



THE AIRE CENTRE

Advice on Individual Rights in Europe

Balance of Competences Review on Police and Criminal Justice

1. The AIRE Centre is a law centre providing information and advice on issues arising under the two European legal orders (EU law and the ECHR) as they affect individuals and representation and third party intervention before the two European Court and , where appropriate national courts. We have also been training judges in Central and Eastern Europe and the FSU (and more particularly with the support of HMG in the Western Balkans) for more that fifteen years.
2. The Centre has participated actively in the discussions surrounding the evolution of the Cross border Criminal Justice Acquis and conducted a two year project in 2008-10 studying the operation of the European Arrest Warrant in the UK Cyprus Slovenia and Croatia, co-ordinated by Dr Theodora Christou. Dr Christou and the AIRE Centre's Senior Lawyer Nuala Mole are both members of the LEAP advisory panel of experts set up under the auspices of Fair Trials International . The AIRE Centre has had the advantage of reading the evidence submitted to this review of both Fair Trials International/JUSTICE and Dr Christou and the present evidence will endeavour not to duplicate what has already been articulated by them. We will refer to that evidence from time to time in our response

Advice Line: 44 20 7831 3850 Telephone: 44 20 7831 4276 Fax: 44 20 7404 7760
e-mail: info@airecentre.org

Third Floor, 17 Red Lion Square, London WC1R 4QH

Company Limited by Guarantee, Reg. No. 2824400 Charity Registered No. 1090336



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Participatory Status



Organisation No.
N200600055

Background

3. The UK was a leading contributor to the establishment of the Council of Europe and to the drafting and subsequent implementation of the European Convention on Human Rights (ECHR), contributing a succession of distinguished Members of the European Commission on Human Rights and Judges of the European Court of Human Rights as well as highly respected officials at the secretariat of the Council of Europe.
4. Over the past 60 years the UK itself has – rather rarely, despite suggestions in the media to the contrary – been found to have violated its obligations under the ECHR including in the areas of Policing and the Criminal Justice. Remedial steps were normally taken promptly to comply with any judgment against the UK in accordance with Art 46 (as it now is) of the ECHR. The UK until recently was regarded as a prominent promoter of excellence in European human rights standards and a beacon of respect for the rule of law and compliance with international obligations. This earned it the admiration of many, and in particular of the newer member states of the Council of Europe. Unfortunately this respect for the rule of law and our international obligations to the Council of Europe now seems to be being diluted. It is against this wider Council of Europe background that the decision to opt out of most of the EU police and criminal justice measures must be considered together with the messages this sends to our partners across the CoE states about our commitment to the rule of law.
5. The UK came late to the European Community (now the European Union) when many of the fundamental tenets of the EC/ EU had already been

fashioned by our European partners before the UK joined , and thus had to accept many measures which – had it participated in their negotiation from the outset might have better reflected the UK's concerns. Crime and policing only came into the EU much later under Maastricht and Amsterdam and police and criminal justice issues remained in the third pillar with the possibility for the UK to opt in as it chose. It chose to cherry pick certain measures but declined to accept the supervision of the Commission and the CJEU. In particular it has deprived the CJEU in developing its jurisprudence in this field of the possibility of having thoughtfully formulated references for preliminary rulings under Art 267 coming from the UK courts which are expert in formulating such references . It also grates amongst our European colleagues that the UK has taken advantage of the possibility to comment on references that have come from other MS whilst denying its own courts the possibility to make such references.

6. Now the UK has chosen to opt out of the measures to which it had previously opted in with the possibility to opt back if it chooses. It is unfortunate that some of the UK's very sensible suggestions in this field (such as the introduction of the concept of proportionality and/ or the observance of the concept of *de minimis non curat lex* into the EAW scheme through SISII) have become lost as a consequence of the UK's inability to commit to the full functioning of the system across the board.

7. As Professor Peers has put it succinctly:

“It is clear that the UK's decision to exercise the block opt out from pre-Lisbon third pillar measures, along with simultaneous demands to opt back in to 35 measures, to

participate in SIS II five weeks beforehand, to check all other Member States' EAWs for proportionality, and to insist that all EAWs be transmitted separately to the UK authorities, topped off by the Conservative party's plan to hold an in/out referendum¹, has pushed some other Member States' patience to the breaking point.

If this results in a delay in the UK's participation in SIS II – which currently seems likely in light of Member States' initial reactions – then it will be manifestly clear that the UK government's position as regards the block opt-out, along with the possibility of an in/out referendum, has reduced Britain's ability to deal with cross-border crime effectively.

