

“The crucial issue will be the terms of the new relationship between the UK and the EU which would take effect at the end of the transition period. Different options exist: an agreement which would in effect preserve JHA arrangements as they stand; a more selective agreement, preserving some areas of agreement but not others; or a more radical form of withdrawal which would see the loss of cooperation across a range of areas.”

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The Repatriation of Competencies After Brexit: Justice and Home Affairs

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THE REPATRIATION OF COMPETENCIES AFTER BREXIT: JUSTICE AND HOME AFFAIRS

PROF STEPHEN TIERNEY AND DR ALEXANDRA REMOND

I. Context: Paper and workshop

This paper addresses Justice and Home Affairs (JHA) in the context of Brexit. Its particular point of focus is the repatriation of competences and the powers of the devolved administrations.

A workshop on Justice and Home Affairs in devolved context was held at the University of Edinburgh on Friday 15 June 2018, at which these issues were explored by a range of stakeholders from the civil service, the solicitors' profession, the bar and the academy. This paper reflects the deliberations of participants in the workshop while not attributing any views to any of the participants.

The paper forms part of the research project 'The Repatriation of Competences: Implications for Devolution', funded under the ESRC UK in a Changing Europe initiative (ES/R001308/1).

II. Background: Justice and Home Affairs within the European Union

Justice and Home Affairs (JHA) has two dimensions: civil justice, and police and criminal justice (PCJ).

When the European Communities were founded, JHA was seen as the preserve of Member States: an integral dimension of national sovereignty. But cross-border cooperation has always been important, as reflected in the Brussels Convention 1973 which established rules on jurisdiction and enforcement of civil court judgments. A move towards more formal cooperation in criminal matters came with the Schengen Agreement, signed in 1985, but this only applied to its signatory states.

The Treaty of European Union/ Maastricht treaty ('TEU') of 1992 introduced the intergovernmental 'Justice and Home Affairs' (third) pillar to the EU's treaty architecture. This was a step change – the EU treaties themselves now embraced JHA, making cooperation a commitment of Union membership itself. Policy in this area did however still require unanimity among Member States, and so member state sovereignty remained central to JHA policy development.

The Treaty of Amsterdam (1999) moved the Schengen system more fully under the umbrella of the EU's legal framework, giving the EU jurisdiction over border controls, asylum, immigration and related areas of civil law. The Treaty of Lisbon (entering into force in 2009) marked the latest significant step. This moved areas such as judicial cooperation in criminal matters and police cooperation into the JHA 'pillar', and effectively made the whole JHA system a mainstream part of EU law, subject to the EU court system and scrutiny by the European Parliament.

Lisbon set the wheels in motion for deep integration across the JHA¹ area and now provides the main framework both for EU jurisdiction and for further member state cooperation.

¹ JHA can also be referred to as the EU's Area of Freedom, Security and Justice (AFSJ)

A. JHA coverage

JHA under the EU includes both civil justice and police and criminal justice (PCJ). These areas are widely framed however and also now include border controls, immigration and asylum.

1. Civil justice: key areas

The cross-border dimension of civil justice cooperation across the EU is extensive. The main areas include:

- Jurisdiction: rules on 'conflict of laws' and the jurisdiction of courts in civil matters, including commercial law. This seeks to streamline legal proceedings and prevent the same case being heard in more than one legal system. Key instruments include:
 - Rome I Regulation (593/2003) which addresses contractual civil and commercial disputes
 - Rome II Regulation (864/2007) which covers applicable law in non-contractual obligations (e.g. anti-competitive practices, intellectual property and product liability).²
- Enforcement: mutually agreed rules that allow for the reciprocal enforcement of court judgments across jurisdictions.
 - The Brussels I Recast Regulation – Brussels Ia – (1215/2012) covers jurisdiction and recognition and enforcement of judgments and applies between EU Member States.
 - Insolvency Regulation (1346/2000 and 2015/848) covers jurisdictional rules and applicable law and recognition of insolvency proceedings in cross-border insolvencies.
 - The small claims (861/2007 revised by 2015/2421), enforcement order (805/2004) and order for payment (1896/2006) Regulations facilitate means for obtaining decisions on claims that can be enforced throughout the EU.
- Family law where it involves cross-border issues. This deals mainly with law relating to children: questions of custody, access, maintenance etc.
 - The Brussels IIa Regulation (2201/2003) covers jurisdictional rules in matrimonial and parental responsibility matters and the recognition and enforcement of judgments.
 - The Maintenance Regulation (4/2009) covers rules for determining which court has jurisdiction for, and the recognition and enforcement of, maintenance decisions.

² Unlike the Brussels Regulations (see below), these do not require reciprocity and so can simply be incorporated into UK law. House of Commons, Justice Committee, Implications of Brexit for the justice system, Ninth Report of Session 2016-17, 15 March 2017, pp15-16.

- Other common approaches: agreements on immigration and, for example, the ‘Common European Asylum System’ (CEAS). Example:
 - EU Service Regulation (2007/1393/EC) covers rules for serving documents in other EU countries.
 - The Dublin system and non-binding resolution on asylum matters together set out the allocation of responsibility for processing asylum claims.

