

BALANCE OF COMPETENCES REVIEW SCOTTISH GOVERNMENT RESPONSE

POLICE AND CRIMINAL JUSTICE

Introductory Remarks

1. The Scottish Government welcomes the opportunity to participate in the Balance of Competences Review. The evidence in this particular area underlines the importance of Scotland's continued place in the European Union. We believe that, where required, reform of the EU is best effected through the existing framework of the EU Treaties and Institutions.

2. The vision set out in the *Justice Strategy for Scotland*¹, published in 2012, is of a justice system that contributes positively to a flourishing Scotland, helping to create an inclusive and respectful society in which all people and communities live in safety and security, individual and collective rights are supported and disputes are resolved fairly and swiftly. European engagement is a key part of ensuring the success of the *Justice Strategy* and Justice and Home Affairs has been identified as one of the priority areas in the *Scottish Government Action Plan for European Engagement*².

3. The implications for Scotland of EU legislation and non-legislative action in this area, particularly how it impacts on our distinct and separate legal system, are an important issue for the Scottish Government. Securing recognition of Scottish interests in Police and Criminal Justice matters is therefore a high priority.

4. Finally, the Scottish Government believes that it is not possible to give a full assessment of the Acquis in this area without consideration of pre-Lisbon Treaty measures. This is recognised in the discussion in Chapter One, which refers to the development of the police and criminal justice competence "over the years". In order to evaluate the post-Lisbon Treaty base, it is also necessary to consider its history and antecedents, and to recognise the considerable impact from earlier Treaties, particularly Amsterdam.

Chapter One – Policy Context

5. EU competence in the area of Freedom, Security and Justice has become essential given the development of the internal market, which has resulted in freedom of movement and the creation of a "common space". For the effective cross border functioning of the police and judicial authorities within this common space, the European Union is required more than ever to play an active role through legislative and non-legislative means.

6. The Treaty on the Functioning of the European Union (TFEU) was an important evolution in the development of competence in Justice and Home Affairs. The

¹ Justice Strategy for Scotland (2012): <http://www.scotland.gov.uk/Publications/2012/09/5160/downloads#res-1>

²For more information, see Action Plan for European Engagement retrieved on 02/07/14 at <http://www.scotland.gov.uk/Topics/International/Europe/Our-Focus/Action-Plan>

majority of the Justice and Home Affairs dossiers are now dealt with through ordinary legislative procedure. This has led to a more transparent decision making process, as draft proposals are subject to greater public scrutiny through being available to the European Parliament.

7. The use of qualified majority voting in most 'Title V' matters also has the potential to result in a higher quality of legislation, which can bring added value to Member States' Criminal Justice systems. The previous Justice and Home Affairs legal base, which required unanimity, sometimes led to time consuming negotiations which produced little end product. For example, the European Evidence Warrant, which took three years to negotiate, was only implemented by five Member States³ and has now been replaced by the European Investigation Order Directive. The current legal base provides more incentive for Member States to thoroughly consider implementation throughout the negotiation process, which may lead to more effective legislation.

8. The Lisbon Treaty also broadened the European Union's competence in Freedom, Security and Justice. For example, Article 82 (ex TEU 31) confers on the EU new competence to facilitate mutual recognition in the admissibility of evidence, the rights of individuals in criminal procedure and the rights of victims. Article 86 confers the right to establish a European Public Prosecutor's Office to combat crimes affecting the financial interests of the Union.

9. It is also important to recognise that the Lisbon Treaty promotes important safeguards for Member States' national law. For example, Article 68, new to the Lisbon Treaty, ensures that Member States, through Council, can define strategic guidelines for legislative and operational planning within the area of Freedom, Security and Justice. Under Article 86, the European Public Prosecutor's Office can only be established after unanimous agreement by Member States, through Council, and consent of European Parliament. Article 82.3 establishes an emergency brake procedure applicable to the new areas of competences in 82.2, which Member States can use if a draft directive "would affect fundamental elements of its criminal justice system". The same applies in Article 83.3 in respect of proposals brought forward under Article 83.1 and 2. We also welcome that Article 82.1 enshrines the principle of mutual recognition within the Treaty base, following the historic agreement at the Tampere Council that it "should become the cornerstone of judicial co-operation"⁴.

10. The Scottish Government therefore believes that, although EU competence has developed in the area of Police and Criminal Justice, there are safeguards to ensure respect for Member States' national law. This is all underpinned by Article 67 (ex TEU 29) which states that "the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and different legal systems". It is therefore the Scottish Government's view that, in principle, the current Balance of Competences in Police and Criminal Justice is at an appropriate level.

³ Source: *European Judicial Network Forum*, retrieved on 24/06/14 at http://www.ejforum.eu/status_table.php?instrument=1363

⁴Source: *Tampere Council European Council Conclusions*, retrieved on 07/07/2014 at http://www.europarl.europa.eu/summits/tam_en.htm#union, paragraph 33

11. The Scottish Government considers however that it is important to maintain an additional safeguard in respect of the distinct Scottish legal system and therefore supports the principle of the opt-in which the UK currently enjoys. The Scottish Government believes that retaining this flexibility strikes the right balance between protecting the interests of Scots law, while seeking to participate in as many EU measures as possible.

