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Response to Commission's December 2005 Green Paper COM (2005) 696 final on:

Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings

Introduction

1. The Bar Council of England and Wales ("the Bar Council") takes this opportunity to compliment the Commission on the quality of its green paper and working document. Both documents lucidly set out most of the issues that warrant examination, and we are grateful to the Commission for compendiously summarising many of the relevant judicial decisions and provisions in international and EU instruments that relate to *ne bis in idem*.

2. Before answering the 24 questions posed by the Commission we make a number of observations that underpin our response. We also note that the Green Paper has been placed before the *House*

of Commons Select Committee on European Scrutiny but it has yet to consider the detail of it.[1]

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1 http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34xx/34xx16.htm. Report 1st March 2006.

2 Working document, page11/12.

3 This includes continued efforts to ensure that legislation strikes a proper balance between vesting public authorities with powers, and providing procedural safeguards for defendants and suspects: see *Further discussions on the proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union*: 7527/06; Brussels, 27 March 2006 (29.03).

4 COM(05) 195.

5 Paragraph 13.26.

6 Whether the method is described as "auditing" or maintaining a "dossier" is immaterial.

7 See the article "*MEPs rap tardy Council over crime suspects' code*", David Cronin, Economist, 2006.

8 We are aware that the United Kingdom government has described the initial EC proposals as "over ambitious" (*Draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union*): House of Commons Select Committee on European Security (2006): http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34-xxi/34xxi02.htm

9 Research Papers In Law 5/2005, John A.E. Vervaele: *European Criminal Law and General Principles of Union Law, part 3. Justice Integration: Effective and Fair Law Enforcement in the EU.* Mr Vervaele also comments (more contentiously) that "In practice…. states qualify transnational acts of justice as governmental acts which are not subject to judicial testing and whereby they take mutual trust and non-inquiry as starting points, which has the consequence of creating a Delaware effect and considerably lowers the protection of fundamental rights in transnational relations. For this reason, it is absolutely essential to break this pattern of non-inquiry and to insert a public order clause or human rights clause in the framework decisions, which permits the courts in the requested state to test the legality of the request."

10 Select Committee on European Scrutiny Twentieth Report, footnote 54.

11 Vervaele states [*The transnational ne bis in idem principle in the EU Mutual recognition and equivalent protection of human rights*; Utrecht Law Review; http://www.utrechtlawreview.org/ 100 Volume 1, Issue 2 (December) 2005]:

> "Articles 54 to 58 of the CISA on the application of the ne bis in idem rule are incorporated in Title VI of the Treaty on EU (Third Pillar provisions) on the legal basis of Article 34 EU and 31 EU.34 Article 54 provides: 'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'. Article 55 stipulates exceptions to the rule of ne bis in idem, but they must be formally laid down at the moment of signature or ratification. One of the possible exceptions is that the acts took place in whole or in part in its own territory. Another relevant article in this context is Article 58 that stipulates that national provisions may go beyond the Schengen provisions on *ne bis in idem*, by giving a broader protection. The Treaty of Amsterdam has extended the jurisdiction of the ECJ in Third Pillar matters, inter alia to give rulings on the validity and interpretation of decisions. Member States must accept that jurisdiction in accordance with Article 35 (2) and they can, according to Article 35 (3) TEU, when accepting choose between granting the power to refer questions for a preliminary ruling either to any of its courts or tribunals or only to those courts or tribunals which give a final decision against which there is no further judicial remedy."

12 http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34xx/34xx16.htm.

13 See page 30, working document

14 Page 4, working document

15 Working document, paragraph 5.2; page 17

16 See section 57(6), Serious Organised Crime and Police Act 2005; and see Article 34, TEU.

17 As of the 1st April 2006, the National Crime Squad (NCA) and the National Criminal Intelligence Service (NCIS) are abolished, and replaced by the "Serious Organised Crime Agency" (SOCA). SOCA is a non-government body. It is not a police force, but which is vested with wide-ranging powers, and whose remit extends beyond the popular notion of "organised crime". Note that the expression "organised crime" is not defined in the Act at all.

18 The relevant passage reads: "*What appears to be necessary is the laying down of an EU rule which would oblige the authorities of the Member States to contact the authorities of other Member States, when a case before them demonstrates a real possibility that other Member States would also be interested in prosecuting the same case. Such a potential interest could objectively be identified if the case before them demonstrates significant links to another jurisdiction. In other words, such a rule could oblige national authorities to inform the competent authorities of other Member States of their intention to initiate a prosecution (or of their actual initiation of a prosecution) when the facts of a case before them indicate significant links to another Member State.*"

19 Paragraph 5.2; working document

20 Law Com No.267, "*Double Jeopardy and Prosecution Appeals*" (March 2001).

21 Edition 2006, para.4-116 onwards.

22 Thus, section 12 of the Extradition Act 2003 forbids extradition on the grounds of double jeopardy only if a defendant would be discharged in criminal proceedings in a relevant jurisdiction in the United Kingdom:

> "A person's extradition to a category 1 territory is barred by reason of the rule against double jeopardy if (and only if) it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction on the assumption- (a) that the conduct constituting the extradition offence constituted an offence in the part of the United Kingdom where the judge exercises jurisdiction; (b) that the person were charged with the extradition offence

Ne bis in idem and the creation of a single area of freedom, security and justice

3. We agree that the subject matter of the green paper needs to be seen in the context of Article 29 of the Amsterdam Treaty that calls for the creation of an "area of freedom, security and justice" within the EU. Although most citizens of the European Union support the three notions embodied in Article 29, we recognise that the means by which the area is to be created is highly contentious. However, it cannot be overlooked that crime increasingly has a cross-border EU effect. Although politicians often seek to legislate unpalatable measures on the grounds that they are necessary to combat "organised crime" the absence of a workable definition of that phrase suggests that policy makers ought not be distracted by artificial descriptions of conduct. Much crime (including transnational crime) is committed by persons acting alone and in circumstances that might not ordinarily be described as "organised" and a discussion of the issues raised in the Green Paper should not overlook the fact that the absence of a *ne bis in idem* effect can cause injustice in cases that are neither complex nor grave. A conviction for a relatively minor offence can have a significantly detrimental effect on a person's life.

Taking an holistic approach

4. We agree with the Commission that it is desirable that issues concerning conflicts of jurisdiction,

and *ne bis in idem*, should be approached holistically rather than in a piecemeal way.[2] This area of the law is shaped by the level of trust/confidence (or frankly, the lack of it) that Member States have in the legal processes of each state. We stress that unless the cornerstone of trust/confidence is in place, we foresee slow progress being made towards the creation of a comprehensive set of rules for the purposes of Article 31(1)(d) TEU ("preventing conflicts of jurisdiction between Member States"). We commend the Commission on its sustained efforts to improve cooperation and the level of trust between Member States and their agencies.[3] That said however, we do have some concerns. In 2005 the *House of Commons Select Committee on European Scrutiny* (6th Report) considered a *Commission Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States*.[4] The Select Committee complained that the Commission was exceeding its functions:[5]

> "We are particularly concerned to see the Commission aspiring to the role of evaluator of the efficiency, quality and credibility of judicial systems in the Member States. We do not consider that this is a proper or legitimate role for the Commission. We consider that it would threaten the constitutional traditions of the Member States and has no basis in the EU Treaty. We therefore welcome and support the Government's opposition to this part of the communication, and ask the Minister what steps the Government proposes to take to remind the Commission not to depart from the Hague Programme and to curb its ambitions in this regard."

