



The Law Society
of England and Wales

**Response to Freedom, Security and Justice: What
will be the future? European Commission
consultation on priorities for the next five years
(2010-2014)**

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supporting
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THE LAW SOCIETY OF ENGLAND AND WALES RESPONSE TO FREEDOM, SECURITY AND JUSTICE: WHAT WILL BE THE FUTURE? EUROPEAN COMMISSION CONSULTATION ON PRIORITIES FOR THE NEXT FIVE YEARS (2010-2014)

We refer to the Freedom, Security and Justice: What will be the future? European Commission consultation on priorities for the next five years (2010-2014) dated 25 September 2008. We welcome the opportunity to respond to this consultation.

We do not propose to respond to the list of closed questions. We note that the consultation states that additional contributions will also be taken into account. We are therefore providing a detailed response, including in the light of the non-binding report of the Future Group on Justice titled Proposed Solutions for the Future EU Justice Programme and the non-binding report of the Future Group on Home Affairs titled Freedom, Security, Privacy – European Home Affairs in an open world.

This position is presented by the Law Society of England and Wales. The Law Society is the representative body of over 120,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representation towards regulators and government in both the domestic and European arena. This position paper comprises an Executive Summary followed by a Detailed Analysis. It also responds at the end to three questions that we are particularly interested in and three questions that we are particularly concerned about.

EXECUTIVE SUMMARY

Legal systems

- Common Law systems: instead of finding solutions “despite” the different legal systems, solutions should be found that respect the different legal systems and traditions of the Member States. The Common Law and mixed systems should be promoted given their significant advantages including flexibility, cost effectiveness, standing as instruments of commerce and in light of their origins.

Criminal

- Criminal procedure: we support a basic set of rights as minimum guarantees, and not ones based on the lowest common denominator which would risk watering down protection already afforded, for example, by the ECHR protections which Member States must already uphold; but not harmonisation through the back door. We would also query what minimum rules on presumption of innocence would entail. If there is no agreement on a wholesale package of minimum rights, other means should be explored, including a series of focused legislative measures that are justiciable and enforceable. Such measures would preferably apply across the board or, failing agreement, be adopted as amendments to legislation in force.
- Police cooperation: procedural safeguards are essential. We are strongly opposed to replacing them with “more flexible” “simplified formalities” or such like.
- Mutual recognition and double criminality: minimum standards in criminal procedure might be necessary to facilitate mutual recognition but mutual recognition should not be used to introduce harmonisation “through the back door.” Where traditional safeguards are being phased out there must be greater scope for judicial oversight in enforcing or recognising the judicial decision of

another Member State throughout all stages of the process. This is not simply to review the substance of the judgment, but to assert that fundamental rights of the defendant have been respected.

- Criminal records: we can see the merits in a sentencing judge in one Member State having information on previous convictions, including on bail, previous binding rulings in the course of a trial, for example on bad character, and previous sentences in another. However, we are concerned that the use of the information will be prejudicial in determining guilt; there is a need to be able to understand what a criminal offence from a different Member State means, what a binding ruling from a different Member State means and its relevance, the relevance of a conviction and the level and significance of a sentence, bearing in mind the very different sentencing regimes in different EU Member States, so that a judge can decide if it is appropriate and proportionate to take it into consideration; it is too crude to automatically impose a higher penalty for a repeat offence; further consideration should be given to the rehabilitation of offenders and where a conviction is spent; and we would emphasise the need for effective data protection.
- Rights of victims: it will be important to resist any attempts, albeit not explicitly referred to in the report, to: extend compensation to victims of offences not actually charged; to introduce any US style system of victims' rights in which prosecutorial discretion to discontinue a case or downgrade a criminal charge would be subject to the victim's input or consent or that of the victim's advisor; or to introduce protective measures to afford witness anonymity that do not adequately protect the right of a defendant to challenge their evidence. We would be concerned if it is proposed that witness anonymity be used other than in wholly exceptional cases subject to safeguards. *We would add that victims of trafficking should be treated as such. It is also important to have regard to the different nature of the Common Law adversarial system and the Civil Law inquisitorial system.*
- Terrorism:
 - We note the Justice Report's calls for an evaluation of counter-terrorism policies to ensure that they are efficient against the threat and to know precisely their impact on fundamental rights. *We would call for continuous evaluation and swift action where fundamental rights are not respected.*
 - The fight against terrorism, whether using surveillance measures or otherwise, must be conducted with due respect for justice, fundamental rights and the rule of law. Ordinary criminal justice and security provisions should, so far as is possible, continue to be the preferred way of countering terrorism.
 - Fundamental rights in extradition, mutual legal assistance and generally clearly extend beyond data protection.
 - It is wholly inappropriate to use diplomatic assurances to facilitate extradition or deportation or expulsion.
 - We are extremely concerned about outsourcing evidence gathering, and would question the legitimacy of reasons for such outsourcing, the means by which such evidence is gathered and the use to which such evidence can be put. The focus should be on the protection of the fundamental rights of the suspect.
 - *The European Evidence Warrant should be accessible to the defence as well as the prosecution.*
 - As noted above, we are concerned about witness anonymity measures.

Data protection

- As regards police co-operation and security, whilst effective co-operation amongst authorities and swift exchange of information are vital there must be an accompanying effective data protection regime. A proper data protection regime at EU level is necessary across the board, not just one based on the Council of Europe regime.
- We welcome a public debate on strengthening fundamental rights. Home Affairs can already learn from the Justice Report's recognition that using information for purposes other than that for which it was collected and unlimited cross-referencing to other databases is a threat for individuals and society as a whole. Also from the Justice Report's acknowledgement that the right to privacy, including in data protection, should not be erased by the necessities of law enforcement.
- We would call for a joined up approach to data protection between Home Affairs and Justice and believe that Home Affairs should take on board these important considerations. We are concerned that the Home Affairs Report overly focuses on data flow within European information networks and are extremely concerned about the open-ended extent of sensitive data exchange envisaged, about further disclosure of data outside the European Union and about the lack of concrete protection afforded.

Family

- It is premature to consider harmonisation of applicable law rules in the family law area. Differences in law and procedure between Member States are significant. However, the law of the forum has the advantage of pragmatism. The appropriateness of allowing parties to designate the applicable law depends on the process at hand. Permitting party autonomy and thus allowing a choice of law and of forum should be encouraged within the EU framework of freedom of movement.
- We support the removal of exequatur provided that common minimum standards in civil procedure do not impinge unnecessarily on domestic family law and procedure, common definitions are in very broad terms and maintenance obligations protect debtor's rights.
- *We believe that recognition throughout the EU of civil partnerships and other non marital registered regimes is a very important issue that should be considered for both same sex and mixed sex couples.*
- We welcome the recognition that it is important to assess the proper functioning of already existing instruments and where further legislative measures are necessary; and the exploration of cooperation mechanisms, including close cooperation between Central Authorities of Member States for example to facilitate the filing of lawsuits.

Wills

- Network of existing national databases for wills and testaments: any system of will registration requires national government support but a flexible system for

internationally mobile testators is vital, whilst ensuring that it does not introduce unnecessary bureaucracy for testators without any cross border issues.

- Harmonisation and choice of law: in the field of wills and succession it is important to deal with applicable law first and jurisdiction and recognition afterwards. There are advantages in approximating conflict rules, limiting the law governing succession and the law of the forum to one jurisdiction. There should be: choice of law (and therefore of jurisdiction) of either nationality or habitual residence for the whole estate at the time of selection or death in a will or codicil not a separate document; clarity about which jurisdiction governs the assets of the deceased irrespective of whether the assets are moveable or immovable; *machinery to resolve disagreements; and a referral mechanism*. Moreover, action should not trespass on legal traditions. Different systems should be protected and made available for those who chose to use them, whether, for example, usufructs or trusts. Protecting property rights against claims *in rem* is vital. However, we recognise that it may be possible that limited claw-back may be workable if, for example, it were only applicable to gifts made less than 6 years before death to tie in with the Inheritance (Provision for Family & Dependents) Act 1975. Moreover, English and other law issues still governed by connecting factors of personal law by domicile or nationality, would need to be integrated with any new regime.
- European certificate of inheritance: a European Certificate of Inheritance may well be unworkable for all Member States in the short run. Once issues of applicable law have been resolved, and the inevitable problems created by that harmonisation dealt with, then means of reducing the need for individual certificates of inheritance in each Member State can be addressed. In any event whilst a European Certificate of Inheritance could reduce need for involvement of the court where the property is situated a mechanism to refer matters to the court of the laws governing succession would be needed. *We also believe that thought should be given to the creation of a European lasting power of attorney in order to protect the elderly.*
- Authentic instruments: *the recognition of authentic instruments and of common law deeds throughout the EU is a complex issue, which should be considered separately from the proposals relating to wills and succession matters. Questions as to recognition of civil status documents such as birth, marriage and death registers and the abolition of the need for an Apostille are also related, but equally important. We underline that any future European Authentic Act should include within its scope authentic acts prepared by notaries as well as analogous legal documents such as deeds. A full impact assessment should be undertaken alongside a public consultation in this area.*

Better Justice for citizens and businesses

- Enforcement of judgments and provisional measures: we welcome the focus on enforcement of judgments and provisional measures. Practical measures should be taken to ensure that enforceable orders can actually be enforced, provided that such measures are transparent, fair and consistent with human rights. We welcome the recognition that defendant's interests must be duly and sufficiently taken into account and that data protection issues have to be taken into account. We would emphasise that the recognition that defendant's interests must be duly and sufficiently taken into account and that data protection issues have to be taken into account should apply in all areas.

