SEWEL MEMORANDUM

CRIME (INTERNATIONAL CO-OPERATION) BILL

PART 1

Purpose

1. To set out the proposed handling of those aspects of the UK Crime (International Co-operation) Bill which are within the competence of the Scottish Parliament.

2. The UK Crime (International Co-operation) Bill was introduced in the House of Lords on November 19. The purpose of the Bill is to implement a number of EU agreements on police and judicial co-operation where the UK has outstanding obligations. Third pillar instruments, which include EU agreements on police and criminal judicial co-operation, need to be implemented in the UK through legislation.

3. Certain of the matters that are dealt with in the Bill would be within the competence of the Scottish Parliament. These are summarised in the list below:

- Many of the provisions of Chapter 2 of Schengen, the Mutual Legal Assistance Convention (MLAC) and the Protocol to MLAC are within devolved competence. These measures and provisions relate to the principles and details of how Member States are to give mutual assistance in criminal investigations and proceedings.
- Most of the provisions of the Framework Decision (FD) on freezing orders are within devolved competence. The FD concerns the freezing of evidence and property in the context of criminal investigations and proceedings.
- Extending the offences necessary to cover the requirements of the FD on non-cash means of payment is within devolved competence. This FD is concerned with combating fraud.
- The cross-border surveillance arrangements needed by article 40 of Schengen are within devolved competence. This measure relates to the need to enable police officers from one country, where necessary, to continue their surveillance operations in another country for up to 5 hours where a suspect unexpectedly crosses the border.

4. In addition, the requirements in relation to a number of other international obligations, which are in reserved territory, are provided for in the Bill. These are certain provisions with regard to extradition, terrorism, data protection and driving regulations. A fuller description of the Bill and its contents can be found in Part 2 of this memorandum and a fuller consideration of these issues as they relate to devolved areas is in Part 3. General background information is provided in the annex.

Consideration

5. Given the complicated mix of devolved and reserved provisions in this Bill in relation to matters of international mutual assistance, across a multiplicity of agreements, the Executive considers that it makes sense for these provisions to be implemented as a whole in one piece of legislation. This ensures consistency of approach and that no gaps and loopholes are left, perhaps inadvertently, which criminals could exploit to further their

activities. In the context of these particular agreements, the obligations relate to the details and technicalities of how mutual assistance is to be afforded. Where criminals operate beyond their own borders, but where there is an area of free movement within the United Kingdom as a whole, it is clearly of some operational importance to have a consolidated set of measures, consistent of course with practice and procedure in both Scotland and England, so that the police, for instance, are able to carry out their duties as effectively as possible in combating crime and criminal activity. Other matters are less high profile but no less important, such as more effective transmission of general requests for assistance, both incoming and outgoing, where this might require operational co-operation between the relevant agencies in Scotland and England.

6. Finally, the purpose of this Bill is to implement binding international obligations. There would therefore be little or no scope for the Scottish Parliament to legislate in a way which was significantly different to the provisions contained in this Bill.

PART 2

The Bill

7. The legislation will provide the legal basis to ensure that the UK is fully compliant with its international obligations with regard to the police and judicial co-operation measures highlighted in this memorandum. The Bill is in 4 Parts, as follows:

Part 1: **Mutual Assistance in Criminal Matters**
This Part provides for the necessary mutual legal assistance measures in Schengen Chapter 2 and MLAC and its Protocol, such as direct transmission of requests, the provision of information on bank accounts and transactions where there is a criminal investigation, provision of evidence by videoconference etc. It also makes provision to give effect to the evidence provisions of the Framework Decision on the execution of orders freezing assets and evidence. The mutual recognition between EU Members States of court orders freezing evidence requires automatic enforcement within the UK of orders emanating from other Member States.

Part 2: Terrorist Acts and Threats: Jurisdiction
This Part makes provision so that extra-territorial jurisdiction is taken over certain offences against British citizens and the premises and staff of UK diplomatic missions abroad. It makes provision for extra-territorial jurisdiction when these offences are committed for a terrorist purpose where the offender is a British citizen. It also makes provision to take jurisdiction over attacks on the premises and staff of EU institutions based in the UK.

