EU Referendum Bar Position
Paper III

Reform or withdrawal: Rights and justice

Introduction

1. This is the third of a series of three papers in which the General Council of the Bar of England & Wales (the Bar Council) examines the legal aspects of the pending referendum on the UK's membership of the EU and its possible outcomes.

2. Paper I is an overview of the legal implications of the in-out question, looking in particular at the Government's "New Settlement for the United Kingdom within the European Union", and considering what Brexit would actually look like. Paper II takes a closer look at other policy areas linked to the four baskets of reforms that were included in the New Settlement.

3. In this, Paper III, we examine the implications of this debate for areas of law and practice not directly covered by the New Settlement but where the referendum result could have profound implications for areas of law and practice that form part of the Bar Council's wider rule of law and public interest work. These mainly concern the administration of justice (civil and criminal), and citizens' fundamental rights.

4. Accordingly, the remainder of this paper is set out as follows:

Co-operation between the EU Member States on justice issues

A few introductory remarks

5. The Bar Council has, in general terms, been supportive of the exercise of EU competence in the area of Justice and Home Affairs since its inception in the 1990s. September 1999 saw the first set of European Council conclusions on Justice and Home Affairs – heralding an expanding EU competence that now accounts for a significant body of EU legislation. Much of this is based on the principles of mutual assistance and recognition – that is, facilitating cooperation and the cross-border recognition of judicial decisions, without actually harmonising the national legal systems. The Bar Councilhas welcomed many of these EU justice measures, and has actively contributed to their development in several instances.

6. The premise for expansion of EU competence into this area was a relatively simple one. If you create a single market for goods and services, people will increasingly make use of that market, shopping across borders, moving between Member States, either temporarily, on holiday or travelling for work; or more permanently. They may meet, marry and have children with a person from another Member State. If that relationship breaks down, what then? Increasingly, they may be purchasing goods or services online from other Member States but have concerns about the security of payment methods, of delivery, their consumer rights if they are not happy with the purchase, etc. They may invest in real property abroad and then be faced with complications regarding title or upon succession. They may become involved in the, often very different, criminal justice system of another Member State. Or what if they move to a different Member State and find that it does not recognise their civil status or, say, the legality of the adoption of their child? These are just a few examples of the types of problems for which the EU has been legislating, or plans to legislate. Of course, there are overlaps in the examples above with other areas of EU competence, such as consumer protection, but the important point is that these and more are the types of issues that the Bar's clients increasingly grapple with, and why we have been supportive of EU legislative developments to resolve them over the past decade and more.

7. Some 2 million UK nationals live in other EU Member States. So the ending of the UK's involvement in EU law that defines rights and obligations in these areas would be of real and practical concern.

8. Accordingly, the questions we seek to address are: What would be the effect of Brexit on these areas of law? Which beneficial elements of the EU *acquis* would it be desirable to seek to replicate in domestic legislation and in relations between the UK and the EU? And how easily and successfully could that be done?

Judicial co-operation in civil matters

General observations on civil judicial cooperation at EU level

9. Article 81 of the Treaty on the Functioning of the EU (TFEU) provides the main legal basis for EU action in this field. The Bar Council broadly supports its premise and the way that it has been applied and interpreted to date. On the other hand, we have had some concerns about successive changes to the Treaty wording that might give scope for an expansionist agenda, in particular away from more procedural mutual recognition / private international law measures towards substantive civil law measures – that is, measures that would re-write the civil law (and especially the contract law) of Member States. However, with the recent refocusing of the Commission's work under its Better Regulation agenda that risk seems to have receded. In particular, we welcome the greater emphasis now placed on rigorous and robust independent Impact Assessments (IA) and the clearer application of the Treaty requirements of subsidiarity and proportionality.

10. In any event, we note that when doubt has arisen, for example on whether a planned EU measure has the cross-border implications required by the Treaty for an EU measure in this field, it has fallen to the Member States through the Council, and to the CJEU, to insist upon this element. We would not welcome any reversion to a more interventionist approach by the EU in Member States' civil law, and if the UK remains a member we would continue to lobby the institutions to ensure that initiatives in this area remain properly focused.

Private International Law at EU level

11. As regards civil and commercial matters, the principal instruments in this area deal with jurisdiction and recognition and enforcement (Brussels I), with choice of law in contract (Rome I) and in non-contractual obligations (Rome II), and with insolvency (Insolvency Regulation). There are also instruments, discussed separately below, dealing with family law and personal status (Brussels IIA, Maintenance Regulation), and with civil procedure and judicial co-operation. Together, these Regulations provide a framework, of slightly varying application, for the great majority of cross-border civil disputes. They provide a largely level playing field for all European countries. Regulations dealing with Wills and Succession (Succession Regulation) and with Divorce (Rome III) do not apply in the United Kingdom, as the UK has not opted into them, and these topics are governed by UK laws.

12. At a general level, the Bar Council has contributed to the development of these instruments and generally considers those to which the UK is a party an extremely valuable part of the body of EU law.

13. Jurisdiction and recognition and enforcement of judgments in civil and commercial matters is regulated throughout the EU by a regime dating back over 40 years (the Brussels I regime), which has been updated from time to time. The Brussels I Recast Regulation (1215/2012), which represents its latest manifestation, is the product of widespread review and active legislative input in which the UK's voice was influential. Some of the particular concerns with earlier versions, notably in relation to the abuse of a rule giving priority to cases started first in time (popularly known as the "Italian torpedo"), have been addressed.

14. If the UK were to leave the EU and cease to be bound by the Brussels I regime, it would be necessary to consider whether to accede to the parallel Lugano Convention, which contains rules equivalent to the previous version of the Brussels I regime. If that did not occur, then in relation to court proceedings in England & Wales, the discretionary rules in the Civil Procedure Rules governing jurisdiction in relation to non-European disputes in civil and commercial cases would again apply. Meanwhile recognition and enforcement of English judgments elsewhere in Europe, and *vice versa*, would revert to a patchwork quilt of bilateral conventions and common law rules.