- Common frame of reference: we accept that it is useful to have non-binding guidelines for use as a common source of inspiration or reference in the Community law making process. Its development should be driven by practitioners to supplement the work already conducted in the academic sphere.
- Other measures: *in the area of legal aid there are big differences in terms of costs between the Common Law adversarial system and the Civil Law inquisitorial system. Indeed in the former the parties do the evidence gathering, whereas in the latter the court does it. Caution should therefore be exercised in any attempt to address legal aid in order to retain this benefit of the Common Law system. We support the existing regime to enable access to legal aid in cross-border cases under Directive 2002/8 of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.*

e-Justice

- We support e-Justice and believe it is essential to link in the “e.” *We also believe that thought could be given to creating an easy claim web-site.*
- However, we would emphasise at the outset that there must be appropriate safeguards in place to ensure that the rights of citizens and the integrity of the justice systems are protected.
- Scope: in terms of scope, as noted by the Justice and Home Affairs Council on 12 to 13 June 2007, we would emphasise that EU action should be “limited to cross-border issues.”
- Information mechanism: in terms of substance, we believe that it is important to clarify not only who will be providing the information that will appear on the e-Justice portal, but also who will determine what is relevant and what mechanisms will be in place to ensure that the information is kept updated. We believe that there should be a mechanism for reviewing information and information should where necessary be provided in a basic summary followed by detail format.
- Videoconferencing: we are concerned that the trend to provide videoconferencing as an additional option can quickly move to it being the main or only form of access to a suspect in custody. Many practitioners would be reluctant to rely on the confidentiality of communications with their clients over a video conferencing medium. It is essential that lawyers have access to their clients to build up a relationship of trust and confidence. Similarly it is essential that courts administer justice in the presence of offenders rather than remotely. We would also draw attention to the Council of Europe anti-torture committee report to the UK Government published on 1 October 2008,¹ which, in relation to extensions of pre-charge detention by video-link, emphasises that the physical presence of a detainee should be seen as an obligation, not as an option open to the judicial authority.

¹ <http://www.cpt.coe.int/documents/gbr/2008-27-inf-eng.htm>

- Interconnection: regarding the interconnection of Criminal Record Databases, we are concerned about the accuracy, access, use and understanding of the information stored and how any errors or misunderstandings can be rectified.
- Interoperability: we have serious concerns regarding using information gathered for one purpose for another purpose.
- Data protection vacuum: we are concerned that e-Justice is developing in a data protection vacuum or at least in a patchwork of national data protection rules. In providing information on cross-border proceedings, the e-Justice portal should at an absolute minimum provide information on data protection rules that apply to all of its subject matter and provide direct access to mechanisms for the correction of data. We believe that data protection rules should be a precondition to the e-Justice portal. An efficient and robust procedure for challenging inaccuracies should also be established.
- Automated translations: we would caution against unqualified reliance on automated translations. For example, we believe that criminal records must be translated with a full explanation of the meaning, and the court process, whether summary, intermediate, or appeal. We would equally caution against the use of standardised dynamic forms with predetermined text and terminology. We believe that the use of automated translations must be clearly defined and limited and should not be relied on in proceedings.

Migration

- The Home Affairs Report calls for establishing a more effective and coordinated European return policy including harmonised rules for effective return procedures and decisions in Member States which fully respect and guarantee human rights.
- Any action on migration must be based on fair and effective procedures with access to legal advice, adequate and appropriate appeal mechanisms and public funding for those who can't afford it. Returns should be fully compliant with the ECHR and are a very significant encroachment on freedom and wishes of individual. In any event, it is wholly inappropriate to use diplomatic assurances to facilitate extradition or expulsion. There should be an emergency mechanism to suspend deportation. Minimum standards must not be based on lowest common denominator. There should be binding standards on parameters of detention, judicial control and alternatives used in preference. Whilst mutual assistance in facilitating returns has merits, there must be clear procedures to safeguard against refoulement.
- *We also believe that authorities should be placed in a position to enable applicants to exercise their protection rights, using training and a culture change.*
- We are concerned about what minimum integration standards and incentives to third states would entail and would emphasise the importance of protecting returnees.
- *We would like to take this opportunity to emphasise the importance of fundamental social rights. We are concerned at the misuse of the right of establishment or the right to provide services across borders to undercut terms and conditions of employment and collective bargaining agreements. EU obligations include the protection of basic economic and social rights of workers.*

Whilst businesses may have the right to reallocate within the market, for example under Article 43 (right of establishment), it cannot be that adverse impact on social rights arise out of the exercise of an Article 43 right.

Asylum

- We agree that asylum applications should be examined individually at national level. *We note that at present refugee status granted in one Member State is not automatically recognised in another Member State. We believe that there should be automatic recognition of the grant of refugee status.*
- Minimum standards must not be lowest common denominator; procedures must be fair, effective and efficient with transparency and integrity of all procedures, adequate and appropriate appeal mechanisms, access to justice and early access to good quality legal advice throughout the whole process, and availability of public funding for those who cannot afford legal costs.
- A single status could risk watering down refugee status. We also have concerns over a single procedure or one stop shop including the range of legal advice required, the lack of time to collate evidence, and inappropriateness in some cases, for example, where circumstances change, and undue emphasis on speed.
- There is a clear need for the courts to have scrutiny of issues relating to detention and exclusion in order to ensure compliance with international law, the ECHR and due process in practice. In any event it is wholly inappropriate to use diplomatic assurances to facilitate removal.
- On enhancing cooperation with third states, we support technical assistance and capacity building but not shifting responsibility for decision making offshore which would create a multi-layered system difficult to administer, with lack of clarity on which country's legal system would apply and hinder access to essential safeguards, legal advice, representation and appeal processes, and obtaining evidence and exacerbate the problem of poor quality decision making.

General

- Justice and Home Affairs policy must be based on due process and must protect the individual's rights as well as facilitate cross-border law enforcement. The principles of transparency and democratic accountability must be at the core of all developments in the Union.
- We welcome the Home Affairs Report's call for disentangling political action; the Justice Report's focus on better law making and call for cover notes to acts explaining rights and gains. Such cover notes should not detract from the acknowledged need for user friendly language and their legal weight should be considered.
- We would emphasise the role of legal practitioners in consultations; that *impact assessments should also show necessary cross-border justification for action and that legislative action should not be an automatic assumption. However in some instances where the objective is to guarantee fundamental rights enforceable rights in legislation are to be preferred.*

- There should also be *Access to Justice Impact assessments* and a *strengthening of the peer review system*.
- We concur that as noted in the Justice Report there is a state of fatigue and a need for a time out period. There is a tendency to churn out legislation rather than take stock, slow down and focus on evidence based measures and intergovernmental consultation. We welcome better law making, not just in terms of legislation and drawing breath, but also in terms of *providing feedback on the wealth of consultations that take place*. Moreover, *whilst implementation reports are provided for and they do examine the state of play on particular instruments these often take place several years later*. *Interim evaluation and assistance to Member States should be considered*. *Examples from the Internal Market sphere where handbooks for implementation and regular workshops with Member States during and after the implementation phase could be used as a model*.
- We call for *co-ordination not just between relevant Directorate Generals concerned but also within Directorate Generals*. *Indeed, the production of a separate Home Affairs Report and a separate Justice Report is a stark example of the absence of a co-ordinated approach which needs to be redressed, discussing the best bits from both reports to build a consolidated programme*.
- We welcome the acknowledgement in the Home Affairs Report that new entities and harmonised rules at European level are not objectives in themselves; we welcome the call for better regulation and simplification; we believe that it is important to clarify what is understood by codifying legislation as we are in favour of consolidation; *we believe that the Commission should consider ways in which it might ensure that Member States deliver more speedily on their legislative commitments*. We welcome considering whether European action generates added value in accordance with subsidiarity and proportionality and fully exploiting the effectiveness of current legislation and measures before taking new action.
- We also welcome the Home Affairs Report's call for a public debate on balancing mobility, security and privacy. We believe that Home Affairs can usefully learn from the Justice Report's acknowledgement that the right to privacy, including in data protection, should not be erased by the necessities of law enforcement.
- Mobilisation of *"legal actors"*, *awareness raising and facilitating mutual recognition in practice*:
 - We welcome mobilising *"legal actors"* to be involved better in drafting the instruments they will have to implement and are keen to discuss this further.
 - *We also call for awareness raising, in particular on conducting cross-border matters, and a focus on facilitating mutual recognition in practice*. *Putting links to the EJN could assist but we would also call for more training and events, including for consumers and consumer organisations and their advisors on the front line, including Citizens Advice Bureaus*.
 - *We also believe consideration could also be given to creating a high profile cross border European Citizens Advice Bureau*.

- *It is also essential to ensure that mutual recognition works in practice, including using periodic reviews, calling Member States to account and training the judiciary.*

New

- Alternative Dispute Resolution and civil procedure: we note the lack of focus on civil matters. All forms of alternative dispute resolution not merely mediation should be promoted. Member States' rules on responding to disputes and penalties for non-compliance should be examined.
- Collective redress and class actions: although not addressed in the Justice and Home Affairs reports, we would like to take the opportunity to refer to developments in the area of collective redress and class actions and in particular the Commission's White Paper on damages actions for breach of antitrust rules, to which the Law Society of England and Wales responded in July 2008. Whilst we agree that indirect purchasers should be able to seek damages when they have borne the loss, we are not convinced of the need for or the ability of the EU to legislate for such matters or to try to harmonise rules of domestic civil procedure. We believe that it is important that any system is fair to both claimants and defendants. Moreover, it should be open not just to consumers but also to businesses. Regarding non-legislative action on group action procedures the UK should take the lead in devising a system that could be rolled out as best practice Europe wide. Any developments should take into account the views of Justice and Home Affairs.
- European litigation claims procedure: we can see merits in a single European litigation claims procedure for cross border uncontested claims and cross border small claims. We call for a review of the interaction between the European Payment Order and the Small Claims procedure with a view to allowing a coherent standalone cross border procedure with one form but not harmonisation impinging on national sovereignty.
- Personal injury: whilst it is important to consider the issue of assessment of damages in personal injury claims, we believe that great care must be exercised in this regard. Indeed, the English approach to damages is quite different from the approach of a number of jurisdictions particularly those which have baremes or tariff schemes. It is fundamentally important for English claimants that the English approach be preserved. We would be concerned if there was any move towards a harmonisation agenda or an agenda which embraced concepts of baremes. It is important to bear in mind that approaches adopted by different jurisdictions are very much influenced by their overall commitments to social and welfare benefits, health provision and indeed private insurance provision.
- European Arrest Warrant: at a minimum there should be more training for practitioners and courts.
- External: directing EU funding in a helpful direction, for example to raise prison standards is important.

DETAILED ANALYSIS

Common Law systems

The Justice Report asserts that its general aim is to “find solutions for citizens despite the fact that there are like relating differences between the legal systems which operate in the Member States. This is particularly the case with regard to the Common Law and Civil Law systems.”

We believe that EU policy making should be based on subsidiarity and proportionality with due regard for the different legal systems and traditions of the Member States.