2. Policing and criminal justice

- Eurojust and Europol: these agencies operate broadly in the delivery of law enforcement across the EU. [C.f. key institutions below].
- Mutual recognition: as in the civil law area there is mutual recognition by Member States of one another’s judicial decisions. Example:
 - Council Framework Decision 2008/675/JHA allows for existing convictions in the Member States of the European Union to be taken into account in the course of new criminal proceedings. This was adopted in the UK by the Coroners and Justice Act 2009 (E/W/NI), and the Criminal Justice and Licensing (Scotland) Act 2010.
- European Arrest Warrant (EAW): a specific example of this mutual recognition is the shared commitment to enforcing judicial decisions across jurisdictions by way of the EAW. This allows for the arrest of suspects and fast track extradition from one Member State to another.
- Asset control: another area of shared enforcement concerns freezing or confiscating property related to criminal enterprises. This can involve asset control in one Member State while the suspect is prosecuted in another. Examples:
 - Council Framework Decision 2005/214/JHA covers mutual recognition to financial penalties and recovery of penalties (over €70) by one Member State issued in another member state. It was implemented in England, Wales and Northern Ireland in 2009 through the Criminal Justice and Immigration Act 2008, with some minor amendments made in 2011. In Scotland it was implemented through the Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) Order (SSI 2009/342).
- Exchange of Information: law enforcement agencies benefit from rules allowing for exchange of information on criminal suspects, criminal investigations, criminal records and missing persons. Related areas include data protection and the complex relationship between exchange of personal information and its protection. Example:
 - Council Framework Decision 2009/315/JHA (the Framework Decision) provides the principles for the system, defining the obligations of the Member States and laying down the framework for the development of a computerised system of exchange of information.

- Cross-jurisdictional offences: there are also agreements on substantive law where crimes are cross-jurisdictional, including rules on appropriate penalties for money laundering. Example:
 - The Council Decision 2008/852/JHA on a contact-point network against corruption which established a network of contact points within Member States who are responsible for preventing and fighting corruption, and who, through cooperation, also act at the EU level. Each Member State designated up to three organisations as members. The UK is the only member state to have five representatives in recognition of the fact that policy is devolved: HM Inspectorate of Constabulary, Independent Police Complaints Commission, Serious Organised Crime Agency, Police Complaints Commissioner for Scotland, Police Ombudsman of Northern Ireland.
 - Council Framework Decision 2008/913/JHA covers racism and xenophobia by means of criminal law. This EU instrument did not require the UK to add to its existing domestic legislation.³
- Rights of the criminal suspect: agreements also cover the rights of the accused, setting standards on procedural rights which are more detailed than those provided for by, for example the European Convention on Human Rights. Examples:
 - Taking of Evidence Regulation (2001/1206) covers cross-border processing of requests to take evidence.
 - Legal Aid Directive (2002/8) covers rules for the grant of legal aid in cross-border disputes.
 - Regulation on protection measures in civil matters (606/2013) covers recognition and enforcement of protection measures, including for victims of domestic violence (this example is also relevant across a range of other issues).

B. Key institutions and agencies

Europol

The European Union Agency for Law Enforcement Cooperation. Based in The Hague. The UK is among the top five Member States adding information to the Europol database.⁴

Europol also works with non-EU partner states and international organisations (e.g. Norway, US). This includes operational co-operation partners (US, Switzerland) with some information and intelligence sharing. These partners however cannot oversee the evolution of the agency. Non-member cooperation is generally slower and less intensive.⁵ Strategic co-operation partners (e.g. Russia) do not partake in the sharing of information.

³ HM Government, Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union, July 2013, pp110-129.

⁴ HM Government, Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union, Cm 8671, 9 July 2013, p.46, para 83.

⁵ Brexit: future UK-EU security and police cooperation', House of Lords European Union Committee, 7th Report of Session 2016–17, HL Paper 77, 16 December 2016 p17.

Europol also provides a secretariat for the CARIN network⁶ – secured message exchange facilities (SIENA). The UK has two Asset recovery offices and CARIN offices (one in the Serious Crime Agency (SOCA), until 2013 when it was then merged with the National Crime Agency, and the Scottish equivalent – SCDEA – now part of Police Scotland).⁷

- *Europol Information System (EIS)* pools information on suspected and convicted criminals and terrorists from across the EU.
- *European Union Agency for Law Enforcement Training (CEPOL)* was located in England and is now situated in Budapest. It aims to develop, implement and coordinate training for law enforcement officials.

Eurojust

A justice co-operation agency, ‘tasked with supporting and strengthening coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States.’⁸ It is based in The Hague.

Member-States can put forward a request for mutual legal assistance (MLA) and European Arrest Warrants. Eurojust also provides technical, legal and financial support to Joint Investigation Teams (JITs). It can reimburse costs incurred by Member States and by third States involved in a JIT.

The UK was involved in about 18% of new cases opened by Eurojust in 2011 and 2012.⁹

Within Eurojust, Scotland’s investigation and prosecuting authorities use both formal and informal methods of contact to request legal assistance. A national member is based permanently at Eurojust in the Hague. In the UK there is also an Assistant National Member representing the Scottish legal system. This representative is “a senior Crown Office prosecutor and works in close interaction within the Scottish prosecution service and with the UK Desk”¹⁰. An officer from Police Scotland is also based at Europol in The Hague.

