



Review of the Balance of Competences between the United Kingdom and the European Union – Police and Criminal Justice

July 2014

This is a joint response from the Law Society of England and Wales and the Law Society of Scotland (the Law Societies).

The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 145,000 members, promoting the highest professional standards and the rule of law.

The Law Society of Scotland is the professional body for Scottish solicitors, established in 1949. It is not only the representative and regulatory body for all practising Scottish solicitors but also has an important duty to work towards the public interest.

Introduction

- I. The Law Societies have considered the Call for Evidence – Police and Criminal Justice (Review of the Balance of Competences) paper prepared in May 2014 by the Ministry of Justice. We have already contributed to a number of Calls for Evidence as part of the Review of the Balance of Competences. This submission should be read in the wider context of all our consultation responses.
- II. UK membership of the EU has brought significant benefits to individuals and companies due to the free movement rights provided in the treaties, most particularly through the ability to establish, provide services and trade across the EU and to seek effective redress to cross-border legal issues.
- III. The Law Societies' practitioner members represent clients both in the UK and overseas who are affected by police and criminal justice instruments due to the exercise of their free movement rights provided in the Treaties. Legal services must meet the needs of their clients and must guarantee the respect for the rule of law. It is for these reasons that the Law Societies and the legal professions in England and Wales and in Scotland have an interest in the continuity of the UK's position at the heart of EU rule-making in police and criminal justice matters.
- IV. We accept that there is a debate as to the appropriate level of EU competence in various policy areas and will input into the parts of the Review of the Balance of Competences of relevance to the legal professions.

- V. While the scope of this Balance of Competences Review focuses on measures adopted following the entry into force of the Treaty on the Functioning of the European Union (Lisbon Treaty) in 2009, we wish to highlight the difficulty in simply examining these measures without also looking at the impact of pre-Lisbon legislative instruments. The inter-relationship between different measures in the area of Criminal Justice have previously been highlighted.¹ While we do not wish to enter into an in-depth discussion on the UK opt-out in this response to the Call for Evidence, we wish to emphasise the need to examine instruments adopted pre-Lisbon due to their impact on the functioning of the criminal justice system.
- VI. A difficulty exists in providing practical information about the impact or effect of post-Lisbon legislative measures due to the fact that many of these measures have not yet reached their national implementation deadline or are at proposal stage.
- VII. The Law Societies are not in a position to comment on every Police and Criminal Justice instrument adopted post-Lisbon. This paper therefore highlights some of the benefits and drawbacks of what we regard as some of the key post-Lisbon instruments² namely (in chronological order):
 - a. Directive 2010/64/EU on the right to interpretation and translation in the framework of criminal proceedings (to which the UK has opted in)³;
 - b. Regulation 542/2010 amending Decision 2008/839/JHA on migration from the Schengen Information System to the second generation Schengen Information System⁴;
 - c. Directive 2012/13/EU on the right to information in criminal proceedings (to which the UK has opted in)⁵;
 - d. Directive 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime (to which the UK has opted in)⁶;
 - e. Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (to which the UK has not opted in)⁷;

¹ Written evidence from the Law Society of England and Wales and the Law Society of Scotland to House of Commons Justice Select Committee on the Government's plans to opt out of EU police and criminal justice measures, available at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmjust/605/605vw06.htm>

² Which are not the same as the "key" instruments identified at pages 12 and 19 of the Call for Evidence

³ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings

⁴ Council Regulation (EU) No 542/2010 of 3 June 2010 amending Decision 2008/839/JHA on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II)