The different legal systems, including the Common Law and mixed systems, should be promoted in EU level legislative developments in all areas including in terms of the effect on the UK and elsewhere; the UK being an example of where different legal systems co-exist. The Common Law and mixed systems of justice have significant advantages, in particular, their flexibility and cost-effectiveness, and standing as instruments of commerce. The origins of the Common Law and mixed systems as an attempt to bring together the best bits from different systems should be emphasised.

Instead of finding solutions “despite” the different legal systems, solutions should be found that respect the different legal systems and traditions of the Member States.

The Common Law and mixed systems should also be taken into account in discussions on the external dimension of Justice and Home Affairs and in particular, when considering how foreign law is to be enforced.

Criminal

Criminal procedure

The Justice Report calls for establishing minimum rights in the law of criminal procedure.

We support the mutual recognition programme in the criminal justice field. This is the most effective mechanism by which to facilitate judicial co-operation and create a genuine area of justice. We accept that certain minimum common standards in criminal procedure might be necessary to facilitate mutual recognition. We do however maintain that mutual recognition must not be used as a means by which to introduce the harmonisation of substantive law and procedure "through the back door."

We refer to the recommendation that all citizens of the EU should be provided with a basic set of rights as minimum guarantees if they are subjected to a criminal investigation. We have long-been concerned that guarantees relating to the rights of the defence and respect for fundamental rights are currently lacking at European Union level. Such minimum rights should not be based on the lowest common denominator, which would risk watering down protection already afforded, for example, by the ECHR protections which Member States must already uphold.

We note that the Justice Report asserts that at first the minimum rights should include at least the rights arising from the proposal for a Framework Decision to strengthen the rights of the accused in criminal proceedings, namely the right to

information with regard to procedural rights, the right to defence counsel, the right to an interpreter and to a translation of the relevant procedural documents.

We note the assertion that additional steps could include for example minimum rules in terms of the presumption of innocence and would query what this would entail.

If there is no agreement on a wholesale package of minimum rights, then we believe that other means should be explored, including a series of focused legislative measures that are justiciable and enforceable. Such measures would preferably apply across the board or failing agreement be adopted as amendments to legislation in force.

Police cooperation

The Home Affairs Report calls for simplifying the regulations for investigations carried out on the territory of another Member State. For example: allowing police officers after simplified formalities to perform non-coercive acts on the territory of another Member State, such as taking witness testimony on a voluntary basis; or creating a system of written information requests by public entities or individuals. It asserts that this would make "today's extremely constraining procedural practices more flexible, without affecting the general principles of legal cooperation in criminal matters."

We emphasise that procedural safeguards are essential. We are strongly opposed to replacing them with "more flexible" "simplified formalities" or such like. Indeed, terming procedural practices as "extremely constraining" and replacing procedural safeguards with "more flexible" "simplified formalities" or such like is extremely concerning. We are very concerned that an individual would not be aware of and may not understand the implications of giving a voluntary statement. The individual may not be afforded the same protection when faced with a police officer as he would have been if he were in that police officer's Member State or if he were faced with a police officer in the Member State that he is in. Moreover, we are concerned that no safeguards are envisaged regarding the use to which such information could be put and the weight that could be attached to it. We are also very concerned by the vague reference to using simplified formalities or such like to perform other "non-coercive acts."

Mutual recognition and double criminality

The Justice Report calls for reflection on mutual recognition and how it is put into practice, for example, on minimizing the lack of clarity in the meaning of the list of offences for which an assessment of double criminality is no longer undertaken.

We believe that mutual recognition is the most effective mechanism to facilitate judicial co-operation in the criminal justice field. Certain minimum common standards in criminal procedure might be necessary to facilitate mutual recognition. However, mutual recognition must not be used as a means to introduce the harmonisation of substantive law and procedure "through the back door." Any proposals for the development of minimum standards for aspects of procedural law or "standardisation" should be measures that are designed to facilitate mutual recognition rather than those that are designed to harmonise or approximate rules across the board.

The imposition of one national law and procedure on another state is one of the contentious aspects of the mutual recognition programme taken to its logical conclusion. There is a danger that the consequences will produce distrust and uncertainty amongst

practitioners across the EU in different Member States unless EU-wide recognised safeguards are established. Indeed, the lack of understanding of national laws and procedures of other Member States goes to the heart of the problem of mutual recognition.

The principle of double criminality is important because it aims to protect the rights of the accused set out in the criminal law that he is familiar with and subject to. Where traditional safeguards such as dual criminality are being phased out under new mutual recognition instruments, the development of relevant human rights safeguards alongside new enforcement measures is of the utmost importance. This is necessary to protect individuals within the area of freedom, security and justice from unjustified use of powers. The heavy caseload of the European Court of Human Rights illustrates that the active promotion of human rights is equally important amongst different jurisdictions with common values.

There must be greater scope for judicial oversight in the enforcing or recognising the judicial decision of another Member State. Not to review the substance of the judgment but rather to assert that fundamental rights of the defendant have been respected. Effective safeguards must be in place throughout all stages of any process based on mutual recognition from the beginning of the investigation to post appeal disposal. Rather than undermining the mutual recognition principle this will reinforce it as it will ensure high standards which in turn facilitates mutual trust.

Criminal records

The Justice Report calls for considering a system to allow for the exchange of information from criminal records for other legitimate and necessary purposes. It asserts that the Commission's May proposal for a Council Decision on the establishment of the European Criminal Records Information System would enable fast exchanges and facilitate subsequent use of information transmitted by setting up common categories of crimes, penalties and types of decisions of the judicial authorities registered in the national criminal records systems. It asserts that this would enable better legal use of the transmitted information in the course of new criminal proceedings, for example, for recidivism purposes.

As regards proposals to enhance the exchange of information from national records and the development of a mutual recognition regime on previous convictions for recidivism purposes, we can see the merits in a sentencing judge in one Member State having information on previous convictions, including on bail, previous binding rulings in the course of a trial, for example on bad character, and previous sentences, in another. Particularly in cases such as child pornography or sexual exploitation or indeed in disqualification cases.

We are, however, concerned about the use of such information once a judge in a different Member State has seen it, as it could be prejudicial in the determination of guilt. It is difficult to understand what an offence means in a particular jurisdiction, what a binding ruling means in a particular jurisdiction and its relevance, the relevance of a conviction and the level and significance of a sentence, so that a judge can decide if it is appropriate and proportionate to take it into consideration. We are concerned that common categories would not redress this difficulty. Indeed, the sentencing and penal sanctions' structures in each Member State are so different that it would be too crude to assume that a higher penalty should be imposed automatically on the grounds of a repeat offence, where the original offence was committed in another Member State. Deciding on whether an offence is a repeat

offence is certainly very difficult given the vast differences in definitions of offences in different Member States, not only are the definitions difficult to determine but the relative seriousness of offences as well.

Using a conviction handed down in one Member State to "influence" the sentencing in another could also be controversial in circumstances in which a conviction may be "spent". Further consideration needs to be given to how issues such as the rehabilitation of offenders can be integrated into a European Criminal Records Information System.

Better information sharing must be subject to effective data protection provisions. We would also underline the necessity of a proper data protection regime at EU level not just one based on the Council of Europe regime. An efficient and robust procedure for challenging inaccuracies would also have to be established and the record would have to be translated with a full explanation of the meaning, and the court process, whether summary, intermediate, or appeal.

Rights of victims

The Justice Report calls for taking into account the potential role of restorative justice in criminal proceedings. It notes that the Council Framework Decision of 2001 on the standing of victims in criminal proceedings² has not been implemented effectively.

It calls for enhancing the victim's position during the entire judicial process using legislation. For example, it considers establishing a more effective compensation regime and giving victims assistance during proceedings, including by using technical measures such as hearings by videoconference and child friendly rooms.

Compensation

The UK Government continues to look for new ways to balance the criminal justice system in favour of victims. We are concerned that any such proposals must respect the rights of the accused person.

For example, the Attorney General Consultation on Extending the Powers of the Crown Court to Prevent Fraud and Compensate Victims was published on 18 July 2008 and will end on 10 October 2008.³ It proposes a new power to award compensation to victims of offences that have not actually been formally charged, but which arise out of a similar series of offences to those that the offender has been convicted of. We are concerned that such a provision will not afford the alleged offender with adequate notice of the case against him, and thus offends the principle of the rule of law.

Restorative justice

We are aware of initiatives of the UK Government in relation to the relatives of homicide victims, for example the Victims' Advocate Scheme Pilot, which gave relatives the choice, if they wished, to address the court after conviction and before sentence. Relatives received assistance from the Crown Prosecution Service (CPS)

² Summary at <http://europa.eu/scadplus/leg/en/lvb/l33091.htm>. Among other things, Member States must align their legislation on criminal proceedings to guarantee victims the right to be heard in the proceedings, the right to furnish evidence and the right to compensation.

³ <http://www.attorneygeneral.gov.uk/attachments/Crown%20Court%20Consultation%20Paper%20-%2018.07.08.pdf>

or an independent advocate, to tell the court about the effect of the crime on them. We understand that the CPS advocate was used to make the statement and read it out in the majority of cases.

We would be concerned if a US style system of victims' rights were proposed in which prosecutorial discretion to discontinue a case or downgrade a criminal charge would be subject to the victim's input or consent or that of the victim's advisor.

Protective measures

Regarding victims and witnesses, in the UK special measures for taking evidence have been in place for some time to take evidence from vulnerable or intimidated witnesses by video conference facilities. We understand that forthcoming legislation in the UK may extend the use of such protective measures.

We welcome proportionate measures to increase public confidence in the criminal justice system and help protect the vulnerable, but any measures must respect due process and the rights of the defendant to a fair trial. Extending protective measures such as the use of video link evidence, and other special measures, may be appropriate to reassure witnesses and ensure that they are able to give their evidence without fear. Such measures however should apply equally to defence witnesses. We are concerned that the existing special measures provisions apply only to prosecution witnesses and we hope that forthcoming legislation in the UK will remedy this.

Moreover, we would be concerned if it is proposed that witness anonymity be used other than in wholly exceptional cases, and only following a ruling by the trial judge, who is able to consider each case on its merits taking into account the interests of all parties. While it is understood that gang related crime for example is prevalent and difficult to prosecute due to fear of intimidation, it is an essential element of a fair trial that the accused knows the case against him or her, and is able to effectively challenge a witnesses' evidence.

We would also note that it is important to have regard to the different nature of the Common Law system and the Civil Law system, the former being adversarial and the latter being inquisitorial.

