This briefing outlines developments in the EU’s civil and criminal justice policies and provides a brief overview of initial arguments on the impact that leaving the EU might have on the UK’s and Scotland’s policies in this field.
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EXECUTIVE SUMMARY

EU JUSTICE POLICIES

- The EU’s justice policies include both civil justice and police and criminal justice (PCJ). They are part of the EU’s wider Justice and Home Affairs (JHA) programme which includes asylum policy, border controls and immigration.

- The EU’s current civil justice policies cover a range of matters which have cross-border or internal market implications including:
  - child and family law with a cross-border dimension (e.g. access and custody; parental responsibility; and maintenance)
  - rules about which courts have jurisdiction for civil and commercial cases (e.g. rules which prevent parallel proceedings in more than one jurisdiction or Member State)
  - reciprocal rules on the enforcement of national court judgments.

- The EU’s current PCJ policies cover a range of matters including:
  - EU agencies created to improve criminal justice and law enforcement within the EU such as Eurojust and Europol
  - Rules which allow for the exchange of information on previous convictions, missing or wanted persons and to support criminal investigations.
  - The mutual recognition by Member States of other Member States’ judicial decisions (this includes the European Arrest Warrant – EAW - which provides for a fast track extradition process between Member States)
  - Rules allowing for the freezing or confiscation of criminal property in one Member State where the alleged criminal is being prosecuted in another Member State
  - Minimum rules for serious crimes with a cross-border dimension (e.g. money laundering)
  - Minimum standards for availability of procedural rights, such as interpretation and translation.

LISBON TREATY OPT-INS AND OPT-OUT

- As a result of the 2007 Lisbon Treaty, which entered into force in December 2009, the UK is only bound by new EU civil and PCJ justice policies if it chooses to opt in.

- The Lisbon Treaty also gave the UK an option, within a five year transitional period, to opt out of all (approximately 130) PCJ measures adopted before that Treaty entered into force (i.e. a block opt-out).
In July 2013, the UK Government notified the EU that it wished to exercise this block opt-out. However, it simultaneously negotiated individual opt-ins to 35 pre-Lisbon PCJ measures on the basis that these were in the national interest.

IMPACT OF BREXIT

- It is currently unclear what form Brexit will take (and what sort of relationship the UK will be able to negotiate with the EU and/or individual Member States).

- Arguments have been made that leaving the EU could have a negative impact on criminal justice and policing in the UK, in particular in relation to:
  - the mutual recognition of criminal judgments and judicial decisions (especially the EAW);
  - the exchange of information between Member State law enforcement agencies and judicial bodies; and
  - the UK’s participation in EU agencies such as Europol and Eurojust.

- Others have, however, questioned the importance of the EU agencies and have argued that the impact will be minimal as it is in the mutual interest of both the UK and the EU to continue cooperation in this field.

- Arguments have also been made that leaving the EU could have a negative impact on commercial matters (including dispute resolution) in the UK; and on child and family law with a cross-border element. Others have, however, argued that it may be possible to negotiate new agreements, or to fall back on other existing treaties or involvement in other international organisations (e.g. the Hague Conference on Private International Law).

- Brexit will have differing impacts throughout the UK, which is a multi-jurisdictional state. In Scotland there will be a specific impact on justice as Scotland has always had a separate legal system with its own civil and criminal law, as well as its own courts, legal profession, prosecution service and police force. In addition, most PCJ matters are devolved under the Scotland Act 1998, as are most aspects of civil law.

- Since Scotland has a separate legal system, specific Scottish issues will arise in relation to negotiations with the EU in the field of justice.

- Although the Scottish Government is not permitted under the Scotland Act to involve itself in international relations, which would rule out international treaties with the EU, it is permitted to observe and implement international obligations, including under EU law.

- There are therefore arguments that there might be some scope under the current devolution settlement for certain forms of Scottish-specific cooperation in the field of EU justice (at least as regards non-reserved matters). However, there is currently little clarity on this point.
INTRODUCTION
On 23 June 2016, the United Kingdom voted in a referendum to leave the European Union (EU), commonly referred to as “Brexit”. This briefing examines some potential implications for Scotland of leaving the EU in relation to:

- the civil justice system (in other words the system of laws, courts and procedures dealing with non-criminal matters such as contracts, family law, commercial law etc.)
- the criminal justice system including policing, often referred to as Police and Criminal Justice (PCJ)

The EU’s civil and criminal justice policies are part of its wider Justice and Home Affairs (JHA) programme which includes asylum policy, border controls, immigration and human rights.

The general aim of the JHA programme is to build an EU-wide area of “freedom, security and justice” (European Commission 2014b, page 1) (House of Lords European Union Committee 2014, para.4).

This briefing does not deal with the implications of Brexit as regards the whole JHA programme. Instead, it focuses on civil justice and PCJ policies.

BACKGROUND

The first part of this briefing provides background information on the EU treaties which impact on civil justice and PCJ policies. This background information is summarised in the flow-chart at Figure 1 (page 13) which is followed by a discussion of the potential impact of Brexit on civil and criminal justice in Scotland. Readers who wish to concentrate on substantive impacts may wish to focus on the section from page 13 onwards.

PERIOD UP TO THE MAASTRICHT TREATY (1993)

EU institutions can only pass legislation, and take other action, where the Member States have empowered them to do so in the EU Treaties (Ministry of Justice 2013, para 13).

The EU has never had a general power to legislate in the fields of national civil and criminal justice rules, for example in relation to budgets, court systems, legal aid rules, policing and intelligence, or the bulk of substantive or procedural law. Broadly speaking, these are matters for the Member States. EU legislation also has to comply with the “subsidiarity” principle – in other words that the EU should not take action (except in areas within its exclusive competence), unless it is more effective than action taken at a national, regional or local level.

The EU’s role in the field of justice has, however, developed over the years, both in terms of the scope of its powers and the role of EU institutions in the decision-making process.

Initially, cooperation was focused on a limited number of cross-border matters and took place outside of the formal framework of the then European Economic Community (EEC).

In the field of criminal justice, Member States’ Justice Ministers met biannually from the mid-1970s in the “TREVI group” to coordinate aspects of cross-border security, policing and counter-terrorism. More frequent meetings on criminal justice topics also took place between officials in individual working groups.
By the late 1980s, permanent intergovernmental structures had replaced some of these ad hoc arrangements (see Bunyan, T). Formal criminal justice cooperation also increased in the context of the border-free Schengen Agreement, which allowed for the pursuit of criminals across the five signatories’ territories and joint action against drug-trafficking and terrorism. The 1985 Schengen Agreement also set up a database – the Schengen Information System (SIS) – for exchanging information between law enforcement agencies in Schengen states (i.e. on wanted persons and stolen objects, including terrorist suspects under surveillance.)

Around this period, there were also elements of cooperation in the civil sphere, for example the Brussels Convention which laid down rules on the jurisdiction and enforcement of civil court matters (Brussels Convention).

MAASTRICHT TREATY (1993)

The Maastricht Treaty (officially the Treaty on the European Union), which entered into force in November 1993, brought cooperation on justice into the formal EU framework.

It provided rules governing JHA cooperation (Title IV), which specified that, “for the purposes of achieving the objectives of the Union” certain issues were matters of “common interest”. These included judicial cooperation on civil and criminal matters, and also police cooperation:

“for the purposes of preventing and combatting terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol).” (Article K.1(9))

Although the Treaty recorded the agreement of the Member States to set up Europol (i.e. an agency aimed at improving the ability of law enforcement agencies to tackle cross-border crime through the exchange of intelligence), it did not establish it. This was done by means of the 1995 Europol Convention which came into force in October 1998 (House of Lords European Union Committee (2008) chapter 2). A new Europol Regulation giving Europol additional powers was, however, adopted on 11 May 2016 and will come into force on 1 May 2017.