⁶ Informal network of law enforcement and judicial practitioners, specialists in the field of asset tracing, freezing, seizure and confiscation. <http://carin-network.org/>

⁷ Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union CM 8671 – p49 para. 99.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf. In regards to queries about the existence of ongoing investigations or name/personal data checks made through Eurojust, the UK National Member also contacts law enforcement. These are regarded by the Liaison Bureau as police enquiries and as such the correct route is via existing police channels including the Europol secure SIENA channel (Liaison Bureau to Liaison Bureau). The Scottish Assistant is a member of the Crown Office and Procurator Fiscal Service (COPFS). Therefore, he has access to COPFS's management systems. This involves the access to all prosecution documents collected in a given case.

⁸ Brexit: future UK-EU security and police cooperation’, House of Lords European Union Committee, 7th Report of Session 2016–17, HL Paper 77, 16 December 2016. P21, para. 70.

⁹ HM Government, Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union, Cm 8671, 9 July 2013, p.60.

¹⁰ Council of Europe, Evaluation Report (Declassified), 2002, pp.14-16.

[http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/6thRME/6th%20RME%20Report%20on%20UK%20-%20Declassified%20\(1%20April%202014\)/6RME-UK-2014-04-01-Declassified_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/6thRME/6th%20RME%20Report%20on%20UK%20-%20Declassified%20(1%20April%202014)/6RME-UK-2014-04-01-Declassified_EN.pdf)

The Crown Office and Procurator Fiscal Services (COPFS) participates in the UK Government's "Eurojust Oversight Board". There is also a separate Scottish Government contact in the European Justice Network.

Frontex

The EU's border and coastguard agency was established in 2005, focused on securing the EU's external borders. The UK is not a full participant (outside Schengen) but attends Frontex Management Board meetings as an observer without the right to vote. The UK also participates in some common operations on an ad-hoc basis.

Frontex has also worked with Eurosur since 2013: an information-exchange framework sharing intelligence on the EU's external borders between Member States.¹¹ The UK and Ireland participate in cross-border sharing of surveillance data through Article 19 of Regulation 1052/2013 which allows Eurosur to work on a bilateral or multilateral basis, but such sharing agreements remain limited to certain types of information.

The UK government has expressed the wish to retain post-Brexit this form of voluntary – ad-hoc – participation in Frontex and broader cooperation.¹²

Schengen Information System II

The Schengen Information System is a 'live' database containing information about individuals and objects of interest to EU law enforcement agencies. Participant countries have in place a Supplementary Information Request at the National Entry bureau known as SIRENE.

The UK International Crime Bureau within the NCA is the UK Central Authority for European Arrest Warrants (EAW).¹³ All UK forces, including Police Scotland and the Police Service of Northern Ireland, have access to the full range of SIS II data.

The National Police Chiefs' Council in the UK has its own Criminal Records Office (ACRO) processes for request for information in England and Wales. Police Scotland and the Police Service of Northern Ireland process their own requests.

Part 1 of the Extradition Act 2003 (the '2003 act') implements the European Arrest Warrant (EAW) framework decision. This operates in relation to Scotland in line with Scotland's particular criminal legal system and system of law enforcement.

Article 34 alerts are invoked by member state to allow for the circulation of a person's data across the SIS II (this can be used to trace witnesses and victims).

¹¹ House of Lords Research Briefing, 'Leaving the European Union: Frontex and UK Border Security Cooperation Within Europe', 24th of April 2017, p1.

¹² Ibid, p2.

¹³ In 2000, the United Kingdom gave effect to the Schengen provisions on police cooperation, judicial cooperation in criminal matters cooperation and the Schengen Information System (SIS) under Council Decision 2000/365/EG.

The responsibility for extradition procedures for category 2 countries falls with the Metropolitan Police Service Extradition Unit in England and Wales, the International Cooperation Unit in Scotland, and the judges in the Laganside Court in Northern Ireland.¹⁴

The European Criminal Records Information System (ECRIS) has been in operation since April 2012. It provides a platform to exchange information on convictions between EU Member States. It can also be used for other purposes such as employment vetting and immigration matters.

The EU databases operate to EU data protection standards and safeguards against their abuse lie partly in the EU's Charter of Fundamental Rights.

The Prüm Decisions provide for the automated exchange of DNA, fingerprints and vehicle registration data among EU Member States.

Originally subject to the UK's 2014 block opt-out, the government eventually adopted the EU Passenger Name Record (PNR) which allows for a large systematic collection, use and retention of PNR data on air passengers.

The obligation of carriers to transmit Advance Passenger Information (API) data to border agencies is regulated by EU law under a 2004 Directive.

C. Funding

The agencies also provide allocated funds to cover the costs associated with cross-border cooperation.

The Internal Security Fund (ISF) budget for 2014-20 was EUR 3.8 billion, established to promote the implementation of the Internal Security Strategy, law enforcement cooperation and the management of the Union's external borders. The UK and Ireland however do not participate in the implementation of the ISF-Borders instrument.

The UK participates in the Rights, Equality and Citizenship Programme for the period 2014 to 2020: the Asylum, Migration and Integration Fund (AMIF) – the UK's allocation under this fund is €370m for the period 2014-20.¹⁵

The UK also received contributions from the Refugee Fund,¹⁶ the Integration Fund, and the Return Fund.

UK-based organisations could also access funding on a competitive basis during the period 2007-2013 under the Prevention of and Fight against Crime (ISEC)¹⁷ programme, and the Terrorism & other Security-related Risks (CIPS).¹⁸

¹⁴ <https://www.app.college.police.uk/app-content/investigations/european-investigations/schengen-information-system/#top>

¹⁵ HM Government, Asylum Migration and Integration Fund List of Actions allocated funding, July 2017, p2.