⁵ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings

⁶ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

⁷ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty

- f. Directive 2014/41/EU regarding the European Investigation Order in criminal matters (to which the UK has opted in)⁸;
- g. Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (to which the UK has not opted in)⁹;
- h. Directive 2014/57/EU on criminal sanctions for market abuse (to which the UK has not opted in)¹⁰;
- i. Proposed Directive on the fight against fraud to the Union's financial interests by means of criminal law (which we understand the UK will not opt in)¹¹;
- j. Proposed Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust) (to which the UK has not opted in)¹²;
- k. Proposal for a Regulation on the establishment of the European Public Prosecutor's Office (to which the UK has not opted in)¹³;
- l. Proposed Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol) (to which the UK has not opted in)¹⁴;
- m. Proposed Directive on strengthening certain aspects of the Presumption of Innocence (to which the UK has not opted in)¹⁵;
- n. Proposed Directive on Provisional Legal Aid for Suspects or Accused Persons Deprived of Liberty and Legal Aid in European Arrest Warrant Proceedings (to which the UK has not opted in)¹⁶.
- o. Proposed Directive on procedural safeguards for children suspected or accused in criminal proceedings (to which the UK has not opted in)¹⁷.

⁸ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters

⁹ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union

¹⁰ Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse

¹¹ COM(2012) 363 final Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by criminal law

¹² COM(2013) 535 final Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust)

¹³ COM(2013) 534 final Proposal for a Regulation of the European Parliament and of the Council on the establishment of the European Public Prosecutor's Office

¹⁴ COM(2013) 173 final Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA

¹⁵ COM(2013) 821 final Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings

¹⁶ COM(2013) 824 final Proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European Arrest Warrant proceedings

¹⁷ COM(2013) 822 final Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings

CHAPTER 1: POLICY CONTEXT

Question 1: Has the development of EU police and criminal justice competence over the years led to improved cross-border cooperation?

1. The development of EU police and criminal justice competence over the years has undoubtedly improved cross-border cooperation. It is important to recognise that a large part of EU Criminal Law focuses on procedures and protection of individual rights rather than on harmonising substantive law. The strengthening of mutual legal assistance (primarily by way of mutual recognition instruments) has significantly contributed to improving cross-border cooperation. EU Member States are uniquely positioned to co-operate more closely on police and criminal justice matters pursuant to EU instruments than pursuant to wider international cooperation frameworks, such as those developed under the auspices of the Council of Europe or the United Nations. The 28 EU Member States are in a better position to agree to reduce the grounds for refusing cooperation amongst themselves, and to agree to recognise each others' judicial orders, through mutual recognition, when cooperating in a smaller group subject to comparable human rights standards.
2. EU decision-making in the area of police and criminal justice has historically been hampered by the need for unanimity in Council. Despite this limitation, the instruments adopted in this field to date have had a considerable impact in practice.

The European Arrest Warrant (EAW)

3. Perhaps the starkest example to date of how Member States can enhance their cooperation in this field is a pre-Lisbon instrument, the EAW Framework Decision. Though the EAW system has room for improvement, and calls have been made to amend the system including by introducing a proportionality requirement (as further elaborated under Question 4 below),¹⁸ it is a far more efficient system than the previous arrangements in place between Member States – primarily by speeding up the extradition process.
4. A number of pre- and post-Lisbon instruments contribute to the success of the EAW system. One such post-Lisbon instrument is Regulation 542/2010 creating SIS II. The UK's continued participation in the Schengen Information System (SIS) is an integral part of the EAW system, and the Law Societies welcome the UK's participation in the "second generation" SIS II from October 2014. New functionalities of SIS II include enhanced alerts on persons and objects (e.g. firearms, bank notes), the linking of alerts on persons, objects and vehicles and the attachment of the EAW directly to alerts for persons wanted for arrest for surrender or extradition. The development of SIS II demonstrates the added value Member States attach to this system which is considered as a key tool for the cross-border fight against crime.
5. The Framework Decision on the European Supervision Order,¹⁹ a pre-Lisbon instrument,²⁰ should also, once implemented by all Member States, provide further

¹⁸ See European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0174&language=EN> and Law Societies' position relating to Protocol 36

¹⁹ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:294:0020:0040:EN:PDF>

support to the operation of the EAW system by permitting periods of pre-trial detention to be served in another Member State. The Law Societies understand that the Government intends to seek to opt back in to this instrument following the block opt-out under Protocol 36, but is concerned that its implementation has been postponed by this exercise.