Trafficking

The Home Affairs report refers to strengthening measures against illegal migration include preventing illegal employment and trafficking. The identification of the fight against trafficking as a priority in this area is welcome. However it should be added that *victims of trafficking should be treated as such*. They are victims not offenders. Without input from victims and witnesses, offences of trafficking are likely to be very difficult and costly to police, investigate and prosecute.⁴ It is necessary that witnesses in trafficking cases should be able to access the same support and care as other victims of sexual violence, rather than being treated as offenders. Victims and witnesses are likely to be suffering the effects of imprisonment, serial and sexual

⁴ Research carried out on behalf of Anti-Slavery International (Human traffic, human rights: redefining victim protection, by Elaine Pearson, Anti-Slavery International 2002) found that the countries which fared better in prosecuting traffickers (Belgium, Italy, The Netherlands and United States) were the countries which also had the most comprehensive measures for assisting victims.

violence. They may also consider that they do not have a viable life to return to in their country of origin, especially if they fear ostracism, which is often the case in sexual exploitation cases. Witnesses and victims are likely to be reluctant to trust police or investigators, at least initially, particularly if to do so will result in arrest for immigration offences and interview as an illegal entrant. This will cause additional difficulties in investigating and prosecuting the offences.

Terrorism

We welcome the Justice Report's assertion that organised crime and terrorism must be fought in full respect of fundamental rights and measures taken be embedded in the rule of law.

We note its calls for an evaluation of counter-terrorism policies to ensure that they are efficient against the threat and to know precisely their impact on fundamental rights. *We would call for continuous evaluation and swift action where fundamental rights are not respected.*

The Home Affairs Report calls for introducing new and more flexible expulsion and surveillance measures respecting fundamental rights and the laws of Member States.

Whilst the Justice Report states that extradition and expulsion to third countries should respect fundamental rights and the principles of the Convention for the Protection of Human Rights and Fundamental Freedoms, it vaguely asserts that as a last resort and in very limited cases the use of agreements could be considered. It also asserts that in agreements with third States on extradition and mutual legal assistance, provide maximum and binding guarantees for the fundamental rights of the persons concerned, namely the protection of personal data, whilst preventing obstacles to the proper functioning of these mechanisms with a view to the needs of efficient international cooperation against terrorism.

We believe that it is wholly inappropriate to use diplomatic assurances to facilitate extradition or expulsion. We believe that it is inappropriate to balance terrorism or such like against fundamental rights, even if such diplomatic assurances were to meet with approval by the judiciary in an individual case at national or European level.

We refer to the European Court of Human Rights' judgment in the case of *Chahal v. United Kingdom*⁵ in which the Home Secretary submitted that even if the applicant were at risk of persecution, he would not be entitled to the protection of the 1951 Convention because of the threat he posed to national security (paragraph 35). The European Court of Human Rights emphasised that:

"79. Article 3 (art. 3) enshrines one of the most fundamental values of democratic society (see the above-mentioned Soering judgment, p. 34, para. 88). The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) even in the event of a public emergency threatening the life of the

⁵ Case number 70/1995/576/662 dated 25 October 1996.

nation (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 163, and also the Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, p. 42, para. 115).

80. The prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion (see the above-mentioned Vilvarajah and Others judgment, p. 34, para. 103). In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 (art. 3) is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees (see paragraph 61 above)."

The Home Secretary had also sought and received an assurance from the Indian Government that the applicant would enjoy the same legal protection as any other Indian citizen and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities (paragraph 37 and 92). Whilst the Court did not doubt the good faith of the Indian Government in providing the assurances, it asserted that it appeared that despite the efforts to bring about reform, the violation of human rights by certain members of the security forces was a recalcitrant and enduring problem. Against this background the Court was not persuaded that the assurances would provide the applicant with an adequate guarantee of safety (see paragraph 105).

We believe that the fight against terrorism, whether using surveillance measures or otherwise, must be conducted with due respect for justice, fundamental rights and the rule of law. The need to safeguard public order and security should not be used as a means to undermine fundamental rights or fair decision making procedures.

Fundamental rights in extradition and mutual legal assistance and generally clearly extend beyond data protection.

We believe that the fight against terrorism crosses over into fundamental rights in an unacceptable way. Terrorists are criminals, and therefore ordinary criminal justice and security provisions should, so far as is possible, continue to be the preferred way of countering terrorism.

There is a need for the EU to draw a more thoughtful and intelligent balance between security and individual rights. Equal rights should not go out the window and ethnic groups should not be stigmatised.

The Justice Report calls for an increase in the effectiveness of police and judicial cooperation, if necessary by improving the legal procedures and practical tools of cooperation available to them. It envisages the following specific measures, among others:

Entering into discussions with specific third states, including agreements focusing on a better system of gathering admissible evidence whilst safeguarding fundamental rights. We believe that the focus should be on the protection of the fundamental rights of the suspect. We are extremely concerned about outsourcing evidence gathering, the legitimacy of reasons for such outsourcing, the means by which such evidence is gathered and the use to which such evidence can be put.

Establishing an effective European Evidence Warrant (EEW) with a general scope, applicable to all kinds of evidence. It notes that the EEW already agreed is limited in scope and the extent to which instruments in this area need to be improved, in particular regarding the collection of new evidence and its admissibility should be examined. *We would instead emphasise that the EEW should be accessible to the defence as well as the prosecution.*

Granting effective protection to persons endangered because of their involvement in trials, including witnesses and the accused. We would be concerned if it is proposed that witness anonymity be used other than in exceptional cases, and only following a ruling by the trial judge, who is able to consider each case on its merits taking into account the interests of all parties. It is an essential element of a fair trial that the accused knows the case against him or her, and is able to effectively challenge a witnesses' evidence.

Data Protection

Concerning duties of law enforcement authorities and data protection, the Justice Report refers to the instrument harmonising national protection laws applicable to personal data collected or exchanged between Member States, being adopted in the framework of police and judicial cooperation, as an important step. The Justice Report calls for continuing the effort to align national legislations and practices to current realities.

The Home Affairs Report asserts that an adequate normative framework and specific provisions on data protection are essential. It asserts that besides the Framework Decision on data protection, specific provisions should be developed on an ongoing basis. Efforts to bring national legislations and practices into line should be continued to improve their compatibility and adapt them to current law enforcement realities. It should be made clear to citizens how information will be processed and protected, on the basis of proportionality and necessity.

We believe that as regards police co-operation and security, whilst effective co-operation amongst authorities and swift exchange of information are vital there must be an accompanying effective data protection regime. The current EU regime, where the EU Directives of 1995 and 1997 offer protection in the economic sphere but protection as regards processing of data in the context of criminal law and security is based on an inter-governmental Council of Europe Convention from 1981, is insupportable. A proper data protection regime at EU level is necessary across the board, not just one based on the Council of Europe regime.

The Home Affairs Report recommends launching a public debate on how to balance mobility, security and privacy, comprising private life and data protection, in a proportionate way. It asserts that the balance should allow for significantly improved security and equally enhanced privacy and mobility and overcome the stereotype of seeing them as opposing concepts.

We welcome a public debate on strengthening fundamental rights. However, we also believe that Home Affairs can already learn from the Justice Report in that the Justice Report recognises that using information for purposes other than that for which it was collected and unlimited cross-referencing to other databases is a threat for individuals and society as a whole. Moreover, the Justice Report also acknowledges that the right to privacy, including in data protection, should not be erased by the necessities of law enforcement. We would call for a joined up

approach to data protection between Home Affairs and Justice and believe that Home Affairs should take on board these important concerns.

We are concerned that the Home Affairs Report overly focuses on data flow within European information networks. In the long-term, it calls for a common European standard for data storage and transmission, including compatibility guidelines and harmonised technical data formats. It calls for information sharing including automatic data transfer and a single interoperable structure. Whilst it asserts that “privacy-enhancing technologies” are essential, it calls on Member States to prioritise investment in automated data analysis and improving real-time collaboration, with the EU ensuring efficient coordination of these activities.

It calls for Member States individually and collectively to take a “platform” approach to delivering public security, pursuant to which outputs from different parts of the system can be shared within and across organisations and elements of the system can be easily and quickly reused; focusing on converged platforms and ensuring that all data streams are digital and meshable.

It calls for a holistic objective in law enforcement information management beyond a case-by-case approach.

It calls for continuing the principle of availability in the EU law enforcement information management strategy. Functionality and interoperability should be maximised and it must be easy to expand and modify. An overview of third-pillar information systems to exploit system capabilities and avoid overlapping mechanisms and duplication should be conducted.

Needs or requirements in terms of access to information and intelligence should be identified, using, among other things, the Common Requirements Vision (CRV) expected from the Police Chiefs Task Force in 2008 to establish business practitioners’ needs.

A data field by data field approach should be used, including assessing which types of information are useful, needed or required. It asserts that so far 49 types of relevant information have been identified and six assessed for how the principle of availability could be applied to them, namely DNA, fingerprints, ballistics, vehicle registrations, telephone numbers and minimum data for the identification of persons contained in civil registers. A top ten list of data categories appropriate for use in further attempts towards more integration should be identified and the functionality for existing systems of information needed for successful operational work and cooperation enhanced.

We are extremely concerned about the open-ended extent of sensitive data exchange envisaged, about further disclosure of data outside the European Union and about the lack of concrete protection afforded.

Family

Harmonisation and choice of law

The Justice Report emphasises the assertion of claims across national borders. In particular, it asserts that when harmonizing rules on applicable law, a limited choice of law opportunity for parties without neglecting the protection of those affected should be explored, particularly in family law.

Applicable law

We believe that it is premature to consider harmonisation of applicable law rules in the family law area. Differences in law and procedure between Member States are significant, rooted as they are in national views of family life and local socio-economic and cultural traditions. Action must be focused instead on the core areas of mutual recognition and enforcement, determination of jurisdiction, judicial co-operation and awareness raising and information sharing. The confusion and uncertainty that any attempt to harmonise or approximate laws between 27 Member States would elicit would actually undermine the very objective of simplification and efficiency that underpins judicial co-operation in this field.

Indeed, the Justice Report, referring to the regulations proposed by the Commission in December 2005 and July 2006 on maintenance obligations and divorce law, acknowledges that quick progress is difficult to achieve; Member States' rules on which persons can be possible creditors of maintenance claims vary considerably.

Applicable law is a highly complex issue and further extensive consultation is necessary here. There are however some general points that can be made.

