



# FACULTY OF ADVOCATES

## RESPONSE

by

FACULTY OF ADVOCATES

to

MINISTRY OF JUSTICE

on

## BALANCE OF COMPETENCE REVIEW ON POLICE AND CRIMINAL JUSTICE

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

Yes. There is a higher degree of cross border co-operation at a number of levels especially law enforcement, police, prosecution and mutual court recognition.

**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?**

This is a highly charged area. A major area of concern is if the UK does not engage completely with proposed policing and criminal justice measures by opting out there is a significant risk that its voice is not heard and the UK is unable to influence change as it might if it had opted in.

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

The Faculty of Advocates does not feel that it would be appropriate for it to comment on this area.

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

The development of EU police and criminal justice has undoubtedly helped the effectiveness of law enforcement.

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

The development of EU police and criminal justice competence has generally benefitted the Scottish criminal justice system e.g. co-operation between prosecutors in seeking and enforcing arrest and witness warrants. It should be noted, however, that the issue of proportionality, for example, has caused concern e.g. Polish nationals being detained and extradited over what can only be deemed relatively trivial matters.

**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**

There are both advantages and disadvantages to the UK as a result of judicial co-operation. As noted above, the increasing international nature of modern criminality means that EU action on the field of judicial co-operation is not only an advantage but a necessity if such crime is to be effectively policed and punished. Further, given the free movement of people, judicial co-operation in the form of European Arrest Warrants, extradition, prisoner transfer and supervision of alleged and convicted offenders has been critical in facilitating a co-ordinated European response to suspected or convicted offenders. Whilst the foregoing are effective and for the most part operate effectively without breaching the articles of the European Convention on Human Rights, problems do arise when these provisions are relied

upon where the suspect or offender has been resident for some time in another member state and has a family, job, home etc. within that new member state. In these circumstances, exercise of judicial co-operation which then leads to the removal of the person may interfere with the article 8 rights of the extraditee/prisoner and his family. This is illustrated in the following cases:

*BH and KAS or H v The Lord Advocate* [2012] UKSC 24.

*HH and PH v Deputy Prosecutor of the Italian Republic, Genoa; F-K v Polish Judicial Authority* [2012] UKSC 25

*SL v The Lord Advocate on behalf of the District Court of Michalovce, Republic of Slovakia* [2013] HCJAC 50.

#### In relation to Freezing and Confiscation of Assets

It is by now a trite statement to say that crime in the European Union has no boundaries and that the modern criminal has no respect for international borders in seeking to launder the proceeds of his crime. As the cross border dimension of crime has increased, so too have examples of the proceeds of that crime being spent, stored and laundered in many nations throughout the European Union.

**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?**

EU action in this area has undoubtedly been highly effective in raising standards and enhancing co-operation. It is both necessary and appropriate that the EU performs this role as it can balance the competing interests and needs of the member states and allow appropriate allowances and dispensations in respect of implementation as is evidenced in the treatment of Poland in respect of Council Framework Decision 2008/909/JHA.

### In relation to Freezing and Confiscation of Assets

EU action in this area has mirrored the reality of how modern organised crime operates.

It is a regular feature of proceeds of crime cases in Scotland to see bank accounts being opened and property bought in other European Union countries using the proceeds of crime committed in Scotland. Given that the purpose of the applicable proceeds of crime legislation in the United Kingdom (*the Proceeds of Crime Act 2002*) is to remove from criminals that which they have obtained from crime, the various European Union Conventions and Decisions in this area have played a vital role in helping to secure the effectiveness of this legislation; c.f *The Schengen Agreements*; *The Convention on Mutual Assistance in Criminal Matters between Member States of the European Union 2000* (“*The MLAC*”); *The 2001 Protocol to the MLAC*; *Council Framework Decision of May 28, 2001 on combatting fraud and counterfeiting of non-cash means of payment*; *Council Framework Decision of June, 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime*; *Council Framework Decision of July 22 2003 on the execution in the European Union of orders freezing property or evidence*; *Council Framework Decision of February 24, 2005 on crime related proceeds, instrumentalities and property*; *Council Framework Decision of October 6 2006 on the application of the principle of mutual recognition to confiscation orders*; *Council Framework Decision of December 18, 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union and*; *Council Decision of December 6 2007 concerning cooperation between asset recovery offices of the member states in the field of tracing and identification of proceeds from, or property related to crime.*

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

To some extent the answer to this question is dependent on what the UK national interest is. It is undoubtedly in the UK national interest that crime and criminals are detected, tried and punished. The existing competence certainly aids this being achieved. If the UK national interest is to act in accordance with the principles of the European Convention on Human Rights, this question becomes more complex, particularly when considered in the context of an individual who has been resident in another member state and has created a life there that results in article 8 considerations being relevant in determining extradition, transfer of prisoners etc.

