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The Crime (International Cooperation) Bill [HL]

Bill 78 of 2002-03

This paper is about the *Crime (International Cooperation) Bill* which is due to be considered on second reading on Tuesday 1st April 2003 .

The Bill is designed to enable the UK to participate in improved arrangements for international cooperation in the fight against terrorism and other crime. Some primary legislation is needed for the UK to meet its commitments under a number of new arrangements which have been agreed between EU Member States. This Bill includes those measures.

The Bill extends to the whole of the United Kingdom.

A companion Research Paper (RP03/31) covers the topic of 'hot surveillance' and other parts of the Bill not covered in this paper.

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Summary of main points

The *Crime (International Cooperation) Bill* contains many measures which are intended to meet the UK's obligations under a series of EU Conventions and Framework Decisions. It would make the changes needed to enable the UK to participate in the non-border aspects of the Schengen Convention. The Bill applies to the whole of the UK, with provisions to take into account the differences between the three jurisdictions.

The Bill would make extensive changes and additions to the present arrangements for providing mutual legal assistance in criminal matters. This paper explains the different agreements which have been made, for enhanced police and judicial cooperation between Member States, initially as measures to preserve security and mutual confidence when internal border controls between Schengen participating countries were abolished, and more recently as a common response to increased threats from terrorism and other international crime.

This paper goes on to describe how the Bill would make the changes required by each of the Conventions and Framework Decisions. It outlines how mutual assistance is to be provided, when needed, in connection with criminal proceedings: in serving documents, in providing facilities for the giving of evidence (including live links between countries, and the international transfer of prisoners), and in giving effect to freezing orders made to ensure that evidence is preserved. It sets out the present powers to require disclosure and monitoring of information about bank accounts, in relation to criminal conduct, and the proposed new powers to allow participating countries to obtain customer information, and account monitoring orders.

Part III of the paper describes the measures which are specifically targeted at terrorism, namely extending the UK's extra-territorial jurisdiction to all terrorist offences, and giving effect to orders freezing terrorist property.

The final part of this paper explains the provisions in Part 3 of the Bill, for mutual recognition of driving disqualification within the UK and across the EU.

Part 4 of the Bill contains provisions about cross-border surveillance and other miscellaneous provisions. These are discussed in a separate Library Research Paper.¹

¹ RP 03/31: The *Crime (International Co-operation) Bill* [HL]: 'Hot pursuit'

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I Introduction

The *Crime (International Cooperation) Bill* was introduced in the House of Lords on 19 November 2002. It has been described as “something of a ragbag”.² A large part of it is intended to implement a number of existing or imminent EU commitments in the area of police and judicial cooperation. These arise from several different kinds of EU legislation, which are described below. This introduction describes some of the history, with links to: the electronic versions of the texts of the EU legislation to which the Bill is to give effect; the reports which various Parliamentary Committees have published about that legislation and the Bill; and to the debates on the Bill in the House of Lords. It also explains some of the special terminology and abbreviations which are commonly used in this context.

A. Definitions and abbreviations

Schengen is a Luxembourg village which has given its name to numerous documents and arrangements for cooperation. These began with an agreement about abolishing internal border controls, signed there by five European countries in 1985, and went on to include the Convention of 1990 and other documents which followed, the group of countries which has now signed up to the Convention, and the accompanying “compensating” measures on policing and immigration, including the common database known as the Schengen Information System.

The **Schengen Agreement** of 1985 was signed by France, Germany, Belgium, the Netherlands and Luxembourg, agreeing to the gradual abolition of checks at their common borders.

The **Schengen Convention** is the Convention implementing the Schengen Agreement, which was signed in June 1990, and took practical effect in March 1995, for Spain and Portugal as well as the original parties. Italy, Greece, Austria, Denmark, Finland and Sweden have subsequently acceded, and a Schengen co-operation agreement has been made with Norway and Iceland (which are not Member States of the EU). The Convention has 142 articles, with measures for creating a common area of justice and security, following abolition of common borders. The key points are:

- citizens of countries implementing the Agreement can cross internal borders within the Schengen area, at any point, without any checks.
- Schengen countries have harmonised visa and related policies.
- a common Schengen standard for external border checks
- access to the Schengen Information System (“SIS”) providing personal identity and other data throughout the Schengen area
- close police and judicial co-operation
- joint efforts to combat drug-related crime

² Lord Lloyd of Berwick at Lords Second Reading, HL Deb 2 Dec 2002 c 995

The **Schengen Acquis** comprises the Schengen Agreement, the Schengen Implementing Convention, Accession Protocols and Agreement to the Schengen Agreement, and decisions and declarations adopted by the Schengen Executive Committee.³

The **Schengen Protocol to the Treaty of Amsterdam** incorporated Schengen co-operation into the framework of the European Union. The UK and Ireland are not parties to the Schengen Agreement but can, with the approval of the EU Council of Ministers, apply the Schengen Acquis in whole or in part and participate in its further development. A Council decision agreeing the terms of UK participation in aspects of the Schengen Acquis (excluding provisions on entry to, residence and free movement within the Schengen area) was formally adopted in May 2000.⁴

The **Schengen Information System** is an information system accessible to all Member States, containing information on persons and articles wanted for a range of law enforcement purposes.

Schengen-building refers to proposals which amend or supplement an existing Schengen measure.

To be considered as an initiative building on the Schengen acquis, a proposal should relate to a specific instrument within the Schengen acquis, rather than to a broad subject area. It would be possible to have future proposals on, for instance, police co-operation, that do not build on the Schengen acquis but relate to other provisions in Title VI TEU or are entirely new. The Commission and Member States will be required to specify, in introducing the text of any proposal or initiative based on Title IV TEC or Title VI TEU, whether they consider that it is a measure building on the Schengen acquis.⁵

The “**compensating measures**” in the Schengen system, sometimes described as “**flanking measures**”, are the measures compensating for the abolition of internal border controls, namely enhanced police co-operation, a common immigration, visa and asylum policy, and judicial co-operation.

The flanking measures accompanying this freedom are then fully justified, to guarantee not only a high level of security, but also mutual confidence: the visas issued and border controls carried out by any one Member State have consequences for all the others. Each Member State has to realise that its gateway is also a gateway to all the other States and, consequently, it must consider the interests of all the participants in the area without frontiers.

Visa and external border policies, as well as the other measures established in the Schengen Convention, now part of the Union’s institutional and legal framework,

³ This can be accessed at: <http://ue.eu.int/jai/schengen/SCH.ACQUIS-EN.pdf>

⁴ http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_131/l_13120000601en00430047.pdf

⁵ Select Committee on European Scrutiny Nineteenth Report: Memorandum 6 May 1999

are some of these flanking measures, the complete list of which is set forth in Article 61 of the Treaty of Amsterdam.⁶

The **Third Pillar** refers to matters dealt with on an intergovernmental basis under Title VI of the *Treaty of European Union*, which covers justice and home affairs matters. In Community parlance people often refer to the three pillars of the EU Treaty. These are:

- the Community dimension, comprising the arrangements set out in the EC, ECSC and Euratom Treaties, i.e. Union citizenship, Community policies, Economic and Monetary Union, etc. (**First Pillar**);
- the common foreign and security policy, which comes under Title V of the EU Treaty (**Second Pillar**);
- police and judicial cooperation in criminal matters, which comes under Title VI of the EU Treaty (**Third Pillar**).

The Treaty of Amsterdam has transferred some of the fields covered by the old Third Pillar to the First Pillar (mainly concerning the free movement of persons).

Communitisation means transferring a matter which, in the institutional framework of the Union, is dealt with using the intergovernmental method (Second and Third Pillars) to the Community method (First Pillar). The Community method is based on the idea that the general interest of Union citizens is best defended when the Community institutions play their full role in the decision-making process, with due regard for the subsidiarity principle.

Why have three “pillars” in the first place? The reason is that Member States take the view that JHA co-operation, and foreign policy co-operation, are issues so central to their sovereignty that the “supranational approach of community law must be set aside. So the distinctions between the three pillars are quite substantial.⁷

Framework Decisions were an introduction of the 1997 Treaty of Amsterdam and their purpose and effect is governed by Article 34 of the Treaty on European Union, which provides:

1. In the areas referred to in this Title, Member States shall inform and consult one another within the Council with a view to coordinating their action. To that end, they shall establish collaboration between the relevant departments of their administrations.
2. The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this Title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:

⁶ http://europa.eu.int/comm/dgs/justice_home/freemovement/wai/dg_freemovement_en.htm

⁷ “EU Justice and Home Affairs Law”, Steve Peers, (2000) p.13

- (a) adopt common positions defining the approach of the Union to a particular matter;
- (b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;
- (c) adopt decisions for any other purpose consistent with the objectives of this Title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union;
- (d) establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time limit to be set by the Council.

Unless they provide otherwise, conventions shall, once adopted by at least half of the Member States, enter into force for those Member States. Measures implementing conventions shall be adopted within the Council by a majority of two thirds of the Contracting Parties.

Transposition means the way in which EC law and obligations are given legal authority in UK law. This can be done by primary legislation, secondary legislation, or administrative regulations under the authority of the European Communities Act 1972. certain treaty obligations also need to be transposed into law by means of legislation before a treaty can come into force.

A **Transposition Note** has been prepared by the Home Office which provides some detail on the implementation for each article of Schengen covered by the *Crime (International Co-operation) Bill*.⁸

The **anti-terrorism road map** means the action plan to carry forward a list of measures identified for urgent agreement and implementation after 11 September by the special EU Council of Justice and Home Affairs ministers on terrorism.⁹

Some abbreviations commonly used are:

ETJ - extra-territorial jurisdiction

MLA - mutual legal assistance

FD – Framework Decision

MLAC - The Convention on Mutual Assistance in Criminal Matters (see below)

TEU – The Treaty on European Union

⁸ http://www.homeoffice.gov.uk/oicd/crime_international_cooperation_bill_tn.pdf

⁹ http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=PRES/01/327/0|AGED&lg=EN&display=

RIPA - The Regulation of Investigatory Powers Act 2000
SIS - The Schengen Information System
PACE – The Police and Criminal Evidence Act 1984

B. Conventions and Framework Decisions

The *Crime (International Cooperation) Bill* includes provisions designed to fulfil UK commitments under the following EU agreements:

a. *The Schengen Convention (1990)*¹⁰

The Convention included a number of mutual legal assistance provisions, some of which have been superseded by the Mutual Legal Assistance Convention, with the notable exception of cross-border surveillance requirements which are implemented in Part 4 of the Bill, while other MLA provisions are implemented in Part 1.

b. *The Convention on Simplified Extradition Procedure between the Member States of the European Union, (1995)*

There is an accompanying explanatory report.¹¹ This Convention is supplementary to the European Convention on Extradition, and is to simplify the procedure when the person whose extradition is sought consents to extradition. It has already been implemented, for most purposes, by the *European Union Extradition Regulations 2002*, which were made under a power conferred by the *Anti-terrorism, Crime and Security Act 2001*, but Part 4 of the Bill makes additional amendment to the *Extradition Act 1989*, to cater for the position of some particular countries.

c. *The Convention relating to Extradition between the Member States of the European Union, (1996)*¹²

There is an accompanying explanatory report.¹³ This Convention was also implemented by the 2002 Regulations.

¹⁰ [http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0922\(02\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0922(02)&model=guichett)

¹¹ http://ue.eu.int/ejn/data/vol_a/4a_convention_protocole_accords/extradition/c-375-12121996-4-10-en.html

¹² JO C 313 of 23 October 1996;

[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=41996A1023\(02\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=41996A1023(02)&model=guichett)

¹³ OJ C 191/13 of 23 June 1997

[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=41997Y0623\(01\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=41997Y0623(01)&model=guichett)

d. *The Convention on Driving Disqualifications (1998)*¹⁴

There is an accompanying explanatory report.¹⁵ Part 3 of the *Crime (International Cooperation) Bill* contains implementing provisions.

e. *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000)*¹⁶

The purpose of this Convention is to encourage and modernise cooperation between judicial, police and customs authorities by supplementing the provisions and facilitating the application of the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters, and its 1978 Protocol, the 1990 Convention applying the Schengen Agreement and the Benelux Treaty of 1962. There was an accompanying explanatory report.¹⁷ This Convention adds to the MLA provisions in the Schengen Convention, and replaces some of the original ones. Implementing provisions are in Part 1 of the Bill.

f. *Council Framework Decision on combating fraud and counterfeiting of non-cash means of payment (2001)*¹⁸

The Framework Decision requires Member States to ensure that particular examples of fraud and counterfeiting are criminal offences. UK laws already meet most of these requirements, but Part 4 of the Bill makes some extensions needed for full compliance. The deadline for transposition is 2 June 2003.

g. *Protocol to the Convention on mutual assistance in criminal matters between the Member States of the European Union (2001)*¹⁹

The 2001 Protocol deals with requests for information about bank accounts. There is an accompanying explanatory report.²⁰ The implementation provisions are in Chapter 4 of Part 1 of the Bill.

¹⁴ Official Reference OJ C 216 of 10 July 1998 ;

[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=41998A0710\(01\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=41998A0710(01)&model=guichett)

¹⁵ JO C 211 of 23 July 1999

[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=41999Y0723\(01\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=41999Y0723(01)&model=guichett)

¹⁶ OJ C 197 of 12 July 2000, p.3

[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0712\(01\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0712(01)&model=guichett)

¹⁷ OJ C 379 of 29 December 2000, p.7

[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000Y1229\(02\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000Y1229(02)&model=guichett)

¹⁸ http://europa.eu.int/comm/internal_market/en/finances/payment/fraud/framedecision/combfraud_en.pdf

¹⁹ OJ C 326 of 21 November 2001, p.1

http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_326/c_32620011121en00010008.pdf

²⁰ http://www.europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_257/c_25720021024en00010009.pdf

h. Council Framework Decision on combating terrorism (2002)²¹

The aim of this Framework Decision is to approximate the definition of terrorist offences in all Member States. It stipulates that they should make particular offences punishable by custodial sentence. UK law meets these requirements but Part 2 of the Bill implements the additional requirement under Article 9, to take extra-territorial jurisdiction. The deadline for transposition is 31 December 2002.

i. Draft Council Framework Decision on the execution of orders freezing assets or evidence²²

When finally agreed, this Framework decision will require Member states to recognise and act on each other's freezing orders. Part 1 of the Bill includes provision for mutual recognition of orders freezing evidence, and Schedule 4 makes provision relating to the freezing of terrorist property, leaving implementation on other asset freezing orders for future legislation.

Some of the above provisions have already been implemented by other legislation, while many others do not need legislation, and are to be implemented by administrative measures. The explanatory reports provided with the agreements perform a similar function to the explanatory notes published alongside UK legislation, the texts of the explanatory reports are approved by the Council.

C. UK Parliamentary Scrutiny

As recognised during debate in the House of Lords, there has been Parliamentary scrutiny during the development of the European agreements which are now reflected in the provisions of this Bill. Also, the Joint Committee on Human Rights and the Lords Constitutional, as well as the Delegated Powers and Regulatory Reform Select Committees, have reported on different aspects of the Bill since its introduction in November 2002. References to committees' reports are given below. The commentary in the following parts of this paper refers to observations and recommendations made by committees about provisions which are now part of the Bill. In some cases the scrutiny committee has reported at progressive stages of the negotiation and drafting of a proposal, and references to the earlier reports are not necessarily included below.

- Lords Select Committee on European Communities Seventh Report 1998-99 Schengen and the United Kingdom's Border Controls: 2 March 1999.²³

²¹ <http://ue.eu.int/jai/default.asp?lang=en>

²² http://ue.eu.int/jaidocs/EN/ST005126_01ORIEN.pdf

²³ <http://www.publications.parliament.uk/pa/cm199899/cmselect/cmeuleg/34-xix/3410.htm#n10>

- Lords Select Committee on European Communities Fifth Report 1999-2000, UK participation in the Schengen Acquis.²⁴
- Commons Select Committee on European Scrutiny, First Report, 30 July 2001 HC 152-I, 200-02²⁵
- Lords Select Committee on European Communities Twelfth Report 1999-2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union - the final stages: 18 July 2000.²⁶
- Commons Select Committee on European Scrutiny Ninth Report 2001-02, Draft Council Framework Decision on Combating Terrorism: 12 December 2001.²⁷
- Commons Select Committee on European Scrutiny Ninth Report: 17 December 2001
- Commons Select Committee on European Scrutiny Tenth Report 2001-02 Commission Communication: preventing fraud and counterfeiting of non-cash means of payment: 17 December 2001.²⁸
- Commons European Standing Committee B: Debate on Execution of Orders Freezing Assets or Evidence, 9 May 2002.²⁹
- Delegated Powers and Regulatory Reform Select Committee (HL) second report, on the Crime (International Cooperation) Bill (HL), 11 December 2002.³⁰
- Constitutional Select Committee (HL) first report 2002-03, 12 December 2002.³¹
- Joint Committee on Human Rights, 2002-03 First Report.³²
- Joint Committee on Human Rights, 2002-03 Third Report, 27 January 2003
- Joint Committee on Human Rights, 2002-03 Seventh Report, 17 March 2003.³³

D. Debates in the House of Lords

At Second Reading in the House of Lords, Lord Filkin, for the Government, said:

The Bill marks a significant advance in co-operation against serious crime and terrorism within the European Union. It will enable us to work more closely and effectively with both our European Union partners and others outside the EU.

²⁴ <http://pubs1.tso.parliament.uk/pa/ld199900/ldselect/ldcom/34/3402.htm#a1>

²⁵ <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-i/15202.htm>

²⁶ <http://pubs1.tso.parliament.uk/pa/ld199900/ldselect/ldcom/93/9301.htm>

²⁷ <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-ix/15202.htm>

²⁸ <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-x/15202.htm>

²⁹ <http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/eurob/st020509/20509s01.htm>

³⁰ <http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/lddelreg/20/2001.htm>

³¹ <http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldconst/27/2701.htm>

³² <http://pubs1.tso.parliament.uk/pa/jt200203/jtselect/jtrights/24/2404.htm#a12>

³³ <http://pubs1.tso.parliament.uk/pa/jt200203/jtselect/jtrights/74/7402.htm>

International crime affects us all. Greater freedom to travel and live in other countries and the growth of international trade mean that crime is no longer confined by national boundaries. But the impact of international crime is often felt on a local scale. It is the larger criminal gangs that facilitate local crimes in the UK—for example, by supplying stolen goods or drugs.

Drug smuggling is one of the main cross-border crimes and the main activity of serious and organised criminals. It is estimated that two-thirds of organised crime groups are involved in drug trafficking, and international drug smugglers feed the local drug markets that in turn lead to theft locally. As many as two-thirds of persistent offenders have a serious drug problem and between a third and a fifth of all acquisitive crime is linked to the need to pay for illegal drugs. Theft and burglary bring insecurity and disruption to their victims, so there is a clear connection between tackling international organised crime and improving the safety of our streets and homes.

Nor is the problem confined to drug trafficking. Other cross-border crimes have an impact on society more widely—such as people trafficking, counterfeiting, money laundering and cigarette smuggling. People trafficking is on the increase: 21,800 illegal entrants were detected in the first nine months of 2000 compared with 16,000 in 1999.

The best way to tackle international crime is to work closely with our neighbours. That is especially true of drug trafficking. The Netherlands and Spain are both significant bases for the secondary distribution of drugs within the EU, including to the UK. We are already working with our EU partners. For example, the first joint investigative team that the UK is setting up is with Spain, targeting cocaine traffickers. During the past 12 months, the UK has worked with Europol on more than 500 UK cases that have required European co-operation. Those have ranged from simple requests for information to major joint operations.

However, we need to do more. Too many obstacles to international investigations serve only to protect the criminal. Bringing multinational gangs to justice may involve several trials in different countries, each with their own criminal procedures. Ensuring success for such complex procedures means reducing the obstacles that block effective cross-border co-operation. That is what the Bill is intended to achieve.

The Bill will make the changes needed to enable the UK to participate in the non-border aspects of the Schengen Convention. The Schengen arrangements provide a clear framework for effective co-operation, especially for cross-border police operations. The UK first applied to participate in the police and judicial co-operation elements of Schengen in May 1999. Our application was accepted a year later, and I welcome this chance to legislate to make good our participation.³⁴

³⁴ HL Deb 2 Dec 2002 c 972

Baroness Anelay of St Johns, for the Conservatives, welcomed parts of the Bill, and stressed the need to ensure that it did not undermine our civil liberties:

... some elements of the Bill raise concerns. In particular, we will consider with extreme caution the provisions to allow customs officers and police officers from abroad to conduct surveillance in the UK without first having obtained the permission of the UK authorities.

(...)

The backdrop to our consideration of the Bill must be the question of how far we have confidence in the judicial and police systems of other countries that will be party to the reciprocal agreements enshrined in the Bill. During the debate on the European arrest warrant earlier this year, the noble Lord, Lord Goodhart, encapsulated the problem when he posed the question:

"Can we have sufficient confidence in the judicial process in other member states to justify giving up the traditional safeguards?"