¹⁶ Managed by the UK Border Agency (€13,643,432 in 2013)

¹⁷ <https://ec.europa.eu/home-affairs/financing/fundings/security-and-safeguarding-liberties/prevention-of-and-fight-against-crime>

¹⁸ <https://ec.europa.eu/home-affairs/financing/fundings/security-and-safeguarding-liberties/terrorism-and-other-risks>

III. JHA and Devolution

Northern Ireland has distinctive legal traditions, and its own specific concerns in relation to policing and criminal justice. Wales is gradually developing what may become a discrete jurisdiction, but essentially its legal system is shared with England. Scotland's legal structure is especially distinctive. Scotland has its own legal system, which makes JHA a particularly important area for Scotland, especially in the devolved context. Scotland is bound by the same opt-in and opt-out decision as the rest of the UK.

Scotland's system of civil and criminal law vary considerably from the common law of England. It also has its own court system, system of judicial appointments, legal profession, a distinctively organised prosecution service and police force.

Policing and criminal justice and most areas of civil law are devolved under the Scotland Act 1998. Therefore, any significant changes to current patterns of UK cooperation with the EU in the JHA areas after Brexit could have considerable implications for Scots law and the effective operation of the justice system in Scotland.

It is worth noting that the operation of the Scottish Parliament is carefully circumscribed in relation to EU law. The Scotland Act 1998 (s 29(2)(d)), stipulates that an Act of Scottish Parliament is not law so far as it is incompatible with EU Law (see also s 57 re Scottish Ministers).

A. Scotland and the UK within JHA

The UK government considered that not all EU justice and internal security measures are in its national interest. This approach to JHA, along with its common law system and geographical and constitutional characteristics have resulted in the UK achieving unique and tailored arrangements in this sector as part of its EU membership.

Although Scotland has its own legal system and network of courts, the UK Supreme Court, as the highest court in the UK, has civil jurisdiction in relation to Scotland and criminal matters can be considered by way of devolution matters. Furthermore, by section 28 (7) of the Scotland Act 1998 the UK Parliament can legislate on matters that have been devolved but will not normally do so without the consent of the Scottish Parliament. Accordingly, devolution involves some level of shared responsibilities in the JHA area, rather than a clear separation of functions or jurisdictions. This was applied for instance around security cooperation, such as the Criminal Finances Act 2017.¹⁹

Scottish and British governments cooperate in the field of justice and internal security through formal and informal intergovernmental channels. While foreign policy is clearly a UK reserved matter, there is a memorandum of understanding between the British and Scottish Governments that includes a Concordat on the Co-ordination of EU policy.²⁰ Scottish Ministers can give their input where there are

¹⁹ Example: <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/103353.aspx>

²⁰ Paragraphs B4.17 - B4.21 of the Concordat on Co-ordination of EU Policy / Scottish Government, European Relations Division, Implementing EU Obligations in Scotland - A guide for Scottish Government officials, March 2016.

particular Scottish interests at stake.²¹ There is also a Scottish Representation Office in Brussels to voice Scottish interest in the EU arena.

B. Policing in the UK and the devolved territories

In Scotland, Scottish law enforcement and judicial agencies are in charge of implementing EU law instruments when they fall within devolved competences. Indeed, most Police and Criminal Justice matters are devolved under the Scotland Act 1998²² as well as some aspects of civil law. There have been parallel implementation measures by the devolved authorities in Scotland but also a willingness to allow Westminster to take the lead in implementing these, in the interest of effective crime-fighting.

Nonetheless, where incongruity between the substance of EU obligations and the domestic competence boundaries exists, additional cooperation between Scotland and the rest of the UK might be required.²³ For instance, the EU “static” Directive on the right to information in criminal proceedings is applied in Scotland through the Criminal Procedure (Scotland) Act 1995, the Criminal Justice and Licensing (Scotland) Act 2010, and the Right to Information (Suspects and Accused Persons) (Scotland) Regulations 2014. Fletcher and Mancano point out that 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.”²⁴ To ensure that EU law is effectively applied across the UK, the UK government issued a code of practice for HMRC criminal justice applicable to suspects in Scotland, extending the EU-derived rights.

Academic literature has pointed out increasing divergence in policing between England and Wales, and Scotland and Northern Ireland respectively²⁵, however they are primarily a result of devolution rather than the process of applying EU laws and regulations.

Within civil law, the Scottish courts are responsible for interpreting and implementing EU rules, including enforcing judgements from other Member States within the principle of reciprocal enforcement. The Scottish Central Authority is responsible for processing applications and duties set out in EU regulations such as those concerning parental child abduction. Scotland deals directly with outgoing and incoming EAW.²⁶

²¹ House of Commons Foreign Affairs Committee 2013 House of Commons Foreign Affairs Committee, 2013. Foreign policy considerations for the UK and Scotland in the event of Scotland becoming an independent country. Sixth Report of Session 2012–13, HC 643.

²² Within the PCJ area, rules on national security, interception of communication, extradition, and terrorism for instance are reserved (Scotland Act 1998, Schedule 6, Part II, B8 and B11).

²³ Maria Fletcher and Leandro Mancano, ‘Brexit and Scots Law: Policing and Criminal Justice’, *Edinburgh Law Review* 22, no. 1 (1 January 2018): 141–42.

