



Law Society
of Scotland

Scottish Parliament Justice Sub-Committee Call for Evidence

Policing regarding their preparations for, and the potential impact of, the United Kingdom's (UK) withdrawal from the European Union (EU) on the Police Service of Scotland

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Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to respond to the Scottish Parliament's Justice Sub-Committee on Policing Call for Evidence regarding the preparations for, and the potential impact of, the United Kingdom's (UK) withdrawal from the European Union (EU) on the Police Service of Scotland (Police Scotland).

When the UK leaves the UK, there will be considerable implications for policing, UK-wide which will come at a time when resources are being fully deployed and required to deal with the ongoing COVID-19 pandemic and in due course during 2021 with the increased need for policing for the 26th UN Climate Change Conference of the Parties (COP26).

With the announcements on a "no deal" at the weekend, there seem to be no agreements agreed and consequently, there is a lack of clarity over what arrangements will replace a number of the key security and law enforcement measures which apply in Scotland. The impact will be considerable though hard to quantify. That impact is of course not restricted to Scotland and what would be of interest is to be aware of what steps have been taken from the Scottish policing perspective to be involved in the relevant meaningful discussions with the UK police forces and policy officials as part of the devolved administrations.

We are aware that the Law Enforcement and Security (Separation Issues etc.) (EU Exit) Regulations 2020 were laid on 13 October 2020 and are currently before the UK Parliament.¹ The regulations deal with the implementation of a number of separation provisions relating to law enforcement and criminal justice. It does not provide any clarity on the replacements. With that background, we have the following comments to make.

¹ <https://statutoryinstruments.parliament.uk/timeline/eb1qyy10/SI-2020/>

General

The UK left the European Union on 31 January 2020. Accordingly, we are now in the transition period until 31 December 2020. Meanwhile we continue to follow the current practices and EU rules. We also continue to be members of various justice and security organisations discussed below. New rules or arrangements will require to take effect on 1 January 2021 when the UK's relationship with the EU ends.

We refer to our response to the Scottish Parliament's Justice Committee's Call for Evidence on "*The implications of the UK's exit from the European Union on policing and criminal justice in Scotland*"² at an earlier stage of the Brexit negotiations. This set out in detail the background and roles of the various EU institutions. We recognise that the arrangements in relation to justice and security matters lie with the UK and that there has been a commitment to discussions with the developed administrations. We outline the specific Scottish interests.

The UK is a multi-jurisdictional state. Justice and security interests overlap between Scotland and the rest of the UK with certain matters being reserved to the UK Government. These include security, official secrets, interception of communication and defence. International relations also lie out with the competence of the Scottish Parliament, though the Scottish Government and Scottish Law Officers do attend relevant meetings at EU level with EU Justice Ministers and EU Prosecutors.

In looking at the role of policing, there is a need to consider the Scottish dimension in relation to criminal justice, given Scotland's own legal and judicial system, criminal laws and law enforcement agencies. These affect the scope of criminal justice, our court structures and procedure, the legal profession, prosecution, all of which involve Police Scotland.

There are significant outstanding questions regarding how criminal justice, policing, law enforcement and security will be dealt with following 31 December 2020. As outlined below, Scotland currently enjoys a strong relationship with justice agencies in countries throughout the EU with significant direct involvement with the European Arrest Warrant (EAW) and other EU information-sharing measures such as Europol, Eurojust, the Schengen Information System II and the European Criminal Records System. These help Police Scotland tackle cross-border crime and terrorism.

We identify what we consider are Police's Scotland's interests and responsibilities in such matters after 31 December 2020. Thereafter as an example, we outline more specifically our concerns over the continuing operation of the EAW and data sharing.

Police Scotland's Interests and Responsibilities

From 31 December 2020, what is essential is for the police is to maintain stability in the law for the public and that the safety and security of individuals should not be prejudiced. This means that there needs to be

² <https://www.lawscot.org.uk/media/359755/scottish-parliament-justice-committee-call-for-evidence-draft-eu-implications-2.pdf>

clarity about the changes that will affect Police Scotland, especially regarding advice that they require to give and in carrying out their operational processes.

The law must be consistent in its application, especially in relation to all aspects of criminal justice and how that is and will be applied. (This is of primary importance in relation to the EAW which we discuss in detail below.)

As an EU Member State, the UK currently enjoys access to agencies such as Eurojust, the European Police Office (EUROPOL), the European Police College (CEPOL), the European Union Agency for Fundamental Rights (FRA) European Network and Information security agency (ENISA).³ The roles played by these agencies should not be underestimated which are important in maintaining the safety of the public. Responsibility and involvement in these systems fall largely but not exclusively into the remit of Police Scotland. These include:

- the management of EU external borders,
- judicial co-operation in criminal matters and police co-operation which include the EAW
- the exchange of security relevant data such as Europol and Eurojust,
- operational co-operation such as Europol and Eurojust
- collecting and exchanging evidence in cross-border criminal proceedings and other forms of assistance.

