

Balance of Competences Review on Police and Criminal Justice EU UK

Response by Kiron Reid, Honorary Research Fellow, School of Law, University of Liverpool.

I am responding to the call for evidence on the balance of powers between the UK and the EU on police and criminal justice.

Within the areas being considered, I am most interested in policing co-operation on criminal matters, although some of the points I make will be by extension relevant to judicial co-operation in criminal matters. As my other major area of academic writing is on the quality of criminal law, I will make a few brief comments on minimum standards in criminal law.

My key point is on accountability. It is not the powers that I want to comment on, but the lack of scrutiny of use of those powers, at both UK and European Union level. I believe that there has been more scrutiny at UK level in recent years (particularly through individual peers asking questions, as well as some work by Parliamentary committees) but this is still minimal.

My interest and experience. Most of my experience is from England and Wales as that is where I have most knowledge and have conducted most policing observation. For fifteen years I taught one of the very few law degree modules on police powers. I also have knowledge from study of police accountability in the four jurisdictions of Britain and Ireland, and from my interest in policing elsewhere and the accountability of international police cooperation, particularly in Western Europe, new EU member states in South Eastern Europe, and the Balkans. I have published four substantive legal articles on police accountability and related issues. I served as a councillor member of Merseyside Police Authority for four years (in the early 2000s), and was an Independent candidate for Police and Crime Commissioner, which gives a different perspective.

The Call for Evidence document itself is the clearest summary of the development of European Union Home Affairs and Police and Criminal Justice policy that I have read and should be a very useful crib for many students of the development of the EU. Inherently because of the content it is still a heavy read but given that it is really quite clear.

One criticism. The announcement of the call for evidence (1 May: <https://www.gov.uk/government/news/government-launches-balance-of-competences-review-on-police-and-criminal-justice--2>) states “Police and criminal justice measures adopted prior to the Lisbon Treaty are subject to the ongoing negotiations under Protocol 36 to the Treaties, introduced by the Lisbon Treaty, (the 2014 Decision) and are not being considered as part of this review.” This is gobbledegook. It also sounds illogical. If a review is considering police and criminal justice cooperation it cannot be logical to exclude certain matters. The *Legal Annex* to the review explains more about Protocol 36 but does not explain what any of the third pillar measures prior to Lisbon are or how important any of them are to the subject matter of the review.

My key issue relates particularly to Question 1. “Has the development of EU police and criminal justice competence over the years led to improved cross-border co-operation?” **How**

can we assess this if there is no reporting, no public record keeping, no scrutiny, no accountability. The same concern applies by necessary implication to Questions 4, “Has the development of EU police and criminal justice competence helped or impeded the effectiveness of law enforcement?” and 5 “Has the development of EU police and criminal justice competence benefitted or caused problems for the British criminal justice system?”

“Cooperation between the UK and other EU Members States’ customs services, police and other agencies takes place on a daily basis and is an important element in tackling cross-border crime.” (Page 14). Where is this documented and reported on? Where is the public record? Where is the scrutiny and accountability? I search for this information periodically – and have done systematically in research for publications in the past – and cannot find it.

It is astounding that a review can be conducted on this area and not once mention Europol. Surely the work of the European Police Office should be inherently relevant to this review.

The work of Europol would seem to be directly related to the content of chapter 3. Some of the cooperation types listed at p. 14 must presumably involve Europol. Another practical issue is the need for frank evidence from those in the UK who take a lead (at any level) in tackling serious and organised crime. Has the political led change from NCS / NCIS to SOCA to NCA helped or hindered the fight against serious and organised crime? As the national body represents the UK in Europol (and presumably in other ways at European level) has creation and then change / replacement of these agencies – it seems only for political reasons – improved the effectiveness of that work, reduced the effectiveness or had no impact on it?

The point on accountability is the same as I included in my response to the Scottish Single Police and Fire services consultation, on 25 October 2011. So I repeat the point here. I first made the point in a published article 14 years ago and have returned to it periodically since.¹

“Cross border UK, and Ireland, and International cooperation should be subject to reporting and scrutiny. My research over a ten year period has shown an accountability and reporting gap. Police forces engage in cross national border police operations but do not report on these and are not scrutinised on them due to a consistent failure by police authorities. The only time the public hear about them is in press releases from SOCA, Europol and particular forces. European and international police cooperation is of great benefit in tackling transnational crime that has very local effects and tragic consequences. It should be both publicised for the successes and scrutinised to ensure that rights of individuals are protected, and public resources stewarded in a responsible way.”

