CALL FOR EVIDENCE ON THE GOVERNMENT'S REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION
Police and Criminal Justice
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General Questions
1. Has the development of EU police and criminal justice competence over the years led to improved cross-border co-operation?

A matter for practitioners.

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?

It still has to be established where the gaps, if any, will arise from the proposed UK participation in the EU AFSJ measures if the position set out in the UK's 2014 Command paper[1] are followed through on. It should be noted that the UK can seek to re-join measures "at any time", under Protocol no 36, Article 10.4. The opportunity to re-join further measures, should they prove necessary, should be used as and when appropriate.

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

This is a loaded question. The question presupposes that the EU is aggressively seeking to expand its remit beyond the provisions of the Treaty. Often EU is just trying to make the EU system work. There will be inevitable ongoing tensions between EU provisions and member state provisions, as the EU attempts to address transnational criminality, while the individual law enforcement, criminal justice and criminal procedure remains a matter for individual EU member states. Individual member states should police the tensions on this boundary by making greater use of the subsidiarity and proportionality provisions which are already in the TFEU.[2] Not only does each of the EU member states have its own constitutional framework, criminal and evidentiary legal systems, but also different methods of policing and prosecution. In addition criminality, and crime priorities can also vary quite considerably in different EU member states, with possibly a considerable overlap with countries with traditional population movements and therefore of shared organised crime gangs and entrepreneurial criminality. These criminals are, however, seeking new opportunities to exploit in non-traditional (for them) EU member states. Non-traditional policing and prosecution relationships need to be developed across the EU in order to meet these challenges. Perhaps it is necessary for a greater level of consultation in the design of proposals, and willingness to engage in greater levels of complexity at the development stage, by both EU officials and their counterparts within (all) member states.

[1] HM Government, Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union, July 2013, Cm 8671.
[2] *Inter alia*, Article 5 TFEU.

Not all "freedom, security and justice" measures are taken under the AFSJ provisions. Some, such as those dealing with financial crime, are taken under the free movement of capital provisions, such as the money laundering and counter-terrorism financing provisions, and some security provisions, for example, would be taken under the inter-governmental Common Foreign and Security Policy provisions. There is an argument to be made that the provisions on the general enhanced cooperation[3] (allowing some member states to go ahead, and leave others behind) or the specific AFSJ provisions should be used more frequently in this area. There are already Treaty provision dealing with "accelerator"[4] and "emergency break"[5] provisions, which should be use more often in the AFSJ, as appropriate. It should be remembered that provisions/ proposals that might well work well, and are of considerable added value for some EU member states, may prove to be a mis-fit for others. In this case alternative arrangements should be made by non-participating countries to address the issue, in order not to leave a gap in the law enforcement and justice procedures that organised crime and international terrorism, amongst others, could exploit. In the event that the objective of the proposal is shared, but the method to achieve that objective is not due to internal constitutional or other constraints, it could be recommended that the alternative to the EU measures might be attached to the relevant EU document by way of a declaration, so that they are easily accessible by police, prosecutors (and their advisors at Europol and Eurojust), and academics. Part of the problem in the past was that governments signed off on agreements that the practitioners did not know about, or could not find, say at 3.am in the morning, when a cross border law enforcement operation was under way. Complexity in versions of a particular legal measures might be clear to a senior civil servant, with a full support staff, but may not be to an operational police officer or his counterpart in another EU member state, say an investigating magistrate who often have to operate 24/7, without the benefit of a full legal team containing specialists in EU AFSJ law.

Expanding competence and further developing policy on the basis of existing competence should be distinguished. Taking a wide horizon scanning approach, which may or may not also cover the AFAJ, an interesting proposal at early draft stage has been issued by the EU (HR-CFSP and the Commission) to start work on a European maritime security strategy.[6] This might be worth following up. There are also gaps in the EU's provision on Critical Infrastructure Protection and Critical Information Infrastructure Protection, which might need to be addressed. The new Europol Regulation (draft) is expanding the types of crimes that Europol is competent to act on, and the already opened Cyber-crime centre, EC3, should start having an impact in the near future. It is arguable that the EC3's range of crimes is too narrow, being based on the CoE Convention on Cyber Crime 2001 (which is currently the only international treaty on Cybercrime, which, counter-intuitively, the US was a key player in drafting). The UK could make some constructive suggestions, based on its own experience, on the type of cyber-crimes that should be added to the EC3 list of competences.