Broadly speaking, the law of the forum has the advantage of pragmatism. It will be a very long time before judges in one EU jurisdiction are able to make competent pronouncements on the law of another jurisdiction on substantive issues. There are distinct difficulties where a judge in one Member State has to take into account law from another; expert evidence is time consuming and costly and the judge may be unfamiliar with, and uncomfortable in applying, principles from another system.

Choice of law

Equally, we believe that problems may arise in allowing the parties to designate the applicable law and the appropriateness of this approach will depend on the particular process at hand. It would be inappropriate, for example, to take this approach for maintenance obligations, given that the choice may be made deliberately to limit and prejudice one party. On the other hand, it may be a reasonable approach for divorce proceedings, subject to caveats on duress, disclosure, imbalance of power. Some thought would also need to be given to the question of when parties would designate the law, whether in a pre-nuptial agreement or upon separation.

Permitting party autonomy and thus allowing a choice of law and of forum, should be encouraged within the EU framework of freedom of movement.

Abolish exequatur

The Justice Report asserts that the general objective is to abolish exequatur. It asserts that it should only be abolished where the rules on applicable law have been harmonised and its consequences assessed. Moreover, it asserts that sufficient legal safeguards should be set, for example minimum standards or common rules on specific aspects of civil law procedures and relevant conflict-of-law-rules.

Again, we believe that it is premature to consider harmonisation of applicable law rules in the family law area

We broadly support the introduction of a system of mutual recognition of judgments in the family law area. An EU wide system of mutual recognition coupled with a practical method of ensuring that enforcement is carried out would result in a

speedier and more cost-effective process for the client. We recognise that this would inevitably require the introduction of certain common minimum standards in civil procedure systems.

We encourage enhanced co-operation on the enforcement of decisions. We advocate a simple, speedy and effective system of enforcement at EU level in relation to judgments and orders in the family law field. Therefore we support the removal of the *exequatur* procedure where it is still in place. Indeed, any limitations on executing enforcement proceedings must be very narrowly defined and stand as exceptions.

That said we do have certain qualifications to this support. First, where such minimum standards impinge unnecessarily on domestic family law and procedure we would not support EU level action. Indeed, at this stage of the EU's development we would also underline that any attempt to establish common definitions or shared concepts must be done in very broad terms.

In addition, we have specific concerns as regards mutual recognition relating to maintenance obligations; principally the need to protect the debtor's rights. We do agree that under a mutual recognition process it is not for the enforcing state to re-open the original case and question a decision taken in another forum. However we maintain that there ought to be some limited form of assessment to ensure that the debtor's rights have been respected throughout that initial process.

Therefore there should be a system in place to check that any maintenance order issued in one Member State and due to be enforced in another must have been made after notice was given to the debtor and the debtor was or could have been present and represented at that hearing. Rather than undermining the mutual recognition principle we contend this will reinforce it as it will ensure high standards are respected which in turn facilitates mutual trust.

In terms of measures to facilitate enforcement and provide safeguards for the maintenance debtor we propose that there should be a system of registration of maintenance orders. These orders could be registered and certified that they have been appropriately translated and verified by a judge.

Mutual recognition of marriages and other civil status acts

The Justice Report asserts that obstacles preventing the speedy recognition of marriages and other civil status acts should be assessed with a view to making recognition easier. It observes that this does not require harmonization of substantive law, while keeping in mind the sensitivity of this area.

We believe that recognition throughout the EU of civil partnerships and other non marital registered regimes is a very important issue that should be considered for both same sex and mixed sex couples.

General

On further perspectives, the Justice Report emphasises that it is important to assess the proper functioning of already existing instruments and where further legislative measures are necessary. It attaches particular importance to cooperation mechanisms, including close cooperation between Central Authorities of Member States for example to facilitate the filing of lawsuits. We welcome such an assessment and also the exploration of cooperation mechanisms.

Wills

Network

The Justice Report emphasises the assertion of claims across national borders, for example, by creating a network of existing national databases for wills and testaments.

We believe that any system of will registration requires national government support but a flexible system for internationally mobile testators is vital, whilst ensuring that it does not introduce unnecessary bureaucracy for testators without any cross border issues.

Harmonisation and choice of law

The Justice Report emphasises the assertion of claims across national borders. In particular, it asserts that when harmonizing rules on applicable law, a limited choice of law opportunity for parties without neglecting the protection of those affected should be explored, particularly in family law.

To the extent that this may be construed as applying to wills and succession:

General

There would be some advantages in approximating systems across the EU in the field of wills and succession, particularly as regards conflict rules in order to deal with the cross-border issues that arise. A series of instruments, dealing with jurisdiction, applicable law, recognition and enforcement, could offer significant improvements over the current situation. However, in the field of wills and succession we believe that it is important to deal with applicable law first and jurisdiction and recognition afterwards. Indeed it is important to address each issue in turn, to be less sprawling and properly focused.

Applicable law

Limiting the law governing succession (*lex successionis*) to only one jurisdiction and the law of the forum (*lex forum*) also to one jurisdiction may well reduce cost and time in resolving issues. A clear designation of jurisdiction would resolve the current situation where conflicts are absolute and irreconcilable.

Choice of law

Further, if EU citizens had an additional choice of laws, and therefore of jurisdiction, whether that of their habitual residence or of their nationality, the availability of such choice would be welcomed. Indeed, a rule of the main habitual residence should not detract from the citizen's right to designate the law to govern the succession of the whole of his estate, be it either the law of nationality or the law of habitual residence, both either at the time of the selection or at the time of death. It is essential for the rights of EU citizens that they should have freedom to choose the applicable law. Such a choice should only be permitted in a will, or codicil, rather than in any separate document.

There should be clarity about which jurisdiction governs the assets of the deceased irrespective of whether the assets are moveable or immoveable. Indeed, we support the adoption of a unified choice of law for all asset classes.

Whilst any such general rule of last or main habitual residence could be used to determine jurisdiction and applicable law and indeed such a system should simplify proceedings and reduce costs it is important to remain aware of residual problems in this area.

Residual problems

For example, however well any EU instrument defines the determining factors such as habitual residence and even citizenship, there will always be cases where advisers, notaries or courts in different jurisdictions will interpret these rules differently or draw different conclusions from the available facts, particularly if there is any definition which includes a concept such as "intention." *Therefore, there should be established machinery, similar to double taxation conventions, to enable the authorities in the two or more jurisdictions involved to reach agreement on which jurisdiction's rules would apply in a particular estate.* The costs of any such procedure to the applicants would have to be reasonable.

Furthermore, a mechanism will need to be found for the court of the lex forum to refer matters to the court of the lex successionis for resolution of matters such as claims under the Inheritance (Provision for Family and Dependants) Act 1975, in cases of England and Wales. Unless conflicts rules in relation to matrimonial property regimes, trusts and gifts are also resolved there will inevitably be continuing conflicts between EU Member States.

Standardisation of laws

However, such action must not trespass on the legal traditions of Member States. There is a general concern that the underlying intention or direction of this process is moving towards standardisation of not only conflict rules, but ultimately towards standardisation of the laws within each jurisdiction.

Different systems should be protected and made available for those who chose to use them, whether for example usufructs or trusts. Protecting property rights against claims *in rem* is vital.

There should not be a system of EU wide forced heirship rules. Forced heirship rules commonly pay no regard to the varying needs of the specified beneficiaries, so that a disabled child is entitled to no more than a wealthy, able-bodied sibling. The child who stays at home and works on the family farm or builds up the family business has no greater entitlement than the child who left home after university and is doing well in business – regardless of the wishes of their parents.

Moreover, we would raise the question of what assets would be included in the definition of "estate property" if this were to be determined at EU level. For example property held on trust or jointly does not pass under the estate at common law. In civil law jurisdictions, statutory heirs can seek to make up the value of their forced heirship shares, based on adding to the patrimony at death the value of earlier lifetime gifts, by bringing compensation claims against recipients of gifts made by the deceased within a specific period before his death, 30 years in some cases. If such forced heirship claims cannot be excluded in respect of previously unimpeachable transfers of English property the impact on individuals, trustees and charities holding property disposed of by a testator decades previously will be significantly detrimental.

In some jurisdictions claw-back is a monetary claim while in others any claim attaches to the asset itself. This is also a relevant consideration when assessing the

likely impact of claw-back in the UK. It may be possible that limited claw-back may be workable if, for example, it were only applicable to gifts made less than 6 years before death to tie in with the Inheritance (Provision for Family & Dependents) Act 1975.

We are also concerned that any EU succession regime in this area should take account of the following particularities of our jurisdiction. English and other law issues still governed by connecting factors of personal law by domicile or nationality, would need to be integrated with any new regime. For example, matrimonial issues and property regimes, same sex marriages and registered partnerships or civil unions and Inheritance (Provision for Family and Dependents) Act 1975 matters would need to be integrated with any new regime. Moreover, protection given in the UK to personal representatives under section 27 the Trustee Act 1925 from creditors in other jurisdictions would need to be integrated into any new system.

European certificate of inheritance

The Justice Report considers creating a uniform European certificate of inheritance.

A European Certificate of Inheritance may well be unworkable for all Member States in the short run. Once issues of applicable law have been resolved, and the inevitable problems created by that harmonisation dealt with, then means of reducing the need for individual certificates of inheritance in each Member State can be addressed.

In any event, whilst the creation of a uniform European Certificate of Inheritance could reduce the need for the involvement of the court of the place where the property is situated (*lex rei sitae*), we take the view that a mechanism would need to be put in place to refer matters to the court of the law governing succession (*lex successionis*).

Indeed, dealing with immovable property outside the jurisdiction would be expensive, because the courts where the immovable property is located will have to interpret the law of the country of domicile or habitual residence, and may require advice from legal counsel of the parties involved, in order to help the courts come to a decision.

We also believe that thought should be given to the creation of a European lasting power of attorney in order to protect the elderly. We note that the Hague Convention XXXV on the International Protection of Adults comes into force on 1 January 2009 having been ratified by England and Wales, Scotland, France and Germany. It would be helpful if there was one form of Lasting Power that could be recognised throughout the EU rather than having very many different versions.

Authentic instruments

The recognition of authentic instruments and of common law deeds throughout the EU is a complex issue, which should be considered separately from the proposals relating to wills and succession matters. Questions as to recognition of civil status documents such as birth, marriage and death registers and the abolition of the need for an Apostille are also related, but equally important. We underline that any future European Authentic Act should include within its scope authentic acts prepared by notaries as well as analogous legal documents such as deeds. A full impact assessment should be undertaken alongside a public consultation in this area.

