European and External Relations Committee

The EU referendum and its implications for Scotland

Written submission from Dr. Maria O’Neill

Post the UK Brexit vote the Scottish European and External Relations Committee should spend some time examining the impact of the Brexit vote on the UK /Scottish – EU relationship in the EU policy of Justice and Home Affairs (JHA). The EU JHA policy is comprised of two main policy areas. One of the areas is the pre-Lisbon EC policy of “Visas, asylum, immigration and other matters dealing with the free movement of persons” (third country nationals), which is a UK reserved matter under the Scotland Act 1998 as amended, and with which the UK has had long standing problems. This area will not be covered in this response, as this is an issue which can only be addressed by an independent state. The EU JHA policy area also covers the pre-Lisbon EU policy area of Police and Judicial Co-operation in Criminal Matters (PJCCM), which the UK has traditionally been involved with, and has been the subject matter of recent House of Lords\(^1\) and UK Ministry of Justice\(^2\) enquiries. Quite a lot of this subject matter is, within the current UK constitutional set up, covered by the devolved powers to the Scottish Parliament, although any Scottish external relations in this area would have to be entered into by the UK government on behalf of the Scottish government, as external relations is a UK reserved matter,\(^3\) and only independent states (currently the UK) can sign legally binding bi-lateral external relations (to the EU) agreements with the EU.

Broadly speaking, the PJCCM policy area covers both police and judicial cooperation across the EU. These cover a number of high profile provisions, such as the European Arrest Warrant and Joint Investigation Teams, as well as membership of both Europol and Eurojust. Continued involvement by Scotland in the European Arrest Warrant, should the rest of the UK (rUK) decide not to continue to participate in this area, would have to be negotiated by Scotland with rUK to cover the post-Brexit situation, as extradition is currently a UK reserved matter.\(^4\) There are also a number of other provisions which are not so high profile, which from part of the web of legal provisions currently in force across the EU. Crimes covered include not just specialist police/ other law enforcement units focusing on level 3 (transnational) crime,\(^5\) e.g. transnational organised crime, to include drug trafficking, trafficking in human beings, weapons trafficking and counter terrorism, but there are also provisions of relevance to local and community policing (level 1 crimes) for example,

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\(^1\) The House of Lords European Union Committee inquiry into EU police and criminal justice Measures: The UK’s 2014 opt-out decision (13th Report of Session 2012-13, HL Paper 159) which was ordered to be printed on the 16th April 2013, and was published on the 23rd April 2013. Written evidence and video testimony is available from the House of Lords web site. [http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-home-affairs-sub-committee-f/inquiries/parliament-2010/protocol-36/](http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-home-affairs-sub-committee-f/inquiries/parliament-2010/protocol-36/).


\(^5\) The phrase “international crime” is not used here as this phrase is usually used for war crimes, genocide etc. crimes which are within the ambit of the International Criminal Court at The Hague. Transnational crime better explains traditional policing crime which moves from one jurisdiction or state to another, possibly a number of different states, such as along a drug trafficking route.
crimes of individuals, such as murder, rape, child sex abuse, etc. In post-Brexit Scotland / UK it would still be important to know if an individual had a criminal record in his or her home state for a wide variety of reasons.

It is unclear at this stage what approach the UK government will take to the EU policy area of PJCCM post Brexit. If it is the case that the UK, for itself, does not propose to continue to proceed with these legal obligations (relying perhaps on the traditional bi-lateral non-legally based or legally based arrangements with individual EU member states, which may or may not include all of the EU member states or all of the provisions of the current EU legal framework), then Scotland may have to examine this issue to see if it wishes to proceed with its own bi-lateral relationship with the EU, endorsed by the UK government. Equally Scotland and rUK may take diverging views of a future relationship with the EU, particularly if the legal status of the European Convention on Human Rights (ECHR) is to be challenged by the Westminster government, as membership of the ECHR, and its counterpart the European Charter of Fundamental Rights, in addition to the EU’s standards of data protection (currently in place across the UK) are likely to be pre-requisites for any jurisdictions full involvement in PJCCM provisions, even on the basis of a bi-lateral external relations (of the EU). If either of the two above situations arise, then Scotland would have the opportunity to revisit the recent exercise by the UK of its Protocol no 35 “opt out” and subsequent opt back in of some, but not all of the PJCCM provisions, with a view to establishing which of these provisions (either less or more) would suit the Scottish legal and police practice situation. At this stage it is recommended that a full and focused consultation be undertaken on this issue with key stakeholders in Scotland, rUK, to include specific input from Northern Ireland, and the Republic of Ireland, amongst others, in order to gain a detailed and practice perspective of the many issues which will arise in this area.

