

JUSTICE SUB-COMMITTEE ON POLICING
BREXIT AND POLICING
WRITTEN SUBMISSION FROM THE CROWN OFFICE

Thank you for your email of 24 September 2019 requesting information from the Crown Office and Procurator Fiscal Service (COPFS) to assist the evidence session with Police Service of Scotland (PSoS) scheduled for the 26 October. In particular, you have asked for the COPFS view on whether PSoS (and UK-wide police forces) will continue to have access to key security and law enforcement co-operation measures, such as the European Arrest Warrant, Europol, Eurojust, the Schengen Information System II and the European Criminal Records System. In the event of no access to these capabilities, you seek views on alternative options that may be available as contingency measures.

As the Committee will appreciate, negotiations are ongoing and the outcome is uncertain. Whether criminal justice agencies will continue to have access to key security and law enforcement co-operation measures and, if so, on what terms, will depend on the terms of any agreement which the UK may reach with the EU. I have sought to address each capability in turn outlining my understanding of the position of the two negotiating parties based on the published draft legal texts on law enforcement and judicial co-operation of the European Union ('Amended draft text of Title I Part III of the Agreement on the New Partnership with the United Kingdom') and the United Kingdom ('The Future Relationship with the EU') dated 14 August 2020 and February 2020, respectively. I also describe the implications for each measure if there is not a deal.

The Committee will appreciate that the arrangements for future criminal justice co-operation with Member States of the EU is relevant and important from the perspective of COPFS as well as of PSoS. As Lord Advocate, I have statutory responsibilities in respect of extradition and mutual legal assistance. The International Co-operation Unit (ICU) of COPFS engages directly with its counterparts in other jurisdictions, both through multilateral arrangements and bilaterally. The institutional arrangements which we have in place for international co-operation in Scotland – in particular, the responsibility of the ICU for both incoming and outgoing requests, and the prosecutorial power of direction vis-à-vis the police - have significant strengths which are appreciated by our counterparts in other jurisdictions; and the ICU works closely with PSoS with a view to the effective use of the mechanisms for international co-operation which are available to us. Experience has shown the significant benefits of direct engagement between the ICU and prosecutorial counterparts in other jurisdictions, to the extent that this is legally possible.

Schengen Information System II (SIS II)

The UK draft text seeks continued access by UK law enforcement to the SISII. The published EU legal text does not provide for continued UK access but rather provides for continued UK participation in the Swedish Initiative. The Swedish Initiative is not a "real time" measure and, unlike the structure of SISII, provides for bilateral police co-operation. In contrast to the SISII, the Swedish Initiative is not a platform for the

dissemination of any warrant based system of extradition which may replace the European Arrest Warrant.

Unless continued access to SISII is achieved, UK law enforcement will be required to revert to Interpol as the main platform for international police co-operation. Clearly, if there is a non-negotiated outcome, Interpol will be the route of transmission between Police Scotland and international law enforcement.

European Arrest Warrant

The Withdrawal Agreement provides that where a person has been arrested (in the UK or a European Union Member State) on an European Arrest Warrant before the end of the transition period, that warrant will continue to be lawful until a final determination is made by the court on extradition.

The published UK draft legal text does not seek continued access to the European Arrest Warrant but rather seeks to build a framework for extradition based on enhancement of the Council of Europe Convention on Extradition 1959 and its protocols. The EU draft legal text provides for a warrant based system of extradition broadly similar to that which operates between Norway, Iceland and the EU Member States which came into force on 1 November 2019. At present, the draft legal texts envisage the European Arrest Warrant being invalid as a basis for arrest in either the UK or EU Member State after the end of the transition period unless the accused has been arrested on that warrant before the end of that period.

On the basis of either draft text, at the end of the transition period, any European Arrest Warrant issued by the UK upon which an arrest has not already been made would cease to be valid, as would any warrant issued by a judicial authority of a Member State upon which an arrest has not already been made. European Arrest Warrants are circulated and made available to all law enforcement in all Member States through the SISII. They are currently, through SISII, visible to any police officer arresting anyone in any EU Member State, including the UK. That would not be the case in the event that the UK does not secure continued access to SISII. SISII, unlike Interpol, is a "real time" measure.

In the event of a non-negotiated outcome, the legal basis for extradition with EU Member States would be the Council of Europe Convention on Extradition 1959 and its protocols. This Convention is currently available as a legal base for extradition with other Council of Europe states. By contrast with the European Arrest Warrant system, which is a system of judicial co-operation based on the principle of mutual recognition, the Council of Europe Convention is a traditional extradition arrangement, which is based on the diplomatic transmission of requests and Ministerial determination of extradition.

