveness of law enforcement?

5. Has the development of EU police and criminal justice competence benefitted or caused problems for the British criminal justice system?

CHAPTER 2: JUDICIAL COOPERATION

Overview

Judicial cooperation is where judicial authorities, mostly prosecutors in the UK, seek assistance from or provide assistance to their counterparts in other countries. Judicial cooperation can either happen at the pre-trial stage – e.g. requesting evidence from abroad – or after a judgment, court order or sentence – e.g. enforcing an overseas confiscation order.

Judicial cooperation can cover a wide range of activities and areas. This includes, but is not limited to:

- Extradition
- Mutual legal assistance in criminal matters
- Exchange of criminal records
- Freezing and confiscation of assets
- Prisoner transfer
- Supervision of alleged and convicted offenders
- Enforcement of fines

Within the area of judicial cooperation in criminal matters the EU has competence to:

- Lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
- Prevent and settle conflicts of jurisdiction between Member States;
- Support the training of the judiciary and judicial staff; and
- Facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

Within the EU there has been a significant increase in the amount and scope of judicial cooperation taking place over the last fifteen to twenty years. The most important judicial cooperation instruments within the EU are now based on the principle of mutual recognition. However, there is also legislation aimed at creating bodies to coordinate judicial cooperation, and creating networks of practitioners.

Judicial cooperation applies to the investigation, prosecution and enforcement of decisions in relation to all crimes. It can be used in relation to terrorism, organised crime, drug and human trafficking, financial crime, cyber crime, or fraud. But equally judicial cooperation can be used in relation to common assault or burglary.

The European Commission runs a range of funding programmes relating to justice and rights. The current funding programme for the Period 2014 to 2020 aims to fund support for judicial cooperation in civil and criminal matters; promotion of judicial training with a view to fostering a common legal and judicial culture; facilitation of effective access to justice for all, including promotion and support for the rights of victims of crime; and support for initiatives regarding judicial cooperation and crime prevention in the field of drugs policy.

In certain circumstances the EU also has competence to act 'externally'. This means that it has the capacity to act internationally as a single entity, the European Union, on its own behalf, in particular by entering into binding agreements under international law. For example, the EU has concluded a Mutual Legal Assistance Treaty with Japan.

Key 'post-Lisbon' EU measures in this area

European Investigation Order

The European Investigation Order (EIO) is a Member State Initiative, based on the principle of mutual recognition, aimed at improving MLA amongst participating Member States. The UK opted into the proposal and the EIO was adopted in March 2014. Member States now have three years to implement the EIO.

The EIO covers all investigative measures that could be used in criminal investigations/proceedings, such as obtaining witness statements and search warrants. The EIO will make it easier to investigate cross-border crime by, for example, providing a standardised form to make requests to other Member States, and the introduction of deadlines within which assistance must be provided.

The European Protection Order

The European Protection Order (EPO) seeks to create a legal framework whereby Orders made to protect a person in one Member State (for example a restraining order in England) can be quickly recognised and enforced in any other Member State to which the protected person has travelled. The EPO started as a Member State initiative before being carried forward by the Commission. It was subsequently split in two, comprising a Directive on protective orders in criminal matters and a Regulation covering protective orders in civil matters. This review is concerned with the criminal Directive. The UK opted in to this measure and it is due to be implemented by January 2015.

European Public Prosecutor's Office

The Commission has proposed a European Public Prosecutor's Office (EPPO). It would be a new supranational EU body which will have exclusive competence over offences against the EU budget – participating Member States would no longer be able to prosecute these offences. It would be able to instigate investigations and have powers to prosecute within participating Member States. This is a significant development, although negotiations are not expected to conclude swiftly and it may be many years before the EPPO is operational. The UK has chosen not to participate in the EPPO.

There have been significant concerns about whether the EPPO proposal breaches the principle of subsidiarity. For only the second time, enough national Parliaments submitted reasoned opinions on the proposal to meet the "yellow card" threshold – which requires the Commission to reconsider its proposal. The yellow card mechanism is discussed in more detail in the Subsidiarity and Proportionality review.

EU-Japan MLA agreement

The Agreement between the EU and Japan on mutual legal assistance in criminal matters (MLA) was signed in November/December 2009. The UK opted into the Agreement, which entered into force on 2 January 2011.

