

The Brexit Papers



Criminal Justice

Paper 5



Bar Council Brexit
Working Group
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**THIRD
EDITION**



Brexit Paper 5: Criminal Justice

Summary

In this field, the Bar Council is asking the Government to consider a number of public security and human rights.

- Firstly, the Government should negotiate a reciprocal measure to replace the European Arrest Warrant which has worked well in securing the speedy arrest of suspects combined with due process and respect for fundamental rights.
- The Government should further seek agreement for the use of Joint Investigation Teams and allow rapid access to identification databases in order to investigate international crime.
- We also urge Government to find an equivalent mechanism for the European Investigation Order which will come into force by mid-2017. The package should further include continuing cooperation through Europol, Eurojust and the European Public Prosecutor's Office, as well as provide for a measure to transfer prisoners to their home countries.
- We further urge the Government to ensure that British citizens subject to investigation and prosecution in other Member States continue to benefit from the safeguards set out in the European Council Resolution of 30 November 2009, on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.

Impact of Brexit on Criminal Justice

1. Crime, especially more serious and organised crime, increasingly does not recognise national borders. Even less serious crimes are likely to have a cross-border element as citizens of the EU have for the last 43 years exercised their Treaty rights of freedom of movement and establishment, and availed themselves of goods and services sent from, or supplied in, EU and other states. British citizens and foreign nationals who commit crimes flee across borders seeking to evade justice. Some crimes can be committed easily across national boundaries, such as child exploitation, fraud and identity theft, often exploiting new technologies. Police and the judicial authorities need to cooperate internationally to combat crime and bring perpetrators to justice.

The EU's approach to the fight against crime

2. Fighting cross-border crime based on case by case contacts, or even bi-lateral agreements to cooperate, especially where several states are involved, is likely to be slow and cumbersome. Under the EU framework we have been doing so by mutual recognition of key elements of each other's systems, with minimum standards applicable in all states for certain factors, together with mutual legal assistance measures that are understood and apply in all the Member States.

3. The EU has been especially active in recent years in identifying cross-border policing issues and putting in place regimes to tackle them, such as Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims; Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography; and Directive 2011/99/EU on the European Protection Order. The UK will probably wish to continue co-operation in these areas and provide legislation to enable reciprocal arrangements to continue.

4. It is illustrative to refer back to the review of EU competences in the area of criminal justice, carried out three years ago in consequence of the negotiated option contained in Protocol 36 of the Lisbon Treaty for the UK to opt out of all pre-Lisbon criminal justice measures after a five-year transitional period. This detailed process concluded that 35 EU measures were crucial to UK law enforcement, leading to the UK opting-back into them. Many of the remaining measures had been superseded¹. While this took place in the context of other EU competences continuing, given the geographical proximity of other European nations, the rise in technology-based crime that knows no borders, and the undoubted need to continue some form of trade and service agreements, the Bar would argue that the assessment by UK law enforcement professionals that these instruments are necessary to enable us to combat cross border crime remains an important and relevant consideration in deciding on UK priorities for the forthcoming negotiations with the EU.

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf

Recommendations

5. Thus, as we withdraw from the EU, the UK will need to seek, if possible, measures in an agreement with the EU, including but not limited to ones that:

- Secure the speedy arrest of suspects with minimum bureaucracy, but with judicial process and respect for grounds of refusal and fundamental rights, via use of the European Arrest Warrant, of those wanted by the British police who have absconded to the EU. There will need to be some reciprocal measure
- Provide for the use of Joint Investigation Teams to investigate criminal networks that operate across national borders
- Secure evidence from overseas, using EU mechanisms such as the European Investigation Order, which is due to be implemented into national law by mid-2017
- Provide rapid access via fingerprint and other identification databases to overseas convictions, for sentencing and other purposes, and
- Provide for the transfer of prisoners or suspects to their home countries to serve their sentence or await trial subject to bail conditions.

6. The courts and police will continue to want to properly identify suspects and defendants from outside the UK with whom they deal, so that justice can be done, and the public protected so far as is possible.

7. Moreover, whatever the outcome of the negotiations on free movement of people, free movement of (criminal) funds across national borders will continue to pose challenges for the criminal justice system, and measures to combat this will need to be included in the package.

8. It is unlikely that the UK Government will want to negotiate 27 separate treaties, or indeed that the remaining EU members will want to negotiate separately either, given the growth in co-operation through Europol, Eurojust and the European Public Prosecutors Office.

