HOUSE OF LORDS - JUSTICE & INSTITUTION SUB-COMMITTEE ENQUIRY INTO EU CRIMINAL PROCEDURE RESPONSE ON BEHALF OF THE COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE (CCBE)

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House of Lords - Justice & Institution Sub-Committee
Enquiry into EU Criminal Procedure
Response on behalf of the Council of Bars and Law Societies of Europe (CCBE)

Introduction

1. The Council of Bars and Law Societies of Europe (CCBE) represents more than 1,000,000 European lawyers through its member Bars and Law Societies of the European Union and the European Economic Area. In addition to membership from EU Bars, it has also associate and observer representatives from a further ten European countries' Bars.

Request for evidence

2. The CCBE is happy to respond to the request for evidence concerning areas of EU competence set out in Article 82(2) of the Treaty of the Functioning of the EU (TFEU) in relation to -

- Investigation of offences
- Evidence
- Pre-trial procedure
- Procedural rights of suspects and defendants
- The position of victims of crime

General comments

3. Before dealing with the specific topics identified we believe that it is apposite to express by way of general comment a concern that EU Criminal Justice Policy both in terms of legislation and specifically in terms of application, has developed in an imbalanced fashion which if not redressed will pose a significant difficulty for Member States endeavouring to protect their own fundamental rights systems.

4. From the introduction of the Intergovernmental Provisions at the Treaty of Maastricht in 1993, immediate steps were taken to advance police and judicial cooperation. Specifically the Europol convention of 1995 and the subsequent establishment of Eurojust demonstrated that political priority was given to the issue of law enforcement without any complimentary steps being taken to secure fundamental rights either by legislating for them, or providing citizens with access to adequately trained lawyers at public expense to protect their rights. Europol is now, since January 2010 a fully fledged EU body.[1] Similarly, with regard to Eurojust, its status, powers and functions have been enhanced substantially by Council decision 2009/426/JHA. The commitment of the Member States to judicial cooperation is evidenced by the comparative speed with which fundamental measures such as the European Arrest Warrant, and currently the European Investigation Order have been promoted.

5. By contrast the Green Paper on Procedural Safeguards in Criminal Cases first published in 2002 failed politically. Some of its constituent elements have been identified for individual legislation in the Stockholm Programme. However, so far only measure A (Right to interpretation and Translation) has been agreed, while measure B (Right to information) is expected shortly. Measure C (access to a lawyer and Right to Communicate) has not secured agreement at a Council level and is being discussed in the European Parliament.

1 Council decision 2009/371/JHA

6. In each case however the measures have been substantially diluted from what was originally proposed, and arguably fall below the minimum standards guaranteed by Article 6.

7. Our concern is that all the evidence to date is to the effect that the Member States are willing to commit substantial resources, both legislative and financial, to the development of ever increasing European Union criminal justice measures without having any adequate regard to the necessity to introduce contemporaneously adequate safeguards for citizens. Each national system has developed its own checks and balances which are in general terms available to protect the citizens from any excesses in domestic legislation. However checks and balances have not been developed on a European Union wide basis to deal with legislative measures emerging from the Union itself.

8. Given that the Treaty of Amsterdam confers competence in criminal matters as diverse as –

- Protecting the EU's financial interest
- Counterfeiting currency
- Counterfeiting non-cash instruments
- Money laundering
- Corruption
- Trafficking of persons
- Child pornography and prostitution
- Facilitation of irregular entry or residence
- Drug trafficking
- Terrorism
- Organised crime
- Attacks on information systems
- Intellectual property rights

it is our strong view that further measures should not be introduced unless and until a procedure is established for the Parliament to satisfy itself that any legislation is fully compliant with Article 6, including a specific requirement that adequate legal representation is available to citizens.

Question 1 - Is an EU system of criminal procedural law desirable?

It is said that national criminal justice systems reflect the societies in which they have developed. Can the EU establish a system which adequately reflects all the constituent societies within the EU?

9. The CCBE strongly supports the proposition that Member States must be in a position to retain their individual systems, reflecting not only general legal heritage, be it of the civil law or common law tradition, but also reflecting specific cultural requirements unique to individual Member States. However that is not to say that there is not a role for the European Union in identifying and articulating common standards which ought to properly apply throughout the EU. This is, after all, closely mirrored by the application of the European Convention of Human Rights throughout the Council of Europe countries. The Convention and its newfound status within the Treaty is a living instrument and the EU has a role to play in codifying and promoting knowledge of developing trends across the whole EU.

10. It is especially true that where the Union seeks to develop its competence in the criminal justice field, that there should be emphasis on "justice" by ensuring that procedural law accompanies substantive law, with a view to ensuring the protection of fundamental rights.

Are EU instruments necessary to safeguard the rights of the citizens involved in criminal proceedings, in addition to the European Convention of Human Rights, the EU Charter of Fundamental Rights and the other multi-lateral and bi-lateral agreements?

11. For any right to be of practical benefit to a citizen it must be well known, in the sense that it is clearly and expressly articulated and accessible so that adequate legal resources are available to a citizen to enforce his rights. Both of these aims are best served by requiring specific consideration to be given to how rights might best be protected in practice, at the time of the introduction of legislation in the field of criminal justice.

