



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

3rd Meeting, 2014 (Session 4)

Tuesday 21 January 2014

The Committee will meet at 10.00 am in Committee Room 6.

1. **Decision on taking business in private:** The Committee will decide whether to consider its draft Stage 1 report on the Criminal Justice (Scotland) Bill in private today and at future meetings.
2. **European Union legislative proposal:** The Committee will consider the following European Union legislative proposal which may raise questions in relation to subsidiarity—

Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (COM (2013) 821).

3. **Subordinate legislation:** The Committee will consider the following negative instrument—

Act of Sederunt (Fees of Sheriff Officers) 2013 (SSI 2013/345).

4. **Criminal Justice (Scotland) Bill:** The Committee will consider a draft Stage 1 report.

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Clerk to the Justice Committee
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The papers for this meeting are as follows—

Agenda item 2

Paper by the EU Reporter

J/S4/14/3/1

Private paper

J/S4/14/3/2 (P)

Agenda item 3

Paper by the clerk

J/S4/14/3/3

[Act of Sederunt \(Fees of Sheriff Officers\) 2013 \(SSI 2013/345\)](#)

Agenda item 4

Private paper

J/S4/14/3/4 (P)

Private paper

J/S4/14/3/5 (P)

[Copy of the Bill, accompanying documents and SPICe briefing](#)

[Written submissions received on the Bill](#)

Justice Committee

3rd Meeting, 2013 (Session 4), Tuesday 21 January 2014

Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (COM (2013) 821)

Note by the EU Reporter

Purpose

1. The Committee is invited to consider whether the following EU legislative proposal meets the subsidiarity principle:

- [Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings \(COM \(2013\) 821\).](#)

Principle of subsidiarity

2. The principle of subsidiarity is that the EU shall only act where (a) it has exclusive competence; or (b) in areas of shared competence, only where the aims could not be achieved at a more appropriate level, whether that be at national, regional or local level. It is based on the presumption that, unless the EU has exclusive competence¹, action should be taken at the lowest level of governance consistent with the subject matter and the objective. A background note providing further details of the subsidiarity principle and process is attached at Annexe A.

Overview of proposal

3. The proposed Directive aims to set common minimum standards concerning certain aspects of the right to be presumed innocent until proven guilty. It specifically establishes:

- a right to the presumption of innocence (Article 3)
- rules to protect against parties being presented as guilty by public authorities prior to conviction (Article 4)
- rules to provide that the burden of proof rests with the prosecution and that any reasonable doubt benefits the accused (Article 5)
- rules against self-incrimination (Article 6)
- the right of the accused to remain silent (Article 7)
- the right of the accused to be present at their trial (Article 8); and
- that a remedy in cases where the right to be present at trial has not been observed is an obligation to provide for a re-trial.

4. The Directive would only bind the UK if each Member State opts in to it (under Protocol 21 of the Treaty on the Functioning of the EU). If the UK was bound by the proposal, the European Court of Justice would take jurisdiction over matters related to

¹ The five areas of exclusive competence are defined in broad terms in Article 3 of the Treaty on the Functioning of the EU as: (1) customs union; (2) the establishing of the competition rules necessary for the functioning of the internal market; (3) monetary policy for Member States whose currency is the euro; (4) the conservation of marine biological resources under the common fisheries policy; and (5) common commercial policy.

the interpretation and implementation of the provisions of the Directive. The UK Government has yet to decide whether to opt in to the proposal; this decision is expected in late February 2014.

5. Further information on the details of the proposal is provided in the UK Government's Explanatory Memorandum at Annexe B to this paper.

Westminster scrutiny

6. Both the House of Lords EU Sub-Committee E (Justice, Institutions and Consumer Protection) and the House of Commons European Scrutiny Committee are to consider this proposed Directive at meetings on 22 January and so any decision by this Committee is required at 21 January meeting.