15. The impact of that on the attractiveness of London as a venue of choice for commercial dispute resolution is likely to be negative overall. Until equivalent arrangements had been negotiated – in itself a challenging task – there would be a period of uncertainty about the jurisdiction and enforcement regimes applicable as between the UK and EU Member States. That would itself generate additional litigation, which may (in the short term) benefit lawyers practising in this area but would involve their clients in additional cost and delay. One factor potentially pulling in the opposite direction is that outside the Brussels I regime, UK courts would no longer be subject to the CJEU's strict interpretation of that regime as restricting their ability to grant anti-suit injunctions where a party has commenced court proceedings in another EU Member State in breach of an arbitration agreement. However, that could be short-lived – or might not arise at all – depending on the terms imposed by the EU for the UK's inclusion in any new jurisdiction and enforcement regime.

16. Choice of law in civil and commercial contract matters is largely, but not exclusively, governed by the Rome I Regulation (593/2008), itself a successor to the Rome Convention of 1980, much of which it replicates, but parts of which were improved. The UK did not opt in to the Rome I Regulation negotiations at the outset, but having achieved many of its negotiating objectives, then opted in. If the UK were to leave the

EU and the Rome I Regulation were to cease to have effect, choice of law in contract would again be governed by the Rome Convention, which is given effect in the UK by the Contacts (Applicable Law) Act 1990. These rules all apply whether or not the case involves a choice of a European or other system of law. The Hague Conference on Private International Law adopted a convention in 2005 of forum selection clauses in business-to-business disputes which is so far in force only between the EU and Mexico, although a (very gradual) widening of its application can be expected over coming decades.

17. Choice of law in non-contractual obligations (torts, but also unjust enrichment and some other matters) is governed by the Rome II Regulation (864/2007), subject to some exceptions, notably trusts, privacy rights and defamation. Although there are some practical difficulties with the operation of the Rome II Regulation, notably in the area of personal injury damages (because their scale, and basis of their computation, differs widely between Member States), it undoubtedly involved a streamlining of a highly disparate group of rules and practices across Europe. Even in the United Kingdom, the choice of law rules in tort were complex and uncertain, largely governed by Part III of the Private International Law (Miscellaneous Provisions) Act 1995. Had Rome II not been adopted, there was a widespread view that this law was in need of reform, and this will doubtless arise again as an issue for consideration in the UK leaves the EU – though the immediate consequences would probably be less significant than the loss of the jurisdiction and enforcement regime.

18. Cross-border insolvency, an increasingly complex and important topic, is governed by the Insolvency Regulation (1346/2000), which will be replaced by a revised version (2015/848) with effect from 26 June 2017. Both regulations provide for the operation of national insolvency law, but clarify choice of jurisdiction issues and provide for cross-border recognition, co-ordination and co-operation. If Britain were to leave the EU, detailed and complex negotiations would need to follow if these advantages were not to be lost.

Overlap with procedural rules

19. Many other EU civil justice instruments have a complementary procedural, usually automatic, recognition and enforcement function, e.g. the European Enforcement Order, the European Order for Payment, the European Small Claims Procedure and the more recent European Protection Order. Of the rest, most are concerned with procedural issues, e.g. the service of documents, taking of evidence, provision of legal aid and measures enhancing the availability of alternative dispute resolution, including the Mediation Directive and the more recent measures on ADR and ODR. The Bar Council endorses the adoption of such measures. We believe that in practical terms, these measures ease the dealings of individuals and businesses (including SMEs) who visit, work or trade across European boundaries. In the event of withdrawal from the EU it

would probably be regarded as sensible to negotiate new arrangements to continue or replicate most of these measures.

EU family law instruments

20. In the specific field of family law, EU measures have had a significant impact that the Bar Council considers beneficial and that is still growing. English family law barristers have had favourable experience in particular of the operation of Regulation 2201/2003 ("Brussels IIa") and more recently Regulation 4/2009 (the Maintenance Regulation). Obvious advantages include having uniform jurisdictional rules in all Member States for divorce proceedings (Brussels IIa) and for maintenance proceedings (the Maintenance Regulation); and having a system of summary enforcement in the courts of all Member States of orders under the Maintenance Regulation and also relating to contact between parents and children made in the courts of any other Member State (Brussels IIa).

21. Again, neither of these measures is perfect, and the Bar is engaging in the work now underway to revise them at EU level. A major change, or even withdrawal from these EU instruments, would, in our view, bring disruption and confusion. It would be particularly difficult for the English family courts to cope with, at a time when (a) legal aid has been greatly reduced in this field and many more litigants are not legally represented; and (b) the family courts are undergoing and/or adjusting to, major structural changes.

The need for revision

22. In endorsing at a general level the bulk of the measures adopted in this field to date, the Bar Council stresses that does not mean we have no concerns about individual measures. Some of the existing EU civil justice measures, including as stated above, those in the family law field, were not as well drafted as they perhaps could have been. That said, most of them contain, on their face, a commitment to review their operation after a few years, and in all cases where this has so far occurred, notably the review of Brussels I regulation 44/2001 replacing it by 1215/2012 and the more recent review of the Insolvency Regulation (1346/2000) the Bar Council has been encouraged by the thoughtful and inclusive approach taken, with the expert views of stakeholders – including the UK legal professions, reflected in the final revised texts.

23. Several of the other existing civil judicial cooperation measures are currently under review or will be coming up for review in the coming years, and we look forward to contributing to improving those instruments in much the same way, should the UK remain a member of the EU. Indeed, we consider it essential that the common law voice is heard in the review of instruments such as Brussels IIa, Rome II, Rome IIa, where key difficulties such as defining the respective scope of the applicable law and the law of the forum, as well as the race to court encouraged by the current rules in certain

circumstances, can have a significant effect on the outcome of litigation. The Bar Council is ready and willing to engage in these revision exercises.