On an institutional level, the Maastricht Treaty set up the “pillar system”, which grouped together policies in three structures with different decision-making and enforcement procedures, i.e.:

1. **The First Pillar** – the former EC policy areas, including the customs union and single market

2. **The Second Pillar** – the Common Foreign and Security Policy (CFSP), including human rights and foreign aid

3. **The Third Pillar** – JHA, including PCJ and civil justice

The TREVI group and justice working groups were brought under committees in the Third Pillar which reported to the Council of Ministers of Justice and Home Affairs (JHA Council) – i.e. the body representing the Member States (see Den Boer).

Unlike the First Pillar, the Third Pillar was “intergovernmental” in nature. The Commission could propose legislation in civil matters, but was restricted from doing so for PCJ measures. In addition, action on justice required voting unanimity in the JHA Council, which meant that

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1 The initial members of Schengen were the Netherlands, Belgium, France, Luxembourg and West Germany
2 This was an international treaty which laid down which courts in Member States had jurisdiction in cross border disputes. It was signed by the then six members of the EEC and entered into force in 1973
individual Member States could veto policies. The European Court of Justice (ECJ) also did not have jurisdiction over justice and the Commission was not permitted to bring enforcement actions against Member States (see House of Lords European Union Committee 2013, Chapter 2 and Bunyan, T.). Consequently, most of the control over the system rested with the Member States.

UK OPT INS – TREATY OF AMSTERDAM (1999) AND SCHENGEN

Civil law opt-ins

The 1997 Treaty of Amsterdam (Amsterdam Treaty), which entered into force on 1 May 1999, introduced a major change to the above framework. It transferred civil law (although not PCJ measures), from the Third Pillar into the First Pillar. This meant that the Commission’s enforcement powers and ECJ’s jurisdiction also applied to civil and family law policies, although not to PCJ measures. Voting was initially on a unanimous basis, although the 2003 Treaty of Nice provided for qualified majority voting in the Council (although not in relation to family law), ultimately reducing the scope for Member State vetoes on most EU civil law policies (UK Government (2014a) para 1.15).

The UK and Ireland did not wish to participate in the new system and negotiated a Protocol to the Amsterdam Treaty which meant that the EU’s JHA policies would only apply to them if they opted in to them on a case-by-case basis (Denmark also has a similar series of opt-outs – Peers, S (2015a)). The UK was, therefore, able to control its level of participation in civil and family law policies.

Police and Criminal Justice – Member States retain veto rights

The Amsterdam Treaty did not transfer PCJ to the EU’s First Pillar. This meant that:

1. Decision-making continued on the basis of unanimity. Therefore any Member State, including the UK, could veto PCJ proposals (House of Lords European Union Committee 2013, para 16).

2. The Court of Justice had no automatic jurisdiction over PCJ cases and the Commission could not bring enforcement actions.5

(See House of Lords European Union Committee 2013, paras 15-17 and House of Commons Library 2011 paras 1.1 and 2.1)

Schengen opt-ins

The Amsterdam Treaty also included a Protocol on the Schengen area.6 As the UK and Ireland did not participate in Schengen at the time, Article 4 of this Protocol confirmed that they were not bound by it. However, they could “request to take part in some or all of the provisions” (i.e. opt-in), with the Council deciding such requests by unanimity.

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3 This is a form of majority voting where votes are allocated to Member States according to their population, but weighted in favour of smaller states
4 Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice
5 Member States had the option (by making a declaration under former Article 35(2) TEU) of allowing their national courts to send references for preliminary rulings to the court. However, ten Member States including the UK chose not to use this option
6 Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union
Following the entry into force of the Treaty, the Council approved a request from the UK to participate in some aspects of Schengen. The result was that the UK participated in the PCJ aspects of Schengen – for example tracking criminals. But it did not participate in relation to immigration aspects – i.e. visa free travel/border controls (see House of Lords European Union Committee 2013 para 17 and Peers, S. (2015b)).

EU POLICIES FOLLOWING THE AMSTERDAM TREATY (1999)

Further EU justice policies came to fruition in the decade following the Amsterdam Treaty. In the field of PCJ two of the most important policies included:

- The setting up of Eurojust in 2002 – a body in The Hague aimed at improving the coordination of investigations and prosecutions in relation to serious cross-border crime among Member States’ judicial authorities
- The European Arrest Warrant – a fast track extradition system – which came into force in 2004

In the field of civil law, policies included:

- The European Judicial Network which was set up in 2002 to facilitate judicial and legal cooperation between Member States (each Member State has at least one contact point) (European E-Justice Portal 1)
- The 2001 “Brussels I Regulation” regulating court jurisdiction and the recognition and enforcement of judgements in cross-border civil and commercial cases. This was replaced by an updated regulation in 2012 (see below)
- The 2003 “Brussels IIa Regulation”, also known as “Brussels II bis” which regulates court jurisdiction and the recognition and enforcement of judgements in cross-border family law cases. The UK has chosen to opt in to 2016 proposals to amend this regulation (see below)
- Rules on which Member State’s or other country’s law is applicable to contractual obligations (Rome I Regulation) and to non-contractual obligations – e.g. damages actions (Rome II Regulation)
- The Insolvency Regulation which came into force in 2002 and which allows insolvency proceedings to be brought in the most relevant Member State (European Commission 2016c). A new regulation has been adopted which will come into force in 2017 (see below)

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8 Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
9 Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility
10 Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations
11 Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations
LISBON TREATY (2009)

The above developments culminated in the 2007 Lisbon Treaty which amended the treaties which form the constitutional basis for the EU, i.e., the Maastricht Treaty (known in its updated form as the Treaty on European Union) and the Treaty on the Functioning of the European Union (TFEU). The Lisbon Treaty entered into force on 1 December 2009.

The Lisbon Treaty led to major changes in the JHA field, both in the scope of the EU’s powers and the decision-making process (House of Lords European Union Committee 2014, paras 4-16) (European Commission 2014a). It is this framework which currently governs EU justice policy.

The EU’s powers

Civil justice

The EU’s civil justice powers are defined in Article 81 of the TFEU. The Ministry of Justice’s Call for Evidence on Civil Justice Cooperation (2013) explained Article 81 as follows:

“Under Article 81, the EU is expected to ‘develop’ judicial co-operation in civil and commercial matters (encompassing family law) with cross-border implications, ‘particularly’ when necessary for the proper functioning of the internal market.” (Ministry of Justice, page 7, para 14)

The reference to “particularly when necessary” is a change from the previous regime where civil justice measures could only be adopted “insofar as necessary for the proper functioning of the internal market.” Arguments have been made that this change removes the requirement for EU civil justice measures to be absolutely necessary for the proper functioning of the internal market, thus potentially increasing the EU’s powers (Ministry of Justice, page 23, para 14).

For further details on the scope of the EU’s civil justice policies following the Lisbon Treaty see:

- the “The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union” (European Commission 2014b);
- “A Citizen’s Guide to cross-border Civil Litigation in the EU” (European Commission)
- the European Commission’s DG Justice website which also refers to the EU’s recent “Justice for Growth” policy (European Commission 2016a).

