Justice Committee

UK Government's 2014 EU opt-out decision

Letter from the Lord Advocate to the Convener

I thank you for your letter of 17 January 2014 seeking my views on the implications for Scotland of the UK Government's 2014 block opt-out decision. I welcome the opportunity to provide you with my observations.

Further to the oral evidence I provided to the House of Lords Select Committee on 13 February 2013 I wrote to the Committee providing a list of the measures I would suggest the United Kingdom should opt in to. A copy of that letter is attached for your information.

You will note that the 35 measures the UK Government have stated they would seek to rejoin include all those identified in my letter to the Committee, with the exception of: Council Framework Decision 2005/222/JHA on attacks against information systems; Council Decision 2005/876/JHA on the exchange of information extracted from the criminal record; and Council Decision 2008/976/JHA on the European Judicial Network.

It remains my position that the European Judicial Network measure (EJN) ought to be included. It is the experience of the Crown Office and Procurator Fiscal Service (COPFS) that this is a valuable tool in the armoury of prosecutors as it is frequently used by the International Cooperation Unit (ICU) of Crown Office to seek assistance in execution of EAWs abroad and allows for urgent requests to be expedited. The EJN has also provided Scottish prosecutors with a rich source of advice on national law in Member States within very short timescales which has been used to good effect in a number of cases considered by the United Kingdom Supreme Court.

With the exception of the EJN measure, I do not assess there to be any particularly damaging consequences for Scotland of not opting back into the other 94 pre-Lisbon police and criminal justice measures and I am generally supportive of the decision by the UK Government to seek to rejoin the 35 measures listed by them, which includes such important measures as the EAW.

That said there remain implications for Scotland as a result of the block opt-out decision, the main one being the danger of the UK being unable to rejoin the EAW measure. The extent of that danger will be determined and assessed by what mechanism the UK Government seeks to provide a legal base in place of the EAW. I understand that the UK Government has begun negotiations in order to secure a seamless process of block opt-out and opt-in come 1 December 2014. However, the UK Government has thus far not shared its view on what legal base will replace the EAW either as an interim measure or in the event of complete exclusion from the EAW scheme and therefore my concerns in this area subsist.

From evidence given to the House of Lords Select Committee and from what is said in the Government's explanatory memorandum, it is believed the UK Government's position is that extradition will be achieved through the European Convention on

Extradition. This however must be predicated on the basis that Member States which have transposed the EAW framework decision into their national law can transfer a member state out of that scheme and recommence on another legal base.

Different issues would arise for incoming and outgoing requests, should the UK not be able to rejoin the EAW scheme, namely:

Incoming requests

For, requests into the UK, the Government could re-designate Member States as part 2 territories, placing them in the same position as, for example, the United States.

This would have the effect of moving the decision on extradition back to ministerial level where the Cabinet Secretary for Justice in Scotland would be required to certify all incoming requests, the International Cooperation Unit (ICU) would crave and issue a warrant to arrest and thereafter the procedure would be similar to the present system, except, rather than the court make the decision on extradition, the court would refer the case back to the Minister who would then decide if extradition would be ordered. The statutory time frames would be different and extradition would take considerably longer than is presently the case.

It would also open up two areas of appeal, the decision of the court and that of the Minister and involve considerably greater work for colleagues abroad as the request needs to be in a more stringent and detailed form. Importantly, double criminality would require to be applied to offences and the current benefit of the framework list of offences would be lost.

Outgoing requests

The anxiety would be reputational damage caused by the UK opt out. Currently member states operate and execute the EAW efficiently. In future, it would not be unreasonable to assume that executing authorities who would be required to undertake considerably more work on execution of requests from the UK in the old convention form, involving as it does affidavit evidence and issue through the Home Office, would be less able to execute UK requests as quickly as they do currently. The fact that affidavit evidence is required where these have to be drafted, sworn before the court, translated and then issued will inevitably involve more preparation time.

In addition, the speed with which arrest can be effected through use of the EAW would be diminished.

It is envisaged that the UK enter the SIS II (Schengen information system) in 2014. This will enable the UK authorities to place on the system an alert which will be available to police forces in around 20 member states. That however is predicated on the use of the EAW. Red notices which are the equivalent for Convention based requests are issued through Interpol channels.

The greatest danger is that some Member States would no longer be able to accept requests from the UK based on the convention as under their national law some states have taken the view that the EAW as a matter of EU law, replaces the

convention base and they cannot revert back to the convention as a legal base for extradition. This would result in not only the UK requiring to take steps to provide interim measures such as a bilateral treaty or new legislation but also the national parliaments of those other states. Under the Lisbon Treaty the UK would be required to meet the cost of any financial implications to Member States. Putting in place bilateral treaties or new legislation would require time and agreement within Member States' own systems which would be beyond the control of the UK. This may lead to interim periods where the UK and some Member States would have no legal base at all upon which to seek extradition of fugitive offenders. This would be most keenly felt with the Republic of Ireland.

Although it is the intention of the UK Government to secure opt-in without there being any gap or break in practice of the EAW this is by no means certain and consideration does not appear to have been given to the situation where there is a gap between the UK Government opting out and being able to rejoin, other than reliance on the European Convention on Extradition. This convention cannot however be relied upon by all member states for the reasons explained and in particular cannot be relied upon by the Republic of Ireland.

Frank Mulholland QC
Lord Advocate
18 February 2014