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Facilitating cross-border criminal justice cooperation between the UK and Ireland after Brexit: 'Keeping the lights on' to ensure the safety of the Common Travel Area

Gemma Davies, Associate Professor, Northumbria University

Email: gemma.davies@northumbria.ac.uk

Key words: criminal justice cooperation, Brexit, police cooperation, EU criminal law

Abstract

Much of the cooperation on criminal justice matters between the United Kingdom and the Republic of Ireland is based on EU level instruments. Whilst there has been consideration of the broader impact of Brexit on the Good Friday Agreement and consensus on the need to avoid a return to a hard border between Ireland and Northern Ireland, more detailed consideration has not been given to the effect that Brexit may have on continued criminal justice cooperation across the border. This article highlights the combined risks that Brexit presents for Northern Ireland in the form of increased criminality at a time when the loss of EU police cooperation mechanisms may result in a reduction of operational capacity and the removal of the legal architecture underpinning informal cooperation. Part 1 seeks to highlight the historical context of UK-Irish cooperation in policing matters. Part 2 explores the risk that post Brexit the Irish border may become a focus for criminal activity. The risks relating to increased immigration crime, smuggling of commodities and potential rise in terrorist activities are explored. Part 3 considers how the risks of increased criminal threats are exacerbated by the loss of EU criminal justice cooperation mechanisms and how this will affect UK-Irish cooperation specifically. Consideration is particularly given to the loss of information sharing systems. Part 4 considers how loss of EU level cooperation mechanisms could be mitigated. The viability of bilateral agreements between the UK and Ireland is considered alongside ways which police cooperation can be formalised to compensate for the potential loss of EU criminal justice information sharing systems. Nordic police cooperation is considered as a potential blueprint for the UK and Ireland.

Introduction

Brexit has presented many problems for the UK and the EU, amongst them is how to deal with the Irish border. The border will, after the end of the transition on 31 December 2020, become an external land border between the EU and the UK. What that means for the citizens of the UK and Ireland will depend on the form of the new relationship that eventually emerges between the UK and Ireland.¹ Whilst the loss of EU criminal justice cooperation made headlines from the time of the referendum the consequences for the Irish border and maintenance of criminal justice cooperation within the Common Travel Area have been largely ignored. In August 2016 the First

¹ Tim Wilson, 'Prisoner Transfer within the Irish-UK Common Travel Area (CTA) after Brexit: human rights between politics and penal reform', in this issue suggests that some aspects at least of the new relationship may evolve through intermittent readjustment over a considerable period of time.

Minister and deputy First Minister of Northern Ireland wrote to the UK Prime Minister to set out their concerns surrounding the implications of Brexit for Northern Ireland. The letter set out a number of issues of particular significance which included the need to ensure that “criminal justice and crime-fighting are not compromised” and “that Brexit does not provide an incentive for those who wish to undermine the peace process.”² With only months to go before the end of the transition period little has been done to address the concerns. Brexit inevitably meant a loss of some EU criminal justice cooperation mechanisms and a concomitant loss of operational effectiveness. This paper emanates from a research network funded by the AHRC. The UK-Irish Criminal Justice Cooperation Network began in 2018 and over a two year period 70 practitioners and academic from Great Britain, Northern Ireland and Ireland generously gave of their time through a series of workshops to consider the issues which are laid out in this paper. At the first event one practitioner commented that “everyone wants to keep the lights on, but we need to work out how to do it.” The impact of Brexit will be felt by all practitioners dealing with cross-border crime, even if a deal on criminal justice and security cooperation can be reached. However, the impacts for Ireland are more acute because of the existence of the Common Travel Area and the underlying political history which means the border, and the political decisions which determine how it is managed hold the potential for conflict. Consideration of the criminal justice risks and how they are best managed is therefore not just a legal question. This paper attempts to highlight why Brexit presents a risk to safety of the Common Travel Area and how the UK and Irish governments and the European Union can work to ensure ‘the lights stay on’.