12. Finally, as the overall Acquis Communautaire in Police and Criminal Justice is now extensive, the Scottish Government considers that it is time for a period of consolidation and review of existing legislation in order to ensure effective implementation that brings real benefits to all European citizens. This could include for example an assessment of 3rd Pillar measures to determine which are defunct.

13. With regard to questions 1, 4 and 5 in Chapter One, in the Scottish Government's view there is a considerable body of empirical evidence which clearly shows that the development of EU police and judicial co-operation over the years has led to (a) improved cross-border co-operation, (b) helped the effectiveness of law enforcement and (c) benefitted the Scottish criminal justice system. This evidence is presented below.

14. The Scottish Government believes the European Arrest Warrant (EAW) has contributed significantly to the effective administration of justice in Scotland and that it has been an effective tool in contributing to public safety, both within Scotland and the EU, where free movement requires closer co-operation between justice systems.

15. In evidence to the House of Lords Inquiry on the 3rd Pillar opt out, the Lord Advocate testified that "the EAW is the success story of all the measures [within this opt out decision]"⁵. It is a frequently used and effective tool for incoming and outgoing extradition requests. For example, in 2013, 149 European Arrest Warrants were received by the Crown Office and Procurator Fiscal Service (COPFS) and 25 EAWs were issued. The average extradition process required 97 days, which is a significant reduction from the time it would have taken under the 1957 Council of Europe Convention on Extradition. A current comparison can also be drawn with extraditions from a non-EU states, which take approximately 10 months⁶.

16. The European Arrest Warrant has played a crucial role in Scotland in the extradition of those suspected of serious criminal offences such as murder, rape and drug trafficking. For example, in 2008 Marek Harcar was arrested within one day of the issuing of the extradition request and was returned swiftly to Scotland from Slovakia to face justice for the murder of Moira Jones. In 2012, Grzegorz Gamla was arrested for the murder of Maciej Ciana within 5 hours of a warrant being issued and returned from Poland to Scotland to stand trial.

⁵ Source: "UK's 2014 Opt-Out Decision ('Protocol 36') Oral and Written Evidence", House of Lords European Union Committee, <http://www.parliament.uk/documents/lords-committees/eu-sub-committee/Protocol36OptOut/VolofevidenceP36asat250313.pdf>, p.143

⁶ Source: "Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision", Ninth Report 2013/14, Home Affairs Committee, retrieved on 02/07/14 at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/615/615.pdf>, p.5

17. As outlined in a report compiled by the organisation JUSTICE, COPFS noted that it “receives relatively few EAWs seeking surrender for trivial offences”⁷. The Scottish Criminal Justice system has therefore not encountered the problems of proportionality reported in England and Wales.

18. Prisoner transfer is covered by Council Framework Decision 2008/909/JHA, which applies the principle of mutual recognition to judgments in criminal matters imposing custodial sentences. The instrument came into force on 5 December 2011. The Framework Decision has not yet been extensively used by the Scottish Prison Service, as not all Member States have implemented it, but we envisage that that it will become a useful instrument. The Scottish Prison Service holds around 190 prisoners from other Member States. The numbers held are small but are not unexpectedly increasing. Given this increase, we expect the Framework Decision to be a valuable tool for intra-EU prisoner transfer for the purpose of sentence enforcement in future.

19. Framework Decision 2009/316/JHA on the establishment of the European Criminal Records Information System (ECRIS) has been a big development in the field of criminal record exchange. Action at EU level has a positive impact, as an individual’s previous offending in another Member State may have significant impacts on their sentencing for a crime committed in the UK. It is therefore clear that, for some individuals, this information is of paramount importance.

20. In Scotland when a person appears in solemn proceedings (*the most serious cases*) on an offence of violence, sexual offence or drug trafficking offence, the test for the grant of bail is higher if the person has a previous conviction on indictment for an offence of violence, sexual offence or drug trafficking. The previous conviction can be from anywhere in the UK or EU, making ECRIS particularly important for the functioning of the Scottish Criminal Justice System.

21. There are many instances where ECRIS has been effectively used by the Scottish law enforcement community. For example, a criminal history check on a suspect in a murder enquiry using ECRIS revealed a previous murder conviction and undoubtedly gave weight to his sentence once convicted of the murder in Scotland. The accused was a Lithuanian national and the previous murder had taken place in Germany. Germany had advised Lithuania of the conviction and had it not been for the notification of convictions to the home country, the Scottish authorities would not have known to approach Germany for information about the previous conviction. The defendant is now serving a life sentence with minimum sentence to be served.

22. ECRIS has also been useful in other law enforcement contexts. For example, a Romanian national came to police attention after being charged with shoplifting. Through ECRIS, it was discovered that he had committed similar offences throughout the UK and had convictions for rape and robbery in Romania. He is now registered as a sex offender and is being monitored by an English force. The information that can be gained through ECRIS can also be invaluable for risk management processes of some individuals living in the communities of Scotland.