Part 3: Convention on Driving Disqualification
This Part makes provision so that a driver who is banned in an EU country apart from his own cannot continue driving in another. It also makes similar provision between the rest of the UK and Northern Ireland, which has its own regulatory regime.

Part 4: Miscellaneous
This Part makes arrangements for the implementation of a variety of measures. It provides for the Information Commissioner to enter the premises where the Schengen Information System is located and inspect the system without a warrant. It gives the same powers with regard to the Europol Convention and the Customs Information System, which are similar to SIS. It makes provision to implement article 40(7) of Schengen by amending the Regulation of Investigatory Powers Act 2000 to enable, in specific circumstances, automatic

authorisation of foreign officers' surveillance, ensuring that such activity is lawful and any resulting material is admissible as evidence. It contains a power to extend existing extradition arrangements to meet the requirements of the Schengen provisions on extradition. Finally, it extends the list of instruments of payments covered by section 5 of the Forgery and Counterfeiting Act 1981 to include bills of exchange and credit and debit cards in order to ensure compliance with the FD on non-cash means of payment. It also includes new provision for Scotland in this connection.

8. In addition there are 5 schedules. Schedule 1 makes provision for proceedings where a court has been nominated to take evidence in assisting with foreign requests for mutual assistance. Schedule 2 makes similar arrangements where assistance is to be given by television link or telephone. Schedule 3 makes provision in connection with certain driving offences. Schedule 4 contains minor and consequential amendments and schedule 5 details repeals.

PART 3

Further consideration of devolved provisions

9. While foreign affairs, including international relations, is generally reserved under the Scotland Act 1998 (schedule 5, part I, paragraph 7(1)), the observing and implementation of international obligations is within the competence of the Scottish Parliament in so far as those international obligations relate to otherwise devolved matters. The Crime (International Co-operation) Bill contains provisions that are reserved and others that would be within devolved competence. This section of the memorandum seeks in particular to identify those parts of the relevant agreements which are devolved in relation to the different Parts of the Bill. It is also observed in this context that the UK is already compliant with some of the necessary provisions and thus that not all of these international obligations require fresh legislation.

Mutual Assistance in Criminal Matters - Schengen Chapter 2, MLAC and Protocol - Bill Part 1

10. Most of Schengen Chapter 2, which makes provision for certain of the details of mutual assistance, such as service of procedural documents and direct transmission of requests, is within devolved competence. MLAC and its Protocol are a complicated mix of devolved and reserved. Certain of the articles of MLAC are introductory and others deal with matters of form, such as entry into force, and are therefore not generally relevant in this context. Articles 3 to 8 deal with similar subject matter to Schengen Chapter 2. MLAC replaces and repeals Schengen where appropriate in this respect. Articles 9 to 12, which deal with the temporary transfer of prisoners, hearing by videoconference/telephone and controlled deliveries, are within devolved competence. Articles 13, 15 and 16, which deal with Police Joint Investigation Teams (JITs), and which are within devolved competence, have already been implemented via the Police Reform Act 2002. However, one further aspect of article 13 does require legislation. Article 13(7) deals with the situation where a JIT in another country, with a UK member as part of the team, subsequently needs to initiate investigations in the UK as part of its work. The legislative requirements here relate to the situation where it may prove necessary for the JIT to apply, for example, for a search warrant for execution in the UK. Making provision for application for search warrants in Scotland, is, of course, devolved. Therefore, counterpart provisions to those found in the Police Reform Act 2002 are to be made in the Crime (International Co-operation) Bill for international joint investigation teams in the circumstance described to be able to request

the Procurator Fiscal to apply to the court for a search warrant and for the procedures to be followed in respect of evidence recovered by virtue of such a warrant.

