



# **H.M. GOVERNMENT OF GIBRALTAR**

## **EU AND INTERNATIONAL DEPARTMENT**

### **6 Convent Place (Annex)**

### **Gibraltar**

#### **THE GOVERNMENT'S REVIEW ON THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION: CALL FOR EVIDENCE ON POLICE AND CRIMINAL JUSTICE**

**Evidence submitted by Her Majesty's Government of Gibraltar ("HMGGoG").**

#### **Summary**

HMGGoG generally has a positive experience of police and criminal justice cooperation and sees its continuation as an appropriate response to cross-border crime. Difficulties in the relationship with Spain, taken together with 'postboxing' of requests to and from all Member States, may serve to limit the extent of the cooperation to which Gibraltar is keen to contribute. HMGGoG sees many areas in which this cooperation can develop and trusts that the UK will exercise its opt-in to support an effective response to cross-border crime.

#### **Introduction and explanatory comments**

HMGGoG is grateful for the opportunity to submit evidence on the *'Government's review of the balance of competences between the United Kingdom and the European Union: call for evidence on police and criminal justice'* published by the Home Office on 1 May 2014.

HMGGoG is conscious of the fact that the call for evidence seeks to analyse what the UK's membership of the EU means for the UK national interest. The Government is hereby invited also to take into account Gibraltar's interest in this exercise since the TFEU applies to Gibraltar by virtue of the fact that Gibraltar is a European territory for whose external relations a Member State (the United Kingdom) is responsible.

#### **General**

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

HMGGoG's experience suggests that the formalisation of cooperation at EU level, and the move towards mutual recognition of other Member States' legal systems, is a proportionate response to the changing nature of complex and serious cross-border crime and provides the necessary framework for productive cross-border cooperation. Informal or bilateral arrangements are increasingly insufficient for this purpose. This is true both for formal legal processes, where the

European Arrest Warrant (EAW)<sup>1</sup> in particular has made extradition a much swifter and objectively-justified process (numbers are small in comparison with larger jurisdictions but the impact is equally significant, details of EAW cases are attached as an annex to this reply) and provisions regarding the taking of evidence have facilitated preparation of criminal cases; and for broader operational contact, where organisations such as Eurojust and arrangements such as Schengen police liaison officers have established effective mechanisms for helpful assistance. At an operational level, the judicial and police authorities in Gibraltar have well-developed relations with those Member States with which they have regular need for contact and the specific arrangements contained in EU measures facilitate the cooperation which flows from those contacts. The EU has the advantage over Council of Europe cooperation of oversight of its implementation, which gives greater certainty to the cooperation structures.

However, the ongoing strain in relations with Spain has detracted from Gibraltar's opportunities to maximise its use of EU police and criminal justice measures. 'Postboxing' of all communications from all other Member States (not limited to Spain) to Gibraltar via the UK and the limited scope for practical cooperation across the Gibraltar-Spain land frontier mean that opportunities are possibly being missed and, for example, practical arrangements for the return of fugitives to Spain or other Member States are made more difficult and may be delayed.

Pre-Lisbon Treaty arrangements meant that Gibraltar was not automatically included in Third Pillar measures. Case-by-case territorial application has resulted in a limited experience of the full range of policing and criminal judicial cooperation measures. HMGoG welcomes the certainty provided by the post-Lisbon regime of the automatic application to Gibraltar of all measures where the UK opts in; such automaticity does however require all parties to ensure that measures operate in a way which reflects Gibraltar's separate jurisdiction and body of criminal law. The operation of the opt-in process should also take full account of the increasing operational need for formal multilateral cooperation as the means for tackling cross-border crime effectively.

Gibraltar has particularly close links with the UK in relation to tackling crime, since there is a high level of travel between the UK and Gibraltar in both directions. It is therefore important to HMGoG that the measures of cooperation which operate as between Member States operate equally between all parts of the UK and Gibraltar.

