Justice Committee

EU engagement plans 2014

Letter from the Scottish Government to the Convener

Thank you for your letter of 15 January about the Justice Committee's plans for EU engagement for the coming year.

I note that the Committee has identified a range of measures it has an interest in, although you are meantime not seeking any further specific information about the **European Public Prosecutor**, **safeguards for vulnerable persons** in criminal proceedings or the **future of EU justice policy**, pending appearance of an expected Commission Communication. However, as the latter is touched on in the justice section of the SG European Engagement Action Plan, on which you have requested further assessments, my officials have nonetheless provided an update in that part of this reply.

With regard to the **European Engagement Action Plan**, the Committee has requested further details on a number of civil and criminal legislative proposals, in particular timescales and possible impact on the Scottish justice system. As this includes a range of information across a number of dossiers, I have appended the details into an Annex. My general assessment of the current Commission justice EU legislative programme is that it contains a number of important and substantive proposals, particularly, although not only, in the area of criminal procedure and cross border co-operation. My officials have sought to give assessments based on the current state of play in respect of each specific proposal, according to where the dossier concerned is in the negotiation process. The Committee will understand that measures can alter significantly during this process, and for that reason the Scottish Government will continue to monitor closely dossiers of particular interest beyond the initial publication stages. I hope that the information provided in the Annex is helpful in your deliberations.

UK Government's 2014 Opt-out Decision

The Committee has asked the Scottish Government for commentary on 4 specific matters:

a) details of the level of consultation by the UK Government in relation to the 35 measures that it intends to opt back into;

b) whether it is content with the 35 measures identified;

c) the implications for the Scottish criminal justice system if there is any time lag between the date of the block opt-out and the opting back into any of the 35 measures; and

d) whether there are any implications for Scotland of the UK Government not opting back into the remaining 95 (approx.) pre-Lisbon police and criminal justice measures.

The Committee is aware of the background to Article 10 of Protocol 36 of the EU Treaties, which was negotiated by the then UK Government as part of the Treaty of Lisbon in 2009, enabling the UK to decide, by 31 May 2014, whether or not to be bound by the over 130 pre-Lisbon Treaty justice and police co-operation measures already in force in 2009. If the UK Government decided not to opt out, or to negotiate to opt back in to specific measures, these measures would become subject to the jurisdiction of the Court of Justice of the European Union and the enforcement powers of the European Commission on 1 December 2014.

The over 130 pre-Lisbon Treaty measures include some which are defunct, but also others which are vital to tackling cross-border crime and security matters, including the European Arrest Warrant and measures relating to co-operation and information sharing between justice agencies.

We have accepted throughout that it is unavoidable for the UK Government to have to reach a decision on the 2014 opt out. However, we have also been clear that Scotland and Scottish justice agencies have a strong interest in and concern about the UK's final decision.

Details of the level of consultation by the UK Government

There are established arrangements for consultation at Ministerial and official levels between the UK and Scottish Governments on EU justice and home affairs matters, in particular around decisions arising from the UK's power to choose whether to opt in to specific post-Lisbon Treaty justice and home affairs measures. Whilst differences of view arise, in general these arrangements operate broadly effectively, within the terms of the current constitutional arrangements.

This contrasts with our experience with reference to the 2014 opt-out decision. Whilst Scottish Government officials have sought to maintain contact with officials in the UK Home Office and Ministry of Justice throughout the opt out process, this official engagement has mainly been at a technical level, for example, in relation to factual assessment of individual dossiers with regard to practical application and implementation. **However, I would assess the level of consultation by UK Ministers on the 2014 opt out decision overall, and in particular at Ministerial level, as unsatisfactory.**

Given the potential implications of the opt out decision for the efficient operation of Scotland's devolved justice system, I wrote to UK Ministers in April 2012 and again in August 2012, emphasising the need for effective dialogue and consultation before any decision on the opt-out was taken and emphasising the Scottish Government's preferred position to remain opted in to these measures. Despite this, no prior notification was received by Scottish Ministers ahead of the Home Secretary's announcement on 15 October 2012 confirming the UK Government's initial thinking to exercise the block opt out and to opt back in to only certain measures.