The EU's powers to act internationally in this area

24. The Bar Council is aware of the controversy surrounding the scope of the EU's exclusive external competence here. The relevant provision is Article 3(2) TFEU, which states:
"The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."

25. Historically, the Commission has tended to interpret this to mean that, provided an instrument has been formally adopted at EU level, the EU has external competence for its subject-matter. The Council takes the more restrictive view that this is the case only if the external instrument would affect the internal one. Moreover, when the EU does have exclusive external competence, it is not always clear whether the power to act lies with the Commission or with the co-legislators.

26. The Bar Council sees the logic to the argument that if the EU has exclusive external competence in a civil justice area, and it conducts negotiations to secure wider international measures that mirror an EU measure successfully, that the result would be preferable to a series of bi-lateral measures. In an ideal world, this would create simplicity and legal certainty. An example that we have heard cited where it could be useful to have the US, say, tied into a comparable measure to that applicable within the EU would be the 2013 regulation setting up Online Dispute Resolution in civil and commercial cases.

27. However, we would like to see clarification of the principle behind the seizing by the EU of exclusive external competence.

Protocol 21 TFEU – the UK's opt-in

28. This is a useful tool, but one which needs to be employed with great political awareness and sensitivity. The main advantage of the UK opt-in is simply that it can choose whether or not to take part in an EU measure in this field. It is not reliant, as are the other Member States (bar Ireland and Denmark) on achieving a blocking minority in the Council in order to block a measure that it does not want to see become law. Plainly, the advantage is greatest outside of the family law area, where in any event, unanimity is required in Council.

29. The UK has two opportunities to decide to opt-in to a measure – within 3 months of the Commission tabling a proposal, or, if not then, at any time after the final text is formally adopted. Within these two alternatives, there are further pros and cons:

- If the UK chooses to opt-in at the beginning, but the negotiations then go badly from its perspective, it is effectively in the same situation as all of the other Member States in needing to form a blocking minority.
- On the other hand, if it waits until the end of the legislative process before deciding whether or not to opt-in, its influence on the negotiations themselves may be diluted. This is discussed further below.

30. With one or two notable exceptions, the UK opt-in has by and large been well exercised. That said, it is important to be aware that it is, and is seen as, a political tool and as such is subject to the political vagaries in place at any one time. The Bar Council has observed several factors at play on this issue in recent years:

- Other Member States may resent the option that the UK secured for itself, in choosing to take part or not in justice measures on a case-by-case basis;
- This resentment is likely to be inflamed if the UK chooses not to opt-in to a measure at the time of its initial adoption by the Commission, but then seeks to play a very active role in the Council negotiations. This approach worked well for the Succession and Maintenance regulations (and in several criminal justice files) but it appears that the more often the UK is seen to take this approach and then chooses not to opt-in at the end of negotiations, the less accommodating the other Member States are likely to be. This "having your cake and eating it too" can have lasting, negative consequences, albeit difficult to quantify, in other areas.
- The Bar Council specifically disagreed with the UK decision not to opt-in to the regulation setting up the Justice Programme 2014-19. We called into question the view that it was a value for money decision. The consequent reduction of opportunities for UK legal professionals, including the judiciary, to benefit from, and contribute to (EU-wide) judicial training and exchange of best practice, with the network-building that accompanies such projects, to the detriment of knowledge base and mutual trust and cooperation, is likely to prove disproportionately significant by comparison to the relatively modest saving.
- Indeed, many of the EU justice measures are dependent for their effectiveness in practice on mutual trust and confidence as between the judges, courts and legal systems of the Member States. Removing any opportunity, such as that of participation in the Justice Programme, to build that trust, can have detrimental effects on the efficacy of those measures, with consequences far beyond the question of taking part or not in the, in this case, regulation creating the funding programme itself.

The Bar Council's wish list in the area of civil judicial cooperation

31. Whilst, as stated above, the Bar is broadly happy with the EU acquis in this area, below is a summary of general suggestions that would improve this body of EU law, and its application in practice, without the need for Treaty change.

32. In general terms, we would prefer to see the EU focus its future efforts on improving, consolidating, and simplifying the existing measures in the civil justice field, and on education, training and awareness-raising, so that mutual trust is enhanced, best practice exchanged and the many practical measures already in existence are more fully utilised. In so far as there are gaps to be filled, we would prefer to see a continuing emphasis on private international and procedural law rules.

33. On limited occasions, it may be appropriate to go further, but then only where there is specific need and an EU response is proportionate. By way of example, the Bar Council, through the Personal Injury Bar Association, has endorsed calls for an EU instrument that would provide a solution in cases involving foreign accidents, where the current variations in national limitation rules cause a disproportionate amount of uncertainty, and increased expense, for injured victims.

34. The importance of active participation by English, or at least common law, trained lawyers at all stages of the law-making process in this area, including on occasion, by way of intervention in cases before the Court of Justice of the EU (CJEU), should not be underestimated. Recent experience suggests that the UK may be foregoing its right to submit observations on many, if not most, references in the private international law field before the CJEU. Notwithstanding the impact of judgments of the CJEU on UK law and practice, important judgments are regularly made without the benefit of any English legal input. Despite the current economic and political conditions, this is short-sighted.

35. As a general rule therefore, the Bar Council would encourage the UK to intervene, whenever practicable, in cases in which it would have *locus standi* before the Court of Justice, regarding the interpretation of the Treaty provisions or the secondary legislation or soft law that emanates from it, in the field of civil judicial cooperation, including on private international law, as described above.

36. If the UK is to remain in the EU, the Bar Council would wish to see more judicious use of the UK opt-in, for the reasons described above, in relation to, for example the regulation creating the current Justice Programme.

