



Law Society
of Scotland

Consultation Response

House of Commons Home Affairs Committee

EU Policing and Security Issues Inquiry

29 November 2016



Introduction

The Law Society of Scotland is the professional body for over 11,000 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.

This paper is a submission to the Home Affairs Committee inquiry into EU policing and security issues.

The Society welcomes the UK Government's intention to opt-into the new European Police Office (EUROPOL) Regulation. We note the letter from Rt Hon Brandon Lewis MP, Minister of State for Policing to the Chair of the Committee dated 14 November 2016¹, and the Explanatory Memorandum dated 14th November 2016² in respect of the new European Police Office (EUROPOL) Regulation: Post Adoption Opt-In.

General Comments: Stability in the Law – a main priority

The need to maintain stability in the law, repeal legislation and prepare new legislation to fill in gaps arising from leaving the EU will comprise a significant part of the domestic legislation which is passed at or following withdrawal. Bearing in mind the public interest in maintaining consistent application of the law, concerning aspects of the freedom, security and justice legal framework, recognition and enforcement of citizens' rights, CJEU pending cases, immigration, residence, citizenship and the impact of the UK's exit on the devolved administrations it is clear that a wholesale repeal of the law which has emanated from the EU over the years would be problematic, difficult to implement, and unduly disruptive.

The area of freedom, security and justice covers policy areas from the management of the EU's external borders to judicial co-operation in civil and criminal matters and police co-operation this includes asylum and immigration policies and the fight against crime, terrorism, trafficking, cyber-crime, organised crime and sexual exploitation of children. The UK retained an opt in facility under the Amsterdam Treaty in 1997 and has opted into (or in the case of Schengen-related measures has not opted out of) a number of

¹ [Letter from Rt Hon Brandon Lewis MP, Minister of State for Policing to the Chair of the Committee dated 14 November 2016](#)

² [Explanatory Memorandum dated 14th November 2016](#)

measures including the European Arrest Warrant (EAW). We would advocate that careful consideration should be given to maintaining such aspects of the area of freedom, security and justice either on a transitional basis or as part of the withdrawal agreement or as part of the future relationship with the EU. The primary objective of judicial security and police cooperation is the safety of the citizen, as a guiding principle there should be no change to the law which would prejudice the safety and security of the individual.

We propose that domestic legislation is passed to ensure a “soft landing” in terms of legal change. In principle laws with direct effect (Treaties and Regulations) will cease to apply once the withdrawal agreement is in place, the UK is no longer a member of the EU and the European Communities Act 1972 has been repealed. However it would be inappropriate to include in any new law the wholesale repeal of direct effect provisions without making some alternative arrangements. These arrangements should ensure clarity and stability in the law and prevent legal uncertainty. Similarly EU law with indirect effect (Directives) has already been transposed into domestic legislation. This has been through primary or secondary legislation either at UK level or through the Scottish Parliament. That law will continue to be part of the UK and Scots Law until and unless it is specifically repealed. Many statutory instruments deriving from EU directives have been enacted under Section 2 of the 1972 Act and so would be repealed once the Act is repealed unless explicitly retained.

In order to reassure and create stability for citizens, business and consumers we believe it is vitally important that effective transitional arrangements are in place to ensure that all necessary provisions continue to apply unless and until they are specifically repealed and that alternative provisions are put in place. It is likely that much of what the UK decides to retain will depend on the outcome of the withdrawal agreement and a new relationship between the UK and the EU.

Options for change

EU measures have been developed to deal with cross-border situations, for example where it is suspected that a criminal organisation is operating in several EU countries, or that a suspected criminal is hiding in a different EU country. In such cases, cooperation is necessary. EU law and policy in this area is intended to strengthen dialogue and facilitate action between the criminal justice authorities of EU countries. We have set out below a number of examples illustrating the need to maintain access to EU databases, information exchange systems, agencies and framework for cross-border co-operation framework: -

a. Access to agencies

As an EU Member State the UK enjoys access to all of the 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). The roles played by these agencies should not be underestimated. The agencies participate in the EU wide investigation of crime and subsequent prosecution by way of data sharing measures, identifying whereabouts of a suspect and the obtaining of a European Arrest Warrant.

The UK Government should as part of the withdrawal agreement negotiations consider giving priority to maintaining access to all agencies, in addition whilst it would be desirable for the UK to retain the ability to influence the policies and operational activities of those organisations this could be a challenge following withdrawal from the EU.

The ability to share information quickly and co-ordinate operations with other law enforcement agencies through Europol is key to detecting, disrupting and detaining criminals across borders.

b. Europol

We note that the Government has laid an Explanatory Memorandum³ in Parliament setting out the Government's intention to opt into the Europol Regulation⁴. In terms of the Code of Practice on the JHA opt-in, the Explanatory Memorandum will be considered by both the European Scrutiny Committee in the House of Commons and the European Union Committee in the House of Lords, which could take up to eight weeks⁵.