I agree with the noble Lord, as I do on so many occasions, that it would be wrong to claim that our procedures are always the best in the world. As he said:

"Others may be our equals and in some cases perhaps better than ours, but not all. Italy is notorious for its delays. The system of criminal administration in Belgium is so bad that it has caused a national scandal".—[Official Report, 23/4/02; col. 226.]

In a Community in which judicial and policing systems are not the same, the question of trust is paramount.³⁵

Lord Dholakia for the Liberal Democrats also emphasized the need for safeguards:

The Bill reflects a more structured framework and a significant improvement on the ad hoc co-operation that existed between member states previously. In principle, we welcome the Bill, allowing Parliament the scrutiny of certain aspects of the third pillar.

(...)

EU justice measures are fast becoming a reality, not as is so often stated because of September 11th, but because of a commitment made upon agreement of the Amsterdam Treaty 1997 and the Tampere council in 1999. Indeed, much inconclusive discussion took place until the atrocities of September 11th brought into harsh reality the need to tackle international organised crime together. Thus decisions and agreements were achieved in unprecedented time.

In addition to these measures, we must have an accompanying, parallel system of safeguards. Governments must commit to upholding the principles of the

³⁵ HL Deb 2 Dec 2002 c 977

European Convention on Human Rights and allow those rights to be enforced. We shall probe these matters at the Committee stage.

Police co-operation is based on mutual assistance between police authorities to prevent and detect criminal offences. There is evidence that it is already operational in character. There are detailed rules on cross-border surveillance and hot pursuit, enabling police officers from one Schengen state to cross the border into another to continue their operations. Will the Minister confirm that the present practice in Schengen states is that, in urgent cases, it can be done without prior authorisation? If so, what implication does that have in relation to policing in the United Kingdom?

It is on that point that we wish to reflect the concern expressed by Justice, whose prime concern with the Bill

"is the absence of sufficient procedural safeguards combined with a failure to address the rights of the defence. While it is important for countries to be able to co-operate to combat crime, it is equally important that defence rights are maintained in such circumstances in order to protect the rights of the individual in an increasingly international environment".³⁶

The Lords Committee Stage was taken in Grand Committee, off the floor of the House. As there may be no Divisions in the Grand Committee, the only amendments which can be made are those which are unopposed. The table below provides links to the Official Report, and draws attention to amendments of substance which were either made or unsuccessfully pressed.

Stage	Date	Official Report	Issues and additions	
Second Reading	02.12.02	641 c971-84,995-1018		link
Grand Committee: first day	13.01.03	643 c1-60GC	New clause proposing annual reports on use of freezing orders considered.	link
Second day	23.01.03	643 c61-116GC		link

³⁶ HL Deb 2 Dec 2003 c 982

Third day	27.01.03	643 c117-66GC	Clauses 50 (application to courts martial etc) removed by Government amendment as being superfluous.	link
Fourth day	29.01.03	643 c167-226GC		link
Fifth day	03.02.03	644 c1-46GC	Government amendments to clause 91 to address concerns about scrutiny of order-making powers. New clause and schedule on freezing terrorist assets added	link
Report: first day	25.02.03	645 c141-94,214-30	Opposition amendment, proposing annual report on use of freezing orders, negated on division Opposition amendment, on setting out specific protections for witnesses giving evidence on live link, negated on division	link
Second day	03.03.03	645 c627-96	Opposition new clause, about unlawful importation of firearms, negated on division. Further amendments on freezing of terrorist assets agreed	link
Third reading	17.03.03	646 c42-65	Opposition amendment, prohibiting foreign police or customs officers from stopping or questioning a person under surveillance, agreed on division.	link

1. General concerns in the House of Lords

Although a large part of the Bill has proved to be uncontentious during its passage through the House of Lords, some concerns of a general nature were expressed, as well as objections or reservations about some individual parts or provisions. Concerns which were expressed about particular provisions are referred to in the commentaries later in this paper, on the different parts of the Bill.

Some Peers commented that it would be helpful to have a direct comparison of the European texts being transposed, and the corresponding provisions of the Bill. A transposition table, as was prepared for this Bill, generally provides a key, without setting out any relevant text. They were also interested to know what transposition timetables were being followed by other Member States, but no further information about that was provided in the debates.

Several Peers were concerned about the role of Parliament in enacting legislation on matters where the Government had already undertaken an international obligation, as to the detail, as well as the principle of the legislation. There were also concerns about the inclusion of Henry VIII powers (leading to some modification at Committee) with a suggestion that they might reasonably be subject to sunset clauses, so that the powers would (unless renewed) lapse after a given period. There were suggestions that annual reporting requirements could provide useful monitoring of procedures which were novel. The insertion of a new clause imposing duties relating to international cooperation in preventing illegal importation of firearms gained the support of 59 Peers at Report Stage.

2. The role of Parliament

At Report Stage, the Conservative spokesman, Baroness Anelay of St Johns, commented:

The Bill implements so many elements of the Schengen acquis and related agreements that it looks as though the Government are leading us gently by the nose into Schengen by the back door. We shall consider that very carefully. How much has our scrutiny role in the UK Parliament already been undermined by the Government's signature to various protocols and agreements? Exactly what room for manoeuvre does Parliament have to improve the Bill? The full regulatory impact assessment lets the cat out of the bag. It tells us that the Government have already agreed,

"to urgently ratify the Protocol"—

their split infinitive, not mine. The assessment goes on to state:

"Ministers have already agreed to ratify the Protocol in the UK and are under an obligation to do so . . . Failure to ratify the Protocol in the UK would break an international agreement".

That protocol has regard to mutual assistance on criminal matters. Have Ministers thereby effectively usurped Parliament's powers to reject the Bill, if it wishes to do so? Have they usurped our power to amend it? In Committee, we shall ask the Minister to put on the record what our EU partners will do to enact national legislation that we hope will impose exactly the same obligations

and penalties upon their citizens. We shall also ask what timetable they have adopted to comply with the various protocols.³⁷

The Liberal Democrat spokesman, Lord Dholakia, was concerned about the level of scrutiny given to European legislation:

... I emphasise that as regards the implementation of EU justice measures into UK legislation, such as we are dealing with here, there is an unacceptably low level of democratic scrutiny. Our colleagues in the European Parliament are merely consulted on such measures, and the EU Justice and Home Affairs Council is made up of both justice and interior Ministers with often clashing political agendas. Transparency and openness are significant by their absence in the decisions of the Council of Ministers. There is no access for European parliamentarians or MPs, other than the relevant Secretaries of State, about what is done in secret. While both Houses of this Parliament debate legislation such as this Bill, there is perhaps a semblance of democratic oversight, but as the Government are obliged under EU law to transpose these measures within a certain framework, there is perhaps little that we can do about it.

Democratic oversight and judicial review of a new generation of European policy in the field of justice and home affairs is vital to ensure both the protection of the rights of EU citizens and the openness essential to maintaining public confidence in supranational competence. The solution is not to denounce measures for EU justice, but to insist on proper interventions and involvement at an earlier, more appropriate stage. One of the key components in EU justice and home affairs policy development must be the commitment to give equal regard to freedom and justice as to security.³⁸

In response, Lord Filkin said:

A number of references were made to the fact that Parliament is being asked via primary legislation to implement a framework agreement made between European Union member states. I shall not go into the fine detail as to what extent we are at liberty to go wider or narrower, although I shall refer later to when we can add other things. I shall give a fuller explanation of the extent to which one can have some flexing on a framework agreement, but the House is right that the basic principle is that one is expected to fulfil the measures as agreed, while having flexibility in the mechanism by which one achieves the end. That is an essential characteristic of such measures.

Why are we doing it? Essentially, the House decided that that was how it should be. We had previous discussions as to whether framework agreements should be undertaken by secondary legislation and the House was clear that it wanted such matters dealt with as primary legislation. I therefore feel slightly aggrieved that

³⁷ HL Deb 2 Dec 2002 c.974

³⁸ HL Deb. 2 Dec 2002 c 982

we are being taken to task for doing something that the House said it wanted done in this way. I understand the reasoning, as it gives more opportunity for testing and scrutiny, about which there is nothing wrong in principle.³⁹

(...)

As to how much room for manoeuvre there is on the Bill, framework agreements are binding as to the effect to be achieved. We believe that we have struck the right balance in the Bill. But, again, we shall listen—as I hope we do—to comments. We do not believe that we have usurped Parliament's powers to amend. As to what other member states are doing, they are under the same obligations as the UK and we expect them to take the same steps to meet their obligations. For the interest and information of the House, I shall do some checking to see whether they are ahead of us or behind us.

3. Henry VIII powers

In their Second Report of 2002-03, the Select Committee on Delegated Powers and Regulatory Reform considered the Henry VIII and other powers in the Bill as introduced. They recommended changes as follows:

5. Clause 91 enables the Secretary of State or the Scottish Ministers, by order, to make

any supplementary, incidental or consequential provision;

any transitory, transitional or saving provision,

considered necessary or expedient for the purposes of, or in consequence of, or for giving full effect to any provision of the bill. By clause 91(3) amending or repealing provisions of Acts is permitted. An example of the possible use of this power is given at paragraph 34 of the Home Office's Memorandum to the Committee. While we consider that negative procedure is sufficient for amendments to secondary legislation, we recommend that affirmative procedure should apply to amendments to Acts of Parliament because of the importance of the subject-matter of the bill.

Other Provisions

Participating Countries

6. Clause 52(2)(b) allows the Secretary of State, by order subject to negative procedure, to designate any country as a "participating country" for the purposes of Part 1 of the Bill. That country would then be treated in the same way as member states of the European Union for the purposes of the provisions of the bill about service of process (clauses 4 and 6), freezing orders (clauses 10 to 12 and 20 to 25), hearing witnesses by telephone (clause 31) and obtaining information about bank accounts (Chapter 4 of Part I). The Department explains in their Memorandum the need for this provision.

³⁹ HL Deb 2 Dec 2002 c 1013

However, we draw to the attention of the House the fact that the power is not expressly limited, in the case of service of process and obtaining information about bank accounts, to countries that participate in the Mutual Legal Assistance Convention or Protocol or, in the case of freezing orders, to countries that become member states of the European Union at some time in the future. So, as it stands, any country could in theory be designated using this provision. Unless the Government brings forward an amendment which would restrict the scope of this power, we recommend that it should be subject to affirmative procedure.

The Government accepted the recommendations, and brought forward amendments in Committee so that

- orders amending Acts would require affirmative procedure, and
- the power to designate participating countries would also require affirmative procedure except in relation to those countries which were already members of the European Union.⁴⁰

There was welcome for the amendments made, but continuing concern about the effect of including the powers. It was suggested, without being pressed, that subjecting them to sunset clauses might help to ensure that any necessary consequential amendments were made expeditiously.

4. Firearms

The House of Lords debated amendments moved by Baroness Anelay of St Johns, both at Committee and Report Stage, to introduce a new clause on international co-operation and the general duty of the Secretary of State on firearms and firearms-related crime. She said:

The Minister will be aware that the Government have sometimes taken the opportunity to "Christmas tree" the Bill, but in a very proper way. We supported them on their amendments relating to terrorism property freezing orders, which were not to the core of the original purpose of the Bill but properly came within the Long Title. We wholly supported the Government's activity in that area. The Minister said in Grand Committee that it was appropriate to take the opportunity, when a Bill such as this came along, to do something that was right. I agree with him, and I have to take exactly the same line with regard to this amendment.⁴¹

During the Debates, Lord Filkin said that this Bill was not the appropriate legislation for dealing with that issue. Moreover the Government had either already taken action to address the issues or was clear as to what else it wanted to do. He outlined other work being done to tackle gun crime, including the Government's intention include in the *Criminal Justice Bill* a provision to introduce a five year minimum sentence for the illegal possession of prohibited weapons, and to make it an offence, under the *Anti-Social*

⁴⁰ HL Deb 27 Jan 2003 GC162 and 3 Feb 2003 GC34.

⁴¹ HL Deb 3 March 2003 c .637

Behaviour Bill to possess an air weapon or an imitation firearm in a public place without lawful authority or reasonable excuse.⁴²

The amendment was defeated on a division.

5. Government defeat

The Government was defeated at Third Reading on an amendment to provide on the face of the Bill that a foreign police or customs officer conducting surveillance under the provisions of the Bill may not stop or question the suspect. In moving that the Bill pass, Lord Filkin said that he was still smarting from the vicious defeat inflicted on the Government, so could not say that the House of Lords would not see the Bill again.⁴³

E. Introduction of the Bill

The Bill introduced in the House of Commons on 18 March 2003, as Bill 78 of 2002/03, includes amendments made at Report and at Third Reading in the Lords.⁴⁴ The numbering of the clauses has been slightly changed because of (a) the omission of the original clause 50, (b) the addition of clause 89 on the freezing of terrorist property and (c) the addition of clause 91 relating to Northern Ireland. *Explanatory Notes* to the Bill, prepared by the Home Office and the Department for Transport, are published separately as Bill 78- EN.⁴⁵

II Mutual assistance in criminal matters

The five main chapters of Part 1 deal with:

- Service of process, implementing provisions of the Schengen Convention (Article 49) and MLAC (Articles 3, and 5)
- Assistance in obtaining and freezing evidence, implementing Article 6 of MLAC and also to implement the provisions for freezing evidence (not those for freezing assets) in what is now still a draft Framework Decision on the execution of orders freezing assets or evidence
- Evidence by television and telephone links, implementing Articles 10 and 11 of MLAC
- Information about banking transactions, implementing the 2001 Protocol to MLAC
- Transfer of prisoners to assist in investigations.

⁴² The *Criminal Justice Bill* has been amended in Committee, but does not include the provision referred to. The *Anti-social Behaviour Bill* was published on 27 March 2003 as Bill 83 2002-03 and would create new firearms offences.

⁴³ HL Deb 17 March 2003 c 64

⁴⁴ <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmbills/078/2003078.htm>

⁴⁵ <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmbills/078/en/03078x--.htm>

A. The proceedings in which the MLA provisions apply

The existing provisions for mutual legal assistance, under *the Criminal Justice (International Co-operation) Act 1990*, apply only to criminal proceedings. MLAC and the Part 1 of the Bill apply additionally to ‘administrative proceedings’, appeals against decisions in administrative proceedings, and ‘clemency proceedings’.

1. Administrative proceedings

Clause 51 (general interpretation) adopts the MLAC description of administrative proceedings, which is:

proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Member State, or both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.

The *Explanatory Report* of the Convention provides an illustration.

The effect of this provision is to enable mutual assistance to be requested in certain types of case which are not covered, or are only covered to a limited degree, by the 1959 Convention, which applies only to judicial proceedings as opposed to administrative proceedings. For example, an ‘Ordnungswidrigkeit’ under German law is an offence which is not classified as criminal and is punishable by fines imposed by administrative authorities. Under the arrangements adopted in this Convention, mutual assistance may be sought in respect of administrative and judicial proceedings arising from such offences notwithstanding the fact that this is possible under the 1959 Convention only for the judicial phase of an ‘Ordnungswidrigkeit’.⁴⁶ It should be noted that equivalent concepts exist in certain other Member States.

Insofar as paragraph 1 is concerned, it does not matter whether initially the proceedings in question fall within the scope of an administrative or a criminal authority in the Member States in question, but it is essential that they may, at a later stage, be brought before a court which has jurisdiction in particular in criminal matters.

The *Explanatory Notes* to the Bill add:

In some EU member states offences such as driving infractions are classified neither as criminal nor civil proceedings, but as administrative proceedings. In the UK, there is no precise parallel to these proceedings, but legislation is needed to allow assistance to be provided to other participating countries in relation to this type of proceedings.⁴⁷

⁴⁶ The literal translation is “irregularity”

⁴⁷ Bill78-EN para.112

Further illustration was given by Lord Goldsmith at Lords' Report stage:

We are informed that in Germany, Austria and Belgium certain traffic offences that would be criminal offences here have been reclassified as administrative offences. That is almost saying that it is a less serious classification. We also understand that the Scandinavian countries classify certain environmental claims as administrative although, again, they would be regarded as criminal here. Not all EU countries have proceedings of this nature; as I said, we do not. As we would classify such offences as criminal, we can already—under existing mutual legal assistance agreements and our own domestic legislation—request and be provided with mutual legal assistance in relation to them. However, as the same acts are "decriminalised" in those countries, those countries are unable to seek such assistance from us. The extension of Schengen and the MLAC to cover administrative proceedings is designed to ensure that those countries can obtain like assistance for like offences.⁴⁸

2. Clemency proceedings

Article 49 (b) to (f) of the *Schengen Convention* requires MLA to be provided in relation to:

- claims for damages for wrongful prosecution or conviction
- clemency proceedings
- some civil actions joined to criminal proceedings.

Clemency proceedings are defined by clause 51 as:

Proceedings in a country outside the United Kingdom, not being proceedings before a court exercising criminal jurisdiction, for the removal or reduction of a penalty imposed on conviction of an offence.

Lord Goldsmith explained in Committee that:

The term "clemency proceedings" is ...difficult to define. It does not appear to us that there are domestic—United Kingdom—procedures that precisely fit that description either. Our European partners say that they have such procedures. They may in certain cases be analogous to appeal applications—as we might call them—which they describe as clemency proceedings. Under the Schengen Convention of 1995 we are required to provide assistance on that matter.⁴⁹

⁴⁸ HL Deb 25 Feb 2003 c 145

⁴⁹ HL Deb 23 Jan 2003 c GC70

3. Procedural documents

The *Explanatory Report* to MLAC draws attention to the intentional omission of any definition of “procedural documents” in the Conventions:

It should be noted that, as in Article 52 of the Schengen Implementation Convention, the term "procedural documents" has not been defined. As was the case regarding said Article 52, Article 5 of this Convention should be interpreted in a broad sense and be taken to include, for example, summonses and court decisions.

B. Sending and service of procedural documents

Article 5 (1) of MLAC establishes the general rule that procedural documents relating to criminal proceedings which are required to be sent by a Member State to a person in (not necessarily a resident of) the territory of another Member State should be sent directly to that person by post. So communication by post is the rule, but Article 5 (2) gives the permissible exceptions, which are concerned with cases where communication by post is not possible or appropriate. These are when:

- a) the address of the person for whom the document is intended is unknown or uncertain; or
- (b) the relevant procedural law of the requesting Member State requires proof of service of the document on the addressee, other than proof that can be obtained by post; or
- (c) it has not been possible to serve the document by post; or
- (d) the requesting Member State has justified reasons.

Legislation is therefore needed to provide for those cases where assistance is needed, where there cannot be direct service by post, either because one of those exceptions applies, or because the other country is not one of the “participating countries”. These are the Member States and any other states which may be designated by order.

1. Incoming requests

Clause 1 makes provision for service of overseas process, when the Secretary of State (or Lord Advocate in Scotland) receives a request. The request may be served by post or, if the request is for personal service, the chief officer of police of the area where the person appears to be, may be directed to effect personal service.

Clause 2 provides that if the process requires the person to appear as a witness, it must be accompanied by a notice which says that the service does not impose an obligation, under the domestic law, to comply with the process, that he may wish to seek advice as to the possible consequences of failing to comply, and that the foreign law may not accord him the same rights and privileges as a witness as the domestic law.

The Bill follows Schengen and MLAC in avoiding precise definitions of the process and documents to which the provisions for service (pursuant to incoming and outgoing requests) are to apply. In England, Wales and Northern Ireland, “process” means:

any summons or order issued or made by a court and includes—

(a) any other document issued or made by a court for service on parties or witnesses,

(b) any document issued by a prosecuting authority outside the United Kingdom for the purposes of criminal proceedings (subsection (3)).

and in Scotland, it means:

means a citation by a court or by a prosecuting authority, or an order made by a court, and includes any other document issued or made as mentioned in subsection (3)(a) or (b).

The human rights organisation Justice commented in its briefing in November 2002:

6. Clause 2 describes procedural safeguards in relation to service of overseas process requiring a person to appear as a party or attend as a witness, in particular the inclusion of a notice advising the person concerned that their rights and the consequences of failure to comply with the process may be different according to the law of the country concerned than they would be according to UK law. In order for the procedural safeguards contained in the notice described in Clause 2(3) to be effective, the notice should include details of how to obtain legal advice on the law of the country concerned. Clause 2(3)(c) should refer to the rights and privileges of a defendant as well as those applicable to a witness.⁵⁰

2. Outgoing requests

Clause 3 provides that process may be issued in criminal proceedings in England, Wales and Northern Ireland where the person to be served is outside the UK. An appropriate translation must be provided if it is believed that the person does not understand English. The process must not include notice of a penalty. Mere service outside the UK does not impose any obligation to comply with the process, and it is expressly provided that failure to comply will not constitute contempt of court, but if there is subsequent service within the UK, non-compliance will have the usual consequences.

Clause 4 permits service otherwise than by post but, for service in a participating country, only if the person’s address is not known, postal service has not been possible, or

⁵⁰ Justice Briefing On The Crime (International Co-Operation) Bill November 2002 – available at <http://www.justice.org.uk/images/pdfs/crimeintcoop.pdf>

there are good reasons for thinking that service by post will not be effective or is inappropriate (subsection (3)(c))

According to the *Explanatory Notes*:

in such cases, process may be sent via the Secretary of State to the central authority of the other country, which will transmit the process to the recipient. Alternatively, they may be sent via the Secretary of State and then transmitted directly to the recipient.