Part 1 – Historical context of cooperation between the UK and Ireland

The Common Travel Area far pre-dates the founding of the European Union and can be traced to the Anglo-Irish Treaty negotiations of 1921³ and the comparatively slow political process by which Ireland dismantled residual British constitutional ties.⁴ From the British perspective, Ireland post 1922 remained part of the Commonwealth and its citizens remained subjects of the British monarch with the same rights as British citizens. In 1948 Ireland declared itself a Republic and revoked any role for the British monarch. However, the Ireland Act 1949 declared that “notwithstanding that the Republic of Ireland is not part of His Majesty’s dominions, the Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the United Kingdom”.⁵ Significantly, or perhaps ironically in the Brexit context, the first real sign

² Letter to the Prime Minister, The Rt Hon Theresa May MP from the First Minister and deputy First Minister of the Northern Ireland Executive, dated 10 August 2016 available at <<https://www.executiveoffice-ni.gov.uk/sites/default/files/publications/execoffice/Letter%20to%20PM%20from%20FM%20%26%20dFM.pdf>> accessed 03 November 2020

³ The politics that gave rise to the CTA, its common citizenship rights and the geographical incoherence of the border are analysed in D. Ferriter, *The Border: The Legacy of a Century of Anglo-Irish Politics* (Profile: London, 2019).

⁴ T. Mohr, ‘The Privy Council appeal as a minority safeguard for the Protestant community of the Irish Free State, 1922-1935’ (2012) 63 *NILQ* 365-95

⁵ Ireland Act 1981, s. 2 available at <<https://www.legislation.gov.uk/ukpga/Geo6/12-13-14/41>> accessed 03 November 2020

of the normalisation of UK-Irish international and economic relations was the Anglo-Irish Trade Agreement of 1965.⁶

Whilst a full recitation of the history of the CTA is not possible what we can see is that the term is shorthand for a much broader and more complex arrangement that is not limited to travel, but seeks to evade the problems stemming from a geographically, socially and economically incoherent border with, in one estimate, 208 crossing points. British and Irish citizens can move freely, without passport controls, and reside in either jurisdiction and enjoy associated rights and privileges, including the right to work, study and vote in certain elections and access to social welfare benefits and health services. A Memorandum of Understanding was signed on 8 May 2019 which reaffirmed the commitment of both Governments to the CTA post-Brexit.⁷ Whilst the UK and Ireland maintain separate immigration policies there has been a significant degree of practical cooperation and policy coordination in order to ensure the security of the CTA.⁸

Ireland and the UK joined the European Community in 1973 and most aspects of the CTA were gradually overtaken by developments in EU law. The one significant exception was travel and border controls. With the advent of the Schengen area in 1985 the UK was firmly opposed to joining the borderless region and Ireland could not contemplate jeopardising the CTA. Protocol 20 to the Treaty on the Functioning of the European Union (TFEU) provides that the UK and Ireland “may continue to make arrangements between themselves relating to the movement of persons between their territories (‘the Common Travel Area’).”⁹ This history is important as it reflects the common law mind set shared by the UK and Ireland as opposed to the traditional continental approach to administration. Unlike Schengen which developed in an open and transparent way framed by supra national legislation and formal international instruments the CTA evolved over time with very little statutory underpinning and the absence of formal international agreements. Inevitably the close but informal cooperation in criminal matters enjoyed by the UK and ROI, framed by the CTA, became increasingly challenged as Irish criminal law diverged from British law through the 1960s and this worsened as a result of the Troubles in Northern Ireland.¹⁰ This process of divergence might have continued were it not for the role of the EU which became a driving force for convergence. This is reflected in a remarkable

⁶ It is clear from UK Cabinet records that the Wilson Government made economic concessions to help put UK-Irish political relations on a better footing: R.I Donnelly, ‘Trade pact improved Anglo Irish relations’, *Irish Times* 2 January 1996 < <https://www.irishtimes.com/news/trade-pact-improved-anglo-irish-relations-1.18236> > accessed 03 November 2020. It even went so far as to volunteer that tariffs on Northern Irish cross-border trade could be lowered faster than for UK mainland exports to Ireland.