The new Regulation repeals the existing Council decisions which set out the framework for establishment and membership of Europol. Membership of Europol would continue until such time as the Regulation were repealed, although there is provision for the Commission to review and evaluate the working practices of the agency every 5 years⁶. The UK Government must indicate by January 2017 if it is to opt-into the new Regulation. Failure to do so would mean the UK will no longer be a member Europol from 1 May 2017. This will have implications for the ability of police to share information.

c. Schengen Information System (SIS)

The SIS facilitates the real-time sharing of information and alerts between the relevant authorities in participating countries, it is in operation in all EU Member States⁷ and Associated Countries⁸ that are part

³ [Explanatory Memorandum dated 14th November 2016](#)

⁴ [Regulation \(EU\) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation \(Europol\) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA](#)

⁵ [Letter from Rt Hon Brandon Lewis MP, Minister of State for Policing to the Chair of the Committee dated 14 November 2016.](#)

⁶ Article 68.

⁷ EU Member States that are part of the Schengen Area are most EU Member States, except for Bulgaria, Croatia, Cyprus, Ireland, Romania and the United Kingdom.

of the Schengen Area. Special conditions exist for EU Member States⁹ that are not part of the Schengen Area, of which the UK is one. On the 13th April 2015 the UK gained access¹⁰ to the Schengen Information System and operates it in the context of law enforcement cooperation, which allows the UK to exchange information with Schengen countries for the purposes of cooperating on law enforcement.

The SIS has been implemented by virtue of a Regulation¹¹ and a Council Decision¹². Each state using the SIS is responsible for setting up, operating and maintaining its national system and its national Supplementary Information Request at the National Entry (SIRENE) Bureau, which in the UK is the National Crime Agency. We understand that the UK police forces have linked the Police National Computer (PNC) to the SIS. The European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA), is responsible for the operational management of the central system and the communication infrastructure. The European Commission is responsible for the general oversight and evaluation of the system and for implementing measures such as the governing entering and searching data.

The UK has full access to SIS for criminal justice and law enforcement. For example, the following specific alerts are available: alerts for persons wanted for arrest for extradition; alerts for missing persons; alerts for witnesses or for absconders or subjects of criminal judgments. Access to the SIS has resulted in access to all information on live European Arrest Warrants, and information in respect of previous convictions of individuals who have offended within the EU and out with the UK.

We understand that some non-EU member states, such as Norway, participate in the SIS. The UK Government will should give careful thought for the need for continued access to the SIS, particularly if an EAW style framework for extradition to and from EU Member States is agreed as part of the Withdrawal Agreement or the post leaving relationship between the UK and the EU.

d. The European Arrest Warrant (EAW)

The EAW is applied throughout the EU and has replaced extradition procedures within the EU's territorial jurisdiction. Judicial procedures have been designed to surrender people for the purpose of conducting a criminal prosecution or executing a custodial sentence. Following a withdrawal from the EU it is possible that, without the trust and mutual recognition between EU Member States that underpins the European Arrest Warrant, the process for the surrender of individuals will be more expensive, complex and time

⁸ Switzerland, Norway, Liechtenstein and Iceland.

⁹ Bulgaria, Croatia, Cyprus, Ireland, Romania and United Kingdom.

¹⁰ <https://www.gov.uk/government/news/uk-joins-international-security-alert-system>

¹¹ [Regulation \(EC\) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System \(SIS II\)](#) and [Regulation \(EC\) No 1986/2006 of the European Parliament and of the Council of 20 December 2006 regarding access to the Second Generation Schengen Information System \(SIS II\) by the services in the Member States responsible for issuing vehicle registration certificates](#)

¹² [Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System \(SIS II\)](#)

consuming and would require a new treaty to underpin any alternative arrangements. Extradition proceedings would become more prolonged and, in custody cases creating significant additional cost. Costs would not only apply to the UK but also to the EU Institutions and the other EU Member States.

Lack of the EAW framework is likely to create tensions with Member States where law enforcement agencies will be hampered in assisting them. There is the possibility that an isolated incidence could create significant tensions e.g. where an individual is suspected of an act of terrorism elsewhere in the EU subsequently flees to the United Kingdom which results in a prolonged extradition process due to the unavailability of the EAW.

Scotland has been making use of the EAW. The Crown Office and Procurator Fiscal Service in Scotland recently published¹³ figures relating to the use of the EWA showing that between 2011 and May 2016 there had been 48 extraditions to Scotland pursuant to EAWs, and 49 EAWs issued by Scotland during the same period.

In terms of options for re-establishing some form of mutual recognition in criminal matters with countries in the EU following a UK exit, one option could be reversion to the European Convention on Extradition 1957¹⁴ ("ECE 1957"). Such an approach is likely to result in increased burden for all agencies of the criminal justice system then having to operate on a more cumbersome extradition process resulting in a high probability of delay and the possibility of less applications being made and processed.