The European Investigation Order (EIO)

6. It is hoped that the EIO will improve the assistance Member States can provide to each other in obtaining evidence in support of criminal proceedings. Based on the mutual recognition principle, this instrument should provide greater added value than the European Evidence Warrant²¹, through the introduction of a standardised form to make requests to other Member States and through the provision for legal remedies. The Law Societies intend to closely monitor the implementation and operation of the EIO, to confirm that procedural rights are adequately protected in practice.

Eurojust, the European Judicial Network, Europol and Joint Investigation Teams

7. A further example of improved cross-border cooperation is joint investigation teams (JITs) and operational cooperation under the auspices of Eurojust, Europol and the European Judicial Network (EJN).
8. The implementation of the 2008 Eurojust Decision²² by Member States has improved cross-border cooperation, with prosecutorial and judicial authorities communicating and cooperating in a more effective and efficient manner. An example is the "Gomorra" case in 2010 which involved the trafficking of counterfeit products by organised crime cartels. Due to several coordination meetings and the creation of a specific judicial strategy for coordination the operations in the Member States, 67 suspects were arrested and assets exceeding €16 million were recovered.²³ As can be seen in the increase in cases reported in the Eurojust Annual Reports, cooperation between two or more Member States has improved. Between 2009 and 2013, the number of bilateral cases has increased from 1,094 to 1,265, with the number of multilateral cases also increasing from 278 (2009) to 311 (2013). Moreover, 102 JITs were supported by Eurojust National Members in 2013.²⁴
9. An example of the "added benefit" of UK participation in Eurojust cooperation is the ability of the UK authorities to seek the (non-binding) opinion of Eurojust in order to resolve a conflict of jurisdiction, when it has not been possible to resolve the matter by direct negotiations with the Member State(s) in question. Conflicts of jurisdiction

²⁰ The European Supervision Order has not yet been implemented by all Member States

²¹ See Law Society of England and Wales response to European Commission Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, February 2009, available at

http://ec.europa.eu/justice/news/consulting_public/0004/civil_society/law_society_of_england_and_wales_en.pdf

²² Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, available at [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejdecision/New%20Eurojust%20Decision%20\(Council%20Decision%202009-426-JHA\)/Eurojust-Council-Decision-2009-426-JHA-EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejdecision/New%20Eurojust%20Decision%20(Council%20Decision%202009-426-JHA)/Eurojust-Council-Decision-2009-426-JHA-EN.pdf)

²³ A full description of the "Gomorra" case is available in the Eurojust Annual Report 2010, p.42, available at <http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202010/Annual-Report-2010-EN.pdf>

²⁴ Eurojust Annual Report 2013, available at <http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202013/Annual-Report-2013-EN.pdf>

between EU Member States may increase as a result of the establishment of the EPPO, given the proposed breadth of its jurisdiction. The potential for conflicts of jurisdiction to arise is also likely to increase generally, mirroring any increase in the incidence of cross-border offending.

10. While EU police and criminal justice has developed, there are still areas for improvement. Greater focus needs to be placed on the training and awareness raising of practitioners and judicial authorities in order to ensure that national practitioners and judges are fully aware of the instruments in place at EU level. The Law Societies are concerned that the UK will not be participating in the Justice Programme and encourages the UK Government to ensure that training on the use of EU instruments in the area of Criminal Justice will be provided at a national level, and that such training is extended to practitioners.

Question 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?