[3] Article 20 TEU and Articles 326 and 327 TFEU. Also relevant are Articles 329 to 334 TFEU.
[4] Specific enhanced cooperation provisions for EU policing being provided for in Article 87.3, second paragraph TFEU. Article 83.3 second paragraph for Judicial Co-operation in Criminal Matters, and Article 86.1 second paragraph *et seq*. TFEU for the European Public Prosecutor.
[5] Article 82.3 TFEU and Article 83.3 first paragraph for Judicial Co-operation in Criminal Matters.
[6] High Representative of the European Union for foreign Affairs and Security Policy and European Commission: Joint Communication to the European Parliament and the Council; For an open and secure global maritime domain: elements for a European Union maritime security strategy, Brussels, 6.3.2014, JOIN(2014) 9 final.

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

A matter for practitioners.

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

A matter for practitioners.

Questions on Judicial co-operation

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

A matter for practitioners.

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

Judicial/ prosecution cooperation operates through Eurojust. A point to point contact for criminal law is provided by the European Judicial Network – Crime. (The EU also has a European Judicial Network for civil and commercial matters). Eurojust describes itself as a network for investigating and prosecuting magistrates. While there are clearly prosecuting magistrates in the UK, there are no investigating magistrates, with this role being occupied by senior police officers. It is expected that senior police officers (particularly in the UK and Ireland) would be using the resources of Eurojust as a transnational investigation develops and issues as to what is legally permissible in another state arises. Eurojust operates a 24/7 on-call service. Any divergence in practice in the UK arising from the various opt ins and opt outs should be fully notified to Eurojust so that all relevant personnel are properly briefed at the time that the original query as to what is permissible or not is made. Waiting for Ministry of Justice etc. staff to arrive in on a Monday morning might be too late. There is no other organisation (EU: Eurojust) which provides this level of judicial, in particular transnational investigation and prosecutorial cooperation. It is to be expected that with the new UK opt-ins and opt-outs that there will be a higher volume of queries going to Eurojust with regard to what does or does not operate in cross border investigations and prosecutions involving the UK. Judicial co-operation in civil matters at an EU level had been ongoing for some years, and is much more developed, with relatively little complaint from the UK. Judicial co-operation in criminal matters is a late developer in the EU context, particularly as both provisions were introduced in the Maastricht Treaty.

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

The UK national interest is not just served by examining how the UK's policing and criminal justice system are affected by EU provisions, but also how other jurisdictions, which work closely with the UK, both regularly and occasionally, are affected by EU provisions. No matter how well country A is run, if it's immediate neighbour, country B is overrun (or even has a significant problem) with organised crime or terrorism then country A will suffer. Equally if country A's citizens regularly travel to country B then they will eventually be affected by policing and prosecution in country B. Equally of country A's criminals keep

running away to country B, then both A and B need to cooperate to do something about it. This is the general understanding that underpins the EU's AFSJ.

It is arguable, however, that if the objective is to provide a more effective and efficient legal and practice framework for tackling transnational (and not national) organised and serious crime and counter-terrorism, that a more robust evaluation process should be conducted to establish what is actually needed, and for what countries. Once measures have been put in place, a more robust review mechanism should be conducted, with a view to ensure that developments are not actually a paper based exercise, but actually address – effectively – issues which arise in practice. This writer would argue that the COSI committee (Committee on Internal Security) might be a more transparent player in the review of mechanisms, with powers to address key issues as and when they arise, rather than leaving problematic issues which arise in practice to continue to such a stage that they become a major irritant, such as the use of the European Arrest Warrant for what many EU member states would regard as minor, and therefore not transnational law enforcement matters.