Commission position

7. The Commission states in the proposal that "there is a significant variation in the legislation of Member States on the right to be presumed innocent" and that "case law of the ECHR shows that violations of presumption of innocence and its related fair trial rights have steadily taken place". This, it argues, leads to the lack of mutual trust between judicial authorities of different Member States and a reluctance amongst these authorities to co-operate with each other.²

8. The Commission argues that "the objective of the proposal cannot be sufficiently achieved by Member States alone as the aim of the proposal is to promote mutual trust; it has to be taken by the EU, which will establish consistent common minimum standards that apply throughout the whole of the EU". It concludes that the proposal complies with the subsidiarity principle.³

9. The proposal refers to an [impact assessment](#) on the proposal which, it states, "has shown that the level of safeguards in Member States' legislation is, in a general way, acceptable and there does not seem to be any systemic problem in this area". It goes on to state that "there still exist points in which legal safeguards should be improved ... moreover, breaches of presumption of innocence do still occur too often across the EU".⁴

UK Government position

10. In its Explanatory Memorandum (at Annexe B), the UK Government highlights that the Commission's Impact Assessment "acknowledges that "there is limited statistical quantifiable evidence of insufficient mutual trust which may raise a question about the necessity of the proposal". It goes on to state that "the Government will consider this matter further and seek clarification of the Commission's justification during the forthcoming negotiations [on whether the UK Government should opt in to the proposal]".⁵

² Proposal regarding presumption of innocence, paragraph 47. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0821:FIN:EN:PDF>

³ Proposal regarding presumption of innocence, paragraph 48.

⁴ Proposal regarding presumption of innocence, paragraph 23.

⁵ UK Government. Explanatory Memorandum, paragraph 19.

Scottish Government position

11. In a letter to the Committee of 7 January (attached at Annexe C), the Scottish Government states that it is “not aware of any such evidence [of insufficient mutual trust], with respect to the Scottish position on the presumption of innocence and the right to remain silent”. It goes on to argue that—

“If a difference among Member States’ application of the presumption of innocence and the right to be present at criminal proceedings were creating a reluctance to co-operate with the Scottish authorities, this would be observable in our contacts at Eurojust. More particularly any such reluctance would be manifested in a refusal to act upon the European Arrest Warrants issued by the Scottish authorities. We have no such experience.

Accordingly we believe that, at least in respect of Scotland, the necessity for the European Union to act to ensure EU judicial authorities co-operate with each other is not made out. On the contrary, our experience is of co-operation: Scottish warrants are acted upon elsewhere in the EU and other Member States’ warrants are acted upon by the Scottish authorities. By the Commission’s own account, evidence of reluctance to co-operate, occasioned by differing views taken of the presumption of innocence and the right to remain silent, is difficult to come by. In these circumstances, therefore, action at EU level to facilitate the objective of “mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension” does not appear to be necessary.

In the Scottish Government’s view, therefore, the proposal does not meet the necessary criteria for action, according to the principle of subsidiarity set out in Article 5(3) TFEU.”⁶

Recommendation

12. The Committee is invited to consider whether this legislative proposal meets the subsidiarity principle and to agree one of the following options:

(a) that the proposal **does** comply with the principle of subsidiarity. No further action would be required;

OR

(b) that the proposal **does not** comply with the principle of subsidiarity. In this case, the Convener would then lodge a motion recommending that the Parliament agrees with this position, which may or may not be debated. If the Parliament approves the motion, the Presiding Officer is required to inform both Houses of Parliament of the resolution.

OR

(c) that the proposal **may** breach the principle of subsidiarity. The Committee could then write highlighting its concerns to the relevant Westminster committees to take into account during their consideration of the proposal.

⁶ Correspondence from the Cabinet Secretary for Justice on the proposed directive.

Principle of subsidiarity

Background note

Principle

1. The principle of subsidiarity is that the EU shall only act where (a) it has exclusive competence; or (b) in areas of shared competence, only where the aims could not be achieved at a more appropriate level, whether that be at national, regional or local level. It is based on the presumption that, unless the EU has exclusive competence⁷, action should be taken at the lowest level of governance consistent with the subject matter and the objective.

Process

2. The [Protocol on the Application of the Principles of Subsidiarity and Proportionality](#) provides for national parliaments to scrutinise EU legislative proposals for compliance with the principle of subsidiarity and, to submit a reasoned opinion where a proposal is found not to comply with the principle. Member States have eight weeks in which to consider whether an EU legislative proposal meets the subsidiarity principle and to submit any reasoned opinion. The EU institution in which the legislative proposal originated must take into account any reasoned opinions submitted by a chamber of a 'national parliament'.