37. In that event we would also call for improved training and awareness raising, as well as exchange of best practice, both at EU level (though here, our non-opt-in to the Justice Programme is an issue) and at national level. Several existing EU civil justice measures

could make a significant contribution to citizens' access to justice were they used more widely. The Bar Council shares the view of many that greater resources need to be committed to raising awareness of the existence of these measures among the public and the legal professions, and on training to maximise their potential. There are several examples of simple, practical measures that are not bringing the benefits they could, but which might do so were they better known, understood and applied. These include the European Small Claims Procedure; the European Order for Payment Procedure, and the European Enforcement Order. We would also encourage similar efforts for more recently-adopted instruments, such as that on ODR, and the European Protection Order so that their uptake is more rapid and effective.

38. If the UK remains a member of the EU, we would hope to see more proactive use made, within the UK, of existing EU measures across different fields of practice. For example, the European Evidence Regulation (Regulation 1206/2001) could be, but has not been, used as a way for English courts to obtain disclosure in (inter alia) competition law cases, where different domestic laws prohibit the giving of evidence in foreign courts (e.g. the so-called French Blocking Statute).

39. The Bar Council would welcome definitive clarification of the issue of external competence in the field of civil judicial cooperation. In particular, we would welcome an express limitation preventing the Commission from being able to claim external competence as soon as the EU has legislated internally on a particular issue in this field.

40. If, however, the UK were to leave the EU, then co-operation under these instruments would on the face of it come to an end. New arrangements would have to be negotiated as part of the burgeoning list of matters for discussion as part of the TEU Article 50 process, including provision to protect the interests of the 2 million or so UK nationals resident in EU Member States. The Bar Council would of course seek to contribute to the negotiation of new measures. However, we consider it likely that following withdrawal the UK would at best be able to negotiate the continued application of some or most, but not all, of the present suite of co-operation measures. We fear, moreover, that UK voices calling for reforms or improvements to those regimes at EU level would carry relatively little weight.

Judicial co-operation in police and criminal matters

General observations on criminal judicial co-operation at EU level

41. The Bar Council's general view is that cross-border co-operation, whether through mutual assistance or mutual recognition, in the criminal justice field, is in the UK interest. We consider that if the UK were to leave the EU, it would be important that provision be negotiated for this co-operation to continue so far as possible.

42. Crime, especially more serious and organised crime, including acts relating to terrorism, does not recognise national borders. Even less serious crimes are increasingly likely to have a cross-border element as citizens work, travel or live elsewhere in Europe, or avail themselves of goods and services shipped or supplied in another Member State. That said, the vast majority of cross-border criminal cases involve a single State investigation that overlaps into one or more other States.

43. It is far from clear how cross-border crime could be controlled if the UK withdrew from the EU. One of the reasons given frequently to withdraw is to have greater control at the borders, and to end the right of free movement from the other EU countries and vice-versa. For the existing constraints that Member States are free to place on free movement across their borders, in the context of crime prevention, see the Free Movement section of Paper I. But cross-border crime includes activities that have little to do with physical movement of individuals across national borders; for example, internet-based fraud, crimes relating to cross-border payments, and customs and tax offences concerning import and export of goods. The view at the Bar Council is that these challenges have been met with increasing effectiveness by the development of EU level bodies such as Eurojust, Europol (whose current Director Rob Wainwright is a UK citizen) and the European Judicial network. If the UK votes to withdraw from the EU, the UK government will no doubt wish to negotiate new arrangements enabling the UK to benefit from these agencies, or to replicate their effect with other mechanisms.

44. If we were to revert to non- EU-led co-operation in the fight against crime, we would be relying on intergovernmental conventions that would need to be agreed and ratified. The view of criminal practitioners who have contributed to this exercise is that this approach has not proved particularly efficient and effective in the past, and would nowadays face significant changes with the growth of technology-enabled crime – even though technology has at the same time enabled improvements in cross-border surveillance. When needed, joint police investigation teams have become more widespread. Through a combination of greater cooperation and the application of relevant EU measures, it has become easier to obtain evidence, and individual antecedents, from EU Member States so that police forces know who they are dealing with when they make arrests or look for suspects.

45. In the specific area of extradition, the operation of the European Arrest Warrant (EAW) means that criminals who flee to other EU countries can be brought back to the UK to face justice, and vice versa, without bureaucracy. It is widely recognised that this power has been misused by some Member States. However, even organisations that have highlighted abuses of the EAW machinery, such as Fair Trials International, have not argued for its abolition, but rather argued for reform to improve the safeguards for affected individuals. The Bar Council supports that position. We also believe that the entry into force, and full implementation and application throughout the EU, of other measures such as the European Investigation Order and the European Supervision

Order would go some way to reducing existing and widely recognised problems with the European Arrest Warrant – for example, where the real purpose of the warrant is to question an individual to ascertain whether there is sufficient evidence to bring criminal proceedings, rather than to implement a genuine decision to prosecute. The value of these procedural mechanisms to law enforcement is their basis in mutual recognition principles. The instruments create more certainty than their predecessors with regard to the progression of a cross-border investigation. This is through requirements for celerity with domestic investigations, time limits on responses and limited bases for refusal of cooperation.

46. The unity of a single common approach in this area seems to us preferable in principle to its likely replacement in the event of UK withdrawal, *viz*. a network of bilateral arrangements between the various States, which may not all agree the same terms. Moreover, the process for negotiating bilateral treaties is generally less transparent than the process of making EU secondary legislation (or indeed negotiating change to the EU Treaties themselves).

47. The EU-level approach has also enabled the standardisation of procedures and forms. Eurojust is breaking down barriers and developing a common approach with partners from different traditions of law, which is mutually beneficial. Prior to the establishment of an EU criminal justice *aquis,* Council of Europe mutual legal assistance measures were relied upon for extradition, investigative assistance, and prisoner transfer between European countries, and indeed still apply for non-EU nations. These instruments do not have the benefits outlined above; there are long delays or (in some cases) a complete failure of response; looser interpretation of provisions; less reliable application of the instruments generally; and no mechanism for authoritative resolution of conflicting interpretations. For some areas of EU co-operation, there are no equivalent alternative agreements currently in place. In the case of EU conflict or co-operation disputes, Eurojust plays a crucial role in their resolution - though of course this may itself be a ground for criticism, since Eurojust is a policing and prosecution body rather than a judicial one. Nevertheless, we find it hard to identify an obvious non-EU alternative that could operate as effectively as Europol and the other current cooperation mechanisms, in terms of both ensuring effective justice for victims and respecting due process safeguards for suspects and defendants.