11. There have been missed opportunities by the UK to further improve cross-border cooperation by participating in EU instruments in this field. The UK's ability to not opt in may be partly to blame. It is noted that the government puts national interest and the benefits to citizens and businesses at the heart of its decision-making and considers each decision under the Protocol with a view to maximising the "*country's security; protecting civil liberties; preserving the integrity of [...] criminal justice system and common law systems; and controlling immigration*".²⁵ This test has not proved sophisticated enough to incorporate considerations of the impact of the UK's failure to participate in EU cooperation instruments on how cooperation requests from the UK are received by other EU Member States. The UK's ability to not opt into new or amended legislation ultimately has the potential to put the UK at a disadvantage, due to the manner in which the ability to opt out is currently exercised.
12. An example is the UK's failure to opt in to the recently adopted Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the EU. The existing UK legislation, in the form of the Proceeds of Crime Act 2002 and related Regulations, already permits UK authorities to freeze and confiscate assets at the request of Member States. Nevertheless the UK's failure to opt in at the outset of the negotiations on this instrument was a lost opportunity for the UK to improve the ability of Member States to act on its own requests. Given the importance currently placed by the present Government on enforcing confiscation orders (as demonstrated, e.g., by the proposals in the Serious Crime Bill), the ability to enforce confiscation orders overseas should have been an obvious priority. The justification for the Government's decision was its "*concerns that the proposal posed risks to the UK's domestic non-conviction based confiscation regime*", i.e. civil recovery under Part 2 of the Proceeds of Crime Act 2002.²⁶ In our opinion, concerns about how a new proposal might adversely affect existing domestic arrangements may sometimes (as in this instance)

²⁵ Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206474/Final_opt-in_webpage_update.pdf

²⁶ Third Annual Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union and the Treaty on the Functioning of the European Union in Relation to EU Justice and Home Affairs matters (1 December 2011 – 30 November 2012), April 2013

provide all the more reason to opt in at the outset, in order to influence the form of a proposal so as to avoid any such adverse effects.

13. The Law Societies acknowledge that England and Wales, as well as Ireland, is in a particular situation due to its Common Law system, with a hybrid system existing in Scotland, and that, more generally, the UK wishes to retain flexibility on its policy for cooperation with other Member States on criminal justice matters. Legislative proposals in the criminal justice field often reflect the principles and practices of continental inquisitorial systems, and are difficult to accommodate conceptually within the Common Law adversarial model of criminal justice. Due to the particularities of the national legal systems in the UK and Ireland, compared to those of Civil Law countries, the Law Societies see the merit of the "opt in" option permitting the Government to assess each instrument separately to determine whether the instrument will provide "added value". However, in the Law Societies' view, the test applied by the Government (identified above) does not ensure that an inclusive view will always be taken when defining the public interest. It must be in the UK's interest for EU instruments in the criminal justice field to equally reflect the principles and practices of the Common Law adversarial tradition, in addition to those of the Civil Law inquisitorial system which applies in most Member States. By not opting in at the outset of negotiations on new proposals, the UK foregoes the opportunity to ensure that the instrument in its final form can be accommodated within Member States ascribing to the Common Law tradition as readily as within those that ascribe to the Civil Law tradition should they wish to adopt it in the future.
14. An example of the latter scenario is the proposed Directive on the establishment of a European Public Prosecutor's Office (EPPO). The UK indicated, at the earliest opportunity, that it would not opt in [and has consequently played no part in the negotiations]. As a result, the procedural rules which are now being proposed to govern the EPPO's operations would be very difficult to reconcile with key principles of the separate criminal justice systems of the jurisdictions within the UK. The UK's lack of participation in discussions on the proposed EPPO Directive might also have a detrimental impact on its participation in discussions on linked instruments, such as the current negotiations on the reform of Eurojust.
15. Finally, we believe that it is important for the UK to consider the overall impact of not opting in to a measure in practical terms particularly since many of the measures are intrinsically linked and may all come into play during an investigation and prosecution in the UK of cross-border conduct. For example, while the UK continues to opt in to the EAW, it has indicated that it will not opt in to the procedural rights proposals seeking to strengthen it (e.g. Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings and the Proposed Directive on Provisional Legal Aid for Suspects or Accused Persons Deprived of Liberty and Legal Aid in European Arrest Warrant Proceedings published by the Commission in November 2013).
16. For the same reason, the Law Societies do not support the exercise of the block opt out from pre-Lisbon instruments under Protocol 36. As outlined in our response to the House of Commons' Justice Committee's Call for Evidence in October 2013, exercising the opt out is likely to cause significant difficulties for cross-border criminal investigations and to increase the complexity of advising suspects and victims. It may also give rise to significant unnecessary costs.