3. There is no direct formal role under the Protocol for the UK devolved administrations. However, they may feed in any views to the UK Parliament. Standing Orders (Rule 10A.3.1) specifies that any EU legislative proposal identified as raising subsidiarity concerns must be considered by the Scottish Parliamentary committee within whose remit the proposal falls. Where that committee considers that the proposal does not comply with the principle of subsidiarity, the Convener is required to lodge a motion for approval by the Parliament, and, if that motion is agreed to, the Presiding Officer notifies the UK Parliament prior to its consideration of the proposal. Where the committee does not share the subsidiarity concerns, no further action is required.

Making the assessment

4. In considering any EU legislative proposals which raise subsidiarity concerns, committees must limit their consideration to subsidiarity alone.

5. The Treaty on the European Union implies that two tests should be applied:

- (1) **a necessity test:** Is action by the EU needed to achieve the objective? Can the objective of the proposed action only be achieved, or only achieved to a sufficient extent, at EU level?; and

⁷ The five areas of exclusive competence are defined in broad terms in Article 3 of the Treaty on the Functioning of the EU as: (1) customs union; (2) the establishing of the competition rules necessary for the functioning of the internal market; (3) monetary policy for Member States whose currency is the euro; (4) the conservation of marine biological resources under the common fisheries policy; and (5) common commercial policy.

- (2) **a greater benefits test:** Would the objective be better achieved at EU level – i.e. would action at EU level provide greater benefits than action by Member States?

6. The Committee may wish to bear in mind the following questions when considering EU legislative proposals which raise subsidiarity concerns:

- Can Member States address the issue acting individually?
- Can Member States, acting individually, fulfil the objectives of the Treaties?
- Would action by the Member States damage the collective interest?
- Would action at EU level produce clear benefits by reason of its scale of effects, compared with action by the Member States? (For example, economies of scale, legal clarity, homogeneity in legal approaches?)
- Does the proposal respect national arrangements and legal systems?
- Does the proposal take account of regional and local factors?
- Does the proposal contain sufficient reasoning for an assessment of subsidiarity to be made?

Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings

COM(2013) 821/2

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE STRENGTHENING OF CERTAIN ASPECTS OF THE PRESUMPTION OF INNOCENCE AND OF THE RIGHT TO BE PRESENT AT TRIAL IN CRIMINAL PROCEEDINGS (17621-13);

AN IMPACT ASSESSMENT ON THE PROPOSAL (17621-13 ADD1)

AN EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT (17621-13 ADD2);

AN IMPLEMENTATION PLAN (17621-13 ADD3).

Submitted by Ministry of Justice 9 January 2014

SUBJECT MATTER

1. The proposed Directive aims to set common minimum standards throughout the European Union on certain matters that the European Commission ("the Commission") has identified in relation to the rights of suspects and accused persons to be presumed innocent until proven guilty; and to be present at one's trial.
2. In a resolution of 30 November 2009, the Council of the EU agreed a "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings" ("the Roadmap"). In 2010, the European Council in agreeing the Stockholm Programme invited the Commission to:
 - *put forward the foreseen proposals in the Roadmap for its swift implementation, on the conditions laid down therein,*
 - *examine further elements of minimum procedural rights for suspected and accused persons, and to assess whether other issues, for instance the presumption of innocence, needs to be addressed, to promote better cooperation in this area.*

There have been separate proposals from the Commission related to several of the issues identified explicitly on the Roadmap which are the subject of other Explanatory Memoranda. This proposal is the Commission's response to the latter invitation to consider wider issues, specifically the presumption of innocence.

3. The Commission's Explanatory Memorandum which accompanies its proposal explains that it considers this proposal is needed to strengthen the right to be presumed innocent and that its proposal builds from the relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), chiefly Article 6 thereof, and the Charter of the

Fundamental Rights of the European Union. The proposal is made under Article 82(2) of the Treaty on the European Union (TFEU) which provides, inter alia, that the European Parliament and the Council may, by means of Directives, establish minimum rules to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross border dimension.

4. The detail of the proposal is to lay down minimum rules concerning certain aspects of the presumption of innocence and the right to be present at trial. The specific areas covered by the draft Directive include: (a) a requirement to ensure that suspects or accused persons are presumed innocent until proven guilty according to law; (b) rules to protect against suspects or accused persons being presented as guilty by public authorities prior to conviction; (c) rules to provide that the burden of proof rests with the prosecution and that any reasonable doubt as to an accused's guilt leads to the accused's acquittal; (d) rights of suspects or accused persons not to incriminate themselves and not to cooperate; (e) rights of the accused to remain silent; and (f) the right to be present at trial.
5. The proposal is accompanied by several supporting documents, chiefly an Impact Assessment and Implementation Plan. Where relevant those documents are discussed within this Memorandum.

