Bar Council response to the Review of the Balance of Competences: Police and Criminal Justice

Introduction

1. This is a written contribution by the General Council of the Bar of England and Wales (the Bar Council) to the Government's call for evidence on Police and Criminal Justice, as part of its review of the Balance of Competences between the EU and the UK.

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

4. In this response, the Bar Council will focus on substantive and procedural criminal law issues. Whilst we recognise that this call is deemed not to cover the pre-Lisbon criminal justice measures that are the subject of the Protocol 36 Opt-out[1], we do not consider it possible to deal with the subject matter of this call without reference to some of those measures, and in particular those that it is hoped will be the subject of opt-back-ins this year, including the European Arrest Warrant

[1] On which the Bar has publicly stated its views. See for example, our written evidence to the House of Lords of December 2012, at: http://www.barcouncil.org.uk/media/210686/bar_council_of_e__w_response_to_hl_inquiry_on_opt-out_2014final.pdf

Response

Chapter 1 Policy context – General questions

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

5. Yes, certainly. Crime, especially more serious and organised, does not recognise national borders. Even less serious crimes are increasingly likely to have a cross-border element as citizens exercise their Treaty rights of freedom of movement, or avail themselves of goods and services sent from, or supplied in, another Member State. That said, very few cases are in fact genuinely multi-national, and those that are are largely limited to trafficking and fraud. More usually the investigation is a single State investigation that overlaps into one or more other States.

6. Against that background, great progress has been made in specific areas of cooperation, for example in obtaining evidence from other EU countries to combat crime in the UK, or affecting the UK. The unity of a single common approach is preferable to a network of bi-lateral arrangements between the various States, and has enabled the standardisation of procedures and forms. Eurojust is breaking down barriers and developing a common approach with partners from different traditions of law, which is mutually beneficial. There is no effective non-EU alternative.

7. In general cross-border co-operation is very much in the UK interest. One additional benefit is that it enables the export of certain procedures and expectations, that are accepted norms in the UK, to other EU partners where they may not be, often to the benefit of the rule of law throughout the EU, and of UK citizens living, working or visiting in other jurisdictions.

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 police and criminal justice measures in relation to Schengen?

8. The English and Welsh legal system is, and is widely seen as, one of the most developed and sophisticated criminal law systems in the EU, if not the world. This is amply illustrated in two of the primary areas on which the EU has focussed much of its attention in the criminal justice field over the past several years: the rights of the defence and of victims. On both, the law and practice in England & Wales is regularly held up in Brussels and in other Member States as a benchmark.

9. Given this pre-eminence, the Bar believes that any actual or foreseeable EU legislative proposals imposing minimum rules in these fields are unlikely to increase the legal or administrative burden in England & Wales, and when they do, we would likely welcome that change. Their effect on English law is, based on the current Treaty competences, likely to be minimal and/or beneficial. With little cost to our system therefore, the message of engagement and support for the underlying principles that UK participation in such measures gives to other EU Member States is invaluable. For this reason, our

starting position has long been and remains that the UK can and should be seen to be leading from the front in this area, and manifesting this by positive use of its opt-in whenever possible, though we are of course mindful of the need to balance the interests of the UK as a whole.

10. Opting out of EU criminal matters undermines the currency of engagement for the UK, loses valuable allies in the implementation of measures that are in the UK's main interest areas, and often appears to be done for cosmetic political reasons rather than a real divergence of interests.