The Agreement provides for MLA (i.e. requests for evidence) between Japan and EU Member States (although the Agreement does not apply to Denmark). When one side makes a request, there is a general obligation (subject to certain exceptions) to provide 'assistance' such as provision of evidence in connection with investigations or prosecutions.

The Japan Agreement is the first EU-level MLA Agreement that provided the standalone

international treaty basis for MLA with a third country. Previous instruments, such as the EU-US MLA Agreement, required Member States to amend existing bilateral MLA treaties, rather than creating a new standalone EU-level agreement.

Questions on Judicial co-operation

6. What are the advantages and disadvantages to the UK of EU action on the field of judicial co-operation? You may wish to refer to specific examples

7. To what extent is EU action in this area effective in raising standards, or enhancing cooperation? And to what extent is it necessary? And to what extent is the EU the most appropriate level for judicial cooperation?

8. Could the EU use its existing competence in a different way which would deliver more in the UK national interest?

9. What future challenges do you see in the field of judicial co-operation and what impact might this have on the national interest?

10. Are there any other general points you wish to make in relation to the field of judicial co-operation which are not captured above?

CHAPTER 3: POLICING, CUSTOMS COOPERATION ON CRIMINAL MATTERS, AND INTERNAL SECURITY

Overview

The aim of **police and customs cooperation on criminal matters**, broadly, is to ensure that law enforcement agencies can access appropriately all relevant information held in other Member States, share information as appropriate and work together to combat crime. In general, police cooperation will be used where there is no need for a judicial decision to be involved, most often at the investigatory stage. For example, UK police may ask their French counterparts if they can take a statement from a willing witness for use in a UK investigation.

The EU has competence to adopt measures in the following areas of police cooperation:

- The collection, storage, processing analysis and exchange of relevant information
- Support for training of staff, and cooperation on the exchange of staff, on equipment and n research into crime detection
- Common investigative techniques in relation to the detection of serious forms of organised crime
- Operational cooperation (although this requires all States to agree)
- Laying down the conditions and limitations under which police authorities of one State may operate in the territory of another State with its agreement (again, this requires all States to agree)

The EU has implemented a range of measures to foster better co-operation between police, and bringing forward a range of information sharing measures such as the proposed legislation on passenger name records (PNR). These measures operate across a range of areas, such as terrorism, organised crime, drug and human trafficking, financial crime, cyber crime, and fraud.

Customs authorities and other law enforcement agencies around the world cooperate with each other to tackle smuggling and carry out criminal investigations into customs offences. This helps to ensure that customs and police in different countries can work effectively to tackle international cross-border crime, such as smuggling of drugs and firearms.

Much of this mutual assistance requires the exchange of information between customs authorities. It can also involve spontaneous disclosures of information, when one agency chances upon an irregularity that will be of interest to another. Customs authorities also share information on new trends in fraud or smuggling, and effective ways of tackling these.

Cooperation between the UK and other EU Members States' customs services, police and other agencies takes place on a daily basis and is an important element in tackling cross-border crime.

The EU's role in **internal security** consists of common policies, legislation and practical cooperation in the areas of police and judicial cooperation, border management, and crisis management. The EU has an internal security strategy, which sets out 5 strategic objectives for internal security:

- Disrupt international crime networks
- Prevent terrorism and address radicalisation and recruitment
- Raise levels of security for citizens and businesses in cyberspace
- Strengthen security through border management
- Increase Europe's resilience to crises and disasters

Underpinning this are specific work programmes and strategies in certain key areas. For example, in the area of counter-terrorism there is an EU Counter Terrorism Strategy, a Strategy for combating recruitment and radicalisation, a Strategy on terrorist financing, the Radicalisation Awareness Network, and the European Network of Associations of Victims of Terrorism. There is also an EU cybersecurity strategy - which covers a range of areas including crime, resilience, defence, industrial and technical capabilities, and an EU Drugs Strategy which aims to contribute to a reduction in drug demand and drug supply in the EU. Article 4(2) of the Treaty on the European Union (TEU) states in relation to Member States that the Union 'shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'[2].

