Cross Border Aspects of Criminal Law: Co-Operation, Harmonisation, Mutual Recognition in the EU; Extradition in Financial Services & Corporate Crime Cases:

1. The final session of the conference focused on criminal law, and the conference was addressed by Paul Garlick QC of Outer Temple Chambers, and Caroline Morgan who has worked for six years at the Directorate-General for Freedom, Justice and Security.

2. Caroline Morgan spoke first and focused on the European Commission approach to Criminal Law. The Directorate General for Freedom, Justice and Security is comparatively modern and was created in 1999. The Directorate General's responsibility falls largely under the so called "third pillar" of the European Union. There are two main ways in which the objective of increased judicial cooperation in the sphere of criminal justice can be achieved. The first is the approximation or harmonization of legislation, although this often meets with significant objections from Member States. The second approach, which has become the beacon for integration in the criminal law context, is the process of mutual recognition.

3. The principal of mutual recognition is an approach to harmonisation which has been borrowed from other areas of Community law. Mutual recognition allows Member States to retain sovereignty but is based on the principal that judicial decisions can be treated as equivalent irrespective of where they are taken. Its success in the criminal context is largely attributable to the process being often more acceptable to Member States than the direct harmonisation of laws. The mutual recognition procedure has been behind a number of the key successes in the field. A notable early success was the European Arrest Warrant scheme. This was passed in the aftermath of the September 11th attacks on the World Trade Centre, and it was suggested that the success of the scheme in becoming implemented was due largely to the perception of the measure as aiding in counter-terrorism within the EU.

4. The Directorate General operates five year programmes. The current "Hague Programme" commenced in 2004 and work has already begun on the "Stockholm Programme" which will commence in 2009. The conference was informed of the importance of reform of the voting system in this context, and Carline Morgan emphasised the necessity of pushing through the reforms which were contained in the Lisbon Treaty. The principal difficulty is that most action in the Criminal sphere must take place on the basis of unanimity, but for obvious reasons this is increasingly impossible to achieve in an enlarged Union with 27 Member States, and the Lisbon reforms would move towards a greater use of Qualified Majority Voting. The perception has been that it is the need for compromise under the current system of unanimity which lies behind the often unclear wording and unsatisfactory state of Community legislation in this field, and it was suggested that the Directorate General for Freedom, Justice and Security has suffered more than most from the failure to implement the Lisbon reforms.

5. The Lisbon regime, if implemented, will also have a number of other effects. It would clarify the legislative base on which action in the field of criminal law can take place, since a recurrent difficulty at present is that the ambiguity of the legislative basis for action in the field of criminal leads to disputes as to the scope of the legislative competences of the EU in this field. A role would also be given to the ECJ in enforcement. This would help counter the current difficulty which stems from the fact that the Commission has no teeth to use against Member States who do not implement harmonising measures within the required time-frame. Currently, the competence of the Commission extends simply to a naming and shaming of Member State offenders. A final reform under Lisbon would be to allow a system of "enhanced cooperation" to take off, which would enable smaller groups of Member States to be allowed to push ahead alone on particular matters. Implementing the Lisbon reforms will therefore have dramatic effects in this area of EU competence.

6. Paul Garlick QC was the next speaker, who chose to focus on the system for extradition within the European Union as well as on extradition more generally. In particular, the speaker was keen to emphasize the long-arm jurisdictions to which directors of companies and corporate clients are potentially exposed. Within the UK there are traditionally three principal categories of extradition. These are extradition to the United States, extradition within the EU, and extradition to Part 2 designated countries under the Extradition Act 2003. Within the latter category there is also a "premier league" of Part 2 territories with whom there is no need for the country seeking extradition to demonstrate a *prima facie* case. Surprisingly, as a result of an Order in Council whose passing was largely unnoticed at the time by practitioners, the UK added the United States to the premier league of Part 2 territories, with the consequence that the US need not demonstrate a prima facie case in seeking to extradite from the UK.

7. It was suggested that this has created an extraordinary position. This is because whilst the US need not demonstrate a prima facie case, there is no reciprocity, and if the UK seeks to extradite from the US it is necessary to demonstrate a "probable cause". This is because the US Constitution prohibits someone being surrendered without a "probable cause" being demonstrated. The conference was also informed of how the EU rejected US proposals for a similar EU wide scheme, with the result that the US can more easily extradite UK citizens through its bilateral arrangements with the UK, rather than through using a Europe-wide scheme.

8. Extradition within the EU has been greatly facilitated by the European Arrest Warrant scheme. The procedure is no longer administrative in the traditional sense, as the procedure operates directly between the judicial branches of different Member States. The system is most straightforward where the offence is on the list of extraditable offences. Where this is so, there is no need for the matter to even amount to a criminal offence in the UK. Another result of the new scheme is that there are very few remaining bars to extradition. The principal bar which remains is that it must be compatible with the fugitives ECHR rights were he to be extradited.

9. The conference was informed that one possible problem with the operation of the scheme is in the case where an offence is not on the list. Here it is necessary to show that no part of the relevant conduct takes place in the UK. In the context of complicated Fraud offences which are not on the list, it would be extremely easy to show that “some part” of the conduct occurred in the UK, even if this is just a fax or email in a corporate case. It was suggested that this is a problem with the new scheme which has not yet been fully addressed, and that this is an area where the new system might be particularly vulnerable.

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