Police and Criminal Justice

The EU’s powers in relation to PCJ measures are provided for in Articles 82-88 of the TFEU as amended by the Treaty of Lisbon. They cover six main areas:

- **Mutual recognition** by Member States of criminal judgments and judicial decisions from other Member States (Article 82(1) TFEU)

- **Minimum procedural rules** where “necessary to facilitate mutual recognition” in the following areas: mutual admissibility of evidence between Member States; the rights of individuals in criminal procedure; and the rights of victims of crime (Article 82(2))

- **Minimum rules for particularly serious crimes** with a cross-border dimension, i.e.: terrorism; trafficking in human beings and sexual exploitation of women and children; illicit drug trafficking; illicit arms trafficking; money laundering; corruption; counterfeiting of means of payment; computer crime and organised crime (Articles 83(1) TFEU)
• **Criminal law offences/sanctions in areas which the EU has harmonised** where essential to ensure the effective implementation of an EU policy (Article 83(2) TFEU)

• **Co-operation between law enforcement agencies** in different countries (Article 87 TFEU)

• **EU agencies** created to improve criminal justice within the EU such as Europol (Articles 85, 86 and 88 TFEU). This includes the right to establish a European Public Prosecutor’s Office to combat crimes affecting the EU’s financial interests (this requires unanimity in the Council and the consent of the European Parliament).

Certain of these rules involved the creation of new EU powers, for example in relation to minimum procedural rules (Article 82(2)) and minimum rules for particularly serious crimes (Articles 83(1) (Rozmus et al).

However, the Treaty also established “emergency brake’ procedures for measures introduced under these articles.

The emergency brake procedures allow any Member State to suspend discussions on a proposal which “affect fundamental aspects of its criminal justice system.” Proposals are then referred to the Council for further discussion. If consensus cannot be reached, then nine or more Member States may establish enhanced cooperation amongst themselves through a mechanism set out in the TFEU (UK Government (2014b), para 48)

**Member State veto right over PCJ measures removed**

One of the most important changes made by the Lisbon Treaty was the abolition of the pillar system referred to above. This meant that:

• **Most PCJ measures would be covered by qualified majority voting** in the Council (thus stopping individual Member States from vetoing EU PCJ legislation)

• **The Court of Justice was given normal jurisdiction** “in all former JHA areas except for a restriction on ruling on national police operations” (House of Commons Library 2014). Therefore, the Court of Justice gained the power to rule over new PCJ measures

• **The Commission gained the right to bring enforcement actions against Member States** in all former JHA areas

**UK right to opt-in to all new JHA measures**

The UK Government only agreed to sign up to the changes in the Lisbon Treaty in return for similar treatment as under the Amsterdam Treaty (i.e. the ability not to participate in JHA policies it did not like).

This was put into effect by a new Protocol to the Lisbon Treaty (Protocol 21) which **extended the existing Amsterdam Treaty opt-in procedure to include PCJ proposals.** This allowed the UK to choose whether or not it wishes to participate in all new JHA policies either at the outset or post adoption by the EU (i.e. **including both civil legislation and PCJ measures**) (House of Commons Library 2011, page 3).

The House of Lords European Committee summarised the position as follows:

“Since the adoption of post-Lisbon PCJ measures no longer requires unanimity, they cannot be blocked by the UK alone; but if the government of the day do not like them, they need not opt in to them.” (House of Lords European Committee 2014, para 20)
Schengen – UK opt-ins and opt-outs

The Schengen Protocol was also amended by the Lisbon Treaty (Protocol 19), so that the UK can:

1. opt in to Schengen PCJ measures in line with the rules in the Amsterdam Treaty; and
2. opt out of measures which build on existing provisions in which the UK already participates.

The House of Lords European Committee explains the opt-out as follows:

“Article 5(2) of the Protocol provides additional flexibility for the UK to decide not to participate in measures which build upon aspects of the Schengen acquis in which it already participates. In such cases, there is a presumption that the UK will participate, but the UK may notify the Council within three months that it does not wish to take part in the Schengen-building measure in question, by opting out of the requisite proposal.”
(House of Lords European Committee 2014, para 21)

Court of Justice/Commission powers - UK bulk opt-out for existing PCJ measures

As explained above, the Lisbon Treaty extended the roles of the Court of Justice and the Commission in relation to PCJ measures. The Treaty did, however, contain transitional rules (Article 10(1)–(3) of Protocol 36) which applied to existing PCJ measures – i.e. ones which had already been adopted by the EU.

These rules meant that the powers of the Court of Justice and Commission only became effective in relation to existing PCJ legislation five years after the coming into force of the Lisbon Treaty (so not until 1 December 2014).

The Lisbon Treaty (Article 10(3) of Protocol 36) also granted the UK (but no other Member States) an option, within the five year transitional period mentioned, to opt out of all (approximately 130) PCJ measures adopted prior to the treaty’s entry into force.

At the time of the entry into force of the Treaty of Lisbon, the UK participated in almost all EU policing and criminal law measures (Peers, S. (2014b)). However, the Conservative 2010 General Election manifesto sought a mandate to negotiate the return of “criminal justice” powers from the EU to the UK (House of Lords European Committee 2014, para 25).

In July 2013 the UK Government notified the Council that it wished to exercise the block opt-out (UK Government (2014c)). However, it simultaneously negotiated individual opt-ins to 35 pre-Lisbon PCJ measures arguing that these were in the national interest. These included Eurojust, Europol, the European Arrest Warrant and the PCJ element of the Schengen Information System (House of Commons Library 2014).

For further details on the UK’s opt-out and opt-in to existing PCJ measures see European Parliament Information Office in the United Kingdom and Peers, S. (2014b). See also the UK Government report which includes a table with all UK PCJ opt-ins and opt-outs (last updated on 8 April 2016) (UK Government 2016a)

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Position in UK, Ireland and Denmark

Both Ireland and Denmark have also negotiated their own JHA relationship with the EU. The European Parliament Research Service (EPRS) summarises the impact of this as follows:

“Ireland and the UK are not automatically bound by any legislation in this field, but may choose to opt in to such acts either before or after their adoption. Denmark is not bound by any legislation in this field, but after its adoption may seek to participate by means of a complementary agreement.” (EPRS)

Table 1 (below) indicates the key legal acts in the JHA field and whether the UK, Ireland and Denmark participate or not.

Table 1: Key Legal Acts in the JHA field

<table>
<thead>
<tr>
<th>Legal Act</th>
<th>UK</th>
<th>IE</th>
<th>DK</th>
</tr>
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<tbody>
<tr>
<td>Dublin III Regulation</td>
<td>✓</td>
<td>✓</td>
<td></td>
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<tr>
<td>Asylum Procedures Directive 2013 (recast)</td>
<td>✓</td>
<td>✓</td>
<td></td>
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<tr>
<td>Schengen Information System (SIS II)</td>
<td>✓</td>
<td>✓</td>
<td></td>
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<tr>
<td>European Investigation Order</td>
<td>✓</td>
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<tr>
<td>Framework Decision on combatting terrorism</td>
<td></td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>Europol (2009)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Eurojust</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>European Arrest Warrant</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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</tbody>
</table>

Source: European Parliament Research Service
SUMMARY FLOW CHART – DEVELOPMENT OF THE EU’S POWERS

The flow-chart below summarises the development of the EU’s JHA powers up to the Lisbon Treaty.

