

Review of the Balance of Competences between the United Kingdom and the European Union:

Police & Criminal Justice

Submission by the Senior European Experts Group

Background

The Senior European Experts group is an independent body consisting of former high-ranking British diplomats and civil servants, including several former UK ambassadors to the EU, a former Secretary-General of the European Commission and other former senior officials of the EU institutions. A list of members of the group is annexed.

SEE has no party political affiliation. As an independent group, drawing on the extensive knowledge and experience of its members, it makes briefing papers on contemporary European topics available to the public through organisations interested in European issues.

Overview

As the call for evidence rightly notes, co-operation in the fields of crime and justice has been a feature of the European Union for almost forty years. Beginning with the Trevi Group and moving on through successive Treaty amendments, police and criminal justice (PCJ) policy has become a progressively more important part of the EU's work. This reflects the nature of our globalised world – the ease of travel, technological developments (e.g. the internet) which have great economic, social and cultural benefits but which can facilitate crime too; as the international dimension of criminal activity has increased in fields as disparate as terrorism, drugs, child pornography, fraud, human trafficking and cyber crime so has the need for international co-operation if it is to be effectively combated. Successive British Governments have approached co-operation in these areas in a pragmatic way, seeking to make best use of the policies, legal framework and infrastructure established through the EU.

The UK has approached co-operation in this field cautiously primarily because of three concerns: the implications of extending the jurisdiction of the European Court of Justice to PCJ policies; the implications for British common law; and, later, the extension of qualified majority voting (QMV) into PCJ policies. These concerns are reflected in the different arrangements for the UK (the right to opt-in to PCJ legislation and the right to opt-out of Schengen-related legislation) which began with the Treaty of Amsterdam in 1997 and have since been extended.

All EU legislation in this field in which Britain participates has been adopted with Britain's agreement. And the mutual recognition approach, as opposed to the one size fits all approach of harmonisation, adopted at the European Council in Tampere in October 1999, and which was subsequently incorporated into the Treaties, has owed much to Britain's advocacy.

We regret that the review of the balance of competences in the PCJ area was not completed before decisions were taken by the Government on the Protocol 36 block opt-out.

General Questions:

1 Has the development of EU police and criminal justice competence over the years led to improved cross-border co-operation?

Yes; successive UK Governments have concluded that Britain gains much from police and criminal justice co-operation. There are four broad reasons for this within an environment of intensifying crossborder crime today; co-operation in and through the EU:

- helps Britain's law enforcement agencies to combat international crime;
- helps to bring British criminals to justice;
- enables the UK to deport more quickly foreign criminals;
- gives greater rights to accused British citizens elsewhere in the EU.

The fact is that crime is increasingly spilling across national borders and that some of the worst crime is crossborder, e.g. drugs, people trafficking, child pornography, terrorism and cyber crime. The existence of PCJ arrangements within the EU has brought a step-change in capability for the British justice system because the UK makes extensive use of EU police and criminal justice work. For example, by working through Europol we have access to the police of 40 countries - far more efficient than having bilateral arrangements. The benefits of this can be seen in the fact that half of Europol's inquiries involve the UK.¹

In addition, these arrangements are more effective than those that exist under Interpol and that existed in the past under the conventions agreed through the Council of Europe. They are also more efficient than operating through the theoretical 378 bilateral agreements we would need if we withdrew. For example, the introduction of the European Arrest Warrant (EAW) has greatly accelerated the extradition of those believed to have committed crimes back to the UK and equally for sending back indicted foreign criminals who were living in the UK. As we noted in a paper on the EAW:

“Since 1 January 2004, when the EAW scheme came into force, the average time taken to extradite a suspect who objects to extradition has fallen from around a year to 48 days. In the case of those who consent to extradition (the majority in most years), the average period until extradition is 14-17 days. The value of the EAW was illustrated by the rapid extradition of a suspect (Hussain Osman) wanted in connection with the attempted 21 July 2005 London bombings from Italy in September 2005; he was subsequently sentenced to a minimum term of imprisonment of 40 years”.²

It also worth noting that, prior to the introduction of the EAW, the time taken to extradite a person wanted in another EU country could be well beyond the average of a year. In the case of Rachid Ramda, an Algerian national wanted in France on terrorism charges, it

¹ Evidence from Europol & other witnesses to House of Lords inquiry into the Europol regulation, June 2013. Found at:

<http://www.publications.parliament.uk/pa/ld201314/ldselect/lddeucom/16/1603.htm#a2>

² SEE Briefing paper on the EAW; found at: <http://www.euromove.org.uk/index.php?id=14973>

took 10 years to extradite him to France.³ He was subsequently convicted in France on these charges and given a sentence of 10 years' imprisonment.