5. It is not necessary for us to comment on the entirety of this complaint but we point out that knowledge of the strengths and weaknesses of any legal process or legal system is a prerequisite for informed decision-making and law reform. We are aware that for several years the Commission has received submissions from commentators in favour of a process or a method by which standards in the legal systems of Member States can be ascertained and assessed.[6] Whether the 'auditing' process is carried out formally by an EU body, or informally, does not alter the basic fact that decision-makers need to know something about the system that they are being asked to work with.[7]

6. The invaluable work of the Commission in the areas of procedural safeguards for defendants and suspects, and witness and victim support, ought not to be neglected by domestic and EU legislators.[8] We see force in the argument advanced by Mr Vervaele that "*individuals have subjective rights deriving from human rights conventions, not only in the territory of each individual state, but also in the common area of the contracting states*".[9]

Cooperation is paramount and the key to resolving conflicts of jurisdiction in criminal matters

7. The Bar Council supports a EU process for resolving conflicts of jurisdiction in criminal matters through dialogue and cooperation. We are not yet persuaded that in the absence of agreement between Member States as to where a case is to be tried, that a *binding* decision by a EU body is appropriate. In any event, we doubt that a legal basis exists under existing treaty arrangements for the existence of such a body. We also note the comments of the *House of Commons Select Committee on European Scrutiny* (20th Report) that "the UK has not made a declaration which would confer such jurisdiction on the ECJ. It is not explained in the Green Paper how the delays resulting from such a reference could be accommodated within criminal proceedings".[10]

8. Vervaele points out that with the coming into force of the Treaty of Amsterdam, the Schengen provisions were integrated into the EU acquis so that the *ne bis in idem* Schengen provision became integrated in the Third Pillar provisions of the area of Freedom, Security and Justice. We recognise that the Treaty of Amsterdam also gave the ECJ a greater role in connection with Third Pillar issues.[11]

9. We are doubtful that there would be sufficient support within the general population of the EU for a scheme that included a power of an EU body *to bind* Member States as to jurisdiction. Objections to such a scheme are likely to be most intense in respect of acts that have attracted

widespread condemnation in a Member State. For example, we doubt that Member States would support a scheme that empowered a EU body to order State "X" to halt a prosecution against a person who had been acquitted of causing an explosion in State "Y" in circumstances where the victims of the attack included nationals of State "X".

10. We note the provisional views of the *House of Commons Select Committee on European Scrutiny* (20th Report):[12]

> "14.20 We view with particular concern the suggestion that an EU body might be empowered to make a binding ruling determining which Member State should be allowed to prosecute. This must involve the proposition that a national prosecuting authority could be prevented, by reason of an EU decision not reviewable in the national courts, from prosecuting an offence taking place within the national territory. We do not believe that such a result would be tolerable for the United Kingdom, not least because it would undermine the accountability of the Law Officers (including the Lord Advocate in relation to prosecutions in Scotland) and we look to the Attorney General vigorously to oppose any such notion.
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> 14.21 We also agree with the Attorney General that it is not clear that the Green Paper has fully considered the implications for defendants of delays while conflicts of jurisdiction are considered. These would be aggravated by the lengthy delays which would necessarily arise from preliminary references to the European Court, and we agree that such a system would be likely to give rise to challenge under the ECHR, notably under Article 6."

11. We see merit in a scheme that makes provision for mediation, and which gives a EU body (perhaps a court) the power to express 'opinions' as to jurisdiction – opinions that are to be treated as being highly persuasive. We do not believe that such a proposal undermines or significantly weakens a scheme that is predominantly structured on rules designed to promote co-operation between Member States.[13]

Parallel investigations

12. The Commission has fallen into error in excluding from the green paper the question of parallel investigations. The paper is expressed to be concerned only with the question of parallel proceedings "*from the moment that criminal proceedings reached the prosecution stage*" [14] but we note that the Commission does not in fact succeed in excluding the question of parallel investigations altogether. For example, the Commission advocates that a "*mutual exchange of information and of views as to the best place to prosecute should start as early as possible*",[15] and that an appropriate stage for exchanging information might be the moment a prosecution is launched. Although a prosecution in the United Kingdom is usually initiated from the moment a person is charged with an offence, this might be no more than a "holding" charge made in connection with a significantly wider investigation that has yet to be completed.

> Example:
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> D is arrested and charged with possessing a drug intending to supply it, but the arrest is made as part of a wider investigation into money laundering and ultimately D is charged with a serious money laundering offence. The prosecution would wish to try D on one indictment in respect of both offences, but which date would be relevant for the purposes of determining jurisdiction?

13. We note that judicial and administrative co-operation has improved substantially in recent years: there is greater dialogue between relevant agencies at the investigative stage. In 2005, the United Kingdom enacted the Serious Organised Crime and Police Act. That Act makes detailed provision for the use of "joint investigation teams", and "international joint investigation teams", the latter being formed in accordance with international agreements.[16] The measures are part of the restructuring of the United Kingdom law enforcement agencies.[17]

14. Presumably each State carrying out a parallel investigation hopes to launch a prosecution in its domestic criminal court. Expense will have been incurred by each state, and each agency will want to demonstrate to its funders that it is being effective in tackling crime.

15. There is little incentive for a State to surrender jurisdiction of a prosecution if, after much time and money has been expended investigating the offence, another State is seen to be actively pursuing the trial. In the United Kingdom the notion of "visible policing" is important. Its purpose is to enhance public confidence in the criminal justice process – a process that begins at the investigative stage. 'Visible policing' demonstrates that criminal laws are being applied and that the laws are effective in bringing about a local area of freedom, security and justice. If there is a realistic prospect that a case might be tried elsewhere then it seems to us desirable that this should be resolved at an early stage. This might provide sufficient time to enable interested parties to be made aware of the intended progress of an investigation/prosecution – and hopefully the parties would understand the reasons why a case is being pursued in one State as opposed to another, or why a prosecution is being halted or closed in a particular State or States.

Making Member States aware of an intended prosecution

16. The Commission correctly states that in order to avoid conflicts of jurisdiction Member States, who wish to prosecute the same case, ought to make each other aware of that fact.[18]

17. If there is to be a "duty to inform"[19] then the duty should arise as early as reasonably practicable having regard to the facts and circumstances of each case. The question whether a state should have declared its intention earlier is one that can be considered at the negotiations/mediation/arbitration stages.

Change of policy and attitudes within the United Kingdom to double jeopardy

18. The expression "*ne bis in idem*" ("not twice for the same") does not have a precisely defined transnational meaning. The United Kingdom has its own complex set of rules that restrict the power of the state to prosecute a person twice for an offence founded on the same or similar facts: see the Law Commission Consultation Paper No. 156 "*Double Jeopardy*", and the Law Commission Report on the same subject.[20] Put shortly, in the United Kingdom the doctrine of *res judicata* applies to the criminal law in the form of the maxim *nemo debet bis vexari pro eadem causa*, or *nemo debet bis puniri pro uno delicto* – "no-one should be twice put in jeopardy of being convicted and punished for the same offence". As the editors of Archbold *Criminal Pleading, Evidence and Practice* point out, the pleas of *autrefois convict* and *autrefois acquit* are founded on these maxims.[21] In practice, the aforementioned rules are applied restrictively (in England and Wales), with a wider remedy rooted in the jurisdiction of a court to stay proceedings as an abuse of process.[22]

19. Prior to the enactment of the Criminal Justice Act 2003, prosecutors had limited powers to appeal judicial decisions that brought a prosecution to an end (e.g. "no case to answer") or that had the effect of forcing the prosecution to bring a case to a close (e.g. orders relating to the disclosure of sensitive material). But now, under Part 9 of the Criminal Justice Act 2003, it is open to

prosecutors to appeal decisions, which (left untouched) would have that effect.[23] The new

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[23] These provisions came into force on April 4, 2005: Criminal Justice Act 2003 (Commencement No. 8 and Transitional and Saving Provisions) Order 2005 (S.I. 2005 No. 950).

[24] That is to say, a summary trial (not being a trial on indictment).

[25] A number of other conditions must be satisfied before an order quashing an acquittal may be made: see s.55 of the 1996 Act.

[26] Law Com No.267, "*Double Jeopardy and Prosecution Appeals*" (March 2001); para.6.21.

[27] That is to say the Criminal Division of the Court of Appeal.

[28] Nor, if those were appeal proceedings, in earlier proceedings to which the appeal related [s.78(2)].