11. It is also important to consider the significance of the message given to the EU institutions and to other Member States when the UK does not opt-in, in particular to measures the objective of which we broadly support and with which we are often already in compliance in practice. The current government has been pursuing a policy of not opting into criminal justice measures of late. Some of these we would hope a future government may yet choose to take part in. And some, such as the future EPPO, could have an impact on prosecutions in England and Wales even though they do not bind it.
Examples:

- Directive (adopted late last year) on the right of access to a lawyer and on the right to communicate upon arrest (which guarantees the right of access in both the issuing and executing state in EAW cases);
- Draft Directive to strengthen the presumption of innocence and the right to be present at trial in criminal proceedings;
- Draft Directive on special safeguards for children suspected or accused of a crime;
- Draft Directive on the right to provisional legal aid for citizens suspected or accused of a crime and for those subject to a European Arrest Warrant;
- Draft Directive on the freezing and confiscation of proceeds of crime;
- Draft Regulation on Europol and the European Police College (CEPOL);
- Draft regulation setting up the European Public Prosecutor's Office and the related proposal revising the European Union Agency for Criminal Justice Cooperation (which will share the administrative functions of the office);
- Draft Directive on the fight against fraud to the Union's financial interests by means of criminal law;
- Draft Regulation establishing, as part of the Internal Security Fund, the instrument for financial support for police cooperation, preventing and combating crime, and crisis management.

12. Not only does the Bar consider that the UK should lead from the front in these negotiations. We also believe that, over time, the UK is needlessly losing credibility with the EU and its EU partners, especially ironic in a field where it is widely seen as a benchmark. Indeed, we are starting to see examples of files, often in other areas of EU competence which may be crucial to UK interests going forward, where the UK's position is being undermined by other Member States, possibly frustrated by its actions in the criminal justice field. The opt-in (and out) here cannot and should not be seen in isolation.

13. The other side of the coin is of course, the flexibility to not take part in measures which the UK genuinely feels are incompatible with our law or practice or in some other

way not in the national interest. In practice, at least so far, the Bar considers that very few of the proposals in the criminal justice field could be so described, or at least, if they were at the outset, they were susceptible to the necessary improvements during the legislative process. The EPPO is one of few examples of a proposal where the UK interest may be best served by staying out. Moreover, Article 82(3) and 83(3) both provide for a Member State to apply the so-called "emergency brake" to suspend certain categories of proposal in the criminal justice field if it believes that it "would affect fundamental aspects of its criminal justice system". If no consensus is reached, but at least 9 Member States wish to proceed, then "enhanced cooperation" (Article 329 TFEU) may be invoked. There are thus other tools available.

14. Of course, in an ideal world, the proposals themselves, these days almost always originating from the Commission, should be fit for purpose. In the context of the parallel call for evidence on Subsidiarity and Proportionality, we are aware of calls for the Commission to greatly improve the transparency and thoroughness of its Impact Assessments, and to review its approach to the exercise by Member States' national parliaments of the so-called yellow card (provided for under Protocol 2), in the light in particular of its dismissive reaction to the yellow card in the context of the recent proposal to create a European Public Prosecutor's Office. We do not propose to go into that here, but improvements up front to the Commission's proposals in this field would be an obvious first step, and doubtless would assist the UK in its assessment of the use of its opt-in.

15. At the Brussels event in late June to discuss this call, stakeholders were asked to suggest criteria by which the UK might assess whether or not the UK should opt-in to criminal justice (or opt-out of Schengen) measures. A possible list:

1. Does the UK agree with the principle behind, and objectives of, the proposal?
2. Is action at EU level the appropriate way to achieve this (subsidiarity)?
3. Is the Commission's approach the right way to achieve it, or is there a less invasive approach that could work just as well (proportionality)?
4. Is the Commission's proposal compatible with the UK system:
    a. In broad terms?
    b. In the detail?
5. If it is not compatible, might it nonetheless bring about improvement in the medium to longer-term?
6. If it is not compatible, are the differences susceptible to being resolved through negotiation during the EU legislative process, especially if the UK is fully engaged therein?
7. All other things being equal, would adoption of this measure be a positive move for the EU as a whole?
8. All other things being equal, is this an area where the UK is seen as an example and could thus expect to positively influence the course of negotiations to achieve the optimum result?
9. Is the subject-matter of the proposal of sufficient importance to merit a non-opt-in (or opt-out as appropriate), with all the negativity that may surround it, when looked at in the wider context of other UK interests and objectives?