²⁴ *Ibid.*

²⁵ e.g. Gerry Mooney et al., ‘Scottish Criminal Justice: Devolution, Divergence and Distinctiveness’, *Criminology & Criminal Justice* 15, no. 2 (1 April 2015): 205–24, <https://doi.org/10.1177/1748895814543533>; Richard Garside, ‘Criminal Justice since 2010. What Happened, and Why?’ *Criminal Justice Matters* 100, no. 1 (2 January 2015): 4–8, <https://doi.org/10.1080/0268117X.2015.1061331>.

²⁶ ‘Brexit: Impact on the Justice System in Scotland’, Scottish Parliament, SPICe Briefing, 27 October 2016, SB 16/83, p14.

Turning to other parts of the UK, the Northern Ireland Act 1998 provided for the devolution of Policing and Justice, although this happened over time. In 2001, the Northern Ireland's Royal Ulster Constabulary was re-named the Police Service of Northern Ireland and it is now accountable to the Northern Ireland Assembly. April 2010 saw the creation of the Department of Justice in Northern Ireland.

Access to EU agencies and alignment with EU regulations are particularly important in Northern Ireland because of its shared border with the Republic and the free movement of individuals within the Common Travel Area. The Intergovernmental Agreement on Co-operation on Criminal Justice Matters (July 2005 and April 2010), provided a structured framework to enhance and develop more effective North-South co-operation and co-ordination on criminal justice matters.

In Wales, justice and policing are not devolved. The Silk Commission (Silk 2014) recommended that operational police powers be devolved to the Welsh Assembly. Plaid Cymru proposed an amendment to the Wales Act 2018 to devolve responsibility for justice and policing to Wales but this was not accepted by Parliament. There has been a degree of decentralisation in policing in 2012 in both countries however.²⁷ There is also an ongoing debate about reforming the Welsh justice system.²⁸

IV. The UK's approach to JHA: Opt out and opt in

Generally the UK has sought to exempt itself from systematic moves towards closer EU cooperation on JHA, preferring to select specific areas in which it seeks to build formal links with EU partners.

Initially, the UK gained an opt-out from the relevant provisions of the Amsterdam Treaty when the Schengen system was brought within mainstream EU competence (Ireland and Denmark did the same).²⁹ This relieved all three states from participation in the passport-free Schengen arrangement. With Ireland, the UK also negotiated a Protocol in relation to the Amsterdam treaty's provisions on civil law, meaning that the EU's JHA rules would only apply to the UK and Ireland by way of opt in on a case-by-case basis.

The situation however became more complex after Lisbon. The Lisbon Treaty gave the UK an option, within a five year transitional period, to opt out of all PCJ measures adopted before that Treaty entered into force. The UK Government decided to adopt this block opt-out (covering some 130 matters), notifying the EU of its intention in July 2013. Protocol 21 to the Lisbon Treaty however also extended the Amsterdam Treaty *opt-in* procedure to include PCJ matters. Therefore, at the same time as adopting the block opt-out, the UK negotiated individual opt-ins on 35 measures that had been agreed in earlier treaties.

A consequence of the opt-in option offered by both the Amsterdam and Lisbon treaties is that the UK's involvement in justice and related matters (covering both civil and PCJ matters) has grown steadily, albeit on a largely de facto basis, in recent years.

²⁷ Yarwood, R. & Wooff, A. (2016). Policing the countryside in a devolving United Kingdom. In Donnemeyer, J. F. (Ed.). The Routledge international handbook of rural criminology, 375-386. Taylor & Francis (Routledge).

²⁸ <http://sites.cardiff.ac.uk/wgc/2016/09/12/justice-in-wales-new-report-sets-out-reform-proposals/>.

²⁹ A special protocol confirmed this exemption from Schengen. But it was possible to opt-in by request, if the proposed arrangements were unanimously approved by the Council.

Currently, the UK participation in the field of police cooperation and judicial cooperation in criminal matters covers: cooperation between Member states authorities, information and data exchange, European agencies/bodies membership, and procedural harmonisation over specific criminal offences.

Indeed, the UK has played an active role in voting on a number of matters coming within the JHA field. An Institute for European Studies paper concludes that ‘the UK has actively influenced decision-making processes and EU policy outcomes in the JHA field, even when it would not be bound by the EU policies.’³⁰ Furthermore, the political culture of cooperation has been very positive. The Justice and Home Affairs Council (one of the configurations of the Council of the European Union) has tended to be successful at building consensus, even through informal channels. This reflects the salience of these issues not only at the practical level of court administration, but in the broader need to build common approaches in areas that involve security, external borders and the economic and social implications of mass migration.

The UK has opted out of following immigration directives:

- The Blue Card directive which covers some high-skilled immigrants to the EU
- The Directive on Family Reunification
- Seasonal Workers Directive
- Directive on Intra-Company Transferees
- Long-term Residents Directive.

The House of Lords EU Select Committee advised in favour of opting-in to the Long-term Residents Directive and the Family Reunification Directive in order to strengthen the rights of the UK’s economic migrants.³¹ In 2012, the UK introduced further restrictions for third country nationals (TCNs) before they can apply for family reunification (e.g. minimum income, language skills etc.), increasing divergence with the EU common policy on this matter.

The UK participates in some measures to help control illegal immigration such as the Carriers Sanctions Directive (2001) and Readmission Agreements with non-EU Countries,³² but not in others such as the 2008 Return Directive which obliges the removal or illegal of irregular immigrants and limits the amount of time for pre-deportation detention. The UK is also not a participant in the Employer Sanctions Directive regime which prohibits employment without permission to work but also offers some labour rights (e.g. right to back-pay).