Clauses 5 and 6 make corresponding provision for Scotland.

C. Mutual provision of evidence

Article 6 of MLAC provides that:

Requests [for mutual assistance] shall be made directly between judicial authorities with territorial competence for initiating and executing them, and shall be returned through the same channels unless otherwise specified in this Article.

But there are savings for requests and returns passing between central authorities, and between central and judicial authorities, in specific cases. There is also an express saving for the existing routing between central authorities, for the UK and Ireland. These provisions are reflected in *clauses 7 to 9* for outgoing requests for assistance in obtaining evidence abroad, and *clauses 13 to 19* for incoming requests.

1. Outgoing requests

Outgoing requests may be made by judicial authorities, on the application of the person charged in proceedings, or prosecuting authorities, where an offence has been committed or there are reasonable grounds for suspecting so, and either proceedings have been instituted or the offence is being investigated. There is also provision for requests to be made by the Lord Advocate or a procurator fiscal in Scotland, and prosecuting authorities designated by the Secretary of State, in other parts of the UK, subject to similar conditions being satisfied.

There are several ways in which requests may be sent. They may be sent via the Secretary of State or Lord Advocate, as before, for transmission to the central agency or court in the receiving country, or they may be sent direct to the court, which was formerly permitted only in case of urgency. In cases of urgency, they may now also be sent, for transmission, to Interpol, or

any body or person competent to receive it under any provisions adopted under the Treaty of European Union (clause 8(3)(b)).

An example given in the Explanatory Notes is Eurojust, a body established by Council Decision under Part VI of the Treaty with a view to reinforcing the fight in member States against serious crime.

Clause 9 prohibits the use of evidence which has been obtained in this way for any purpose other than that specified in the request, except with the consent of the authority to whom the request was made.

2. Incoming requests

Incoming requests are governed by *clauses 13 to 19*. They may be received from:

- (a) a court exercising criminal jurisdiction, or a prosecuting authority, in a country outside the United Kingdom,
- (b) any other authority in such a country which appears to the territorial authority to have the function of making such requests for assistance,
- (...)
- (a) the International Criminal Police Organisation,
- (b) any other body or person competent to make a request of the kind to which this section applies under any provisions adopted under the Treaty on European Union.(clause 13 (2) and (3).

The “territorial authority” is defined as the Secretary of State, in relation to evidence in Northern Ireland, England and Wales, and the Lord Advocate in relation to evidence in Scotland (clause 28(9)).

The *Explanatory Notes* explain why the direct transmission envisaged by MLAC could be difficult to effect in the UK:

direct transmission is difficult to apply to our domestic system where jurisdiction is largely based on function rather than geography, and where the same authorities are not necessarily competent to both issue and execute letters of request. Misdirection of requests sent directly to the wrong authority would create delays, defeating the purpose of direct transmission, which is to speed up the process. The UK therefore has a special provision in the MLAC enabling it to opt out of the direct transmission requirement.⁵¹

Clauses 14 to 19 and *Schedule 1* set out the machinery for providing the evidence requested. While clause 9 ties the use which can be made of incoming evidence to the purpose specified in the request, there is no corresponding provision limiting the use which other countries can make of any evidence supplied to them under these provisions. At Lords Committee stage, Lord Goldsmith explained that, since it was not possible to

⁵¹ Bill 78 – EN para.52

legislate for overseas authorities, there would be no way of enforcing any such restriction in the absence of a binding international agreement.⁵²

The human rights organisation Justice had expressed concern that, unless some restriction is imposed, these provisions would allow international “fishing expeditions”.⁵³ At Report Stage, Lord Goldsmith expanded on his previous answer:

The general position in relation to mutual legal assistance—and the general position under the Bill and the 1990 Act—is, as I think I heard the noble Lord say, a matter for the discretion of the state that receives the request. I am told—something of which I was not aware when I responded previously, and which may be helpful—that on occasion, by relying on that general discretion, conditions are imposed in relation to particular requests where there is concern that a fishing expedition may be being conducted. There are examples where that has taken place.

There is therefore a general ability to impose a condition in certain cases. We would not want as a matter of policy and practicality to establish a general power to do so in relation to incoming requests. Indeed, in certain cases that would be impossible. The noble Lord rightly referred to the bilateral treaty with the United States, which contains restrictions, but there are international obligations that, in a sense, go the other way. Article 23 of MLAC states that certain personal data communicated under the convention can be used for specific purposes that go beyond the proceedings to which the particular request applies. So there would be a problem with the provision contained in the amendment.⁵⁴

D. Freezing Orders

1. The draft Framework Decision

The Tampere European Council defined the principle of mutual recognition as a cornerstone of judicial cooperation in civil and criminal matters. It stated that the same principles should apply to pre-trial order, in particular those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable. In November 2000, the Council adopted a programme of measures to implement the principle of mutual recognition in criminal matters, giving top priority to the adoption of an instrument applying the principle of mutual recognition to the freezing of assets and evidence.

The draft Framework Decision is the initiative of France, Sweden and Belgium. The initial draft has been modified and extended so that its scope parallels those of the

⁵² HL Deb 23 Jan 2003 c GC83

⁵³ <http://www.justice.org.uk/parliamentpress/parliamentarybriefings/index.html>

⁵⁴ HL Deb 25 Feb 2003 c 166

Framework Decision on the European arrest warrant, which was agreed in June 2002 (namely the abolition of the dual criminality requirement for a list of 32 offences and for offences carrying a maximum sentence of 3 years).

The purpose and progress of the draft is described as follows in the European Parliament's monitoring *Legislative Observatory*:

22/12/2000 - Document annexed to the procedure

PURPOSE: to present a Communication from the Governments of the French Republic, the Kingdom of Sweden and the Kingdom of Belgium on the Initiative of these countries regarding the adoption by the Council of a Framework Decision on the execution in the European Union of orders freezing assets or evidence.

CONTENT: This explanatory note seeks to explain the basis for the Initiative regarding the Framework Decision on the execution of orders freezing assets or evidence. The offences that may give rise to the freezing of assets or evidence under this Directive have been defined restrictively. At this stage of the discussions in the European Union, it was decided that it would be difficult to seek to use this instrument to abolish the conditions of double criminality and double punishability that still exist in many Member States. However, a restrictive list of offences should enable this problem to be overcome. Furthermore, the production of a certificate - at the same time as the order that is to be executed - will enable the court that orders the measures to attest, on its own responsibility, that the freezing order comes within the scope of the instrument. Execution can be refused only on formal grounds (certificate missing or incomplete). The drafters of the initiative wanted to avoid a situation where the State executing a freezing order did not know exactly what to do with the asset that was frozen. The text therefore provides not only for the execution of the freezing order but also for what will happen to the asset which has been frozen once the order has been executed. Against this background, a Framework Decision was a natural choice of instrument involving the approximation of legislation, especially procedural legislation.

11/07/2001 - Decision of committee responsible

The committee adopted the report by Luís MARINHO (PES, P) amending the proposal under the consultation procedure. It felt that mutual recognition of court orders to freeze assets or evidence should apply not only to cases of drug trafficking, fraud against the EU budget, money laundering, counterfeiting of the euro, corruption or trafficking in human beings (as specified in the text proposed by the governments of France, Sweden and Belgium) but to all cases which are punishable by a custodial sentence of at least six months. Other amendments adopted in committee included bringing forward the date of its entry into force by six months, from 31 December to 30 June 2002. The committee also advocated a pragmatic linguistic approach, arguing that, as speed was essential in the execution of freezing orders, provision could be made for Member States, if they so agreed, to accept a translation of the certificate into a widely used official EU language other than their own, which would greatly speed up proceedings.

13/03/2002 - Reconsultation

On the basis of a compromise from the Spanish Presidency of the Union, the Council has taken note of a certain number of parliamentary reservations that have come to light on the contents of the framework decision on the execution in the European Union of orders freezing property or evidence. This text has been established for the purpose of the reconsultation of the work Decision is to establish the rules under which a Member State shall recognise and execute in its territory a freezing order issued by a judicial authority of another Member State. It shall not have the effect of amending the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union. This framework decision applies to freezing orders issued for the purpose of securing evidence, or subsequent confiscation of property. With regard to the scope of the framework decision, the Presidency's compromise has been aligned on the solutions reached in the context of the Framework Decision relating to the European arrest warrant (in particular the list of 32 offences, as they are defined by the law of the issuing Member State, and if they are punishable in the issuing Member State by a custodial sentence of a maximum of at least 3 years, shall not be subject to verification of the double criminality. It should also be added that the Council may decide to add other categories of offences to the list of 32 offences at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in Article 39(1) of the TEU. The freezing orders must, in addition, be recognised and implemented in respect of the principles of legality, subsidiarity and proportionality. The Parliament shall be reconsulted on the new contents of the draft framework decision as revised by the Council.

14/05/2002 - Decision of committee responsible

The committee adopted the report by Luis MARINHO (PES, P) broadly approving the revised initiative for a framework decision, subject to a number of amendments tabled under the consultation procedure (reconsultation). It was pleased that the new draft decision had incorporated many of the amendments tabled by Parliament in 2001 and that its scope had been enlarged to cover the same 32 types of offences listed in the European arrest warrant. Nevertheless, the committee still regarded the draft framework decision as timid and inadequate in scope, and it therefore adopted an amendment stipulating that freezing orders may be issued in the case of offences without requiring verification of double criminality, if those offences carry a maximum sentence of at least two years instead of three as stated in the proposal. It argued that otherwise many proceeds derived from offences would remain beyond the reach of the law. Other amendments were intended to ensure that all decisions relating to the freezing measures provided for in the initiative are taken exclusively by the judicial authorities of either the issuing State or the executing State and in the framework of criminal proceedings. Finally, the committee believed that the framework decision should be brought into effect as a matter of urgency namely, by 31 December 2002.

11/06/2002 – European Parliament vote 1st reading

Using its procedure without debate, the European Parliament adopted a resolution drafted by Luis MARINHO (PES, Portugal) on freezing orders. (Please refer to the document dated 14/05/02.) Parliament stated that freezing orders

should be subject to adequate checks and should be issued by the competent judicial authority.

In the draft of 13 March 2002, *Article 2* sets out the following definitions:

For the purposes of this Framework Decision,

(a) "issuing State" shall mean the Member State in which a judicial authority, as defined in the national law of the issuing State, has made, validated or in any way confirmed a freezing order in the framework of criminal proceedings;

(b) "executing State" shall mean the Member State in whose territory the property or evidence is located;

(c) "freezing order" shall mean any measure taken by a competent judicial authority in the issuing State in order provisionally to prevent the destruction, transformation, moving, transfer or disposal of property that could be subject to confiscation or evidence.

(d) "property" includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents and instruments evidencing title to, or interest in such property, which the competent judicial authority in the issuing State considers :

- is the proceeds of an offence referred to in Article 3, or equivalent to either the full value or part of the value of such proceeds, or
- constitutes the instrumentalities or the objects of such an offence;

(e) "evidence" shall mean objects, documents or data which could be produced as evidence in criminal proceedings concerning an offence referred to in Article 3.

Article 3 parallels the Framework Decision on the European Arrest warrant in respect of offences for which double criminality need not be shown:

2. The following offences, as they are defined by the law of the issuing Member State, and if they are punishable in the issuing Member State by a custodial sentence of a maximum of at least three years shall not be subject to verification of the double criminality:

- participation in a criminal organisation ,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in

- endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and product piracy,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- motor vehicle crime,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Tribunal,
- unlawful seizure of aircraft/ships,
- sabotage.

4. For cases not covered by paragraph 2, the executing State may subject the recognition and enforcement of a freezing order made for purposes referred to in paragraph 1(i) to the condition that the acts for which the order was issued constitute an offence under the laws of that State, whatever the constituent elements or however described under the law of the issuing State.

For cases not covered by paragraph 2, the executing State may subject the recognition and enforcement of a freezing order made for purposes referred to in paragraph 1(ii) to the condition that the acts for which the order was issued constitute an offence which, under the laws of that State, allows for such freezing, whatever the constituent elements or however described under the law of the issuing State.

Articles 5 and 9 set out the recognition requirements and conditions.

Article 5

Recognition and immediate execution

1. The competent judicial authorities of the executing State shall recognise a freezing order, transmitted in accordance with Article 4, without any further formality being required and shall forthwith take the necessary measures for its immediate execution in the same way as for a freezing order made by an authority of the executing State, unless that authority decides to invoke one of the grounds for non-recognition or non-execution provided for in Article 7 or one of the grounds for postponement provided for in Article 8.

Article 9

Certificate

1. The certificate, the standard form for which is given in the Annex, must be signed, and its contents certified as accurate, by the competent judicial authority in the issuing State that ordered the measure.

Articles 7 and 8 set out the circumstances in which execution may be refused or delayed.

Article 7

Grounds for non-recognition or non-execution

1. The competent judicial authorities of the executing State may oppose the recognition or execution of the freezing order only if:

(a) the certificate provided for in Article 9 is not produced, is incomplete or manifestly does not correspond to the freezing order;

(b) there is an immunity or privilege under the law of the executing State which makes it impossible to execute the freezing order;

(c) it is instantly clear from the information provided in the certificate that rendering judicial assistance pursuant to Article 10 for the offence in respect of which the freezing order has been made, would infringe the *ne bis in idem* principle;

(d) if, in one of the cases referred to in Article 3(4), the act on which the freezing order is based does not constitute an offence under the law of the executing State; however, in relation to taxes or duties, customs and exchange execution of the freezing order may not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing Member State.

2. In case of paragraph 1(a), the competent judicial authority may:

– specify a deadline for its presentation or completion or correction, or

– accept an equivalent document, or

– exempt the issuing authority from the requirement if it considers that the information provided is sufficient.

3. Any decision to refuse recognition or execution must be taken and notified forthwith to the competent judicial authorities of the issuing State by any means capable of producing a written record.

4. In case it is in practice impossible to execute the freezing order for the reason that the property or evidence have disappeared, have been destroyed, cannot be found in the location indicated in the certificate or the location of the property or evidence has not been indicated in a sufficiently precise manner, even after consultation with the issuing State, the competent judicial authorities of the issuing State shall likewise be notified forthwith.

Article 8

Grounds for postponement of execution

1. The competent judicial authority may postpone the execution of a freezing order transmitted in accordance with Article 4:

(a) where its execution might damage an ongoing criminal investigation, until such time as it deems reasonable;

In his report to the European Parliament in May 2002, the Rapporteur commented on:

-the way in which the tragic events of 11 September 2001 have influenced the change in political thinking which is reflected in the profound changes which have been made to the original initiative.

He also said that it should be noted that the draft text constituted a decisive step towards the creation of a European judicial area.⁵⁵

The original timetable has not been followed, and it remains uncertain when a decision will be made. Speaking for the Government at Grand Committee of the House of Lords, Lord Goldsmith explained:

The framework decision on the freezing of assets and evidence has still not been adopted but I am told that it—and, in particular, the accompanying certificate—is in the final stages. It is hoped that it will be adopted at the earliest opportunity during the term of the Greek presidency.

He added:

... My understanding is that, so far as concerns evidence, the provisions in relation to freezing orders are well set out in the draft. There is no reason to think that there will be any difficulty in that respect. Indeed, I can go further than that. The substance has been agreed and it is the only thing outstanding. I was rather more cautious in my words previously. The only matter outstanding in terms of negotiation is the accompanying certificate.⁵⁶

Statewatch, the EU civil liberties monitoring body, has commented on the relatively slow progress on this Framework Decision:

Negotiations began in November 2000 and have taken much longer than the controversial Framework Decisions on terrorism and the European Arrest Warrant. Of 26 identifiable EU documents relating to the "freezing" measure, only nine have been released in full to the public (11 have been kept secret, and six are subject to the partial access rule to hide negotiating positions).⁵⁷

According to a report from the Article 36 Committee two questions of principle have held-up negotiations. The first concerns provision for the restitution of frozen property to its rightful owner, which was included in initial drafts of the proposal but now seems to have been dropped due to opposition from a number of member states. The matter is also complicated by the EU Legal Service opinion that restitution claims are civil law matters (first pillar). Due to the pressure on the Council to adopt the measure quickly, it appears that the freezing of assets for the purpose of restitution will be excluded from the scope of the

⁵⁵ Committee on citizens freedoms and rights, Justice and Home Affairs, report 16 May 2002: A5-0172/2002

⁵⁶ HL Deb 13 Jan 2003 c GC50

⁵⁷ <http://www.statewatch.org/news/2002/may/01freezing.htm>

Framework Decision and an additional instrument will follow “as soon as possible”.

The second sticking point in the negotiations has been the list of offences covered by the proposal. The member states are considering a number of options - a generic list, a more precise list containing references to definitions of offences in other EU legislation, a broader scope (without a list) containing a clause allowing member states to insist on dual criminality or a requirement that the offence carry a minimum penalty in the issuing state.⁵⁸

The European Scrutiny Committee has reported on successive drafts of the Framework Decision, and has voiced particularly strong concern about three aspects of it. The Committee’s 23rd Report of 2001/02 explains what the Committee’s concerns have been throughout, and how it has pressed the Government to deal with them. It outlines the effect of the text of March 2002, and the modifications which have been made, but emphasized the outstanding concerns:

1.25 First, we are concerned that there is still no clear provision requiring the issue and execution of freezing orders to be in accordance with the European Convention on Human Rights (ECHR). The language now proposed is vague and ambiguous, containing no express reference to the ECHR and referring only to discrimination, freedom of expression and freedom of association, thus giving rise to an arguable implication that recognition of a freezing order may not be refused on the grounds that it infringes any other rights guaranteed by the ECHR. If human rights are to be preserved by this proposal, we do not understand why it should not be stated in clear and simple terms that the making, recognition and enforcement of a freezing order are to be subject to the ECHR.

1.26 Secondly, we repeat our concern that the concept of "judicial authority" is left to Member States to determine, so leaving open the possibility of a police authority being designated as competent to issue freezing orders which must then be recognised and enforced in all other Member States. The Minister's own reply of 11 February in relation to the scope of the freezing order and its relationship with the European Arrest Warrant shows how wide-ranging and invasive such orders might be. As these orders would be made without notice being given to the persons affected, we consider that it is essential that the recognition and enforcement of such orders should be conditional on their having been made or approved by a judge or other judicial officer in the issuing State, as is the case with the European Arrest Warrant, which must be a "court decision". It is all the more important that there should be judicial oversight of the original order when, as in the present case, the right to appeal is so limited and has no suspensive effect and must in practice be exercised in the foreign jurisdiction. Without the minimum safeguard of judicial involvement in and oversight of the making of

⁵⁸ <http://www.statewatch.org/news/2001/oct/13analy6.htm>

orders in the issuing State, we do not consider there is any proper basis for their recognition and enforcement in this country.

1.27 Thirdly, we do not consider that the relationship of this proposal with the seizure powers under Article 23a of the European Arrest Warrant is adequately explained. The provision in the European Arrest Warrant is not confined to evidence but applies also to property acquired as a result of an offence, so its subject matter is indistinguishable from the subject matter of a freezing order. Moreover, we do not find in Article 23a of the European Arrest Warrant, in the version deposited, any limitation to property which is physically associated with the requested person. The two provisions appear to us to have the same material scope, but to have different rules for such matters as appeals. This is notably the case for third parties, who have no rights of appeal under Article 23a of the European Arrest Warrant where their property or rights may be affected. It may be that the problem has been caused by the last-minute insertion of Article 23a into the European Arrest Warrant, but we consider that the confusion which now arises should be resolved by the present proposal before it is formally adopted.⁵⁹

The Joint Committee on Human Rights reported on the Bill in December 2002 and again in January and March 2003. In its First Report it commented adversely on the Explanatory Notes merely noting that the Minister had made a statement of HRA compatibility, without identifying the provisions which are thought to engage Convention rights, the rights which are thought to be affected, or the reasons for deciding that the provisions are compatible with the rights. The Committee also suggested that orders to freeze evidence were among the provisions which needed justification on human rights grounds, as they engaged the right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the ECHR and the right to respect for private and family life, home and correspondence under ECHR Article 8

The *Explanatory Notes* have now been expanded to offer the following explanation:

Part 1, Chapter 2: Mutual Provision of Evidence

226. Chapter 2 of Part 1 the Bill makes provision for the UK to seek assistance from abroad in obtaining evidence located abroad for use in UK criminal proceedings and investigations, and it also makes provision for the UK to provide reciprocal assistance of this type to other countries. The gathering of evidence may engage Article 8(1) of the ECHR, but an interference with this right may be justified under Article 8(2) insofar as it is in accordance with the law and is necessary in a democratic society in the interests of the prevention of disorder or crime. It is the Government's view that these criteria are fulfilled in the provisions of the Bill. In addition, the authorities acting under Chapter 2 will be subject to section 6(1) of the Human Rights Act which provides that it is unlawful for a

⁵⁹ European Scrutiny Committee, Twenty-third Report 2001/02: Execution of orders freezing assets or evidence, <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xxiii/15202.htm>,

public authority to act in a way which is incompatible with a Convention right (unless primary legislation requires this).