[29] And with some modifications to Northern Ireland: see s.96.

[30] See section75(6) of the Criminal Justice Act 2003.

[31] Schedule 5 of the 2003 Act.

[32] Section 79 elaborates on what this test entails.

[33] Section 75(4) reads: "*This Part also applies where a person has been acquitted, in proceedings elsewhere than in the United Kingdom, of an offence under the law of the place where the proceedings were held, if the commission of the offence as alleged would have amounted to or included the commission (in the United Kingdom or elsewhere) of a qualifying offence*".
Section 75(5) provides: "*Conduct punishable under the law in force elsewhere than in the United Kingdom is an offence under that law for the purposes of subsection (4), however it is described in that law*".

[34] Section 76(2).

[35] Law Com No.267, "*Double Jeopardy and Prosecution Appeals*" (March 2001).

[36] "…a useful precedent is provided by Article 20(3) of the Rome Statute of the International Criminal Court. This allows a second trial, despite a prior one on the same facts, where the first trial was in a different jurisdiction and was designed to shield the suspect from prosecution elsewhere, or was not independent, impartial or consistent with an intent to bring the perpetrator to justice. In the light of the overwhelming international consensus on this point, we think it would be appropriate to adopt similar criteria in English law."

[37] Para.6.16; Law Com No.267, "*Double Jeopardy and Prosecution Appeals*" (March 2001).

[38] Para.6.17; Law Com No.267.

[39] Para.6.17.

[40] This was a reference to *Archbold 2001*, para 4–130.

[41] "…an English court should be permitted to disregard an acquittal or conviction in another jurisdiction where it is satisfied that it is in the interests of justice to do so; and, in determining whether it is so satisfied, the court should be required to have regard to whether it appears that the foreign proceedings:
(1) were held for the purpose of shielding the defendant from criminal responsibility for offences within the jurisdiction of the English court,
(2) were not conducted independently or impartially in accordance with the minimum requirements of due process and fairness, or
(3) were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the defendant to justice, together with any other considerations which appear to the court to be relevant.

[42] See paragraph 15.16-15.18

[43] The history of steps away to the enactment of Part 10 of the 2003 Act is concisely set out in *Research Paper 02/74*, "*The Criminal Justice Bill: Double Jeopardy and Prosecution Appeals*".

[44] Working document, page 49.

[45] Judgment, paragraph 33.

[46] 20th Report.

[47] A cross-departmental team comprising the Home Office, the Office of the Attorney General and the Department for Constitutional Affairs.

[48] 20th Report, para.14.16.

[49] Although the United Kingdom is increasingly taking a 'positive law approach' in relation to conduct and human affairs, its effect on discretion is that the law acknowledges the existence of discretion but regulates its use. We use the expression "positive law approach" in its loosest sense to mean the use of legal rules to regulate human conduct, to entrench rights, to create duties, and to set the parameters of rights, duties, freedoms, etc.

[50] See page 16 of the Working Document.

[51] *The Prosecution of Public Figures and the Separation of Powers: Confusion within the Executive Branch – A Conceptual Framework*; Aaken, Salzberger, and Voigt; International Centre For Economic Research; Working Paper No. 32/2003.

[52] Working document; page 17

[53] Working document, page 18

[54] Working document, page 21

[55] Working document, page 24

[56] Working document, page 27

[57] Page 28, Green Paper.

[58] Working document, page 31

[59] Working document, page 32

[60] Part 2, paragraph 8

provisions treat decisions of a judge at first instance as not being "final" and therefore the *ne bis in idem* principle is not engaged. The provisions would not normally result in a defendant being prosecuted twice on the same facts salient facts. However, the provisions reflect public policy that persons ought not to escape justice by reason of procedural defects in a trial process that prevents fact-finders determining whether (on the merits) the accused is guilty of the offence charged.

20. It should be noted that a decision of a Magistrates' Court (England and Wales) to dismiss a charge,[24] being a decision that is perverse and unreasonable, might be overturned on appeal with a direction that the case be remitted to the Magistrates' Court for a rehearing, or with a direction to convict. Arguably, a rehearing would not have a *ne bis in idem* effect because the initial decision of the Magistrates was not 'final'.

21. In 1996, the Criminal Procedure and Investigations Act 1996, ss.54-56 made provision for the High Court to quash an acquittal if a person has been "*convicted of an administration of justice offence involving interference with or intimidation of a juror or a witness (or potential witness) in any proceedings which led to the acquittal*" [s.54] and where there is a real possibility that "*but for the interference or intimidation, the acquitted person would not have been acquitted*" [s.54(2)].[25] We do not know how often this provision has been used to quash "tainted acquittals", but nonetheless, we suggest that an EU set of rules should make provision that enables acquittals obtained by improper means to be set aside and for a retrial to be ordered (a step that may be taken by the national court that receives the indictment, or by another Member State that is permitted under the rules to set aside such an acquittal and to direct a retrial). In expressing that view, we have taken into account what the Law Commission for England and Wales said on this issue namely:[26]

> "….It would be exceptionally difficult to apply the tainted acquittal procedure to foreign proceedings, and we believe that this possibility should therefore be discarded (except insofar as a foreign verdict could be ignored under the considerations discussed above). Our proposed new exception for fresh evidence in murder cases, however, would apply to acquittals in any jurisdiction, because it would be inconsistent to give a foreign verdict greater finality than one of our own. We recommend that the tainted acquittal procedure should not apply to acquittals outside England and Wales."

22. Although the Law Commission recommended that the "new exception" to try a person on fresh evidence should apply only where the offence of which the defendant was acquitted was "murder, genocide consisting in the killing of any person, or…reckless killing" [para.4.42], it will be appreciated that the United Kingdom Parliament went further than the Law Commission by enacting an extended list of "qualifying offences" (summarised below).

23. Part 10 of the Criminal Justice Act 2003 introduced a more radical change. The effect of that Part is to empower the English Court of Appeal[27] to set aside an acquittal and to order a retrial if there is "*new and compelling evidence against the acquitted person*" [s.78(1)]. Evidence is "new" if it was not adduced in the proceedings in which the person was acquitted[28] [s.78(2)]. The 2003 Act states that evidence is "compelling" if it is reliable, substantial, and (in the context of the issues in dispute in the proceedings) "*it appears highly probative of the case against the acquitted person*" [s.78(3)].

24. Part 10 applies to England and Wales[29] but not as yet to Scotland. Part 10 applies retrospectively.[30] The provisions apply to "qualifying offences"[31] and these include a number of serious offences against the person, serious sexual offences, various drugs offences, some criminal damage offences, war crimes and terrorism, as well as conspiracy in relation to any of the aforementioned offences. An application to set aside an acquittal, *including an acquittal in a place elsewhere than in the United Kingdom*, cannot be made without the written consent of the Director of Public Prosecutions, and only the Court of Appeal (Criminal Division) may order a retrial. An application will not be entertained if a retrial is not in the interests of justice.[32]

25. As indicated above, Part 10 will also apply in respect of an acquittal in proceedings heard in a foreign jurisdiction if the conduct relied on would have amounted to, or included, the commission of a "qualifying offence" in the United Kingdom: see ss.75(4) and (5).[33] Of course an English court cannot quash an acquittal of a foreign court (because the verdict was not returned in the jurisdiction of England and Wales) and therefore, to overcome this problem, Part 10 enacts a modified scheme. First, a prosecutor may apply to the Court of Appeal for a determination whether the acquittal is a bar to the person being tried in England and Wales for the "qualifying offence". If the answer is in the affirmative, the prosecutor may seek a further order that the acquittal is "*not to be a bar*" to a trial in England and Wales.[34] The Court of Appeal will make an order in the prosecutor's favour if there is new and compelling evidence against the acquitted person and that it is in the interests of justice for the matter to be tried.