## **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?**

Although a separate jurisdiction, Gibraltar operates broadly the same common law legal system as England & Wales; the opt-in process therefore provides a mechanism whereby the UK's and Gibraltar's systems can be protected from any adverse impact of measures based on different legal systems. However, given Gibraltar's geographical position, and, notably, its location on mainland Europe, its police and legal systems deal with EU nationals (especially Spanish nationals) daily. Cooperation with Member States such as Spain and Portugal is regularly required and the absence of

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<sup>1</sup> HMGoG has limited experience as yet of post-Lisbon measures, so our examples include pre-Lisbon measures, of which the EAW is the one most cited by our stakeholders in Gibraltar as of real value and importance.

a comprehensive EU-based means of cooperation may in the future be a disadvantage, requiring the negotiation of bilateral arrangements between Gibraltar and affected Member States. Some EU measures may increase the financial burden on Gibraltar, for example in relation to recovery of fines, where these are currently paid immediately by EU nationals from other Member States, whereas the mutual recognition measure allows the other Member State to collect and retain the fine. The measures introduced since the Lisbon Treaty in which the UK has chosen not to participate are currently few and as a result the potential impact of this on Gibraltar's means of cooperation is as yet untested. As a general principle, more rather than less cooperation makes practical sense to Gibraltar, given its particular geographical situation.

The certainty over the UK's participation in Schengen development measures has provided a clear framework for Gibraltar in the past; the new power for the UK to opt out of measures which build on the Schengen acquis removes this certainty. Given the limited areas in which the UK (and therefore by extension Gibraltar) has been accepted for participation, this could lead to less interest from other Member States in cooperating with Gibraltar in the future. Mutual legal assistance based on the Schengen acquis, for example, has been of particular value to Gibraltar. HMGoG has made clear<sup>2</sup> its interest in greater rather than less participation in Schengen and any reduction in influence and cooperation is to be regretted.

The general disadvantage to Gibraltar of EU-level cooperation is the 'postboxing' arrangements which can add to the complexity of cooperation and may discourage some Member States from seeking cooperation in the first place. Linked to this point, EU measures could usefully take account of the needs of small jurisdictions by providing specifically for light-touch mechanisms for cooperation, avoiding the need for complex infrastructure, and special arrangements for practical implementation, for example the need for individuals to transit another Member State in order to hand over a fugitive or effect a prisoner transfer. HMGoG assumes that this operational difficulty is experienced by other smaller Member States as well as Gibraltar.

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

HMGoG supports the view taken by the UK that the EU should have competence in this area only where cross-border criminality is concerned or where the EU acting collectively can better tackle serious forms of crime but that, once established, cooperation is of real benefit to Gibraltar. The selection of the correct legal base, to avoid extension of criminal law sanctions in particular via non-JHA measures, is important to avoid creeping competence.

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

As described in the response to question 1 above, HMGoG considers that the opportunities provided by EU police and criminal justice competence far outweigh any disadvantages and have considerably

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<sup>2</sup> Minister for Europe's evidence to the Foreign Affairs Committee Q135  
[<http://www.parliament.uk/documents/commons-committees/foreign-affairs/Transcript%20for%20publication.pdf>]

helped the effectiveness of law enforcement, by providing formal means whereby information might be exchanged and by providing frameworks for cooperation. The EAW has been particularly valuable in this respect.

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

As described in the response to question 1 above, HMGoG considers that the opportunities provided by EU police and criminal justice competence have considerably helped the effectiveness of the criminal justice system in Gibraltar, by providing speedier and more streamlined systems for cooperation and the exchange of information, which is admissible in court and in turn leads to swifter criminal justice processes and disposals. The interplay between domestic, EU and other international law is increasingly indispensable for the delivery of justice. HMGoG considers that the combined effect of measures currently being considered for the UK's 2014 opt-in relating to surrender and transfer of prisoners will be of particular value to Gibraltar, where some 30% of remand and sentenced prisoners currently held in its prison are EU (non-British) citizens, who might more appropriately be held in their own Member State.

**Judicial cooperation**

**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.**

The nature of cross-border crime is such that an EU framework and the support of, for example, Eurojust are of real advantage in the area of judicial cooperation. On this basis, Gibraltar has welcomed the opportunities provided by the UK's opt-in to certain Lisbon measures as the basis for future cooperation at EU level, building on the real advantages it has already experienced through its participation in measures such as the EAW. This will particularly be the case with the European Investigation Order, which will overtake 'traditional' mutual legal assistance in many cases, and the European Protection Order which will allow for mutual recognition and enforcement of restraining orders, which should be of significant value to Gibraltar given its geographical position and will provide a welcome protection for vulnerable persons; mutual recognition provides a means to cooperate above the detail of differing legal systems with minimum legal process in each Member State. This is an advantage both from a resource perspective in a small jurisdiction and for the speed and mutual confidence with which judicial cooperation can be conducted, enhancing the quality of dispensing justice generally. Gibraltar currently responds to more requests than it needs to make but welcomes the opportunity to provide assistance for the wider benefit of the EU and its Member States.