The UK has also adopted the recast EURODAC Regulation which requires Member States to record the fingerprint data of asylum-seekers in order to identify where they entered the EU. It also allows Member State’s law enforcement authorities and Europol to request data.

³⁰ ‘The UK in Justice and Home Affairs: the engaged outsider’, Institute for European Studies, Policy Brief, April, 2016.

³¹ House of Lords European Union Committee 2005: para 102.

<https://publications.parliament.uk/pa/ld200506/ldselect/ldeucom/58/5808.htm>

³² The UK and Ireland have a special status in this regard under the Treaty of the European Union <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11992M/PRO/UK> . Specific report on this policy available from European Parliament:

[http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/596843/IPOL_BRI\(2018\)596843_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/596843/IPOL_BRI(2018)596843_EN.pdf)

Since 2017, it has also applied the Europol Regulation to which the UK government ultimately opted-in (Decision 2009/371/JHA). Europol's new regulation introduces a number of changes³³ to the structure of the organisation, e.g.:

- Making it easier for Europol to set up specialised units to respond immediately to emerging terrorist threats and other forms of serious and organised crime
- Providing clearer rules for the European Counter Terrorism Centre (ECTC) and the European Union Internet Referral Unit (EU IRU)
- Increasing data protection safeguards, democratic control and parliamentary scrutiny.

V. Brexit and JHA

It is not yet clear what impact Brexit will have upon the UK's relationship with the EU in the area of JHA.³⁴ So far the UK has signed a transition agreement with the EU which will cover the period between exit of 29 March 2019 and 31 December 2020.³⁵ It has also passed the European Union (Withdrawal) Act 2018. But no agreement has been reached on the terms of the UK's exit or on the terms of the new relationship between the UK and the EU.

It is therefore also not clear what the implications will be for the Scottish legal system or for the other devolved administrations. Two issues are in play: the nature of the UK's withdrawal, and the way in which returning competences will be reallocated across the UK's territorial constitution. We address each in turn.

Much remains unclear because as yet we do not know what the terms of the UK's withdrawal from the EU will be. The first point to consider is timescales. Three dates are relevant: Brexit day itself on 29 March 2019; the end of the proposed transition agreement (31 December 2020), and the commencement of any new relationship agreement(s).

There seems to be the political will across the EU – as reflected in the agreement reached in December 2017 – for continuity in arrangements during the transition period which could mean no significant change in the current UK arrangements in relation to JHA until the end of 2020 at least. The crucial issue therefore will be the terms of new relationship between the UK and the EU which would take effect at the end of the transition period. Different options exist: an agreement which would in effect preserve JHA arrangements as they stand; a more selective agreement, preserving some areas of agreement but not others; or a more radical form of withdrawal which would see the loss of cooperation across a range of areas.

The impact of Brexit upon devolution remains unclear. Some matters are currently reserved and will revert to UK level. Matters become much more complicated when we consider the nature of the relationship between existing devolved competences and those areas of EU jurisdiction which fall in whole or in part within devolved areas. The EU (Withdrawal) Act 2018 will govern the reallocation of

³³ <https://www.europol.europa.eu/newsroom/news/europols-new-regulation>

³⁴ 'Brexit: future UK-EU security and police cooperation', House of Lords European Union Committee, 7th Report of Session 2016–17, HL Paper 77, 16 December 2016.

³⁵ 'Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union.' TF50 (2017) 19 – Commission to EU 27, 8 December 2017.

returning EU competences, and much will remain to be worked through by way of intergovernmental relations in consequence of this act.

A. Recent Developments

The UK government first set out its position on security cooperation in September 2017 in the ‘future partnership’ paper. It expressed the desire to maintain the UK’s existing policing and security capabilities, as part of its future relationship with the EU.³⁶ The UK government however stated that the UK would no longer be subject to the direct jurisdiction of the CJEU, which could pose challenges if it seeks to continue membership of key agencies linked to JHA.

Transitional arrangements

The jurisdiction of the CJEU is likely to continue to apply during transition period. The agreement secured in December 2017 provides for ongoing data exchange and the use of the European Arrest Warrant and the EU’s proposals for a “transition period” also suggest extending the full EU *acquis*, with a proposed end date of December 2020. It provides that the UK will not be involved in the decision-making of agencies during this period.³⁷

A transitional judicial cooperation agreement in criminal/policing matters will be needed in regards to all pending procedures, such as EAW and EIO already undertaken, or already issued European protection orders. Transitional provisions will also be needed as regards the pending criminal proceedings started before the exit of the UK “since the EU legislation provides for extensive procedural rights of the suspected and accused and of the victims which rights should be respected until the relevant proceedings come to an end.”³⁸

Family reunification

According to the Civil Liberties, Justice and Home Affairs Committee of the European Parliament, ‘the rules of Directive 2003/86 will apply to ‘British citizens already living in the EU25 with third-country national family members.’ In Denmark and Ireland national law may apply to them. In EEA states and Switzerland, which are not bound by Directive 2003/86, family reunification for third-country national family members of British citizens will be a matter of national law after Brexit.³⁹ But longer term issues remain to be resolved.