⁷ Source: *European Arrest Warrants: Ensuring an Effective Defence*, JUSTICE, 2012, retrieved on 24/06/14 at <http://www.justice.org.uk/data/files/resources/328/JUSTICE-European-Arrest-Warrants.pdf>, p.150

23. The information shared between Member States is important to ensure that those individuals who have offended out-with Scotland can be effectively managed and all aspects of their previous offending known to ensure that the risks an individual presents are identified. It is difficult to envisage a more efficient method of doing this work and police officers in Scotland are becoming increasingly aware of this important instrument.

24. Framework Decision of 2005/214/JHA on the Mutual Recognition of Financial Penalties has had an important impact on the enforcement of fines. The Decision enables more effective punishment of crime by ensuring that fines may be collected from offenders anywhere in the EU, and thereby contributes to the deterrence of crime.

25. It is not only the additional revenue which is valuable, but the ability to ensure that fines imposed in Scotland can actually be collected from criminals who go abroad. This gives credibility to the justice system both for the individuals concerned and for the public as a whole. The justice system would be impaired where penalties might be imposed by the court with no obvious prospect or avenue of recovery when the offender is, or has moved, abroad. More intensive use is expected now that Member States have implemented the provisions and are becoming used to operating them.

26. The Scottish Government assesses that UK accession to the Schengen Information System II (SIS II) will bring considerable benefit. Participation will considerably widen the access that Scotland's law enforcement community has to European Arrest Warrants. A further benefit is the added functionality of being able to share real-time information through the "Alert" mechanism and also additional information such as biometric data and photos, which has the potential to greatly improve cross-border police and judicial cooperation within the Schengen area.

27. When SIS II was launched in April 2013, over 45 million alerts were loaded onto the system. The largest number of alerts concern lost or stolen documents (over 39 million) and stolen vehicles (about 5 million)⁸. We therefore hope that the system will also facilitate the recovery of lost or stolen items.

28. Police Scotland also utilise Article 40 of the Schengen Convention, which provides that where law enforcement officers of a Schengen State are keeping a person under surveillance because he is suspected of an extraditable offence or because there is reason to think that he can assist in identifying or tracing such a person, they may expect assistance with the continued surveillance of that person in another Schengen State in the event that he crosses the border into that State.

30. Asset recovery legislation at European level has also added value to the Scottish Law Enforcement community, particularly the Council Framework Decision 2007/845/JHA concerning cooperation between Asset Recovery Offices of the Member States. The instrument is used by Police Scotland's Asset Recovery Office.

⁸ Source: European Commission, Memorandum 09/04/13, [http://europa.eu/rapid/press-release MEMO-13-309_en.htm](http://europa.eu/rapid/press-release_MEMO-13-309_en.htm)

A particular benefit of the Framework Decision is its regulation of time limits for responses. In the last few years, there has been a significant improvement in response times and results coming back from other Member States due to carefully crafted relationships with the relevant authorities within the ARO networks. The legal instrument has therefore provided real added benefits, as the Proceeds of Crime Act 2002 is limited in terms of international reach.

31. An example of the effective use of ARO networks took place in April 2013, when contacts assisted the former Lothian & Borders Police to identify at an early stage a Polish individual suspected of committing a murder in Edinburgh. ARO checks also identified substantial properties throughout Europe which were restrained for recovery.

32. Throughout the UK, Scottish law enforcement is able to establish a Joint Investigation Team with any EU Member State. UK police forces can receive funding from Eurojust's JIT fund and as of 1 September 2013, Eurojust committed itself to continuing the financing of JIT activities from within its regular budget. In the 2012-13 reporting period, 102 JITs were supported by National Members, of which 42 were newly created in 2013⁹. JITs have proven a valuable tool and could be even more valuable in future given the new provisions made by Eurojust.

33. JITs enable law enforcement agencies to identify, investigate, disrupt and prosecute individuals within the organised crime group identified. They achieve this by confiscating criminal assets, facilitating the gathering, exchange and use of law enforcement intelligence and evidence, and agreeing an investigation and prosecution strategy. The appropriate jurisdiction for any proceedings can also be assessed with the support of Europol and Eurojust.

34. Scotland has also benefited from proposals such as the Joint Action 96/277/JHA on liaison magistrates. The task of liaison magistrates is to encourage and accelerate all forms of judicial cooperation in criminal and, where appropriate, civil matters, in particular by establishing direct links with the relevant departments and judicial authorities in the host state.

35. COPFS has, for example, obtained assistance with proceedings from Spanish authorities through a liaison magistrate. This has included contribution to the highly successful Operation Captura¹⁰ organised by Crimestoppers, the UK Embassy in Madrid and the former Serious Organised Crime Agency. COPFS together with the liaison magistrate identified and provided details of those accused of crime and for whom both domestic arrest warrants and European Arrest Warrants had been issued. Four individuals sought in Scotland were arrested and their return to face trial was facilitated through this route of co-operation. Regarding extradition cases, due to their location in the executing State, with contacts and language skills, magistrates also facilitate direct enquiries or requests speedily and effectively to the

⁹ Source: *Eurojust Annual Report 2013* retrieved on 02/07/14 at <http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202013/Annual-Report-2013-EN.pdf>, p.8

¹⁰ For more information, see Crime Stoppers, retrieved on 24/06/14 at <https://crimestoppers-uk.org/get-involved/our-campaigns/international-campaigns/operation-captura/>

correct official. This measure also illustrates that highly effective EU co-operation can be facilitated without resort to burdensome legislation.