26. An obvious issue is whether these provisions comply with the United Kingdom's international treaty obligations. The Law Commission of England and Wales noted in its Final Report[35] that Art.20(3) of the Rome Statute of the International Criminal Court permits a second trial albeit on the same facts, where the first trial was "*designed to shield a suspect from prosecution elsewhere, or was not independent, impartial, or consistent with an intent to bring the perpetrator to justice*" (para.6.14)[36]. The Law Commission therefore thought it appropriate to adopt similar criteria in English law. It also recommended that an acquittal by a foreign court should not be regarded as subject to the *autrefois acquit* rule if the result was based solely on the fact that the alleged offence was committed outside the territorial jurisdiction of that court (para.6.20). To us, the last point makes obvious sense and we adopt what the Law Commission said on this point:[37]

> "In this case there is no question of impugning the integrity of the foreign proceedings. Where a foreign court dismisses a case on the basis that the foreign legal system has insufficient interest in or connection with the alleged offence, we think it should still be open to the English courts to proceed against the defendant."

27. The Law Commission pointed out that the difficulty would not arise if:

> "…under the relevant foreign law, the foreign court's dismissal of the case were not a final determination but a preliminary decision as to admissibility. In that case there would be no final determination of the case, and therefore no possibility of an *autrefois* plea".[38]

28. Interestingly, the Law Commission added [emphasis supplied]:[39]

> "If, on the other hand, the foreign ruling were a final one according to the foreign law, that would activate the autrefois rule, and prevent an English court from trying the case. We do not think it would be satisfactory that the applicability of the autrefois rule should depend whether, under the particular foreign law in question, the court's decision on the issue of jurisdiction was regarded as final. *English law must have its own position on whether want of jurisdiction is final, and cannot answer that differently according to the country in which the abortive proceedings were taken*. We therefore believe that a ruling of lack of jurisdiction by a foreign court should not count as a final determination of the proceedings for the purposes of the autrefois rule. We note that, according to *Archbold*, only a verdict of a foreign court of competent jurisdiction will activate the autrefois rule.[40] Presumably, therefore, an acquittal for want of jurisdiction cannot have that effect, even under the present law."

29. The above passage must of course be seen in the context of abortive proceedings, but it indicates nonetheless the real difficulties that exist developing an EU set of rules for resolving conflicts of jurisdiction where there are (or may be) parallel proceedings. What would be the position if the Court Appeal (England) were to find that a foreign court did not take into account material held in England, that was not passed to investigators in the other State?

30. We stress that an application to try a person acquitted by a foreign court can only be made with the written consent of the Director of Public Prosecutions. The DPP may only give his consent if (among other things) he complies with s.76(4)(c) of the 2003 Act, which provides that:

> "any trial…would not be inconsistent with obligations of the United Kingdom under Article 31 or 34 of the Treaty on European Union relating to the principle of *ne bis in idem*".

31. Without s.76(4)(c) the Government would have been exposed to criticism that it was seeking to circumvent existing EU rules on the application of the *ne bis in idem* principle, and Part 10 might have proved to be something of a political handicap for the United Kingdom government when it negotiates with foreign powers on law-enforcement issues and mutual recognition of decisions in criminal matters.

32. Part 10 of the Act does not give statutory effect to all of the Law Commission's recommendations because s.75(4) is rather more open-ended in its reach. Presumably, the thinking of the legislature was that in respect of a foreign acquittal neither the Director of Public Prosecutions nor the Court Appeal would be party to a process that is intended (for all practical purposes) to set aside a foreign acquittal, without taking into account the factors [see the footnote][41] that the Law Commission set out in its Report as part of its recommendations.

33. It may be said that s.75(4) of the Criminal Justice Act 2003 [application of Part 10 to foreign acquittals] incorporates too few limitations and protections. On the other hand, Part 10 appears to be ECHR compliant in that Art.4(2) of Protocol 7 does not prevent "*the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings*".

34. Part 10 provides a legal route by which earlier proceedings might be reopened but it does not empower prosecuting authorities to launch fresh proceedings without limitation. Similarly, Part 10 appears to be compatible with Art.14(7) of the *United Nations International Convention on Civil And Political Rights* on the assumption that Article 14(7) permits a "resumption" of criminal proceedings (*General Comment, 13/21, of The UN Human Rights Committee*; see para.3.6, Law Commission 267).

35. Although the power in Part 10 of the Criminal Justice Act 2003 is likely to be used sparingly, the new measures reflect a hardening of public attitude against rules that are perceived as being capable of allowing a person to escape justice or to avoid adequate punishment. The public is likely to be just as critical of technical acquittals by a foreign court (for example where a procedural point is successfully taken by the defence without the court examining the validity of the allegation), or in cases where new and compelling evidence against the defendant comes to light after his acquittal by a foreign court. That such concern exists is apparent from the views expressed by the United Kingdom's *Home Affairs Select Committee on European Scrutiny* (32nd report 2003) which considered the *Initiative of the Hellenic Republic with a view to the adoption of a Council Framework Decision on the application of the ne bis in idem principle.*

36. Article 2(2) of the proposed Framework Decision, as then drafted, addressed acquittals in the light of new or newly discovered facts. It provided that a state may inform the state that tried the defendant of those facts, or of any fundamental defect in the previous proceedings that could affect the outcome of the case. If Article 2(2) was intended to mean that the second state could only provide information to the first state but that it could not itself reopen the case, then Article 2(2) was unacceptable to the United Kingdom government.[42] The United Kingdom government relied on Protocol 7 of the ECHR that articulates the rule against double jeopardy but includes an exception to the rule where there is "evidence of new or newly discovered facts or if there has been a fundamental defect in the final decision".[43]

37. As the Commission points out, the ECJ in the joint cases of *Gozutok/Brugge* [see C-187/01; C-385/01] took account of the fact that:

> "the integration of the Schengen acquis... into the framework of the EU is aimed at enhancing European integration and...enabling the union to become more rapidly the area of freedom,

security and justice",[44] based on the assumption that Member States "have mutual trust in the criminal-justice systems and that each of them recognises the criminal law in force in the other Member States *even when the outcome would be different if its own national laws were applied*" [emphasis supplied][45]

38. Bringing Member States to the point where they will accept a decision made by a criminal court of foreign jurisdiction - even when the decision would be different had its own national laws applied - requires the bedrock of mutual trust to exist. This is not a state of affairs that can be *assumed* to exist, but must be created by a combination of sound legal principles and public/political goodwill.

A preliminary question

Do we need legislative change?

39. We have considered whether the problems raised in the green paper are sufficiently acute to warrant the introduction of formal procedural arrangements for determining jurisdiction. Given the content of the Green Paper and the Working Document, this might seem a surprising question to ask. An initial view might be that in practice the current system works quite well, and that disputes concerning jurisdiction in criminal matters, and *ne bis in idem*, are so rare that the time has not yet come to change the existing structure. Changes to the rules - without clearly identifying the need for change - might make matters worse, or lead to unintended consequences. There might also be concern that the desire to install a formal process for determining jurisdiction might carry with it other objectives, for example, the closer approximation or harmonisation of legal rules, substantive criminal law, practice and procedure. Recent experience of the proposed Constitution for the European Union has shown that such concerns are real, and exist in many, if not all, Member States.

40. We are also mindful of the views of the Attorney General (United Kingdom; Lord Goldsmith Q.C.) who, on 7 February 2006, submitted to the *House of Commons Committee on European Scrutiny*[46] an Explanatory Memorandum on behalf of the *Office for Criminal Justice Reform.*[47] The Committee states [emphasis supplied]:[48]

> "The Attorney General notes the statement at the beginning of the Green Paper that 'EU criminal justice is increasingly confronted with situations where several Member States have criminal jurisdiction to prosecute the same case' but questions what data supports this statement, and the basis for the suggestion in the Green Paper that current arrangements for informal discussions with other Member States, including Eurojust, are insufficient or ineffective. The Attorney General remarks that Eurojust already plays a significant role in dealing with disputes relating to conflicts of jurisdiction and notes the provisions of Articles 6 and 7 of the *Council Decision 2002/187/JHA* establishing Eurojust by virtue of which Eurojust may ask the competent authorities of the Member States to consider accepting that one of them may be in a better position to undertake an investigation or prosecution. The Attorney General points out that Eurojust may make recommendations, but not a binding decision, in cases where a dispute arises over jurisdiction, and that it has agreed guidelines (which now appear as Annex IV in the Eurojust Annual Report for 2004) for deciding which jurisdiction should prosecute."