2 *What are the advantages and disadvantages arising from the UK's ability to opt in to new or amended EU policing and criminal justice legislation, and opt-out individually of new policing and criminal justice measures in relation to Schengen?*

The main advantages are that the UK can identify whether it is in our interests to participate in a particular piece of legislation on a case by case basis; examples are the European Investigation Order and the draft Data Protection Regulation. In addition, it remains possible for the UK to opt in after adoption, as we did over the Human Trafficking Directive.

The key disadvantages are that we might not be permitted to join measures that we wish to join and that we may lose negotiating leverage by not opting in from the outset, as was the case with the Passport Directive and the Frontex regulation.⁴ In both these cases the UK was refused permission to opt in to the regulation on the grounds that it formed part of the Schengen *acquis*.

3 *Are there any areas where the EU is looking to expand its competence (either by legislating or by other means) beyond the treaty?*

We are not aware of any such area at present.

4 *Has the development of EU police and criminal justice competence helped or impeded the effectiveness of law enforcement?*

We believe that the development of EU competence in PCJ has helped British law enforcement. This view was taken in evidence from the Association of Chief Police Officers (ACPO), the Crown Prosecution Service (CPS); and by the majority of legal practitioners, as well as by the Law Officers of Scotland and of Northern Ireland in their evidence submitted to the House of Lords enquiries into Protocol 36.

For example, ACPO described the EAW as "a mainstream tool" in law enforcement in the UK.⁵ They pointed out that:

"Under the previous arrangements many European states, such as Germany, France and Poland, did not allow their nationals to be extradited to stand trial and required them to be tried in their home state".⁶

The then Director of Public Prosecutions described the arrangements for Eurojust as being of good value to the UK because it enabled access to 26 other countries at a cost of

³ Cited in ACPO written evidence to the House of Lords EU Select Committee inquiry into the UK Protocol 36 Opt Out, p.8: <http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/Protocol36OptOut/VolofevidenceP36final220413.pdf>

⁴ The Passport Directive was a regulation concerning the introduction of biometric passports; the Frontex Directive related to the establishment of the EU's border agency.

⁵ *The EU's police and criminal justice measures: the UK's 2014 opt-out decision*, House of Lords EU Sub-Committee F, HL159, 2012/13, evidence volume, para 4.2.3, p.7.

⁶ *Ibid*, para. 4.2.6, p.8.

about £360,000 a year, far less than if the UK had to deploy liaison magistrates in each of the countries on a bilateral basis at about £150,000 a year each.⁷

As a result of PCJ policy, the UK now has the benefit of assistance from other Member States' police forces on an automatic basis rather than having to be negotiated case by case. The European Arrest Warrant has transformed the ability to extradite suspects, dramatically cutting the time taken (and by extension reducing the cost of the process to the taxpayer) as well as extending the UK's reach in terms of being able to extradite from countries who previously did not permit it. The mutual recognition of offences avoids the arguments of the past about whether a suspect can be extradited, for example because an offence (such as terrorism) was claimed to be "political" or not to be an offence in the country where the suspect was residing. There has been a combination effect of enhanced police co-operation, through Europol, mutual recognition of offences and the availability of the EAW, enabling the speeding up of investigations and the bringing of suspects to justice more quickly.

There have been some difficulties caused by the EAW being used for minor offences and therefore taking up the time of the Metropolitan Police's extradition unit (for example) but one of the Member States most criticised for issuing EAWs for minor offences (Poland) has responded by reforming its domestic law and UK law was amended in the Anti-Social Behaviour, Crime & Policing Act 2014 in response to concerns about the implementation of the EAW in the 2003 Extradition Act.⁸

5 Has the development of EU police and criminal justice competence benefited or caused problems for the British criminal justice system?

PCJ policy has brought considerable benefits to the British criminal justice system, for example, the EAW has brought an end to the "Costa del Crime" and other large-scale evasions of British justice in Europe. Operation Captura has now returned 50 out of 65 wanted fugitives in Spain back to the UK thanks to the EAW.⁹ Because the EAW so dramatically simplified the extradition process within the EU, all 43 police forces in England and Wales are now able to operate the EAW process for themselves, without having to go through the Metropolitan Police (as was the case before 2009).¹⁰ This is a substantial benefit to both victims and to the taxpayer and is also likely to have a deterrent effect.