Both the Home Secretary and the Secretary of State for Justice wrote subsequent to the 15 October announcement, acknowledging the need for dialogue at Ministerial level between the UK and Scottish Governments and with operational organisations in Scotland. James Brokenshire MP, then Minister for Security in the Home Office, visited Edinburgh in January 2013. During his visit, Scottish Ministers expressed

concern about the UK Government's preferred position and the lack of clarity about the basis for this position or the process for identifying the measures which the UK Government planned to opt back into. The concerns of the Scottish police, prosecutors and legal professions about the opt out decision were also emphasised to the UK Minister.

These specific concerns were reflected in the Report of the House of Lords European Union Committee report of its inquiry into the 2014 opt-out decision, published in April 2013, to which I, the Lord Advocate, Scottish police, the Law Society and Faculty of Advocates all provided evidence:

http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeucom/159/159.pdf.

Despite this, no prior notification was again provided at Ministerial level ahead of the Home Secretary's further announcement on 9 July 2013, which confirmed the UK Government's formal decision to exercise the opt out, and the list of 35 measures to which it planned to negotiate with the Commission and Member States to opt back into. Specifically in relation to your question, the UK Government did not divulge the composition of the list to the Scottish Government in advance of the 9 July announcement, or the basis on which specific measures were either included or excluded.

I should emphasise that concerns about how the UK Government has handled the opt out decision are not unique to the Scottish Government or Scottish justice agencies. Various Committees of both the Westminster House of Lords and House of Commons and the Northern Ireland Government have all expressed negative views about how UK Ministers have conducted this process.

List of 35 Measures which the UK plans to Opt Back into

You ask whether the Scottish Government is content with the list of measures that the UK Government intends to opt back into. The list of 35 measures was set out in Command Paper 8671 published by UK Ministers on 9 July 2013, the same day that they announced their decision to exercise the block opt out. The list of 35 measures includes those which we and justice agencies in Scotland would have been most concerned at not participating in, including the European Arrest Warrant; measures associated with the functions and operation of Europol and Eurojust; measures facilitating the sharing of information; Joint Investigative Teams; mutual recognition of financial penalties and confiscation orders; cross-border police co-operation, etc.

However, notwithstanding this, **I can confirm that Scottish Ministers are not content with the list of 35 measures which UK Ministers plan to opt back in to**. The reasons for this view reflect both general and specific concerns:

- As noted above, our stated preference was to remain fully opted in to all pre-Lisbon police and criminal justice measures as best representing the interests of justice in Scotland and effective EU co-operation.

- We are concerned, in particular, about the uncertainty associated with the UK having to negotiate with the Commission and EU Members States to opt back

in to the specific 35 measures and the risk of a potential gap in access to these measures.

- We do not believe that the UK Government has made a clear or compelling case to justify exercising the block opt in.

- Nor do we believe the UK Government has adequately explained its choice of 35 measures and those which it will not opt back in to.

On this final point, concern about the lack of effective evidence and justification for the choice of 35 measures in the UK Command Paper was well articulated in the follow-up report of the House of Lords EU Committee, published in October 2013:

"*We are disappointed that the Command Paper presented both the 35 measures which the Government intend to rejoin and the 95 they do not intend to rejoin in an unhelpful manner. We regret that the grounds on which the Government made their selection of measures to seek to rejoin were not set out persuasively in the EMs* [Explanatory Memoranda]."

Our more general concerns about the decision to opt out and the choice of 35 measures are reflected in our responses to the other two issues raised by the Committee.

The implications of any time lag between the date of the Block Opt-out and Opting back into the 35 Measures

In considering the risk of a potential time lag, it may be helpful to set out briefly the process by which the UK must seek to rejoin specific measures. In practice there are two separate processes. For Schengen measures (5 of the 35), the rejoining process requires negotiation and agreement with all EU Members States. For non-Schengen measures (30 of the 35) the rejoining is progressed through negotiation with the European Commission.