41. At paragraph 14.17 of the 20th Report, the Committee quote the Attorney General:

> "The Attorney General makes the following general comment on the policy implications of the Green Paper:
>
> > 'Formal procedures for Member States to inform, consult and participate in a possibly binding dispute resolution mechanism are bound to lengthen proceedings. Delays have implications for fairness to the accused and may render the proceedings liable to ECHR challenges. It is unclear if these aspects have been fully explored by the Commission though the Green Paper refers to the need to minimise bureaucracy so far as possible.

> 'In conclusion, the Government will consider its support for further initiatives in this area in the light of hard evidence showing the operational need for an institutionalised mechanism to resolve positive conflicts of jurisdiction and its assessment of the consequences for the maintenance of national policies and arrangements. The Government's initial reaction to the current Green Paper would be to probe if the experience of the failed negotiation in 2004 has been fully taken into account and if the proven added value stipulated by the Council has in fact been established.'

42. The Committee's provisional view was (para.14.19) that
> "We agree with the Attorney General that the need for a formal mechanism for allocating jurisdiction is far from being demonstrated. Such a mechanism is open to criticism on grounds of practicality in that it does not bring any advantage, which is not already secured by voluntary co-operation through Eurojust."

43. In addressing these issues we have been greatly assisted by the Commission's discussion of the case law of the ECJ on *ne bis in idem* at paragraph 11.3 of the working document. We have also considered the views of a number of commentators including John A.E. Vervaele ["*The transnational ne bis in idem principle in the EU; Mutual recognition and equivalent protection of human rights*"; Utrecht Law Review, December 2005; the Modern Law Review, M Fletcher] and the paper by Otto Lagodny "*Possible Ways to Reduce the Double Criminality Requirement from Double Criminality to Double Prohibition*". As at March 2006, only a small number of cases had been decided by the ECJ in connection with *ne bis in idem* and third pillar issues under the TEU: see *Gozutok and Brugge* (2003) ECRI5689; *Miraglia* [C-69/03]; and more recently *Van Esbroeck* [C-436/04; 9th March 2006]: see also *Kogg v The Commission* [T-224/00].

44. Vervaele contends that in *Gozutok*, the ECJ did not solve all the problems of the *ne bis in idem* principle, and that if "the legislator does not intervene in due time, the ECJ will certainly receive other requests for preliminary rulings on the interpretation of the *ne bis in idem* principle" [p.114]. They have indeed been further requests [see *Gasparini* [C-467/04], *Bouwens* [C-272/05]; *Kretzinger* [C-288/05].

45. Vervaele sees potential strength in the fact that in the EU there exists a single area of freedom, security, and justice, as well as an integrated legal order "in which full effect should be given to fundamental standards". Unfortunately, the EU has not yet reached a settled position as to what those standards are. Given that a significant number of cases are now reaching the ECJ on the question of *ne bis in idem* in criminal proceedings, and bearing in mind the volume of crime that now has a EU "effect" we accept that there is a need for a legislative instrument that makes procedural arrangements for determining jurisdiction. We stress that arrangements must be rooted in the concept of cooperation, and Member States must be afforded a significant degree of discretion: see the *Freiburg Proposals on Concurrent Jurisdiction and the Prohibition on Multiple Prosecutions in the EU* [Max Planck Institute, November 2003]. We depart from the authors of the *Freiburg Proposals* who propose that where Member States are unable to agree in which state a prosecution should take place, that the matter should be referred to the ECJ for an opinion/judgment that is *binding* on Member States. We suggest that Member States should be asked to regard such an opinion as being highly persuasive.

Question 1

Is there a need for a EU provision which shall provide that national law must allow for proceedings to be suspended by reason of proceedings in other Member States?

It is not law of the United Kingdom that a "competent authority" has a duty to prosecute every crime that falls within its competence. Discretion is an increasingly important tool in the application of United Kingdom legal rules.[49] The exercise of discretion is subject to judicial control/review, and therefore discretion is not to be viewed as a recipe for arbitrary or capricious determinations. It

follows that the United Kingdom already has the ability to refrain from initiating a prosecution, or to halt an existing prosecution if the case is to be prosecuted elsewhere. We are aware that some EU states adhere to the "legality principle" where the competent authorities have a duty to prosecute every crime, which falls within their competence.[50] However, even in those States there usually exists some scope for the operation of discretion.[51]

The Commission states that a prosecuting authority should be able to halt or to close proceedings "on the mere ground" that the same case is being prosecuted in another member state. It seems implicit in the Commission's reasoning that the decision of one member state to halt/close proceedings should also be in the interest of the population of that state (i.e. "public interest considerations"). This brings the discussion back to the issue of mutual trust/confidence in the legal systems of other Member States. We take this opportunity to repeat the importance of ensuring that legislators do not pay mere lip-service to the concepts of (i) mutual recognition, (ii) "trust", (iii) fundamental safeguards and rights. Measures must both exist and be applied to support those concepts.

Question 2: duty to inform

Should there be a duty to inform other jurisdictions of ongoing or anticipated prosecutions if there are significant links to those other jurisdictions? How should information on ongoing proceedings, final decisions and other related decisions be exchanged?

We agree that the mutual exchange of information and views, on the best place to prosecute should start as early as possible,[52] but prosecuting authorities will need to decide whether the information should be disclosed *at the latest* when a prosecution is launched, or at an earlier time. We acknowledge that our competence to answer this question is necessarily limited because in England and Wales barristers who practice in the criminal courts tend to be instructed once a prosecution has been initiated. We recognise that the exchange of information is a complex and often sensitive subject. However, the trend is towards greater co-operation between agencies, and greater case management at the investigative stage of a case. There is obvious merit in Member States, that have an interest in prosecuting a case, being informed of the intentions of one or more Member States to launch a prosecution, but we are uncertain as to how this information should be imparted and shared. Suppose State "A" intends to prosecute D for an internet fraud that adversely affected the interests of all 25 Member States. Is State "A" really to notify all 25 Member States? How will State "A" know which Member States are seriously contemplating prosecuting D for a like offence?

Our provisional view is that it would be sufficient for a competent authority to register its intention to prosecute with an EU body (perhaps by way of a secured intranet server) in order that Member States can make themselves aware of the existence of a case that might give rise to a conflict of jurisdiction, or a *ne bis in idem* issue. The Commission acknowledges that a European Register of proceedings is theoretically feasible. To impose a requirement that goes further than this might prove unduly onerous for Member States and be unworkable. Many cases would trigger the duty to register (for example drug trafficking, where drugs are hauled across several states). The retention and use of data are clearly important albeit contentious matters that warrant careful attention and handling.

The Commission states that the duty to inform should not go beyond "*what is necessary in enabling the competent authorities in other Member States to express their view and effectively contributes to a possible solution*".[53] When put this way, the words "what is necessary" become meaningless because all facts relevant to resolving a conflict of jurisdiction are "necessary".

We tentatively suggest that the duty to inform should be confined to disclosing the name of the accused and the charge. Other Member States who might have an interest in prosecuting the same case have some responsibility to make their own enquires of the first state about the facts of the registered case, and if a conflict of jurisdiction might arise, to open negotiations.

If a potential conflict arises it will be for Member States to decide between themselves (during the

initial phase) how much information ought to be exchanged. If there has been co-operation between states at the investigative stage, it seems likely that the Member States will know most of the relevant details of the case at the time that they seek to launch a prosecution.

Question 3: duty to enter into discussions

Should there be a duty to enter into discussions with Member States that have significant links to a case?

