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Brexit and Scots Law: policing and criminal justice

Maria Fletcher and Leandro Mancano

A. INTRODUCTION

Police and judicial cooperation in criminal matters (PJCCM) is a key dimension of Brexit. Fighting crime is an example of where co-operation amongst member states has proved particularly successful, with many instruments adopted by the European Union (EU) over the years. The United Kingdom's (UK) participation in this area of law has been far from linear, with it enjoying a privileged regime of opt-ins and opt-outs. However, the benefits of this close cooperation for both the UK¹ and the EU² are undeniable, so the future of security strategies in the context of the UK's departure from the EU is a political priority for both sides. The UK's variable position already presents a complicated picture, but when this is mapped on to the domestic constitutional structure, the landscape is ever more complex. While issues like international relations and security are within the competence of the Westminster Parliament³, criminal justice (including policing) and aspects of criminal law are devolved matters. Therefore, the question arises as to what the specific role for Scotland in this area will be in light of Brexit.

In a paper expressing its Brexit negotiating position on security and law enforcement, the UK Government identified three main priorities: continued cooperation to facilitate data-driven law enforcement, through the use of shared databases;⁴ practical assistance for cross-border law enforcement operations;⁵ and cooperation through the EU's specialised agencies, such as Eurojust and Europol. It also stressed the importance of working closely "where justice and policing are devolved [...] as negotiations progress on the UK's new partnership with the EU".⁶ The UK Government has frequently repeated its broad commitment to sustaining the closest possible cooperation with the EU in tackling terrorism, organised crime and other threats to security now and into the future, suggesting, surely correctly, that is in the clear interest of UK and EU citizens to do so.

To understand the potential role for Scotland in the future of PJCCM after Brexit, the peculiar position of the UK in relation to this area of EU law is first outlined (B). Then, the impact of Brexit on UK - and Scotland especially - in relation to criminal justice will be addressed first, by outlining how EU law obligations map (messily) on to the UK, thereby encouraging legal and operational co-operation north and south of the border and second, by reflecting on the impact of the European Union (Withdrawal) Bill should it be adopted in its current form (C). Finally, possible scenarios will be outlined as to how inter-state cooperation in police and criminal justice between the UK and the EU might operate after Brexit. Scotland's role here would be to feed its preferred options into the UK negotiating line (D).

1 HM Government, *Security, law enforcement and criminal justice: a future partnership paper*, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/645416/Security_law_enforcement_and_criminal_justice_-_a_future_partnership_paper.PDF, para 4; H Farrand Carrapico, C Berthelemy, A Niehuss, *Better Safe than Sorry? Brexit and Internal Security*, <https://drive.google.com/file/d/0BxFXUjkeG5j4OGR5UjJqGxONjg/view>

2 V Mitsilegas, "European Criminal Law after Brexit" (2017) 28 *Criminal Law Forum* 219 at 246 ff.

3 Also misuse of drugs, data protection, national security, interception of communications, official secrets and terrorism and extradition.

4 An example is the Regulation on the second generation of the Schengen Information System (SIS II), OJ 2006 L 381/4.

5 The UK government refers to the Prüm Convention on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, now incorporated in OJ 2008 L 210/1, and the European Investigation Order Directive on gathering of evidence, OJ 2014 L 130/1.

6 See fn 1 above, at 14.

B. THE UK PLACE IN EU POLICE AND JUDICIAL COOPERATION

The provisions concerning PJCCM are included in Chapters 4 and 5, Title V (devoted to the Area of Freedom Security and Justice, or 'AFSJ') of the Treaty on the Functioning of the European Union (TFEU).