Moreover, other Member States' hostility to the UK's plans regarding proportionality checks for EAWs mean that these plans – a major part of the government's justifiable attempt to ensure that EAWs are not issued or executed for minor offences – will be difficult to implement in practice when and if the UK participates in SIS II²

8. The UK has an extraordinary reservoir of expertise and experience in the field of policing and criminal justice and that should be at the heart of combatting crime in Europe not pushed to the fringes because of the governmental vacillation that is occurring .
9. Irrespective of what the UK government's policies or commitment to Europe may be now or in the future , nowadays so many criminal activities , and in particular organised criminal activities, are currently conducted and will continue to be conducted by those who run big international criminal operations across Europe. To combat such organised or cross border crime

¹ on continued membership of the EU

European measures have to be in place which ensure that co-operation in this field is at least as effective and pan-European as the co-operation between the criminals . Art 2 TEU specifies the Member States commitment to the prevention and combating of crime. Art 67(1) TFEU reinforces this commitment. The EU , and in particular its development of measures for co-operation in policing criminal justice and security , is helping to ensure that there is in place the essential co-ordination needed for the effective prohibition, prevention, investigation, prosecution and punishment of crime and especially of cross border crime.

10. It is a fundamental human right of the people of Europe to be protected by the states of Europe from – avoidably – becoming the victims of criminal acts. “Did the state take all the steps that it could reasonably have been expected to take to prevent a harm of which it knew or ought to have known” ³ If such harm has occurred the ECHR requires that it has to be effectively investigated, prosecuted and punished . It follows from the philosophy (if not from the black letter law) of the ECHR that if the harm has a cross border dimension then the steps taken to combat and redress that harm must also have a correspondingly effective cross border dimension. (See e.g Soering v Uk 1989 at paras 86 and 89)

11. It is of course equally essential that the substantive and procedural rights of suspects, accused or convicted persons are respected because the rule of law requires the principles on both sides of this coin to be applied .

12. We fully endorse the points made by FTI and Justice in their evidence . We would only add one additional point of principle about the added value

² Statewatch Analysis The UK optout from Justice and Home Affairs law: the other member states finally lose patience

³ Osman v UK ECtHR

of these matters being regulated at EU level , both where the pursuit of criminals and the safeguarding of the rights of suspects and accused are concerned .

13. The ECHR sets standards to which contracting states are required to adhere – though the case load of the Court shows that this is sometimes more honoured in the breach than the observance - but the mechanisms for enforcement of ECHR rights are much weaker. EU law has at its core the two parallel principles of “effective legal protection” and “ effective judicial protection”. These key principles mean that any matter which is governed by EU law must be buttressed by effective legislative , administrative and judicial support . Where an EU measure insists on particular actions or safeguards, not only must national law expressly reflect this in legislation but the way in which the national measures implementing a Directive are being applied in practice is in reality achieving the result sought by the Directive in question. The principle was clearly set out in the *Marks and Spencer* case ⁴where the Court held :

Member States remain bound actually to ensure full application of the directive even after the adoption of those [implementing] measures. Individuals are therefore entitled to rely before national courts, against the State, ... not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it.(para 27)(emphasis added)

This is a more exigent test than the requirement under the ECHR that the protection of rights must be “ practical and effective not theoretical and illusory” (*Artico v Italy*, ECtHR 1980)

14. Although the ECtHR had already ruled in 2009 in *Salduz v Turkey* ECtHR on this point , in 2010 it took human rights based litigation in the UK courts to secure the right to a lawyer in the police station in Scotland , and the recent case of *Dvorski v Croatia* ECtHR (now pending before the Grand Chamber of the ECtHR) shows that the implementation of the right remains patchy even within the EU . British Citizens arrested (whether rightly or wrongly) in other EU Member States should be able to rely on a minimum

⁴ Case C-62/00 *Marks and Spencer v Commissioners of Customs and Excise* para 27

common core of safeguards- as should other EU citizens or TCN's arrested in the UK

15 The AIRE centre has spent many hours assisting the newer Member States of both the Council of Europe and the EU (and now the candidate countries of the Western Balkans) to improve their adherence to the rule of law and their practical implementation of the European Convention on Human Rights . This is a challenge to which they are rising despite the historical and institutional difficulties they need to overcome. It is hard for us to continue to emphasise the importance of adhering to those European standards when the UK appears to be rejecting those minimum requirements by declining to be part of the EU system for reinforcing police and criminal justice measures . Abroad this is simply seen as rejecting the standards themselves and not the acceptance or rejection of EU competence in the field.

15. Finally we endorse the points made by FTI and Justice at paras 29 et seq of their submissions. We particularly agree that, as noted at para 32 ,
- “ by repeatedly failing to engage , the UK cannot continue to influence other member states as forcefully to improve their standard to reach those that already exist in the UK”.

Nor can the UK's citizens feel confident that they belong , in reality, to the area of freedom justice and security that the UK solemnly agreed to support when signing the Treaty of Lisbon.

The AIRE centre
September 2014