Once Member States become aware of a conflict of jurisdiction there should be a duty on them to enter into discussions with a view to resolving the conflict. We agree that "red-tape" is to be avoided, but not at the expense of procedural safeguards (for example, in connection with data retention and data usage). We envisage many cases being resolved quickly and amicably at the discussion stage, perhaps requiring no more than an exchange of letters between competent authorities. It should be left to the good sense of the parties to decide on the appropriate forum for discussion - for example round-table discussions. Protocols, accords, and guidelines, might be the way forward here (i.e. guidance based on experience).

We agree that the competent agencies could ask for the assistance of Eurojust. We have no firm view about the competence of Eurojust to fulfil this role. The Commission states that Eurojust has "adequate facilities" and "experience in the field"[54] but we do not know what that "experience" amounts to. Eurojust is a relatively young body and it may be that its resources are already stretched. If Eurojust is to be involved in this process at all then we suggest that its functions and aims should be publicly available in order to give this part of the process transparency. Presumably if negotiations have reached this stage there will be a consideration of the interests of victims, witnesses, and defendants.

Question 4: mediation

Is there a need for a EU model on binding agreements among the competent authorities?

We are in favour of a mediation process, but we are not convinced that Eurojust is "well placed" to take on the role of mediator. Eurojust is in its infancy. Given the importance of mutual trust and confidence in this field, it is essential that the population of Member States have confidence in Eurojust if it is to offer assistance in mediating disputes. Conflicts of jurisdiction are likely to be at their most intense in high-profile cases (particularly notorious ones). The creation of an "advisory panel" might be worth considering. The object should be to *persuade* the parties to resolve their differences rather than *imposing* a decision upon them. See our observations in the introduction to this Response.

Question 5: a binding decision by an EU body

Should there be a dispute settlement/mediation process when direct discussions do not result in an agreement? What body seems to be best placed to mediate disputes on jurisdiction?

We have mentioned in the introduction to our response that we do not take the view that a case has been made out for a stage that includes a *binding* decision on member-states by a EU body.[55]

Questions 6

Beyond dispute settlement/ mediation, is there a need for further steps in the long run, such as a decision by a body on EU level?

Experience is likely to produce an answer to this question.

Question 7: judicial review

What sort of mechanism for judicial control or judicial review would be necessary and appropriate with respect to allocations of jurisdiction?

We do not agree with the Commission' view that "*the most obvious option for an EU rule on the requirement for legal review seems to be to leave this review to the national court which receives the relevant indictment or accusation after the jurisdiction allocation procedure is successfully completed, without excluding any other remedies that are available under national laws*".[56] Legal challenge is likely to be mounted in the state that is being asked (or is being directed) to give up a criminal prosecution. In cases where jurisdiction is hotly disputed, we doubt that the national court seized of the indictment would readily surrender jurisdiction in all but the rarest of cases. If, weeks or months after the procedure for determining jurisdiction has been completed, the national court decides for the first time that it has no jurisdiction to try the case under domestic law, one wonders why this fact was not established at the outset of negotiations.

Judicial challenge/review might be mounted in the state requested to halt a prosecution, on the grounds of a defect of the process for determining jurisdiction, or there might be attempts to block a trial taking place elsewhere founded on concerns about the treatment of suspects and convicted persons at the hands of the state that wishes to receive the indictment. The extent to which such challenges might arise should not be exaggerated, but what ought not to be minimised is public reaction, and/or political reaction, to outcomes of a EU scheme for resolving conflicts that would be have been different had the cases in question been tried in the state that surrendered jurisdiction.

We doubt that the United Kingdom government would support an EU scheme that limited the power of a UK domestic court to set aside a "jurisdiction application" only if the court finds that there has been abuse of process or abuse of discretion, and only in so far as such a finding is made in accordance with the national laws of the member state that receives the relevant indictment.[57] We would prefer to see a process of conflict resolution emerging by a combination of legislative procedural arrangements based on consensus, and case law.

Question 8: rules demanding the halting of a prosecution

Is there a need for a rule or principle which would demand the halting/termination of parallel proceedings within the EU? If yes, from what procedural stage should it apply?

Part 2, paragraph 7 of the working document raises a number of important issues not wholly embraced by **question 8**.

We have already stated that discussion (in anticipation of a determination as the place of trial) might start prior to the moment a prosecution is launched. This does not mean that the choice of jurisdiction need be made by the time a prosecution is initiated. As the Commission points out [page 31] new findings might change the picture of what at first hand might seem to be the most appropriate jurisdiction. This statement merely underlines the point that determining the choice of jurisdiction in complex cases will often not be straightforward and a final decision might not be made until after an indictment has been drawn up and the investigation is complete (or close to being completed).

The Commission says that parallel proceedings "*such as investigations by the police authorities*" in two or more Member States could even be "*encouraged*" in order to assist the states in obtaining as much information as possible before coming to a decision as to which of them "*is better placed to prosecute the case in question*".[58] We doubt whether this would do much to raise the spirit of co-operation to the level that the Commission seeks. It would surely be preferable for states to

endeavour to determine the most appropriate jurisdiction at the earliest opportunity on the understanding that, should circumstances change, roles might have to be reversed. Thus state "A" might agree with state "B" that the latter is better placed to try D, but state "A" also agrees to co-operate if it receives requests for assistance from state "B". Investigations can be costly and labour-intensive. It is neither desirable nor workable that measures should be enacted that specifies the point at which rules determinative of jurisdiction should be applied (for example the application of the "priority rule").

The Commission propose that "*an indictment may not be brought while a consultation and/or dispute settlement - mediation procedure is still ongoing*".[59] This might lead to undesirable delays in getting a case trial-ready should the state in question be given the green light to initiate a prosecution. The procedural process for determining jurisdiction needs to be flexible. We see merit in a rule that upon the choice of jurisdiction being determined, Member States should undertake not to pursue parallel proceedings save in circumstances specified in EU rules. Member States would also undertake not to revive parallel proceedings save upon the happening of events specified in those rules.

Question 9: third countries

Is there a need for rules on consultation and/or transfer of proceedings in relation to third countries, particularly with parties to the Council of Europe? What approach should be taken in this respect?

For the moment we have little to add to the observations of the Commission in the working document.[60] Suffice to say that this is a complex topic that embraces a number of important topics – some of which are sensitive and/or contentious. We are aware that the EU already cooperates with some non-EU states including (some would say "particularly") the United States of America. The extent to which information and resources should be shared with third countries warrants separate, detailed, and critical examination. As it is, we have only been able to give this subject superficial consideration (and we have not had time to consult our members some of whom have extensive practical experience of the legal systems of some non-EU states). We say, provisionally, that any extension of the process for sharing information or resources with non-EU states must be transparent and Member States will need to be confident that the standards of justice in the legal and administrative systems of the third country are acceptable to Member States.

Question 10: criteria to be used in the choice of Jurisdiction

Should a future instrument on jurisdiction conflicts include a list of criteria to be used in the choice of jurisdiction?

The United Kingdom takes a modern approach to the issue of jurisdiction, and it has significantly broadened the exceptions to the general rule the crimes are presumed to be local: *R v Smith (Wallace*

Duncan) [2004] 2 Cr.App.R.17.[61] Taken very shortly, that case holds that:

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61 And see *Smith No.1* [1996] 2 Cr.App.R.1. See also Part I of the Criminal Justice Act 1993 that has widened jurisdiction in specified cases.

62 In *Libman*, (1985) 21 C.C.C. (3rd) 206 La Forest J said: "The English courts have decisively begun to move away from definitional obsessions and technical formulations aimed at finding a single *situs* of a crime by locating where the gist of the crime occurred or where it was completed. Rather, they now appear to seek by an examination of relevant policies to apply the English criminal law where a substantial measure of the activities constituting a crime take place in England, and restrict its application in such circumstances solely in cases where it can seriously be argued on a reasonable view that these activities should, on the basis of international comity, be dealt with by another country".