Clearly any process relying on the agreement either of the Commission or all Member States carries some level of risk of agreement not being reached or of delay. **The implications of any such time lag would vary depending on the specific measures.** For example, for certain measures, such as the European Arrest Warrant, information sharing protocols or practical police co-operation, there is potential for live judicial processes or criminal investigations being delayed or undermined. The views of both academics and justice organisations have expressed significant doubts that satisfactory alternative arrangements could be put in place to cover any temporary gap.

The UK Government position is that opt in negotiations could, in principle, be concluded in early course to provide 'political and legal certainty for all involved' and have stated that other Member States agree with this approach. Specifically, they have said they consider that 'formal steps can be taken by the UK and the EU institutions before 1 December 2014 that facilitate the UK rejoining pre-Lisbon measures, including the EAW' on that day. I have written to the Home Secretary and Secretary of State for Justice, seeking an update on the negotiation processes with

the Commission and Member States and reassurance on the steps being taken to avoid any gap in the UK rejoining specific measures.

Implications for Scotland of the UK Government not opting back into c.95 pre-Lisbon Treaty Police and Criminal Justice Measures

You ask about the implications for Scotland with regard to the measures the UK Government is proposing not to opt back into. The UK Government has taken the position that it will only seek to opt back in to measures which it considers to be essential for cross border co-operation and has categorised the other circa 95 measures variously as being defunct, repealed and replaced (either now or pending), not actually required to enable the underlying actions to take place, or requiring minimum standards in substantive law, which the UK already meets and will continue to do so even if it is not bound by the measure in question.

The various reviews by Committees of the Westminster Parliament have identified a number of additional individual measures within the c.95 which they consider that the UK Government should consider opting in to, including for example the European Judicial Network (EJN) and operational matters relating to Europol. The UK Government has, however, rejected these requests to extend the list of 35 measures.

The specific measure we are most concerned about losing is membership of the EJN. As the Lord Advocate has argued, this measure is of utility to Crown Office officials in respect of progressing mutual legal assistance cases. My officials have raised this matter with their UK Government counterparts and I have written to the Home Secretary asking for the EJN to be added to the list of measures which the UK will seek to opt back into.

We are also concerned by the UK Government's decision to withdraw from a number of minimum standard measures on the grounds that the UK is already compliant with these measures. Signing up to such measures represents a collective statement and reaffirmation that EU Member States across the continent find certain conduct to be unacceptable and, in some cases abhorrent, for example in respect of racism and xenophobia.

One of our primary concerns about the UK Government's decision to opt out of the c.95 measures is the potential reputational damage which it will have for the UK's and Scotland's engagement on vital police and UK co-operation matters and the wider signal it gives to the UK Government's 'direction of travel' on EU matters. During the debate in the House of Commons on 15 July 2013, UK Government Ministers indicated that the opt out decision forms part of its wider agenda to alter the relationship between the UK and EU. As the Home Secretary stated: "*We are first and foremost talking about bringing powers back home*."

As we move closer to December 2014, we will seek to continue to keep in touch with the negotiation process at both Ministerial and official levels, in particular about the risk of any gap in the UK opting back into specific measures. However, as noted above, our experience of UK Ministers' willingness to engage on this matter to date has not been encouraging.

The Minister for Community Safety will attend the Justice Committee on 4 March and will be happy to discuss these matters further during the oral evidence session.

Kenny MacAskill
Cabinet Secretary for Justice
18 February 2014

ANNEX

Scottish Government European Engagement Action Plan

The Scottish Government updates the European Engagement Action Plan every six months. The Committee has asked for information on the legislative proposals relating to justice included in that plan. As the plan has recently been updated, the response below covers both the dossiers included in the previous six months (July to December 2013) and the current six months (January to June 2014). The UK Government's (UKG) decision to exercise the power to 'opt out' of pre-Lisbon Treaty 3rd Pillar measures has been covered elsewhere in this letter, so although it is a priority matter, it is not considered in this Annex.

European Investigation Order (EIO)

The EIO was published in May 2010 as a Member State initiative. Formal negotiations are nearly finalised and it is anticipated the Directive will be formally adopted shortly, with an implementation deadline of early 2017. The UK opted into this measure at the outset.