17. Real disadvantages can arise and have already arisen from the UK's ability to opt in to new or amended EU policing and criminal justice legislation. While the Law Societies recognise the difficulty in getting the right balance and understand the need for the UK to assess each instrument separately to determine whether the instrument will provide added value to national law, and be in the national interest, it should also be borne in mind that, in not opting in, the UK loses its ability to influence in the development of EU instruments by proposing provisions which could benefit the UK as well as the entire EU criminal justice system.
18. Not opting into measures can cause difficulties in cross-border cooperation cases where there is an uneven implementation of EU law in the UK, with the result that UK criminal justice authorities may not be in a position to extend the full cooperation sought by another Member State and/or may not receive the full extent of cooperation the UK criminal justice authorities require from other Member States. This can increase the complexity of seeking and responding to cooperation in cross-border cases as well as the costs associated with such cooperation which can ultimately only be of detriment to UK citizens. The Law Societies are concerned that the Government's current position to not opt in to the proposed Eurojust Regulation will create these anticipated difficulties.

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

19. In the Law Societies' view there would, in principle, be little need for the EU to seek to expand its competence beyond the Treaty, as the Treaty already confers a wide measure of competence in the field of police and criminal justice.
20. We wish to highlight the need to ensure that the EU institutions adhere strictly to proportionality and subsidiarity principles when proposing new initiatives. In this context the Law Societies are concerned that the current operation of the "Yellow Card" procedure and the method it offers for determining whether a proposal falls within EU competence may not be strong enough. Based on the Commission's response to the Yellow Card raised by 14 national parliaments following the Commission's adoption of the proposal on the establishment of the European Public Prosecutor's Office, we are not confident that the procedure offers sufficient scrutiny or accountability.²⁷

Question 4: Has the development of EU police and criminal justice competence helped or impeded the effectiveness of law enforcement?

21. It follows logically from the Law Societies' response to Question 1 above, that the improvement of cross-border cooperation has also helped the effectiveness of law enforcement. Improved cross-border co-operation necessarily results in more effective law enforcement, in cases which involve cross-border offending.
22. EU police and criminal justice competence can also improve the effectiveness of law enforcement in purely domestic cases, where there is no direct cross-border element. These instruments can potentially improve the procedural rights protections throughout the criminal justice system. EU police and criminal justice instruments are also often accompanied by "soft law" measures and initiatives, such as training.

²⁷ See Joint Response submitted by the Law Society of England and Wales and the Law Society of Scotland in June 2014 to the Call for Evidence on Subsidiarity and Proportionality