Chapter Two – Judicial Cooperation

36. The Mutual Legal Assistance agreements that the EU has negotiated with Japan and the United States have ensured a comprehensive system for allowing evidence located in one country to be sought and used in criminal proceedings in another. The EU has particularly added value with the MLA agreement with Japan. If the EU had not negotiated this agreement on behalf of Member States, it is unlikely that formal arrangements would be in place, as there was no prior bilateral agreement between Japan and the UK.

37. We greatly value that Mutual Legal Assistance agreements have built in safeguards to protect fundamental elements of our justice system. For example, Article 11 (1) (b) of the mutual legal assistance agreement with Japan makes it clear that any request for assistance could be refused in a case where the death penalty may be imposed. The agreement reflects the important balance between defending our values and assisting in the fight against transnational and international crime.

38. COPFS is currently using the EU-Japan MLA agreement to obtain evidence for use in Japan in relation to alleged bribery of a public official, and also uses the EU-USA MLA agreement regularly. For example, Crown Office officials may be asked to obtain evidence from social media networks. As these companies are often based in the USA, evidence is gathered through this legal route. Evidence of this type was vital in a recent case when an admission to murder on Facebook showed the necessary mens rea to prove guilt for murder, and also in another case in confirming a sexual predator had approached females on Facebook with a view to grooming them. COPFS has also processed incoming requests through the MLA agreement in relation to a case involving a share price manipulation scheme, and another involving alleged trading with firms in contravention of UN Sanctions.

39. However, with regard to external agreements the Scottish Government's position is that Article 4 (2) (j) TEU, which states that the area of Freedom, Security and Justice is a shared competence, must be respected when the EU seeks to exercise external competence through Article 3 (2) TEU. Extensive consultation with Member States must be undertaken when the EU decides to exercise its external competence.

40. Article 86 confers on the European Union competence to establish a European Public Prosecutor's Office (EPPO) to protect the EU's financial interests. The Scottish Government believes it incontestable that actions need to be taken to address EU fraud. A European Commission impact assessment identified fraud of about £425 million in each of the last three years was actually the tip of a £2.55 billion iceberg¹¹.

¹¹ Source: European Commission Memorandum, 11/07/12, retrieved on 02/07/14 at http://europa.eu/rapid/press-release_IP-12-767_en.htm

41. However, the correct course of action, in line with the principle of subsidiarity under Article 5 TEU, would be to recognise that some Member States are currently more effective in tackling EU fraud than others. In 2011, the Commission suggested that national prosecution authorities had conviction rates of between 14 and 80 per cent for cases that the European Anti-fraud Office—OLAF—transferred¹². It is therefore clear from the Commission's figures that some Member States are achieving high prosecution rates. We are therefore concerned that a jump be made directly to a supra-national agency with extensive and harmonised powers. No effort has been made to consider whether other means, such as prevention at source in Member States or more effective enforcement by the Commission might also be effective.

42. The role of the Lord Advocate in Scotland's Criminal Justice system is fundamental to our position on the EPPO. Decisions by the Lord Advocate are to be taken independently of any other person. The implications would essentially be that he would no longer be the sole authority at the head of the system of criminal prosecution as provided for in the Scotland Act, which secures the independence of the Lord Advocate as well as the basis upon which the Lord Advocate is appointed and can be removed.

43. The Scottish Parliament share these concerns regarding the subsidiarity principle and the role of the Lord Advocate. Consequently, the Scottish Parliament's first motion regarding subsidiarity, stating that "EPPO does not comply with the principle of subsidiarity"¹³, was passed on Thursday 5 September 2013.

44. We believe that current instruments and structures in place, for instance OLAF, could be used to greater effect than they currently are, which could achieve the desired result without the need for such drastic and far reaching proposals. Member States do take action on OLAF cases reported to them but many are not raised criminally due to perceived evidential difficulties. Greater engagement by OLAF with relevant authorities at an earlier stage and, in cross border cases, with the use of already available instruments could achieve the desired results set out for the European Public Prosecutor's office.

45. Along with the EPPO proposal, the Commission has, in July 2013, proposed a new Regulation to replace the current Eurojust Council Decision. This is in part because the Treaty requires the EPPO to be established from Eurojust, but more generally the need to establish the potential relationship between any EPPO and Eurojust. However, the Commission has also sought to make a number of other changes, for example, to increase the powers of national members.