The EIO is a mutual legal assistance measure which will create a single platform for obtaining evidence in criminal proceedings. It is intended to replace the existing patchwork of provision in this area, including the European Evidence Warrant. It is viewed as being a counterpart to the European Arrest Warrant.

The basis for the measure is mutual recognition of the issuing judicial authority's decision for execution in another country. In addition to standard provisions such as obtaining identified items, there are provisions in more specialised areas, such as controlled deliveries, cross border surveillance, interception of telecommunications in real time, temporary transfer of prisoners to give evidence, hearing by video/teleconference, and provision of information on bank accounts. The EIO improves current measures in a number of ways: creation of a standardised request form, formal deadlines for execution of requests, limited grounds for refusal and putting the mechanics in place to transmit, receive and execute requests. However, it also includes a number of important safeguards which allow EIOs to be refused: investigation measures do not exist or would not be available in Scotland, on double jeopardy grounds, where conduct occurred wholly or partially in Scotland and on fundamental rights grounds.

The Scottish Government is currently considering the impact of this measure. However, we welcome the rationalisation of existing mutual legal assistance provision. A full implementation strategy will be put in place once the measure is formally adopted

Directive on the Freezing and Confiscation of Proceeds of Crime in the EU

This Directive was published by the Commission in March 2012. Formal negotiations have been completed and it is anticipated that the Directive will be formally adopted next month, with an implementation deadline in the second half of 2016. The UK did

not opt into this measure at the outset, but can seek to opt in at any time after adoption.

The Directive creates minimum standards across Europe with respect to the freezing and confiscation of criminal assets and instrumentalities in order to facilitate mutual trust and effective cross-border co-operation between Member States.

It makes provision for the freezing and confiscation of criminal assets and instrumentalities through a number of methods, including direct confiscation; value extended confiscation, which is the confiscation not only of property associated with a specific crime, but also of additional property which the court determines are the proceeds of other crimes; third party confiscation, which deals with the practice by a suspect or accused person of transferring property to a knowing third party with a view to avoiding confiscation; and non-conviction based confiscation.

It remains to be seen whether the UK will seek to opt into this Directive after adoption. Concerns have been expressed on the relationship its provisions may have with the existing civil confiscation regime, in particular, that it may put non-conviction based confiscations at risk. The UKG has also expressed the view that the measure will not offer any direct benefit to the UK, as there are already domestic provisions which deal with confiscation and asset recovery. If the UK does choose to opt in to this Directive, the Scottish Government will consider carefully how it can be implemented to ensure the existing robust domestic confiscation regime remains intact.

Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol)

The Europol Regulation was published in March 2013 and negotiations are continuing under the Greek Presidency. The UK did not opt into this measure at the outset, but can seek to opt in at any time after adoption.

Europol is the EU's law enforcement agency which supports Member States in the fight against organised crime. This Regulation proposes to merge Europol with the European Police College (CEPOL). The justification given by the Commission for this merger is to reduce duplication and make efficiency savings. It also proposes to strength and clarify the obligation on Member States to provide data to Europol, with the aim of making Europol a hub for information and analysis of serious crime. It will also make changes to how Europol can use data it already holds while ensuring individual's data protection rights are protected. The UKG decided not to opt in because of concerns about the obligations being placed on Member States to supply data to Europol without exemptions for e.g. national security or on-going investigations. It was also concerned about an obligation being placed on Member States to comply with requests from Europol to initiate investigations. However, the UKG has committed to playing a full part in negotiations with a view to influencing the text so as to be able to opt in post adoption.

Europol is an important organisation which makes a significant contribution to tackling serious organised crime. Its role is valued by our Police and Prosecution

Services. However, the Scottish Government, along with many other Member States, shares the UKG's concerns about the proposed changes to Europol. Negotiations are continuing and it is hoped that a compromise solution can be reached which allows Europol to continue its valuable work, while respecting the need for domestic investigation authorities to have autonomy and flexibility, which would result in the UK opting in.