Figure 1: Development of EU Competence in the JHA field

Source: UK Government (2014b), page 29
HOW EU MEMBERSHIP CURRENTLY IMPACTS ON CIVIL AND CRIMINAL JUSTICE IN SCOTLAND

IMPACT IN SCOTLAND – GENERAL

The UK, as an EU Member State, is the entity which signs up to both EU Treaties and individual EU justice measures.

However, Scotland has always had a separate legal system within the UK, with its own civil and criminal law, as well as its own courts, legal profession, and police forces and prosecution service. Devolution in 1998 did little to change this as most PCJ matters are devolved under the Scotland Act 1998 (Scotland Act) – the main exception in the PCJ field is that rules on national security, interception of communications, official secrets and terrorism are reserved to Westminster, as is extradition. In addition, most aspects of civil law relate to devolved matters.

Consequently, although the UK Government controls the direction of the UK’s involvement in EU justice policies, the Scottish Government has a key role in inputting its views into the UK’s negotiating positions as well as implementing EU legislation. The Scottish Parliament also has an important role in scrutinising such legislation (see for example Scottish Parliament (2013)).

Scottish bodies are also involved in parts of the UK’s institutional framework for dealing with EU justice matters – for example, the Crown Office and Procurator Fiscal Service (COPFS), which is responsible for prosecuting crime in Scotland, participates in the UK Government’s “Eurojust Oversight Board” which sets the direction of the UK’s Eurojust policy (see Eurojust 2014). Similarly, in the civil field there is a separate Scottish Government contact in the European Justice Network mentioned above (European E-Justice Portal 2). Police Scotland also has an officer based in the Europol Liaison Office in the Hague (Scottish Government 2).

Scottish bodies are also responsible for the operational and administrative aspects of the EU’s justice policies in Scotland. For example, in the criminal sphere, the Crown Office’s International Co-operation Unit deals with outgoing and incoming European Arrest Warrants, with Police Scotland’s Fugitive Unit executing incoming European Arrest Warrants in Scotland (see Crown Office and Procurator Fiscal Service 2011 and Police Scotland 2015).

Similarly in the civil sphere, it is the Scottish courts which are responsible for interpreting and implementing the various EU rules, for example by enforcing judgments from other Member State courts in Scotland (Brodies 2012). The Scottish Central Authority, which sits within the Scottish Government’s Justice Directorate, acts on behalf of Scottish Ministers to process applications and discharge other duties set down in various EU Regulations, notably those concerning parental child abduction (Brussels IIA) and reciprocal enforcement of maintenance obligations. The Scottish Government also contributes to the formation of UK Government policy in respect of areas which are devolved to Scotland.

More detailed information follows on how EU policies currently impact on both civil and criminal justice in Scotland.

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15 There is, however, often an interplay between devolved areas (e.g. contract law) and reserved areas (e.g. consumer law)
IMPACT IN SCOTLAND – CIVIL JUSTICE

As outlined above, in broad terms the EU’s civil justice policies are focused on cases with cross-border or internal market implications.

As part of the UK, Scotland currently participates in a number of pre Lisbon Treaty EU civil justice policies as well as policies which the UK opted into post Lisbon. While this is not an exhaustive list, these include:

- Rules on which Member State courts have jurisdiction over civil and commercial cases and on the recognition and enforcement of national court judgments in other Member States (recently updated and known as the “Recast Brussels Regulation”)

- The Rome I and Rome II Regulations mentioned above on the law applicable to contractual obligations and to non-contractual obligations

- Various rules on cross-border family law cases, the most important one being the Brussels IIa Regulation mentioned above which:
  - determines which Member State court is responsible for divorce, custody and access proceedings;
  - ensures judgments issued in one EU country are recognised and enforced in another country; and
  - sets out a procedure to settle cases where a parent takes a child from one EU country to another without the other parent's agreement. (European Commission 2016d)

  The UK has opted in to 2016 proposals for amending the Brussels IIa Regulation (European Civil Justice)

- The Maintenance Regulation – common rules for applications for maintenance (or child support) arising where one family member is in another EU country

- The Taking of Evidence Regulation – simplified rules for taking evidence in one country for direct use in a case in another country, without using consular or diplomatic routes

- The Service Regulation – simplified rules for the direct service of judicial documents from one Member State to another, without using consular or diplomatic routes

- The Insolvency Regulation mentioned above – this is to be replaced by a Recast Insolvency Regulation which will apply to insolvency proceedings commencing on or after 26 June 2017.

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16 Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
17 Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement or decisions and cooperation in matters relating to maintenance obligations
18 Regulation 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters
19 Regulation 1393/2007 on the service of judicial and extrajudicial documents in civil or commercial matters
20 Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings (recast)
- Rules simplifying the circulation of public documents such as birth certificates – when the rules apply, Member States will no longer be able to require that documents have an official stamp to be considered authentic (European Commission 2016b)
- The European small claims procedure which can apply to cross-border small claims21 (Scottish Courts and Tribunals Service 3)
- The European Enforcement and Payment Orders which create a fast track procedure for the enforcement of cross-border orders for uncontested claims (Scottish Courts and Tribunals Service 1 and 2)

The Scottish Government analysed the impact of civil justice cooperation in the context of the UK Government’s 2012 balance of competences review (UK Government 2012).

In its 2012 response to the UK Government’s review, the Scottish Government indicated that it was broadly supportive of the EU’s powers in the area of civil justice, noting that:

“Measures adopted under Article 81 are mainly aimed at ensuring that court judgments and other judicial decisions in one Member State are recognised and can be enforced in another Member State. It also enables the EU to adopt measures which harmonise national laws in this field. Creating mechanisms for the expeditious enforcement and recognition of judgements across Member States is vital to the proper functioning of an internal market and for the effective enforcement of civil rights.” (Scottish Government, para 1)

However, the Scottish Government also indicated that there have been EU proposals which, “would not have correctly translated into Scots private law” and that it, therefore, supports the UK’s Lisbon Treaty opt-in, i.e. the UK’s right to choose which civil justice policies it wants to participate in (Scottish Government 1, para 2).

The Scottish Government’s response also included a short analysis of the broader practical application of EU civil justice policies in Scotland.

This analysis explained that the Court Service held little readily available data on the number of court actions which relied on measures made under the EU rules (see para 7).

The response did, however, provide more information, and some limited statistics, on the Scottish Government’s experience of acting as a Central Authority under the EU’s cross-border family law regime. Central authorities act as an information point between Member States, solicitors and members of the public. They are obliged to facilitate communications between Member State courts.

The response explained that:

“The Scottish Government has more experience as a Central Authority under the Brussels Regime, particularly in relation to Parental Child Abduction (Council Regulation No 2201/2003, “Brussels II bis”) and Family Maintenance Obligations (Council Regulation No 4/2009). The Central Authority dealt with 20 cases under the Brussels II bis Regulation in 2012, 44 in 2011 and 23 in 2010. The Regulation is a useful bolt-on to the 1980 Hague Convention, for example in relation to provisions for the collation and exchange of information between Member States. The Maintenance Regulation has only been in force for two years. In the first year of operation, the Scottish Central Authority

21 Recently revised – see European Commission 2016d
According to the Scottish Government, the number of cases dealt with under Brussels IIa has increased year-on-year to 43 in 2013, 50 in 2014 and 54 in 2015. Similarly, the number of new cases under the Maintenance Regulation has apparently risen to 106 in 2013 and 114 in 2014, though numbers dropped to 85 in 2015 (source: informal communication from Scottish Government).

Both the Faculty of Advocates and the Law Society of Scotland responded to the UK Government’s call for evidence in its 2012 balance of competences review.