48. Indeed, the Bar has long sought a better balance at EU level between prosecutorial measures and the safeguarding of defence rights. The EU has recognized this through a programme of measures creating minimum standards across EU Member States for certain procedural rights of suspects and accused persons. Raising standards across EU countries has the benefit of not only providing stronger provisions at home, but protecting UK nationals who travel abroad. We have also been calling for greater emphasis on defence rights in the texts of new proposals for prosecutorial measures, and

those of measures that apply criminal or quasi-criminal sanctions in other EU policy areas. Examples include:

- The 2014 Regulation on insider dealing and market manipulation (market abuse); early drafts of which raised concerns about the principle of double jeopardy;
- The 2014 Directive on the freezing and confiscation of the proceeds of crime in the EU; and that same year, the civil justice regulation creating the European Account Preservation Order; and
- The July 2013 proposal for the creation of the European Public Prosecutor's Office.

The English Criminal justice system as a Benchmark

49. The English and Welsh criminal justice system is, and is widely seen as, one of the most developed and sophisticated in the EU, if not the world. This is amply illustrated in two of the main criminal justice fields in which the EU has been active over the past several years, the rights of the defence and of victims. On both, the law and practice in England and Wales has been regularly cited in Brussels and in other Member States as a benchmark. If the UK chooses to withdraw from the EU, Ireland will remain as the only member of the EU using Common Law, and a system that is recognisable to UK citizens. This will undermine the useful work of the last 40 years in raising standards in this area in certain other EU countries by reference to the UK system.

50. Given this pre-eminence, the Bar believes that any actual or foreseeable EU legislative proposals imposing minimum rules in these fields are unlikely to increase the legal or administrative burden in England and Wales, and when they do, we would likely welcome that change. Their effect on English law is, based on the current Treaty competences, likely to be minimal and/or beneficial for both the victims and suspects they seek to provide procedural safeguards for. With little cost to our domestic system therefore, the message of engagement and support for the underlying principles that UK participation in such measures gives to other EU Member States is invaluable. For this reason, our starting position has long been and remains that the UK can and should be seen to be leading from the front in this area, and manifesting this by positive use of its Protocol 21 opt-in whenever possible, though we are of course mindful of the need to balance the interests of the UK as a whole.

51. An additional advantage of proactively engaging in this way is that it enables the export of certain procedures and expectations that are accepted norms in the UK, to other EU partners where they may not be, often to the benefit of the rule of law throughout the EU, and of UK citizens living, working in or visiting other jurisdictions.

Use of the UK's Opt-in

52. In recent years, the Government seems to have pursued a policy of not opting into criminal justice measures. Some of these we would hope a future government may yet choose to take part in, if the UK remains part of the EU. Examples:

- Directive (adopted 2013) on the right of access to a lawyer and on the right to communicate upon arrest (which guarantees the right of access in both the issuing and executing state in EAW cases);
- Directive (adopted 2014) on the freezing and confiscation of proceeds of crime;
- Regulation (adopted 2015) on Europol and the European Police College (CEPOL);
- Directive (adopted 2016) to strengthen the presumption of innocence and the right to be present at trial in criminal proceedings;
- Directive (adopted 2016) on special safeguards for children suspected or accused of a crime;
- Draft Directive on the right to provisional legal aid for citizens suspected or accused of a crime and for those subject to a European Arrest Warrant;
- Draft Directive on the fight against fraud to the Union's financial interests by means of criminal law; and
- Draft Regulation establishing, as part of the Internal Security Fund, the instrument for financial support for police co-operation, preventing and combating crime, and crisis management.

53. The other side of the opt-in coin is of course the flexibility to not take part in measures which the UK genuinely feels are incompatible with our law or practice or in some other way not in the national interest. In practice, at least so far, the Bar Council considers that very few of the EU's proposals in the criminal justice field could be so described, or at least, if they were at the outset, they were susceptible to the necessary improvements during the legislative process. Indeed, we consider that the proposed regulation creating the European Public Prosecutor's Office (EPPO) is one of very few examples of a proposal where the UK interest may be best served by staying out. Even so, since the future EPPO could have an impact on prosecutions in England and Wales, it requires the Government and relevant UK stakeholders to take an active interest in the passage of the legislation that will set it up – though we recognise that this collateral impact would be reduced or avoided altogether if the UK left the EU.

54. It is illustrative to note that a review of EU competences in the area of criminal justice was carried out two years ago in consequence of the negotiated option contained in Protocol 36 of the Lisbon Treaty for the UK to opt out of all pre-Lisbon criminal justice measures after a five-year transitional period under the new treaty arrangements. This detailed process concluded that 35 measures were crucial to UK law enforcement, leading to the UK opting back into them. Many of the remaining measures had been superseded[1]. While this took place in the context of other EU competences continuing, given the geographical proximity of other European nations, and the undoubted need to continue trade and service agreements, the assessment by UK law enforcement professionals that these instruments are necessary to enable us to combat cross-border crime remains an important and relevant consideration.

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf

Other tools to protect the national interest

55. The Treaties provide other means of protecting Member States' national interests. Article 82(3) and 83(3) TFEU both provide for a Member State to apply the so-called "emergency brake" to suspend certain categories of proposal in the criminal justice field if it believes that it "would affect fundamental aspects of its criminal justice system".[2] If no consensus is reached, but at least nine Member States wish to proceed, then "enhanced cooperation" (Article 329 TFEU) may be invoked. There are thus other tools available to prevent any concerns about overreach.