11. As far as the MLAC Protocol is concerned, the provision of information on bank accounts within Scotland is devolved. However, the purpose of the Protocol, as explained in its introduction, is due to the need to have in place additional measures in the field of mutual assistance to tackle, in particular, organised crime, money laundering and financial crime. Matters in relation to money laundering, financial services and the financial markets are reserved.

12. While Articles 17 to 22 of MLAC, interception of telecommunications, are reserved and in any case do not require further primary legislation, it is perhaps relevant however at this point to draw attention to one aspect which will require secondary legislation. These provisions are covered by the Regulation of Investigatory Powers Act 2000, which extends to Scotland. While no primary legislation is required with regard to these articles, a further Executive Devolution Order (transfer of functions etc) will be necessary to enable Scottish Ministers to issue interception warrants in connection with the international mutual assistance agreements, which they cannot currently do in terms of the powers transferred to them under the Transfer of Functions to the Scottish Ministers etc (No 2) Order 2000 under the Scotland Act 1998.

Framework Decision on freezing assets and evidence - Bill Part 1

13. The purpose of this FD 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. The freezing order may relate to property, which for the purposes of the FD is defined as property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents showing ownership. Evidence is defined as objects, documents or data which could be produced in criminal proceedings. Mutual assistance in relation to criminal proceedings and investigations is devolved, and this also applies to matters such as the freezing of evidence and the proceeds of crime. However, these provisions are widely framed to include a very broad spectrum of offences, some of which, such as terrorism, relate to reserved matters.

Terrorist Acts and Threats: Jurisdiction - Bill Part 2

14. Legislation in relation to terrorism is reserved.

Convention on Driving Disqualification - Bill Part 3

15. Legislation in relation to driving rules and regulations is reserved.

Emergency cross-border surveillance and Framework Decision on non-cash means of payment - Bill Part 4

16. Enabling foreign police officers to continue their operations in Scotland and making the possession of falsified bills of exchange and debit cards an offence in Scotland are within devolved competence.

17. The emergency cross-border surveillance provisions concern the UK's obligations under Schengen article 40(2) that deal with urgent cross-border surveillance. Article 40(2) provides that where a person under surveillance crosses the border into the territory of a second contracting state in urgent circumstances, where it is not possible to submit a request for continued surveillance in advance, the second state must ensure that the foreign officers

have authority to continue surveillance for up to 5 hours subject to conditions. The conditions include that the offence which the person under surveillance is presumed to have committed is one of a limited range of serious extraditable offences listed in article 40(7), including murder, drugs trafficking, trafficking in human beings, counterfeiting and illegal use of explosives. The provisions enable the Home Secretary, with the consent of the Scottish Ministers, to make a number of Orders establishing conditions to make lawful foreign surveillance carried out in any part of the UK.

Power of entry for the Information Commissioner and Schengen extradition provisions - Bill Part 4

18. Matters relating to the powers of the Information Commissioner and extradition provisions are reserved.

Scottish Executive
November 2002

Annex

General background information

Schengen

l. The original aim of the Schengen Agreement of 1985 was to abolish checks at common borders between the Benelux countries, Germany and France. The Convention implementing the agreement carne into effect in 1990 and introduced additional measures relating to co-operation between the police, customs and judicial authorities. In 1997, by which time all EU Member States except the UK and Ireland, plus Norway and Iceland, had joined Schengen, the Treaty of Amsterdam incorporated Schengen into the EU treaty structure. At the same time, a Protocol was agreed which allowed the UK and Ireland an opt in subject to the unanimous agreement of the Schengen States. The UK and Ireland are able to exercise this opt in on a selective basis. A further Protocol preserves the UK's system of border controls. In May 1999 the UK applied to participate in the police and judicial cooperation elements of Schengen, some minor drugs provisions and in the Schengen Information System. (The Schengen Information System is a joint information system consisting of a national section in each of the Contracting Parties. Its purpose is to enable those authorities designated by the Contracting Parties to have access to alerts on persons and objects for the purpose of border checks carried out in the country in accordance with national law) The UK Schengen application was approved by the EU Justice and Home Affairs (JHA) Council on 29 May 2000.