That submission continued to make some points about internal UK jurisdiction cooperation.² These are tangentially relevant only because lessons about internal cooperation and liaison –

¹ ‘Who’s watching EU? Police accountability and civil liberties’ *European Information Service* issue 207, (February 2000) 4-5. (The magazine of the Local Government International Bureau).

² “In relation to UK cooperation, I defer on the best policing mechanisms to those with the professional knowledge, and the legal expertise of commentators such as Clive Walker as well as those in Scotland. [footnote omitted] There should be clear and accountable systems as to how the Scottish Police Service will liaise with SOCA and its replacement and with Europol. There should of course be clearly revised protocols for working with the British Transport Police (BTP) if needed as well. These should cover Scotland as a whole and local cooperation. **BTP’s advice from their experience in working across police force boundaries at present**

and the experience of different bodies such as the British Transport Police, and Police Scotland – can be relevant to this review.

My impression is that Joint Investigation Teams have grown in importance over the last decade but I have only ever seen one academic study on European Union criminal justice cooperation that has considered them in anything more than a cursory way.³ There has been reference in a number of journal articles. How can the British public know if these are benefitting them?

Chapter 2: Judicial Cooperation.

Question 6 and Question 7. Advantages and disadvantages / effectiveness.

“The European Commission runs a range of funding programmes relating to justice and rights. The current funding programme for the Period 2014 to 2020.” This is no doubt excellent work. Who publicises the work done, let alone scrutinises it and shares the benefits of good practice further? Both in the UK and in networks across Europe.

The European Investigation Order is mentioned (detail p. 12). What scrutiny is there of these? Scrutiny of both the issuing and the use of? It sounds like a thoroughly good idea but hopefully this review will shed light on how they are being used in practice. The European Protective Order likewise seems like an inherently good idea. It could curtail civil liberties however if the legal basis of the order is as over wide as the harassment and stalking legislation in the UK are (containing incredibly broad overlapping offences with low requirements of proof). Restraining and other protective orders being enforceable in other countries appears an obvious example (which I had not thought of) of how increased international cooperation can help protect vulnerable members of the public when travel is easier than nearly at any time in the past.

Question 10. Other general points.

Over the last twenty years many British judges, police officers, prosecutors and court staff have gained significant experience in contributing to international missions in other European countries, particularly Bosnia Hercegovina, and the EULEX rule of law mission in Kosovo, as well as work assisting new Eastern and South Eastern European EU member states and candidate countries in the Balkans. This work often involves high level complex and challenging legal and policy analysis along with diplomatic skills. My impression is that such experience is not routinely utilised effectively to review practice, or valued to recognise talent and experience, when those seconded return to the UK. There should always be some reporting and recognition of the contribution that English, Welsh, Scottish and Northern Irish / UK public servants have made to overseas missions elsewhere in Europe. I don't know if policing agencies value the contribution made to bodies such as Europol and in police exchanges, as they are rarely mentioned, but surely they should do as policing has had an important international dimension for more than a century. My impression is (and it is only that) that countries like France and Germany more highly value this kind of experience in relation to judicial and court system cooperation.

should specifically be sought in case their practical experience gives them an insight for suggestions that others of us may have missed.”

³ Alexandra De Moor ‘The Role of Europol in Joint Investigation Teams’ Readings on Criminal Justice, Criminal Law and Policing, Marc Cools et. al. (eds.) (Maklu, 2009).

This ties in with the point about funding relating to police cooperation also, at p. 15. (“The European Commission runs a range of funding programmes for police and customs cooperation.”).

Questions on policing, customs co-operation on judicial matters, and internal security

Question 12. To what extent is EU action in this area effective in raising standards, or enhancing cooperation? And to what extent is it necessary? The initial question needs to be what work is done, and how is it generally evaluated and that reported to those who provide the funds and the personnel involved, and to elected authorities (such as Parliament) tasked with scrutinising.

Question 13 is a perceptive question, and it requires comprehensive information on, reporting of and scrutiny of use of the powers across EU borders for an answer to be provided. It isn’t inherently about the competence but about the use of powers by policing bodies (whether in the UK or other countries or at EU level) that may infringe rights.

Questions on minimum standards in criminal law and procedure

The Call for Evidence quite correctly does not overstate the impact of the EU in criminal law, which has been very limited, and notes that impact has mostly been through minor amendments to criminal procedure to help mutual recognition. This has included emphasis on both suspects’ and victims’ rights.