The operational disadvantages to EU cooperation in this area are 'postboxing' and operational constraints where provisions for eg transit are not provided; this is described in more detail in our reply to question 2. Judicial cooperation is also a specific area where HMGoG would welcome clarity that the measures of cooperation which operate as between Member States operate equally between all parts of the UK and Gibraltar.

**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?**

HMGoG welcomes the creation of clear frameworks for cooperation based on mutual recognition and the establishment of minimum standards to underpin its implementation. Gibraltar has found EU measures of judicial cooperation to be most helpful in providing evidence in a format which is readily acceptable in the legal process and as a common basis for its dialogue with other Member States, especially the new accession countries, where knowledge of each other's systems can be lacking. The EU is the obvious level for such cooperation to be developed, as a corollary to the free movement of persons which all EU citizens enjoy and as an effective multilateral means of cooperation readily accepted by the courts. HMGoG would however welcome the further development of cooperation outside the EU's borders, especially with countries such as the USA, China and Russia, with which Gibraltar is developing its business base, subject of course to suitable safeguards. Given Gibraltar's responsibilities to the Red Ensign Group of Countries and the need to be able to undertake coronial/criminal investigations aboard Gibraltar- flagged ships around the world, judicial cooperation arrangements with the US, Canada, non-EU EEA states, Maghreb and the Caribbean states could also be of value.

Gibraltar also has close links with communities in the Maghreb, given its history and geographical location; more structured means of cooperation with the authorities in that area would be welcome.

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

HMGoG welcomes in particular the incorporation in the TFEU of mutual recognition as the cornerstone of judicial cooperation. Measures which reinforce the nature of different jurisdictions and make objective the way in which Member States should cooperate with each other would in particular for Gibraltar help to make cooperation with Spain easier. Gibraltar supports the principle of greater EU cooperation and would hope that the EU could focus its work on mutual recognition measures in which the UK will wish to participate.

Rather than focussing exclusively on a programme of new initiatives, there could be real value in full review and renewal of key existing measures, to ensure that any weaknesses in provision or changes in requirements are taken into account. Such renewal, based on empirical experience, would serve to reinforce the value of EU cooperation.

HMGoG considers it also important that confidence in the EU is protected by ensuring a balance between measures concerned with the operational delivery of criminal justice and those providing for the treatment of witnesses and protection of victims in the criminal justice system.

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

HMGoG shares the Government's concern that proposed measures such as the European Public Prosecutor and Eurojust contain provisions which would tend to direct investigations in a Member State. It hopes that changes can be made in order to enable the UK to opt in to the Eurojust Directive and that cooperation can be developed on that basis. In other respects, the mutual

recognition approach appears to HMGoG to be a welcome one which, providing that all Member States operate a similar level of safeguards and standards, avoids many of the pitfalls of a harmonisation approach to cooperation.

HMGoG wishes to maximise its operational cooperation within the EU and to demonstrate its commitment to the transparent and effective application of the rule of law.

**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?**

HMGoG would welcome greater consideration and recognition in EU measures of the constitutional arrangements that exist both within Member States with devolved administrations (such as the United Kingdom) and between the Member State and territories (such as Gibraltar) which are not part of any Member State but which are nonetheless territories to which the TFEU applies by virtue of being a European territory for whose external relations a Member State (in the present case, the United Kingdom) is responsible.

In particular, EU measures must respect the competence of authorities set up under domestic constitutional arrangements and not undermine them, whether de jure or de facto, in the performance of their constitutional responsibilities.

The clear way in which to achieve this is by EU measures consistently permitting the establishment of more than one competent authority per Member State so that the constitutional sharing of competences agreed upon domestically are fully respected. This is an extremely important point for HMGoG.