The Bar Council's wish list in the area of judicial cooperation in criminal matters

56. Developments we would welcome, were the UK to remain a member of the EU, not already mentioned elsewhere in this paper, and not requiring Treaty change:
    - The Commission actively to supervise the implementation by the Member States of the measures already in place, and where necessary, to bring infringement proceedings;
    - Remedies to be put in place for breach of certain measures, in particular those relating to the rights of the defence and of victims;
    - Minimum standards on recourse to and review of pre-trial detention;
    - Funding for training and exchange of best practice between defence and other practitioners and legal professionals. Here again, we note that the UK's non-opt in to the Justice Programme is a hindrance, though there is some assistance possible through the concurrent Fundamental rights Programme into which the UK did opt.
    - Appointment of judges to the CJEU with criminal justice experience, and training for all CJEU judges who may preside in such cases, on criminal law;
    - Ensure that Commission officials, so far as possible, who are drafting legislation in this field, not only have criminal justice experience, but are also drawn from the different legal traditions in the Member States. The Commission should make greater use of temporary staff to fill lacunae where necessary in order to achieve the right mix.

57. We take a more finely balanced view of the possibility of future expansion of EU competence in the field of criminal justice. The most recent Treaty changes, now incorporated in provisions of the TFEU, provided scope for the EU to be more ambitious in the future through changes introduced by unanimous agreement of all Member States. Examples include:
    - Article 82(2)(d) created a new catch-all, allowing the Council (unanimously) to add to the list of EU criminal procedural objectives at a later date;

[2] And see discussion of the New Settlement, Sovereignty basket of reforms, in Paper I

- Article 83 (1) provided a list of types of "serious crime" where the EU has competence to establish minimum rules. So far, we have seen this used most actively in prevention of various trafficking offences, but there are signs that the Commission would in future wish to rely on it in other areas such as money laundering.
- Article 83(2) provided a new broad power to establish minimum rules with regard to the definition of criminal offences and sanctions in pursuit of a Union Policy area which "has been the subject of harmonisation measures" (e.g. protection of the environment);
- Article 84 created a new power to adopt measures, including harmonising ones, in the field of crime prevention.
- Article 86 provided for the creation of a European Public Prosecutor's Office – the proposal, tabled in 2013, even though it is proceeding by way of enhanced cooperation, continues to have a bumpy ride in the Council. The Treaty article includes the power to extend the competence of the EPPO, but again, only with the unanimous support of the European Council. There has been some debate as to whether that means the full European Council or only those taking part in the enhanced cooperation.

58. It is thus clear that the Treaty provisions themselves contain significant safeguards weighing against an unfettered expansion of EU competence in this area. When seen with restraints such as the UK's opt-in, the so-called red card system, and the other more general safeguards described above, in the Bar Council's view, there exists sufficient assurance that any future proposed expansion of competence could be checked, or would only apply to the UK if the UK expressly agreed to it. In practice to date, and in reliance on those various restraints, the UK has been able to contribute to proposals that assist UK interests, such as the ability to trace stolen funds into foreign bank accounts; whilst it has also acted as a brake on the progress of measures through Council where change might impair the powers available to the UK Government.

59. The Lisbon Treaty also introduced changes which the Bar Council generally welcomed. The status of the European Parliament (EP) as co-legislator in most criminal justice measures now provides greater scrutiny of the proposed measures and a vehicle through which stronger procedural, and in particular, defence and victim, safeguards can be obtained.

Fundamental Rights

Understanding the Human Rights context in Europe and the UK

60. As pointed out in Paper I, EU law has developed general principles of fundamental rights based on the constitutional traditions of the Member States (including the UK). From there developed the Charter of Fundamental Rights, which post-Lisbon has equal

status with the Treaties themselves. However, it is important to understand that for the most part, the protection of human rights in the legal systems of the UK is quite separate from the UK's membership of the EU. That is because, as we explain below, EU rules about fundamental rights apply in the domestic system only in relation to acts and decisions in areas governed by EU law. Outside those areas, protection of human rights stems partly from the common law but predominantly from the application of the European Convention on Human Rights (ECHR), which is implemented in the UK by means of the UK-wide Human Rights Act 1998 (HRA) and the devolution legislation for Scotland, Wales and Northern Ireland. The EU is not a party to the ECHR. The Lisbon Treaty provided for it to become so, but in 2013 the first attempt at a draft accession agreement was ruled by the CJEU to be incompatible with the Treaties.[3] The ECHR is an instrument of the Council of Europe, whose 47 Member States include non-EU members such as Russia and Turkey. All EU Member States are expected to belong to the Council of Europe and adhere to the ECHR; but it is not necessary to be an EU Member State to belong to the Council of Europe.

61. It follows that UK withdrawal from the EU would not have a wide-ranging impact upon the general protection of human rights in the UK legal systems. The UK's obligations under the ECHR would remain binding on it under international law, and by virtue of the HRA and devolution Acts, the rights it confers would continue to be justiciable in domestic courts. The Government has recognised that, and has proposed a separate reform agenda in relation to the ECHR/HRA regime, albeit one which at times has tended to be bound up politically with the EU debate. The Government has suggested that it will put forward proposals for a Bill of Rights. In the domestic debate on the Government's eventual proposals, the Bar Council will seek to ensure that certain principles are upheld in any future changes, including defending the rule of law; ensuring that the principle of non-discrimination underlies any changes to human rights law in the UK and cautioning against any potential derogation of rights and/or of access to justice.

The impact of the Charter of Fundamental Rights

62. The Charter of Fundamental Rights, as a codifying and clarifying document, contributes to the advancement of fundamental rights by making these rights clearly identifiable in one, legally binding instrument. In EU cases the Charter has been pleaded increasingly since its inception in 2000, as an interpretative tool, and since 2009, as a binding set of rights with equal Treaty status (which means that acts of Union institutions can be struck down as incompatible with the Charter). From the perspective of a lawyer, it gives more definite and concrete form to certain fundamental rights, and spells out some rights that might otherwise be less obvious to discern from general principles or case law (for example, the right of access to documents). To non-specialists, the Charter

[3] http://curia.europa.eu/juris/liste.jsf?num=C-2/13

provides transparency and accessibility over previously disparate fundamental rights principles.