All existing EU member states have ratified the ECE 1957¹⁵, although the majority of member states have negotiated a set of reservations. The main differences between the EAW and the ECE 1957 are: -

- The EAW can be described as a transaction between judicial authorities where the role of the executive is removed. By contrast, applications under the ECE 1957 would require to be made via diplomatic channels with Secretary of State approval being required at a number of points in the process for example, the final surrender decision, and consideration of bars to extradition.
- The streamlined EAW framework imposes strict time limits at each stage of the process. By contrast the ECE 1957 does not impose the same strict time limits, if an ECE 1957 approach were adopted then then it is likely that extraditions between the UK and EU members states will take longer.
- Article 6 of the ECE 1957, provided that states could refuse an extradition request for one of their own nationals. For example under ECE 1957, where a national of Germany, or another state committed a crime in Scotland and fled to that country, that country could refuse extradition on grounds of nationality, in those circumstances the Lord Advocate would lose jurisdiction to prosecute that individual in Scotland. Careful consideration will be required to ensure that UK

¹³ <http://www.crownoffice.gov.uk/foi/responses-we-have-made-to-foi-requests/38-responses2016/1373-european-arrest-warrants-13-july-2016-r013208>

¹⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117678/european-convention-extradition.pdf

¹⁵ https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024/signatures?p_auth=jrAnfYMX

prosecutorial authorities are able to continue to exercise their functions in respect of an alleged crime within their jurisdiction, without losing the ability to have the individual returned to UK, and without losing jurisdiction to bring prosecution in respect of the alleged offence. The EAW framework abolished the exception to extradite own nationals based upon the concept of EU citizenship.

If the ECE 1957 model were adopted, the UK would need to amend its law. Part I of the Extradition Act 2003 designates the Category 1 territories which are all other member states of the European Union and which is the United Kingdom's implementation of the European Arrest Warrant framework decision. Part 2 of the Act is concerned with extradition to all other countries which have an extradition treaty with the United Kingdom. For example, post-withdrawal the UK could amend Part II of the Extradition Act 2003 to designate all existing EU member states as Category II jurisdictions. In addition to the UK having a treaty with each state, each of those designated Category II jurisdictions would likely require to enact their own domestic legislation to implement and recognise any reciprocal arrangements.

Pre-EAW framework, the UK and Ireland had an arrangement based upon the ECE 1957. Following the introduction of the EAW, the Republic of Ireland has repealed all pre-existing extradition arrangements with the UK prior to the adoption of the European Arrest Warrant Framework decision. The Irish Extradition Act 1965 provides for extradition between Ireland and countries other than the UK. This legislation is modelled on the 1957 Council of Europe Convention on Extradition to which Ireland is a party. Part III of the 1965 Act dealing with extradition between Ireland and the UK was repealed by the Irish European Arrest Warrant Act 2003. Accordingly, if the UK withdraws from the European Arrest Warrant Framework completely and adopted the ECE 1957 framework with EU member states, Ireland would require to amend its domestic law to give effect to the arrangements.

As an alternative to the ECE 1957 process, the UK could consider an alternative option of negotiating a series of bilateral treaty agreements with EU Member states which is likely to be a long and complex process. In addition to negotiating new extradition treaties, the UK would need amending and implementing legislation. EU member states would subject to their constitutional requirements need to make amendments to their domestic law to reciprocate any negotiated arrangements.

In 2012, the UK Government made a positive decision to opt into the EAW framework. At the time then Home Secretary May¹⁶ outlined some of the reasons in support of the decision to opt-into the framework, for example it being a streamlined process making it easier to bring serious criminals back to the UK to face trial or serve sentences. We believe those reasons for opting into the EAW are still sound and the UK Government should give careful consideration to an approach which avoids disengagement from the European Arrest Warrant process, particularly if alternative options could have a detrimental effect on the administration of justice. There should be no change to the law which would prejudice the safety and security of the individual.

¹⁶ <https://hansard.parliament.uk/Commons/2014-04-07/debates/14040711000001/JusticeAndHomeAffairsOpt-Out>

e. The European Investigation Order (EIO)

The UK Government should prioritise the implementation of the directive¹⁷ regarding the European Investigation Order in respect of criminal matters. The UK Government opted-in to this measure and the timescale for transposition into domestic law expires on 1st May 2017. The directive allows member states to carry out investigative measures at the request of another member state on the basis of mutual recognition. These investigative measures could, for example, include interviewing witnesses, obtaining of information or evidence already in the possession of the executing authority, and (with additional safeguards) interception of telecommunications.

f. Criminal Procedure

In respect of the treatment of accused persons, the EU published a ‘roadmap’ on procedural rights in 2009 to ensure that the basic rights of suspects and accused persons are sufficiently protected¹⁸. A number of measures followed with proposals to further strengthen procedural safeguards for citizens in criminal proceedings. Of those measures, the UK opted into and transposed the Directives on the Right to Interpretation and Translation in Criminal Proceedings¹⁹ and the Right to information in Criminal Proceedings²⁰.

The Government undertook careful consideration and made positive decisions to opt-into both Directives. We believe that the rationale for opting into these measures remain, notwithstanding the vote to leave the European Union, therefore the Government should avoid any proposal which results in a reversal or erosion of the opt-in and, which diminishes the right of the individual.

¹⁷ [Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters](#)

¹⁸ [Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings](#)

¹⁹ [Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings](#)

²⁰ [Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings](#)



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