⁷ For further information see <<https://www.gov.uk/government/publications/common-travel-area-guidance>> accessed 03 November 2020

⁸ McGuinness, Gower and Wilkins, ‘The Common Travel Area, and the special status of Irish nationals in UK law’, House of Commons Briefing Paper No 7661, 16 October 2019

⁹ Consolidated Treaty on the Functioning of the European Union, Protocol 20 on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland.

¹⁰ The difficulties with extradition between Ireland and the Northern Ireland are explored in Arnell and Davies, ‘Extradition Between the UK and Ireland After Brexit: Understanding the past and present to prepare for the future’ in this issue.

transformation in Northern Ireland politics and society between the 1975 and 2015 referendums¹¹.

Criminal justice has only been a devolved matter in Northern Ireland since 2010. This move was consistent with important changes made possible in Northern Ireland by the Good Friday (Belfast) Agreement (GFA) and as it emerged from direct rule by the UK Government during the Troubles. For example, the major structural reforms to policing in Northern Ireland with the replacement of the Royal Ulster Constabulary with the Police Service of Northern Ireland (PSNI) in 2001. The priority here has been to embed an inclusive and community-based form of policing by consent, in which all parts of the still fractured Northern Ireland society have a stake. Change has had to be incremental. The history of civil conflict during the Troubles still casts its shadow and has impacted criminal justice developments. The Department of Justice once established tried to support policing by consent which sees the PSNI operating in an era less marked by their historic role in counterterrorism. Martin has demonstrated that 'policing in Northern Ireland has undergone one of the world's most extensive human rights reform programmes.'¹² Policing in Northern Ireland has subsequently focused on accountability and justice and the Northern Ireland Policing Board has a statutory duty to monitor the performance of the PSNI in complying with the Human Rights Act 1998. Such a focus was a necessary part of the peace process as policing had been so bound up with community tensions following the independence of Ireland in 1921 during which the RUC were seen as upholding the interests of unionists,¹³ who dominated the Stormont assembly and local government, within a system which resulted in discrimination against nationalists in particular and Catholics in general.¹⁴ The GFA and the devolution of responsibilities for policing and justice to the Northern Ireland Executive marked an era of enhanced capacity for coordination in this area.

One of the priority areas for discussion in the North/South Ministerial Council (on the island of Ireland) has consistently been that of justice. The Council was established under the GFA to develop consultation, cooperation, and action within the island of Ireland. Even before this date the House of Commons Northern Ireland Affairs Committee in their 2009 report on cross-border cooperation between the Governments of the United Kingdom and the Republic of Ireland stated that "In the course of our inquiry, we have repeatedly been told... that relations between [the UK and ROI] are closer than has ever been the case and that cooperative arrangements

¹¹ For example, in 1975 Northern Ireland produced the slimmest remain majority (52% compared with England, Wales and Scotland at, respectively, 69%, 65% and 59%) but the second largest remain majority in 2016 (56%, with Scotland voting 59% to remain), See V. Bognador, *Beyond Brexit: Towards a British Constitution* (I B Taurus, London 2019)

¹² Richard Martin, 'Ethno-National Narratives of Human Rights: The Northern Ireland Policing Board' (2020) 83(1) *Modern Law Review* 91

¹³ R. Weitzer, *Policing Under Fire: Ethnic Conflict and Police-Community Relations in Northern Ireland* (New York, NY: State University of New York, 1995); G. Ellison and J. Smyth, *The Crowned Harp: Policing Northern Ireland* (London: Pluto Press, 2000).