46. The Scottish Government believes that Eurojust is successful; as is reflected in its recent annual report—its 11th—in which the organisation is said to have "reached

¹² Source: *COMMUNICATION FROM THE COMMISSION: On the protection of the financial interests of the European Union by criminal law and by administrative investigations: An integrated policy to safeguard taxpayers' money* retrieved on 02/07/2014 at http://ec.europa.eu/justice/criminal/files/comm_pdf_sec_2011_0621_f_en.pdf, p.7

¹³ Source: Official Report, 05/09/13, retrieved on 02/07/13 at <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9021&mode=html>

'cruising speed'¹⁴. The central role of Eurojust is to provide essential support in potentially complex cases involving multiple jurisdictions. Ad-hoc arrangements would not have been as efficient in cases such as ensuring an agreement was reached between France and Spain on the return of a terrorist suspect, the sharing of evidence regarding Human Trafficking and a multilateral bribery case involving four separate jurisdictions.

47. Evidence of Eurojust's success can be seen in its increased use. The number of cases where Member States requested Eurojust's assistance in fighting serious cross-border crime increased 14%, from 1,372 cases in 2009 to 1,576 cases in 2013¹⁵. Moreover, there has been an increase in Eurojust's use in every year of its existence.

48. COPFS actively contributes to Eurojust in its current form. An Assistant National Member has been appointed from COPFS and Scotland engages in the Eurojust National Correspondent Scheme (ENCS). A legal manager from the International Cooperation Unit of Crown Office attends The Hague on a regular basis to attend to all Scottish cases at Eurojust. COPFS also sends trainee solicitors on rolling three month placements to The Hague as an intern to the UK desk. They ensure COPFS are alerted to all Scottish cases raised at Eurojust, where they are dealt with either remotely at Crown Office or during the attendance of the legal manager.

49. Eurojust has provided real added value to Judicial Cooperation in Scotland. For example, Eurojust was invaluable in the case of Anna Tothova and Atilla Lakatosova, who were smuggled into Scotland in a bid to force Miss Tothova into a sham marriage. Witnesses were cited from the Slovak Republic, who initially advised that they were happy to travel to give evidence. However, they changed their minds 2 weeks prior to the trial and requested to give their evidence by Video Conference. The provision of video link evidence is regulated by the 2000 European Union Convention on Mutual Legal Assistance in Criminal Matters and a great deal of assistance was given in the facilitation of the Video Conference by Eurojust. The Video Conference simply could not have taken place in the timescales without the assistance given by Eurojust and was extremely valuable to the prosecution.

50. With regard to Commission's proposed Regulation on Eurojust, the Scottish Government outlined its concern to the Scottish Parliament Justice Committee on 3 September 2013 that no effort had been made to establish whether the objectives could be better achieved by continuing with the existing arrangements, which respect national and local jurisdictions more. Any proposed reformed version of Eurojust, in which the agency could act independently from national prosecutors, would breach the principles of proportionality. It would also undermine the current balance of competence which is working well for Member States.

¹⁴ Source: *Eurojust Annual Report 2012* retrieved on 02/07/14 at <http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202012/Annual-Report-2012-EN.pdf>, p. 7

¹⁵ Source: *Eurojust Annual Report 2013* retrieved on 02/07/14 at <http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202013/Annual-Report-2013-EN.pdf>, p.56

51. We were also surprised that the Commission offered no bespoke impact assessment for the proposal and stress the need that thorough assessment is undertaken to ensure that all Justice and Home Affairs dossiers add value to Member States' Justice Systems.

52. The European Investigation Order will create a single platform for obtaining evidence in criminal proceedings and in doing so, will replace the existing patchwork of provision in this area, including the European Evidence Warrant, which is considered ineffective.

53. We believe that the EIO will improve cross-border efficiency of Member States in a number of ways: the creation of a standardised request form, formal deadlines for execution of requests, limited grounds for refusal and putting the mechanics in place to transmit, receive and execute requests. This will contribute to one of the aims of our *Justice Strategy* to ensure "our institutions and processes are effective and efficient"¹⁶.

54. We also value the number of important safeguards which allow EIOs to be refused, for example, where investigation measures do not exist or would not be available in Scotland, except with regard to certain evidence already in the possession of the executing authority, or with regard to non-coercive measures; on double jeopardy grounds; and where there is a request for a coercive measure in relation to conduct which is not a crime in Scotland, unless with regard to an agreed list of particularly serious offences. We welcome that Member States have been given three years to implement this Directive. Whilst COPFS and Police Scotland already operate in a manner consistent with the Directive, the timeframe will allow us to consider all the options for an effective implementation which will deliver real benefits to the Scottish Criminal Justice System.

55. The Scottish Government welcomes agreement of the European Protection Order Directive, along with its civil law counterpart. Although this measure is pending implementation across the EU, we are clear that, as with the Victims' Directive, this is an area where the EU can add value, in this case in relation to providing assistance to vulnerable persons in cross border situations, particularly individuals who may be subject to domestic abuse. This is a complex area of law, covering both civil and criminal proceedings, which the Scottish Government is assessing carefully to give best effect across all areas of law.