Eurojust has in many cases enabled the UK authorities to bring to justice criminals involved in crossborder crime. For example, it enabled the British and Dutch authorities

⁷ Ibid, Q210, p.523.

⁸ *Follow up report on EU police & criminal justice measures: The UK's 2014 opt-out decision*, House of Lords EU Select Committee, HL 69, 201314, paras. 69 and 73:
<http://www.publications.parliament.uk/pa/ld201314/ldselect/ldcom/69/6908.htm>

⁹ <https://crimestoppers-uk.org/misc/media-centre/news-press-releases/operation-captura-achieves-50th-arrest/>

¹⁰ Commander Allan Gibson, Metropolitan Police, in evidence to the House of Lords Select Committee, as note 5, p.35.

to work together to bring to an end a sham marriage racket in which illegal immigrants married Dutch nationals to get into the UK.¹¹

We can find no evidence that in the implementation of EU law differences between the common law in Britain and continental systems has caused any problems or undermined the former. This question was looked at in some detail in Chapter 4 of the House of Lord's report on Protocol 36 and they noted that each Member State has its own distinct legal system.¹²

Judicial Co-operation

6 *What are the advantages and disadvantages to the UK of EU action on the field of judicial co-operation? You may wish to refer to examples.*

The advantages of EU judicial co-operation include the potential for co-operation in crossborder cases, for example, those with issues such as the admissibility of evidence in different jurisdictions, or where it is unclear in which jurisdiction a suspect should be prosecuted. Eurojust enables successful co-ordination in these cases, which are often complex and involve different jurisdictions, sometimes both inside and outside the EU.

Recent successful examples of effective co-operation include multiple arrests in a trafficking case in 2011 involving Roma women from the Czech Republic being forced into prostitution in the UK.¹³ Eurojust set up a joint investigation team and enabled questions of jurisdiction to be resolved so that investigation could proceed quickly. In another trafficking case, in 2013, help from both Eurojust and Europol enabled the UK and other Member States to wind up an organised crime group which was thought to have been smuggling 4,000 people a year into the UK.¹⁴ The UK opened 81 new cases through Eurojust in 2013, the second highest total of any Member State.¹⁵

What these examples demonstrate is both the scale of the challenge that the UK faces from international crime and the ability of EU policies and structures to help us respond to that challenge.

We have been unable to identify any examples of judicial co-operation working to the disadvantage of the UK.

7 *To what extent is EU action in this area effective in raising standards, or enhancing cooperation? And to what extent is it necessary? And to what extent is the EU the most appropriate level for judicial co-operation?*

¹¹ Ibid, p539.

¹² *The EU's police and criminal justice measures: the UK's 2014 opt-out decision*, op cit, Chapter 4.

¹³ <http://eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202011/Annual-Report-2011-EN.pdf> [p.21]

¹⁴ See note 15 below, p.31.

¹⁵ <http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202013/Annual-Report-2013-EN.pdf> [p.57]

In terms of effectiveness, the results of the casework show (e.g. the examples cited above) EU PCJ policy has enabled the UK police and criminal justice system to bring people to justice, to speed up extradition and to obtain high level and essential co-operation with other member States.

The improvements in criminal justice work in the UK that have resulted from EU PCJ policy will now be balanced by improved rights for the accused which will result from the Procedural Rights Directive and other changes.¹⁶ These new rights, which set a minimum standard in terms of rights for the accused, mark a significant improvement in the rights of British citizens arrested in another Member State. A further improvement will be made when the UK brings into effect the European Supervision Order as this will rectify one of the main causes of concern about the EAW by enabling British citizens to be bailed in Britain until their case in another Member State is brought to court.

EU PCJ policy is necessary, because of the nature of crossborder crime – without it the effectiveness of UK investigations and prosecutions would be reduced. The only beneficiaries of that would be those involved in crossborder crime.

The EU is the right level for co-operation in PCJ because other arrangements, e.g. through Council of Europe, are slower, more costly and less effective than the instruments adopted through the EU. The main reason for that is that there is a properly functioning legal order in the EU which does not exist in the Council of Europe. It is also true that the closer relationship we have with other Member States, developed over a number of years, means that we have the basis for greater co-operation in this particularly sensitive field. This can be seen in particular in the way EU PCJ policy has helped to transform, by placing it in an EU framework, the co-operation between the UK and Ireland in this area. Finally, EU agreements with third countries give us greater reach. Such agreements are attractive to third countries because through the EU they can work with all 28 Member States. These third country agreements include the USA and a number of Commonwealth countries.