Regulation on a Common European Sales Law

The Common European Sales Law (CESL) Regulation was published in October 2011. It has been the subject of protracted discussions over the past few years and these are continuing under the Greek Presidency. This was published under a non-JHA legal base and so the UK opt in does not apply.

The Regulation contains a set of uniform contract law rules which would form part of the national law of each Member State as an alternative to the national contract law regime. The instrument is optional and could only be used where the seller and buyer agree to apply the regime, rather than use national law; and in business to business transactions, if one is a small to medium sized enterprise. The rules would then cover the whole life cycle of the contract.

In September 2013 the Legal Affairs Committee (JURI) of the European Parliament passed a number of amendments to the proposed CESL. The broad thrust of these was to make the instrument apply only to cross-border distance and online sales contracts and supplies of digital content, rather than to such sales and supplies in general.

The Scottish Government held an event in 2012 to seek the views of key stakeholders on the proposals. Opinions were varied and some concerns were expressed about the impact the proposal could have on consumer rights. The Scottish Law Commission, as part of its Eighth Programme of Law Reform, is currently working on a large long term project on contract law. As part of that project consideration will also be given to recent European initiatives, including CESL. As a Regulation, the measure, although optional, would be directly applicable in Scotland but until detailed proposals are developed and agreed it is too early to say whether legislative changes will be necessary.

At this stage it is unclear when agreement will be reached but the Scottish Government will continue to follow developments closely to determine any impact on Scots law.

Regulation Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters

This draft Regulation was published in July 2011 and has been progressing at speed through the negotiating process. We anticipate that there will be political agreement reached soon, which could result in the measure being adopted before the summer. The current draft provides that the measure shall have effect 30 months after it enters into force, which would mean it would be directly applicable in late 2017.

However, the UK has not opted into this proposal and we are unclear if they intend to do so after adoption.

The Regulation proposes to allow creditors in cross border cases to obtain a European Account Preservation Order (EAPO). This means accounts could be frozen in any Member State irrespective of where the competent court is located. It would also allow creditors to obtain information on the whereabouts of their debtors' bank accounts. An EAPO could be obtained prior to initiating proceedings for a claim, during proceedings but before final judgement, or after judgement. It would be available in addition to any domestic remedies. The UK did not opt in at the outset because of concerns around the need to balance the rights of creditors to recover debts with adequate protection for defendants. A danger also exists where an account is frozen and the company is in the process of restructuring. This could tip some companies at the brink of insolvency over the edge.

There are also concerns regarding the burdens that would be placed on the Government and the banks through provisions enabling a claimant to request a "competent authority" in the Member State of enforcement to obtain bank account details of the debtor. The UK does not have such system at present so setting this up would involve significant work for both the Government and financial institutions.

The Bankruptcy and Diligence (Scotland) Act 2007 contains provisions, that have not yet been commenced, which would enable a creditor to ask the sheriff to obtain information about a debtor. However, a range of activity including identifying a body as the competent authority, stakeholder consultation and secondary legislation would be required to bring this into force.

The Scottish Government and the Accountant in Bankruptcy have been considering the text as negotiations have progressed and will continue to do so. Significant progress has been made to meet some of UKG's concerns, but it remains to be seen whether they will seek to opt in after adoption.

Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings

This proposal was published in December 2013 and is part of a new package of procedural rights measures which form the next step in the Procedural Rights Roadmap. Formal negotiations have not yet begun on this measure. The UK opt in does apply and the deadline for opting in at this stage is 19 March.

The Directive sets out minimum standards in relation to the rights of suspects and accused persons to be presumed innocent until proven guilty and to be present at trial. In addition, it provides that there should be: rules to protect suspects being presented as guilty by public authorities prior to conviction; rules to provide that the burden of proof rests with the prosecution and that any reasonable doubt as to an accused's guilt should lead to acquittal; a right for suspects not to incriminate themselves and not to cooperate; the right to remain silent; and the right to be present at trial.