63. In cases relating to UK implementation of EU law, both the Charter and the ECHR are likely to be sources of rights. In those cases, the advantage of the Charter (from the point of view of the person claiming its protection) is that unlike the Convention, it entitles the domestic court to dis-apply primary domestic legislation that is incompatible with a Charter right – again, because of its status as equivalent to the Treaties.

64. Much of the content of the EU Charter of Fundamental Rights is very similar to that of the ECHR, though the Charter (CFR) provides a more expansive catalogue of rights – for example, the right to human dignity (article 1 CFR), the right to a fair trial and effective remedy (article 47 CFR), and non-discrimination (article 21 CFR). The extensive presence of what might be termed 'socio-economic' rights, rather than classical civil or political liberties, is a further contrast with the ECHR.

65. In cases where the content of an ECHR right and the corresponding Charter right are the same, the substantive answer to the question – has there been an infringement of rights? – is likely to be the same. Nevertheless, the Bar Council generally welcomes the availability of the Charter in cases with an EU law element, because it makes established principles of EU law clear and accessible, and therefore helps promote the rule of law. At the same time, because the Charter applies only to acts of the Union institutions within the competences conferred by the Treaties, and to implementing acts of the Member States, the Charter is – quite properly – constrained by the scope of those competences. It cannot itself expand the competence of the EU.

The implications of withdrawal from the EU

66. As noted above, the applicability of the Charter to certain UK disputes, those involving implementation of EU law, flows directly from EU membership. Once EU law no longer binds the UK, there would be no implementation of EU law as such, and equally no challenge to acts or decisions of public bodies could be based on the Charter. However, in the absence of parallel reform to the UK's relationship with the ECHR, equivalent acts and decisions based on post-withdrawal domestic law would remain amenable to challenge on the basis of ECHR rights as implemented by the HRA and devolution legislation. The answer to the question whether there has been a violation of fundamental rights would in most cases be the same. The main difference would be that the remedy of disapplication of offending provisions of Westminster legislation would not be available – though devolved legislation could, as now, be set aside for incompatibility with fundamental rights.

67. As in other areas, it would also be necessary to take into account the terms of the UK's post-withdrawal relationship with the EU, and in particular the content of the

transitional regime for applying current EU rules in the meantime (see Paper I). The transitional legislation would have to address the extent to which the Charter remains applicable to the continuation in force of EU-derived rules following expiry of the negotiation period under Article 50 TEU. In the absence of clear provision about this, the UK courts would have to determine for themselves the extent to which the consequences of violation of Charter rights – in particular the disapplication of incompatible primary legislation – continue to have effect.

Information Rights, including Data Protection

68. This subject is a broad, complex and currently politically delicate one. The Bar Council is principally concerned with those aspects that relate to the administration of justice, though we also address other relevant issues on which our practitioners have expertise.

69. The European data protection regime is based on Council of Europe Convention 108, which is separate from the EU and stretches beyond its borders. Substantive principles of protection of personal data are thus inherently pan-European in nature, irrespective of whether competence to implement them lies with the EU or Member States. In the context of the EU, there are particularly strong reasons -- related to the single market and cross-border trade -- for a high degree of harmonisation of data protection standards.

70. Consumer, and increasingly Business to Business (B2B), transactions, involving online sales to buyers in one Member State are often fulfilled by a trading entity operating in another. That involves cross-border flows of consumer and business data. Online information and data processing services have evolved to the point where it is a rarity for the data involved in even a single transaction to be processed entirely within the borders of a single State. Given the inherent portability of data, the concept of a market without internal frontiers is nowhere more real than in relation to online activity. Consumer and business confidence in the use of digital services depends on the existence of uniformly high standards of protection of users' interests regardless of where their data is processed. Equally importantly, harmonisation avoids non-EU businesses facing 28 different sets of data protection rules when providing goods and services in Europe. That helps make Europe an attractive place to do business and contributes to the competitiveness of the region in global trade, in particular in digital services.

71. Another benefit of EU-wide standards is the ability to negotiate as a bloc with global corporations such as Amazon and Google on standards of protection for cross-border data flows and transfers of funds. If the UK decided to withdraw the government can of course negotiate as a separate entity, but may not be in as strong position on its own in terms of "safe harbour" agreements and corporate rules.

72. Against that background, the Bar Council has been broadly supportive of the evolution of the EU Data Protection regime. This has undergone full revision, in a process begun in 2011, and culminating now in the final adoption of a new Data Protection Package. The centerpiece will be the Data Protection Regulation (the General Regulation). The General Regulation will replace the current Data Protection Directive 95/46/EC while the accompanying Directive will replace Framework Decision 2008/977/JHA (adopted under the pre-Lisbon "third pillar").

73. We consider, were the UK to remain in the EU, that a binding EU-wide instrument that harmonises the interpretation of key terms such as "personal data" would be beneficial in

the context described above. At the outset of the reform process, the Bar Council called for the revised regime to provide universally high standards of protection of privacy and confidentiality rights without imposing unjustifiable burdens on business or hindering economic growth. In general terms we consider that the resulting package achieves this.

74. We consider it helpful to look more closely at three specific aspects of particular interest to the Bar: proportionality of national enforcement action; the treatment of legally privileged information; and recent legal developments affecting the "safe harbour" regime for data flows between the EU and US.

Proportionality of national enforcement action

75. Member States will have front-line enforcement functions under the new General Regulation (which among other things introduces the possibility of very significant financial penalties for non-compliance). It is important that the national enforcement authorities – in the UK as elsewhere – perform their functions with the principle of proportionality firmly in mind.