I first included half a page “The EU and Criminal Law” in my undergraduate lectures only five years ago, the same time as David Ormerod in the authoritative *Smith & Hogan* casebook included one paragraph for the first time (10 ed.). I observed “Some of these laws are enforced by the criminal law but it is UK criminal law enacted here. However as political pressure grows to harmonise laws, and to voluntarily increase police cooperation, EU influence on the UK criminal law will likely increase.” As yet, as the Call for Evidence shows, it is indirect and minimal.⁴ Arguments about international legal obligations have grown in much greater volume than their success.⁵

There is no need to harmonise criminal law for the sake of it, given that most conduct that is criminal in one European country is criminal in another, even if procedure and terminology are very different. The same core issues of general principles of criminal law arise. Any necessary European level work on substantive criminal law should start from a set of principles. The UK Government’s criminal justice gateway principles are a good start – though they have often been breached, most likely inadvertently, under this same government that promulgated them. For more detail on what principles could form the basis of a rational

⁴ Professor Michael Dougan has charted the increased impact of EU legislation on criminal law over several years as the Commission tries to increase effectiveness of enforcement (eg in environmental protection). E.g. M. Dougan M. (2006) 44 *Journal of Common Market Studies* The European Union Annual Review 2005-2006 ‘Legal Developments’ p. 131 on *Commission v Council*.

⁵ Kate Grady gave a short useful evaluation of the influence of international law in our domestic criminal law in her commentary on *R. v Gul (Mohammed)* [2013] UKSC 64 [2014] Crim LR 315. She also noted: “It has been said before in this *Review* that “[t]he internationalisation of criminal law and criminal process is an important trend of our times” (*Jones [2007] Crim. L.R. 66, 68 (C. Walker)*). Indeed, as the realm of public international law as a whole has grown over recent decades, and the subject matter of treaties and customary international law has expanded, the courts of England and Wales have had increasingly to grapple with this discipline.”

approach to enacting new criminal law there is much useful work elsewhere, including in other Commonwealth countries such as Australia and Canada.⁶

Other points not covered above.

The principle from the Tampere summit of 1999 is still a good one, reflecting both subsidiarity (power being exercised at the lowest appropriate level) and diverse legal cultures:

“The aim of adopting mutual recognition as a key principle was to avoid the need to harmonise Member States’ distinct legal systems”. (Page 6).

“This review will cover measures which provide for sharing data between police and other authorities. The subject of **data protection** is covered in the concurrent review on Information Rights.” Call for Evidence, p. 3. I understand this but data protection is a fundamental aspect of police and criminal justice cooperation – potentially affecting many UK citizens – and should be addressed here also, even if in the same terms as in a specific data protection review. Accountability, scrutiny and oversight (governance) on this issue are intrinsically linked to the accountability, scrutiny and oversight of police operations that impact on individuals in the UK or elsewhere in Europe or the world. It is also a fundamental part of the work of Europol and subject to some safeguards there.

“This review covers criminal law measures, including those which contribute to the protection of EU fundamental rights (such as the right to fair trial and the right to defence). The **EU’s framework on fundamental rights**, including the Charter, is being considered as part of the Fundamental rights review.” Call for Evidence, p. 3 - 4. The Fundamental rights review should recommend that the minimum fault level for criminal offences should be negligence unless clearly expressed otherwise in legislation for good public policy reason, and that absolute or strict liability should not be used for imprisonable crimes.

Similar to the very small effect of the EU on criminal law, the review should note that the European Convention on Human Rights has had minimal effect on actual UK criminal law. As most academic commentators predicted at the time of the Human Rights Act, precisely because our criminal law itself already complied with most Convention standards that British lawyers help draft. Ashworth recently concluded:

“In the early years after the implementation in 2000 of the Human Rights Act 1998, it was a commonplace to suggest that the greatest impact of European human rights law on criminal justice would be felt in criminal procedure and evidence, and that the criminal law itself would be less affected. And so it has been.”⁷

It is worth reminding the popular and right wing press that the EU and ECHR systems have lead to very few changes in our criminal laws.

⁶ For a starting point on introductory issues, and detail on strict liability see: ‘A bonfire of the criminal laws? A review of Law Commission Consultation Paper no. 195: Criminal liability in regulatory contexts’ (2011) *The Loophole* - journal of the Commonwealth Association of Legislative Counsel issue 2 pp 27-48 (11,000 words). Available online at <http://www.opc.gov.au/calc/index.htm> The file is a .pdf. For other general principles see Pamela Ferguson ‘The Drafting of Offence Provisions by the Scottish Parliament’ (2011) 32 *Statute Law Review* 1.

⁷ ‘A Decade of Human Rights in Criminal Justice’ [2014] Crim LR 325.