On the basis of these provisions, and the corresponding ones in previous Treaties, the EU has adopted many instruments, mainly in the following areas: approximation of rules of substantive and procedural criminal law;⁷ instruments of mutual recognition, according to which a judicial order issued by member state (MS) A and addressed to MS B, must be recognized and executed in MS B without further formality, except when grounds for refusal apply;⁸ police cooperation (mainly, information exchange and operational cooperation);⁹ establishment of specialised EU agencies, such as Europol and Eurojust.¹⁰

The UK does not participate fully in EU PJCCM, but currently has a distinctive and privileged position that allows it to pick and choose which instruments to adopt from a default *opt-out position*. To this end, a distinction must be drawn between PJCCM instruments adopted *before* and *after* the Treaty of Lisbon. As regards post-Lisbon measures, according to Protocol 21 to the TFEU, the UK does not take part in the measures agreed under Title V TFEU (so including those on police and judicial cooperation), but it can notify its intention to take either at proposal stage or after adoption.¹¹ As for pre-Lisbon instruments, Protocol 36 TFEU allowed the UK to opt-out *en masse* from all of the PJCCM instruments it had previously signed up to. However, the UK could then notify the Council of its wish to participate in acts which have ceased to apply pursuant to this Protocol.¹² The reasons for this special regime relate to the UK's concerns in terms of sovereignty and loss of control over its criminal justice system.¹³

In December 2014 the UK exercised its right to opt out *en masse* and to *opt back in* to certain individual instruments; it did so in relation to 35 of them. Among these are key instruments to fight against cross-border crime, including the European Arrest Warrant Framework Decision.¹⁴ As for the instruments adopted *after* the Lisbon Treaty, the UK has opted in to quite a number of these since 2009, (and in some cases even since the UK Brexit referendum) such as the 2016 Europol Regulation.¹⁵ Finally, the UK participates in those parts of the Schengen *acquis* relating to police and judicial cooperation in criminal matters, the fight against drugs and the Schengen Information System.¹⁶

C. What Role for Scotland in PJCCM?

Let us turn now to consider how the UK Government's selective adoption of EU PJCCM instruments maps on to the UK's internal legal landscape; far from simple if one considers the existence of not one

7 Directive 2011/93/EU on sexual exploitation of children, OJ 2011 L 335/1.

8 See fn 5 above.

9 Examples of these two categories are the Decision on exchange of information to prevent terrorist offences (OJ 2005 L 253/22), and the Framework Decision regulating the setting up of Joint Investigation Teams (OJ 2002 L 162), respectively.

10 OJ 20L 138/14.

11 Articles 1, 3 and 4, OJ 2012 C 326/296.

12 Article 10, OJ 2012 C 326/326.

13 See J Lindsell, "We should opt out of the EU police and criminal justice measures", Civitas Europe Debate, available at <http://www.civitas.org.uk/pdf/EuropeDebateNo3Justice.pdf>

14 For a helpful summary of this 'saga' see House of Commons Library Briefing Paper (by Joanna Dawson) Number 7650, 24 February 2017, "Brexit: implications for policing and criminal justice cooperation."

15 OJ 2016 L 135/53.

16 For an overview of the system of opt-ins and opt-outs in PJCCM and its legal sources, see S Peers, *EU Referendum Brief 5: How would Brexit impact the UK's involvement in EU policing and criminal law?*, available at <http://eulawanalysis.blogspot.co.uk/2016/06/eu-referendum-brief-5-how-would-brexit.html>

but two systems of criminal justice and the devolution scheme contained in the Scotland Act 1998. Unsurprisingly, the mapping is neither neat or simple but to better understand how the EU legal *acquis* on PJCCM impacts on Scotland/UK we refer to a broad distinction between ‘static’ and ‘dynamic’ EU instruments.

The vast majority of EU criminal justice measures regulate or ‘bite’ cross border Member State activity. Such ‘dynamic’ instruments entail some form of interaction with other Member States or participation in multilateral arrangements or agreements - whether they provide for exchange of data through an EU wide database, operational cooperation between police forces, or judicial cooperation in the form of arrest or evidence warrants. Operationally, Scotland’s law enforcement and judicial agencies are engaged in implementing dynamic EU law instruments and where such instruments have touched upon devolved competences in the past, there has been a willingness to allow Westminster to the lead in implementing in the interest of effective crime-fighting.¹⁷ It is our understanding that such ‘dynamic’ instruments would simply not work in the absence of an agreement between the UK and EU to enable them to continue in some form post Brexit. The UK government, as noted earlier, seems to want to reach such an agreement(s) with the EU. Scotland might wish to add its voice to the UK’s negotiating position here as a stakeholder (both in legal and operational terms). One might hope for a continued co-operative approach north and south of the border.