Question 3 Are there any areas where the EU is looking to expand its competence beyond the Treaty?

16. We are aware of plans to increase security on international flights, and adopt American standards in relation to passenger manifests. There will also be further directives on the preservation of mobile phone and computer communications in the future. Whilst not strictly speaking EU criminal justice measures, all of these will have a direct or indirect impact on the fight against crime.

17. Within the criminal justice acquis, the most recent set of Treaty changes introduced by the TFEU already provides scope for the EU to be more ambitious in the area of criminal law than we have seen so far. Here we are referring to the Treaty wording that introduces scope for approximation and harmonisation of national laws and procedural rules in various scenarios. The Bar Council believes the full extent of the Treaty remains to be tested by the Court of Justice. Examples:

- Article 82(2) d) created a new catch-all, allowing the Council (albeit unanimously) to add to the list of EU criminal procedural objectives at a later date;
- Article 83 (1) provided a list of types of "serious crime" where the EU has competence to establish minimum rules. So far, we have seen this used most actively in the prevention of the various trafficking offences, but there are signs that the Commission will rely on it more and more – its Work Programme for 2014 lists a consultation on the harmonisation of money laundering, which could have significant implications in other areas down the line.
- Article 83(2) provided a new broad power to establish minimum rules with regard to the definition of criminal offences and sanctions in pursuit of a Union Policy area which "has been the subject of harmonisation measures" (e.g. protection of the environment)[2];
- Article 84 created a new broad power to adopt measures, including harmonising ones, in the field of crime prevention.
- Article 86 – provided for the creation of a European Public Prosecutor's Office – the proposal, as we know, emerged last autumn. The Treaty article includes the power to extend the competence of the EPPO, but only with the unanimous support of the European Council. There is some debate as to whether that means the full European Council if the EPPO proceeds on the basis of enhanced cooperation.
- In addition, there are grey areas, where for example, the overlap between criminal sanctions, and administrative ones, could muddy the waters, without any Treaty change. The late 2011 Proposal for a regulation on insider dealing and market manipulation (market abuse) (COM(2011)0651) revealed the problem of applying the principle of double jeopardy in just such situations.

[2] Note that in December 2009 Council adopted conclusions on model provisions guiding Council criminal law deliberations: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/111543.pdf

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

18. It has helped. Firstly in the arrest of persons, without bureaucracy, via the European Arrest Warrant (EAW). This power has been misused by some Member States, and there is a need to reform its operation, but overall the effect has been positive. Joint investigation teams have become more widespread. Large numbers of known UK criminals live in Spain and Italy, Baltic state criminal gangs have resettled in the UK, and flight across EU borders is a common occurrence which can be combatted by greater co-operation. It has become easier to obtain evidence, and individual antecedents, from EU Member States so that police forces know who they are dealing with when they make arrests, or look for suspects.

Question 5 Has the development of EU Police and Criminal justice competence benefitted or caused problems for British Criminal Justice?

19. The development of EU Criminal Justice competence has benefitted the UK and has not caused any great difficulties. Rulings from the ECHR such as Al-Khawaja have caused difficulties, but these are not aspects that can be laid at the door of the EU.

Chapter 2 EU competence in the field of Judicial Cooperation in Criminal matters

Question 6 What are the advantages and disadvantages of EU action on judicial co-operation? Give examples.

20. The benefits in practice of judicial co-operation have been greatest in obtaining information about antecedents. The alternative to judicial mutual recognition would be to have experts in law of other Member States being called to give evidence as to how the law works in other jurisdictions.

21. In terms of the "32 Crimes", we consider that these are not sufficiently well defined, but this is a good start in building a consensus in how various serious crimes are recognised and dealt with.