56. Partly in relation to question 8, but also more generally the Scottish Government believes that judicial co-operation could be impacted on positively by non-legislative initiatives as well as legislative measures. EU legislation should not necessarily be the first port of call. The EU could for example seek to work co-operatively with the Council of Europe (CoE), particularly where the CoE is already recognised as leading the field. This would both avoid duplication and obviate the need for further EU specific provision, particularly for example in matters where EU legislative competence may be in doubt and where there is high risk that negotiations become enmeshed in time consuming and potentially intractable legal debates.

¹⁶ Source: *The Strategy for Justice in Scotland*, Scottish Government, published 12 October 2012, retrieved on 24/06/14 at <http://www.scotland.gov.uk/Resource/0040/00401836.pdf>, p.5

57. Finally, in relation to the new EU Funding Programmes, the Scottish Government regrets and disagrees with the UK Government decision not to opt in to either the Justice Programme or the Internal Security Fund dealing with police co-operation, crime prevention and crisis management. In order to give access to potentially significant cross border collaborative projects to Scottish and UK stakeholders, we urge the UK Government to opt in post adoption.

Police Cooperation

58. The Scottish Government supports the role of Europol in assisting Member States' competent authorities in the fight against organised crime, other forms of serious crime and terrorism. It plays an effective role through providing analytical support, enabling law enforcement information exchange and producing threat assessment. We are therefore assessing carefully the Commission proposed Regulation of March 2013, which suggested various innovations to its set up and role as part of the process of 'Lisbonisation'. Amongst these were the proposed merger with Cepol, the EU police training agency, which has been subsequently dropped, and enhanced provision of information from national authorities. The Scottish Government would be concerned if the current balance between national law enforcement and Europol were disrupted by any new measures.

59. Police Scotland currently has an officer based in the Europol Liaison Office in the Hague which allows our police services to access information from other European countries and vice versa, which would be very difficult to replicate on a bilateral basis. This direct access has allowed police in Scotland to work in partnership with several European countries resulting in seizures of drugs and arrests in Spain, Italy, France, Portugal, The Netherlands and Bulgaria and identify links between Scottish crime groups and criminals in Spain, Romania, Albania, The Netherlands, Bulgaria, Portugal and Germany. Europol also facilitates the personal relationships with law enforcement agencies throughout Europe which are key in tackling cross border crime.

60. From April 2013 to March 2014, Police Scotland used Europol extensively – 1,144 messages were sent to and from other countries at Europol relating to 160 different cases.

61. Finally, the Scottish Government recognises that a legislative framework may be needed to facilitate police co-operation, such as with regard to Europol. However, non-legislative measures are also welcomed as useful tools. A good example is the new EU Organised Crime Policy Cycle, which seeks to put co-operative action in these matters on a more rigorous footing, for example through a more limited but better planned series of Operational Action Plans (OAP) within set time frames (the current cycle is 2014-17) with periodic progress reviews and end term analysis of achievements, which aim to inform better planning for the next cycle. This new approach is still bedding in, but the Scottish Government supports, for example the inclusion within current OAPs of measures countering human trafficking and child sexual exploitation.

Criminal Procedure

62. The development of EU competence in criminal procedure has come at an important juncture for the Scottish Criminal Justice system. The case of *Cadder vs. HM Advocate* brought criminal procedure in Scotland under great scrutiny. This led to the Scottish Government's decision to commission Lord Carloway's review into criminal law and practice, which was published on Thursday 17 November 2013¹⁷.

63. The Scottish Government considers the Procedural Rights Roadmap to be a positive development in principle, with its objectives of seeking to ensure suspected persons across the EU have certain basic rights in criminal procedure. Overall, the Roadmap seeks to ensure a level of provision across Member States, helping to guarantee access to fundamental rights and provide a balance to the significant development of law enforcement co-operation and mutual recognition of judicial decisions which has taken place over recent years.

64. However, attempting to harmonise minimum standards in criminal procedure over 28 Member States is evidently a complex task, and presents a considerably greater challenge than harmonising substantive law. There may, for example, be differences between adversarial and inquisitorial approaches, and between 'common' and 'civil' procedure in specific cases such as when certain matters are taken to court and the role of police, prosecution, judiciary, juries and defence agents in such processes. This means that individual measures need to be carefully prepared by the Commission, and to take full account of Articles 67 and 82(2) TFEU, which stipulate respect for the different legal systems and traditions of the Member States.

65. The starting position of the Scottish Government is a strong desire to opt in whenever possible to all new proposals, preferably at the outset, but where not, to seek a successful resolution of outstanding issues with a view to opting in post adoption. It is therefore with some regret that Scottish Ministers have supported the decision not to opt-in initially to certain Procedural Rights Roadmap measures. This decision was reached because certain aspects of the draft Directives as tabled by the Commission gave cause for concern in the specific case, and sometimes significantly so.

