

David Edward

I have been asked to submit written evidence following the meeting at the Law Society of Scotland on 23rd June.

I should say at once that criminal law and procedure were never specialist subjects of mine when I was at the Bar, though, like all other Scottish advocates in those days, I did some criminal work. When I was a judge in Luxembourg, the Court had no competence in criminal matters, though some references under (then) Article 177 came from criminal courts.

Consequently, I do not feel able to deal in detail with the questions set out in the Call for Evidence.

However, it seems to me that, in today's circumstances, effective and efficient cross-border co-operation in the investigation and prosecution of crime is not just desirable but self-evidently necessary. And, of course, cross-border co-operation between two different, if cognate, legal systems, has been part of our experience in the UK for many years.

On the wider European front, I was very impressed with the evidence of the representative of the Procurator Fiscal Service, whose name I did not note.

It was clear from his evidence that co-operation in the field of JHA has enormously facilitated the work of the Service. It is perhaps worth stressing that the Procurator Fiscal in Scotland is concerned, not only with the prosecution of crime but with investigation, with power to direct the police.

His evidence is therefore particularly valuable in indicating the ways in which JHA co-operation can assist in both aspects of criminal work.

The concepts of "equivalence", "mutual recognition" and "mutual trust" have been extremely useful in solving problems in enforcement of the rules of the internal market. But it is important to note that their application has always been subject to qualifications of public interest, objective necessity and proportionality, starting with the decision of the Court in Thieffry (1977 ECR 765) in relation to establishment and services, and Cassis de Dijon (1979 ECR 549) in relation to free movement of goods.

Reliance on mutual recognition threw up some problems in dealing with civil jurisdiction and judgments under the Brussels Convention, and I am glad to note that steps are now being taken to adjust the Brussels I Regulation to take account of those problems.

Consequently, I hope that, where these concepts are transposed into the field of JHA, account will be taken of the really fundamental differences

between the Member States (not to speak of England and Scotland) - not simply in relation to systems of criminal procedure but in relation to the assumptions on which those systems proceed. It is important to be clear (1) as to the judgments and orders that are to fall within the scope of mutual recognition; and (2) as to the grounds on which recognition may be refused, or at least deferred.

It seems to me that the proposal for a European Public Prosecutor is rational enough as a way of dealing adequately with EU fraud. The original proposal was unsatisfactory insofar as it supposed that the EPP could direct and conduct prosecutions before the courts of the Member States, without taking account of the substantial differences between the systems of prosecution in the Member States (again, not to speak of the UK). Since the revised proposal envisages reliance on prosecutors familiar with the system in the Member State (or part of it) concerned, this problem ought not to arise.

As I understand it, the EPP is off the menu as far as the UK is concerned, but, as I have said, it seems to be a rational, and perhaps necessary way of dealing with EU fraud.

I am sorry that my reflections are of such a superficial character.

Best regards David Edward.