SCRUTINY HISTORY

6. None. This is a new proposal.

MINISTERIAL RESPONSIBILITY

7. The Secretary of State for Justice has the leading interest in the procedural law aspects of the proposal and the Home Secretary leads on related matters concerning the investigative and arrest stages in England and Wales.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

8. Procedural criminal law is a devolved matter. The Scottish Government has seen and is content with this Explanatory Memorandum and officials with responsibility in Northern Ireland have also seen and are content with it.

LEGAL AND PROCEDURAL ISSUES

i) Legal basis

9. The proposal for this Directive is on the basis of Article 82(2)(b) of the Treaty on the Functioning of the European Union (TFEU). This legal basis falls within Title V of Part Three of that Treaty. In accordance with Article 3 of Protocol No 21 on the Position of the United Kingdom and Ireland in respect of the area of Freedom, Security and Justice, the UK's opt-in protocol is engaged.

ii) European Parliament procedure

10. Ordinary legislative procedure.

iv) Voting procedure

11. Qualified Majority Voting in Council.

v) Impact on United Kingdom Law (including implementation issues)

12. The Directive will only bind the UK and Ireland in the event that each Member State decides to opt in to the instrument as per Protocol 21 TFEU. The Directive will be binding in its entirety on all other EU Member States with the exception of Denmark (who will not be bound as per Protocol 22 TFEU).

13. Those Member States that are participating when the Directive is adopted will need to implement the Directive in their national law. The deadline for implementation is set out in Article 13 of the draft Directive and currently stands at 18 months after the Directive is published in the Official Journal of the European Union.

14. The Government is currently considering what legislative changes the UK would have to make in order to be compliant with the Directive if the UK were to participate.

v) Application to Gibraltar

15. This Directive would be binding upon Gibraltar if the UK opts in and the Directive is then adopted.

vi) Fundamental Rights Analysis

16. This draft Directive is designed to enhance the rights of suspects or accused persons in relation to the presumption of innocence and the right to be present at one's criminal trial. The main fundamental right engaged by these proposals is article 6 ECHR (right to a fair trial). Article 6 ECHR provides that in the determination of any criminal charge, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. Article 6(2) specifically provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". Articles 47 and 48 of the Charter of Fundamental Rights contain corresponding principles about the right to a fair trial, the presumption of innocence and right of defence. In the view of Ministers, the substantive provisions of the draft Directive in chapter 2 (right to the presumption of innocence) and chapter 3 (right to be present at one's trial) would respect these rights.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

17. The proposal would not extend to the EEA.

SUBSIDIARITY

18. The Commission's assessment is that the proposal complies with the principle of subsidiarity as it has identified variations in the legislation amongst Member States which have led, it asserts, to ECHR rights not being fully observed and a consequent reluctance of EU judicial authorities to cooperate with each other. It says that the European Court of Human Rights (ECtHR) alone does not ensure full protection of the presumption of innocence. It suggests, therefore, that EU level action is necessary to address these variations and, by inference, only the EU can act. In that respect and insofar as that analysis is correct then the subsidiarity principle would be fulfilled.
19. The European Commission's Impact Assessment, which accompanies this proposal also acknowledges, however, that there is limited statistical quantifiable evidence of insufficient mutual trust which may raise a question about the necessity of the proposal. The Government will consider this matter further and seek clarification of the Commission's justification during the forthcoming negotiations.

POLICY IMPLICATIONS

20. The principle that individuals are entitled to the presumption of innocence is a well established and fundamental principle of the UK criminal justice system. It underpins various aspects of the UK law and we will need to analyse further what the implications of this proposal would be for extant laws and practices. It is also a fundamental principle in the UK that defendants are entitled to be present at their trial, though there are also well-recognised and ECHR compatible exceptions to this.
21. The detailed provisions of the draft Directive include:
- Scope (Article 2) sets out that the provisions of the Directive are to apply throughout criminal proceedings, from the point an individual is suspected or accused in criminal proceedings until the final conclusion of those proceedings. In this respect, this article is wider than the corresponding scope provisions for other measures arising out of the Roadmap for strengthening procedural rights. For example, article 1(2) of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings provides that the right in that Directive applies "to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence". The UK Government will be considering the implications of this wider approach in the context of the specific rights conferred by this draft Directive. Article 2 also establishes that these rules apply to natural persons only.
 - Article 3 contains a statement that Member States must ensure that suspects or accused persons are presumed innocent until proven guilty according to law. This provision would appear to reflect the provision in Article 6(2) of the ECHR. The Government will be considering further whether this provision is designed to have an identical meaning to the meaning in Article 6(2).