22. Mutual recognition, through the operation of the European Arrest Warrant, has been of benefit in extradition cases, avoiding the dual criminality test. We also believe that that the entry into force, and full implementation and application of other measures such as the European Investigation Order , and the European Supervision Order would go some way to reducing problems with the European Arrest warrant, as well as being valuable instruments in and of themselves.

23. Beyond that, as stated earlier, the Bar has long sought a better balance at EU level between prosecutorial measures and the safeguarding of defence rights (we examine the roadmap measures under Chapter 4 below). We have also been calling for greater emphasis on defence rights in the texts of new proposals for prosecutorial measures such as those mentioned in paragraph 20, and those that apply criminal or quasi-criminal sanctions in other EU policy areas. Recent examples of the latter include:

- The late 2011 Proposal for a regulation on insider dealing and market manipulation (market abuse) (COM(2011)0651) - where the principle of double jeopardy was of particular concern;
- The March 2012 proposal for a Directive on the freezing and confiscation of the proceeds of crime in the EU; and the European Account preservation order;
- The July 2013 proposal for the creation of the European Public Prosecutor's Office.

Question 7 To what extent is EU action in this area effective in raising standards? And to what extent is it necessary? What is the most appropriate level for judicial co-operation?

24. In general terms the Bar supports judicial co-operation in criminal matters at EU level, based on the principles of mutual recognition, together with the development of minimum standards across the 28 countries of the EU. Over 150,000 UK citizens live in France, 105,000 in Germany, 400,000 in Spain, and 30,000 in Italy. Increasing numbers of UK citizens own property and live part-time in the countries of the former eastern Bloc. The Bar Council espouses a principle of the rule of law, throughout the world, and wishes to see certain minimum standards upheld in all EU countries. EU initiatives to provide minimum expectations of legal processes are unlikely to materially impact the UK legal system, but are important in protecting the rights of UK citizens living abroad, and the rights of citizens of those countries as well. No other forum exists across Europe for this to be done effectively. Judicial co-operation has not yet fully come into force across the EU, but we foresee the potential for great benefits. Turning to the specific extensions of competence under the Lisbon Treaty , including for certain categories of cross-border crime, we welcome these in principle , but would not welcome any development beyond that envisaged in the Treaty without activating the relevant passarelles, in particular any that might have the effect of undermining the common law tradition in the UK.

25. The alternative to judicial co-operation through EU channels is a plethora of bi-lateral arrangements such as that agreed individually with the USA. These are bound to be cumbersome, and confusing in their variation, unless a single bilateral treaty is concluded between the EU and the UK, in which case the UK is accepting its projected second-tier status within the organisation.

26. To some extent, improvements in communications and technology are removing obstacles to the collection of evidence internationally. The 2000 MLA treaty on video-conferencing is less likely to be invoked as Police officers are permitted to travel to EU countries and transmit live witness evidence by Skype.

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

27. We would like to see a more transparent, interactive approach preceding the adoption of proposals by the Commission. More thorough impact assessment and greater consultation with relevant practitioner groups, less recourse to largely academic expert groups, often working behind closed doors, and a more obvious respect for the views of

professional practitioners, and indeed Member States, should they disagree with the Commission's proposed course of action.

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

28. The principle point of challenge will be in reconciling the Common law tradition and un-codified constitutional law of the UK, and to a lesser extent Ireland, with the tradition of codified law on the continent. For instance, the UK courts rely on live witness evidence, which is tested in cross-examination. Witnesses therefore have to appear live or by a link. Assistance is therefore given to witnesses to attend. In codified jurisdictions evidence can be given by deposition, and witnesses are not afforded the same assistance. This is just one area where there is gap between what a UK citizen would expect, and the traditions in other EU criminal law systems. The provision of interpreters for the accused is also not standard practice in all EU countries, although the recent roadmap directive on the right to interpretation and translation should address that in time.