Another example of EU activity in the internal security spectrum is the EU Organised Crime Policy Cycle. This is a multi-annual work programme that aims to improve operational and intelligence collaboration amongst Member States and EU Institutions to address the Serious and Organised Crime (SOC) types that pose the greatest threats to the EU. Nine crime types have been identified as priorities for the current 2014-17 programme (Illegal Immigration, Cocaine/Heroin, Counterfeit Goods, Excise/MTIC fraud, Firearms, Trafficking in Human Beings, Organised Property Crime, Synthetic Drugs, Cyber (Child Sexual Exploitation, Cyber Attacks and Card Fraud). Annual operational action plans (OAP's) underpin each strategic objective, each designed to improve operational collaboration between law enforcement officers in Member States in addressing the key threats. The UK participates in all OAPs; leads on the strands relating to Child Sexual Exploitation and Trafficking in Human Beings, and co-leads the Cocaine/Heroin and Excise/MTIC strands.

The EU programme for **Critical Infrastructure Protection** (EPCIP) aims to improve the protection of critical infrastructure in the EU. The programme consists of three main strands: the Critical Infrastructure Directive, which allows for two or more Member States to cooperate on critical infrastructure relating to Energy and Transport; a number of measures to facilitate the implementation of the Programme, including an EPCIP action plan, the Critical Infrastructure Warning Information Network (CIWIN); and some limited initiatives with third countries (e.g. EU-US). The Commission is currently running pilot projects to identify and share best practice.

The European Commission runs a range of funding programmes for police and customs cooperation. Under the last financial perspective the main funds were ISEC (prevention of and fight against crime[3]) and CIPS (terrorism and other security related risks). From 2014-2020 these have been replaced by a consolidated Internal Security Fund which will cover all internal security issues (law enforcement cooperation, organised crime and counter terrorism)[4].

The EU also legislates to require bodies to retain and share certain information with the police and other competent authorities.

<u>Example of a post-Lisbon EU measure in this area</u>

Passenger Name Records

Passenger Name Records are the data recorded in an airline's reservation system when a passenger books a flight. This can include the booking reference, travel itinerary, method of reservation and

[2] See also Article 346(1)(a) TFEU and paragraph 39 of the legal annex below.
[3] http://ec.europa.eu/dgs/home-affairs/financing/fundings/security-and-safeguarding-liberties/prevention-of-and-fight-against-crime/index_en.htm
[4] http://ec.europa.eu/dgs/home-affairs/financing/fundings/security-and-safeguarding-liberties/terrorism-and-other-risks/index_en.htm

payment method. UK legislation provides for the use of the data by the competent authorities to assist investigations, to develop intelligence-led operations, to prevent and detect crime, including terrorism, and to identify potential suspects and victims of trafficking. There is a clear public interest in tackling terrorism and serious crime and more countries around the world are now seeking to make better use of PNR data to protect passengers, citizens and infrastructure.

The Commission has published a proposal for a unified EU PNR framework to provide the common rules for how PNR data is processed and managed across the Union, in line with data protection legislation. The Directive, once agreed, will make it easier for Member States to collect and share PNR data, and will set out common rules for how such information is processed and protected. The UK is lobbying for the Directive to provide for the capture of intra and extra EEA PNR data. The EU has international PNR sharing agreements with the United States, Australia, and Canada.

Questions on policing, customs co-operation on judicial matters, and internal security

11. What are the advantages and disadvantages to the UK of EU action in the field of policing, internal security, and customs co-operation in criminal matters? You may wish to refer to specific examples

12. To what extent is EU action in this area effective in raising standards, or enhancing cooperation? And to what extent is it necessary? And to what extent is the EU the most appropriate level for co-operation on policing, customs co-operation on judicial matters, and internal security?

13. Is EU competence in this area appropriate or are there any areas where it may have led to unintended and / or undesirable consequences for individuals and their civil liberty rights?

14. Could the EU use its existing competence in this area in a different way which would deliver more in the UK national interest?

15. What future challenges do you see in the field of policing, internal security, and customs co-operation in criminal matters and what impact might this have on the national interest?