8 *Could the EU use its existing competence in a different way which would deliver more in the UK national interest?*

EU co-operation in this field developed partly in the absence of other arrangements and because of the inadequacy of other international co-operation, as explained above. It is hard to see what other arrangements, whether through the EU or other agencies, could deliver the same level of benefit.

It would be helpful if defunct or largely out of date PCJ legislation could be removed from the statute book, as the Home Office stated in its evidence to the House of Lords Select Committee inquiry into the block opt-out.¹⁷

9 *What future challenges do you see in the field of judicial co-operation and what impact might this have on the national interest?*

¹⁶ Directive 2013/48/EU.

¹⁷ *The EU's police and criminal justice measures: the UK's 2014 opt-out decision*, op cit, page 547.

International crime will be a threat to the UK national interest for the foreseeable future; and it will evolve so as to pose new challenges. It will be important that the EU helps the UK to respond to these challenges.

10 Are there any other general points you wish to make in relation to the field of judicial co-operation which are not captured above?

No. Much will depend on the outcome of the Government's efforts to re-join the 35 pre-Lisbon JHA instruments when the Protocol 36 British opt-out takes effect on 01.12.14. A failure to do so would be very damaging to the national interest.

Policing, customs co-operation on judicial matters, and internal security

11 What are the advantages and disadvantages to the UK of EU action in the field of policing, internal security, and customs co-operation in criminal matters? You may wish to refer to specific examples.

The main advantages are that police co-operation extends the reach of UK police forces so that they can work with other Member State authorities to investigate crossborder crime, including fraud, cyber crime and terrorism. For example, the Government's Independent Reviewer of terrorism legislation, David Anderson QC, has pointed out that the adoption of the mandatory requirements concerning jurisdiction and terrorism offences by the EU has had "the effect of requiring all Member States to introduce laws equivalent to some of those established in the UK's Terrorism Acts 2000 and 2006".¹⁸ This is important because, as Mr Anderson went on to say, while the UK and a number of other Member States have had recent experience of terrorism and therefore understand the need for this kind of legislation, many others have not.¹⁹

Access to the Schengen Information System (SIS) II database is a vital tool for police forces, as the Association of Chief Police Officers has made clear. When the UK puts an alert on this EU database that our police forces are seeking a particular individual, police forces in all other Member States will automatically be made aware of it and they are legally required to act, for example, if that person is arrested for some other offence or arrives at their border.²⁰

Customs co-operation enables joint pursuit of drug traffickers, and other contraband goods, including the massive smuggling of tobacco products.

We cannot identify any disadvantages to Britain of co-operation in these fields.

12 To what extent is EU action in this area effective in raising standards, or enhancing co-operation? And to what extent is it necessary? And to what extent is the EU the most appropriate level for co-operation on policing, customs co-operation on judicial matters, and internal security?

¹⁸ Ibid, pp1-2.

¹⁹ Ibid.

²⁰ ACPO evidence in *ibid*, p11; see also European Commission memo explaining how SIS works: http://europa.eu/rapid/press-release_MEMO-13-309_en.htm

On effectiveness the arguments are similar here to those for judicial co-operation: greater co-operation has raised the standard of crossborder investigations, making it more likely that offenders will be caught and prosecuted. Numerous examples were given in the ACPO evidence to the House of Lords EU Select Committee inquiry into the block opt-out.

This kind of co-operation is essential, as the police have made clear, because of the scale and nature of crossborder crime today. This co-operation balances free movement by enabling the sharing of data about criminals (e.g. criminal record sharing for teaching posts) it also enables the UK courts to consider previous convictions in other countries, facilitates crossborder investigations and ensures the swift repatriation of wanted persons (i.e. through the EWA).

The EU is the right level as no one Member State can protect its citizens from criminal or terrorist threats in 2014 on its own; co-operation with other countries is essential. The EU is the most effective mechanism in Europe for this kind of co-operation; it is unclear how we would manage without it were it to be withdrawn. The UK is, for example, an extensive user of Europol, having been involved in half of its major investigations in 2012/13.²¹ The regular use by the British police of Europol's intelligence records is a notable feature of the UK's relationship with the agency.²² International co-operation is necessary on a world-wide level on most of these issues, for example through Interpol but that is not a substitute for co-operation through Europol. Links with Europol established by a whole range of third countries show how much these countries value the work being done at EU level.