29. A long-standing criticism of the Criminal Justice Acquis is that prosecutorial measures, most notably the EAW, have been given precedence, but defence measures necessary to counter-balance them are still incomplete. The Bar of England and Wales has been among the many actively supporting the Commission's efforts to redress that balance over the last decade or more. Most defence protections are in the ECHR, but are sadly still not enshrined in the law of all Member States. Taking cases to court based on breach of rights is one remedy. But a better solution is for those rights and protections to become law and practice across the EU. We remind the Government that this specifically assists the protection of UK citizens living abroad.

Question 10 Are there any other general points you wish to make.

30. No

Chapter 3 EU competence in the field of policing, customs cooperation in criminal matters, and internal security.

31. Questions 11 – 16 focus on policing, customs co-operation on judicial matters, and internal security, subjects on which the Bar would cede to the expertise of those on the front line in those areas. We restrict ourselves to a few general observations.

Question 11 What are the advantages and disadvantages to the UK of EU action in the field of Policing?

32. On a general level, we would point to the success of Eurojust, Europol, the European Judicial network and the financing programmes, none of which would exist without the EU. If we were to revert to non-EU-led cooperation in the fight against crime, we would be relying on intergovernmental conventions that need to be ratified. There is ample evidence from the past that this is not an effective approach, and would be even less so in the face of the growth of technology-enabled crime. Moreover, cross-border surveillance is now so much better. The police, even at local level, generally themselves know how the system

works, allowing them to deal with cross-border issues themselves. This was not the case even ten years ago. That in and of itself increases efficiency and speed, often of the essence in such cases.

33. In the specific area of extradition, the operation of the EAW means that criminals who flee back to other EU countries can be brought back to the UK to face justice, including from Lithuania, a state that will not otherwise permit the extradition of its own citizens. The disadvantages are that UK citizens alleged to have committed offences abroad can be taken from the UK. The government has now introduced a test to prevent extradition for activities not considered to be a crime in the UK.

Question 12 To what extent is EU action in this area effective in raising standards, or enhancing co-operation? And to what extent is the EU the most appropriate level for cooperation on Policing and customs matters?

34. The EU began as a customs union, based on customs co-operation. There is ample evidence that prior to the advent of EU competence in the area of Police co-operation, such cooperation as there may have been was inadequate. Now, even at police station level, it is known that the police can count on support from other EU jurisdictions with matters such as evidence, and previous antecedents. This benefits the combatting of crime. Generally the Bar Council considers Eurojust, Europol and the other EU measures that have already been cited in this context, have brought about considerable improvement in cross-border co-operation. An ad hoc approach would not work, given the movements of individuals around the EU on holiday, working and other assignments. Even if the UK withdrew from the EU, UK citizens would still expect to visit neighbouring countries, work and live there

Question 13 Is EU competence appropriate or have there been unintended consequences for individuals and their civil liberty rights?

35. As previously mentioned, the measures adopted pre-Lisbon by agreement of the Member States in Council did not contemplate in any detail procedures by which defendants could challenge the application of a mutual recognition decision. In the context of the EAW, while the UK has included bars to extradition that would allow for consideration of human rights concerns and mental or physical incapacity, these are not express grounds for non-recognition in the EAW framework decision itself, and many other Member States have not provided refusal grounds of this nature in their systems. Nevertheless, the EAW framework decision has the most developed procedure to afford requested persons the opportunity to make representations because it allows for legal assistance and includes a hearing process at which non-execution grounds can be considered. Other instruments require much less involvement of the affected person. At the time mutual recognition was conceived there was assumed to be much more trust between Member States of their respective legal regimes than has in reality been the case. There was also little scrutiny of procedural safeguards and conditions of detention amongst the Member States, with a presumption that membership of the European Convention on Human Rights was a sufficient quality mark.