- Public statements and official decisions from public authorities are not to contain references to suspects or accused persons being guilty prior to final judgement in accordance with Article 4.
- The rules within Article 5 seek to establish that the burden of proof is upon the prosecution, subject to exceptions, and any reasonable doubt in the case presented by the prosecution should benefit the accused. The broad principle of this provision is reflected in UK laws though there are limited circumstances where the evidential burden is reversed (for example those set out in the Criminal Procedure (Scotland) Act 1995), and the impact of this provision on those exceptions will be considered further.
- Article 6 establishes that suspects/accused persons have the right not to incriminate themselves or to cooperate with any criminal proceedings. There is an exception to this right concerning material which has an existence independent of the will of the suspects or accused persons. This article also prohibits any inference being drawn from the acts of the suspect/accused person in this respect. This would alter the position in English and Scottish law and changes to some laws may be required to reflect this provision, for example s55(13A) the Police and Criminal Evidence Act 1984 as this provides that in certain circumstances and with appropriate safeguards some inferences can be drawn from non-cooperation. For example, where consent to a search for drugs is refused without good cause, the court or jury in determining whether that person is guilty of an offence may draw such inferences from the refusal as appear proper. Laws of this nature are ECHR compliant and there is ECtHR case law to support this. The proposed rules around the admissibility of evidence may also suggest changes were needed to UK laws.
- Similarly to the above, Article 7 would establish a right for the suspect/accused to remain silent throughout any criminal proceedings and the exercise of that right is not to be used against the suspect or accused person. It provides that any evidence obtained in breach of this provision would be inadmissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings. Again, English law provides that in certain circumstances and with appropriate safeguards inferences can be drawn from silence. These laws are compliant with ECHR which has been tested and upheld in the ECtHR. The rules around the admissibility of evidence may also suggest changes were needed to UK laws.
- The rules within Article 8 aim to provide a right to all persons to be present at their trial and determine and restrict the circumstances in which proceedings may continue toward judgment in their absence. The general principle that the accused should be present is already established in UK law. There are exceptions to this principle in England and Wales, but only where, in magistrates' courts, the accused has explicitly or impliedly waived the right to be present. In the Crown Court in England and Wales, the circumstances in which the trial will continue in the defendant's absence are comparatively rare. The Government will consider further whether article 8 would require any additional safeguards to the safeguards which presently exist in UK law.

- The provision in Article 9 establishes that the suspect/accused would be given a new trial if they were absent from an earlier trial and the conditions that allow a judgment to be reached in their absence, as established under Article 8, are not met.
- Article 10 establishes that effective remedies for any failure to observe the provisions of this proposal must be in place and in general the aim of those remedies would be to ensure that any such failure returned the suspect of accused person to the same position in which they would have found themselves had the breach not occurred. What precisely this means will need to be considered during the negotiations.
- The final provisions concern the reporting of data on the implementation of the Directive and the transposition and implementation processes. The requirement to collect and submit data to the European Commission periodically may require a new data collection process, which may incur costs, and it is unclear to what purpose these data are sought, which will need to be clarified and made explicit.
- The Government will consider these matters and any further implications identified in reaching a decision on whether to opt in to the proposal and approach that decision within the terms set out in the Coalition Agreement. That decision will of course be informed also by any views expressed by Parliament. That decision will also consider broader issues such as whether the proposal is necessary and proportionate and the implications of the consequent extension of the European Court's jurisdiction into this area.

CONSULTATION

22. The Government is, and will continue to be, consulting with relevant stakeholders. In particular, we are seeking the views of those law enforcement and judicial agencies that would be required to operate under the requirements of this Directive.

IMPACT ASSESSMENT

23. The Commission has produced an Impact Assessment to accompany its proposal 17621-13ADD1. The Government is in the process of carrying out its own assessment of potential impacts and will provide an impacts checklist assessment in due course.

