



**THE LAW SOCIETY
of SCOTLAND**
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Briefing

Scottish Government Debate

**UK Referendum on EU Membership: Impacts on Justice and
Security in Scotland**

The Law Society of Scotland

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 Law Society of Scotland has been considering the future of EU-UK security and police co-operation, justice and home affairs in light of the outcome of the referendum to leave to the European Union.

General Comments: Stability in the law

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 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.

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are in place to ensure that all necessary provisions continue to apply unless and until they are specifically repealed and that alternative domestic provisions are put in place.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 the new relationship between the UK and the EU.

Options for change

European Union (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

The UK Government should consider giving priority to deciding whether or not to opt in to the new European policing co-operation framework¹ in order to continue access to Europol. The new Regulation² 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 years³. 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 States⁴ and Associated Countries⁵ that are part of the Schengen Area. Special conditions exist for EU Member State⁶s that are not part of the Schengen Area, of which the UK is one. On the 13th April 2015 the UK gained access⁷ 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 Regulation⁸ and a Council Decision⁹. Each state using the SIS is responsible for setting up, operating and maintaining its national

¹ [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](#)

² [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](#)

³ Article 68.

⁴ 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.

⁵ Switzerland, Norway, Liechtenstein and Iceland

⁶ Bulgaria, Croatia, Cyprus, Ireland, Romania and United Kingdom.

⁷ <https://www.gov.uk/government/news/uk-joins-international-security-alert-system>

⁸ [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](#)

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 consuming and would require a new treaty to underpin any alternative arrangements. Extradition proceedings would become more prolonged and, in custody cases creating

⁹ [Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System \(SIS II\)](#)

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 published¹⁰ 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 2012, the UK Government made a positive decision to opt into the EAW framework. At the time then Home Secretary May¹¹ 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.

e. The European Investigation Order (EIO)

The UK Government should prioritise the implementation of the directive¹² 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

¹⁰ <http://www.crownoffice.gov.uk/foi/responses-we-have-made-to-foi-requests/38-responses2016/1373-european-arrest-warrants-13-july-2016-r013208>

¹¹ <https://hansard.parliament.uk/Commons/2014-04-07/debates/14040711000001/JusticeAndHomeAffairsOpt-Out>

¹² [Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters](#)

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 protected¹³. 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 Proceedings¹⁴ and the Right to information in Criminal Proceedings¹⁵.

The UK 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 UK Government should avoid any proposal which results in a reversal or erosion of the opt-in and, which diminishes the right of the individual

For further information and alternative formats, please contact:

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¹³ [Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings](#)

¹⁴ [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](#)

¹⁵ [Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings](#)