36. Post-Lisbon measures are now addressing these problems in two ways. Firstly, the co-decision of the European Parliament provides greater scrutiny of the proposed measures and a vehicle through which stronger procedural safeguards can be obtained. Secondly, the instruments themselves are directly addressing the wide variance in standards between Member States through a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings and directives adopted thereunder. Equally, through experience of the EAW, Member States have sought the inclusion of protections for their nationals in subsequent instruments. This was the case with the European Investigation Order, which when first proposed on a Member State initiative included minimal refusal grounds. The UK amongst other Member States sought grounds of refusal that would enable the affected person to make representations.

37. There are three post-Lisbon measures which have the potential to affect the fundamental rights of individuals – the Directive on the right to interpretation and translation, the Directive on the right to information, and the European Investigation Order. The first two are in force, the last not due to be implemented until 2017. It is not yet clear what effect they will have in practice, though there is potential for litigation around a number of issues such as poor interpretation quality, access to the case file and legal remedies under the EIO. The Directive on the right of access to a lawyer is a significant improvement to protecting the rights of suspects and accused people across Europe and was adopted in November 2013. Three other proposed directives relating to legal aid, children's safeguards and the presumption of innocence (discussed in more detail below) will also improve standards across Europe.

38. It is disappointing that the UK has chosen not to opt in to these instruments. It is also in our view short-sighted, since they confer benefits to British nationals travelling through Europe, as well as raising standards in the UK through the prism of the evolving human rights instruments. Without a commitment from the UK, which is still seen as having the highest standards of procedural safeguards amongst Member States, the instruments may be weak and enable other countries to retain the lower safeguards that still exist in certain States, falling short of the protections available in England and Wales. By engaging in the process and negotiating for safeguards that research has proven are important to ensuring a fair trial, or appropriate detention conditions, the UK has the opportunity to ameliorate some of the concerns that the mutual recognition instruments create.

Questions 14 - 16

39. These are not matters upon which the Bar can comment.

Chapter 4 EU competence in the field of minimum standards in criminal procedure and law

Question 17 What are the advantages and disadvantages to the UK of EU action in the field of minimum standards in Criminal law?

40. We reiterate the points made in answer to Question 7 and elsewhere above. Some of the crimes listed in Article 83 TFEU are by definition of a cross-border nature (e.g. all forms

of trafficking and money laundering) but all are increasingly occurring in a cross-border context. Prevention, investigation and prosecution of such crimes must inevitably be simpler when the Member States have common standards on what is the criminal act, what are the minimum sanctions for their commission, and the means to assist each other to investigate and prosecute etc. At this stage, we would not wish to see steps taken to try add to the list of very serious crimes in Article 83, but as it stands, we consider that the crimes covered are better handled through coordination at EU level.

41. Discussions on cross-border crime must always include victims and witnesses and those who are suspected or accused of having committed crime, whose rights and interests must also be protected. Police and prosecuting authorities have systems in place, both at national, and at EU level, through bodies like EUROJUST and EUROPOL, and measures such as the European Arrest Warrant, the Evidence Warrant and most recently, the European Investigation Order, to find witnesses and gather evidence.

42. In an effort to correct this imbalance, the Bar of England and Wales gives its full support to EU efforts to establish minimum standards for the rights of the defence and of victims. Even though the measures adopted by the EU so far in these two areas do not add materially, and in many cases are in fact of a lower standard, than those applicable in England and Wales, nonetheless as already stated, we consider them to be advantageous to UK citizens:

- They guarantee a certain minimum level of protection going forward, no matter how the domestic situation may evolve;
- They provide minimum standards for UK citizens when suspected of crimes, or the victim of crime, while in another Member State, meaning that UK citizens can rely on these rights when exercising their free movement rights.

Question18 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?

43. For the reasons set out in response to earlier questions, the fight against serious cross-border crime such as those defined in Article 83 is necessarily more effective and efficient when the national authorities can coordinate their activities and avail of the other support systems created at EU level.