The Faculty of Advocates (the Faculty) indicated that EU civil judicial cooperation is a practical necessity in the context of the single market (paras 1.1. and 3). It argued that the impact has been most marked in relation to:

1. rules on the jurisdiction and choice of law in civil and commercial disputes; and
2. cross-border family law (para 2.1).

The Faculty took the view that most of this impact has been positive whilst highlighting certain practical difficulties in the field of family law (para 2.2)

The Law Society’s response indicated that there are, “clear advantages both to business and to individuals in the UK from EU civil judicial cooperation.”

It also stressed that, in Scotland, the impact of the EU policies has been most strongly felt in relation to cross border family law, insolvency proceedings and the application of jurisdictional rules to international cases.

More details on EU civil justice measures which apply in the UK can be found in the UK Government’s report on its review of the balance of competences in the civil justice field (UK Government (2014a)).

**IMPACT IN SCOTLAND – POLICE AND CRIMINAL JUSTICE**

As part of the UK, Scotland currently participates in a range of PCJ measures and agencies as a result of the 2014 bulk opt-in mentioned above, and individual opt-ins exercised since then. While this is not an exhaustive list, these include:

- Europol
- Eurojust
- The European Arrest Warrant which came into force in the UK on 1 January 2004 as a result of the Extradition Act 2003
- The European Investigation Order\(^\text{22}\) – this provides criteria for the mutual recognition and transfer of evidence gathered in one Member State to be used in other Member States. It has not begun operation yet, but as of 22 May 2017 it will replace most of the EU rules on the transfer of evidence between Member States in criminal cases (Peers, S. (2014a))

• The European Protection Order\textsuperscript{23} – this allows a victim of domestic violence in one Member State to have a restraining order against the abuser transferred to another Member State if the victim moves there

• Rules on the recognition of assets and freezing orders in relation to the proceeds of crime\textsuperscript{24} and on cooperation between Asset Recovery Offices in Member States.\textsuperscript{25}

• The EU Directive on minimum standards for crime victim’s rights.\textsuperscript{26}

• The EU Directive on the right to interpretation and translation in criminal proceedings.\textsuperscript{27}

• Rules on the exchange of police information, i.e.:

  - The Schengen Information System – in 2015 the UK joined the second generation Schengen Information System (SIS II) which enables participating countries to share and receive law enforcement alerts in real time (Home Office)
  - The Customs Information System – used in trafficking and drugs cases\textsuperscript{28}
  - The Prüm Decisions – these provide Member States with access to police databases on fingerprints, vehicle registration data and DNA
  - The European Criminal Records Information System\textsuperscript{29} which allows for the exchange of criminal records

The impact of the EU’s PCJ policies was analysed as part of the UK Government’s 2012 balance of competences review. The Scottish Government and a variety of Scottish bodies submitted written evidence as part of this review.

In its evidence, the Scottish Government (Scottish Government 2) indicated support for the EU’s PCJ role arguing that such policies have:

“…become essential given the development of the internal market, which has resulted in freedom of movement and the creation of a “common space”. For the effective cross border functioning of the police and judicial authorities within this common space, the European Union is required more than ever to play an active role through legislative and non-legislative means.” (para 5)

It also argued that, although EU’s PCJ powers had developed over the years, there were sufficient safeguards to ensure respect for national laws, including the emergency brake procedures mentioned above. Support was also expressed for the UK’s right to opt-in to PCJ legislation on a case by case basis.

The Scottish Government’s response also included detailed views on the practical impact of the EU’s PCJ policies in Scotland, including reference to various case studies.

The response emphasised the value of European Arrest Warrants, noting that:

\textsuperscript{24} Council Framework Decision 2006/783/JHA of 6 October 2006 and Framework Decision 2003/577/JHA
\textsuperscript{25} Council Decision of 6 December 2007/845/JHA concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime
\textsuperscript{27} Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010
\textsuperscript{28} Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes
\textsuperscript{29} Council Decision 2009/316/JHA on the establishment of the European Criminal Records Information System (ECRIS)
“… in 2013, 149 European Arrest Warrants were received by the Crown Office and Procurator Fiscal Service (COPFS) 25 EAWs were issued. The average extradition process required 97 days, which is a significant reduction from the time it would have taken under the 1957 Council of Europe Convention on Extradition. A current comparison can also be drawn with extraditions from a non-EU states, which take approximately 10 months” (para 15)

More detailed statistics on the use of European Arrest Warrants in Scotland were released by COPFS on 24 May 2016 following a freedom of information request (see below).

Table 1: Number of cases in which proceedings have been taken in Scottish Courts after an arrest on an EAW

<table>
<thead>
<tr>
<th>Year (starting from January)</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>67</td>
<td>101</td>
<td>99</td>
<td>89</td>
<td>137</td>
</tr>
<tr>
<td>2012</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>48</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>541</td>
<td></td>
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</tbody>
</table>

Table 2: Number of extraditions from Scotland pursuant to an EAW (conclusion of court proceedings)

<table>
<thead>
<tr>
<th>Year (starting from January)</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>35</td>
<td>90</td>
<td>93</td>
<td>39</td>
<td>78</td>
</tr>
<tr>
<td>2012</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>32</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>367</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 3: Number of extraditions to Scotland pursuant to an EAW

<table>
<thead>
<tr>
<th>Year (starting from January)</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>4</td>
<td>7</td>
<td>12</td>
<td>9</td>
<td>9</td>
</tr>
<tr>
<td>2012</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>7</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>48</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 4: Number of EAWs issued by Scotland

<table>
<thead>
<tr>
<th>Year (starting from January)</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>4</td>
<td>8</td>
<td>13</td>
<td>12</td>
<td>9</td>
</tr>
<tr>
<td>2012</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>49</td>
<td></td>
<td></td>
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</tbody>
</table>

Source: COPFS 2016
The Scottish Government’s response mentioned above also argued that the European Criminal Records Information Exchange System (ECRIS) has had a positive impact in Scotland as it enables law enforcement agencies to manage non UK offenders (for example those with sex offence convictions) as well as making it easier for courts to take into account previous offending in other Member States when sentencing.

It also argued that the Schengen Information System II will benefit Scottish law enforcement authorities as it covers additional information such as biometric data and photos and can also be provided on a real time basis.

Other positive impacts identified by the Scottish Government include:

- **Asset recovery legislation** – in particular the regulation of time limits and responses when dealing with other Member State agencies
- **EU funding for the establishment of Joint Investigation Teams (JITs)** with other Member States (funded through Eurojust’s JIT fund)
- **EU Mutual Legal Assistance Agreements with Japan and the USA** – these provide a system for allowing evidence in these countries to be used in EU Member States and vice versa
- **Eurojust** – the response notes that there has been an increase in requests from Member States to deal with serious cross-border crime
- **The European Investigation Order** – this is regarded as a more efficient system for obtaining evidence in criminal cases, whilst containing safeguards to ensure that Member States national laws are respected
- **Europol** – the response considers that Europol plays an effective role in “providing analytical support, enabling law enforcement information exchange and producing threat assessment”
- **Rules on Human Trafficking, the Sexual Exploitation of Children and Victims’ Rights**

Although the Scottish Government took a broadly positive view of the impact of the EU’s PCJ policies in Scotland, its response did contain critical caveats. These included the suggestion that the European Commission’s proposals sometimes do not respect the differences between national legal systems (see for example its comments on Commission proposals to expand the role of Eurojust – Scottish Government 2, para 50.)