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

A general future challenge is to not only ensure that the EU continues to encourage judicial co-operation between member states but that all members act in a manner that is convention compliant which must ultimately be in the UK national interest. This may necessitate, for example, consideration in the extradition context of whether a court is obliged to consider whether prosecution can occur in this country and whether it is necessary to consider if an individual can serve their sentence in this country under either Council Framework Decision 2008/909/JHA or the Convention on the Transfer of Sentenced Persons. A challenge arising from such an approach is the political and public resistance to the costs of prosecution and punishment of foreign nationals being borne by the UK in order to minimise interference with the convention rights of the accused and his/her family.

**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?**

Judicial co-operation has operated well to date particularly in the fields of terrorism, organised crime, drug and human trafficking, financial crime, cybercrime and fraud. Co-operation in respect of securing extradition for prosecution or prisoner transfer to serve a sentence has been largely very effective. Whilst co-operation of this nature is to be encouraged, a growing difficulty faced by all jurisdictions will be balancing the public interest in an effective response to crime with the article 8 rights of those affected. It is particularly in this area that further consideration requires to be given whether the current provisions governing co-operation are as effective as they could be.

The term 'judicial co-operation' may need to be clarified. In the continental system 'judicial' and 'prosecutorial' are often synonymous. In the UK/Scottish adversarial system there is a far greater separation of judicial and prosecutorial functions. Further, in Scotland there is a centuries-long tradition of independent prosecution. It may be important to recognize these significant differences in both use of language, and in fundamental approach, to ensure protection and mutual respect of citizens' rights within the EU.

**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**

The Faculty of Advocates does not feel that it would be appropriate for it to comment on this area of policing, internal security and customs co-operation.

**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 Faculty of Advocates does not feel that it would be appropriate for it to comment on this area.

**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?**

The Faculty of Advocates does not feel that it would be appropriate for it to comment on this area.

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

The Faculty of Advocates does not feel that it would be appropriate for it to comment on this area of policing, internal security and customs co-operation.

**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 Faculty of Advocates does not feel that it would be appropriate for it to comment on this area.

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

The Faculty of Advocates does not feel that it would be appropriate for it to comment on this area.

**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**

The advantage in minimum standards is ensuring the confidence that EU members can have in the judgments of other member states, allowing mutual enforcement of warrants etc. Minimum standards can be a useful driver in maintaining fundamental freedoms such as provision of adequate funding for accused persons, or resisting attempts by the state to encroach on fundamental freedoms such as holding trials in public.

**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?**

It is debatable whether EU action is effective in raising standards in the Scottish system. The Scottish system has always had relatively high standards e.g. time limits for custody. However, vigilance is always required, e.g., in relation to UK (and Scottish) Government activity regarding holding trials in camera or limited disclosure of witness identities and evidence - EU action is helpful in protecting these minimum rights.

An alternative question may be whether the UK/Scottish authorities have perhaps used the EU to allow less thorough scrutiny of proposed changes, or a lower standard than could have been achieved e.g. the meeting of the minimal standards of vulnerable witness protocols in Scotland, which met the minimum EU standard but involved little effective raising of standards and missed an opportunity to introduce higher standards, such as introducing registered intermediaries.

The enforcement of minimum standards does enhance the ability to co-operate greatly. Member states can have confidence in the systems of fellow member states to allow mutual enforcement of judgments e.g. the area of cross-border arrest.



In the increasingly global/pan-European market EU action in this area is very necessary, and will only become more so as both co-operation and criminality develop.

A further note of caution, however, is the importance of recognising the fundamental difference between the Scottish (UK) adversarial system, and the systems of the rest of the EU. Comparisons can be very difficult e.g. in the area of disclosure. This may limit the extent to which the EU is the most appropriate level for action in this area.

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

It is difficult to see how, with the current level of UK engagement, the EU could use its competence differently in the UK national interest.

**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?**

The drive to set up pan-EU bodies to enforce a common criminal jurisdiction (EPPO) will test the ability of the UK/Scottish system to protect the rights of its citizens. An EU prosecutor would inevitably lead to conflict between UK/Scotland, and that body, over minimum standards. Any conflict would almost inevitably be focussed on the difference between the adversarial system and the inquisitorial system, and the ability to show the requisite protection of the rights of the individual.

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

In addressing issues in this area it is important to emphasise the relevance of the three UK legal systems which are caught by the 'UK' title. It is essential to reinforce

understanding of the fact that Scotland has a different legal system from the rest of the UK, and a principal difference is the criminal justice system. In attempting to set minimum standards the EU/UK runs the risk of failing to accommodate the differing UK systems, particularly to the disadvantage of the smaller Scottish and Northern Irish jurisdictions.