44. Victims, for their part, have the protection of the State in bringing a case against an accused person for the crime committed, though there is still a long way to go amongst the Member States to ensure that all victims (and their families in the event of death) are properly protected, are able to give their best evidence in court, and are adequately compensated for the loss and harm they have suffered. We understand for example, that the rules still vary between the Member States as to eligibility, including for non-nationals, for the local form of criminal injuries compensation. That is striking in light of Council Directive 2004/80/EC relating to compensation to crime victims, which requires that it be available in national as well as in cross-border situations, regardless of the country of residence of the victim or in which Member State the crime was committed. That Directive

creates a system of cooperation between national authorities for the transmission of applications for compensation in cross-border situations. Perhaps the race to fully implement and apply such measures ahead of 1 December 2014, mentioned above, will bring about improvements on this file too.
The more recent directive on Minimum rights, support and protection of Victims of Crime, gives parity of rights and protections to victims of crime throughout the EU, but Member States have until late 2015 to implement it into national law.

45. Suspects and defendants, by and large, must rely on the rights that are in place to protect them, and hopefully, the legal advice that they are given. The patchwork of such rights across the EU has made EU action to set minimum standards essential.

46. Though it has been slow, as mentioned above, the EU has formally adopted three of the Defence Safeguard measures called for in the European Council's Roadmap of December 1999:

- Measure A - the right to translation and interpretation in criminal proceedings
- Measure B - the right to a letter of rights.
- Measure C1 and D - the right of access to a lawyer and to consular and third party contact, adopted during 2013 but not due for implementation until November 2016.

This is the most crucial defence safeguard adopted so far. It deals amongst other things with the following:

- The right of (early) access to a lawyer for suspects and accused persons in particular: when deprived of liberty; before and during questioning; upon evidence-gathering; and prior to appearing in court.
- The principle of confidentiality of communications between the lawyer and the suspect or accused person.
- The right for a suspect or accused person to have a third person informed of his deprivation of liberty.
- The right for a suspect or accused person who is deprived of liberty to
- communicate with third persons and with his country's consular authorities.
- The possibility of making temporary derogations to certain rights in exceptional circumstances and under strict conditions only.
- The right for requested persons subject to a European Arrest Warrant to have
- access to a lawyer in the executing state and to appoint a lawyer in the issuing
- state – so called "dual representation".

For the reasons stated earlier in our response, we consider it unacceptable that the UK has not opted into this directive, and join in the call for it to do so.

47. The key outstanding measure is the right to legal aid. Having the right of access to a lawyer is all well and good, and indeed essential, but who is going to pay for it? This is likely to be the biggest challenge of all. In our jurisdiction, we have long recognised that Article 6 of the European Convention on Human Rights; the right to a fair trial, requires the state to provide legal representation in criminal cases. But the Commission's preparatory work revealed significant variation in the approach taken by the Member States: to have a means test or not; a merits test; emergency defence system and mechanisms to ensure quality and so on. An EU measure to correct that disparity is thus clearly called for, however delicate and difficult the negotiations may be.

48. The Bar Council considers that a fair legal aid system is crucial to the effective administration of criminal justice. This is not just about money, but mechanisms for ensuring the provision of properly qualified, independent and skilled lawyers, who are able to fulfil their professional obligations with adequate means to support the work necessary to ensure an effective defence. Moreover, effective and efficient defence lawyers can assist by avoiding delay, lead to early guilty pleas, narrow the issues at any trial, and prevent miscarriages of justice, which prove costly to the state in terms of both reputational and financial damage.

49. The Commission has of course, in November 2013, adopted a package of further safeguard measures, comprising 3 proposals for directives and 2 Commission recommendations:

1. A Proposal for a Directive to strengthen the presumption of innocence and the right to be present at trial in criminal proceedings.
2. A Directive on special safeguards for children suspected or accused of a crime. Children, who are deemed vulnerable because of their age, have mandatory (and thus non-waivable) access to a lawyer at all stages.
3. A Directive on the right to provisional legal aid for citizens suspected or accused of a crime and for those subject to a European Arrest Warrant.