Constitutional and legislative changes will be required to enable Scotland to fully participate in EU PJCCM provisions, post Brexit, while still remaining part of the UK. Both constitutional and legislative changes will be required post Brexit anyhow. The Scotland Act will need to be amended to reflect the post-Brexit situation. The solution being proposed in this submission would require less legislative and constitutional changes, while still maintaining a high level of security for the Scottish public. It is possible that in re-negotiating the Scotland Act post Brexit, and in an effort to keep the UK together, the Westminster government might be prepared to sign off on agreements which deal with Scotland’s relationship with the EU, even if the rest of the UK (rUK) are not interested in pursuing these arrangements. The EU is actively involved in extra-territorialising its PJCCM provisions, with many of its proposed external relations provisions being held up by a lack of involvement of the third state in the European Convention on Human Rights. This would not pose a problem for Scotland.

An example of the need for constitutional change post Brexit is Section 57 of the Scotland Act 1998, which requires Scottish Ministers to act in compliance with both EU law and the European Convention of Human Rights. This requirement to comply with EU law is related to the European Communities Act 1972, which we know is to be repealed post Brexit. An amendment therefore will be necessary to section 57, and other related provisions of the Scotland Act, to reflect this change in circumstance. While this change is being negotiated with the Scottish parliament, an
opportunity arises for Scotland to examine the possibility of continuing Scotland’s cross border law enforcement and justice relationship with the rest of the EU, post Brexit, relying on both current devolved powers in policing and justice, and the extension of its powers in specific areas in order to continue the EU relationship.

The EU does not have any provisions which would affect or involve the UK intelligence services, with the intelligence services, in any event, being a UK reserved matter. However counter-terrorism provisions also include many other actors, to include police, prosecutors, etc. which the EU has legislated on. The role of these actors in Scotland in EU counter-terrorism provisions would have to be negotiated with rUK, as these are currently reserved matters. Other issues which merit examination, and are currently UK reserved matters, but are legislated for by the EU under its PJCCM policy area are money-laundering, the misuse of drugs as opposed to the policing of drug trafficking, which is devolved to Scotland, data protection and firearms. The balance of EU activity in this area are already covered by Scottish Government competencies.

At the moment the key transnational policing “one stop shop” operates within the UK’s National Crime Agency (NCA) in their multinational / international office. If the UK is not to maintain the current PJCCM legal relationship, and if Scotland wishes to pursue its own bilateral relationship, then some arrangements would need to be entered into to provide a similar service in Scotland. For prosecutions, Scotland currently has its own direct relationship with the EU, and Eurojust, however this is currently supporting the UK lead. This would also have to be restructured if legal tools, such as the European Arrest Warrant, and the forthcoming European Investigation Order, and other judicial legal tools are to operate in Scotland. UK judges are also currently involved in the European Judicial Network – Crime, which assists in processing transnational legal tools issued under the PJCCM policy area, such as the European Arrest Warrant, etc. While the provisions of the ECHR are currently on the Scottish statute books, it is unclear how the European Charter of Fundamental Rights would be separately incorporated into Scottish law. However, at the moment, and in the absence of many Court of Justice of the EU (CJEU) rulings on the matter, it would appear that EU member state interpretations of these two legal documents are very similar if not identical.

At the time of the enactment of the Crime (International Co-operation) Act 2003, despite the fact that some of the matters being covered by the UK wide legislation were devolved matters, the then Scottish Executive agreed that the mix of devolved and reserved powers about to be enacted, should all be in one piece of legislation, in order to ensure that “no gaps or loopholes are left” in the legal framework which either transnational organised crime or terrorist organisations could exploit. The same sentiments should drive developments for the UK/Scotland in this area. There is no doubt that the Westminster government, in particular under the leadership of Prime Minister Theresa May will have their own concerns in this area,

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12 In November 2002.
however political considerations at Westminster post Brexit may lead to different conclusions being drawn to Holyrood as to how to prevent these policing and prosecution gaps developing. In addition, it is possible that the concerns of the stakeholders (UK/Scottish) of this policy area may be drowned out by advocates of more high profile issues post-Brexit. The Scottish European and External Relations Committee should be prepared to address this issue, with the support of key players not just in the Scottish Parliament, but from relevant Scottish based practitioners. Some clarity on both the UK and EU position on this policy area post Brexit would inform the parameters within which Scotland, under the current UK constitutional arrangements, may have room to develop its own policy and practice area on these issues. The Scottish Parliament/ Government then could spend some time considering the details of this EU policy area, in particular for those aspects of this policy area which is currently devolved to the Scottish Government/ Ministers, with a view to ensuring the safety of Scottish nationals and residents, and maintaining good and effective relationships with both rUK and the EU post Brexit. In the event of a positive Indyref2 for those advocating independence for Scotland, concerns that gaps should not develop between an independent Scotland and rUK that organised crime and terrorist organisations can exploit will also then arise.