16. Are there any other general points you wish to make in relation to this area which are not captured above?

CHAPTER 4: MINIMUM STANDARDS IN CRIMINAL LAW AND PROCEDURE

Overview

EU competence to take action in this area is provided for under Articles 82 and 83 TFEU. The EU can adopt Directives which set minimum standards in criminal procedure or which establish minimum rules regarding the definition of criminal offences and penalties. Importantly, the EU's competence to take action in this area is limited by an "emergency brake" whereby any Member State can block a proposal which it considers would "affect fundamental aspects of its criminal justice system".

Criminal Procedure

EU action related to procedural rights is covered in Article 82(2) TFEU, which provides that the EU can act "to the extent necessary to facilitate mutual recognition" and "by means of Directives" to establish common minimum rules related to criminal procedure law. The minimum rules can apply in the following areas:

- Mutual admissibility of evidence between Member States
- The rights of individuals in criminal procedure
- The rights of victims of crime

The EU may only act in other areas if the Council, acting unanimously, adopts a Decision giving it authority to do so. This also requires the approval of the European Parliament.

These measures aim to facilitate and promote mutual recognition. They seek to guarantee that certain minimum procedural protections are afforded to individuals who become involved in criminal proceedings, irrespective of the Member State in which those proceedings are taking place.

The Criminal Procedural Law Roadmap

The "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings" was agreed by a Council Resolution in 2009 and set out the priority areas for action, which were later confirmed in the Stockholm Programme.

The Roadmap set out measures which aim to facilitate protection of suspected and accused persons in criminal proceedings and the application of the principle of mutual recognition of judicial decisions. The Council resolved to take action in six areas:

- Translation and Interpretation
- Information on Rights and Information about the Charge
- Legal Advice and Legal Aid
- Communication with Relatives, Employers and Consular Authorities.
- Special Safeguards for Suspected or Accused Persons who are Vulnerable
- Pre-Trial Detention

The Roadmap was incorporated into the EU's JHA work programme (The Stockholm Programme) in 2009. The Stockholm Programme also gave priority to the protection and rights of victims of crime, with a specific focus on vulnerable groups such as children, victims of domestic violence and victims of female genital mutilation.

As with all post-Lisbon measures in the field of police and criminal justice, the UK can choose whether to opt in to proposals in the field of criminal law and procedure. In the area of defendant rights it has so far opted in to two Directives concerning minimum rights for suspected or accused

persons: on interpretation and translation (implemented in October 2013); and on access to information (which stands to be implemented by June 2014) – which are discussed in more detail on page 25.

The UK has also chosen not to opt into some proposals in this area. The decision not to opt in can be taken for a number of reasons, usually if it is felt the proposal is unnecessary for the UK (for example the UK already has suitable domestic legislation in place) or if it contains a provision which is incompatible with the UK system. For example, In 2012 the UK did not opt in to the proposal for a new Directive concerning access to a lawyer in criminal proceedings, in part because the Commission's proposal would have required immediate access to a lawyer in circumstances where that might compromise an investigation. The Government will in due course review its position on future participation in light of the final text which was adopted in October 2013. Another example would be a directive on counterfeiting proposed by the Commission in February 2013. The UK did not opt in to this proposal as the UK already has effective laws and robust sanctions for Counterfeiting and due to a requirement in the directive that the UK take extra-territorial jurisdiction for the offences committed by UK nationals abroad which the Government considered was not necessary.

Most recently the Government also decided not to opt in to three further Directives proposed by the Commission in December 2013 concerning provisional legal aid; the procedural rights of child defendants; and a broader proposal relating to the presumption of innocence and the right to be present at trial. The Government decided not to opt in to these proposals because the proposals on legal aid would have had implications on UK ability to set its own direction and priorities for the legal aid regime. Equally, the proposal on the presumption of innocence would lead to significant changes to areas of UK law.

Criminal Law

The aim of EU competence in this area is to harmonise criminal laws to deal with particularly serious crimes of a cross-border dimension and to ensure the effectiveness of EU law in other areas where criminal law is deemed essential. Article 83 (1) provides a list of types of "serious crime" where the EU has competence to establish minimum rules. These are:

- terrorism
- trafficking in human beings and sexual exploitation of women and children
- illicit drug trafficking
- illicit arms trafficking
- money laundering
- corruption
- counterfeiting of means of payment
- computer crime
- organised crime

These specified crimes can only be added to by unanimous Council decision after obtaining the consent of the European Parliament. As such, the EU's involvement in this area has been largely limited to approximation of the law regarding these types of serious crime which have an obvious cross-border dimension.