66. In his review, Lord Carloway outlines that:

*"The underlying and long-lasting implication of Cadder is that the system must fully embrace and apply a human rights based approach. This is not to say that it must adhere to a standardised Convention compliant template and abandon all traditions that have developed over centuries. But in promoting further evolution of a system, which should remain specifically designed for Scottish society, a more conscious application of the express and implied rights of the Convention is required."*¹⁸

Carloway's following recommendations have informed our approach to the Procedural Rights Roadmap, as we aim for a balanced approach to criminal procedure which works well for Scotland within the broader framework of the

¹⁷ For full report, see Carloway Review, retrieved on 24/06/14 at <http://www.scotland.gov.uk/About/Review/CarlowayReview> , p.2

¹⁸ Ibid., p.2

European Convention on Human Rights. This position has been reinforced by the Human Rights Act 1998, which incorporates into Scots law the European Convention on Human Rights, including its requirements that trials be fair.

67. The concern on the part of Carloway to observe the European Convention reflects a particular problem for the Scottish legal system. Under the Scotland Act 1998, the legislation of the Scottish Parliament and the acts of the Scottish Ministers must comply with the Convention, or they are a nullity. It was this effect of the decision in *Cadder*, nullifying the existing Scottish practice on police interviews, which was so disruptive, requiring emergency legislation and immediate changes of practice, and undermining hundreds of on-going prosecutions and convictions.

68. In relation to the matters covered by the draft Directive on Rights of Child Suspects, the Scottish Government has adopted a balanced approach to the safeguards for those young people aged 16 and 17 years in the justice system.

69. Whilst it might appear attractive to treat all individuals under 18 years in exactly the same way, the age-based laws which allow for a sixteen year old to be living independently and married, and have children of their own, reflect the quite different contexts and degrees of self-determination that can exist between children under the age of 18 years. Our position is that our policy of a scaled approach to those young people aged 16 and 17 years is consistent with the objectives on the United Nations Convention on the Rights of the Child (UNCRC).

70. We believe strongly that the youth justice system in Scotland is fair and provides for the appropriate level of protection for children. This is being augmented by the safeguards being delivered by the Criminal Justice (Scotland) Bill. The wider protections for children are also encapsulated in the Children's Hearing System and have been further strengthened in the Children and Young People (Scotland) Act 2014.

71. With regard to the Access to a Lawyer Directive, certain aspects of the draft Directive gave cause for significant concern. Particular concerns arose such as at which point legal access was to be provided; the requirement for a lawyer to be present during certain evidence-gathering acts (e.g. searches); its operation for minor offences; inflexibility where access might permit destruction of evidence; and an absolute ban on admissibility of evidence obtained in breach of the Directive. The Criminal Justice (Scotland) Bill will however provide a person with a right to legal advice and to have their deprivation of liberty intimated to a third person in a manner which is broadly consistent with the aims of the Directive.

72. Regarding the proposal for a Legal Aid draft Directive, legal aid provision in Scotland is very comprehensive and the Scottish Government is committed to maintaining the current wide scope of matters that it covers. We therefore believe that we are already compliant with the majority of the provisions of the proposed Directive.

73. With regard to the Directive on Interpretation and Translation in Criminal Proceedings, such provision for persons who would otherwise be unfairly disadvantaged because they do not understand or speak English, has long been

considered essential in Scotland. Although the language of the Directive presented challenges, transposition and implementation have brought the added benefit of transparency.

74. With regard to the Right to Information, the Directive's aims have complemented our own policy objectives in this field. For example, the Letter of Rights stipulated in Article 4 of the Directive was also a recommendation of the Carloway Review. In July 2013, a non-statutory Letter of Rights, available in 34 languages, was introduced which conveys information about the right of access to a lawyer, and is provided to every suspect who is in a police station¹⁹. The transposition of this Directive in June 2014 added value by putting the Letter on a statutory footing and following extensive stakeholder engagement, officials are now considering whether amendments should be made to further improve the accessibility the Letter of Rights.

Substantive Criminal Law

75. We support EU action to combat serious crime, which often has transnational and international elements. The closed list of serious crimes covered by Article 83.1 TFEU clarifies any potential ambiguity over where the EU has competence in this field. In contrast, the previous Amsterdam Treaty base was interpreted as an open list through Article 29 TEU, which only referred to certain crimes "in particular" as opposed to establishing a close-ended list. Treaty revision has therefore added significant value in this area. Similarly, the Scottish Government welcomes the inclusion within Title V of Article 83(2), which provides for approximation of criminal law where essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures. This guarantees that such measures are discussed and assessed by criminal law experts.

76. When EU action is proposed under Articles 83.1 and 83.2 TFEU, the specific actions can often include proposals that do not fit within the normal approach taken in Scots law. For example, it is important to also underline that we have not generally been supportive of proposals to introduce mandatory minimum sentences. In Scots law, sentencing in individual cases is a matter for the judge to determine, taking account of all the facts and circumstances of that case. The role of the Government is to set out the sentencing framework, including the maximum penalties for statutory offences. Mandatory minimum sentences would place limits on the discretion of judges to pass sentence based on the facts of the individual case in front of them and run counter to the long established principle of judicial independence. We would be concerned if any EU legislation required minimum mandatory sentences to be transposed into national law.