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

Individual EU member states often have close working relations with certain countries, such as their immediate neighbours. Often they work on the basis of traditional bi-lateral relations, such as the UK and the Republic of Ireland. There are similar close relationships across the EU. However, when a jurisdiction works with another EU member state for the first time, or in a new crime area, new challenges arise. It is intended that both Europol and Eurojust would be key players in mediating issues which arise in these circumstances. Key challenges for the future are in developing effective working relationships with non-traditional law enforcement and criminal justice partner countries, and in new crime areas. The EU cross border law enforcement provisions were, for example, designed predominantly by drugs enforcement officers. Their suggestions were reflected in the later legal frameworks. Their working methods and their legal frameworks were then adopted (mainly post 9/11) by counter-terrorism operatives (at a policing, rather than intelligence service level), and more recently are being expanded to Trafficking in Human Beings investigations and other crimes. The type of law enforcement officers engaging with the EU, and their prosecution counterparts, are therefore widening. As new cohorts join the transnational law enforcement and criminal justice practice community new challenges will arise. The EU itself has acknowledged that its attempts to use the drug trafficking model for trafficking in human beings has not worked, hence the recent EU directive on trafficking in human beings. Similar problems will arise in the future. It is expected, in particular, that on-line crime (in its many various forms), environmental crime and the more elaborate financial crimes (beyond the traditional police remits in the context of anti-money laundering and proceeds of crime cases) will cause particular issues which those crime specialists will have to resolve. It would be in the national interest to have those issues resolved in a way which is workable for the UK legal and law enforcement practice systems.

The ongoing challenge will be to make the EU system work while not crossing the red lines set out in Article 72 TFEU (security of individual member states) and Article 73 TFEU (national security, i.e. intelligence services). In addition the automatic supremacy of EU law does not appear to be as clear cut as is often portrayed. While the equivalent of the High

Court in most EU member states appear to have been loyally following the EU law / Court of Justice of the EU lead, individual Supreme/ Constitutional courts of the various EU member states – where the most senior judges in a member state can be reluctant to overly defer to another court - have been adding a level of complexity to this issue. According to recent work by Martinico and Pollicino, although efforts are made at Constitutional Court level to accommodate EU law into national law, there do appear to be judicial red lines[7] over which EU law is not permitted to cross. The UK is therefore not exceptional is having issues at this level.

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

No.

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

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

A matter for practitioners. However it has to be noted that customs co-operation generally is based on a different legal basis from those of policing and internal security, and are not subject to any UK opt out provisions. There are AFSJ legal measures which deal with customs-police cooperation with Joint Police Customs Co-operation Centres (PCCCs), across borders, having been set up.

Customs co-operation is also driven by external factors, such as the US Customs –Trade Partnership Against Terrorism (C-TPAT) and the World Customs Organisation (WCO) SAFE Framework of Standards, as the idea behind customs cooperation is to have your ship safely dispatched, not just to other ports in the EU, but around the world, in particular to the UK and EU's major trading partners. There is also a Customs Information System (CIS), with a key target for customs co-operation being weapons smuggling with CFSP rather than AFSJ measures focusing on this point.

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

The first part of this question is a matter for practitioners.

The phrase "internal security" used in EU documents refers to security internal to the EU, not to the internal security of individual member states. The EU also has security provisions in place, and in development, which are "external to the EU", such as provision in the Euro-Mediterranean agreements, the European Neighbourhood Policy agreements, and in two of the four common spaces programme with Russia. "EU internal security" can only therefore be dealt with by the EU. Internal security within the UK, for example, is expressly excluded by Article 72 TFEU, which should be read in conjunction with Article 276 TFEU. There are

[7] The only exceptions to this would appear to be Estonia, Belgium (but this is disputed), Luxembourg and the Netherlands. Martinico G. and Pollicino, O., *The Interaction between Europe's Legal Systems; Judicial Dialogue and the Creation of Supranational Laws* (Cheltenham: Edward Elgar 2010), 134.

no other organisations which deal with "transnational policing" (as opposed to International policing: INTERPOL) or transnational justice provisions. It is this writers understanding (being an academic and not a police practitioner, and this should be confirmed with relevant law enforcement officers,) that Europol operates a system of classified information, Europol 1, 2 and 3, which map onto the UK's classifications of confidential, secret and top secret. Interpol does not appear to have the same number of levels of security classifications. This writer presumes that Europol 3 is used for counter-terrorism intelligence sharing. Equally before Europol started working Interpol handled a lot of European traffic. Once Europol started Interpol capacity was freed up to deal with non-European traffic, addressing till then, unmet needs of other parts of the world.