³⁶ HM Government, Security, law enforcement and criminal justice: a future partnership paper, 18 September 2017

³⁷ See Joint Report above, and also House of Commons Home Affairs Committee, UK-EU security cooperation after Brexit, 14 March 2018, p11-12.

³⁸ EU Parliament - Committee on Civil Liberties, Justice and Home Affairs, Contribution on the UK withdrawal from the EU (Brexit), February 2017, pp7-8.

³⁹ IPOL, The implications of the United Kingdom’s withdrawal from the European Union for the Area of Freedom, Security and Justice, 2017, pp13-14.

VI. Reflections from the Workshop

In this section we summarise the main discussion points from the June Workshop discussion. The Workshop focussed upon process issues, substantive issues, types of new agreement and devolution.

A. Process issues

There was general agreement that the UK has cooperated well with the EU on JHA issues, and that this has also worked effectively in the devolution context, particularly in relation to Scotland which has its own particular jurisdictional issues.

Cooperation has been smooth particularly in the civil sphere and on conflict of laws matters. These tend not to be high level political issues, but rather are matters that work out jurisdictionally. It is anticipated that this level of judicial cooperation across jurisdictions should be able to continue relatively unproblematically after Brexit.

One issue is the necessity to continue (or secure new) agreements with third countries, for example in the family law area. This is essential given the level of international engagement across the civil law/family law areas.

In terms of enforcement of judgments – again it will be important for the UK/Scotland to be able to continue with existing enforcement arrangements or to put new arrangements in place.

Depending upon the terms of any exit/new arrangement agreement, it remains to be seen how, if at all, judgments of the CJEU will continue to be enforced. The Withdrawal Act addresses the status of CJEU jurisprudence, but this could change depending upon any new agreements.

The Supreme Court has given warnings about politicizing the UK courts, and so clarity will be crucial to allow the courts to exercise discretion in its usage of CJEU case law in a way that immunises the courts from political controversy.

Process issues in the JHA area are likely to narrow down to enforcement and how judicial authorities in the UK, at EU level and across the member states can work together.

A related factor is legal culture. UK and Scottish courts have long-established precedents based upon EU law and interaction with related areas such as human rights law. It is hard to see a radical roll-back from these rules and legal principles in the short to medium term.

Enforcement raises the issue of forum shopping: one question that cannot be answered as yet is whether the UK will continue to be seen as a safe enforcement sector. Economic issues will no doubt play a role in how litigants address this issue.

A broader issue for the courts at both UK and devolved levels will be how to interpret 'retained EU law' in the Withdrawal Act, what status to give it and its compatibility with constitutional doctrines, in particular parliamentary sovereignty.

In general, JHA was considered to be one of the least contentious issues at stake in Brexit, so a more pragmatic approach to continuing cooperation should be possible. On the other hand there is a risk that it is not a priority in the search for a larger Brexit deal and important areas are at risk of neglect.

B. Substantive issues

Data protection

This was discussed at length, particularly in light of a recent EU directive, which has now been given effect in UK law. The crucial nature of this area was emphasised in relation to trust and the sharing of information. Without continuing agreement it would be effectively impossible to do business across a range of areas. Voluntary compliance might work well enough in certain sectors, but there needs to be reliance upon enforcement methods; there will also be a need to track and follow EU law over time, in light of new law and shifting interpretation of regulations.

Police and Criminal Justice/Borders

In this area, the role of the executive, including executive discretion, remains crucial. This should make the prospects for cooperation better since the UK Government has made it clear it wants to retain as much cooperation as possible in this area. However, unlike the civil area where much can be done by the courts on their own, the need for political agreement here is crucial.

There was general agreement that there are good prospects that cooperation on the ground will continue on the basis of established relationships and the mutual benefits that flow from cooperation.

Specific areas could raise problems. On the European Arrest Warrant, the prospect of Brexit is already being used in extradition cases to suggest that uncertainty threatens the rights of accused persons. If agreements are not put in place for continued cooperation, then issues of trust could affect cooperation in relation to arrests and transfer of prisoners. Human rights issues could also feed into actions which seek to resist arrest warrant enforcement or extradition.

Other areas where new agreements will be needed include asset control/confiscation of assets/anti-money laundering provisions. Again there will be a need to seek replication of EU-wide regimes. This will include mutual agreement on penalty levels to reflect existing agreements among EU member states.

One sticking point could be information sharing because states cannot rely only on informal relations here. There will need to be a continuation of agreements if this is to work properly. The police have made it clear that they need the information sharing arrangements to continue. There is no precedent for non-EU states to be part of data sharing systems in the criminal justice area, so again new agreements will be needed.

One difficult issue is that information sharing tends to be enforced by the CJEU, so again agreement on mutual enforcement would most likely also be needed to make up for the lack of an agreed final arbiter.

At the moment the areas of cooperation/enforcement at EU level tend to be procedural rather than substantive in criminal justice. But the longer term trajectory is not clear. One complication would be if the EU begins to move into areas of more substantive agreement/EU competence within the civil or criminal law sphere. If it does, what implications would this have for third countries like the UK? What

scope would exist for cooperation by third countries? Would the UK want to be part of this? Could it do so on a case by case basis?

Migration

Policy issues in relation to immigration and citizenship remain to be resolved between the UK and the EU. Legal advisers will require clarity in order to advise individuals and families on the right to stay.