Better Justice for citizens and businesses

Enforcement of judgments and provisional measures

The Justice Report recognises that the area of enforcement of judgments and provisional measures is underdeveloped. It notes that the EU has existing law on insolvency proceedings and on combating late payments in commercial transactions. However, it highlights problems legislating in this area. In particular, that enforcement is closely linked to the exercise of national sovereignty; there is a particular need to ensure that a defendant's interests have been duly and sufficiently taken into account; Member States' enforcement systems are diverse; modern technology is lacking at national court level; and data protection issues have to be taken into account.

Points for development which it identifies include: non-legislative instruments promoting IT-based implementation of EU instruments like the European payment order regulation and the Small claims regulation for better cross border access to justice; promoting cooperation between judicial authorities; promoting access to on-line registers in other Member States and direct cooperation between registers by electronic means; evaluating and where necessary revising existing instruments, taking into account the sensitiveness of the issue and the cross border element.

We welcome the focus on enforcement of judgments and provisional measures. We believe that practical measures should be taken to enforce the enforceable, provided that such measures are transparent, fair and consistent with human rights.

We welcome the recognition that defendant's interests must be duly and sufficiently taken into account and that data protection issues have to be taken into account. We would emphasise that the recognition that defendant's interests must be duly and sufficiently taken into account and that data protection issues have to be taken into account should apply in all areas.

Common Frame of Reference

The Justice Report calls for continuing work on the common frame of reference in the area of contract law to achieve greater coherence and higher quality Community legislation.

We support the development of a common frame of reference in relation to Community law making. We recognise that there is a clear need to improve the consistency of the *acquis* in this area. We accept that it is therefore useful to have non-binding guidelines for use as a common source of inspiration or reference in the Community law making process.

We encourage the Commission to continue work on this exercise. Any initiative to develop this must be driven by practitioners to supplement the work done to date by academics. Indeed, we advocated the creation of a high level experts' group, including in particular legal practitioners, both to liaise in detail with the research group and to comment on the final drafting of the common frame of reference.

Other measures

The Justice Report calls for elaborating ancillary areas of civil justice cooperation, for example, service of documents, information and proof of foreign law and legal aid.

In the area of legal aid there are big differences in terms of costs between the Common Law adversarial system and the Civil Law inquisitorial system. Indeed in

the former the parties do the evidence gathering, whereas in the latter the court does it. Caution should therefore be exercised in any attempt to address legal aid in order to retain this benefit of the Common Law system. We support the existing regime to enable access to legal aid in cross-border cases under Directive 2002/8 of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

e-Justice

The Justice Report refers to creating a one-stop access point to European and national law, providing access to various registers and some filing forms for judicial proceedings. It notes that the Council is currently evaluating the possible use of cross-border videoconferencing and how it could interact with the portal. It also notes that several instruments already adopted in judicial cooperation in civil matters foresee the use of modern information technologies, for example the European payment order, the Regulation on the taking of evidence and the European small claims procedure. It calls for developing standards in data protection.

We support e-Justice and believe it is essential to link in the “e.” *We also believe that thought could be given to creating an easy claim web-site.*

However, we would emphasise at the outset that there must be appropriate safeguards in place to ensure that the rights of citizens and the integrity of the justice systems are protected.

Scope

In terms of scope, as noted by the Justice and Home Affairs Council on 12 to 13 June 2007, we would emphasise that EU action should be “limited to cross-border issues.” (see Press Release 2807th Council meeting Justice and Home Affairs <http://register.consilium.europa.eu/pdf/en/07/st10/st10267.en07.pdf>).

Information mechanism

In terms of substance, we note that the Commission e-Justice Communication envisages that the portal will contain: European and national information on victims' rights in criminal cases and their rights to compensation; the fundamental rights enjoyed by citizens in each Member State (rights of persons charged under criminal proceedings); and fundamental principles relating to a citizens' ability to initiate proceedings before a court in another Member State, or to their defence when summoned to appear before such a court. The intention is to provide practical information, in particular regarding the competent authorities and how to contact them, the use (obligatory or optional) of lawyers and procedures for obtaining legal aid. The Communication asserts that responsibilities must be clearly allocated among the Commission, the Member States and other actors involved in judicial cooperation; that the Member States will have to update the information on their judicial systems that appears on the site; and that the Commission will manage the e-Justice portal in close cooperation with the Member States and coordinate the information on the various existing e-Justice sites.

We believe that it is important to clarify not only who will be providing the information that will appear on the e-Justice portal, but also who will determine what is relevant and what mechanisms will be in place to ensure that the information is kept updated.

We would note that rules of civil and criminal justice can be notoriously complex in

terms of applicability and availability of rights. There is a risk that the information provided may either have to be edited and selective in order for it to be comprehensible to a layperson, or so detailed that it risks being too complex to be of any useful general use. We believe that there should be a mechanism for reviewing information and information should where necessary be provided in a basic summary followed by detail format.

Effective judicial cooperation

The Commission e-Justice Communication, under the heading more effective judicial co-operation, sets out initiatives encompassing: facilitating the use of video conferencing; continuing the interconnection of criminal records; aids for translation including developing automated translation tools and creating a network of secure exchanges for sharing information among judicial authorities.

Videoconferencing

Regarding facilitating the use of videoconferencing, we understand that in some Member States, including the UK, there is an increasing trend to use video conferencing during criminal proceedings. The Commission's Communication on e-Justice focuses on the benefits of increased videoconferencing including savings of time, money and travel and increased flexibility. However it fails to consider or even to acknowledge the disadvantages.

We are concerned that the trend to provide videoconferencing as an additional option can quickly move to it being the main or only form of access to a suspect in custody. Many practitioners would be reluctant to rely on the confidentiality of communications with their clients over a video conferencing medium. It is essential that lawyers have access to their clients to build up a relationship of trust and confidence. Similarly it is essential that courts administer justice in the presence of offenders rather than remotely.

We would also draw attention to the Council of Europe anti-torture committee report to the UK Government published on 1 October 2008,⁶ which, in relation to extensions of pre-charge detention by video-link, emphasises that the physical presence of a detainee should be seen as an obligation, not as an option open to the judicial authority. It emphasises that from the point of view of making an accurate assessment of the physical and psychological state of a detainee, nothing can replace bringing the person concerned into the direct physical presence of the judge. Further, it explains that it will be more difficult to conduct a hearing in such a way that a person who may have been the victim of ill-treatment feels free to disclose this fact if the contact between the judge and the detained person is via a video conferencing link.

Interconnection of criminal records

We have already raised concerns about the interconnection of Criminal Records Databases in this position paper. We are concerned about the accuracy, access, use and understanding of the information stored and how any errors or misunderstandings can be rectified.

⁶ <http://www.cpt.coe.int/documents/gbr/2008-27-inf-eng.htm>

Interoperability

We also have concerns regarding the Commission's Communication on e-Justice assertion that it will be important for exchanges of information to go beyond judicial cooperation to incorporate other objectives (access to certain posts for example). We have serious concerns regarding using information gathered for one purpose for another purpose.

Such concerns would be borne out, for example, if the Commission were to act on its Green Paper Effective Enforcement of Judgments in the European Union: the Transparency of Debtors' Assets dated 6 March 2008 consultation call for comments on enabling enforcement authorities to access other registers, namely, population, social security and tax.

Data protection vacuum

We are concerned that e-Justice is developing in a data protection vacuum or at least in a patchwork of national data protection rules. This begs the question of what data protection rules will apply to the processing of data and any corrections to it. In providing information on cross-border proceedings, the e-Justice portal should at an absolute minimum provide information on data protection rules that apply to all of its subject matter and provide direct access to mechanisms for the correction of data.

We believe that data protection rules should be a precondition to the e-Justice portal. Indeed, better information sharing must be subject to effective data protection provisions. We would also underline the necessity of a proper data protection regime at EU level not just one based on the Council of Europe regime. An efficient and robust procedure for challenging inaccuracies should also be established.

Automated translation

The Commission's Communication also refers to developing automated translation. It asserts that it can make it possible to identify rapidly elements useful for another case and which should be translated by a professional. It asserts that it can also rapidly give actors basic information about the contents of a foreign court decision or an important document for proceedings. It envisages integrating automated translation systems in the long term to share files among national judicial authorities.

We would caution against unqualified reliance on automated translations. For example, we believe that criminal records must be translated with a full explanation of the meaning of sentences, and the court process, whether summary, intermediate, or appeal. We would equally caution against the use of standardised dynamic forms with predetermined text and terminology.

We believe that the use of automated translations must be clearly defined and limited and should not be relied on in proceedings.

Migration

The Home Affairs Report calls for establishing a more effective and coordinated European return policy including harmonised rules for effective return procedures and decisions in Member States which fully respect and guarantee human rights.

Any action in this area must be based on fair and effective procedures, with access to legal advice, adequate and appropriate appeal mechanisms and public funding for those who cannot afford legal costs.

We recognise the need to tackle illegal immigration and understand a key component of an effective European asylum and immigration policy is an effective, fair return procedure. We reinforce however that any policy on returns should be fully compliant with the ECHR. This is essential in the light of the potential conflict for Member States in balancing a desire to remove people with proper adherence to international human rights obligations. In any event, it is wholly inappropriate to use diplomatic assurances to facilitate extradition or expulsion.

Forced return is a very significant encroachment on the freedom and wishes of individuals. In respect of human rights and fundamental freedoms any illegal resident must have adequate possibilities to lodge an appeal before a court during the return procedure.

There should be an emergency mechanism in place that allows for the suspension of deportation in appropriate circumstances. Given the concerns about police and immigration authorities, this system should have a judicial element. Good quality legal advice is also essential in ensuring this mechanism is effective.

There should be provisions on minimum standards in relation to removal and detention. EU level action in this area would be welcome. However these standards must not be minimum standards based on the lowest common denominator.

It is essential that there are binding standards regarding the parameters of detention, proposed by a defined competent authority and subject to full and independent judicial scrutiny within a specified time limit. The principle of judicial control over detention must always be respected.

Detainees must have access to independent legal advice and representation throughout their detention. Alternatives to detention such as regular reporting and compulsory residence should be used in preference wherever possible, particularly where children are affected.

We have previously raised concerns over the use of detention in immigration matters, particularly in relation to the lack of judicial oversight and limited access to legal representation for those detained by the Immigration Service. We are concerned that these problems may be exacerbated by the use of formal juxtaposed controls and immigration detention in other states, for example in France. It is essential that those detained under UK legislation in other states, for example in France, have access to the support services they require, in particular legal advice and assistance.