77. The Scottish Government disagreed with the UK Government's initial decision not to opt into the Human Trafficking Directive, stating that to do so would be seen as weakening the UK stance against human trafficking. Human Trafficking is a key concern for the Scottish Government; the Cabinet Secretary for Justice is a member of the Inter-Departmental Ministerial Group on Human Trafficking.

¹⁹ To view the Letter of Rights, please see <http://www.scotland.gov.uk/Resource/0042/00426560.pdf>

78. We welcomed the decision by the UK Government when it decided to opt into this Directive post-agreement. The Criminal Justice and Licensing (Scotland) Act 2010 had gone further than the minimum standards for criminal law set out in the Directive and we are content that minimum standards throughout Europe are rising.

79. Regarding the Sexual Exploitation of Children Directive, we agreed with the UK Government's decision to opt into the Directive. A response at a European level was required to deal with new forms of abuse and sexual exploitation of children caused by the misuse of the Internet and communications technologies.

80. The Directive also builds on the 2007 Council of Europe (CoE) Convention on the Protection of Children against Sexual Exploitation, which the UK has signed and not yet ratified. It also mirrors what we are doing at a domestic level through the Sexual Offences (Scotland) Act 2009 and the establishment of Child Protection Committees.

81. We did however have some challenges due to the drafting of the Directive. For example, Article 3 (5) states that:

“abuse is made of a particularly vulnerable situation of the child, in particular because of a mental or physical disability or a situation of dependence, shall be punishable by a maximum term of imprisonment of at least 8 years if the child has not reached the age of sexual consent, and of at least 3 years of imprisonment if the child is over that age.”

While criminalising sexual activity with a child under the age of consent is straightforward, defining what is meant by a “particularly vulnerable situation of the child” or a “situation of dependence”, outlined in Article 3 (5), was challenging. It was not clear exactly what conduct this was intended to criminalise, over and above sexual activity with a child who is under the age of consent, sexual activity with a child which takes place without that child's consent, or sexual activity between a child and a person in a recognised position of trust, as the terms “situation of dependence” nor “vulnerable situation” are not defined anywhere in the Directive. It was difficult to ascertain if we already complied fully with the Directive through the Sexual Offences (Scotland) Act 2009, the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 and the Civic Government (Scotland) Act 1982. After careful consideration, the view was taken that compliance was assured through the Sexual Offences (Scotland) Act 2009. Specific definitions of both terms however would have helped to ascertain exactly what is required for Member States to comply with the terms of this Article.

Victims' Rights

82. We welcome the European Commission's focus on victims' rights. The Scottish Government has a longstanding interest in victim support; the first *Scottish Strategy for Victims* was published in 2001²⁰ and in 2004 a highly regarded Victims Notification System was established, which gives victims the right to receive

²⁰ For view the Strategy, please see <http://www.scotland.gov.uk/Publications/2001/01/7963/File-1>

information about the relevant offender's progression within prison and eventual release. In addition, we currently provide more than £4 million each year to support victims' organisations such as Victim Support Scotland.

83. The Victims Directive, published in October 2012, ensures that victims across Europe receive the high quality support that we value in Scotland. The Victims and Witnesses (Scotland) Act 2014, which gained Royal Assent on 17 January 2014, also addressed requirements of the Directive.

Concluding Remarks

84. The Scottish Government is supportive in principle of the European Union having competence in the area of Police and Criminal Justice. Action at a European level makes sense in the coordination of national law enforcement agencies and judiciaries throughout the common space that the Schengen Convention and successive European Treaties have created.

85. We believe that there has been a real benefit to citizens through the participation in practical Police and Criminal Justice Cooperation. The examples above outline that European legislation has played a key role in tackling serious crimes such as murder, rape and drug trafficking in Scotland.

86. We acknowledge that there have however been some criminal law proposals under Title V TFEU which would not have translated easily into Scots law. The European Public Prosecutor's Office is a good example.

87. With regard to the next Justice and Home Affairs Programme, after more than 15 years of developing the area of 'Freedom, Security and Justice', mainly through mutual recognition initiatives and with a focus on legislative measures, it is perhaps timely for the EU to pause and reflect on progress. Whilst further legislation may be justified, it should not be the automatic first choice without considering beforehand whether equally effective measures could be put in place on a co-operative basis, perhaps more quickly than would be the case with legislation. Where new legislation is desired, it should always be accompanied by rigorous impact assessments.

88. It is important to reflect that Article 67, which sets the scene for Title V measures, provides that the Union, inter alia, '*shall respect the different legal systems and traditions of the Member States*'. This is an interesting reflection point not only within UK, with its different legal systems, but also in the wider European context. The Scottish Government believes that Commission proposals ought to take full account of this stipulation.

89. When legislation is required, sufficient implementation periods should be allowed concomitant with the level of complexity of the instrument. We welcomed for example the decision to allow three years for the implementation of the European Investigation Order, in contrast with the 18 months initially suggested for certain Procedural Rights Roadmap measures. Longer implementation periods provide the opportunity to consider all the options for effective transposition, ensuring that European action in this field meets its proposed aims.