How that access to these systems post December 2020 is to be maintained is unclear. We stress that there is a need to ensure that there is the closest possible continued co-operation between the UK and EU to continue to deal with the issues arising in relation to policing and the criminal justice system, especially when addressing terrorism and organised crime.⁴ These remain continuing threats to Scotland, UK and EU.

There are significant implications arising for Police Scotland with how that agreement is being reached on what will operate and how these systems are to be managed when all current practices will cease. A seamless transition to avoid delays and problems in accessing the relevant information and databases which are required for future investigations or management functions should be the priority.

With the ongoing global issues of COVID-19, there has been a lack of publicity as to what the arrangements will be. Time is inevitably short; there is now little time to issue practice notes on operating processes or how any exchange of security information is to be maintained in the absence of any agreement with the EU.

³ EU agency dedicated to preventing and addressing network security and information security problems. ENISA also assists the European Commission in updating and developing European Community Agency legislation in the field of Network and Information Security.

⁴ organised crime which includes financial and cyber-crime, human and drug trafficking and smuggling of firearms.

The European Arrest Warrant (EAW)

Extradition being the formal legal process by which a person accused or convicted of a crime is surrendered from one country to another is a reserved matter to the UK Parliament under Schedule 5 Section B.11 of the Scotland Act 1998.

Within the EU Member States, the EAW currently operates to allow any UK police force, including Police Scotland, the prosecution service, including the Crown Office and Procurator Fiscal Service and the National Crime Agency to apply for an EAW, That effects a fast extradition of a suspect from any EU Member State. Similar reciprocal arrangements operate for the EU Member States.

The advantages currently with the EAW are that it allows for faster and simpler surrender procedures and an end to political involvement in extradition procedures.

We understand that there are discussions ongoing to try to avoid the complexity and delay of pre-EAW extradition arrangements. These propose new arrangements for criminal justice cooperation to come into force at the end of the transition period.

There are two main possibilities which include:

Extradition (Provisional Arrest) Bill:

Under paragraph 51 of *The Future Relationship with the EU The UK's Approach to Negotiation*,⁵ it was clearly outlined that the UK would not to participate further in the EAW. What appears to be the intention is for the Extradition (Provisional Arrest) Bill⁶ currently before the UK Parliament is may provide the mechanism for implementing the arrangements which will then be required. Paragraph 7 of the Bill's Explanatory Notes to the Bill specifies:

“should the UK lose access to the EAW, a statutory instrument may be made to extend this arrest power to some or all of the EU Member States.”

The Bill seeks to amend the Extradition Act 2003 (2003 Act) which currently governs extradition in the UK by creating a new power of arrest for extradition purposes. The 2003 Act is in two parts:

Part 1 relates to the current arrangements relating to arrest warrants such as the EAW which will no longer apply. As the EU is as a ‘category 1 territory’, after 31 December 2020, there is a capability gap. The legislation would need to be amended to extend its scope.

Part 2 relates to countries where the UK has formal extradition arrangements based on extradition requests between governments. Under Part 2 of the Bill, that power of arrest will enable law

⁵ <https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu>

⁶ <https://services.parliament.uk/Bills/2019-21/extraditionprovisionalarrest/documents.html>

enforcement officers to arrest individuals without a warrant of arrest from a UK court for certain cases falling within Part 2 of the 2003 Act.⁷

What is important is that the justification why these countries have been selected according to the Bill because “the UK has a high level of confidence in them as extradition partners in their criminal justice systems and the use of extradition.”⁸ (our emphasis)

It is unclear how and on what exact criteria these countries were selected. Accordingly, exactly what criteria would be applied to the Member States is also unclear. It would presumably be with reference to confidence as above and the use of extradition. This will not of course provide any comfort regarding mutual recognition of judicial systems by EU Member States of any warrants issued by the UK.

Many countries have the power to arrest on an Interpol Red Notice and will be able to rely on that power for UK extradition cases if the UK ceases to operate the EAW. In the absence of the power that the Bill affords, there is a risk to the success of UK requests for extradition since some countries can only use this power reciprocally.

Surrender Agreement:

A bespoke deal could be agreed similar to the Surrender Agreement that the EU has with Norway and Iceland.⁹ However no countries outside the EU or EEA currently have extradition arrangements that are equivalent to the EAW. This may replicate to an extent the EAW in scope and form and a designated “public prosecutor” will assume judicial authority. It therefore seems likely that, if the new arrangement were to take effect, EAWs could be received and processed by UK courts without having to be transmitted in a separate form.¹⁰

Scale of the Issue:

In the absence of any agreement, the EAW will “screech to an abrupt halt.”¹¹ How important the EAW is in Scotland, may provide some perspective on the effect of the changes and consequently, on policing.