We recognise that there is a lot of merit in setting up a system whereby Member State authorities could provide mutual assistance in facilitating returns in order to ensure that the process is handled efficiently and smoothly. However it is imperative that there be clear procedures and safeguards to protect against potential refoulement during this process.

There is a need for expert training of the relevant authorities and a culture change regarding their role. They must be in a position to enable applicants to exercise their rights to protection.

The Home Affairs Report also calls for further implementing minimum standards on integration and for providing incentives for third States to cooperate more closely with the EU in fighting illegal migration and efficient returns.

We are concerned about what minimum integration standards and incentives to third states would entail and would emphasise the importance of protecting returnees.

Whilst the migration section in the Home Affairs report focuses on migration from third countries, it does assert that Member States should fully exploit all possibilities of intra-European economic migration. *We would like to take this opportunity to emphasise the importance of fundamental social rights. We are concerned at the misuse of the right of establishment or the right to provide services across borders to undercut terms and conditions of employment and collective bargaining agreements. Recent decisions of the ECJ have identified a contradiction between the objective of delivering citizens' social rights on the one hand and employers' economic rights on the other, in the key area of terms and conditions of employees at work. Rather than seeking a fair balance, the ECJ's decisions in the cases of Viking, Lavell, Ruffert and Luxemburg assert the employer's economic rights as predominant over the worker's social rights.*

EU obligations include the protection of basic economic and social rights of workers. This emanates from the European Social Charter of 1961 but has been reaffirmed in the Service Directive, Posted Worker's Directive and Public Procurement Directive.

Whilst businesses may have the right to reallocate within the market, for example under Article 43 (right of establishment), it cannot be that adverse impact on social rights arise out of the exercise of an Article 43 right.

Asylum

General

In the area of asylum, the Home Affairs Report calls for further harmonising legislation based on an evaluation of the current legislation and enhancing practical cooperation to achieve common eligibility criteria for protection, common procedures for applying the criteria and a common status valid throughout the EU and to reduce differences between decisions taken.

It also asserts that whilst procedural rules should be based on the principle of effectiveness they should not lower existing standards of protection and that asylum applications should be examined individually at national level.

We agree that asylum applications should be examined individually at national level. However, we note that at present refugee status granted in one Member State is not automatically recognised in another Member State. We believe that there should be automatic recognition of the grant of refugee status.

It is unacceptable that minimum standards have been based on the lowest common denominator.

We believe that fair, effective and efficient procedures relating to the determination of an asylum claim, based on accurate information about the applicant's circumstances, should limit abuse of the system yet protect those that are in real need.

The principles of effective access to justice and the operation of due process must be protected in the practice and operation of immigration and asylum law. The following principles should underpin all policy regarding immigration and asylum issues: transparency and integrity of all procedures; adequate and appropriate appeal mechanisms; access to justice and good quality legal advice throughout the whole process; and availability of public funding for those who cannot afford legal costs.

A common European asylum policy

Any future action taken to elaborate upon the basic instruments currently comprising the common EU asylum policy must be founded upon effective access to justice and a high level of protection alongside a respect for the rights of the individual. Furthermore we reiterate that any further European Union action in this area, such as a uniform status of asylum, must be based on full and inclusive application of the Geneva Convention. Moreover, the ECHR should also be respected.

All asylum seekers must have access to good quality legal advice throughout their cases, both to protect their human rights and to ensure the efficient operation of the decision-making process. Early access to good quality legal advice will improve the quality, fairness and integrity of the process as a whole and will facilitate good quality decision making from the outset, which would in turn lead to fewer appeals

A single status

It would be difficult to decide on the conditions that would attach to a uniform status. Different protection categories have different conditions attached to them and there is a risk that refugee status will be watered down if it is compromised with other less "permanent" levels of protection.

A single procedure "one-stop shop"

We support arrangements which would enable a rapid decision to be made about claims for asylum, based on accurate information about the applicant's circumstances. We have some concerns however as to a single procedure, otherwise known as the "one-stop shop".

Good quality legal advice must be provided to the applicant at the outset of the single asylum procedure. If a number of different protection claims were to be considered, an applicant should receive advice on a number of issues, including:

- how to frame their reasons for seeking protection;
- what evidence will be required to substantiate their claims; and
- what type of status they could reasonably expect to obtain.

The single asylum procedure should be flexible enough to allow adequate time for applicants to collate evidence relating to all claims made. There may be difficulties for the applicant in collating sufficient evidence to support a variety of applications if a number of different categories are included in a one-stop shop procedure.

Safeguards in terms of pre-determined examination and the establishment of a procedure for appeals against the refusal of a claim under the Geneva Convention or for protection under the ECHR should be established as part of a single procedure to promote access to justice and create due process.

There are circumstances, however, where a single procedure will be inadequate, for example ill-health or other obstacles making a voluntary or enforced return impossible or unacceptable. If circumstances relating to the country of origin of the asylum seeker significantly change between the refusal of protection and removal, then a further decision may have to be considered after the determination of a claim.

We have very serious concerns about accelerating and streamlining court processes. Undue emphasis on speed militates against good and thorough decision making especially if not balanced by proper representation. Whilst we appreciate the wish to deal with cases as efficiently and expeditiously as possible, this must not be done without proper safeguards and representation for asylum seekers. There is a clear need for the courts to have scrutiny of issues relating to detention and exclusion in order to ensure compliance with international law, the ECHR and due process in practice. In any event it is wholly inappropriate to use diplomatic assurances to facilitate removal.

Enhancing cooperation with transit States

The Home Affairs Report also calls for enhancing cooperation with transit States especially by using, evaluating and further developing “Regional Protection Programmes.”

The development of partnerships and co-operation with countries of transit is of course of great importance in the management of an EU migration regime, particularly as regards technical assistance and capacity building. However partnership and co-operation with countries of transit should not lead to a shift in responsibilities with regard to the decision-making process nor allow Member States to renege on their international obligations.

We refer to any proposals that may relate to the determination of asylum applications in a country other than where they were made. To that end we would raise concerns here of any future action regarding transit processing centres (“TPCs”) and regional protection areas (“RPAs”).

Any such system will threaten the global safety net provided by the 1951 Refugee Convention rather than remedying the perceived weaknesses of the current system. It will instead create multi-layered systems for the determination of asylum applications and appeals that will be expensive and difficult to administer.

Access to legal advice, representation and appeal processes are vital safeguards for asylum seekers, wherever their claim is processed, but we are unclear how these would be provided in external processing centres. It is unclear which country’s legal systems would apply. We are also unclear how issues such as the need to obtain medical and expert reports and the quality of the decision-making process would be dealt with in processing centres. We reiterate that in framing EU asylum policy, respect for the fundamental rights of the individual must be paramount and strictly in accordance with international human rights obligations.

We are concerned that the problem of poor quality decision-making will not be solved by the proposal to process asylum claims offshore, but is likely instead to exacerbate it. In view of this, it is vital that the essential safeguard of an effective ability to appeal against poor initial decision-making is in place.

GENERAL

The Justice Report emphasises communication to the public; the quality of legislation and the need for clear language; and implementation, impact assessment and evaluation.

We believe that Europe's Justice and Home Affairs policy must be based on due process and must protect the individual's rights as well as facilitate cross-border law enforcement. It is essential that the principles of transparency and democratic accountability be at the core of all developments in the Union, be it legislation, policy or practice.

A European Judicial area must be based on the unambiguous rule of law. It should be clear not only that the law governs activity by the European Union in all areas, but also how those laws are made, by whom, and how they can be changed or challenged.

In this regard, we welcome the reference in the Home Affairs report that there needs to be an efficient and balanced distribution of tasks between the different levels of decision making at European, national and regional level, disentangling political action so that citizens can understand which level a decision is taken at and why.

We welcome the reference to better law making and the call for a horizontal review of the coherence of instruments adopted. There is a direct relationship between justice and good law making. Where laws are clear in the problem they are trying to address, equitable, well-drafted and enforceable, then justice is not only more easily done, it can be done more effectively and at lower cost.

We also welcome the concrete measure of explaining the rights and gains for citizens and businesses when new legislation is adopted in a cover note to the act. However, this should not detract from the acknowledged need for legislative acts to be drafted in user-friendly language. We also believe that some thought would need to be given to the legal weight of such cover notes.

Better lawmaking should infuse all stages of legislative development: consultation, drafting, scrutiny, implementation and enforcement.

We welcome the reference to reviewing and evaluating better how existing legislation works to identify areas where there is a clear and practical need for legislation at EU level on the basis of its added value, its necessity to ensure a single European area of justice and its capacity to meet with political consensus and conducting appropriate impact assessments in this regard.

We would emphasize that prior to proposals there should be extensive consultation with interested parties and "stakeholders". Legal practitioners have a great deal to offer at this stage because of their involvement in litigation arising from unclear or badly drafted legislation. We therefore emphasize the need for public consultations presented by the Commission and for close co-operation in the future with those working in the field.

There should be real and effective impact assessments to determine the existence of the "cross-border" problems that form the basis of the justification for work in this area.

Where a Green Paper has been scheduled, this should not necessarily nor automatically mean that a legislative proposal should follow. A legislative proposal should only be brought forward after an effective impact assessment and real consideration of the views expressed at consultation stage. *It should not be an automatic assumption. However in some instances where the objective is to guarantee fundamental rights enforceable rights in legislation are to be preferred.*

The European Commission and Member State Governments responsible for the drafting of legislation should prepare and submit an *Access to Justice Impact Assessment (AJIA)* together with any draft legislation that purports to confer rights of any description on European citizens.

Such an assessment would need to consider whether the mechanisms existed at both the European and national level in order to provide 'access' to the rights conferred by the proposed legislation. At the domestic level, it is important that the proper courts and procedures, such as legal aid, are in place in order to give effect to European-conferred rights.

We note the reference to "implementation fatigue" due to the high number of EU legislative acts adopted in recent years in this relatively new policy area and that some have called for a "time out" period to evaluate what has been achieved and a comprehensive assessment of the state of play before new legislation is sought.