International policing would be one law enforcements powers stopping at the border. Transnational policing allows for some overlap, to include the chase across land borders border, both overtly (not UK or Ireland) and covertly (not Ireland). It provides for the placing of undercover officers across borders, joint investigation teams, cross border wire intercepts, also used by MI5 (the only time a national intelligence service of any EU member state is referred to in EU legal documents), analysing intelligence at a supranational level – Europol – in order to get a clearer picture of transnational organised crime, etc. It has long been argued that transnational organised crime moves very easily across borders, and exploit borders in order to evade detection and capture, and that there is a need for law enforcement to be able to work more effectively across borders in order to keep up. The days of crossing and internal EU border in order to evade capture and prosecution are now long gone. Prosecutors also need to be able to work effectively across EU borders in support of their law enforcement colleagues in transnational cases.

The World Customs Organisation does operate in customs co-operation. Many of the EU provisions on customs cooperation are effectively a cut and paste from the World Customs Organisation provisions. EU Customs cooperation is predominantly commercial. A small amount of "law enforcement" style provisions have been added to the commercial customs provisions in order to address customs- police cooperation across borders (i.e. not UK Customs cooperating with UK police, which is an individual member state matter, but UK Customs cooperating with French Gendarmerie, etc.).

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

It is widely acknowledged that the EU provisions in the Area of Freedom Security and Justice are over developed in the area of security, at the expense of matching provisions on freedom and justice. The recent and anticipated developments at EU level, which the current UK Government appear to have particular problems with, are efforts to rebalance this issue. Measures include the upgrade in legal status of the EU Charter of Fundamental Rights 2000, the anticipated accession of the EU to the European Convention on Human Rights, and the measures being enacted pursuant to the Procedural Rights Road map (e.g. provisions on translation and interpretation, etc.), some of which are in force, and some are under negotiation. The upgrade in the role of the Court of Justice of the EU in the Area of Freedom Security and Justice is also part of this process. Full operation of the European Arrest Warrant without UK participation in the full range of supporting measures will cause problems, in particular for UK nationals detained abroad. If the UK are not to participate in key EU provisions in this area consideration should be given to an alternative measures which might address civil liberty/ due process/ human rights issues.

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

A comparative examination and exchange of best practice in the area of judicial arrangements specifically adopted in the context of terrorism trials would be useful, as some other member states also have a lengthy experience of terrorism, and all are supposed to be operating under the umbrella of the ECHR. A shared understanding of the balance between effective counter-terrorism trials and human rights and due process protection could then be developed, and lobbied for at both the EU and Council of Europe level.

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

The most pressing issue for the UK will be to establish the exact effect of the operation of the provisions under Protocol no. 21 and 36 attached to the TEU and TFEU. The replacement to the Stockholm Programme is currently being designed. The Stockholm Programme is a list of intentions, some of which have been met by new legislation, some not. The UK position on this should take the perspective of what is needed, and not needed, on the ground. It should not be driven by "opt-in"/ "opt-out"/ maintenance of national sovereignty ideology.

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

No further comments.

Questions on minimum standards in criminal law and procedure

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

A matter for a criminal lawyer.

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?

A matter for a criminal lawyer.

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

A matter for a criminal lawyer.

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?

A matter for a criminal lawyer.

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

A key point in this area is that ensuring that whatever measures are in fact taken at the EU level that they don’t end up being merely a paper based exercise, and actually make a difference in practice, in all EU member states.