227. Chapter 2 covers two types of assistance. Firstly, mutual legal assistance requests for evidence, which are only made where an offence has been committed or there are reasonable grounds for suspecting that an offence has been committed, and proceedings in respect of the offence have been instituted or the offence is being investigated. The Government considers that both incoming and outgoing requests of this type, which are not new forms of assistance, are ECHR compliant.

228. The second type of assistance dealt with in Chapter 2 concerns the mutual recognition of evidence freezing orders, under the Framework Decision on the execution in the EU of orders freezing property or evidence. The Government considers that domestic freezing orders issued here to obtain evidence overseas will be ECHR compliant as they will be issued by UK courts which are bound to act in accordance with ECHR as implemented by the Human Rights Act. Under these provisions UK courts will equally be expected to give effect to an order issued in another Member State (an "overseas freezing order") unless either of two circumstances (in clause 21(6) and (7)) apply. Clause 21(7) relates to the ECHR and provides that a UK court may not give effect to an overseas freezing order if this would be incompatible with a Convention right. It is considered that these provisions are compatible with the ECHR.

As introduced in the Lords, the Bill contained provisions to deal only with the freezing of evidence, not property. In a letter to the Joint Committee on Human Rights, Lord Filkin explained that:

-it has not been possible to introduce the asset freezing measures for all serious crime in this Bill due to the complexities of matching the requirements of the Framework Decision with the existing asset freezing provisions in the Proceeds of Crime Act.

However, amendments to implement the Framework Decision in relation to *terrorist* property were brought in at Committee. These provisions are discussed in Part III of this paper.

2. Freezing orders made in the UK

Clauses 10 to 12 of the Bill contain provisions for the making, sending to other countries, and variation of "domestic freezing orders" made in the UK. *Clause 10* sets out when a domestic freezing order may be made, and what it means. A domestic freezing order is:

an order for protecting evidence which is in the participating country pending its transfer to the United Kingdom (subsection (2)).

Only a “judicial authority” may make a domestic freezing order, and the judicial authorities are specified in subsection (5) as:

- (a) in relation to England and Wales, any judge or justice of the peace,
- (b) in relation to Scotland, any judge of the High Court or sheriff,
- (c) in relation to Northern Ireland, any judge or resident magistrate.

Unlike other requests for assistance, freezing order must, under clause 11, be sent via the Secretary of State or Lord Advocate. The reason for this requirement, given in the *Explanatory Notes*, is:

45. ... because mutual recognition orders are completely new, and freezing orders will be unfamiliar to those issuing and receiving them in terms of format, conditions and procedural requirements. Transmission via the central authority will enable the orders to be checked and monitored, to ensure that they comply with the requirements of the FD, and to ensure that they are responded to by the overseas authority in the appropriate manner. Under the terms of the FD the UK is allowed to require transmission via the central authority.

It was suggested in Grand Committee, that the judicial authority in England and Wales should be limited to circuit judges. Baroness Anelay of St Johns said:

I am advised by the Law Society that applications for freezing orders to take effect in the domestic jurisdiction are usually heard by a circuit judge. The clause allows for applications for freezing orders to take effect in other jurisdictions to be heard by any judicial authority, including magistrates. That could mean, for example, that an application could be made on a Friday afternoon—I am not sure how many magistrates' courts outside the metropolitan areas sit on Friday afternoon—in an area unused to cases involving other jurisdictions for a freezing order to be made in relation to a journalist's notebook held, perhaps, in Paris. The Law Society may be referring to a particular case.

It is not appropriate that an unfamiliar application that involves complex proprietary rights should be put before an inexperienced Bench. It would be more appropriate for any evidence defined as excluded evidence or that would otherwise come under the special procedure rules to be dealt with by the appropriate judicial authority in the United Kingdom. On principle, our procedures should require as much rigour in applications relating to overseas jurisdictions as would be required in the domestic jurisdiction.⁶⁰

Lord Goldsmith responded:

⁶⁰ HL Deb 13 Jan 2003 c GC57

At the moment, if a police officer believes that there are guns in Birmingham, Bradford or Halifax, he can obtain a search warrant from a justice of the peace. We, rightly, take the view that justices of the peace are well able, through long practice and experience, properly to grant such search warrants. That is all the order does. It happens to be a search warrant in a different country. But, if noble Lords consider the terms of the domestic freezing order, as outlined in subsection (3), they will see that it is granted in circumstances where evidence,

"(a) is on premises specified in the application in the participating country,
 (b) is likely to be of substantial value . . . to the proceedings or investigation",
 of a serious offence; where evidence,

"(c) is likely to be admissible in evidence at a trial for the offence, and
 (d) does not consist of or include items subject to legal privilege".

For all intents and purposes, it is precisely the same as a search warrant. It tracks the very language used in PACE, which, noble Lords will note, does not refer to a circuit judge, a High Court judge or a Court of Appeal judge, but a justice of the peace. Section 8 of PACE provides that a search warrant may be issued:

"If on an application made by a constable a justice of the peace is satisfied that there are reasonable grounds for believing—

(a) that a serious arrestable offence has been committed; and
 (b) that there is material on premises specified in the application which is likely to be of substantial value . . . to the investigation of the offence;
 and
 (c) that the material is likely to be relevant evidence".

And so it continues. The Government's view is that magistrates are entirely fit and able to grant such orders. There is no reason why we should apply a different process to orders executed across a frontier.⁶¹

3. Freezing orders sent to the UK

Clauses 20 to 25 deal with “overseas freezing orders” made by a court or authority in a participating country. To fall within these provisions, an overseas freezing order must have been made by:

- (a) a court exercising criminal jurisdiction in the country,
- (b) a prosecuting authority in the country,
- (c) any other authority in the country which appears to the territorial authority to have the function of making such orders (clause 20 (3)).

“Territorial authority” means the Secretary of State or Lord Advocate. The *Explanatory Notes* highlight clause 20 as implementing:

one of the key measures set out in the Framework Decision: the requirement to execute an order to freeze evidence for its subsequent use in any proceedings or

⁶¹ HL Deb 13 Jan 2003 c GC59

investigation in a participating country, where the order is made by a court or other authority in that country. The UK is already able to consider requests for mutual legal assistance in similar circumstances, but the FD is based on the principle of mutual recognition, and requires the UK to recognise the validity of an overseas order from a participating country, subject to certain conditions, rather than consider it as a request for mutual legal assistance.

(...)

67. The clause sets out the authorities competent to make overseas freezing orders, and the conditions for executing the order. Provided that the other requirements are met, the UK is obliged to execute orders relating to offences listed in the FD that are subject to a three year prison term in the issuing state, even if that conduct would not constitute a crime here, but may make the execution of orders relating to crimes that do not fall into this category subject to the requirement that the conduct would constitute a crime here.

68. Overseas freezing orders must be accompanied by a certificate. Article 9 of the FD requires provision of a certificate, which must follow a standard format containing the details required in order that the receiving authority can execute the order. These will include for example details of the issuing authority, the person and offence under investigation, and the evidence sought.

69. Frozen evidence is not automatically provided to the overseas authority that issued the order. It must issue a mutual legal assistance request, either simultaneously with the order, or at a later stage, in order for the evidence to be transmitted. This is provided for in clause 24.

If the conditions of *clause 20* are met, the territorial authority must, under *clause 21*, refer the order to a court. The court may only refuse to execute the order, or postpone giving effect to it in the limited circumstances set out in *clauses 21* and *23* respectively. The two conditions under which the court may refuse are set out in subsections (6) and (7) of *clause 21*:

The first condition is that, if the person whose conduct is in question were charged in the participating country with the offence to which the overseas freezing order relates or in the United Kingdom with a corresponding offence, he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction.

The second condition is that giving effect to the overseas freezing order would be incompatible with any of the Convention rights (within the meaning of the Human Rights Act 1998 (c. 42)).

Clause 23 provides that the nominated court may postpone giving effect to an overseas freezing order in respect of any evidence:

(a) in order to avoid prejudicing a criminal investigation which is taking place in the United Kingdom, or

(b) if, under an order made by a court in criminal proceedings in the United Kingdom, the evidence may not be removed from the United Kingdom.

In moving an amendment which he later withdrew, Lord Goodhart said:

this is an issue raised by Justice, which is concerned that the provision in paragraph (c) is too wide. It is desirable that overseas freezing orders must be subject to some judicial scrutiny. They should not merely be made administratively. The amendment would mean that the freezing orders would have to come from authorities which have the power to make orders and not merely from those which appear to the territorial authority to have the function of making such orders.

A domestic freezing order must be made by a judicial authority; and a freezing order, whether domestic or overseas, can have serious effects. It may, for example, deprive the owner of property of the use of that property for a substantial time or possibly even permanently. In such cases, while we support the idea of mutual assistance, we feel it is desirable that such orders should be granted only where in another country, as in this country, the order has been made by a judicial authority.⁶²

Lord Goldsmith responded:

Under the framework decision, we are under an obligation to recognise orders issued by judicial authorities. In a number of EU countries, orders of this kind could be made by examining magistrates, who have no precise equivalent in this country. They are plainly legitimate judicial authorities—"judicial authority" is the description in the framework decision. But, plainly, we must be able to enforce orders that they make. An examining magistrate might not accurately fall within the description,

"a court exercising criminal jurisdiction in the country",

or,

"a prosecuting authority in the country".

Therefore, the purpose of Clause 20(3)(c) is to cover all judicial authorities in other EU countries. I say "other EU countries" because that is the limit on the application of this provision. EU judicial authorities are designated under the 1959 Council of Europe convention, so they are clearly identified.

For many years, we have been able to execute requests for mutual legal assistance, including for search and seizure, by authorities of this type. Section 7(4)(b) of the 1990 Act includes that type of person. That is re-enacted by Clause 13(2)(b) of the Bill. So the provision merely applies to the new concept of the freezing order the same approach that has already been adopted in relation to mutual legal assistance. It has not caused any difficulties in practice. It must be available for the enforcement of overseas freezing orders.⁶³

⁶² HL Deb 23 Jan 2003 c GC84

⁶³ HL Deb 23 Jan 2003 c GC85

The concerns of the human rights organisation Justice were set out in their briefing in November 2002:

7. Chapter 2 of the Bill relates to the mutual provision of evidence. Freezing orders for evidence are dealt with in clause 10 (domestic) and clause 20 (overseas). The procedure for considering and giving effect to such orders is dealt with in subsequent paragraphs but there seems to be no provision for defence rights such as the provision of documents etc. Defence rights must be protected in cases of international mutual assistance, particularly in the light of the complex nature of such proceedings.

8. The Bill makes no reference in clause 19 to the use that may be made of seized evidence once it has been sent to the court or authority making the request for assistance. In order to avoid international ‘fishing expeditions’, the Bill should specify that evidence seized under the terms of the Act may only be used for the purposes set out in the original request for assistance unless the territorial authority expressly consents for it to be used in specified further investigations.

9(...)

10. Throughout the bill, authorities in prescribed countries are referred to in an insufficiently exact way. The authorities from which requests may be received and to which requests may be sent are not defined. For example, clause 14(3) relating to the powers to arrange for evidence to be obtained reads:

The territorial authority is to regard as conclusive a certificate ... issued by any authority in the country in question which appears to him to be the appropriate authority to do so.

For the avoidance of doubt, where reference is made to the authorities of other countries, these should be identified as ‘the appropriate authority’ which is an objective and verifiable entity.⁶⁴

E. TV and telephone links

1. The present law

There are no current statutory provisions to authorise or regulate setting up video or telephone links so that evidence can be transmitted from the UK to a foreign criminal court. Nor is there any provision for evidence to be given by telephone at criminal trials in the UK, by witnesses in the UK or abroad. It has been possible for more than ten years for some kinds of evidence to be received in criminal trials in British courts via live links. Video links with other countries may already be used in some criminal trials. Apart from cases where witnesses are not in the UK, the giving of children’s evidence by video links and recordings is now well established, and those provisions have been extended to other

⁶⁴ <http://www.justice.org.uk/parliamentpress/parliamentarybriefings/index.html>

vulnerable witnesses. Increasing use is being made of video links in preliminary criminal proceedings, as well as in civil proceedings.

Section 32(1)(a) of the *Criminal Justice Act 1988* introduced provisions under which a person other than the accused, who was outside the United Kingdom, could be allowed to give evidence through a live television link, in some criminal proceedings.⁶⁵ The statutory provisions are limited to a fairly narrow range of offences, and have so far only been brought into force for proceedings for murder, manslaughter or other unlawful killing, and for certain fraud offences.⁶⁶ The procedure is governed by rule 23B of the *Crown Court Rules 1982*. The party seeking to have evidence given by live television link must apply to the Crown Court for leave. Other parties to the proceedings are notified, and may oppose the application. Notification of the court's decision has to be given to all the parties and, if leave is granted, must give information such as the country and (if possible) place, where the witness is to give evidence.

In April 2000, the provisions were used in a fraud case, to set up video links with America, Australia and South Africa.⁶⁷ Some of the practical implications were described in an article by a solicitor, who pointed out the need to take international time differences into account, as well as organising the necessary technical equipment and locations:

Court 6 at Southwark Crown Court contains most of the technical equipment required to receive evidence by video link. This includes television monitors for the judge, counsel, and jury, microphones, and a link up to the telephone lines. However, as this was a fraud case with a vast amount of documentation to be put to the various witnesses a document camera was required. (...) Although it may be possible in some cases to provide an agent or third party with copies of the documents at the overseas location to be shown to the witness on counsel's request, this is certainly not ideal. Particularly when dealing with prosecution witnesses, it would be unfair for the defence to supply documents for use in cross-examination in advance.

There are various video conferencing companies who can provide equipment needed at court, although we could only find one company ... who could supply a document camera.

(...) another problem can be to find a suitable overseas location. Again, video conferencing companies can help in finding an overseas location. However, it is not possible to have link-ups everywhere in the world. Therefore, for the practitioner hoping to rely on this facility, enquiries need to be made early to avoid disappointment. It is not possible to use this technology with analogue

⁶⁵ See also section 273 of the *Criminal Procedure (Scotland) Act 1995*

⁶⁶ The Criminal Justice Act 1988 (Commencement No. 12) Order 1990, SI 1990/2084

⁶⁷ "Record breaking TV-link witnesses to give evidence in fraud trial", 7 April 2000, LCD Press Notice 116/00

telephone lines and therefore this problem will arise in any jurisdiction or area that does not have ISDN lines.

Although one solution would be to use video streaming where images are sent via a bandwidth to a computer at the court, this technology also requires ISDN lines and is very unpredictable with problems of picture break-up and loss of transmission.

An alternative would be to set up satellite telephone links, but they can require different equipment including an SNG (a truck with a satellite dish and transmission equipment) both at the court and at the overseas location. This technology is still in its infancy and there are problems with time delay and picture break up. Further it is not possible to transmit documents on this system.⁶⁸

2. The proposals

The Convention MLAC requires Member States to provide outgoing live video and telephone links at the request of other Member States.⁶⁹ This is principally aimed at evidence to be given by witnesses, but MLAC does permit Member States, at their discretion, to extend the provision of videoconference to hearings involving accused persons. It does not make it obligatory for States to make use of such facilities as could be available for evidence coming into their own criminal courts. Accordingly the Bill makes new provision for live video and telephone links to transmit evidence to requesting states. It also lays the foundation for the existing provisions which allow the use of evidence given by video conferencing to be extended to a wider range of offences. But there are no current proposals to allow evidence to be given by telephone in the British courts, and accordingly no provision in the Bill for receiving telephone evidence from abroad.⁷⁰ Nor is the Government proposing to enable accused persons to be heard by video.⁷¹

The Explanatory Report to the Convention provides the following commentary on *Article 10*:

Paragraph 1 establishes the principle that a request for a videoconference hearing may be submitted by a Member State in respect of a person who is in another Member State. The circumstances in which such a request may be made are that the judicial authorities of the requesting Member State require the person in question to be heard as a witness or expert and that it is not desirable or not possible for him or her to travel to that State for a hearing. "Not desirable" could for example apply in cases where the witness is very young, very old, or in bad health; "not possible" could for instance cover cases where the witness would be exposed to serious danger by appearing in the requesting Member State.

⁶⁸ "Video links and overseas witnesses", Louise Hodges, 7 June 2002, *New Law Journal*

⁶⁹ [http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0712\(01\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0712(01)&model=guichett)

⁷⁰ It is not anticipated that telephone links, now used in some Scandinavian countries, will be in great demand.

⁷¹ Lord Bassam, HL Deb 23 Jan 2003 c GC107

Paragraph 2 obliges a requested Member State to agree to a videoconference request provided that the hearing would not, in the circumstances of the particular case, be contrary to the fundamental principles of its law and that it has the technical capacity to carry out the hearing. In that context the reference to "fundamental principles of law" implies that a request may not be refused for the sole reason that hearing of witnesses and experts by videoconference is not provided under the law of the requested Member State, or that one or more detailed conditions for a hearing by videoconference would not be met under national law. Where the relevant technical means are lacking, the requesting Member State may, with the agreement of the requested Member State, provide suitable equipment to permit the hearing to take place.

Paragraph 3 concerns the information that must accompany requests made under Article 10 and requires, *inter alia*, that a request must explain why it is undesirable or impossible for the person who is the subject of the request to attend a hearing in the requesting Member State. Although the requesting Member State must provide the reasons for its request, it is entirely up to it to assess the relevant circumstances.

Paragraph 4 provides that the person in question is summoned to appear by the judicial authorities of the requested Member State. Its purpose is to ensure that appropriate steps can be taken to secure his or her attendance for the hearing. This is a derogation from Articles 4 and 5. Unlike paragraph 9 concerning accused persons, the consent of a witness or expert to be heard by way of videoconference is not required.

The rules to be observed where a hearing takes place by way of videoconference are set out in paragraph 5. In particular, provision has been made in point (a) for the attendance, and if necessary the intervention, of a judicial authority from the requested Member State to ensure, *inter alia*, that the fundamental principles of law of that Member State are not contravened during a hearing. The requesting Member State may, for example, on the basis of this point in conjunction with Article 4 and Article 10(5)(c) of the Convention, request that counsel for the person to be heard be present at the hearing.

(...)

Paragraph 8 provides that if, in the course of a hearing by videoconference, a person refuses to testify or provides false testimony, the Member State in which the person being heard is located must be in a position to deal with that person in the same way as if he or she were appearing at a hearing conducted under its own national procedures. This follows from the fact that the obligation to testify at a videoconference hearing arises, pursuant to this paragraph, under the law of the requested Member State. The paragraph is in particular intended to guarantee that the witness, in case of non-compliance with an obligation to testify, is subject to consequences of his or her behaviour similar to those applicable in a domestic case where videoconferencing is not used.

Where the difficulties mentioned in paragraph 8 occur, the requesting and the requested Member States may communicate with each other in relation to the application of the paragraph. This will normally imply that the authority of the requesting Member State conducting the hearing as soon as possible provides the authority of the requested Member States with the information necessary to enable the latter to take appropriate measures against the witness or expert.

On telephoned evidence it says:

Telephone-conference hearings represent a further area in which means of telecommunications can be employed in the mutual assistance field. Such hearings can be particularly useful in situations where, for example, a statement on a routine matter is required from a witness. In addition they can be arranged and conducted quite easily and economically.

This Article [11] sets out the arrangements to apply between the Member States in respect of requests relating to hearings by telephone conference. It should be noted, however, that nothing in Article 11 is intended to undermine the practice that exists in some Member States whereby a person is heard as a witness by telephone from abroad, perhaps on consular premises, without the assistance of the Member State where he or she is situated.

The overall approach of this Article is to establish a general framework for telephone hearing requests which is somewhat different from that adopted for videoconferencing in Article 10. In that context it may be noted, in particular, that, according to Article 11(2), a hearing may be conducted only if the witness or expert agrees thereto. For that reason there was no need to establish that it is not desirable or possible for the person to be heard to appear for a hearing in person.

Clause 30 introduces the new arrangements for UK courts to take video evidence of witnesses for transmission abroad. Requests will go to the Secretary of State or the Lord Advocate, who must – unless he considers it inappropriate to do so - nominate the UK court in which the witness is to be heard. *Clause 31* introduces the arrangements for telephone transmission. Both clauses make provision for the domestic laws on perjury and contempt of court to apply to the proceedings. Schedule 2 sets out the regimes for each kind of hearing. In both cases rules of court must make provision for the use of interpreters. The main differences are that:

- witnesses can be compelled to give evidence by video link, although they cannot be compelled to give evidence which they could not be compelled to give in the UK court (e.g. because of privilege), whereas the court has to be satisfied that any witness giving telephone evidence does so willingly, and
- where evidence is given by video link, the court is to intervene where it considers it necessary to do so to safeguard the rights of the witness

At Committee stage in the House of Lords, Lord Filkin indicated that the Government had no present intention to use the power, to be conferred by *clause 29*, to seek video evidence from abroad in a wider range of cases than is currently permitted:

The types of proceedings covered presently include homicide, serious fraud cases and cases involving the evidence of children. The clause provides for those sections to apply to further types of proceedings. Clearly, there are many other potential criminal offences to which those types of proceedings could be applied. All I would say at this point is that there are no present plans by the Lord Chancellor's Department to do so.