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

23. The development of EU police and criminal justice competence has been controversial. There is perhaps a perception in the public that EU police and criminal justice competence is inherently problematic. However, many of these perceived problems are often, in reality, the result of people exercising their freedom of movement under the Treaties rather than as a result of EU police and criminal justice competence. An example is the operation of the EAW system. One of the most frequently voiced concerns in the UK press²⁸ is the disparate number of requests received by the UK, as compared to the number of requests received by other Member States and as compared to the number of requests emanating from the UK. However, the number of persons in the UK who are sought by other Member States cannot be attributable to the existence of the EAW system and would remain unchanged if the EAW system were to be abandoned by the UK in favour of a return to extradition under the Council of Europe Convention mechanism, which the EAW system replaced. If the EAW was abandoned in the UK, there would be a risk that it would be seen as a safe haven for criminals since it would be harder for Member States to retrieve them. Furthermore, many criticisms of EU criminal justice instruments tend to be based on opposition to EU co-operation in principle and not concerned with an objective appraisal of how such instruments actually operate, or could operate, in practice.
24. In addition to this perception of EU police and criminal justice competence in general, the Law Societies recognise that some particular instruments have the potential to be problematic, whether in their implementation and/or in principle. Specific concerns have been expressed in the past with regard to some aspects of EU legislative instruments in this area. For example, concerns have been raised with regard to the lack of a proportionality test in the EAW. The Law Societies' concern in this respect remains, and we note the European Parliament's call for the European Commission to propose an amendment to the Framework Decision within the next year. However, we do not believe that the express lack of a proportionality test in the current system can be said to cause a problem for the British criminal justice system – as we have previously pointed out, there are various safeguards in place at domestic level which ensure that proportionality is, in practice, an element of the extradition process in the UK. The Law Societies note the recent amendment to the Extradition Act 2003, which introduced an express proportionality requirement in domestic law.²⁹
25. Mindful of these concerns, we are nevertheless of the view that they are outweighed by the potential benefits of the development, in the Lisbon Treaty, of EU police and criminal justice competence. One of the Law Societies' key concerns is to satisfy itself that EU instruments in the police and criminal justice area (whether adopted pre- or post-Lisbon) operate compatibly with fundamental rights protections under both EU and UK law. Parliamentary scrutiny of the exercise of the UK's opt-in offers an indispensable mechanism for public debate, which is of huge benefit to the Law Societies and its members. We therefore welcome the Government's commitment to

²⁸ See Guardian “How to fix the European Arrest Warrant system” <http://www.theguardian.com/law/2011/apr/11/proportionality-fairer-european-arrest-warrant>

²⁹ Anti-Social Behaviour, Crime and Policing Act 2014, section 157 Proportionality, available at <http://www.legislation.gov.uk/ukpga/2014/12/section/157/enacted>

effective Parliamentary scrutiny of opt-in decisions, as demonstrated by the adoption of the *Code of Practice on Scrutiny of Opt-In and Schengen Opt-Out Decisions in Justice and Home Affairs Matters*.³⁰

26. An aspect of EU police and criminal justice competence, post-Lisbon, is the jurisdiction of the Court of Justice of the EU (CJEU). The UK Government has expressed concern relating to the automatic acceptance of the CJEU's jurisdiction over any post-Lisbon police and criminal justice measures which the UK opts in to. As in relation to pre-Lisbon instruments, the Law Societies are of the view that accepting the jurisdiction of the CJEU over post-Lisbon instruments is unlikely to cause any practical difficulties for the UK. The UK already has long experience of CJEU jurisdiction in other areas of EU competence. The UK has also already chosen to accept the CJEU's jurisdiction for police and criminal justice measures opted into following the Lisbon Treaty. As outlined in our written evidence relating to the Protocol 36 Opt out, *"if EU law is to function, then there must be a court able to provide interpretation on its meaning (through preliminary rulings to national courts) and to consider whether the EU institutions or Member States have infringed that law. Domestic courts already take account of CJEU case-law, even in relation to measures where the UK is not yet subject to the CJEU's jurisdiction"*.³¹
27. Finally, the perceived merits of post-Lisbon competence in criminal justice is often discussed in conjunction with the merits of the UK's continued participation in the Council of Europe's European Convention on Human Rights (ECHR). With regard to the ECHR, the Law Societies are aware of concerns being expressed in several quarters – including by several judges of the Supreme Court – relating to the extension of the ECHR into areas which are for decision by national parliament and national law. The balance between national and European competences in this context as well as in the context of EU post-Lisbon criminal justice instruments is an issue which will continue to be examined, particularly as the protection of fundamental rights plays an important role in police and criminal justice matters.