These legislative proposals are complemented by two Commission Recommendations to Member States:

1. A Recommendation on procedural safeguards for vulnerable people suspected or accused in criminal proceedings.
2. A Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings: providing common factors to take into account in the assessment of whether one has a right to legal aid, and ensure the quality and effectiveness of legal aid services and administration.

50. For the Bar, the key issues arising at this early stage of negotiations are:

- The enforceable right to legal aid is for provisional legal aid only. The accompanying, wider recommendation, though useful, can be ignored by Member States. The Bar would like to see the binding provision go further.
- Enforceable safeguards for vulnerable persons are available only to children. Again, whilst this is a very delicate area in which to legislate, as things stand, other vulnerable groups will have to rely on the willingness of the State concerned to comply with the terms of the Commission recommendation.

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

51. We repeat the sense of our answer to this question in other parts of this paper.

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?

52. The Bar anticipates a greater emphasis on harmonising underlying offences, and the penalties therefor, both topics that go to the heart of national sensitivities. Each Member State has its own local priorities and traditions. Even within the EU, what is seen as unacceptable in one Member State, may not be in another, in terms of defining criminal behaviour, criminal responsibility, and how best to deal with it. These differences often have deep roots in the culture of the Member States, and must be respected.

53. We also anticipate difficulties will arise in the area of mutual admissibility and the transfer of evidence between the Member States. The standards of evidence gathering, the way that it is produced and relied on before the courts, its value etc., vary widely between the legal systems and in particular, between the inquisitorial and accusatorial systems. It is clear that some steps will need to be taken at EU level in the area of transfer of evidence relying on principles of mutual recognition, but these should be explored delicately. In principle, we would not support any initiative aimed at harmonizing evidential standards, except in the most limited of circumstances, for example when it was shown to be necessary to support defence safeguards.

54. We note that the full UK opt-in is not available for all of these types of measures, but the emergency brake would be.

55. We also expect to see, and would welcome, increased development and use of e-justice tools, including, for example, video-conferencing, provided sufficient safeguards are in place, to facilitate, for example, the examination of witnesses, including for the defence; service of documents; more on-line availability of legal texts and information for accused persons and their lawyers; and information to assist in identifying an appropriate lawyer in another Member State when necessary.

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

56. The Charter of Fundamental Rights, despite being adopted in 2000, only achieved equal legal value with the Treaties through the 2009 Lisbon Treaty. In the area of criminal law there are significant procedural protections – of the right to a fair hearing, legal defence, legal aid, access to information and reasoning in proceedings against a person, the principle of legality and proportionality in sentencing to name but a few. There are also connected substantive rights - not to suffer ill-treatment, not to be detained without due process, and protection against discrimination in all its forms. The Charter offers a significant protection that the ECHR cannot give – the power for national courts of their own motion to dis-apply legislation which is not in conformity with its provisions. The Member States and the EU Institutions must be mindful that the Charter applies in the area of criminal procedure and ensure it is respected in the adoption and implementation of all EU instruments.

57. Other developments we would welcome, not already mentioned elsewhere in this paper:

- The Commission actively to police the implementation by the Member States of the measures already in place, and where necessary, to bring infringement proceedings;

- Penalties to be put in place for breach of certain measures, in particular those relating to the rights of the defence and of victims;
- Funding for training and exchange of best practice between defence and other practitioners and legal professionals.
- **Institutiona**l
- Appointment of judges to the Court of Justice of the EU (CJEU) with criminal justice experience and training for all CJEU judges who may preside in such cases, on criminal law;
- Ensure that Commission officials, so far as possible, who are drafting legislation in this field, not only have criminal justice experience, but are also drawn from the different legal traditions in the Member States. The Commission should make greater use of temporary staff to fill lacunae where necessary in order to achieve the right mix.

Bar Council
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