Both the Law Society of Scotland (Law Society) and the Faculty of Advocates (Faculty) responded to the UK Government’s call for evidence in its 2012 balance of competences review (the Law Society in a joint response with the Law Society of England and Wales).

The Law Society’s response took the view that the development of EU PCJ measures over the years has improved cross-border cooperation and highlighted the European Arrest Warrant as good example of effective legislation noting that:

“Perhaps the starkest example to date of how Member States can enhance their cooperation in this field is a pre-Lisbon instrument, the EAW Framework Decision. Though the EAW system has room for improvement, and calls have been made to amend the system including by introducing a proportionality requirement … it is a far more efficient system than the previous arrangements in place between Member States –
primarily by speeding up the extradition process.” (Law Society of Scotland and Law Society of England & Wales, para 3)

The Faculty also agreed that the EU action in the PCJ area has been effective in raising standards and enhancing co-operation between Member States. However, its response indicated that more efficient processes can sometimes lead to human rights concerns, noting that:

“The development of EU police and criminal justice competence has generally benefitted the Scottish criminal justice system e.g. co-operation between prosecutors in seeking and enforcing arrest and witness warrants. It should be noted, however, that the issue of proportionality, for example, has caused concern e.g. Polish nationals being detained and extradited over what can only be deemed relatively trivial matters.” (Faculty Advocates 2014 at para. 5)

The scope and use of the European Arrest Warrant was an issue which proved very controversial during the UK Government’s 2014 opt-in process. Arguments were made that the process can allow British citizens to be extradited to Member States with less robust human rights protections and/or for minor offences (for a summary of criticisms of the EAW see House of Commons Library 2015).

For more details on PCJ measures in which the UK participates see Peers, S (2016); and UK Government (2014b).

**REACTION TO THE DECISION TO LEAVE THE EUROPEAN UNION**

It is currently unclear what the consequences of Brexit will be. Much will depend on the outcome of future negotiations. Consequently, by their nature, current reactions to the decision to leave the EU may involve elements of speculation and are also subject to change.

In the field of justice, however, it seems likely that the UK will wish to re-establish certain of the existing arrangements – i.e. the PCJ opt-ins and cooperation on civil law matters. This appears to be confirmed by David Davis MP, Secretary of State for Exiting the European Union, in a recent House of Commons debate. In response to a question about the UK’s future relationship with Europol, he indicated that:

“..the aim is to preserve the relationship with the European Union on security matters as best we can. The right hon. Lady will recall that last year a decision was made which laid aside about 100 measures that we did not want to be part of, but kept some others, including the European arrest warrant and one or two others—controversially, as she will remember. So yes, of course we are across that, and of course we are aiming to maintain it. That is the answer.” (Hansard column 46)

It is worth noting that certain matters are covered by existing Council of Europe treaties (or other international treaties such as civil justice conventions falling under the Hague Conference on private international law). Some of these could potentially act as a default position post Brexit.

In other areas there may be a need to negotiate bilateral treaties with individual Member States, or with the EU as a whole. This approach has been taken by certain EFTA countries, for example Norway, which has entered into cooperation with the EU in various areas of justice (see Norway – Mission to the EU)

Although there are differences of opinion, there are arguments that new arrangements have the potential to be more complicated, expensive and time-consuming than the existing regime.
There are also important questions as to what Scotland’s role will be in the process given that Scotland has its own legal system with its own civil and criminal law, as well as its own courts, legal profession, prosecution service and police force.

Although the Scottish Government is not permitted under the Scotland Act to involve itself in international relations, which would rule out international treaties with the EU, it is permitted to observe and implement international obligations, including under EU law. In the past the UK has also ratified an international treaty – the Hague Convention on the International Protection of Adults – for Scotland alone (see Conflictoflaws.net).

Although there is little clarity on this point at the moment, there are arguments that there might be some scope under the current devolution settlement for certain forms of Scottish-specific cooperation in the field of EU justice (at least as regards non-reserved matters). In this regard, a specific group has been set up within the Scottish Government’s Justice Board to consider the impact of Brexit on Scotland’s justice system (source: informal communication from the Scottish Government).

It is also worth noting that the Memorandum of Understanding between the UK Government and the devolved administrations outlines general principles which apply to EU and international matters (notably in the international relations and EU concordats) (UK Government 2013). These principles will be relevant to negotiations with the EU, and other international organisations, on justice matters.

A brief summary of some reactions to Brexit follows as regards both civil justice and police and criminal justice.

**CIVIL JUSTICE**

**Dispute resolution**

Much of the immediate reaction in the field of civil justice has focused on the potential impact of Brexit on commercial dispute resolution in the UK.

For example, the London law firm Slaughter and May produced a “Brexit Essentials briefing” which emphasises that the UK currently benefits from the EU rules on courts’ jurisdiction and the enforceability of judgments (the Recast Brussels Regulation). It notes that:

> “Post-Brexit, the UK would have to replace these arrangements or face the prospect of its courts’ judgments becoming less effective across Europe. Without a replacement, international parties might be persuaded to nominate an EU Member State (rather than the UK) as the forum for their disputes if a pan-European judgment was important to them or, alternatively, switch to arbitration” (Slaughter and May, page 8)

According to Slaughter and May, possible solutions range from:

- Trying to sign up to the Lugano Convention which applies to the jurisdiction and enforcement of judgments between EU Member States and EFTA states with the exception of Liechtenstein (i.e. Iceland, Norway and Switzerland)

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30 Schedule 5, Part I, para 7
• Signing (reciprocal) individual treaties with EU Member States;\textsuperscript{31} or

• Doing nothing

The briefing notes that:

“The first two options require the co-operation of other States and, while they are likely to be attracted to the idea of their judgments being readily enforceable in the UK, they might seek to attach conditions to that agreement. Doing nothing would mean that an English judgment would be no more enforceable in France than it is at present in, say, New York.” (Slaughter and May, page 9)

The Scottish law firm, MacRoberts has however argued that the Lugano Convention may not be as effective as the Brussels Regulation noting that:

“A key point to note in relation to Lugano, however, is that, unlike the Brussels recast regulation it does not ensure that where parallel court actions are brought in another jurisdiction in contravention of an exclusive jurisdiction clause, the litigation in that jurisdiction will be sisted (frozen) to allow the chosen court to determine jurisdiction.”\textsuperscript{32} (MacRoberts)

Other potential issues which have been raised relate to the service of documents and the taking of evidence in cross border civil cases. In that regard, the law firm Bird & Bird notes that:

“The procedure for service of judicial and extra-judicial documents between member states (including Denmark) is … governed by EU rules, as is the taking of evidence. The aim of these rules is to improve and expedite the transmission of judicial and extra-judicial documents between member states, and to simplify and accelerate cooperation between member states with regard to the taking of evidence in one member state for use in proceedings in another member state” (Bird & Bird)

Bird & Bird also explains that pre-existing international agreements could potentially provide a solution to the issue of jurisdictional rules, noting that:

“the UK could decide to ratify the Hague Convention on Choice of Court Agreements which provides an optional worldwide framework of rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The EU (along with Mexico and Singapore) has recently ratified the Hague Convention, so there is a framework in place regulating these issues which the UK could sign up to” (Bird & Bird)

MacRoberts has also argued that Hague Convention could be an alternative, although it questions its global relevance:

“Another option would be the Hague Convention on Choice of Court Agreements which does protect the validity of exclusive jurisdiction clauses, but its relevance is limited in global terms, as it has only been ratified by Mexico, Singapore and the EU.” (MacRoberts)