CHAPTER 2: JUDICIAL COOPERATION

Question 6: What are the advantages and disadvantages to the UK of EU action in the field of judicial cooperation?

28. The Law Societies agree with the UK Government's view that cooperation in Justice and Home Affairs matters can deliver key benefits, such as helping the UK to tackle cross-border crime and facilitating cross-border business by UK citizens. The cooperation that occurs between Scotland and England and Wales in tackling cross-border crime is an example of this.
29. The Law Societies are hugely supportive of the efforts that have been made within the EU not only to improve cooperation but also to improve the training of judges and legal practitioners in relation to EU criminal justice instruments. It is hoped that this

³⁰ Code of Practice on Scrutiny of Opt-In and Schengen Opt-Out Decisions in Justice and Home Affairs Matters (JHA) following implementation of the Lisbon Treaty on 1 December 2009 and further enhanced during 2011 and 2012, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206475/JHA_Code_of_Practice.pdf

³¹ *ibid*

supplemental work will continue and develop further, and thereby assist in fostering a greater understanding of the functioning of the different criminal justice systems in the EU.

30. Cooperation is favoured by way of mutual recognition rather than by approximation, and an understanding of the differences between the criminal justice systems of the 28 EU Member States is key to the success of mutual recognition (as discussed further below). We do not believe that the concept of mutual recognition is less relevant, or less workable, as a result of expanded EU membership.

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

Questions 11-16

31. The Law Societies are not in a position to comment on the experience of policing and customs cooperation and internal security matters.

CHAPTER 4: MINIMUM STANDARDS IN CRIMINAL LAW AND PROCEDURE

Question 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?

32. The introduction of minimum procedural rights in EU legislation ensures that all Member States offer the same minimum standard of procedural protection in the operation of EU criminal justice instruments, and is a prerequisite for the success of cooperation instruments based on mutual recognition. The Law Societies support continued reliance on mutual recognition instruments to further cross-border cooperation, in preference to the approximation of substantive criminal law.
33. From the perspective of mutual recognition, EU action to ensure minimum procedural rights is essential. Although EU-wide minimum standards in procedural rights already exist under the EU Charter and as general principles of EU law, as well as in the ECHR to which all EU Member States are signatories, the procedural rights protections in the Roadmap instruments are specifically tailored to the criminal justice sphere and to the particular instruments adopted by the EU to date. The Roadmap protections "add value" in that they enable individuals to invoke procedural rights directly in their national courts (subject to the principle of legality/legal certainty), where they take precedence over domestic law. There will be a remedy available at national level in the event of a breach. Even if procedural protections in UK law are sufficient for domestic purposes, the UK foregoes the opportunity to "raise the bar" in the rest of the EU by failing to participate in all the Roadmap proposals and in any similar measures which seek to impose minimum standards. This can be to the detriment of UK nationals and UK residents when faced with proceedings in other EU Member States. Even if EU Member States remain free to raise their standards in the absence of UK participation in an instrument, UK non-participation could be seen as sending the wrong signals about the importance of the particular procedural right(s) in question. The UK's decision to not participate in these instruments can also imperil

the continuing viability of EU cooperation by means of mutual recognition instruments rather than the approximation of criminal law.

34. Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings provides an example of the effective raising of standards at EU level to ensure procedural rights. By laying down common minimum rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of an EAW, the Directive ensures that suspected or accused persons who do not speak or understand the language of the criminal proceedings are provided without delay with interpretation. It also ensures that suspected or accused persons are provided with a translation of all documents, within a reasonable period of time, which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings. While the Law Societies acknowledge that the UK has, in most instances, high standards already in place with regard to procedural rights, the EU has ensured that the "bar is raised" for other Member States.³²