9. In addition, the UK will undoubtedly want to secure some bilateral recognition of systems to protect the UK nationals living in and visiting EU states. They, for example, make up the largest group of non-nationals living in France and Spain, and the second largest living in Germany. The largest non-national groups living in the UK are the Polish and the French, followed by the Portuguese and Spanish. Whilst some people may move country after Brexit, substantial numbers of EU citizens are likely to remain. In addition, if Britain is to be open to the world for business, substantial numbers of visitors can be anticipated.

10. The UK will therefore need to engage with Europol, Eurojust, and the European Judicial Network. If we were to revert to non-EU-led cooperation in the fight against crime, we would be relying on intergovernmental conventions that need to be ratified. There is ample evidence from the past that this is not an effective approach, since there is no obligation for other countries to prioritise requests from the UK, and would be even less so in the face of the growth of technology-enabled crime. The current mechanisms require requests from other EU Member States to be treated with the same celerity as domestic cases and must be answered within a specific period. Moreover, cross-border surveillance is now greatly improved. The police, even at local level, will themselves generally know how the system

works, allowing them to deal with cross-border issues themselves. This was not the case even ten years ago. This increases efficiency and speed, which is often of the essence in such cases.

Procedural Safeguards – the EU’s approach

11. The investigation and prosecution of crime necessarily requires procedural safeguards to be in place to ensure fair process, from the moment a person is made aware that they are a suspect of crime. Research has repeatedly shown that the European Convention on Human Rights (the “Convention”) is an insufficient tool to ensure effective protection of suspects’ and accused persons’ rights in the context of enhanced cooperation arrangements.² Moreover, to varying degrees, all Member States have been found by the European Court of Human Rights to be in violation of Convention rights. It was therefore acknowledged in the Council Resolution for a Roadmap on procedural rights 2009 that the EU should enhance rights protection for suspected and accused persons.³ Recognition by the EU in the Lisbon Treaty and subsequently implementing laws that these safeguards are necessary is a positive and welcome recognition of fair trial processes, which the Bar endorsed.

12. The EU has so far passed six detailed, concrete Directives⁴ binding upon most⁵ Member States, that provide rights for all individuals (regardless of nationality) and are enforceable

² See T. Spronken and M. Attinger, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, (University of Maastricht/ EC, DG JLS, 2005); Tilburg, Griefswald, *An Analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU, Draft Introductory Summary*, EC DG JLS/D3/2007/01, (2009); T. Spronken et al, *Effective Criminal Defence in Europe* (Intersentia, 2010); T. Spronken, *EU-wide Letter of Rights in Criminal Proceedings: Towards Best Practice* (University of Maastricht/Bundesministerium der Justiz, 2010); E. Cape and Z. Namoradze, Legal Aid Reformers Network, *Effective Criminal Defence in Eastern Europe* (Soros Foundation-Moldova, 2012); S. Schumann et al, *Pre-trial Emergency Defence* (Intersentia/NWV, 2012); J. Blackstock, *European arrest warrants: Ensuring an effective defence* (JUSTICE, 2012); Fair Trials International, *Advancing defence rights in the EU* (2012); J. Blackstock et. al, *Inside Police Custody: An Empirical Account of Suspect’s Rights in Four Jurisdictions* (Intersentia, 2012).

³ Resolution of the Council of 30 November 2009, *on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, OJ C 295/1 (4.12.2009).

⁴ Directive 2012/13/EU on the right to information in criminal proceedings; Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings; Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings; Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings; Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

⁵ With some exceptions due to Protocols 21 and 22 to the Treaty on the Functioning of the European Union enabling the UK, Ireland and Denmark to opt out of laws relating to the Area of freedom, security and justice.

through domestic courts and, if a reference is made to it, the Court of Justice of the European Union.

13. Such measures provide people living in and moving between EU countries with the protection of certain minimum standards throughout the EU. For the UK, which already has extensive, though not all-encompassing, procedural safeguards, this means that British citizens and residents will be able to avail of similar protections to those at home should they become embroiled in the criminal justice system in another Member State. Promotion of fair trial rights can also alleviate some of the concerns about the swift and cursory operation of mutual recognition decisions.

The challenge post-Brexit

14. Part of the challenge in negotiating law enforcement measures post Brexit will be to ensure that these procedural standards continue to be available for British nationals and British residents accused before EU courts. Agreements must also provide mechanisms for affected persons to make representations and invoke postponement or refusal grounds where it is appropriate to do so. Improved procedural safeguards will have minimal effect unless there is the opportunity for the affected person to be heard by a judicial authority on the application against them, and with the commensurate fair trial principles that should attach to that process.

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