I go further. Any decision to extend the types of cases in which that sort of assistance is provided would follow only after extensive consultation with all parties concerned and would reflect a consensus view across the criminal justice system. We believe, therefore, that Clause 29 provides a practical solution ensuring that Section 32 of the Criminal Justice Act and the corresponding Scottish provisions may be extended in future, but with the safeguard that that would be done only after the proper forms of consultation, which, I put on the record, were carried out.

The clause has general application and is not restricted to participating countries. That reflects the existing position under the Criminal Justice Act. We consider that those arrangements have particular benefit in relation to countries outside Europe, which may pose greater travel obstacles for witnesses. That sort of assistance is a useful tool in trials which deal with offences which take place in more than one state, and which are often those involving organised criminal gangs.⁷²

Baroness Anelay of St Johns suggested that another matter which the Government would have to take into account was having the budgets to put the IT system in place, and that should be part of the consultation process.⁷³

When asked whether the facilities would be part of the ordinary provision of IT for courts or whether there would be special courts particularly well provided, he said:

I am advised by the Lord Chancellor's Department that some 154 magistrates' courts have already been set up for remand links and that these would generally be the ones used. These links currently operate only between courts and prisons for use in remand hearings. I am sure that the noble Baroness is familiar with those. The technology is in place and merely requires refinement by the responsible contractors in order to provide the link services to the courts.⁷⁴

He also welcomed the opportunity to explain the jurisdiction in relation to contempt. He said:

Other than for the purposes of contempt of court and perjury, television and telephone hearings are not proceedings before the domestic (UK) court. The Bill simply enables witnesses to be heard as part of proceedings before the overseas court.

Under the Mutual Legal Assistance Convention we, as the home authority, are obliged to ensure that perjury and contempt of court in such circumstances are subject to domestic sanctions. That is necessary because the overseas court which is conducting the hearing will be unable to take any direct action itself.⁷⁵

⁷² HL Deb 23 Jan 2003 c GC 100

⁷³ HL Deb 23 Jan 2003 c GC 102

⁷⁴ HL Deb 23 Jan 2003 c GC 104

⁷⁵ HL Deb 23 Jan 2003 c GC 105

There was further debate, in Committee, as to whether it should be specified, on the face of the Bill (as it is in the Convention) that a request for video evidence should specify the reason why it is not desirable or possible for the witness to attend in person, and certain other requirements. Lord Bassam explained that although the Government had considered putting two such requirements on the face of the Bill, the conclusion had been that it would make the clause unduly restrictive.

The first two conditions are requirements of article 10 of the Mutual Legal Assistance Convention. The problem with including these conditions in a clause of general application is that other future agreements containing provisions on television evidence might not be expressed in precisely the same terms as the convention. For that reason, we do not want the Bill to be drafted so narrowly as to exclude the granting of assistance under other agreements, although in practical terms we would expect these conditions to be met in order to be able to make the necessary administrative arrangements to set up the hearing.

That does not mean that we shall apply a lower standard to requests from outside the EU. In contrast, we consider that the current drafting provides for greater discretion in the absence of an international agreement, because of the general discretion provided for in subsection (3), which provides that the Secretary of State is to nominate a court to hear the evidence unless he considers it inappropriate to do so.⁷⁶

There was also interest as to how such hearings would work in practice, particularly when a witness was being questioned in his own language, but it would still be necessary to provide a translation service, so that the judge sitting in court could follow the questioning.

F. Banking Information

1. Background

Chapter 4 of Part I deals with the disclosure of banking information in connection with criminal investigations. It implements a recent EU-level agreement, the 2001 *Protocol to the Convention on mutual legal assistance in criminal matters*.⁷⁷ The Chapter covers both requests by the UK for information from overseas jurisdictions ('outgoing requests') and requests by overseas jurisdictions for information about accounts held in the UK ('incoming requests'). It builds on domestic powers recently enacted in the *Proceeds of Crime Act 2002*.

At Second Reading in the Lords, Lord Filkin (for the Home Office) said:

⁷⁶ HL Deb 23 Jan 2003 c GC107

⁷⁷ *Protocol to the Convention on mutual assistance in criminal matters between the Member States of the European Union*, 10076/2001, OJ C 326 21.11.2001 (the '2001 Protocol')

Criminals operating across international borders are often also involved in financial crime and money laundering. It is recognised that the ability to obtain comprehensive banking information from other EU countries would be of significant assistance to domestic law enforcement. The Bill will increase our ability to respond to requests from other EU countries for information relating to bank accounts of criminal suspects. By implementing the protocol to the mutual legal assistance convention, the EU has created a reciprocal obligation between member states to respond to requests for financial information. The requests will reflect the new investigative tools introduced by the *Proceeds of Crime Act 2002*.⁷⁸

Opposition parties broadly supported these provisions in the Lords but raised some concerns about protections for individual rights and personal information and the compliance costs of aspects of the new procedures. The provisions specifically override other restrictions on the disclosure of information although the Government has asserted that the protections of the European Convention on Human Rights nevertheless apply.⁷⁹

a. 2001 Protocol

Well-established international agreements already allow some information about bank accounts to be disclosed internationally, including the *European Mutual Assistance Convention* of 1959 which was drawn up under the auspices the Council of Europe. European Union countries more recently drew attention to the harmful effects of economic crime and money laundering at the Tampere council of October 1999. Based on those conclusions, in June 2000 the French brought forward a draft proposal on mutual assistance in criminal matters which focused specifically on financial information.⁸⁰ Originally intended as a separate Convention, during the course of negotiations the proposal was transformed into a Protocol and annexed to the recently-concluded *Convention on mutual assistance in criminal matters between the member states of the European Union* (the Convention on Mutual Assistance in Criminal Matters 2000).⁸¹

The 2001 Protocol is being implemented in the UK by this Bill. It was signed on 16 October 2001, and invited Member States to begin the procedures for adopting it before 1 July 2002.

⁷⁸ HL Deb 2 December 2003 c973

⁷⁹ See for example clauses 32(7) and 37(7). HL Deb 27 January 2003 c125-6GC

⁸⁰ *Explanatory report to the Protocol to the 2000 Convention on mutual assistance in criminal matters*, 5568/2002, 14 October 2002

⁸¹ See above for details of the 2001 Protocol. The 2000 *Convention on mutual assistance in criminal matters* (adopted in May 2000) is also being implemented in the UK by Part 1 of the Bill.

b. Current UK disclosure powers

The UK's *Proceeds of Crime Act 2002* has recently introduced disclosure and monitoring powers at domestic level. Those powers principally relate to money laundering offences and the ability to recover financial benefits derived from crime. Under the 2002 Act:

- customer information orders (s.363⁸²) can be obtained to help the authorities carry out confiscation, money laundering and civil recovery investigations. The orders seek information as to whether a person or a company holds an account with a specified institution or institutions, and if so, require the institution to provide details about the account and the account holder. The definition of those details in the *Proceeds of Crime Act* – i.e. of ‘customer information – forms the basis of the definition in the current Bill too.
- account monitoring orders (s.370⁸³) are available for the same types of investigation as customer information orders but seek ongoing information about transactions on a specific account for a specified period.

The 2002 Act allows some information to be disclosed to overseas authorities for the purposes of assisting with criminal investigations and prosecutions (s.438);⁸⁴ it further allows the UK to use some of its freezing and investigative powers (including customer information and account monitoring orders) at the request of overseas jurisdictions which have been designated by an Order in Council (ss.444-5).⁸⁵

In addition, existing mutual legal assistance agreements already allow the UK to seek and supply historic information about transactions on UK bank accounts. Requests for such information are currently made under section 4 of the *Criminal Justice (International Co-operation) Act 1990*.

c. New powers

The present Bill would allow participating countries (principally EU member states) to obtain customer information orders (in relation to serious criminal conduct) and account monitoring orders (for criminal conduct). It also makes it an offence for financial institutions and their employees to inform their customers of the fact that such orders have been made or that information has been disclosed.

⁸² England and Wales; see also s.397 (Scotland)

⁸³ England and Wales; see also s.404 (Scotland)

⁸⁴ England and Wales; see also s.441 (Scotland)

⁸⁵ During the report stage of the *Crime (International Co-operation) Bill 2002-03* in the Lords, the Government said that it hoped to make ‘the relevant Orders in Council later this year’ (HL Deb 25 February 2003 c191)

It therefore extends the existing legislation in the following ways. Overseas countries which fall within the scope of the Bill will be able to request monitoring of future transactions on specific accounts as part of any criminal investigation (rather than just the past information which current mutual legal assistance arrangements allow). They will also be able to request customer information and account monitoring orders for a wider range of investigations than would be permitted under the *Proceeds of Crime Act 2002* (i.e. not just for money laundering and benefits from crime).

The UK, meanwhile, gains reciprocal rights to seek customer and account information from participating overseas countries.

d. *Parliamentary scrutiny*

The European Scrutiny Committee examined the Protocol at various stages of its development, during which the scope of the proposal was significantly altered.⁸⁶ When it cleared the document in July 2001, the Committee noted that its key concerns had been dealt with by the dilution of elements of the requirements to provide information on bank accounts and transactions and by the deletion of other articles.⁸⁷ It did, however, express concern at the way in which the Protocol had been negotiated:

We are not happy to learn that the latest version of this proposal secured “provisional agreement” at the May Justice and Home Affairs Council. This confusing term appears to have allowed Ministers to consider that they were maintaining the scrutiny reserve, while signalling agreement to the text. It does not help that paragraph 2 of the introduction to document (g) states that the Council reached *political agreement* (our italics) on the revised text, subject to the parliamentary scrutiny reservations. It is unclear to us what account, if any, the Government would have been able to take of any serious concerns we might have raised at this stage.⁸⁸

When the Bill was in the Lords, several speakers commented on the limited ability of Parliament to reject it given that the 2001 Protocol had already been signed.⁸⁹ The Regulatory Impact Assessment (RIA) for the Protocol notes:

The Government, in common with all EU governments, has agreed to urgently ratify the Protocol in recognition of its value in the fight against serious and organised crime, including the financing of terrorism. Failure to ratify the Protocol in the UK would breach an international agreement. Furthermore, it would damage the UK’s ability to obtain mutual legal assistance. The UK would

⁸⁶ See European Scrutiny Select Committee, *Ninth report*, 30 March 2001, HC 28-ix, 2000-01 and European Scrutiny Select Committee, *First Report*, 30 July 2001 HC 152-i, 2001-02

⁸⁷ European Scrutiny Select Committee, *First Report*, 30 July 2001 HC 152-i, 2001-02 para 47.13

⁸⁸ European Scrutiny Select Committee, *First Report*, 30 July 2001 HC 152-i, 2001-02 para 47.12

⁸⁹ See for example Baroness Anelay of St John’s, HL Deb 2 December 2002 c976 and Lord Dholakia, HL Deb 2 December 2002 c981

be unable to expect this type of assistance from other Member States, as the arrangements are reciprocal.⁹⁰

e. *Regulatory Impact Assessment*

The Home Office consulted on implementing the proposals in February 2002 and again through a partial Regulatory Impact Assessment (RIA) in August 2002.⁹¹

A full Regulatory Impact Assessment has now been prepared by the Home Office. The RIA seeks to quantify only the additional costs of implementing the Protocol, that is those costs that are additional to the costs already assessed for the partly-overlapping provisions of the *Proceeds of Crime Act 2002*. As regards customer information orders, the RIA estimates annual additional costs for UK banks of between £1.25m and £3.75m, based on the UK receiving between 50 and 150 additional requests, each of which is sent to 100 banks on average and costs £250 for each bank to process.

The *Proceeds of Crime Act* RIA had earlier anticipated 500 overseas requests each year for customer information orders, between 250 and 350 of which were expected to come from EU states (which will be the main users of the Protocol).⁹² Those requests are now expected to take the form of Protocol requests. Taking into account the expected additional requests, this implies an annual total of between 300 and 500 Protocol requests for customer information orders.

Account monitoring orders by definition are only made where an account has already been identified, so only one institution is involved. Each order is assumed to give rise to a cost of £250. The government estimates that the Bill may yield an additional 50 to 75 requests from the EU for account monitoring orders (at an annual cost of £12,500 to £18,750). This is in addition to the 75 to 105 EU requests already estimated as part of the *Proceeds of Crime Act* (implying a total of 125 to 180 Protocol requests for account monitoring orders each year).

The Government had in earlier consultations assumed a much lower unit cost of £50 for each type of request. Although it revised the estimate to £250 after representations from

⁹⁰ Home Office, Protocol to the Convention on mutual assistance in criminal matters between the member states of the European Union, *Full Regulatory Impact Assessment*, 2002, p2

www.homeoffice.gov.uk/riass/regulatory_impact_assessment.pdf

⁹¹ According to the full RIA (see below), the partial RIA was sent to 26 organisations and placed on the Home Office website. Responses were received from two organisations: the Association of Chief Police Officers in Scotland and the British Bankers' Association.

⁹² The *Proceeds of Crime Act 2002* only permits such orders to be sought where money laundering or benefit from crime is involved. Ministers expect most cases would fall within these categories. Under the 2002 Act, an order can be made against all financial institutions, so the RIA assumed that an order would apply to 200 rather than 100 institutions on average. The Protocol is addressed to banks: the Bill's language is wider but the current RIA assumes that orders will only be sought against banks.

the industry, the Government believes that unit costs may fall with increasing computerisation.

2. Clauses in Chapter 4

As stated above, information about historic banking transactions can already be sought from overseas jurisdictions by the UK and by overseas countries in the UK using the mutual evidence arrangements of the *Criminal Justice (International Co-operation) Act 1990*. While such information will still be able to be sought, requests will now have to specify why the evidence asked for is necessary to the investigation (see c.7(7) in Chapter 1). This additional information is needed to reflect the terms of Article 2(3) of the 2001 Protocol. This requirement aside, it is Chapter 4 of Part 1 which sets out a new, coherent framework for mutual access to banking information under the 2001 Protocol.

Chapter 4 first deals with incoming requests from outside the UK for information (customer information and account monitoring orders) and with the offences that individuals and institutions may commit if they do not comply with these orders. It then establishes procedures for outgoing requests from the UK for equivalent information. Separate clauses provide for incoming requests in Scotland. A more detailed account of clauses follows.

3. Incoming requests

a. Customer information orders

Clauses 32 -3 (England, Wales and Northern Ireland) and clauses 37-8 (Scotland) set out the procedures for dealing with incoming requests from EU states and other participating countries for information about UK account holders and bank transactions.⁹³ ‘Customer information’ includes whether an individual or a corporate entity holds an account with a financial institution, and basic information about the individual or company (for example, account numbers; date of birth, current and recent addresses for individuals; company number, VAT number and registered address for companies).⁹⁴

Requests for customer information are received by the Secretary of State. The Secretary of State then instructs a senior police or customs officer (i.e. at least a superintendent or equivalent customs rank) to apply to a Crown Court judge for a ‘customer information order’. An order requires specified financial institutions to provide any customer information they have on the person specified. The information is then passed to the Secretary of State for transmission to the requesting authority. In Scotland, requests are

⁹³ Article 1 of the 2001 Protocol is the main source of the entitlement to customer information (‘all the details of the identified accounts’). Member States are allowed to make requests under the Article conform to their domestic conditions for search and seizure but in general the purpose of the Protocol is to reduce the grounds on which mutual assistance requests can be refused.

⁹⁴ Customer information is based on the definition in section 364 (Scotland: s.398) of the *Proceeds of Crime Act 2002*, but excludes information that has been provided as evidence of identity.

received by the Lord Advocate who directs a procurator fiscal to apply to the sheriff for an order. Information received is returned to the Lord Advocate for onward transmission.

Before granting a customer information order, the judge or sheriff must be satisfied that:

- the person specified is subject to an investigation in the requesting country
- the investigation concerns ‘serious criminal conduct’
- that conduct would be an offence in the UK, and that
- the order is sought for the purposes of the investigation

‘Serious criminal conduct’ is defined in clause 46(3) with reference to Article 1 of the Protocol.⁹⁵ Applications may be made *ex parte* and in chambers.⁹⁶ The court can hear applications to vary or discharge the order from a number of parties.

Similar powers exist in domestic law under the *Proceeds of Crime Act 2002*, but in respect of a narrower class of offences.

Financial institutions which fail to comply with their obligations under a customer information order commit an offence which attracts a maximum fine of £5,000.⁹⁷ If an institution makes a statement in purported compliance with an order which it knows is false or misleading, or if it recklessly makes such a statement, the offence attracts a maximum fine of £5,000 on summary conviction or an unlimited fine on conviction on indictment.⁹⁸

The Explanatory Notes record that while evidence that is gathered under the 2000 Convention (see elsewhere in Chapter 1) will normally be returned directly to the requesting party, as a matter of policy the fruits of customer information orders and account monitoring orders under the 2001 Protocol will normally be channelled through the Secretary of State (or the Lord Advocate in Scotland) to allow for central monitoring.⁹⁹ In Committee in the Lords, Lord Filkin explained in more detail how incoming requests would be handled:

All requests will be received centrally by the UK Central Authority, which will establish whether the request meets the necessary criteria set out in the Bill and the protocol. If it does, the authority will forward the request to the National

⁹⁵ Article 1(3) extends to offences which are punishable by a maximum term of imprisonment of at least 4 years in the requesting member state and two years in the requested state; offences specified in Article 2 of the Europol Convention or its Annex; and (if not already covered by the Europol Convention) offences specified in the 1995 Convention on the Protection of the European Communities’ Financial Interests and its two Protocols. The Council’s Explanatory Report on the 2001 Protocol lists the broad scope of these offences.

⁹⁶ i.e. without the other side being present and not in open court

⁹⁷ Clauses 34(1) and 39(1)

⁹⁸ Clauses 34(3) and 39(3)

⁹⁹ Bill 78-EN para 32

Criminal Intelligence Service. NCIS will undertake certain intelligence checks to see whether accounts exist and will then apply to a court for an order. A customer information order will be directed at a number of institutions. It might involve one or two institutions, to obtain details of accounts identified by the initial checks, or a larger number, if that is appropriate to the case. In the case of account monitoring orders, the account will already have been identified, so the order will be directed at only one institution.¹⁰⁰

A number of amendments were tabled in the Lords, in response to concerns expressed by the British Bankers' Association and others, that customer information orders might be used for speculative inquiries, thereby causing unnecessary costs to UK banks. In response to one such amendment (which would have removed the ability to direct such orders at 'all financial institutions'), Lord Filkin said:

I address the understandable concern of fishing expeditions. The Bill gives the Secretary of State discretion as to whether he executes a request for assistance, as we signalled during the discussion on an earlier amendment, and it gives the court a discretion whether to make the order.

One of the matters that the Secretary of State will take into account will be whether the request contains the information specified in Article 1 of the protocol, in particular the conditions in Article 1(4). That includes, for example, the requirement that the requesting authority state why it is considered that the requested information is likely to be of substantial value to the investigation. If that information is not given, refusal may follow. The test is the same as one of the tests under domestic law in PACE. We are confident, therefore, that we will not be allowing fishing expeditions. It will not be a general trawl as to whether one might know of someone who might have done something wrong; it has to relate to a specific investigation. We expect that in most cases there will be evidence why it was thought that there was a UK-relevance to the investigation.

We have not listed these requirements on the face of the Bill but consider that the general discretion conferred on both the Secretary of State and the court as to whether to execute the request and make the order are adequate and powerful. They will prevent fishing expeditions whilst enabling necessary investigations to be undertaken.¹⁰¹

The EU's explanatory report says of Art 1(4) that while requesting States must provide information to the requested State as to why the information sought would be of substantial value to an investigation, 'the provision does not allow the requested State to question whether the requested information is likely to be of substantial value'.¹⁰² This suggests that the operative assessment is made in the requesting State and that, where

¹⁰⁰ HL Deb 27 January 2003 cc143-4GC

¹⁰¹ HL Deb 27 January 2003 c128GC

¹⁰² *Explanatory report to the Protocol to the 2000 Convention on mutual assistance in criminal matters*, 5568/2002, 14 October 2002

customer information orders are concerned, the scope for discretion in the requested State - despite the use of the word 'may' in clauses 32(3), 33(1), 37(3) and 38(1) - is quite limited.

b. *Account monitoring orders*

While customer information orders are aimed at identifying accounts and providing static information about them, account monitoring orders seek details of transactions on an account over a period of time.¹⁰³ An account monitoring order could be sought once an account has been identified through a customer information order, or if the identity of the account is already known, a requesting authority could move straight to a monitoring order. The Protocol allows much greater discretion to requested States on the handling of requests for account monitoring. In the words of the EU's explanatory report, because the measure is new it 'only obliges Member States to set up the mechanism...but leaves to each Member State to decide if and under what conditions the assistance may be given in a specific case'.¹⁰⁴ The UK appears to have decided to allow account monitoring assistance on a wide basis, in part because of the breadth of the UK's existing disclosure laws.