\textsuperscript{31} The Court of Justice has ruled that the rules in the Brussels I Regulation (and hence the Lugano Convention) are an exclusive competence of the EU (Opinion 1/03). Therefore, it is very likely that treaties in this area between the UK and individual Member States would be subject to legal challenge

\textsuperscript{32} There are a number of other differences between the Lugano Convention and the Recast Brussels Regulation
Others have explained that the Hague Convention only concerns choice-of-court clauses, not all issues arising from the jurisdiction and enforceability of judgments. For example, the law firm Eversheds indicates that:

“The Hague Convention only deals with the validity and effectiveness of exclusive jurisdiction agreements (and enforcement of judgments made in such cases) so would not provide a means of ascertaining the relevant jurisdiction in the absence of an express agreement between the parties.” (Eversheds)

Brexit could also lead to uncertainties as to the application of “choice of law” clauses in relation to contractual and non-contractual disputes as the UK will no longer be bound by the rules in the Rome I and II Regulations. However, commentators have indicated that the practical impact for the UK is likely to be minimal as the rules in question have universal application and apply even if the law in question is not that of an EU Member State (Simmons & Simmons). According to the Scottish law firm, Brodies, this means that:

“The courts of the remaining EU member states will therefore still have to apply Scots, English or Northern Irish law to a dispute where the Rome Regulations would lead them to that result, including where the parties have agreed that one of those laws should govern their relationship” (Brodies)

For a more detailed overview of these issues see the briefings provided by the barristers 20 Essex Street (20 Essex Street) and the law firm Simmons & Simmons (Simmons & Simmons).

**Family law**

There has already been a degree of discussion on the impact of Brexit on family law in England and Wales, much of it focused around the impact that leaving the EU would have on the cross-border rules in the Brussels IIa Regulation, but also on the potential for using Brexit as a trigger for more general reforms (see Solicitors Journal).

Family law in Scotland is significantly different than in England and Wales. Therefore not all comments on the impact of Brexit in England and Wales necessarily apply to Scotland. This said, the current commentary on the impact of Brexit on Scottish family law has also tended to focus on the Brussels IIa rules on jurisdiction, enforcement and recognition of judgments in cross-border cases.

Writing just before the EU Referendum, Professor Eric Clive has argued that there will need to be new legal provisions covering the rules in the Brussels IIa Regulation. He argues that the Brussels IIa Regulation can:

“… not just be continued in effect by a simple provision converting it into a UK Act or, for Scotland, an Act of the Scottish Parliament. Most of its provisions are framed by reference to Member States. Even the word “court” is defined as covering “all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation” (art.2(1)). So there would have to be new provisions.”

Professor Clive argues that negotiating such provisions would be a complex matter and that, in relation to jurisdictional rules:

“The best solution for Scottish family law would therefore be a new Act of the Scottish Parliament on jurisdiction and judgments complying with the UK’s obligations under the relevant Hague Conventions, in particular the Hague Convention of 19 October 1996 on

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33 These stipulate that the laws of a certain legal system apply to a contractual/non-contractual obligation
Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. As the Council Regulation itself follows the 1996 Hague Convention quite closely the new Scottish rules could and should be similar to those under the Council Regulation.”

In relation to recognition and enforcement he notes that it would be possible to fall-back on certain Hague Conventions. However, he also notes that the 1970 Hague Convention on the Recognition of Divorces and Legal Separations has not been ratified by all EU States and has less robust mechanisms than the EU rules. His view is therefore that,

“it would be desirable to have negotiations on an arrangement for reciprocal recognition and enforcement with the EU with a view to replacing the Council Regulation. The prospects of a successful negotiation would be improved if, as suggested above, our own rules on jurisdiction mirrored those in the Council Regulation.”

POLICE AND CRIMINAL JUSTICE

Substantive law

Arguments have been made that there is likely to be relatively little impact in relation to areas of minimum criminal law rules as the UK has opted out of almost all of the harmonising legislation.

In this regard, one of the experts in this field, Professor Steve Peers, stresses in a recent blog post that most substantive criminal law is domestic law, noting that:

“the UK has opted out of almost all EU substantive criminal law. It is covered by the EU Directives adopted since the Lisbon Treaty defining offences relating to trafficking in persons, sexual abuse of children and attacks on information systems (a form of cyber-crime), but not by EU laws defining offences relating to terrorism, organised crime, fraud, drugs, market abuse by bankers, racism, or currency counterfeiting.” (Peers, S. 2016)

This point is also made by Professor J.R. Spencer of the University of Cambridge, who notes that:

“The UK is not bound by most of the harmonisation measures requiring EU states to punish certain acts under criminal law.” (Spencer, J.R.)

Procedural law

The impact on procedural law would, however, appear to be slightly more significant. Professor Steve Peers indicates that:

“…as regards the harmonisation of criminal procedure, the UK participates in the EU Directive on crime victims’ rights. However, the UK has only opted in to two of the six EU laws which set out criminal suspects’ procedural rights. In particular, it has opted into the laws on translation and interpretation, and giving suspects information on their rights; but it has opted out of laws on access to a lawyer, presumption of innocence, child suspects’ rights, and a proposed law on legal aid (not yet agreed)." (Peers, S. 2016)  

34 The legal aid provisions were adopted by the EU in October 2016.
Mutual recognition, information exchange and EU agencies

Based on initial commentary, it appears likely that Brexit will have the largest impact in relation to the remaining areas of EU PCJ policy – in others words mutual recognition of judgments, exchange of information and participation in EU agencies.

In that respect, Professor Steve Peers notes that:

“‘It’s sometimes argued that EU laws on policing and criminal law are irrelevant to the UK’s membership of the EU, because the UK can simply do everything it wishes to do in this field in its domestic law. That’s a valid argument for two of the five areas of law described above: substantive criminal law and harmonisation of procedure. But it doesn’t work for the three other areas – mutual recognition, exchange of information and participation in EU agencies – which necessarily require some cooperation with other states. Put simply, a British Act of Parliament cannot regulate how France or Germany issue extradition requests.’ (Peers, S. 2016)

There are international treaties which may provide an alternative option to support mutual recognition. However, Professor Peers argues that these do not provide the same degree of cover as the existing EU rules and are also not ratified by all Member States. He also argues that negotiating new treaties, for example in relation to extradition, is likely to be time-consuming and difficult which will be made more difficult by the fact that many Member States’ constitutional laws do not permit the extradition of their citizens outside the EU.

Professor Peers also makes similar arguments as regards the exchange of law enforcement information and indicates that the largest problem may relate to the exchange of criminal records, noting that:

“the EU has not extended access to its system on exchange of criminal records to any non-EU countries. While there is a Council of Europe treaty on mutual assistance in criminal matters (which the UK and all other Member States are party to) that provides for some exchange of information of such records, it results in far less information exchange.” (Peers, S. 2016)

These points are also made by Professor J.R. Spencer, who notes that

“To replace mutual recognition instruments and police cooperation instruments would be more difficult. In principle these could be replaced by new “intergovernmental” agreements negotiated bilaterally with individual EU members. But that would be a long and complex process.” (Spencer, J.R.)