In the event of reversion to a Convention-based system of extradition, the Extradition (Provisional Arrest) Bill (which I am advised is expected to receive Royal Assent on 23 October) provides for the National Crime Agency to certify Interpol red notices issued by EU Member States and for the person subject to such a certified notice to be liable to arrest in Scotland or elsewhere in the UK. It is not known to what extent

European Arrest Warrants issued by judicial authorities in Member States across the EU have associated Interpol red notices.

In the event of either a negotiated or a non-negotiated outcome, certain Member States will operate a bar to extradition of own nationals, a feature which is absent from the European Arrest Warrant scheme of extradition. Where the application of such a bar operates, it is anticipated that the Member State in question would itself seek to exercise criminal jurisdiction in respect of the crime. This would require the transfer of the evidence recovered in the investigation by Police Scotland to that jurisdiction, where any trial would proceed on the rules of evidence and procedure of that State.

Europol

Police Scotland currently have one officer embedded at Europol as part of the wider UK police team. In the event of a negotiated outcome, we understand that the continued presence of UK law enforcement agencies at Europol is envisaged albeit with a reduced number of officers, physically located outwith the Europol building and, we anticipate, without the formal authority to call a meeting of law enforcement colleagues to discuss particular investigation related issues.

A non-negotiated outcome would result in Police Scotland having no presence at Europol and would entail a reversion to the use of enhanced co-operation and operational engagement through Interpol.

Eurojust

Eurojust is not a law enforcement agency but rather a body for judicial co-operation, in particular co-operation between prosecution agencies. The outcome for COPFS of a negotiated or non-negotiated outcome as regards Eurojust would be broadly similar to the position for PSoS in relation to Europol. The loss of the ability to open a case or parallel investigation with Eurojust or Europol would affect our ability to initiate effective joint investigations, complementing parallel investigations. We would have to rely on the goodwill of Member States to open the case with Eurojust or Europol and to invite our participation within these institutions.

European Judicial Network

The UK is now a third country so far as the European Judicial Network (EJN) is concerned. This invaluable mechanism for co-operation was particularly heavily used by COPFS. As a third country, we no longer have direct access to that mechanism.

European Criminal Records System (ECRIS)

ECRIS is a highly effective tool for swift exchange of criminal history records. Currently, ECRIS results in the previous criminal history of foreign national offenders being recovered from EU Member States within an average of six days. The UK draft legal text seeks continued access to ECRIS but this is not reciprocated in the draft EU legal text, which envisages law enforcement agencies recovering previous criminal history through bilateral co-operation under the framework of the Swedish Initiative.

In the event of a non-negotiated outcome, Police Scotland would require to revert to the Council of Europe Convention on Mutual Legal Assistance 1959 and its protocols, which require requests for previous criminal history to be made by letter of request by the Crown Office (which is designated as a central authority). Such a request relies on the goodwill of the foreign authority to execute within a reasonable timescale. We would lose both control of the time taken to execute requests and certainty that requests would be executed.

Potential Public Disorder

Finally, I note that the Sub-Committee will also consider the progress of discussions between the UK and Scottish Governments on mutual assistance between police forces within the UK should there be civil unrest and increased border control issues as a result of Brexit. COPFS Brexit planning is overseen by the COPFS Corporate Resilience Group (CRG), chaired by the Crown Agent. CRG continues to meet regularly to monitor Brexit developments and COPFS preparations for the same. COPFS contingency planning with justice partners has identified a potential risk of public disorder related to Brexit. COPFS is a member of the EU Exit Oversight Group, which is led by Police Scotland, and is engaged with Police Scotland's planning for potential public disorder. COPFS has prepared guidance for prosecutors in the event of Brexit related public disorder. COPFS is also fully engaged with the Scottish Government's Brexit contingency planning.

Concluding observations

International criminal justice co-operation is an essential feature of the work of COPFS and PSoS. It is necessary both with a view to responding to transnational criminality (including serious organised crime), and also because accused persons, witnesses and evidence required in one jurisdiction may be located in another jurisdiction. COPFS and PSoS engage effectively with their counterparts in many jurisdictions internationally, both within the EU and elsewhere. That engagement will continue; and COPFS and PSoS will work within whatever legal regime applies after the end of the transition period. However, the EU legal regime has provided a particularly effective set of instruments for co-operation; and, from the perspective of criminal justice co-operation, it would be highly desirable that the arrangements which replace those instruments are as effective as possible.

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Lord Advocate
29 October 2020