The Mutual Legal Assistance Convention and Protocol

2. The EU Mutual Legal Assistance Convention (MLAC) was agreed in May 2000 and its associated Protocol, which focuses in particular on mutual assistance in the areas of organised crime, money laundering and financial crime, was finally adopted in October 2001. MLAC consists of 30 articles, many of which build on Schengen. The Protocol will create reciprocal arrangements between Member States. Where there is a direct replacement or counterpart, then the Schengen article is repealed and replaced by MLAC. This is the case, for example, with sending procedural documents by post, where MLAC article 5 replaces Schengen article 52. The provisions of MLAC are largely procedural and technical and relate to the details of how Member States are to give and receive mutual legal assistance. They also introduce some modernising measures such as the ability to provide evidence by videoconference. An important new development from the Scottish perspective is that it is expected that requests for assistance, both incoming and outgoing, should be sent as near as possible to the point where action requires to be taken, consistent with domestic arrangements. The purpose of these changes is to try to ensure that requests for assistance are dealt with as promptly and effectively as possible. In practical terms, therefore, most requests for assistance involving Scotland, both incoming and outgoing, will be routed through the Crown Office. The current practice is that such requests are routed through the UK Central Authority in London.

EU Framework Decisions (FDs)

3. Framework Decisions are agreements that are binding on Member States as to the result to be achieved but leave the means of implementation to the discretion of the Member State. There are three Framework Decisions to be implemented in the Bill: two

are concerned with approximation - the concept that all Member States should fulfil certain minimum requirements in their domestic provision on key aspects of policy and one - the FD on orders freezing assets and evidence - is a mutual recognition measure.

4. The European Council meeting in Tampere in Finland in October 1999 endorsed the principle of mutual recognition as the way ahead for judicial co-operation in both civil and criminal matters within the EU. The concept of mutual recognition is based on the idea that, where necessary, decisions taken by judicial authorities in one Member State are to be recognised and implemented or enforced by the authorities in other Member States. It presupposes confidence that decisions to be recognised and enforced will always be taken in compliance with the principles of legality, subsidiarity and proportionality.

5. The FD on freezing of assets and evidence is a mutual recognition measure which requires a court in one Member State to enforce an asset or evidence freezing order made by a court in another Member State, without considering the substance of the order and with limited grounds on which enforcement can be declined or deferred. The Bill will implement the FD as far as it relates to evidence, with the asset-freezing provisions likely to follow at a later stage, possibly in tandem with implementation of the draft FD on mutual recognition of confiscation orders. Although this FD has not yet been formally adopted by the JHA Council, the final form has been clearly established.

6. The FD on non-cash means of payment, which was adopted in May 2001, deals with combating fraud involving non-cash means of payment. Most of its provisions are covered by existing common law in Scotland. However, forgery is not in itself an offence. The position is different in the rest of the UK where Part 1 of the Forgery and Counterfeiting Act 1981 applies. In particular, section 5 of that Act provides that the custody or control of certain instruments without lawful authority or excuse is an offence. For the rest of the UK all that is necessary in relation to the FD is to extend the list of instruments of payment covered by section 5. For Scotland there will be new provision to ensure that the position in relation to the FD is equivalent to that in the rest of the UK.

7. The FD on combating terrorism, adopted in June 2002, obliges Member States to introduce anti-terrorism legislation. This FD does not require any change to UK anti-terrorism legislation, which is already comprehensive and thus meets most of the requirements of the FD. Implementation in the UK, therefore, will only involve taking extraterritorial jurisdiction as described in Part 2 of this memorandum.

EU Convention on Driving Disqualification

8. This is a stand alone measure on which agreement was reached in 1998. The purpose of the Convention is to ensure that a driver who is banned in an EU country other than his/her own, cannot continue driving in another country, as he/she can at the moment. It therefore plugs a loophole. At the same time the Bill will allow driving disqualifications made in Northern Ireland to be recognised in the rest of the UK and vice versa, another current loophole.