Initial analysis suggests that Scots law and practice are largely compliant with the Directive. However, careful consideration will need to be given to this proposal as the negotiations progress and the text develops. The Committee will recall that the Cabinet Secretary wrote to them on 7 January setting out subsidiarity concerns about this measure. However, the Committee did not have adequate time to reach a firm view on this, but did write to its Westminster counterparts to suggest there may be concerns around this proposal. The House of Commons has now issued a Reasoned Opinion in respect of this measure.

Directive on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings

This proposal was also published in December 2013 and is part of the same package of procedural rights measures as the Directive on the Presumption of Innocence. The UK opt in does apply to this measure and the deadline for opting in at this stage is 19 March. Formal negotiations have begun on this dossier, with the Greek Presidency keen to make progress.

The Directive will apply from when a child is suspected or accused through to the conclusion of proceedings. It defines a child as any person under 18. When a child becomes a suspect they must be provided with certain information, including, but not restricted to that included in the Directive on the Right to Information (this is an earlier measure in the Procedural Rights Roadmap which has been implemented in Scotland on a non-statutory basis). The information provided to the child is also given to their parent or guardian. The right of access to a lawyer cannot be waived. The Directive also refers to the right to legal aid. Individual assessments and medical examinations should be carried out or at least offered, and they are to be repeated as circumstances require. Questioning must be recorded audio-visually, with no derogation where a child is deprived of their liberty.
Deprivation of liberty must be used as a measure of last resort, and children must be held separately from adults and get educational provision. Cases involving children are to be treated as a matter of urgency.

There is some divergence between the Directive and domestic provisions. Of particular note is the definition of a child. In Scotland, generally in criminal proceedings a child is defined as someone who is under 16, unless they are subject to a Compulsory Supervision Order, whereas the Directive defines a child as someone under the age of 18. On a related point, there is some divergence from domestic proposals on how 16 and 17 year olds are to be treated when they are detained by the police. The Criminal Justice (Scotland) Bill, currently being considered by Parliament, gives greater discretion to 16 and 17 year olds than to those under 16. They are to be given the choice whether or not anyone is contacted following their arrest, and, if they wish someone contacted, who that person should be. By contrast, the Directive treats all those under 18 in the same manner and does not allow for any degree of discretion.

Negotiations on this Directive are at a very early stage and we will continue to work constructively with the UKG, other Member States and the European Commission to suggest ways in which this Directive can be amended to fit more closely with the

current provisions proposed in the Criminal Justice (Scotland) Bill. We still await the UKG decision on whether or not to opt in to this Directive at this stage.

Directive on Provisional Legal Aid for Suspects or Accused Persons Deprived of Liberty and Legal Aid in European Arrest Warrant Proceedings

This is the third measure in the new procedural rights package published in December 2013. As with the other two measures, the UK opt in does apply to this measure and the deadline for opting in at this stage is 19 March. Formal negotiations have not yet begun.

This Directive sets down minimum rules regarding the right to legal aid. It ensures suspects and accused persons deprived of liberty are provided with access to legal aid pending a final decision as to eligibility. Access must be provided without delay after deprivation of liberty and before questioning. Provisional legal aid should last at least until a decision on eligibility has been taken and where legal aid is granted, until the suspects or accused persons have a lawyer appointed. In EAW proceedings, requested persons have a right to legal aid in the executing MS from the point of arrest until they are surrendered or a decision on surrender becomes final. Legal aid should be available for the appointment of a lawyer in the issuing Member State to assist the lawyer in the executing Member State.

Initial analysis indicates that Scots law is already broadly in line with the essential requirements of the draft Directive. In particular, legal aid is immediately available for persons deprived of their liberty. However, as with all these measures it will be crucial for the Scottish Government to follow closely the negotiations and the development of the text. As with the other new procedural rights measures, we still await the UKG's decision on whether or not to opt in at this stage.