The second broad type of EU instrument is ‘static’. Such instruments – which lay down minimum definitions of certain (serious and cross border) offences or common minimum procedural safeguards for suspects, defendants and victims of crime - upon implementation, affect only domestic criminal justice systems and in principle could remain on the domestic statute books post Brexit. The UK has opted in to very few of this type of instrument, but where it has, implementation by devolved authorities has taken place given the distinctive criminal justice system in Scotland. Nevertheless, incongruity between the substance of EU obligations and the domestic competence boundaries might require additional co-operation action north and south of the border. A good example is the implementation of the ‘static’ Directive on the right to information in criminal proceedings.¹⁸ In Scotland, many of the requirements of the Directive were already met by the Criminal Procedure (Scotland) Act 1995 and the Criminal Justice and Licensing (Scotland) Act 2010. However, in order to comply with certain provisions of the Directive (relating to timely provision of information about rights for those in custody and the availability of information to enable persons to challenge the lawfulness of their detention or arrest), the Right to Information (Suspects and Accused Persons) (Scotland) Regulations 2014 were adopted by the Scottish Ministers.¹⁹ Such Regulations confer rights on individuals when they are in the custody of Police Scotland *but* they do not extend to individuals who are arrested in Scotland by HM Revenue and Customs (HMRC), since revenue and customs are almost entirely reserved matters. In order to ensure effective application of EU law across the UK, the UK government therefore issued a code of practice regarding (HMRC) criminal justice working practices for suspects in Scotland only, extending to them the EU-derived rights.²⁰

17 For instance, see the Sewel Memorandum on the then Crime (International Cooperation) Bill – “[g]iven the complicated mix of devolved and reserved provisions in this Bill ... 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.”

<http://www.gov.scot/About/Government/Sewel/FirstSession/CrimeInternatCooperation>.

18 Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings. OJ L 142 1.6.2012, p.1

19 Scottish Statutory Instrument 2014 No 159. See relevant provisions of Criminal Justice (Scotland) Act 2016 which implement Directive 2012/13/EU, although still prospective at the time of writing.

20 <https://www.gov.uk/government/publications/criminal-investigation/hmrc-code-of-practice-for-eu-directive-201213eu-the-right-to-information-in-criminal-proceedings>

The need for legal and operational cooperation north and south of the border to ensure effective crime fighting, criminal justice and the appropriate enforcement of rights will not disappear when the UK leaves the EU, but the unifying forces which flow directly from commitments to comply with the EU's legal framework, will. It remains to be seen, what impact, if any this will have on the future of internal cooperation in this field. As noted above, co-operation has been good to date,²¹ and in the interests of security and citizens' safety, this will not easily fall away, whatever the shape or form of future international obligations at play. But trust between authorities at Holyrood and Westminster is at an all-time low in the context of Brexit and the government's proposals as laid out in the European Union (Withdrawal) Bill (EUW Bill) do not help matters.

How would the EUW Bill affect EU PJCCM? It will be recalled, in broad summary, that the EUW Bill proposes to repeal the European Communities Act 1972, convert existing EU law into domestic law on Brexit day and create temporary powers to allow UK (and devolved) Ministers to deal with any deficiencies, so that the legal system continues to function effectively. Somewhat controversially, the EUW Bill (effectively) reserves all 'retained EU law' justified by the view that new common UK frameworks may be required to coordinate policy currently held constant across the UK by EU law. Looking at the category of *dynamic* measures, and as noted above, unless and until an external agreement with the EU (or bilateral agreements) can be made in relation to these measures, the retained EU law simply cannot work. On the likely external scenarios that could enable the UK to participate in multilateral arrangements post Brexit see section D.