Clauses 35-6 (England, Wales and Northern Ireland) and clauses 40-41 (Scotland) set out the UK's procedures, which are in many respects similar to those for customer information orders. The Secretary of State (or Lord Advocate) directs a senior police or customs officer (or procurator fiscal) to apply to the court for an order. Again, there are conditions which must be met before the judge can grant the order. A different threshold test however applies: account monitoring orders can be granted in respect simply of 'criminal conduct' (and not necessarily conduct by the account holder) whereas the Bill sets a higher test for customer information orders ('serious criminal conduct'). The different wording reflects the language of the Protocol. In the Lords, amendments were tabled at Committee and Report stage to restrict the availability of account monitoring orders to investigations into 'serious criminal conduct'. Lord Filkin justified the distinction on the basis of the lower administrative burden:

Requests for customer information orders under the protocol are limited to investigations into serious criminal conduct, as set out in Clauses 32, 33, 37 and 38. This is in accordance with the terms of the protocol, which only requires member states to assist in limited circumstances on customer information orders, in recognition of the potentially higher volume of work flowing from such requests.

¹⁰³ Article 3 of the 2001 Protocol is the source of the entitlement for account monitoring. Historic account information (already permitted under existing law) is covered by Article 2 - see the evidence provisions of section 7 of this Bill.

¹⁰⁴ *Explanatory report to the Protocol to the 2000 Convention on mutual assistance in criminal matters*, 5568/2002, 14 October 2002, Notes on Article 3

Account monitoring orders are focused on one specific named account and are therefore much less resource-intensive for a financial institution to respond to. Furthermore, they are based on concrete evidence of the existence of an account. They are also arguably less intrusive, as they seek information about an account that has already been identified, whereas customer information orders are designed to identify any account that an individual might hold.¹⁰⁵

At Report stage, Lord Goodhart observed that such distinctions matter little to account holders for whom both orders are ‘highly intrusive’.¹⁰⁶ The Minister was not sympathetic to this argument:

The view that we should not use legitimate, properly tested conditional and proportional powers of the state to try to find out whether criminality is going on because it is argued that it is best to protect the civil liberties of the suspected criminals is deeply unconvincing. We will not use the powers willy-nilly; they will be used although they are burdensome to the requesting states, the officiating states and the courts. It will require effort to use them but we must use them and monitor accounts when there is a suspicion that people have committed offences.¹⁰⁷

An account monitoring order will require financial institutions to provide account information for a specified period. The Protocol permits states to have due regard to their domestic law on search and seizure. According to the Explanatory Notes:

Under the Proceeds of Crime Act, monitoring orders may be made for a period of up to 90 days and the same restriction will apply to Protocol requests. No limit is stated because the arrangements will be made between the relevant authorities on a case by case basis.¹⁰⁸

c. Disclosure offences

Clause 42 creates a ‘tipping-off’ offence. Similar offences exist in the *Proceeds of Crime Act 2002*. The offence can be committed where a financial institution is subject either to a customer information order or an account monitoring order or where a request has been received under clause 13 for assistance in gathering evidence. It applies both to financial institutions and to their employees. They must not disclose that they have received a request to gather customer information, account information or evidence, nor must they disclose that an investigation is being carried out or that information has been passed on to the authorities.

¹⁰⁵ HL Deb 27 January 2003 c135GC

¹⁰⁶ HL Deb 25 February 2003 c215

¹⁰⁷ Lord Filkin, HL Deb 25 February 2003 c216

¹⁰⁸ Bill 78 –EN, 2002-03

If the offence is committed by an institution, it faces an unlimited fine on indictment (£5,000 on summary conviction). Individuals who commit the offence may be fined or imprisoned: on conviction on indictment there is a maximum term of five years' imprisonment or an unlimited fine or both (summary conviction: six months, or a £5,000 fine or both).

4. Outgoing requests

a. Procedures

Under the Protocol, UK prosecuting authorities are able to request information about bank accounts held abroad in participating countries, and to apply for those accounts to be monitored.¹⁰⁹ Because they implement the Protocol, these clauses give UK authorities reciprocal rights to those provided for incoming requests.

Looking at information about a person's bank account first, under clause 43 this information is expressed slightly more widely than 'customer information' (clauses 33,37) in that it also covers past transactions (i.e. evidence which could currently be obtained under the *Criminal Justice (International Co-operation) Act 1990*.¹¹⁰ A request for account information can either be made directly by designated prosecuting authorities or via an application to the judicial authorities. In either case, it must appear to the judicial authorities (or the prosecuting authorities in the case of direct requests) that:

- the person is subject to an investigation in the UK for serious criminal conduct
- the person holds or may hold a bank account in the other country, and
- the information sought is likely to be 'of substantial value for the purposes of the UK investigation'

The request can seek information about whether the person holds an account, details of the account and details of past transactions on the account (over a specified period). The request must also state the grounds for believing that the person holds an account in the country, why the information sought is likely to be of substantial value to the UK investigation, and include other information which will help the requested country to comply.

Requests for overseas authorities to monitor bank accounts (i.e. the Article 3 entitlement) are made under clause 44. Again, these requests may be made either directly by designated prosecuting authorities or via the judicial authorities. Before requesting assistance, it must appear that the information sought is 'relevant' (compare 'likely to be of substantial value' in clause 43 for information about a person's bank account) to an

¹⁰⁹ Clause 43

¹¹⁰ The 2001 Protocol provides that 'all the details' of identified accounts should be provided (Art. 1(1)). Clause 43 appears to cover the entitlements of both Articles 1 (account details) and 2 (past transactions) of the Protocol.

investigation into ‘criminal conduct’ (compare ‘serious criminal conduct’ in clause 43). Again, this lower threshold reflects the wording of Articles 2 and 3 of the Protocol (‘the offence’).

The normal procedure will be for requests to be passed to the Secretary of State (in practice the UK Central Authority for mutual legal assistance, which is based in the Home Office) for onward transmission. While both clauses 43 and 44 allow prosecuting authorities to make requests directly to overseas authorities, clause 45 makes clear that direct requests should be made only in ‘cases of urgency’. As noted above, urgent or direct requests will not be evaluated by the courts although the prosecuting authorities will have to apply the same tests that the court would have.

b. Definitions

Clause 46 provides definitions for Chapter 4. Customer information and account monitoring orders can be directed at ‘financial institutions’. This is defined as ‘persons carrying on business in the regulated sector’, which is itself defined in Schedule 9 of the *Proceeds of Crime Act 2002*. This definition covers investment firms and insurance companies as well as banks, but the intention appears to be that only banks will be covered. The RIA says:

the UK will only be under an obligation to direct the orders at banks, not all financial institutions (although legislation will be sufficiently flexible to [?allow] financial institutions to be included if required...¹¹¹

The Protocol applies to ‘participating’ countries. This definition (in *clause 51*) applies to all of Part 1 of the Bill, not just the Protocol entitlements under Chapter 4. Participating countries are those which are member states of the EU when Part 1 comes into force and other countries designated by the Secretary of State. In the Lords, Lord Filkin noted that in addition to EU countries, Iceland and Norway are thought to be interested in participating in the Protocol, while Switzerland is negotiating to participate in the Schengen area.¹¹² It will be possible for the UK to ‘seek and provide the new types of assistance on a reciprocal basis’ with selected Member States before all Member States have implemented the Protocol.¹¹³

¹¹¹ Home Office, Protocol to the Convention on mutual assistance in criminal matters between the member states of the European Union, *Full Regulatory Impact Assessment*, 2002, p6. The present author has supplied the word in parentheses to repair an apparent omission in the original.

¹¹² HL Deb 27 January 2003 c118GC. If Switzerland did join Schengen, it would have to take a further decision on whether to participate in the Protocol.

¹¹³ HL Deb January 27 2003 cc118-9GC

G. Transfer of prisoners to other jurisdictions: international arrangements

Clauses 48 and 49 would give the Secretary of State fresh powers to issue warrants, transferring prisoners to participating countries to assist in investigating offences. Existing measures provide for the transfer of prisoners to complete their sentences or, temporarily, to assist in criminal investigations and proceedings.

1. Existing arrangements

a. The Council of Europe Convention

The repatriation to the United Kingdom of a British citizen who has been sentenced to a term of imprisonment in another country is possible only where that country is a signatory to the Council of Europe Convention¹¹⁴ or has reached a bilateral agreement with the United Kingdom. Otherwise, the sentence of imprisonment must be served in the jurisdiction in which it has been handed down.

The Council of Europe has described the Convention as “a very valuable instrument for international co-operation in penal matters”, although

unfortunately, in practice, the convention does not operate as smoothly as is desirable. The procedural framework for transfer set out in the convention is unwieldy and lacks clarity. In addition, states often overlook the normative basis for transfer set out in the convention. The result is that either states do not co-operate fully in using the convention or they seek to restrict its application.¹¹⁵

Under the Convention, the conditions for transfer are (among other things) that the prisoner is a national of the administering state; has at least six months of sentence still to serve; has consented to the transfer (or, if necessary and appropriate, a legal representative has consented on the prisoner’s behalf); and the act or omission for which the sentence was imposed would constitute a criminal offence if committed on the administering state’s territory.¹¹⁶

¹¹⁴ Council of Europe Convention on the Transfer of Sentenced Persons

¹¹⁵ *Recommendation 1527 (2001)115: Operation of the Council of Europe Convention on the Transfer of Sentenced Persons – critical analysis and recommendations* – available on the Council of Europe website at <http://assembly.coe.int/Documents/AdoptedText/ta01/EREC1527.htm>

¹¹⁶ Council of Europe Convention on the Transfer of Sentenced Persons available on the CE website at <http://conventions.coe.int/treaty/en/Treaties/Html/112.htm>

Some jurisdictions may sometimes be reluctant to consent to the transfer of prisoners if a reduced sentence or more generous arrangements for early release might lead to a prisoner serving a very much shorter sentence elsewhere. Much will depend on the circumstances of the particular case. As far as the possible reduction of a prisoner's sentence following his or her return to the United Kingdom is concerned, Section 3(3) of the *Repatriation of Prisoners Act 1984* - concerned with warrants providing for the transfer of prisoners into the United Kingdom – empowers the Secretary of State to consider the inappropriateness of warrants which provide for more than the maximum penalty applicable in the United Kingdom for a corresponding offence or which are open-ended.

Thus, even where both countries are signatories to the Council of Europe convention, the transfer of prisoners back to their own country is not automatic. Both countries must be satisfied that the sentence can be enforced in the other jurisdiction: in other words, that the sentence served in the home jurisdiction will be broadly equivalent to that which would have been served in the sentencing jurisdiction. The prisoner too must be satisfied with and agree to the transfer arrangements.

b. Transfers to assist in criminal proceedings: the Criminal Justice (International Co-operation) Act 1990

Other considerations apply – and separate provisions have been made – where the transfer is not to complete a sentence of imprisonment but, rather, to assist in criminal proceedings.

Existing provision for the transfer of United Kingdom prisoners to assist in criminal proceedings overseas is contained within the *Criminal Justice (International Co-operation) Act 1990*. Section 5 of that Act provides that:

5.—(1) The Secretary of State may, if he thinks fit, issue a warrant providing for any person ("a prisoner") serving a sentence in a prison or other institution to which the Prison Act 1952 or the Prisons (Scotland) Act 1989 applies to be transferred to a country or territory outside the United Kingdom for the purpose—

(a) of giving evidence in criminal proceedings there; or

(b) of being identified in, or otherwise by his presence assisting, such proceedings or the investigation of an offence.

[...]

Warrants may only be issued where the prisoner consents or where, if it seems to the Secretary of State that the prisoner cannot act for himself because of his physical or mental condition or youth, by an appropriate person acting on his behalf. Once given, consent cannot be withdrawn.

Section 6 of the Act makes analogous provision for the transfer of overseas prisoners to the United Kingdom. This can be done where a witness order has been made or a witness summons issued or where the Secretary of State considers it desirable that the prisoner be identified in or otherwise assists in criminal investigation or proceedings. Overseas prisoners brought to the United Kingdom under this heading are not subject to the *Immigration Act 1971* unless the warrant ceases to have effect, in which case they would be deemed to be illegal entrants and removed from the United Kingdom accordingly.

2. The Crime (International Cooperation) Bill

The *Crime (International Co-operation) Bill* would give the Secretary of State fresh powers to issue warrants, transferring prisoners to participating countries to assist in investigating offences.

Clause 47 provides that the offence must have been (or might have been) committed in the United Kingdom (**clause 47(1)**) and that the prisoner must be in prison either serving a sentence, awaiting trial or sentence or committed for default in paying a fine (**clause 47(2)**). In the case of transfers from Scotland, the prisoner must be detained in custody (**clause 47(3)**). Written consent must be given by the prisoner (**clause 47(4)**) or - if it seems to the Secretary of State that the prisoner cannot act for him or herself because of his or her mental or physical condition or youth - by a person who appears to the Secretary of State to be an appropriate person to act on his or her behalf (**clause 47(5)**). Consent cannot be revoked (**clause 47(6)**).

Clause 48 likewise makes provision for overseas prisoners to be transferred to the United Kingdom to assist in the investigation of crime here. The prisoner must be serving a sentence or order of a criminal court or have been transferred there from the United Kingdom under the provisions of the *Repatriation of Offenders Act 1984* (**clause 48 (2)**). Again, the overseas prisoner must give consent in writing (**clause 48(4)**), which cannot be withdrawn (**clause 48(5)**). On the issue of a warrant, the overseas prisoner would be brought to the United Kingdom and held in custody at any place specified in the warrant (clause 48(6)). Such entry to the United Kingdom would not be subject to the *Immigration Act 1971* (**clause 48(8)**).

The Explanatory Notes to the Bill draw a distinction between these powers and those contained within the *Criminal Justice (International Co-operation) Act 1990* and argue that these new powers would seldom be used:¹¹⁷

¹¹⁷ Crime (International Co-Operation) Bill [HL] Bill 78 of 2002-03: Explanatory Notes - available at <http://pubs1.tso.parliament.uk/pa/cm200203/cmbills/078/en/03078x-b.htm>

Clause 47: Transfer of UK prisoner to assist investigations abroad

107. This clause provides for prisoners from the UK to be transferred to another participating country to assist with UK investigations, implementing Article 9 of the MLAC.¹¹⁸ This differs from section 5 of the 1990 Act which covers the transfer of UK prisoners to other countries at the request of the authorities of that country to assist their investigations. This new power might be used, for example, where a prisoner assisting an UK investigation could identify a site or participate in an identification parade in another participating country. It is unlikely to be used frequently. The requirement that a prisoner (or an appropriate person acting on his behalf) must give his consent before the transfer takes place (subsections (3) and (4)) is consistent with section 5 of the 1990 Act.

Clause 48: Transfer of EU etc. prisoner to assist UK investigation

108. This clause provides for the transfer of a prisoner from a participating country to the UK in order to assist with that country's investigation. Section 6 of the 1990 Act allows overseas prisoners to be transferred at the UK's request to assist with a domestic investigation. The requirement that a prisoner must give his consent before the transfer takes place (subsections (3) and (4)) is consistent with section 6 of the 1990 Act.

Commenting on these clauses, *Justice* has argued that prisoners who may be invited to agree to transfer abroad should be offered free legal advice, to ensure that they understand the implications of their giving consent, and that the Bill should define who would be an “appropriate person” to act on the prisoner’s behalf:¹¹⁹

13. Transfer of a prisoner could have a significant impact on the exercise of that person’s fundamental rights. Those rights can only be guaranteed if the prisoner is adequately represented and advised on the potential consequences of consent to transfer. This is particularly important given the irrevocable nature of consent.

III Dealing with terrorism

The Bill as brought from the Lords contains two sets of measures specifically targeted at terrorism. Provisions in Part IV applies UK extra-territorial jurisdiction to a wider range of offences, which may be classified as terrorist offences, to meet the requirements of the Framework Decision on combating terrorism. *Schedule 4* would be a partial implementation of the draft Framework Decision on the execution of orders freezing assets or evidence: it implements the asset-freezing provisions, for assets connected with terrorism.

¹¹⁸ 2000 Convention on Mutual Assistance on Criminal Matters

¹¹⁹ Justice Briefing On The Crime (International Co-Operation) Bill November 2002 – available at <http://www.justice.org.uk/images/pdfs/crimeintcoop.pdf>

A. Extra-territorial jurisdiction

The Framework Decision on combating terrorism is the result of a proposal made on 19 September 2001, and was agreed on 13 June 2002. The deadline for transposition was 31 December 2002. The main substantive provisions are:

Article 1

Terrorist offences and fundamental rights and principles

1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

- seriously intimidating a population, or
- unduly compelling a Government or international organisation to perform or abstain from performing any act, or
- seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation, shall be deemed to be terrorist offences:

- (a) attacks upon a person's life which may cause death;
- (b) attacks upon the physical integrity of a person;
- (c) kidnapping or hostage taking;
- (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
- (e) seizure of aircraft, ships or other means of public or goods transport;
- (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
- (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
- (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
- (i) threatening to commit any of the acts listed in (a) to (h).

2. This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

Article 2

Offences relating to a terrorist group

1. For the purposes of this Framework Decision, 'terrorist group' shall mean: a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. 'Structured group' shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

2. Each Member State shall take the necessary measures ensure that the following intentional acts are punishable:

- (a) directing a terrorist group;

(b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact such participation will contribute to the criminal activities of the terrorist group.

Article 3

Offences linked to terrorist activities

Each Member State shall take the necessary measures to ensure that terrorist-linked offences include the following acts:

- (a) aggravated theft with a view to committing one of the listed in Article 1(1);
- (b) extortion with a view to the perpetration of one of the listed in Article 1(1);
- (c) drawing up false administrative documents with a view to committing one of the acts listed in Article 1(1)(a) and Article 2(2)(b).

Article 4

Inciting, aiding or abetting, and attempting

1. Each Member State shall take the necessary measures ensure that inciting or aiding or abetting an offence referred in Article 1(1), Articles 2 or 3 is made punishable.
2. Each Member State shall take the necessary measures ensure that attempting to commit an offence referred to in Article 1(1) and Article 3, with the exception of possession as provided for in Article 1(1)(f) and the offence referred to in Article 1(1)(i), is made punishable.

Article 5

Penalties

1. Each Member State shall take the necessary measures ensure that the offences referred to in Articles 1 to 4 are punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition.
2. Each Member State shall take the necessary measures to ensure that the terrorist offences referred to in Article 1(1) offences referred to in Article 4, inasmuch as they relate to terrorist offences, are punishable by custodial sentences heavier than those imposable under national law for such offences the absence of the special intent required pursuant to Article 1(1), save where the sentences imposable are already the maximum possible sentences under national law.

The Government's view is that the UK's extensive anti-terrorism legislation already broadly meets the requirements of the Framework Decision. The existing legislation is briefly described in the *Explanatory Notes*:

115. The main UK legislation on counter-terrorism is the Terrorism Act 2000. The Terrorism Act defines terrorism as being both a serious criminal act, and one that is designed to influence the government or to intimidate the public and made for the purpose of advancing a political, religious or ideological cause. Under UK law, in general, there are no "terrorist" offences (apart from a few specific offences such as directing terrorism, weapons training, terrorist funding and inciting terrorism). Suspected terrorists are prosecuted under criminal legislation such as murder, conspiracy to cause explosions etc. Criminal offences falling

within the definition of terrorism contained within the Terrorism Act 2000 can be investigated by the police using the powers within the Act. The UK's extensive anti-terrorism legislation already broadly meets the requirements of the Framework Decision, with the exception of the provisions on extra-territorial jurisdiction.

Additionally *Article 9* requires Member States to have extra-territorial jurisdiction in particular cases.

Article 9

Jurisdiction and prosecution

1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 1 to 4 where:

- (a) the offence is committed in whole or in part in its territory.
- (b) the offence is committed on board a vessel flying its flag or an aircraft registered there;
- (c) the offender is one of its nationals or residents;
- (d) the offence is committed for the benefit of a legal person established in its territory;
- (e) the offence is committed against the institutions or people of the Member State in question or against an institution of the European Union or a body set up in accordance with the Treaty establishing the European Community or the Treaty on European Union and based in that Member State.

Extraterritorial jurisdiction in relation to criminal offences is the exception, rather than the rule.

The primary basis of English criminal jurisdiction is territorial, it being the function of the English criminal courts to maintain the Queen's peace within her realm... it followed, therefore, that, statutory exceptions apart, the courts were not concerned with conduct abroad...Accordingly, there is a well established presumption in construing a statute creating an offence that, in the absence of clear words to the contrary, it is not intended to make conduct taking place outside the territorial jurisdiction of the Crown an offence triable in an English court... The presumption against a Parliamentary intention to make acts done by foreigners abroad offences triable by English courts is even stronger.¹²⁰

The UK does, however, have extraterritorial jurisdiction over numerous offences, by no means limited to terrorist offences.

The *Explanatory Notes* comment that the purpose of *Article 9* is to ensure that Member States take responsibility for terrorist activities by their own nationals and residents, no matter where those acts occur, and also to ensure that those who attack UK nationals,

¹²⁰ Archbold, *Criminal Pleading Evidence and Practice*, 2002, para 2-33

residents, UK diplomatic staff and EU institutions can be prosecuted effectively. The notes go on to describe in detail how this is to be achieved, in amendments to the *Terrorism Act 2000*.