12. It may not be adequate to rely on the mechanisms in place in individual Member States given the transnational nature of the measures under discussion. For instance, dual representation, namely the access to legal assistance in more than one Member State may be an essential safeguard where specific measures are concerned. The requirement to provide this is one that should be imposed on Member States as a necessary corollary for the additional powers being exercised, powers that the Member States have supported.

13. It should be possible for individual citizens and their advisors to find the guarantees of their fundamental rights in the same instrument conferring those additional powers.

To what extent does existing EU legislation affect national criminal justice systems?

14. While individual Member States may be reluctant to concede to a domestic political audience the extent to which criminal justice policy is in fact framed in Brussels/Strasbourg, the reality is that from a practitioners point of view we see on a daily basis the extent to which entirely unforeseen consequences now flow from the nature of measures adopted at European Union level.

15. Perhaps the most obvious and strident example is the operation of the European Arrest Warrant. It is generally accepted that the measure was subjected to less than robust scrutiny, in the wake of the 9/11 atrocities. Now the reality for many European citizens is that they can find themselves being surrendered to a requesting State with little or no real opportunity to challenge that surrender in their home State. Particularly in cases where the requesting State exercises extra-territorial jurisdiction it is possible that a citizen can find themselves on trial in a country where they have never been, and subject to powers of investigation and rules of evidence far removed from their

domestic system. To such a citizen, and indeed to every Member State, there is an urgency to ensuring that equivalent procedural safeguards apply throughout the European Union and that a citizen should not find themselves disadvantaged by failure of the Union to act in that regard. That is a clear example of the extent to which in procedural terms national laws have been affected in a most unforeseen way.

16. In terms of substantive law, a good example will be the extent of the changes to domestic law in the field of money laundering brought about by the three directives to date. The abolition of the entitlement to client confidentiality is as far-ranging a modification to centuries-old legal traditions as one could imagine[2].

To what extent does existing EU legislation and proposed legislation go further than the existing EU or international instruments or UK law?

What is the effect of importing the jurisdiction of the Court of Justice of the EU?

Will the Court of Justice be able to cope with litigation arising from EU legislation?

17. The clear danger is that the broader the remit the European Union gives itself in the field of criminal justice, the more far reaching the measures that will be introduced. It follows that the nature and extent of the legal challenge to such measures will increase, as will the number of cases which are incapable of resolution at the national level, and which will require reference to the Court of Justice. There is every danger that the Court will become as over burdened by its case load as has happened to the European Court of Human Rights. To avoid this, the following principles must attach to developing areas and new legislation.

a. They should be clear in their terms and self-contained in respect of application. Fundamental rights should be expressly stated and provided for to reduce the necessity for subsequent challenges.

b. National Courts should develop real expertise in the Charter so that domestic decisions reflect as closely as possible the probable outcome at the Court of Justice. This will involve Member States providing adequate resources in terms of training and research to their national Courts and to the lawyers practicing in those Courts.

The Court of Justice itself will need to ensure that it has adequate judicial resources to deal with the increase in the volume of challenges before the case load becomes backlogged.

Are there other areas of criminal procedure which should be covered by EU legislation and, conversely, are there areas which are covered unnecessarily?

18. As we have alluded to, our primary concern is that effectively the exclusive attention of Member States has been to provide themselves with additional law enforcement resources whether in terms of black letter legislation, enhanced judicial cooperation or administrative measures such as the arrest warrant and investigation order. It follows that there is a deficit in counter-balancing measures required to ensure equality of arms on the part of citizens specifically where they are embroiled in complex transnational investigations or prosecutions.

19. We have stressed the importance of providing procedural safeguards to meet the challenges of these new legislative developments. For the safeguards to be effective however, citizens will have to access them, and in order to do so they will need to have available to them lawyers specially trained in the field of European Union Criminal law. As many of the persons affected by these measures will be unable to pay for their own representation, and many lawyers who are prepared to undertake this work would be unable to meet from their own resources the cost of training, the European Union must

2 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing,

ensure that there are in place adequate systems of legal aid and professional training. It is noted that there appears to be no shortage of resources when required by Europol and Eurojust, but nothing has been provided by way of support for practitioners on the defence side.

20. The issue of legal aid is an urgent one, and while it is under consideration as part of the Stockholm programme, it does not appear to have the same level of political support/priority as law enforcement projects.

21. Another area where more work can be done is in the area of conditional release pre-trial. While one would have thought that the outstanding success of the European Arrest Warrant in simplifying surrender proceedings would lead to a situation where authorities accept that persons should be allowed return to their home States awaiting trial (because of the ease of having them surrendered) this has not occurred n practice. Measures to secure provisional release are suitable for further work at EU level.

Question 2 - Does EU legislation in the areas within scope add value?

What practical benefits does EU legislation bring – for citizens, law enforcement authorities, Courts?