13 Is EU competence in this area appropriate or are there areas where it may have led to unintended and/or undesirable consequences for individuals and their civil liberty rights?

Differing standards (and systems) of police and judicial practice have caused some problems for British citizens accused of crimes in other Member States. But this happened before EU PCJ co-operation and would continue without it. Indeed, without EU involvement it might be worse, as the Procedural Rights Directive and other measures tackle some of the problems that have appeared. Some problems have arisen under the EAW, for example the lack of proportionality shown in some cases involving minor offences, but the operation of the system could be improved within the existing framework and by making full use of instruments like the European Supervision Order (which would have avoided the problems that arose, for example, in the Symeou case, where a British citizen spent a lengthy period in a Greek prison awaiting trial).

14 Could the EU use its existing competence in this area in a different way which would deliver more in the UK national interest?

We found no evidence of this.

²¹ Ibid, Europol written evidence, p.214.

²² Ibid, pp215-16.

15 *What future challenges do you see in the field of policing, internal security, and customs co-operation in criminal matters and what impact might this have on the national interest?*

There is no sign of the growth of serious organised crime at the international level abating, nor of its spread into domestic cases of criminal activity diminishing. It will be in the national interest therefore that, where there is a sound base for extending EU co-operation, this should take place in a pragmatic way.

16 *Are there any other general points you wish to make in relation to this area which are not captured above?*

No

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Annex
Members of the Senior European Experts group

Sir Michael Arthur

Director-General Europe, FCO, 2001-3; British High Commissioner to India 2003-07; British Ambassador to Germany 2007-10.

Graham Avery

Director, European Commission, 1987–2006.

David Bostock

Deputy Permanent Representative to the EU 1995-98; Member of the European Court of Auditors 2002-2013.

Sir Colin Budd

Chairman of the Joint Intelligence Committee 1996/97. British Ambassador to the Netherlands, 2001-05.

Lord Butler of Brockwell

Secretary to the Cabinet and Head of the Home Civil Service, 1988-98.

Anthony Cary

Head of the European Union (Internal) Department, FCO, 1993-96; Chef de cabinet to Chris Patten, European Commission, 1999-2003; British Ambassador to Sweden 2003-2006.

John Cooke

Member of the UK Permanent Representation to the EC 1969-73 and 1976-77. Under-Secretary, International Trade Policy Division, DTI, 1992-96. Chairman, OECD Trade Committee 1996-97

Sir Brian Crowe

Director-General (External & Politico-Military Affairs) Council of the European Union, 1994-2002. Previously Deputy Under-Secretary for Economic Affairs, FCO.

Sir Alan Dashwood QC

Former Director in the Legal Service of the Council of Ministers, later Professor of European Law at the University of Cambridge from 1995 to 2009. A barrister in Henderson Chambers, he specialises in the law of the European Union, and appears regularly in proceedings before the Court of Justice.

Sir David Elliott

UK Deputy Permanent Representative to the EU 1982-91. Director-General (Internal Market), Council of the European Union, 1991-95.

Lord Hannay

UK Permanent Representative to the European Communities 1985-90 and to the United Nations, 1990-95.

Lord Jay of Ewelme

Permanent Under-Secretary of State, Foreign & Commonwealth Office, 2002-06.

Lord Kerr of Kinlochard

UK Permanent Representative to EU 1990-1995; Permanent Under-Secretary of State, Foreign & Commonwealth Office, 1997-2002.

Anne Lambert

UK Deputy Permanent Representative to the EU, 2003-2008.

Andy Lebrecht

UK Deputy Permanent Representative to the EU, 2008 – 2012.

Sir Emyr Jones Parry

UK Permanent Representative to NATO, 2001-03 and to the UN, New York 2003-07. Political Director and previously EU Under-Secretary at FCO. Now President of Aberystwyth University.

Sir Nigel Sheinwald

UK Permanent Representative to EU 2000-03. Prime Minister's Foreign Policy & Defence Adviser, 2003-07. British Ambassador to the United States, 2007-12.

Sir Stephen Wall

UK Permanent Representative to EU 1995-2000. Head, European Secretariat, Cabinet Office, 2000-04.

Michael Welsh

Member of the European Parliament for Central Lancashire, 1979-94.

Lord Williamson of Horton

Deputy Director-General (Agriculture) European Commission 1977-83. Cabinet Office 1983-87. Secretary-General, European Commission, 1987-97.

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