**Policing, customs cooperation 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.**

The opportunities for closer Customs cooperation have been limited by the restriction of the Naples II Convention to those Member States within the Common Customs Area. Against that background, Gibraltar has welcomed the available opportunities for policing cooperation, in particular in the Schengen framework. As a small jurisdiction with a land border with a Member State and with nationals of every Member State crossing the border daily to work in Gibraltar, police cooperation is essential for Gibraltar. Gibraltar's authorities are eager to cooperate and share best practice with Member States. The EU's competence in relation to drugs crime, financial crime and tackling sexual exploitation are among the priorities shared by HMGoG.

Gibraltar has not previously been able to access the various police cooperation IT systems which would facilitate the exchange of information, although this is likely to improve following the UK's 2014 opt-in Decision; it is difficult to measure objectively how disadvantageous this may have been in tackling cross-border criminality but it is inevitable that lack of relevant information may have impacted on certain operations. Gibraltar is committed to the timely and open exchange of

information with the UK and other Member States and the EU framework provides a means to achieve this.

As noted above, the general disadvantage to Gibraltar of EU-level cooperation is the 'postboxing' arrangements which can add to the complexity of cooperation and may discourage some Member States from seeking cooperation in the first place. Better IT links may well mitigate the adverse effects of the arrangements.

**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?**

As with its experience in relation to judicial cooperation, Gibraltar has found EU measures of policing cooperation helpful as the basis for multilateral cooperation to tackle cross-border crime and as the basis for dialogue with other Member States, especially the new accession countries, where contacts may have been fewer in the past. Operational cooperation is essential for an increasing number of investigations and the EU provides both the mechanisms and the overview of joining up separate strands of what can become a single coherent investigation. HMGoG would welcome inclusion in Customs cooperation in criminal matters, where Gibraltar's current position outside the Common Customs Area does not detract from its commitment to combat illegal traffic in goods, particularly drugs. The EU is the obvious level for such cooperation to be developed, as a corollary to the free movement of persons which all EU citizens enjoy. Gibraltar would however welcome the further development of EU cooperation beyond its borders, especially with countries such as the USA, China and Russia, with which Gibraltar is developing its business base and where the need for closer law enforcement cooperation can only increase as a result. Gibraltar also has close links with communities in the Maghreb, given its history and geographical location; more structured means of cooperation with the policing authorities there would be welcome.

**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?**

Within clear EU frameworks which have at their centre respect for human rights obligations, HMGoG is unaware of any particular adverse consequences for individuals. Reciprocity of standards is important when Agreements are concluded with third countries to assure such respect.

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

HMGoG considers it important that EU action focuses on priority areas for policing cooperation, such as tackling drugs and financial crimes, human trafficking and sexual exploitation. As noted in our reply to question 8 above, review and revision of existing key measures could be of real value. The EU might also profitably give greater priority to the increasing threat of IT-based organised crime and focus its attention on relationships with third countries where such ISPs are often based (Russia, China and US as non-exclusive examples). A focus on shared training of law enforcement officers to investigate complicated crimes of this type would support the work of Joint Investigation Teams and maximise the value to be gained from Europol. Gibraltar supports the principle of greater EU

cooperation and would hope that the EU could focus its work on those measures which the UK in particular will feel able to opt in.

**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?**

Uncertainty about the precise nature of future forms of organised crime means that the EU and its Member States need to retain maximum flexibility to respond to the emergence of new phenomena. The way in which IT-based crime, as mentioned above, will develop is a current example. This may well influence the way in which the Government will wish to operate its opt-in.

HMGOG is concerned at the lack of certainty which the UK opt-in process brings to the future of policing cooperation and would hope that it would be able to participate to the maximum possible. It is Gibraltar's wish to demonstrate its willingness to cooperate fully within the EU.

HMGOG recognises however that there is a balance to be achieved and fully supports the Government's reluctance to concede power to EU-level bodies to direct investigations or judicial processes in the UK (and Gibraltar).

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

The reply to Point 10 above on competent authorities is restated.

**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.**

HMGOG fully supports the actions which have been taken at EU level under this heading to tackle the serious criminality associated with sexual exploitation of children and preventing and combating trafficking in human beings and protecting its victims. It is only by taking measures at this level that such criminals can be tackled consistently seriously. Gibraltar criminal law tends to follow the principles of English law and sentencing in the areas of serious crime provided for in the Treaty.