22. Insofar as law enforcement authorities are concerned, the question is capable of a straight-forward answer. Every aspect of international prosecution has been enhanced by the measures both legislative and practical that have been put in place. For instance, the provision in the Treaty of Lisbon authorising Europol to request national authorities to take certain actions, coordinate investigations and establish joint investigation teams is far-reaching, as is the obligation on the Member States to explain itself if it does not accede. Law enforcement agencies benefit from the enhanced judicial cooperation and mutual recognition not least in the area of the European Arrest Warrant.

23. Substantial resources both in terms of legislative time and in terms of direct support have been invested in the law enforcement sector.

24. Equally from the point of view of Courts, enhanced judicial cooperation and mutual recognition is a real benefit. The increasing willingness to accede to requests for surrender is the clearest evidence of this.

25. However, when it comes to looking for practical benefits enjoyed by ordinary citizens the question is much more complex. As previously stated, there is an imbalance between the scale of the introduction of new intrusive powers and the creation of new offences, with the complete failure to introduce any harmonised standards for the defence. The reality is that the individual citizen is now more heavily legislated than ever before, dealing both with criminal law measures at domestic and European Union level without any increase in the level of legal protections available either in theoretical or practical form.

Do the benefits of EU legislation outweigh the disadvantages?

26. This is classically a question where the answer will differ depending on the perspective you have. From the point of view of the Member States and the law enforcement machinery of those States it is clear that the extra powers have clear advantages.

27. From the point of view of a citizen more heavily regulated than ever without adequate safeguards the disadvantages outweigh the advantages. The gap of course can be closed if Member States accord real meaning to their obligations to advance human rights standards and to secure personal freedoms for all citizens.

Does EU legislation promote mutual trust between national authorities and facilitate judicial and police cooperation in practice?

28. Yes, and there is no doubt but that the entire trend in national courts is to accommodate European Union measures at the request of other Member States. However, it is equally the situation that there is a growing clamour of concern in legal and political circles at the fact that in some regards measures that ought to be capable of challenge are in fact immune. We would say rhetorically how many cases of miscarriage of justice where perhaps a citizen is held in poor prison conditions for a lengthy period pre-trial having been surrendered on a European Arrest warrant will it take before national courts resent the very limited role they have in the scrutiny of such requests? The fact that citizens may be sent for trial to a jurisdiction where there is an absence of adequately trained lawyers or the absence of legal aid is another area which is likely, if not corrected to undermine confidence in judicial systems of other Member States. We can see these difficulties arising in practice on a daily basis and it can only be a matter of time before cases, stark on their facts, emerge to compromise the whole exercise.

Should EU minimum standards for criminal procedure apply only to cross border cases?

29. Absolutely not. We strongly take the view that the same procedural rights should attach to all (EU citizens or otherwise) engaged by the criminal procedure of any Member State. It is in our view invidious that a different, and therefore lesser standard, should apply in one category of case rather than the other. To be respected, fundamental rights may need different expression in different types of cases. It is, for instance, not every case that will require an interpreter or dual representation. The important point is that where required they should be provided. Obviously it is to be hoped that with the passage of time best practice will be learned from other Member States and followed throughout the European Union. In the short term however it is essential that minimum safeguards apply throughout Europe, properly protected by non-regression measures.

Question 3 - The impact of the UK opt-in

To what extent should the UK opt into legislation in this area?

30. This is a judgement call. It is obviously easier for the UK to opt in to legislation which is already in place, and one example is legislation involving victims and vulnerable witnesses where there is a whole raft of legislation in the UK. It has of course to be remembered that the UK has separate legal systems, some would say three or four - England and Wales, Scotland, Northern Ireland and, for example, strangely the Channel Islands. It is of course a system also linked to Ireland and all are adversarial rather than inquisitorial. The judgement also would be whether to opt-in totally or to specific instruments and this is referred to on page four of the Commission paper on access to a lawyer where it states "*Denmark is not participating in newly adopted measures on substantive criminal law, while the United Kingdom and Ireland only participate in the adoption and application of specific instruments after a decision to "opt in".* The UK should opt-in to ensure the effective implementation of EU policies on the basis that this should support the needs of EU Systems and the EU area of freedom, security and justice, while fully respecting subsidiarity and the last-resort-character of criminal law.

What factor should inform the UK government's decisions on opting in?

31. The initial factor is the benefit to the UK, its individual jurisdictions and obviously its citizens, and its obligations and commitment to Europe - Article 67(1) TFEU *"the Union should constitute an*

area of freedom, security and justice with respect for fundamental rights and different legal systems and traditions of member states".

Will the fact that the UK has not opted into some EU legislation undermine the trust of authorities of other Member States in the UK criminal justice system? If so how will this affect UK nationals involved in criminal proceedings in other Member States and the ability of the UK authorities to investigate and prosecute cross border crimes.

32. It is apparent that extensive use of the opt-out possibility, especially in relation to fundamental rights such as the right to legal assistance or other procedural rights, would be highly counter-productive with respect to European integration and could undermine mutual trust between Member States. A common area of justice is based on common fundamental values; this area cannot develop properly if some states –especially very influential ones like the UK - prefer to opt out in the above cases.