We would concur that there is a state of fatigue and a need for a time out period. Indeed, we believe that it is important to stop and draw breath regarding mutual recognition measures; to stop and explore the current measures before pursuing more measures. There is a tendency to churn out legislation rather than take stock, slow down and focus on evidence based measures and intergovernmental consultation. We welcome better law making, not just in terms of legislation and drawing breath, but also in terms of *providing feedback on the wealth of consultations that take place.*

Moreover, whilst implementation reports are provided for and they do examine the state of play on particular instruments these often take place several years later. Interim evaluation and assistance to Member States should be considered. Examples from the Internal Market sphere where handbooks for implementation and regular workshops with Member States during and after the implementation phase could be used as a model. We believe that a focus on implementation and enforcement is crucial when determining future action as problems often arise in practice because of poorly drafted legislation or its inconsistent or late implementation in different Member States.

These problems need to be ironed out and reflected on when new legislation is proposed. We welcome the acknowledgement that the effectiveness of EU level action can only be improved by taking practical level experiences into account in future decision making. Indeed, the Commission needs to think harder about how it can learn from past experience on a more systematic basis. There is plenty of scope for cleaning up the existing *acquis* before coming forward with more legislative proposals.

Effective evaluation of the implementation as well as of the effects of all measures is essential to the effectiveness of EU action. There should be systematic scrutiny.

We note the reference to incorporating a detailed reference to ex-post evaluation in legislation and an obligation on Member States to deliver the basic data and

developing a comprehensive evaluation mechanism. We would emphasise that the ex-post evaluation introduced in draft legislation at a European (and domestic) level should involve feedback from end-users on existing legislation.

Given increasing reliance on mutual recognition, we are keen to see effective monitoring and reporting practices in place at an EU level on the standard of justice in each Member State. Mutual trust and a belief in the value of mutual recognition can only develop on the basis that practitioners can rely on the concrete application of these standards in the daily legal life of the Member States. Member States should be held to account should they fail in their obligations or commitments.

While the European Union has put in place mechanisms for effective co-operation and co-ordination of law enforcement, the considerations relating to protection of individuals have been left to the internal procedures and mechanisms of the Member States. These mechanisms are often inadequate and far from respected.

We call on the Commission to strengthen a system of *peer review* in a multi-annual framework programme so as to allow for monitoring and evaluation of the standards of justice in Member States.

We welcome the reference to drafting legislative acts in user-friendly language as consistently as possible. Indeed, in terms of drafting and preparation, when new proposals are brought forward steps must be taken to ensure that the legislative initiatives produced are well-drafted, clear and concise documents.

We believe there is a need for better law making in terms of consistency, clarity and, moreover, *co-ordination between relevant Directorate Generals concerned. Indeed, the production of separate a separate Home Affairs Report and a separate Justice Report is a stark example of the absence of a co-ordinated approach which needs to be redressed, using the best bits from both reports to build a consolidated programme.*

The Home Affairs Report emphasises efficient cooperation; better regulation and simplification; prioritisation; and public debate on balancing mobility, security and privacy.

We welcome the acknowledgement that new entities and harmonised rules at European level are not objectives in themselves.

We welcome the focus on better regulation and simplification to make law coherent, clear, understandable and accessible. We welcome the concrete measures, including an electronic publicly available consolidated compilation of secondary law and enhancing better regulation; better coordinating the process of transposing Directives. We believe that it is important to clarify what is understood by codifying legislation as we are in favour of consolidation. Regarding better co-ordinating the process of transposing Directives, we would emphasise that *more rigour needs to be introduced into the timetables for implementation of legislation in order to avoid uneven access to justice around the European Union and uncertainty.* The delay in implementation of the European Arrest Warrant is a case in point. *We urge the Commission to consider ways in which it might ensure that Member States deliver more speedily on their legislative commitments.*

We welcome considering whether European action generates added value in accordance with subsidiarity and proportionality and fully exploiting the effectiveness of current legislation and measures before taking new action.

We would welcome a public debate on how to balance mobility, security and privacy, comprising private life and data protection, in a proportionate way. However, we believe that Home Affairs can usefully learn from the Justice Report's acknowledgement that the right to privacy, including in data protection, should not be erased by the necessities of law enforcement.

Mobilisation of “legal actors”, awareness raising and facilitating mutual recognition in practice

The Justice Report calls for mobilising “legal actors,” including legal practitioners, to be involved better in drafting the instruments they implement. It envisages continuing to create a better understanding by professionals of the EU's legal instruments, a better mutual understanding of the legal systems of the Member States, and improving language training.

We welcome mobilising “legal actors” to be involved better in drafting the instruments they will have to implement and are keen to discuss this further.

We would also call for awareness raising and a focus on facilitating mutual recognition in practice.

We believe that awareness raising about EU Justice and Home Affairs matters and in particular on conducting cross-border matters is essential. Indeed, we believe there is significant lack of awareness on cross-border procedures and how to conduct claims. We note actions taken in the area of awareness raising, including the European Civil Judicial Network, but believe that awareness of it is lacking. Putting links to the EJM could assist but we would also call for more training and events, including for consumers and consumer organisations and their advisors on the front line, including Citizens Advice Bureaus.

We also believe consideration could also be given to creating a high profile cross border European Citizens Advice Bureau.

It is also essential to ensure that mutual recognition works in practice, including by periodic reviews, calling Member States to account and training the judiciary. The European Enforcement Order is a case in point as there are limited reports of its use and the success thereof. It is unfortunate that in practice there is no mechanism to give effect to it, which generates differing levels of trust.

NEW

Alternative Dispute Resolution and civil procedure

We note the lack of focus on civil matters. We would call for promoting all forms of alternative dispute resolution or appropriate dispute resolution and not merely on mediation. Indeed, mediation is not the only route. We support a shift in attempts to resolve disputes out of court. We would also emphasise examining Member States' rules on responding to disputes and penalties for non-compliance. For example, in the UK the parties define the issues and there is a requirement of full disclosure.

Collective redress and class actions

Although not addressed in the Justice and Home Affairs reports, we would like to take the opportunity to refer to developments in the area of collective redress and class actions and in particular the Commission's White Paper on damages actions for

breach of antitrust rules, to which the Law Society responded in July 2008.⁷ Whilst we agree that indirect purchasers should be able to seek damages when they have borne the loss, we are not convinced of the need for or the ability of the EU to legislate for such matters or to try to harmonise rules of domestic civil procedure.

We believe that it is important that any system is fair to both claimants and defendants. Moreover, it should be open not just to consumers but also to businesses.

Regarding non-legislative action, we believe that it is important for the UK to take the lead in devising a system that could be used to deal with group action procedures and rolled out as best practice Europe wide.

We believe that any developments should also take into account the views of Justice and Home Affairs.

European litigation claims procedure

We can see merits in a single European litigation claims procedure for cross border uncontested claims and cross border small claims. Indeed, we can see merit in conducting a review of the interaction between the European Payment Order and the Small Claims procedure with a view to allowing a coherent standalone cross border procedure with one form.

Indeed, we can see merits in a standard procedure for cross border matters with simple and effective forms but not harmonisation impinging on national sovereignty.

Personal injury

Whilst it is important to consider the issue of assessment of damages in personal injury claims, we believe that great care must be exercised in this regard. Indeed, the English approach to damages is quite different from the approach of a number of jurisdictions particularly those which have baremes or tariff schemes. It is fundamentally important for English claimants that the English approach be preserved. We would be concerned if there was any move towards a harmonisation agenda or an agenda which embraced concepts of baremes. It is important to bear in mind that approaches adopted by different jurisdictions are very much influenced by their overall commitments to social and welfare benefits, health provision and indeed private insurance provision.

⁷ It is available at: http://ec.europa.eu/comm/competition/antitrust/actionsdamages/white_paper_comments.html#L

It notes that the proposal for collective actions on an opt-in basis is coherent with the current position in England and Wales at the moment. However, the debate continues as to whether it should be possible to bring collective actions on an opt-in or an opt-out basis.

The opt-in mechanism ensures that persons do actually support the action that is being taken in their name. However, there are potential gaps in a system based purely on an opt-in mechanism, particularly in relation to mass claims of low individual value, which consumers do not tend to bring individually.

Representative actions, which it supports in general terms, would create economies of scale, aggregate costs and reduce court time and create real incentives to reach a settlement. However, it has concerns about claimants being catapulted into an action which they may not wish to take for costs or other reasons. The extent to which the entity in question could bring an action on behalf of a group or class of victims, without those victims having taken any steps to join the litigation would need to be clarified. The extent to which claims that would not be brought without such a system should be facilitated should also be considered. Moreover, it may be preferable for courts to confine themselves to awarding compensation to a defined set of injured parties, consistent with the principle of compensatory damages, instead of distributing the compensation to related good causes.

European Arrest Warrant

We refer to the huge increase in requests for European Arrest Warrants. It is a very practical domestic issue about how to have sufficient court capacity to deal with them all. We believe that at a minimum there should be more training for practitioners and courts.

External

We also believe that directing EU funding in a helpful direction, for example to raise prison standards is important.

QUESTIONS

We would like to respond to three other questions that we are particularly interested in.

First, we agree that the EU should promote respect of Fundamental Rights in Europe in addition to the activities of the Member States.

Secondly, we agree that the EU should do more in the field of promotion of the rights of children and the protection of women against violence.

Thirdly, we agree that the EU should ensure mutual recognition between Member States in respect of marriage, civil partnerships and civil status (names, marital status, descendants) (e.g. recognition of a family name or children's names in whichever European Union state you are living); of administrative documents, civil partnerships, registers of marriages, births and deaths (to be able to have one's birth or marriage certificate or other documents easily recognised in any other Member State).

We would like to highlight three other questions of particular concern.

First, the question "Do you think integration of legal immigrants should be further strengthened and that the EU could help Member States, for example by sharing information?." We would query what type of information sharing is envisaged, the purpose of such information sharing, for example, whether it is to assist the legal immigrant, and the use to which it is put, and emphasise the importance of data protection, procedural safeguards and defence rights.

Secondly, the question "Do you think that the EU should harmonise criminal sanctions for cross-border crimes such as trafficking in human beings, sexual exploitation of children or environmental crime?." We would emphasise the importance of tackling such crimes but are not convinced that harmonisation of criminal sanctions is the best way forward, particularly given its potential to lower standards to the lowest common denominator.

Thirdly, the question "Should police forces have access to non-police data at EU level (e.g. information collected by immigration and asylum authorities) in order to fight terrorism and serious and organised crime?." We would query exactly what type of information sharing is envisaged and the use to which it is put, and emphasise the importance of data protection, procedural safeguards and defence rights.

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