76. Members of the legal professions are well accustomed to treating their clients' personal data with the utmost care. In parallel with obligations under the data protection regime, they owe stringent duties of confidentiality and are bound to protect the legal privilege that subsists in communications made in the course of dealing with clients' affairs.

77. A recent high profile case involving the legal profession, in which the relevant UK competent authority applied its enforcement policy on "naming and shaming" data controllers in an inflexible and disproportionate manner, served as a reminder that retaining enforcement functions with Member State authorities is no guarantee that individual rights, or the interests of SMEs, will be any better protected than by retaining competence at EU level. Indeed in this situation the Bar Council considers that it is particularly important for affected businesses to have access to strong public law principles such as proportionality, which experience shows do not necessarily carry the same force when domestic law alone applies.

Legally privileged information

78. The right of individuals and businesses to communicate privately with their legal representatives is a cornerstone of access to justice. The UK legal profession was quick to bring to wider attention its concerns about the potential impact of the draft General Regulation on lawyer-client communications, when the proposal first emerged. A balance needs to be struck which prevents the misuse of data-subject access rights to breach the privilege attaching to lawyer-client communications or to sidestep the limits on inter-party disclosure, but which prevents a data controller from evading the subject's rights by "parking" personal data with a lawyer.

79. English barristers are often instructed in disputes with a European cross-border element. As explained in Paper II, the Bar's cross-border work makes a significant contribution to UK service sector exports. We see considerable advantage in a degree of harmonisation of the rules governing subject access and information rights in relation to data held by a lawyer in the context of a legally privileged relationship. The legal profession continues to lobby to ensure that this is so.

"Safe harbour" rules

80. Under the present Data Protection Directive, personal data may be transferred to a territory outside the EU only if that territory has an adequate level of data protection. Otherwise data transfers are unlawful. For many years the Commission relied on its "Safe harbour" agreement with the US as providing "adequate" protection for data transferred to the US. However, the Snowden revelations that personal data passing through US jurisdiction could be, and was, routinely acquired and retained by the US authorities put increasing pressure on the agreement. In Case C-362/14 *Maximillian Schrems v Data Protection Commissioner*, on a reference from the Irish courts, the CJEU held the EU/US agreement inadequate. Urgent negotiations ensued, resulting in a new deal known as the "EU-US Privacy Shield", unveiled in a Commission Communication in February this year[4] The draft provisions of the General Regulation about extra-EU data flows were also strengthened.

Impact of Brexit

81. The current UK Data Protection Act 1998 was enacted largely to implement Directive 95/46/EC. If the UK remains a member of the EU, much of the substantive content of the Act will be repealed, because the General Regulation will have direct effect. New UK legislation will be needed to provide for administration and enforcement of the system and to implement the new Directive in the area of investigations and criminal justice. If the UK withdraws from the EU, the likelihood is that it would not accept the new Regulation and Directive, and would instead maintain the existing Data Protection Act for the time being.

82. On that basis, it would be entirely possible for UK law effectively to retain the present EU data protection rules, or to amend the Act to modify the rules as Parliament sees fit. However, as a matter of practical reality, the approach to data protection inspired by Convention 108 is deeply ingrained in data protection practice across the entire continent. So long as the UK remains a member of the Council of Europe, it is hard to see how our domestic data protection rules could be amended so as to differ from the Convention 108

[4] http://ec.europa.eu/justice/newsroom/data-protection/news/160229_en.htm

regime. Indeed it is probable that Council of Europe Member States who are not presently members of the EU will now adjust their own data protection rules to track the changes made by the new EU Regulation and Directive. The greater the data flows between each State and the EU, the more urgent that task will be. A non-Member State such as the UK, with a booming digital economy and high data flows to and from EU Member States, would swiftly face major impediments to its online economy unless either (a) its domestic rules were completely aligned with EU law, or (b) it achieved a "safe harbour" or "privacy shield" agreement satisfactory to the Commission.

83. For the UK, the difficulty with option B – particularly in the light of the provisions of the General Regulation -- is that the Commission would wish to subject to close and critical scrutiny the domestic rules governing non-consensual access by the authorities to EU data stored or processed in, or passing through, the UK, just as it did in relation to the US in the wake of *Schrems*. The Investigatory Powers Bill, presently before Parliament, replicates and in some respects extends the authorities' powers – currently contained in RIPA 2000 and the Data Retention and Investigatory Powers Act 2014 (DRIPA). The English High Court, however, has found powers in relation to online metadata, conferred by DRIPA, to infringe privacy rights under EU law.[5] The Court of Appeal has referred the question of compatibility to the CJEU[6] [2015] EWCA Civ 1185], where it is likely to be considered alongside a similar reference from the Swedish courts.[7]

84. So, as matters stand, it is improbable that the Commission would accept as providing an "adequate" level of protection anything less than a legal regime entirely, or almost entirely, aligned with the General Regulation and new Directive, since that would reassure the Commission that any future or ongoing interference by the authorities could be challenged domestically on the basis of privacy rules corresponding to the EU regime. It is, of course, possible that greater clarity will emerge from the eventual judgment in *Davis & Watson* and *Tele2 Sverige*, but that is unlikely to pre-date the referendum.

85. One by-product of the Snowden revelations was a decline in public confidence in the security of US-based storage and processing services. That led to a realization within the Commission and the European digital business community that an opportunity had presented itself for development of EU-based "cloud" and similar services. The UK digital industry may be expected to be extremely concerned at the impact of withdrawal from the EU on its ability to contribute to those developments. So in the event of a vote to leave, the industry would probably lobby strongly for domestic law to remain closely aligned with EU law.

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[5] Divisional Court judgment in Davis v Watson [2015] EWHC 2092 (Admin)

[6] https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/11/Davis-FINAL.pdf

[7] Case C-203/15 *Tele2 Sverige*.

86. Our overall assessment, therefore, is that by far the most likely scenario following a Brexit would be that the UK would have little choice but effectively to implement the new Regulation and Directive and to continue to track future changes in the EU Data Protection regime.

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