63 Working document; page 35.

64 http://www.ejn-crimjust.eu.int/uploadFiles/632471796985023750_prosecution_guidelines_en.pdf

65 Home Office Circular 2/2006; *Law Enforcement Liaison With The Immigration And Nationality Directorate (Ind) To Support Foreign Witnesses Or Covert Investigations.* The circular replaces *Home Office Circular 12/97*. Circular 2/2006 explains that "A consequence of the international nature of organised crime is the number of foreign nationals whose entry to, or deferral of removal from, the United Kingdom is of interest to various UK Law Enforcement Agencies (LEAs). In the main these persons will be witnesses for the Crown in criminal prosecutions, or Covert Human Intelligence Sources."

66 See working document, page 47

67 Utrecht Law Review, pages 100-101, December 2005.

68 Working document, page 52.

69 Care needs to be taken as to what this expression actually means.

70 See the Financial Services and Markets Act 2000

71 Part 10 of the Act; and see the "introduction" to our response.

72 *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*; paragraph 21

73 Paras.25-29 of the introduction to this response.

74 Working document, page 58

75 Working document, page 59

76 32nd report (2004), paragraph 15; *ne bis in idem*.

77 See working document, page 61.

78 At page 117 Vervaele makes the following comments:

> "We can conclude that the final version of the framework decision on the European Arrest Warrant has improved substantially compared to the Commission draft when it comes to the protection offered by the transnational *ne bis in idem* principle. However, the EAW regime also allows for the optional application of the *ne bis in idem* principle in the case of out-of-court settlements. Still, the *ne bis in idem* principle has been largely spelled out in the text, which cannot be said of the duty to respect other human rights in a transnational setting: these must be at least flagrantly violated before they may bar the surrender procedure.46 By contrast, for the principle of *ne bis in idem*, the ECJ has laid the foundation for its transnational application as a human right, which leads to equivalent protection in the common area of Freedom, Security and Justice."

(i) A court in England and Wales will have jurisdiction if either the last act took place in England or a substantial part of the crime was committed here and there was no reason of comity why it should not be tried here.[62]
(ii) Thus, the crime must have substantial connection with the jurisdiction of England and Wales.
(iii) There does not have to be a distinction in relation to the principles of jurisdiction between different crimes. Conspiracy in inchoate crimes and obtaining by deception can be governed by the same general, less rigid approach

We agree with the Commission that because each case must be judged on its facts, no "hard-and-fast" rules relating to jurisdiction should apply.[63] Factors that will typically be relevant appear in Article 8 of the *Council of Europe Transfer Convention* [1972, Council ETS No 073], and in the *Freiburg Proposal on Concurrent Jurisdictions* (p.13); and see the Commission's Working Document, page 35.

Thus factors that are likely to be relevant include [based on the *Freiburg Proposals*]:
(a) Territory where the act has been committed or where the result has occurred
(b) Nationality / residence or official capacity of the suspect / accused
(c) Nationality of the victim
(d) Location of evidence
(e) Appropriate place for executing the sanction
(f) Place of arrest and / or custody
(g) Other fundamental interests of a Member State

We note that Eurojust published guidelines in 2003 that include criteria "which would assist Eurojust when exercising its powers to ask one state to forgo prosecution in favour of another state which is better placed to do so".[64]

In connection with (c) above, we would add that witnesses should not be ignored. A case might involve very many witnesses (resident in territory where the act/result occurred) whose attendance at court might be required. There will be cases where witnesses travelling to a Member State will be required to comply with local immigration requirements. It is conceivable that a state might prefer not to give entry clearance to a particular witness (e.g. on the grounds of national security) and this might be a further matter to be taken into account during negotiations as to jurisdiction. The Home Office (UK) has recently updated its guidance on the procedures for dealing with persons who are subject to immigration control and who are required to give evidence at criminal prosecutions in the United Kingdom (as well as making provision in connection with the deployment of foreign covert human intelligence sources ["CHIS"], and all other matters where covert policing assistance is required in respect of foreign nationals).[65]

In our view, the place of arrest [see (f) above] might be a relevant consideration but the weight to be attached to it has to be judged taking other facts and matters into account. A combination of factors (a), (b), (d) and (f) might be compelling.

We have no objection to any future legislative instrument, concerning conflicts of jurisdiction, including a list of criteria that Member States shall take into consideration when seeking to resolve their differences, but it should also make clear (a) that the list is not exhaustive, and (b) that the instrument does not attach greater weight or significance to any of the criterion specified.

Question 11: criteria other than territoriality
Apart from territoriality, what other criteria should be mentioned on such a list? Should such a list be exhaustive?

We take this shortly because this question has been answered as part of our response to **question 10**.

The list ought not to be exhaustive.

Question 12: list of relevant factors
Do you consider that a list should also include factors which should not be considered relevant in choosing the appropriate jurisdiction? If yes, what factors?

Yes. Factors that might encourage prosecutors to shop for a forum that is most likely to convict the accused, and factors that might encourage "races to the bottom", should be specified in a EU instruments. For the avoidance of doubt, we use the expression "race to the bottom" to describe instances where the choice of jurisdiction is influenced by the level and quality of procedural and evidential safeguards for defendants, and suspects, that exist in member-states (or more accurately, the lack of such safeguards).

Question 13: priority
Is it necessary, feasible and appropriate to "prioritise" criteria for determining jurisdiction? If yes, do you agree that territoriality should be given a priority?

We have answered this question in response to **question 10**. The Commission has used the expression "centre of gravity" to describe the point at which there may be consensus (or ought to be) as to where a criminal matter should be tried. We do not believe that it is either necessary, or desirable, to prioritise criteria for determining jurisdiction.

Question 14: revising the rules on *ne bis in idem*
Is there a need for revised EU rules on *ne bis in idem*?

The Commission points out that Articles 54-58 of the CISA provides limitations and exceptions for the *ne bis in idem* principle, and the United Kingdom has issued a declaration reserving an exception to the application of the principle where (a) the acts to which to a foreign judgment relates took place, in whole or in part, in its own territory, and provided that the offence did not take place (at least in part) on the territory of the contracting party where judgment was delivered, and (b) where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party.[66]

The Bar Council of England and Wales is not best placed to express a view on the question whether either or both those exceptions should be removed but we note that the mutual recognition programme calls for a reconsideration of those exceptions - particularly exception (a). The existence of those exceptions involves issues of policy and politics that are matters for the United Kingdom legislature.

Given that article 29 of the TEU calls for the creation of a single area of freedom, security and justice, and that the application of the *ne bis in idem* principle is no longer relevant only to the domestic legal order of a member state, there is a need (i) for revised EU rules on *ne bis in idem* and (ii) for the principle to be rationalised and recognised transnationally in the EU. Vervaele notes that "national law has not yet produced a common standard concerning the scope and application of the *ne bis in idem* principle in domestic legal orders" and concludes that a common EU standard is needed.[67] We agree with that view.

Vervaele remarks that it is the ECJ which "*through interpretation of the principles of the Community legal order, has to define the legal principles and determine their scope and application*" [page 118]. Our provisional view is that a transnational principle of *ne bis in idem* and a common set of rules for resolving conflicts jurisdiction, will develop by a combination of EU case-law and incremental legislative reform. Recent case law of the ECJ suggests that this process has already begun: *Kogg v*

The Commission [T-224/00], *Gozutok and Brugge* (2003) ECRI5689, *Miraglia* [C-69/03]], *Gasparini* [C-467/04], *Bouwens* [C-272/05], *Kretzinger* [C-288/05], and more recently *Van Esbroeck* [C-436/04; 9th March 2006].

In *Van Esbroeck*, the ECJ made two important rulings on matters of principle:

1. "The *ne bis in idem* principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 in Schengen, must be applied to criminal proceedings brought in a Contracting State for acts for which a person has already been convicted in another Contracting State even though the Convention was not yet in force in the latter State at the time at which that person was convicted, in so far as the Convention was in force in the Contracting States in question at the time of the assessment, by the court before which the second proceedings were brought, of the conditions of applicability of the *ne bis in idem* principle.