Regulation on the establishment of a European Public Prosecutor's Office

This proposal was published in July 2013 as part of a package of measures to combat crimes affecting the financial interests of the EU. This includes a separate proposal to reform the EU Agency Eurojust (discussed below) and a Communication on the step-by-step reform of the European Anti-Fraud Office (OLAF). Negotiations are continuing under the Greek Presidency.
From the outset the UK indicated that it will not opt into the EPPO. Under the terms of the European Union Act 2011, UK Ministers may not vote in favour of participation in the EPPO without a majority in a referendum, and an Act of the UK Parliament, allowing them to do so. In addition, the EPPO proposal was the subject of the 'yellow card' procedure for only the second time since it was introduced. This is because 18 National Parliaments issued 'reasoned opinions' expressing subsidiarity concerns about the proposal. The Committee will recall that the Cabinet Secretary gave evidence before them on 3 September 2013 on this measure. The Committee subsequently wrote to its Westminster counterparts to express subsidiarity concerns. The triggering of the yellow card procedure required the Commission to review the proposal, although that review rejected all of the concerns expressed by Member States. It did agree to take these views into account when negotiating the instrument. This measure requires unanimity and given the concerns expressed by

a number of Member States it is possible that it will only proceed by way of enhanced cooperation, although that remains to be determined.

The EPPO would be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in, offences against the Union's financial interests. It would exercise the functions of prosecutor in the competent courts of the Member States in relation to offences against the Union's financial interests. It would consist of both a centralised team and delegated prosecutors in each MS who would be directed by the EPPO and exclusively responsible to it when dealing with crimes within its jurisdiction, for which it would have EU wide exclusive competence, including for certain ancillary offences. The Regulation also sets out the general rules applicable to the EPPO, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, its powers and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

Although the UK has made clear it will not opt in to this measure, the Scottish Government is following the negotiations closely. Even if the EPPO will not operate in Scotland, there is the possibility that Scottish prosecution authorities may have to co-operate with the EPPO, should it be established, in the investigation of cross border offences involving the EU's financial interests. Such co-operation would not, however, extend to a right on the part of any future EPPO to direct prosecutorial authorities in Scotland.

Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust)

This Regulation is intrinsically linked with the EPPO proposal and was also published in July 2013. Eurojust was established in 2002 to support Member States in cross border investigations and prosecutions, particularly in multi-jurisdictional cases. It also provides funding and technical support for joint investigation teams. The UK did not opt into this measure at the outset, but can seek to opt in at any time after adoption.

The Eurojust Regulation will set out the working arrangements and relationship with the EPPO. There will be operational, administrative and management links between the two organisations. The Regulation says that Eurojust shall maintain a "special relationship" with the EPPO and that the President of Eurojust should meet regularly with the EPPO in order to discuss "issues of common concern". It will also change the management structure of Eurojust by creating an Executive Board. The justification for this is to distinguish between the two compositions of the College of Members, depending on whether they are exercising operational or management functions. The Executive Board will be responsible for preparation of the College's management decisions and some administrative tasks.

It will support the administration of Eurojust while retaining the current model under which a College of national members headed by a President will oversee Eurojust's management and operational responsibilities. The Executive Board will be made up of the President and Vice-President of Eurojust plus a representative of the Commission and one other Member of Eurojust's College.

The Regulation also proposes to improve accountability of European and National Parliaments, which includes requiring the annual report to be provided. The other main element of the Regulation is the change to the powers of National Members. At present, there is discretion for each Member State to decide which powers to confer on its National Members. The Regulation would oblige Member States to confer specific powers on National Members. These powers include (i) to facilitate the issuing and execution of any MLA request; (ii) to contact directly and exchange information with any national competent authority of the Member State; (iii) to contact directly and exchange information with any competent international authority; (iv) to participate in Joint Investigation Teams; (iv) to order investigative measures; and (v) to authorise controlled deliveries. It is this element of the proposal that has caused the most concern for the Scottish Government. The Cabinet Secretary appeared before the Justice Committee on 3 September to discuss this proposal and subsidiarity concerns. The Scottish Government's view was that there has not been adequate effort by the Commission to establish whether their objectives could be better achieved by continuing with the existing arrangements, which respect national and local jurisdictions more. The reforms would allow National Members throughout the Union to initiate investigations themselves in undefined urgent circumstances. A power for National Members to direct prosecutions runs counter to the prosecutorial independence of the Lord Advocate. Decisions by the Lord Advocate are to be taken independently of any other person. The proposals for an EPPO and for the reform of Eurojust trespass directly on that position by granting prosecutorial powers in member states to the EPPO and by allowing National Members of Eurojust to direct investigations.