As regards agencies, both Professor Peers and Professor Spencer note that the UK may be able to come to agreements to cooperate with, for example, Eurojust and Europol. However, they explain that such agreements would not give the UK as much control over the system as EU Member States. Professor Peers notes in particular that:

“As regards the EU agencies, the UK can enter into agreements to cooperate with Europol and Eurojust, like other non-EU countries. However, as the Director of Europol points out, such agreements don’t allow the UK to have direct access to databases, to lead investigation teams, or to take part in the management of those agencies: both Europol and Eurojust have had British Directors.” (Peers, S. 2016)

The importance of the exchange of information and intelligence was recently stressed by Assistant Chief Constable Steve Johnson, who has responsibility for organised crime and counter terrorism within Police Scotland. In a recent comment in the Scotsman, he noted that
“The EU referendum vote brought into focus a number of areas where previous arrangements would need to be considered to ensure that we could continue to operate with our colleagues in Europe to combat serious organised crime and terrorism. It would be remiss for us not to start thinking through what the implications are and what we might need to do differently in order to maintain levels of protection and crime prevention for our communities. We have established a team with extensive experience in this area to engage with stakeholders and scrutinise each process as it stands, looking at logistics, processes and practice.” (Johnson, S.)

Based on other comments in the press, it would appear that Police Scotland recently met with Europol to discuss possible future arrangements (The Register). In addition, the Cabinet Secretary for Justice, Michael Matheson, recently travelled to The Hague to meet its director-general Rob Wainwright and an officer from Police Scotland who is seconded to the agency (BBC). Mr Matheson has apparently also written to the UK Home Secretary, Amber Rudd, urging her to opt in to the new Europol Regulation (BBC).

Although much of the debate has focused on the benefits of the EU’s PCJ system, there are other voices which argue that the current EU agencies do not have a crucial role.

One of the arguments is that much key intelligence is shared through other informal channels which would continue if the UK leaves the EU.

For example, before the EU Referendum, Richard Dearlove who ran MI6 from 1999 to 2004, indicated that such co-operation would continue if the UK left the UK arguing that:

“Britain is Europe’s leader in intelligence and security matters and gives much more than it gets in return. It is difficult to imagine any of the other EU members ending the relationships they already enjoy with the UK. Furthermore, counter-terrorist and counter-espionage liaison between democratic allies is driven as much by moral considerations as by political ones. If a security source in Germany learns that a terrorist attack is being planned in London, the Bundesamt für Verfassungsschutz, Germany’s domestic intelligence service, is certainly not going to withhold the intelligence from MI5 simply because the UK is not an EU member.

In addition, though the UK participates in various European and Brussels-based security bodies, they are of little consequence: the Club de Berne, made up of European Security Services; the Club de Madrid, made up of European Intelligence Services; Europol; and the Situation Centre in the European Commission are generally speaking little more than forums for the exchange of analysis and views.” (Dearlove, R)

Similarly, the former head of the Metropolitan Police Service Counter Terrorism Command, Richard Walton, has indicated that he thinks the risks to security post-Brexit are overblown. In an interview on 27 June, he noted that:

“The EU massively depends on our intelligence and information … There is no way European countries will want to us to stop sharing with them and vice versa. They need us as much as we need them. Our security does not depend on engaging with the institution of the EU, it does depend on collaboration with European countries and that will carry on regardless.” (Policeprofessional.com)

Richard Walton also argued that Europol and the SIS information sharing system were not essential (particularly in relation to counter-terrorism), noting that:
“I’m pretty cynical about Europol all round, it is duplicating a lot of what Interpol was already doing. We could survive if we weren’t part of Europol quite happily. But I think Europol will want us to be an associate member and to carry on with existing relationships. Europol has very little role in countering terrorism, it facilitates information sharing across EU Countries, but most of the important intelligence is not shared by the SIS.” (Policeprofessional.com)

On this basis, there seem to be two main arguments from those taking a more pro Brexit approach, namely that:

1. much of the collaboration between law enforcement agencies takes place outside of formal EU projects; and

2. the EU and the UK should have a mutual political interest in coming to some sort of an agreement on security post Brexit.

**House of Lords Select Committee inquiry**

The House of Lords EU Home Affairs Sub Committee is currently carrying out a short inquiry into the impact of Brexit on police and security co-operation between the UK and the EU.

On 14 September it heard the views of academics, NGOs and legal practitioners. Although the focus was on the UK as a whole and not Scotland in particular, a number of general issues were discussed which are of direct relevance to Scotland’s future relationship with the EU’s PCJ infrastructure.

Issues of interest included:

- The need for a future agreement with the EU to allow UK courts to have:
  - efficient access to evidence from other Member States
  - efficient access to previous convictions from other Member States
  - the ability to use asset freezing and confiscation orders in other Member States

- The need for any agreement with the EU to also deal with transitional arrangements, e.g. pending requests for European Arrest Warrants

- The possibility for the UK to enter into a co-operation agreement with Europol on the exchange of strategic and operations information in a similar way to countries such as Norway, the USA etc.

- The possibility for the UK to enter into a cooperation agreement with Eurojust in a similar way to Norway, the USA etc.

- The limitations of entering into cooperation agreements with Europol and/or Eurojust rather than being part of these bodies as an EU Member State

- The need for the provisions in any agreement with the EU to ensure a balance between effective prosecution of cases and human rights and civil liberties protections

- The need for the UK to have equivalent data protection rules as the EU in order to be able to fully access EU law enforcement information
The need for any negotiations to take into account both the PCJ measures which the UK opted into in 2014 and measures opted into since then, e.g. the European Investigation Order mentioned above

The pros and cons of falling back on relevant Council of Europe treaties instead of EU law – for example in relation to extradition

Questions as to what sort of institutional framework would allow the UK to get involved in new PCJ policies at an EU level

The future role, if any, of the Court of Justice in relation to the UK’s future relationship with the EU and cases based on existing legislation

Arguments that both the EU and the UK have a mutual self interest in negotiating a deal on PCJ matters given that other Member States will need information from UK law enforcement agencies and will also need to extradite criminals based in the UK

Arguments that Brexit may not have a major impact on security and intelligence agencies such as GCHQ, MI5 or MI6 as they share information with other agencies outside of the EU framework (House of Lords EU Home Affairs Sub Committee 2)

The Committee heard from law enforcement agencies on 12 October 2016. It also heard from the UK Minister for Policing and the Fire Service and David Jones MP, Minister, Department for Exiting the EU. During his oral evidence David Jones explained that the UK Government would be looking for a bespoke deal with the EU on justice, noting that:

“We frequently hear mention of a Swiss model or a Norwegian model; we believe that our position is unique. We are currently a full member of the EU that is withdrawing. This country has a great deal of strength in a large number of fields, not least in that of justice and home affairs. Certainly, we would look to achieve that bespoke model that suits this country ideally and which is able to contribute to the ongoing work of our colleagues in the European Union.” (House of Lords EU Home Affairs Sub Committee 1, Q 38)

He also explained that:

“In terms of looking at that bespoke, correct deal for our country, we come from a very different position to anybody else who has done this before, which is why the off-the-shelf presumptions … are a false representation, on two levels. One, as Mr Jones and I have both outlined, is that we bring an awful lot to the table in terms of our expertise and knowledge. Secondly, we should not underestimate the fact that we come to the table with a relationship that none of the others who have negotiated deals has had before and a known back record which is positive and on which we can base those negotiations. That is why we are in a good position to have those discussions.” (House of Lords EU Home Affairs Sub Committee 1, Q 39)

Therefore, in very general terms, the position of the UK Government seems to be that a bespoke EU deal on justice should be possible. The scope of any deal is, however, currently unclear, as is the position of the EU and its Member States.
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