2. Article 54 of the Convention must be interpreted as meaning that the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

Accordingly on the facts in that case, the Court ruled that:

> "punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different Contracting States to the Convention are, in principle, to be regarded as 'the same acts' for the purposes of Article 54, the definitive assessment in that respect being the task of the competent national courts".

Question 15: "criminal matters"

Do you agree with the following definition as regards the scope of *ne bis in idem*: "*a decision in criminal matters which has either been taken by a judicial authority or which has been subject to an appeal to such an authority*"?

The authors of the Freiburg Proposals recommend that the *ne bis in idem* principle should define "prosecution" broadly, embracing "*any proceedings with a repressive character. It is not necessary that the offence on which the prosecution is based is qualified as criminal by the legal system which ruled the first proceeding*".

The above formulation therefore goes further than the Commission's paper which does not address the question whether the *ne bis in idem* principle should be applied in areas other than the criminal law.[68] The Commission says that it might be preferable for an instrument to refer to the types of decisions, which can lead to a prohibition on further (criminal) proceedings [p.52].

We are only able to offer a provisional response to **question 15**. Although we are conscious of the reasoning behind the *Freiburg Proposal* [§6(2)(b)], rules need be clear and unambiguous. It is preferable that an instrument should specify the decisions and/or the type of decisions that attract the application of the *ne bis in idem* principle. The list should not be confined to matters taken by a "judicial authority",[69] or which has been subject to an appeal to such an authority. Some decisions bring a prosecution to a close without judicial authority. For example, in England and Wales the police may "caution" offenders. The scheme is statutory in respect of persons under the age of 18 years. Minor offences may attract a caution, but there can be circumstances in which more serious breaches of the criminal law also attract a caution. Cautioning is an out-of-court process following an admission of guilt. A penalty is not imposed. We do not see why a second prosecution, based on facts that led to a caution being imposed should not attract the *ne bis in idem* principle.

Final decisions, which are not characterised as 'criminal' by the legal system of a Member State, arguably ought to attract the *ne bis in idem* principle in some instances. Examples include "fines" imposed by the Financial Services Authority for regulatory breaches;[70] sanctions imposed in respect of 'health and safety' violations (e.g. leading to a charge of manslaughter); a finding of contempt.

Question 16: "final decision"

Do you agree with the following definition of "final decision": *"a decision, which prohibits a new criminal prosecution according to the national law of the Member State where it has been taken, unless this national prohibition runs contrary to the objectives of the TEU*?

The obvious problem about the formula contained in the question is that it accepts the absence of an EU transnational definition of *ne bis in idem*, but it anticipates that Member States will converge towards a defining 'focal point' as the Court's case law develops (we presume that this is what is intended by the words "unless this national prohibition runs contrary to the objectives of the TEU").

We have pointed out that Part 10 of the Criminal Justice Act 2003 now makes provision in England and Wales for an acquittal to be set aside and for a retrial to be ordered if new and compelling evidence against the acquitted defendant has come to light.[71] The Act imposes a number of procedural restrictions and safeguards on the use of this power. The *Freiburg Proposals* advocate making the "reopening" of a prosecution "subject to exceptional circumstances" [see §6(2)(d)]. This is intended to exclude "*merely formal thresholds such as the renewal of the indictment because of formal defects in the first one*".[72]

Without expressing a conclusive view, we see merit in the definition set out in **question 16**, but it is a definition that ought to be the subject of further clarifying provisions and exceptions. For an illustration of potential difficulties that might arise in connection with the definition of "final", see the introduction to our response.[73] We are attracted to the idea that there should be room for the application of the "of principle of accountancy" which should include financial penalties and financial orders (for example fines and confiscation orders, and other financial orders).

Question 17: exceptions to the definition

Is it more appropriate to make the definition of "final decision" subject to express exceptions? *(e.g. "a decision which prohibits a new criminal prosecution according to the law of the Member State where it has been taken, except when…")*

We have addressed this question as part of our response to **question 16**.

Question 18: prior assessment of the merits

In addition to the elements mentioned in question 16 and 17, should a prior assessment of the merits be decisive on whether a decision has an EU wide *ne bis in idem* effect?

We take this shortly because it seems to us that the matters discussed by the Commission at pages 55 and 56 of the working document fall to be considered as part of the consultation/mediation process, and we agree with the Commission that the list of criteria should include the interests of other Member States whose rules may or may not bar a prosecution (or further prosecution) without an assessment of the merits of the case [see **questions 10-12**]. We anticipate that EU case-law will offer guidance as to the future shape of the procedural process for determining jurisdiction and resolving conflicts between Member States, and we say this without overlooking the value of the domestic case-law of Member States.

Question 19: defining the concept of *ne bis in idem*

Is it feasible and necessary to define the concept of *idem*, or should this be left to the case law of

the ECJ?

We have touched upon this issue as part of our response to **questions 14-17**. Our approach is pragmatic. The ideal would be consensus for a transnational definition of the concept of n*e bis in idem* but such literature as exists concerning this question suggests that consensus is a long way off. The alternatives are (1) to do nothing, (2) to modify the rules (in so far as that is achievable), or (3) to support a process of "organic" development that includes EU case law (ECJ and E.Crt.H.R). We favour options (2) and (3). Option (1) is not sustainable.

Question 20: enforcement condition

Do you see any situations where it would still be necessary to retain an enforcement condition, and if yes, which ones? If yes, can the condition be removed if a mechanism for determining jurisdiction is established?

We note that the *Freiburg Proposals* include retaining an enforcement condition albeit on limited grounds [see §7]. However the Freiburg Proposal team did not have the advantage of the views of the Commission[74] and it seems to us (taking these views into account) that the enforcement condition ought not to be retained: issues concerning enforcement should be taken into account at the stage of negotiations/mediation.

Question 21: derogations

To what extent can the derogations in Article 55 CISA still be justified? Can they be removed if a mechanism for determining jurisdiction is established, or would you see a need for any further measures to "compensate" for a removal of the derogations under these circumstances?

This question embraces matters of policy that fall outside the competence of the Bar Council: these are matters for the legislature of each member state to address.

The Commission say that the fact that up to now "*only seven EU Member States saw the necessity to make use of these exceptions illustrates that they are not entirely indispensable*".[75] We do not think that this is a warranted conclusion. The tone of the report of the *House of Commons Select Committee on European Scrutiny* points the other way.[76] As the mechanism for determining jurisdiction develops it is foreseeable that some rules will cease to have practical significance or value, and they can be pruned back at that stage.

Question 22: mandatory refusal of mutual legal assistance

Should *ne bis in idem* be a ground for mandatory refusal of mutual legal assistance? If yes, which EU law provisions should be adapted?

We agree with the Commission that within the single area of justice, *ne bis in idem* should be a ground for mandatory non-execution or non-recognition of requests for mutual recognition or execution of a decision, or for legal assistance.[77] We also agree that provisions such as Article 3(2) and Article 4(3) EAW should be amended to ensure that they have a *ne bis in idem* effect [and see *Krombach v Bamberski* [C-7/98]; and see Vervaele's comments at pages 116/117, Utrecht Law Review, December 2005].[78]

Question 23: third countries

Is there a need for a more coherent approach on the *ne bis in idem* principle in relation to third countries? Should one differentiate between parties of the Council of Europe and other countries?

There is a need for a coherent approach to the *ne bis in idem* principle in relation to third countries, but the reality is that we are a long way from seeing a set of common transnational standards that would enable governments to support a mechanism that did not contain derogations and exceptions of the type we see already: also see our response to **question 9**.

Question 24

Do you agree that with a balanced mechanism for determining jurisdiction,
a) certain grounds for non-execution in the EU mutual recognition instruments could become unnecessary, at least partly? Which grounds, in particular?
b) certain grounds for optional non-execution should be converted into grounds for mandatory non-execution or *vice versa*? Which grounds, in particular?

We have provided a partial response to this question in connection with questions 21 - 22.