Lord Lloyd of Berwick commended the speed of the transposition but was highly critical of the method which had been chosen. In December 1995 the previous Government appointed the Lord Lloyd to carry out a review of the law governing the prevention of terrorism in the UK and to consider whether there would be any need for specific counter-terrorism legislation in the UK in the event of a lasting peace in Northern Ireland. The two-volume report of Lord Lloyd's inquiry was published in October 1996. Lord Lloyd concluded that there would be a continuing need for permanent UK-wide legislation and recommended a number of changes to the existing arrangements. The *Terrorism Act 2000* built on Lord Lloyd's work. For further information about the *Terrorism Bill*, including a discussion of clause 1, which became section 1 of the 2000 Act see Library Research Paper 99/101.¹²¹

At Second Reading of the *Crime (International Cooperation) Bill*, he said:

Finally, I turn to the anti-terrorist provisions in Clauses 53 and 54. These clauses implement Article 9 of the Framework Decision of 13th June of this year so the Government have acted with commendable speed. What is to my mind far less commendable is the way in which these new provisions have been incorporated into existing legislation. The purpose of the new sections is to confer jurisdiction on our courts in the case of terrorist offences committed by or against British subjects overseas. The Framework Decision refers repeatedly to what it calls "terrorist offences". The problem is that the Terrorism Act 2000 contains no definition of "terrorist offences". That can now be seen to be a grave defect. Instead we now have the two long lists of offences set out in new Sections 63B and 63C and lists that are nearly but not quite the same tacked on to a provision about terrorist finance. I do not find that drafting satisfactory.

Chapter 6 of my report sets out the reasons why I thought that it would be desirable to have a definition of "terrorist offences" that could be included in the Terrorism Act. Soon after the Terrorism Bill was published I spent an hour with the then Home Secretary trying to persuade him of my view on that matter but I did not succeed. The Terrorism Act instead specifies comparatively minor matters such as weapons training, fundraising, the wearing of uniforms and so on as terrorist offences. But nowhere does it state that murders such as those that were committed on September 11th or in Bali or in Mombasa are terrorist offences within the meaning of the Act. That seems to me to be very strange indeed. Nowhere is the word "murder" even mentioned in the Terrorism Act. Now it is to be mentioned for the first time. I am glad of that. I confess that I have an almost overwhelming desire to say to the Minister, "I told you so", but I shall try not to do so in too offensive a way.

¹²¹ p 15 et seq

If we are to have murder included among terrorist offences, surely it should not be tucked away, as it is, in new Sections 63A to E. It should be set out in resounding terms at the very outset, probably in new Section 2 immediately following the definitions of terrorist offences in new Section 1. The measure would then no doubt refer to a new schedule which could be brought up to date as new terrorist offences are proposed, as no doubt they will be as the years go by. That format is what I suggested in Chapter 6 and Appendix E of my report.

I beg the Minister to think again about the drafting of the new clauses. That would be quite easy to do and if it were proper to offer to do so, I should be very willing to offer my help. We have already missed a golden opportunity to include in the Anti-terrorism, Crime and Security Act a comprehensive definition of what we mean by "terrorist offences". I hope that we will not miss that opportunity for a second time.¹²²

B. Freezing terrorist assets

The draft Framework Decision on the execution of orders freezing assets or evidence is discussed in Part II of this paper. *Clause 89* of the Bill, with *Schedule 4*, were inserted into the Bill in the Lords Grand Committee, to allow mutual recognition of orders freezing terrorist assets. Introducing the amendments, Lord Filkin said:

The Bill already implements the evidence-freezing provisions of the EU framework decision on the execution of orders freezing property or evidence. Freezing of assets is a difficult area, even more so when it comes to international mutual recognition of freezing orders. But it would be a useful addition to the anti-terrorism tool kit, which is why we have tabled these amendments. I wrote to the noble Baroness, Lady Anelay, and the noble Lord, Lord Dholakia, setting out why we thought that it was important for the Bill to introduce the aspects of the framework decision relating to the freezing of terrorist property, as it forms a key part of the post-11th September EU anti-terrorism roadmap.

The Terrorism Act 2000 already provides for the freezing of terrorist assets in a way that is compatible with the framework decision. Schedule 4 to the 2000 Act provides for restraint orders, which carry out the same function as freezing orders, to secure property, with a view to its later confiscation. These orders specifically apply to property that is supplied for, or is intended to be used for, terrorism, that represents the proceeds of terrorism or that has been used to pay someone for committing a terrorist act. This amendment provides for domestic orders under the Terrorism Act, freezing terrorist property in another member state to be sent to that other member state for enforcement, and for overseas freezing orders made by another member state but relating to terrorist property here to be enforced in relation to that property by our courts.

¹²² HL Deb. 2 Dec 2002 c 997

The amendment makes separate provision for sending orders to another EU state, and for registering and enforcing incoming orders sent from the rest of the EU.

So far as outgoing orders are concerned, new paragraphs 11B and 11C, which will be inserted into Schedule 4 to the 2000 Act, allow a court, when making a restraint order under that schedule, to sign the certificate required by the framework decision, allowing the order to be transmitted overseas for enforcement. These paragraphs do not extend the powers of the court to make such orders—those powers will remain as set out in the Terrorism Act.¹²³

The Court will be able to sign the certificate if any of the terrorist property to which the order relates is situated elsewhere in the EU, and there is a good arguable case that that property is either likely to be used for the purposes of a listed offence, or the proceeds of the commission of such an offence. Once the certificate has been signed, it, together with the order to which it relates, would be sent to the Secretary of State for forwarding to the state where the property in question is believed to be located. The requested state would be required to execute the order on the basis of mutual recognition, under the terms set out in the framework decision.

The Terrorism Act 2000 allows the enforcement of incoming orders to restrain terrorist assets to be dealt with by Order in Council. However, we propose to deal with the main provisions for incoming orders in the Bill to give Parliament the opportunity to consider the use of mutual recognition in more detail. The amendment therefore inserts the appropriate provisions—paragraphs 11D to 11F—into Schedule 4 of the Terrorism Act 2000.

The proposed procedure for executing incoming requests will work similarly to the procedure already set out in Clauses 20 to 25 of the Bill for the execution of evidence-freezing orders, though there are some differences that reflect the distinction between the freezing of assets and that of evidence.¹²⁴

Refinements and additions were made at Report Stage. The amendments were welcomed in principle. There was some debate on the detail and drafting, in particular as to the transposition, into domestic laws, of the word “considers”, in the context of the issuing authorities in Member States forming a view as to whether or not particular property is the proceeds of an offence, or constitutes the instrumentalities or the objects of an offence. This will be relevant both for the issuing of orders by UK courts, and for enforcing orders made in other countries. In response to an amendment moved by Lord Goodhart, Lord Bassam said:

We need to interpret "considers" in the context of the framework decision that is intended to allow freezing orders to be made and transmitted at a relatively early stage of the judicial process. Many EU states, including the UK, freeze assets

¹²³ HL Deb 3 Feb 2003 c GC23

¹²⁴ HL Deb 3 Feb 2003 c GC24

from the start of a terrorist investigation, and the intention is that these orders should be able to be transmitted abroad.

However, at this early stage of the investigation, it is unlikely that the court will ever have sufficient information of value to be able to say absolutely that the assets are likely to be used for an offence. That is why the test for making a freezing order in this country allows an order to be made at the beginning of an investigation or proceedings provided it appears to the court that the frozen property may be forfeited later in the proceedings.

If "considers" is construed as requiring a "likely" test, this could limit the framework decision to freezing assets at what we would see as a late stage of the judicial process at which forfeiture orders are made. That is because this is the only stage at which such a standard of proof is likely to be met—where all the evidence has perhaps been gathered and all the required information is in place. Such a restriction would detract considerably from the effectiveness of the instrument. I am confident that the noble Lord would not want to do that.

The Government believe, in this context, that the requirement that there be a "good arguable case" that the property in question is likely to be used for a listed offence is a legitimate interpretation of the word "considers". It will allow the framework decision to have its intended effect. This amendment would make it much harder to send freezing orders out of the UK to be enforced, and for that reason we must resist it.¹²⁵

But in relation to orders made by other countries, it was for them to interpret "considers" in their own implementing legislation.

Lord Filkin had written to the Joint Committee on Human Rights explaining what was proposed, before the amendments were introduced. The Committee accepted that the amendments were compatible with Convention rights.

26. The amendments engage the right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the ECHR (hereafter 'P1/1'), and the right to respect for private life under ECHR Article 8. The Minister in his letter explains that the purpose of the amendments is to limit the capacity of terrorist organisations, and that it has proved to be an effective weapon in destabilising terrorist organisations and preventing groups from profiting from terrorist activity. The courts would not be required to give effect to a freezing order made in another Member State if doing so would be incompatible with a Convention right. For these reasons, the Minister believes that the amendments would be compatible with Convention rights.

27. We accept this. It seems to us that the courts, as public authorities under section 6 of the Human Rights Act 1998, would act unlawfully if they were to

¹²⁵ HL Deb 3 March 2003 c .678

give effect to an order in circumstances that would result in an incompatibility with a Convention right. The reasons supporting the proposed Government amendments seem to us to be sufficient to justify the interference with Convention rights and the safeguards seem sufficient to make a violation unlikely. We welcome the Government's decision to introduce the new powers through primary legislation, rather than by exercising the powers (provided by the Terrorism Act 2000 and the Anti-terrorism, Crime and Security Act 2001) to give effect to the Framework Decision by way of Order in Council.

IV Road traffic

A. Background

The EU Driving Disqualification Convention was adopted and signed by all EU member states in June 1998, during the UK's Presidency of the EU.¹²⁶ The objective of the Convention is “that drivers who are disqualified from driving in a Member State other than that in which they normally reside should not escape the effects of their disqualification when they leave the State of the offence” (Article 2). The Convention therefore aims to plug a loophole whereby a driver who is disqualified in his country of residence is effectively disqualified from driving anywhere (since his licence has been removed) whereas a person disqualified abroad can continue driving in his home country and elsewhere. The Convention will only take full effect 90 days after every member state has completed their national ratification measures, by introducing it into domestic legislation. So far only Spain has ratified the Convention.¹²⁷

The UK has not ratified the Convention because mutual recognition of driving disqualifications across the EU presupposes that there is mutual recognition of driving disqualifications within the UK. At present drivers disqualified in Great Britain can legally drive in Northern Ireland and vice versa. Mutual recognition of driving disqualification within the UK is also provided for in this Bill.

B. Chapter 1: Convention on Driving Disqualifications

Chapter 1 of the Bill provides for the UK to ratify the EU Convention. The provisions of the Convention are summarised below:

- **Article 1** defines the terms “driving disqualification”, “State of the offence”, “State of residence” and “motor vehicle.”

¹²⁶ Convention drawn up on the basis of Article K.3 of the Treaty on European Union on Driving Disqualifications, OJC 216, 10.7.1998 pp 002 - 0012

¹²⁷ HL Deb 29 January 2003 c 177GC

- **Article 2** provides that EU Member States shall cooperate so that drivers disqualified in a Member State other than the one they normally reside in shall not escape the effects of their disqualification on leaving the State of the offence.
- **Article 3** requires the State of the offence to promptly notify the State of residence of a disqualification arising from conduct listed in the Annex. It also allows Member States to agree not to notify disqualifications which are excluded on the grounds of dual criminality.
- **Article 4** sets out the different methods which the State of residence can use to give effect to a disqualification (direct execution, execution via a judicial or administrative decision, or the conversion method). In all cases, the State of residence must not extend the duration of disqualification imposed by the State of the offence. When using the second or third method, the State of residence is also allowed to reduce the period of disqualification.
- **Article 5** provides that giving effect to a driving disqualification shall be without prejudice to any additional road safety measures that the State of residence may take under its own legislation.
- **Article 6** sets out the circumstances in which the State of residence must refuse to enforce a disqualification (Article 6(1)) – for example when the offender has already been disqualified for the same offence. It also sets out the circumstances in which it may refuse to enforce a disqualification (Article 6(2)) – for example when the condition of dual criminality is not satisfied (Article 6(2)(a)).
- **Article 7** provides for EU Member States to designate authorities for sending and receiving notifications.
- **Article 8** stipulates the information to be provided as part of notification and provides for the State of residence to request the State of the offence to supply further information as necessary.
- **Article 9** sets out the provisions on translation of documents.
- **Article 10** provides for the State of residence to inform the State of the offence of any decision it takes in respect of a notification, including giving reasons where it refuses to give effect to a disqualification.
- **Article 11** provides that the total period of disqualification imposed shall not exceed that originally determined by the State of the offence. It also provides that the right of the State of the offence to execute the full period of the driving disqualification in its territory shall not be affected by the decision of the State of residence.
- **Article 12** provides for Member States to penalise those who drive in their territory when disqualified as a result of this Convention.
- **Article 13** stipulates that costs of implementing the Convention must be borne in the Member State in which they occur.
- **Article 14** sets out provisions on the European Court of Justice's jurisdiction. The Court has jurisdiction to rule on disputes between Member States or the Commission (Article 14(1)). It also has jurisdiction to give preliminary rulings on the interpretation of the Convention when so requested by courts in a Member State which accepts this type of jurisdiction (Article 14(2)).
- **Article 15** provides that the Convention shall enter into force when it has been ratified by all of the Member States (Article 15(3)). Member States may however bring the Convention into force on a bilateral basis with any other Member State which has ratified the Convention (Article 15(4)).
- **Articles 16 and 17** are standard final provisions in Conventions adopted by the EU.

· **Article 18** provides that as regards the UK, the Convention shall apply only to the United Kingdom of Great Britain and Northern Ireland.

The Convention covers driving disqualifications arising from the following conduct listed in the Annex to the Convention :

ANNEX

CONDUCT COVERED BY ARTICLE 3 OF THE CONVENTION

1. Reckless or dangerous driving (whether or not resulting in death, injury or serious risk).
2. Wilful failure to carry out the obligations placed on drivers after being involved in road accidents (hit-and-run driving).
3. Driving a vehicle while under the influence of alcohol or other substances affecting or diminishing the mental and physical abilities of a driver.
4. Refusal to submit to alcohol and drug tests.
5. Driving a vehicle faster than the permitted speed.
6. Driving a vehicle whilst disqualified.
7. Other conduct constituting an offence for which a driving disqualification has been imposed by the State of the offence:
 - of a duration of six months or more,
 - of a duration of less than six months where that has been agreed bilaterally between the Member States concerned.

1. Consultation

In September 2001 the Home Office consulted on proposals to ratify the Convention.¹²⁸ It pointed out that the key questions in ratifying the Convention were the choice of enforcement method (Article 4), dual criminality (Article 6(2)(a)), calculation of the period of disqualification to be enforced (Article 11(3)) and notification of decisions (Article 3).

a. Enforcement

The government favoured the enforcement method in Article 4(1)(a) “directly executing the State of offence’s decision imposing disqualification from driving, while taking into account any part of the period of disqualification from driving imposed by the State of the offence which has already been served in the latter.” This means that the State of residence recognises the decision taken in the State of the offence and is able to give effect to it with the minimum of formality and without the need for the decision to be endorsed or confirmed in any way in the State of residence. The Convention applies only to final decisions, i.e. those which are no longer subject to an appeal. Drivers have the opportunity to appeal against the decision in the State of the offence.

¹²⁸ Home Office, *Ratification of the EU Driving Disqualification Convention: Consultation Document*, September 2001

b. Dual criminality

Article 6(2)(a) allows the State of residence to refuse to enforce a disqualification when the conduct for which it was imposed does not constitute an offence under its law. This is a discretionary provision which the government proposes not to apply, in line with the general development of wider mutual recognition of decisions in civil and criminal matters. The government takes the view that a person driving in other member states has a responsibility to abide by road traffic rules in that member state. For example, the government considers that it would be right to enforce disqualifications imposed for driving with a blood alcohol level in excess of the permitted level in that member state but below the maximum permitted in the United Kingdom.

c. Calculating the period to be enforced

Article 11(3) of the Convention provides that the total duration of the driving disqualification imposed by the State of offence must not be artificially extended by virtue of the way in which a decision is executed. In particular time already served must be taken into account. There may be instances where a disqualification has been imposed in another member state and partially enforced. In this case the UK authorities will calculate and enforce the remaining balance on the basis of information provided by the State of the offence. Examples of how to calculate a disqualification period were given in Annex C of the consultation paper.

d. Notification

There is no obligation to notify member states other than the state of residence of a disqualification (see Article 3). Nonetheless, the government considered that it may be appropriate to notify on a wider basis. For example, in certain cases, the offender might hold a driving licence issued by an EU member state other than the State of residence and State of the offence. The government proposed to notify other EU Member States on the following basis:

Where the UK is the State of the offence: (Article 3)

- The UK will notify the State of residence, plus the State which issued the driving licence, if this is different from the State of residence.

Where the UK is the State of residence: (Article 10)

- The UK will notify the State of offence, plus the State which issued the driving licence if this is different from the State of the offence.

e. Central Authority

The Central Authority in the UK for the purposes of the implementation of the Convention is to be the Driver and Vehicle Licensing Agency (DVLA). DVLA has also agreed to act as a clearing house for Driver and Vehicle Licensing, Northern Ireland. DVLA will also require UK residents applying for driving licences to disclose whether they have been disqualified from driving by another EU member state. Such a disqualification, if current, will prevent a licence of any kind being issued.

f. Bilateral or unilateral implementation

Article 15(4) allows member states who have ratified the Convention to implement it bilaterally. The government revealed in the consultation paper that it was considering the possibility of making use of this provision in order to begin operating the Convention as soon as possible. The government was also considered whether to the legislation to implement the Convention should allow the UK to enforce disqualification orders imposed on a UK resident by another member state, even when that state had not ratified the Convention.

2. The Bill

Clause 54 of the Bill prescribes when the duty in **Clause 55** to notify a central authority of an EU member state about a disqualification will apply. Clause 54 (4) states that clause 55 does not apply in “prescribed circumstances”. What might constitute prescribed circumstances was queried during Grand Committee in the House of Lords. The Minister explained that the Bill provides for regulations to be made as regards other prescribed circumstances. Such circumstances might include the conduct for which driving disqualification had been imposed and the remaining period of disqualification that might have to be enforced.¹²⁹ In discussion about regulations under the Bill, the Minister said that regulations would also be made on a bilateral basis with other member states to ratify the convention. Negotiations with Spain would begin to decide the terms of regulations shortly after the Bill came into force.

Clause 54(1) states that section 55 shall not apply when there is an appeal outstanding in relation to the offence. This is further defined in **Clause 54(5)**. Some peers felt that the latter clause merely repeated the provisions in clause 54(1) but the Minister insisted it was necessary to set out that strict time limits apply.

Schedule 3 to the Bill lists the road traffic offences which would require notification of disqualification.

Clause 55 of the Bill imposes a duty to notify a central authority of an EU member state when a disqualification has been imposed in the UK on a resident of another member state. It sets out what such a notice must contain, including whether or not the offender took part in the proceedings in which the disqualification was imposed. If the offender did not take part in such proceedings evidence that the offender was notified must be produced (Clause 55(5)). Some probing amendments to clause 55 (then clause 56) were

¹²⁹ HL Deb 29 January 2003 c 177GC

introduced in Grand Committee.¹³⁰ Some peers were concerned about the nature of this evidence; how would they be sure that the offender had received such notification.¹³¹

Lord Carlisle of Bucklow: I support what the noble Lord, Lord Renton, and my noble friend Lady Anelay have said. Presumably, Clause 56 deals with offences, including careless driving, set out in Schedule 3.

If a Frenchman were stopped in this country by the police and charged with careless driving, one could state whether or not the offender took part in the proceedings during which the disqualification was imposed. But how could one confirm that an offender who was moving around the country had been duly notified? Out of genuine ignorance I seek clarification. Normally, service of the notice would be effected by registered post and would be deemed to have occurred on its acceptance. Could one state with certainty that an offender travelling about the country on holiday had been duly notified of the proceedings?

Lord Clinton-Davis: Uncharacteristically, the noble Lord has misinformed himself. As I understand it, the authorities must only give notice by registered post where it is prescribed. Notice can be effected by other means. If the authorities cannot find someone who is travelling about the country—by caravan, for example—the service of notice is effected by registered post or whatever means the statute confers. It is not important that the individual should always be found.

The Minister, in his response, explained why the amendments proposed would take the requirements for what is to be included in the notification sent to a driver's State of residence beyond what is required by the Convention.¹³²

Lord Bassam of Brighton: Committee Members have asked several questions. In setting out the thinking behind Clause 56, I hope that I can answer them.

In general, the amendments would place additional evidential requirements on the notification and recognition of driving disqualifications between the United Kingdom and member states. They would also restrict the information that the UK could provide to a foreign authority or a disqualified driver resident in the UK.

As is plain, our starting point for this part of the Bill is the EU Convention on Driving Disqualifications and what it says should be required to recognise a foreign disqualification. The convention requires us to notify a driver's state of residence of a disqualification covered by the convention. The notification and

¹³⁰ References to clause 56 in the text of the debate refer to clause 55 of the Bill as brought to the Commons.