C. Types of Agreement

What types of agreement will follow after Brexit? How might existing cooperation continue during any transition period, and how could this period be best used to secure longer term agreements? It was widely agreed that there is unlikely to be much change in JHA cooperation during any transitional period, and that the main challenges will come in trying to arrive at new relationship agreements.

In terms of a new UK-EU relationship, will the UK fall back on existing international treaties? In the areas of civil justice and conflict of laws that would not be entirely problematic, but in the policing/criminal justice area, the EU has now an established, bespoke set of arrangements which would require UK buy-in to maintain cooperation.

Will the UK seek to secure a comprehensive agreement with the EU in relation to civil and criminal cooperation more broadly, rather than sector by sector or country by country agreements? This is the most likely approach as part of a new relationship agreement. Questions were raised as to how likely such an outcome is in the context of continuing uncertainty over 'hard' and 'soft' Brexit options.

In the absence of a comprehensive agreement, will the UK seek bilateral treaties with member states? This could be very complex and could leave gaps.

D. Devolution

There are policy areas within EU competence where differences already apply across the UK. One is procurement. After Brexit, there is a risk that more than one procurement regime operating at UK level will make the policy sector very complex internally while also complicating the terms of any new agreements with the EU.

The asymmetry of UK devolution will also be a significant factor, particularly as Wales edges closer to the possibility of its own jurisdiction. The workshop discussed how this could serve to complicate internal justice arrangements and in particular new general or bilateral agreements at the European level.

The impact of the European Union (Legal Continuity) (Scotland) Bill, is as yet uncertain, its legality currently under consideration by the UK Supreme Court. If it found to be wholly or even partially lawful, then a crucial issue will be its interaction with the UK Withdrawal Act regime. Significant questions remain about where the boundaries between reserved and devolved competence will lie; the status of the Sewel convention; judicial interpretation of the respective powers of the centre/devolved governments etc.

Will further changes to the devolution statutes be needed depending upon the terms of any exit agreement or of a new relationship agreement(s)? Matters of EU competence are currently policed by the devolution statutes, but these will increasingly become matters of international relations. This will also have an impact on levels of scrutiny, and a broader question is how the UK Parliament and the devolved legislatures will seek to scrutinise new international agreements.

A related matter is how the devolved institutions will use their powers under the Withdrawal Act, and how the different governments interact to achieve common policies and common frameworks in the JHA area in matters of both civil and criminal jurisdiction.

Many of the powers that will be used to give effect to Brexit are secondary legislation powers which are not subject to the Sewel convention. This leaves a potential consent/accountability gap. How will this be filled?

Legislation is likely to become more complex at both central and devolved areas because in addition to the traditional reserved powers model, the changes that come with the Withdrawal Act will require a second layer of competence analysis.

A challenge will now be laid down for the devolved legislatures in terms of scrutiny of their own governments. Are there sufficient resources properly to police the wide range of powers coming back from the EU and the strong executive powers which the devolved administrations have to adapt and use these powers?

It was pointed out that the manner in which the UK Withdrawal Act has been passed has seriously fractured relations between the Scottish and UK governments, and so at the political level there is a need to rebuild political relations. More broadly the system of intergovernmental cooperation needs to be improved.

Another issue is what role the devolved territories will play in negotiations on exit and on the UK's new relationship and any other treaties that flow from this. International relations is a reserved matter so there is no constitutionally guaranteed role for the devolved administrations. Much again will depend upon the health of intergovernmental relations.

Scotland has played a key role in European law reform in the conflict of laws area, also providing expertise for law reform in other countries. How will this continue? Will there be scope for the institutions of the Scottish legal system to continue with their own bilateral arrangements with European partners?

Will opportunities exist more broadly for Scotland to cooperate in its own way on issues of civil and criminal law and procedure, possibly staying more in tune with EU standards and rules? How could the Scottish administration use its limited international relations powers to do so? International relations is a reserved matter but it is open to the Scottish Parliament and Government to give effect to the UK's international obligations in devolved matters. What options, if any, exist for the Scottish Government, and the other devolved administrations, to develop their own areas of JHA cooperation in devolved areas? Would such efforts push the boundaries of devolved competence, leading to possible legal disputes? Will the UK allow devolved territories to arrive at their own international agreements in relation to legal system matters?

One final reflection was whether there is now a need to formalise the constitution to take account of Brexit. There is no doubt that UK membership of the EU has had a profound impact upon the UK's

constitution. It may be that a consequence of Brexit, in order to manage the return of powers in the context of the Scotland Act 2016 and Wales Act 2017, is a move towards a more formalised system of 'shared rule' in the form of intergovernmental relations.

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Further Reading

'Brexit: Impact on the Justice System in Scotland', Scottish Parliament, SPICe Briefing, 27 October 2016, SB 16/83

'The UK's cooperation with the EU on justice and home affairs, and on foreign and security issues', UK Government, 2016

'Brexit: future UK-EU security and police cooperation', House of Lords European Union Committee, 7th Report of Session 2016–17, HL Paper 77, 16 December 2016

'The Lisbon Treaty's impact on the Justice and Home Affairs (JHA) Council: More co-decision and new working structures', Council of the European Union, December 2009

'The UK block opt-out in police and judicial cooperation in criminal matters: recent developments', House of Commons Library, 2014

Steve Peers, *EU Justice and Home Affairs Law* 3rd edn. (Oxford: Oxford University Press, 2011)

'The UK in Justice and Home Affairs: the engaged outsider', Institute for European Studies, Policy Brief, April, 2016



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