The Treaties also provide EU competence in criminal law beyond the list of "serious crimes" specified above. Article 83(2) TFEU provides for establishing minimum rules on the definition of criminal offences and sanctions if it "proves essential to ensure the effective implementation of a Union Policy which has been subject to harmonisation measures". This means that any areas of EU policy

which are subject to harmonising measures (for example protection of the environment) could also be subject to criminal law measures pursuant to Article 83(2). As more areas of EU law become harmonised, there is the potential for criminal law measures pursuant to Article 83(2) to be used more widely.

For criminal law measures, in most cases UK law has already met or exceeded the "minimum standard" set by the EU in respect of both the definition of the offence and the associated penalty. This is not the case however for all Member States. As with the procedural measures, the UK can choose whether to opt in to proposals establishing minimum standards in criminal law.

Key 'post-Lisbon' EU measures in this area

The Victims' Directive

The 2012 Victims' Directive was a key measure seeking to establish minimum standards on the rights, support and protections afforded to victims of crime. The UK opted in to the proposal, which stands to be implemented by November 2015, in support of its aim to improve standards on the entitlements, support and protections available to victims of crime across the EU. The Directive largely reflects existing practice in the UK in respect of victims' rights and protections.

Directives relating to the rights of suspected or accused persons

The UK has opted into two Directives relating to the rights of the suspect or the accused person in criminal proceedings: the Interpretation and translation Directive (implemented in October 2013); and on access to information (which stands to be implemented by June 2014). The former establishes common standards to ensure that individuals involved in criminal proceedings have access to appropriate translation and interpretation services; whilst the latter concerns the provision of information to individuals on the charge made against them and their rights. Procedures in the UK were already largely compliant with the proposals set out in the Directives, so the legislative changes required to implement them in the UK are minimal.

Directive on combating the sexual abuse, sexual exploitation of children and child pornography

This Directive came into force on 15 December 2012. It replaced and built on a previous instrument (Framework Decision) agreed under the old Treaty provisions which established a minimum approximation of Member States' legislation in respect of offences involving the sexual exploitation of children and the penalties imposed upon conviction.

The new Directive broadened the definition of offences to criminalise new forms of sexual abuse and exploitation facilitated by the internet, and established minimum maximum penalties to be imposed on those convicted of such crimes. It also included provisions on the procedural protections available for child victims, such as limiting as far as possible the number of interviews to which they can be subjected. Jurisdiction extends beyond national borders to ensure that child sexual abusers or exploiters from the EU face prosecution even if they commit their crimes in a non-EU country (via so-called sex tourism). It facilitates the communication between Member States on known offenders' previous convictions.

For the UK, existing law and practice met the main objectives of the Directive, but some small changes were necessary in relation to the special measures available to help children involved in court proceedings and to facilitate the transfer of information about previous convictions between the competent authorities in different Member States.

Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims

The Directive on preventing and combating trafficking in human beings and protecting its victims was adopted in April 2011. The Directive replaced and built upon an earlier Framework Decision. The Directive consolidates and broadens the definition of human trafficking offences; it introduces an extraterritorial jurisdiction for prosecution purposes, and it sets out certain procedural protections for victims of human trafficking crimes, in particular for child victims.

Questions on minimum standards in criminal law and procedure

17. What are the advantages and disadvantages to the UK of EU action in the field of minimum standards in criminal law and procedure? You may wish to refer to specific examples

18. To what extent is EU action in this area effective in raising standards, or enhancing cooperation? And to what extent is it necessary? And to what extent is the EU the most appropriate level for action in the field of minimum standards in criminal law and procedure?

19. Could the EU use its existing competence in this area in a different way which would deliver more in the UK national interest?

20. What future challenges do you see in the field of minimum standards in criminal law and procedure and what impact might this have on the national interest?

21. Are there any other general points in relation to this area that you wish to make which are not captured above?