FINANCIAL IMPLICATIONS

24. The Directive, if adopted as currently drafted, could give rise to a number of financial implications. Mostly, though possibly not exclusively, any implications would fall on the public sector in particular, police and law enforcement authorities which would need to comply with specific obligations. We are examining the implications of these requirements further to determine how significant they would be in light of existing practices and UK law.

TIMETABLE

25. We expect preliminary technical and expert negotiations of this proposal to begin early in 2014. The date by which the UK must declare its position on the opt-in is not yet confirmed but is likely to be in late February or early March 2014. Once

agreed and adopted, the Directive as currently drafted will need to be implemented two years after its entry into force.

A handwritten signature in black ink, appearing to be 'C. Grayling', written in a cursive style.

Chris Grayling
Lord Chancellor and Secretary of State
Ministry of Justice

Correspondence from the Cabinet Secretary for Justice in relation to the Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings

I understand your Committee is seeking the views of the Scottish Government on the proposed Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, in relation to its compliance with the subsidiarity principle.

The principle of subsidiarity is set out in Article 5(3) of the Treaty on European Union (TFEU):

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The objective the Commission is pursuing here is, according to its own Explanatory Memorandum, based on the provision in Article 82(2) of the TFEU:-

[t]o the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

You may be aware that the Commission's assessment is that the proposal complies with the principle of subsidiarity. It contends that it has identified variations in the legislation amongst Member States which have led, it asserts, to ECHR rights not being fully observed and a consequent reluctance of EU judicial authorities to co-operate with each other. It suggests, therefore, that EU level action is necessary to address these variations and implies that only the EU can act.

However, the Commission also notes in its Impact Assessment, which accompanies the proposal, that there is "limited statistical quantifiable evidence of insufficient mutual trust" which may raise a question about the necessity for the proposal.

We are not aware of any such evidence, with respect to the Scottish position on the presumption of innocence and the right to remain silent. If a difference among Member States' application of the presumption of innocence and the right to be present at criminal proceedings were creating a reluctance to co-operate with the Scottish authorities, this would be observable in our contacts at Eurojust. More particularly, any such reluctance would be manifested in a refusal to act upon European Arrest Warrants issued by the Scottish authorities. We have no such experience.

Accordingly we believe that, at least in respect of Scotland, the necessity for the European Union to act to ensure EU judicial authorities co-operate with each other is not made out. On the contrary, our experience is of co-operation: Scottish warrants are

acted upon elsewhere in the EU and other Member States' warrants are acted upon by the Scottish authorities. By the Commission's own account, evidence of reluctance to co-operate, occasioned by differing views taken of the presumption of innocence and the right to remain silent, is difficult to come by. In these circumstances, therefore, action at EU level to facilitate the objective of "mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension" does not appear to be necessary.

In the Scottish Government's view, therefore, the proposal does not meet the necessary criteria for action, according to the principle of subsidiarity set out in Article 5(3) TFEU.

I hope this information is helpful.

Kenny MacAskill
Cabinet Secretary for Justice
7 January 2014

Justice Committee

3rd Meeting, 2014 (Session 4), Tuesday, 21 January 2014

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following negative instrument:

- Act of Sederunt (Fees of Sheriff Officers) 2013 (SSI 2013/345).

2. Further details on the procedure for negative instruments are set out in the Annexe attached to this paper.

Act of Sederunt (Fees of Sheriff Officers) 2013 (SSI 2013/345)

Introduction

3. The purpose of the instrument is to substitute a new Table of Fees in Schedule 1 to the Act of Sederunt (Fees of Sheriff Officers) (No. 2) 2002. The fees levels in the new Table represent an increase of 2.15% on the existing fees. This increase comes into effect from 27 January 2014.

4. An electronic copy of the instrument is available at:
<http://www.legislation.gov.uk/ssi/2013/345/contents/made>

Delegated Powers and Law Reform Committee consideration

5. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 7 January and determined that it did not need to draw the attention of the Parliament to the instrument on any grounds within its remit.

Justice Committee consideration

6. Members are invited to consider the instrument and make any comment or recommendation on it. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 3 February 2014.

ANNEXE**Negative instruments: procedure**

Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).

Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.

If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.

Each negative instrument appears on the Justice Committee’s agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Guidance on subordinate legislation

Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee’s web page at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/64215.aspx>