With regard to *static* measures which impact on domestic criminal justice systems only, these have led to parallel implementation measures by the devolved authorities in Scotland. As 'retained EU law' this will be automatically reserved according to the EUW Bill but there is arguably no strong case for a common UK wide framework here – after all, there was not one before Brexit and where cooperation is needed to avoid gaps emerging, it has happened. Moreover, there is apparently no need for 'correcting' measures in the two year window provided by the Bill and this retained EU law is unlikely to be affected by the withdrawal agreement. After two years, as retained EU law, the UK government could feasibly decide to repeal the relevant bits of legislation (on the basis that it only existed as a consequence of EU Law). However, there is arguably a strong case for the UK government to make an Order in Council removing the specific pieces of retained EU law adopted by the devolved authorities from the scope of the general restriction, which prohibits the Scottish parliament and government from modifying *all* retained EU law, other than to the extent that they could have modified it pre-Brexit. This would mean these (rights- enhancing) pieces of law could be retained and amended in the future by the devolved authorities.

D. POSSIBLE FUTURE SCENARIOS FOR EU-UK COOPERATION

At the external level, three main scenarios are envisaged post Brexit in relation to the key multilateral or 'dynamic' aspects of the agenda (i.e, mutual recognition, exchange of information and participation in EU agencies).²² The first (and most desirable) scenario is the establishment of EU-UK agreement(s); the second is the conclusion of bilateral agreements between the UK and individual EU member states; the third scenario is one of no agreement, in which case the UK would fall back on relevant instruments

21 For more recent examples of co-operation in the criminal justice field, although not connected to EU law, see the legislative consent memoranda in relation to the Criminal Justice and Courts Bill (August 2014) <http://www.gov.scot/Resource/0045/00458593.pdf> and the Serious Crime Bill (January 2015) <http://www.gov.scot/Resource/0046/00468789.pdf>

22 See House of Commons Justice Committee – Implications of Brexit for the justice System HC 750 – 22 March 2017

adopted within the Council of Europe (CoE) to the extent that they exist (largely in relation to mutual assistance i.e., not operational policing or data exchange).

While these scenarios are not mutually exclusive, it should be made clear that no existing examples of the EU negotiating treaties with third countries in this field goes as far as the relevant EU legislation currently in force.²³ In relation to both judicial co-operation in criminal matters and access to EU databases, close co-operation has to date been confined to third countries which are also full Schengen members; and of course the UK is not.²⁴ Moreover, bilateral agreements are by definition more limited as a tool in the context of *transnational* crime. As for the scenario of falling back on existing CoE instruments, those that do exist in the field are less detailed and less effective than EU law.²⁵ In short, in terms of possible developments, Brexit could result in significant regression for both the UK and the EU in relation to the fight against cross-border crime. Even if, as Theresa May has stated, the UK Government wants a bespoke and deep arrangement around security, crime and policing and even if the UK is indeed starting from a more 'integrated' starting point than other third states in terms of negotiating an agreement, the outcome of any negotiations cannot feasibly lead to a legal relationship that provides more and better cross border law enforcement arrangements than currently exist. The UK has had its cake (the opt-out) and eaten it (2014 mass review in UK interests) already in relation to this particular EU law agenda.

Nonetheless, rigorous negotiations will undoubtedly take place around the UK's continued involvement in dynamic, multilateral instruments and while Scotland's margin for autonomous action is limited here, it is a key stakeholder in ensuring the success of any agreed international commitment. To this end, the decisive factor will lie in the UK Government's openness towards the priorities and positions put forward by the Scottish Government. For the UK it is hard to imagine a future that is as positive as the past in terms of both international and internal cooperation in relation to crime and security.

23 For instance, a variant of the European Arrest Warrant for Norway and Iceland (although not yet in force) and an extradition treaty with the USA.

24 V Mitsilegas, "European Criminal Law after Brexit" (2017) 28 Criminal Law Forum 219 at 242.

25 See on this S Peers, "Mutual recognition and criminal law in the European Union: Has the Council got it wrong?" (2004)

41 Common Market Law Review, 5–36, at 6 ff.