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

35. We believe that it is in the UK's national interest for the EU to continue to legislate to improve cross-border cooperation, as a matter of principle. The adoption of legislation at EU level enables a reduction in costs that can be faced by the citizen when dealing with cross-border criminal cases. Minimum procedural rules can reduce some of the "red tape" that can arise when dealing with an investigation/prosecution in multiple Member States.
36. The Law Societies have reservations about whether the fact that the EU has competence to legislate in the area of police and criminal justice will necessarily mean that it is appropriate for it to do so in every case. Not every instance of cross-border criminality merits an EU-response, and reliance on the cross-border nature of offending is not a reliable indicator of the need for EU action as most offences have some cross-border element. We would like to see more rigorous interrogation, by the EU institutions as well as by national parliaments, of the methodology adopted in any research relied on by the Commission in order to justify its proposals and to inform its impact assessments (including a thorough cost benefit analysis) in the criminal justice and police area. The necessity of EU action needs to be beyond dispute.
37. Given that EU competence in the area of policing and criminal justice is still relatively recent, we welcome a commitment from the EU institutions to focus their efforts on monitoring the implementation and evaluating the impact of existing measures before expanding EU law further in this field. However, any reduction of the UK's participation in the existing cooperation instruments would be unhelpful.

Question 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?

38. The Law Societies see the further development of minimum procedural rules under Article 82 TFEU as an area in which EU law could potentially develop in a direction

³² The Law Societies welcome the introduction of a quality provision in this instrument in order to guarantee the quality of interpretation and translation.

which is adverse to the UK's national interest, if such instruments do not adequately provide for the principles and practices of the Common Law adversarial system.

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

39. The Law Societies support mutual recognition as an alternative to procedural or substantive law harmonisation and would oppose any introduction of procedural or substantive law harmonisation through other means i.e. under the guise of improving mutual recognition instruments (and/or the mutual trust required for their successful operation), including through minimum standards. In expressing our support in this response for closer mutual legal assistance and enhanced procedural safeguards, and on assessing the balance of competences in the context of policing and criminal justice, we wish to emphasise our opposition to the expansion of substantive or procedural criminal law without a cross-border dimension.
40. We base our assessment of the balance of competences upon support for the preservation of the integrity of the existing Common Law adversarial systems and their principles including (but not limited to), the burden of proof, the obligation for the Crown to prove its case beyond a reasonable doubt, and the separate jury systems which exist in Scotland and England and Wales.
41. Our assessment of any proposals to introduce minimum procedural rights starts from a position of support for the doctrine of prosecutorial discretion where public prosecutors decide which cases to prosecute, as distinct from a doctrine of legality where once a case passes an evidential threshold test a prosecution is automatic. We support the preservation, in Common Law jurisdictions, of the discretion of the trial Judge to exclude evidence the admission of which would be more prejudicial than probative.
42. In opposing an extension of substantive EU criminal law to offences without an obvious cross-border dimension, such as theft, the Law Societies note that concepts which inform domestic law definitions of such offences and their defences, such as dishonesty or provocation or self defence, are influenced by longstanding national identity and traditions and, in the case of England and Wales, of the development of the Common Law over many hundreds of years.
43. We wish to preserve the differences currently existing in the legal systems of each Member State of the European Union. These systems have evolved organically over many years in order to address national needs. While Member States have recognised the need for more interconnection between their systems at EU level, this interconnection primarily relates to cross-border procedural law. The Law Societies take the view that a harmonisation of substantive law is, in principle, an unnecessary action which does not match the organic development of national systems. The difference in legal systems in Scotland and England and Wales, which exists in one Member State, provides an example, in our view, of the benefits of good cross-border cooperation without the need for harmonising substantive law between these countries.
44. We believe that our concerns over the extension of substantive criminal justice offences are compatible with our support for the case to further develop mutual legal

assistance and procedural safeguards which are believed to be well founded and of demonstrable benefit to the interests of justice and pan European law enforcement.

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