¹³¹ HL Deb 29 January 2003 c 182GC

¹³² HL Deb 29 January 2003 cc 182-184GC

driver's licence must be accompanied by information to locate the driver; the original or certified copy of the order of disqualification; a brief statement of the circumstances of the offence and the legal provisions that gave rise to the disqualification; details of the disqualification; and a statement that no appeal is outstanding.

If the offender did not take part in the proceedings that resulted in disqualification, the convention requires that the notification should also include evidence that the offender was duly notified of the proceedings. That is the information that the convention has determined will normally be sufficient to allow the driver's state of residence to satisfy itself that the offender had an adequate opportunity to defend himself, and to allow it to give effect to the disqualification. If it is not satisfied that the offender had an adequate opportunity to defend himself, it may ask for additional information, and, ultimately, it could refuse to recognise the disqualification. Those are comprehensive and very equitable arrangements to allow the recognition of a driving disqualification in another member state.

Amendment No. 139ZA would require a notice of disqualification given to another member state to include a statement to the effect that there is,

"written evidence that the offender has had adequate opportunity to defend himself and to gain access to legal advice".

At first glance, the amendment is perfectly sensible and reasonable. But it would take the requirements for what is to be included in the notification sent to a driver's state of residence beyond the factual information required by the convention. It would also introduce a test concerning access to legal advice, which is not covered by the convention.

The convention rightly leaves it to the driver's state of residence to form a view on whether someone has had an adequate opportunity to defend himself, based on the factual information provided by the state of the offence. The Bill provides for the information to include either confirmation that the offender took part in the proceedings resulting in disqualification or, if he did not participate, evidence of notification and that he had the opportunity to participate. Amendment No. 139ZA would require the UK to make a statement that written evidence exists of the adequacy of the driver's opportunity to defend himself and to gain access to legal advice. That statement would involve a subjective assessment of the fairness of the court proceedings. Without the evidence itself being transmitted, it would add nothing of value to the procedure.

Likewise, Amendment No. 139ZD, which deals with the recognition of foreign disqualifications in the UK, goes beyond what is required for the purposes of the convention to confirm that an offender has had an adequate opportunity to defend himself. It would make it a condition of recognition of a foreign disqualification in the UK that there is written evidence that the offender has had adequate opportunity to defend himself and to gain access to legal advice. The Bill already makes the recognition of a foreign disqualification conditional on the offender's having been duly notified of, and entitled to take part in, the proceedings. This is

a less subjective test than that envisaged by the amendment. It also reflects, in line with the general application of the principle of mutual recognition of criminal decisions in the EU, that all member states are signatories of the European Convention on Human Rights, which guarantees the right to a fair hearing.

Amendment No. 139ZB would restrict the content of a notice of a disqualification given to another member state to only those details specified in Clause 56(2) and no other information. That would impede the effective operation of the notification procedures by preventing the UK from including additional information that would assist the driver's state of residence in executing the disqualification. It might include information relating to the court proceedings, or to the period of the disqualification already served in the UK, which the driver's state of residence must take into account. Member states may also have particular information requirements in order to give effect to a disqualification. Those will become apparent only during our concluding agreements for the bilateral implementation of the convention. Amendment No. 139ZB would prevent us from doing that.

Amendment No. 139ZC, which requires that evidence should be "written", is unnecessary and potentially restrictive, particularly at a time when steps are being taken to introduce electronic transmission. Although the notification sent to the driver's state of residence is likely to rely on written evidence to show that he was duly notified of the proceedings against him, the convention requirement is only for "evidence". To go beyond that could create problems with other states.

Amendment No. 139ZF concerns the notice given to a driver resident in the United Kingdom that a foreign disqualification is to be recognised here. It would restrict the content of that notice to only those details specified in Clause 59(1). It would be unduly restrictive, preventing the appropriate Minister from including additional information, as he considers appropriate, in a notice of disqualification sent to a UK resident disqualified abroad. That would not be terribly helpful in those circumstances. Information would be included in the notice only where it was relevant to the offender in respect of the disqualification imposed on him. The offender may, for example, be required to surrender his licence where it has not been seized by the state in which the offence was committed. Information on how to reapply for a licence might also be usefully included. It is helpful to ensure that that takes place.

Clause 56 sets out when clause 57, a driving disqualification imposed in another member state on a person normally resident in the United Kingdom (UK), will be enforced in the UK. Clauses 57 and 58 provide for the recognition in the UK of foreign driving disqualifications.

Clauses 59 to 62 enable a person disqualified under clause 58 to appeal on limited grounds to a local magistrates court in England and Wales, the sheriff court in Scotland or a court of summary jurisdiction in Northern Ireland. The appeal is only concerned with the imposition of the disqualification under clause 57 and has no bearing on the conviction and disqualification in the State of the offence. The Minister explained in the House of Lords that these clauses allowed a driver to appeal on any of the criteria for

recognising a foreign disqualification set out in clause 56.¹³³ An appeal could be brought for example where the offender considered that he had not been properly notified of the proceedings. An appeal could also be brought on the grounds that an appeal was outstanding in the State of the offence.

Clauses 63 to 65 require a licence holder, disqualified under clause 57, to deliver his licence and counterpart to the appropriate Minister with 21 days of the notice being given. An offence is created where a person does not comply with this requirement. The clauses relate to holders of Great Britain, Northern Ireland and European Community licences respectively.

Clauses 66 and 67 provide for the rule for determining the end of the period of disqualification and **clauses 68 and 69** provide for the endorsement of a licence under clause 58 and require that an endorsement remains on the licence for four years. Clauses 66 and 68 relate to holders of Great Britain licences and clauses 67 and 69 related to holders of Northern Ireland licences.

Under **clause 70** the appropriate Minister must inform the competent authority of the State where the offence took place of the details of the disqualification that has been imposed in Great Britain. If he has not imposed a disqualification he must give his reasons to the competent authority of the other EU state.

Clauses 60 to 70 were agreed to without debate in the House of Lords.¹³⁴

3. Regulatory impact assessment

A partial regulatory impact assessment was attached to the consultation document. This stated that figures available from 7 of the 14 other EU member states showed that the average number of Great Britain licence holders disqualified per year was 85. It was assumed that the real total of GB licence holders disqualified in all other member states would be at least 170 each year. In 1997, 165 drivers using licences from other EU member states were disqualified by courts in Great Britain. It is assumed that were mechanisms in place to allow disqualifications to be honoured in the State of residence, the number of disqualifications would be higher.

It was expected that ratification of the convention would have minimal impact on industry, charities or voluntary organizations. It was recognized that the impact on the workforce of the disqualification of a single driver would be proportionately larger on a small haulage firm than on a large haulage firm.

¹³³ HL Deb 29 January 2003 c 190GC

¹³⁴ Ibid

4. Financial effects

The main effect of ratifying the Convention on driving disqualification would be on the Department for Transport's Driver and Vehicle Licensing Agency.¹³⁵ The estimated one-off cost, mainly for ensuring IT systems are compatible with the new requirements, is estimated to be £50K. The on-going cost to DVLA of full implementation of the Convention is estimated to be £66,000 per annum. These costs would be met from existing resources. There would be an additional cost to the courts arising from the appeals procedure provided for in clause 59 but this was thought to be negligible in the context of the courts existing workload.

C. Chapter 2: Mutual recognition within the United Kingdom

There is mutual recognition of driving licences between Great Britain and Northern Ireland: it is legal for Great Britain licence holders to drive in Northern Ireland, and vice versa. However, there is no statutory provision to enable a driving disqualification or penalty points endorsement incurred in one jurisdiction to be recognised in the other. This anomaly was highlighted when a penalty points scheme, similar to that operating in Great Britain was introduced in Northern Ireland in October 1997. Furthermore a Great Britain licence holder who commits an endorsable offence in Northern Ireland cannot make use of the fixed penalty procedure in Northern Ireland (and vice versa). Such cases must be prosecuted via the courts.

Chapter 2 of the Bill, together with its consequential amendments, removes these driver licensing anomalies between Great Britain and Northern Ireland so as to enable the United Kingdom to ratify the EU Convention. It will amend Northern Ireland and Great Britain road traffic law to ensure that driving disqualifications and penalties imposed in either jurisdiction are recognized in both. It will also simplify the treatment of motoring offences committed in Great Britain by Northern Ireland licence holders by removing the obligation to deal with their offences through the courts rather than by fixed penalties.

1. Consultation

The Department for Transport issued a consultation paper in February 2001 on the proposal that Great Britain and Northern Ireland should each make legal provisions to remove the key anomalies as they effect each jurisdiction, and also make appropriate provision (for example an enabling power to permit secondary legislation) whereby Great Britain and Northern Ireland could recognize disqualifications incurred in the Isle of Man, the Channel Islands and Gibraltar.¹³⁶ The following minimum provision was proposed:

The minimum worthwhile provision

¹³⁵ Explanatory Notes to the Bill, HL Bill 5-EN, paras 207-208

¹³⁶ Department for Transport, *Mutual Recognition of Driving Disqualifications and Endorsements: Great Britain and Northern Ireland*, February 2001

<http://www.roads.dft.gov.uk/consult/disqual/index.htm>

12. Any person disqualified from driving in Northern Ireland would also be disqualified from driving in Great Britain, whatever the provenance of his or her licence, including if the offence was committed whilst driving without a licence.

- This would be true for any road traffic offence carrying in Northern Ireland law the penalty of outright disqualification, whether automatic or discretionary.
- It would also be true of any disqualification imposed in Northern Ireland and resulting from penalty point totting for road traffic offences penalised in Northern Ireland.
- The duration of the disqualification would be that imposed by the Northern Ireland jurisdiction.
- Offences concerned with wider social or criminal policy for which disqualification from driving can be a penalty should be excluded.

13. At the same time, steps would be taken to make it even more difficult than at present for an individual to avoid disqualification or to delay the effects of penalty point totting by simultaneously holding a Great Britain and a Northern Ireland driving licence. And the arrangements in Great Britain for recognising Northern Ireland provisional licences would be tidied up to ensure parity between the two jurisdictions.

14. A provision would be made to permit the revocation in Great Britain of a Northern Ireland driving licence. A revocation may for example be on medical grounds or as a result of the accumulation of six or more penalty points in respect of the Road Traffic (New Drivers) Act 1995.

15. Provision would be needed to oblige the Great Britain authorities to notify those of Northern Ireland whenever a Northern Ireland licence-holder was disqualified in Great Britain.

The following further measures were envisaged for introduction as soon as practicable:

Further measures for introduction as soon as practicable

17. Action in respect of three further aspects of Great Britain/Northern Ireland mutual recognition will be progressed as quickly as possible, but may prove more appropriate for a later legislative opportunity. The three aspects are:

- penalty points for motoring offences;
- the removal of the anomaly whereby the holder of a Northern Ireland driving licence, if he commits a fixed penalty offence in Great Britain, has to be dealt with in the courts rather than by an endorsable fixed penalty; and
- an enabling provision so as to permit the introduction by secondary legislation of provisions for Great Britain to recognise in due course as appropriate driving disqualifications incurred in the Isle of Man, the Channel Islands and Gibraltar. Lack of such recognition has for several years been a matter of real concern to some of the island authorities.

In Great Britain some 54 organisations were formally consulted, representing motorists, business, voluntary, charitable, police and legal interests. The balance of responses received agreed that offences connected with wider social and criminal policy, including

Child Support Agency disqualifications (see para 12 above), should be excluded and any measures limited to road safety and motoring offences only.¹³⁷ Almost all the 21 responses received in Great Britain were fully supportive of the proposals. A similar approach was taken in Northern Ireland with similar results from a widespread consultation across the whole community. The consultation paper was published before the suspension of the Northern Ireland Assembly and envisaged reciprocal measures being introduced by the Assembly:

16. The Great Britain provisions would come into effect only if reciprocal measures were enacted by the Northern Ireland Assembly and when these reciprocal provisions took effect.....

Northern Ireland

18. It is proposed to introduce legislation in Northern Ireland by an Assembly Bill making reciprocal provisions in Northern Ireland in respect of driving penalties incurred by Northern Ireland licence holders in Great Britain. These reciprocal provisions would come into force at the same time as those made in Great Britain, and they would be identical so far as possible given the detailed provisions of existing Northern Ireland law.

19. It is proposed also that the Northern Ireland Assembly Bill would seek to address a number of differences between Northern Ireland and Great Britain road traffic offences. In particular it is proposed to provide for the offence of contravening a temporary speed restriction imposed under Part III of the Road Traffic Regulation (NI) Order 1997 to attract discretionary disqualification, obligatory endorsement and penalty points in addition to the existing monetary penalty. Such amendment would bring the law in Northern Ireland into line with Great Britain and would help maximise the benefits of mutual recognition in relation to speeding offences. It would also bring the penalty for contravening such a temporary speed restriction into line with the general speeding offence provision contained in Part VI of the 1997 Order.¹³⁸

However the Northern Ireland Office took on the work of the Executive following the suspension of devolution. Assembly Bills which were either passing through the Assembly or were due to be introduced will instead be introduced into Parliament as Orders in Council. Following approval by the Departmental Minister and Secretary of State, the draft Order and accompanying Explanatory Memorandum are laid at Westminster. The draft Order is then considered by Standing Committee and approved by the House of Commons and approved by the House of Lords. The Queen then makes the Order at a meeting of the Privy Council.

¹³⁷ Department for Transport, *Regulatory Impact Assessment, Mutual Recognition of Driving Disqualifications and Penalties: Great Britain and Northern Ireland*, November 2002

¹³⁸ SI 1997 No 276 (N.I.2)

2. The Bill

The necessary measures for mutual recognition of driving disqualifications are to be made by Northern Ireland Orders in Council. A government amendment to the *Northern Ireland Act 2000* was introduced in Grand Committee to enable the necessary legislation to be introduced in Northern Ireland by Order in Council.¹³⁹

Lord Bassam of Brighton moved Amendment No. 162:

Before Clause 91, insert the following new clause—

"NORTHERN IRELAND

An Order in Council under paragraph 1(1) of the Schedule to the Northern Ireland Act 2000 (c. 1) (legislation for Northern Ireland during suspension of devolved government) which contains a statement that it is made only for purposes corresponding to those of Chapter 2 of Part 3 of this Act—

(a) is not to be subject to paragraph 2 of that Schedule (affirmative resolution of both Houses of Parliament), but

(b) is to be subject to annulment in pursuance of a resolution of either House of Parliament."

The noble Lord said: This is a procedural amendment to enable Northern Ireland to replicate the provisions in Part 3, Chapter 2 of the Bill—that is, mutual recognition of driving disqualification within the UK—by way of Order in Council subject to the negative resolution procedure. The clause is necessary due to the current suspension of the Northern Ireland Assembly.

The provisions of Part 3, Chapter 2, mutual recognition of driving offences or disqualifications between Great Britain and Northern Ireland, cannot come into force until reciprocal measures are in place in Northern Ireland. The new clause will expedite Northern Ireland legislation and allow the earliest introduction of the Great Britain/Northern Ireland mutual recognition measures. We think it important that the existing anomaly whereby a disqualification imposed in Northern Ireland is not recognised in Great Britain is closed as quickly as possible. I beg to move.

Clause 76 of the Bill amends the *Road Traffic Act 1988* (RTA) to provide for the recognition in Great Britain of driving disqualification imposed in Northern Ireland, the Isle of Man, the Channel Islands and Gibraltar. Reciprocal legislation will be needed in these territories for mutual recognition. The Isle of Man has already introduced such legislation, and an Order in Council will be introduced to allow recognition in Northern Ireland of disqualification imposed in Great Britain as outlined above. The government will encourage the Channel Islands and Gibraltar jurisdictions to introduce reciprocal legislation.¹⁴⁰

¹³⁹ HL Deb 3 March 2003 c 33GC

¹⁴⁰ HL Deb 16 December 2002 c 83WA

Clause 77 provides that the holder of Northern Ireland driving licence committing a road traffic offence in Great Britain will be able to opt for the fixed penalty system for road traffic offences, in the same way as the holder of a GB licence. **Clause 77(1)** inserts a new section into the RTA 1988 enabling the secretary of state to issue a driving licence counterpart to a Northern Ireland driving licence holder so as to enable endorsement by authorities in Great Britain. It enables the secretary of state to endorse the counterpart of the licence of a Northern Ireland licence holder with penalty points incurred in Great Britain and obliges him to return it to the holder. Section 109A(5) empowers the Secretary of State to require surrender of the counterpart or delivery of the licence to him, and to serve notice in writing that such delivery must be made and information provided within 28 days. It makes it an offence to drive a motor vehicle on a road whilst unreasonably failing to surrender the counterpart for endorsement or for correction of particulars of the holder's name or address.

Clause 77(2) inserts new sections 91ZA and 91ZB into the *Road Traffic Offenders Act 1988* (RTOA) setting out the application of that Act to Northern Ireland licence holders. The provisions of RTOA 1988 to be applied to Northern Ireland licence holders are those which apply to them the fixed penalty system for traffic offences committed in Great Britain. The court procedures followed when penalty points are endorsed on a driving licence are extended to Northern Ireland licences. In particular, this includes various aspects of procedure when a driver is both disqualified and gains penalty points at the same time.

Clause 78(2) prevents a Northern Ireland licence holder who obtains a GB licence from continuing to be able to drive in Great Britain by virtue of the Northern Ireland (NI) licence. It provides that, on surrender of the NI licence when a GB licence is granted, the authorisation to drive a vehicle in Great Britain by virtue of the NI licence ceases, and that the Secretary of State must send the NI licence and its counterpart back to the Northern Ireland authorities.

Clause 78(3) is in respect of reciprocal provisions intended in Northern Ireland law. It requires the Secretary of State, where he is satisfied that a Northern Ireland driving licence has been granted to the holder of a Great Britain driving licence and he has received the GB licence, to serve written notice on the person concerned that the GB licence is revoked.

Clause 78(4) provides, in order to prevent duplication of licences, that a person holding a NI licence to drive a particular class or classes of vehicle is disqualified from holding or obtaining a GB licence to drive a motor vehicle of that class or classes, if he does not surrender the NI licence to the Secretary of State and remains authorised to drive in Great Britain as a holder of that licence.

Clause 79 amends the provisions of the RTA 1988 relating to disability and prospective disability of a licence holder. **Clause 79(2)** inserts a new Section 109B into the RTA 1988, which provides for revocation by the Secretary of state of the authorisation to drive

in Great Britain conferred by a NI driving licence, on grounds of disability or prospective disability. Currently the Secretary of State has a power to revoke a driving licence issued in Great Britain as set out in section 93 of RTA 1988. The new provisions parallel those which already exist for revocation of a Great Britain driving licence on medical grounds, except that the revocation extends only to the right to drive in Great Britain conferred by virtue of section 109(1) RTA 1988. The secretary of state may require the NI licence holder to deliver up his licence and the relevant counterparts, so that it may be returned to the Northern Ireland authorities.

Clause 79(2) also inserts a new section 109C into the RTA 1988. This amendment places the holders of NI licences, if resident in Great Britain, under the same duty as GB licence holders to provide information relating to disabilities.

Clause 79(3) makes provision for GB licences, where the right to drive in Northern Ireland has been revoked on medical grounds there under a corresponding provision of Northern Ireland law. In this event the secretary of state may revoke the licence. In either circumstance, the secretary of state may on application grant a new licence for a period which he determines. (For example in the case of an individual suffering from a degenerative disease likely progressively to impair his or her ability to drive, a short-period licence might be granted).

Paragraph 22 of schedule 5 of the Bill amends section 109 of RTA 1988 relating to NI provisional licences. Paragraph 22(a) provides that the holder of a NI provisional driving licence will no longer be treated in Great Britain as the holder of a full NI licence. A person's authorisation to drive in Great Britain as the holder of a Northern Ireland licence extends only to driving in accordance with that licence.

Paragraphs 38 to 53 of schedule 5, which amend the *Road Traffic (New Drivers) Act 1995*, provide for the early termination in Great Britain of the probationary period for the holder of a Northern Ireland driving licence in similar circumstances to those applying to the holder of a Great Britain driving licence, except that, as regards revocation, it is not the licence which is revoked, but the permission to drive in Great Britain conferred by section 109(1) of RTA 1988. As for revocations on medical grounds, the secretary of state is obliged to inform the Northern Ireland Authorities of any such revocation involving a NI licence. The amendments also provide that a NI licence-holder, whose entitlement has been revoked under a corresponding provision of Northern Ireland law, shall be subject to the requirement to satisfy the secretary of state on a re-test.

Clauses 76 to 79, then clauses 77 to 80, were agreed to without debate in the House of Lords.¹⁴¹

¹⁴¹ HL Deb 29 January 2003 c 190GC

3. Regulatory impact assessment

In a monitoring exercise in 1999 136 Great Britain drivers were disqualified in Northern Ireland.¹⁴² There was general consensus that this could be higher as there might be a lack of understanding in some courts of the need to notify the conviction to the licensing authority. The Department for Transport estimated therefore that some 150 individuals might be affected each year.

¹⁴² Department for Transport, *Regulatory Impact Assessment: Mutual Recognition of Driving Disqualifications and Penalties: Great Britain and Northern Ireland*, November 2002