Although the UK has not opted into this proposal, we are following negotiations closely.

Next 5 year JHA programme - successor to the Stockholm Programme

Since the Treaty of Amsterdam and the establishment of an effective legal base for EU JHA legislation, the European Council has set out in a series of 5 year programmes, a general approach to developing the area of 'freedom, security and justice.' The current Stockholm programme spans to 134 pages and covers 88 different themes/action areas and is generally viewed as being far too long and unfocused. The next programme will take effect from 2015 and is currently the subject of ongoing discussions. It is anticipated that the next Programme will be adopted under the Greek presidency at the European Council in June. The European Parliament elections may impact upon this timetable, although they have no formal role in the drafting of these Council guidelines.

There appears to be a consensus among Member States that the next Programme should be more concise and strategic than the Stockholm programme. There should be a focus on results and rather than being simply a catalogue of initiatives and it should be a document focused on quality. The UK Government has set out 5 areas which it considers should be the priority areas for action. These are: (i) preventing the abuse of free movement rights, (ii) strengthening the EU's external border, (iii) action against human trafficking, (iv) the more effective return of

prisoners to their country of origin, and (v) improved exchange of criminal records. In addition, rather than a detailed programme, the UK wants to see strategic guidelines which set out overriding principles and the priority areas for action.

The UK has said the guiding principle should be that the EU should achieve its objectives wherever possible through practical cooperation rather than legislation. It wants to ensure that proposals that come from the Commission, in particular in the area of civil law, always take into account costs and burdens to both private sector organisations and public bodies. It wants the Council to have responsibility for monitoring the way in which the guidance is applied in practice. This should include monitoring the extent to which Commission legislative proposals (where these are necessary) comply with it. The UK also said it wants to start the process of tidying the European statute book. In its view the UK's Protocol 36 decision has highlighted a significant number of European measures in the JHA field which are defunct or obsolete, and they consider that repealing these would be a positive move.

The Scottish Government's starting point is that the considerable progress that has been made in developing the area of 'freedom security and justice' which has led to considerable benefit for Scottish citizens across a range of areas, from closer cooperation in combating organised crime, to better recognition of judgements in civil and commercial law. However, we agree that it is now time to pause and reflect on that progress. Accordingly, we support the growing Council consensus that the next 5 year programme should be more strategic in outlook and that where further action at EU level is needed, the Commission should explore flexibility within the current *acquis*, or practical measures, before moving to legislate. In addition, where legislation is viewed as essential it should be accompanied by rigorous impact assessments, with due regard for subsidiarity and proportionality.

Particular areas where the Scottish Government would welcome future EU cooperation includes improving the exchange of criminal records amongst Member States, taking practical steps to tackle serious organised crime, combatting trafficking of human beings, police cooperation, the general areas of criminal and civil justice and a focus on consolidating the already good work across the field of JHA.

The Cabinet Secretary has written to the Home Secretary, Theresa May, and the Secretary of State for Justice, Chris Grayling, to highlight the strong interest of the Scottish Ministers in the next 5 year programme, particularly given much of the subject matters is within devolved competence and highlighting that, even those areas of reserved competence often have a significant and sometimes distinct impact in Scotland. The Scottish Government agrees with the need for the UK to engage fully in the negotiation process as a positive partner. We also agree with much of what the UK has said. However there are a number of points where the Scottish Government's position does differ, in particular, on migration issues the Scottish Government greatly values both the contribution that EU migrants bring to our economy and society, and the benefits of freedom of movement enjoyed by our own citizens. We consider that any action to prevent abuse of free movement rights should be evidence based.

We are following developments closely and anticipate that this will be an item high on the agenda of the next JHA Council in March. In addition to writing to the UKG, the Cabinet Secretary has submitted written evidence to the House of Lords, who are carrying out an inquiry into this matter.