HMGOG agrees with the Government that this is an area where incompatibilities can arise for common law jurisdictions. Nonetheless, providing that there is appropriate approximation of procedural laws to underpin it, mutual recognition provides an effective solution at practical level without the need to harmonise distinct and different legal systems. This both provides reassurance for those involved in proceedings in Gibraltar and for British citizens charged with a criminal offence in another Member State as to what they can expect. The mutual recognition approach to police and judicial cooperation is a real advantage for Gibraltar in enabling cooperation to occur without significant change to its domestic procedures. The principal disadvantage for a small jurisdiction such as Gibraltar is the level of expectation which these measures can bring, especially on matters such as interpretation and translation, where there is limited availability of services to achieve this and



where providing it can take time and become costly. To minimise this risk, the RGP has entered into an agreement with a UK-based company to provide translation and interpreter services 24/7. This is a welcome measure which further enhances Gibraltar's provision of citizens' rights whilst in police custody. The development of greater cooperation between Member States to assist in areas of language may well be a fruitful area for development of cooperation.

HMGOG fully supports the Government in its concerns about the adverse impact of establishing minimum levels of legal aid and assistance, which would not be affordable for a small administration such as Gibraltar.

**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?**

HMGOG sees real value in setting minimum standards in this area as the basis for confidence in mutual recognition and for acceding Member States. Minimum standards also provide a reassurance as to the standards which British citizens can expect if they are involved in any way in the criminal justice system in another Member State. Although HMGOG welcomes the firm stand which the EU has taken on matters of child sexual exploitation and combating human trafficking, it is evident that cooperation needs to extend beyond the EU if this trade is to be tackled effectively. This is particularly the case with crimes facilitated via the internet, where many ISPs operate beyond the reach of the EU. The influence which the EU, based on its own minimum standards, can bring to bear on those third countries where criminals might consider it easier to operate is therefore a priority.

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

As the Government has implied in its call for evidence, it may be preferable for the EU to focus its attention on procedural means of improving cooperation rather than standardisation of criminal law. A focus on developing areas of cross-border crime and means to enable the EU to respond effectively would also be welcome.

**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?**

Gibraltar is a small jurisdiction and while it welcomes minimum procedural standards, the imposition of too heavy a burden of such standards could be costly. It is for this reason that HMGOG supports the Government's approach to certain procedural measures, particularly legal aid, where the proportion of EU national defendants in the Gibraltar courts would make this particularly onerous.

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

The reply to Point 10 above on competent authorities is restated.

## ANNEX

### Statistics - EAWs Received

As recent statistics show (please see table “EAWs Received by Gibraltar” below) the number of EAW requests received average 5 persons a year, that is under 0.02% of the population.

EAWs Received by Gibraltar				
Year	Total Number	Executed & Surrendered	Not Executed	Reason for not Executing & Surrendering
2010	3	0	3	1 - undertaking on speciality not provided. 1 - undertaking on speciality, the translation and an original were not provided. 1 - individual arrested in another MS.
2011	9	6	3	1 - not executed as tried in absentia and no undertaking providing the defendant would be retried and translation was incomplete. 1 - individual arrested in another MS. 1 - individual no longer sought.
2012	5	1	4	1 - extradition ordered but order discharged due to delay in transit issues. 1 - undertakings on speciality not provided and defects and omissions in information provided. 2 - individuals serving prison sentence in Gibraltar or subject of on-going criminal proceedings.
2013	6	2	4	1 - currently serving prison sentence in Gibraltar. 1 - defect in EAW. 1 - query answered, no further action requested. 1 - pending further instructions from MS.
2014 (to end June)	2	0	1	1 - case withdrawn, defect in EAW. 1 - case currently subject to appeal.

## Statistics - EAWs Sent

In comparison the number of EAW requests sent (please see table “EAWs Sent by Gibraltar” below) average 2.25 persons a year, that is under 0.01% of the population.

EAWs Sent by Gibraltar				
Year	Total Number	Executed & Surrendered	Not Executed	Reason
2010	2	2	0	-
2011	3	2	-	1 - unknown
2012	1	1	-	-
2013	3	-	-	2 - in process of issuing 1 - arrested and proceedings are underway
2014 (to end June)	0	-	-	-

**Her Majesty's Government of Gibraltar**  
**23 July 2014**