- In UK, 15,540 requests were made under the EAW process in 2018/19 and 1,412 arrests were related to EAWs and 919 to surrenders.¹²
- In Scotland, COPFS issued 15/16 EAWs respectively in 2015/2016. In 2015/2016, the number of EAWs sent to Scotland were 176/116 respectively.

Effect on the police:

⁷ This power of arrest only affects six countries meantime. These countries, described as category 2 territories are specified in Schedule A1⁷ and include Australia, Canada, Liechtenstein, New Zealand, Switzerland and the USA.

⁸ Paragraph 7 of the Explanatory Notes to the Bill

⁹ [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22006A1021\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22006A1021(01)&from=EN)

¹⁰ <https://crimeline.co.uk/knowledge-base/looking-beyond-the-transition-period-will-there-be-surrender/>

¹¹ <https://crimeline.co.uk/knowledge-base/looking-beyond-the-transition-period-will-there-be-surrender/>

¹² <https://www.gov.uk/government/publications/extradition-provisional-arrest-bill-impact-assessment>

The loss of the EAW will have significant effects as little information exists as to how to handle the validity of existing EAWs and for EAW requests after 31 December 2020. Issues that will arise include:

- What will happen to EAWs issued before the end transition period when the requested person has not yet been arrested? All EAWs are invalid after 31 December, unless the person was arrested before this date for the purposes of executing an EAW, in which case they will be honoured.
- Whether the effect of the EAW will be preserved since some jurisdictions (Germany, Austria and Slovenia) have declared that they will no longer surrender their own nationals to the UK. That means if a national from one of these countries commits a crime in the UK and subsequently leaves, it will only be possible to prosecute them if the authorities in their own country are willing to do so.¹³
- As the Court of Justice of the European Union is the judicial authority for EAWs and the UK has does not want to be bound by the CJEU, how will any disputes regarding EAWs be resolved?

At present, with EAW's ceasing to apply after 31 December 2020 and without agreement, the position reverts to domestic law and the European Convention on Extradition 1957 (ECE)¹⁴ will apply to all new extradition requests.

We understand that the UK has issued Interpol Red Notices and ECE requests in respects of all wanted persons that it seeks.¹⁵ A red notice is an international wanted persons notice, but it is *not* an arrest warrant. The ECE has no time limits and does not apply to political or military offences with requests to be made through diplomatic rather than judicial channels.

Requests will involve a longer and more complex process. Extraditions will be more difficult with implications for policing in respect of the practical effects alone.¹⁶

Data Exchange

Data exchange is of crucial importance for any future cooperation agreement in criminal justice and policing. We understand that data transfer implications will potentially affect:

- Europol Information System (EIS)
- Passenger Name Records (PNR)
- Prüm, a mechanism that allows for the searching of DNA profiles, fingerprints and vehicle registration information against other member states' databases
- Second Generation Schengen Information System (SIS II)

¹³ <https://commonslibrary.parliament.uk/brexit-next-steps-the-european-arrest-warrant/>

¹⁴ multilateral extradition treaty to which all EU member states are parties

¹⁵ <https://crimeline.co.uk/knowledge-base/looking-beyond-the-transition-period-will-there-be-surrender/>

¹⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759760/28_November_EU_Exit_-_Assessment_of_the_security_partnership__2_.pdf

- European Criminal Records Information System (ECRIS)

If data cannot flow freely between UK and EU, the UK cannot access information from EU databases, with participation in Eurojust and Europol specifically being unable to be secured. How it is planned for that access to be maintained remains unclear as what was envisaged through negotiations to such data had been access, on a more limited basis. This is essential to support our work on fighting crime and terrorism and to be able to participate, even as a third country, in and to the work of Europol and Eurojust.

However, to access to data bases, the UK need to “*safeguard high standards of data protection*” and those standards should be substantially equivalent to those set out in the EU. Just whether the UK 's standards meet those required for the EU is not clear.

The Management of Data Contained in the European Union's Information Systems establishes a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System (EU Reg. 816/2019) through which third countries may be able to participate and share data with the EU. There is be no direct access to such data. A two steps approach is required with (i) confirmation that something is available and (ii) the submission of a request to receive this data from the Member State concerned.

What is certain is as for the EAW the processes will be unclear at the date of exit and longer to secure information if that is possible, with implication where Scotland may require to plan and to develop a fast response to any security threats.



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