¹⁴ See, for example: J. O'Brien, *Discrimination in Northern Ireland, 1920-1939: Myth or Reality?* (Cambridge Scholars Publishing: Newcastle upon Tyne 2010) pg. 9-18 and P. Buckland 'A Protestant Parliament and a Protestant State: Regional Government and Religious Discrimination in Northern Ireland, 1921-39' in A.C., Duke and C.A Tamse (eds) *Britain and The Netherlands: Volume VII Church and State Since the Reformation Papers Delivered to the Seventh Anglo-Dutch Historical Conference* (Springer, Dordrecht 1981) pg. 231-242.

have never run more smoothly.”¹⁵ Giving evidence to the committee Lord Carlisle, the then UK Government’s independent assessor of terrorism legislation, stated, “cooperation is extensive, everyday, operational and essential”.¹⁶ The committee concluded that devolution of criminal justice and policing matters to Northern Ireland would not diminish the need for cooperation between London and Dublin and both sides of the border needed to continue to work together towards an even greater level of cooperation.

The introduction of the Justice and Home Affairs (JHA) as a third pillar of the EU’s architecture in 1992 marked a step change in the level of co-operation between Member States in this area. The Treaty of Lisbon finally moved judicial co-operation in criminal matters and police cooperation into the JHA pillar and integrated this into the EU acquis subject to supervision by the Court of Justice of the European Union (CJEU). The European Union recognised the United Kingdom as the relevant Member State and there was little formal recognition of devolved nations. However, devolution played a limited but important role in criminal justice co-operation with the EU. For example, Council Decision 2008/852/JHA established a network of contact points within Member States who are responsible for preventing and fighting corruption, and who, through cooperation, also act at the EU level. The UK was the only Member State to have five representatives in recognition of the fact that policy in this area was devolved.¹⁷ Every country in the European Arrest Warrant (EAW) system has a SIRENE (Supplementary Information Request at the National Entry) Bureau. For the UK this is the National Crime Agency (NCA). They act as the legal gateway between authorities requesting an arrest and those carrying out an arrest. However, the Crown Office and Procurator Fiscal Service (COPFS) in Scotland and the Crown Solicitors Office (for Northern Ireland), also issue EAWs on behalf of UK police forces when a subject is in another Member State. They also represent other Member States’ prosecution authorities in seeking extradition from the UK if the wanted person is in their jurisdiction. Different courts in each devolved nation also hear EAW appeals.¹⁸ The National Police Chiefs’ Council (NPCC) has its own Criminal Records Office (ACRO) which processes requests for information via the European Criminal Records Information System (ECRIS) in England and Wales but Police Scotland and the Police Service of Northern Ireland process their own requests.

Cooperation between the UK and Ireland in policing and criminal matters has long predated membership of the EU and much cooperation between the two countries is outside of the EU framework. Today cross-border cooperation between Ireland and the UK is anchored by the Intergovernmental Agreement on Co-operation on Criminal Justice Matters (July 2005 and April 2010), which provides a structured framework to

¹⁵ Northern Ireland Affairs Committee, Cross-border co-operation between the Governments of the United Kingdom and the Republic of Ireland, Session 208-09.

¹⁶ Ibid.

¹⁷ Stephen Tierney, ‘The Repatriation of Competencies After Brexit: Justice and Home Affairs’, Centre on Constitutional Change, 05 November 2018

¹⁸ Westminster Magistrates Court (for England and Wales), Edinburgh Sheriff Court (for Scotland) and Belfast Magistrates Court (for Northern Ireland). The judge or sheriff decides if extradition should be ordered. Similarly, the responsibility for extradition procedures for category 2 countries falls respectively, with the Metropolitan Police Service Extradition Unit in England and Wales, the International Cooperation Unit in Scotland, and the judges in the Laganside Court in Northern Ireland.

enhance and develop more effective North-South cooperation and coordination and includes a programme of secondment between the two police forces.¹⁹ In 2010 and again in 2016 the Police Service of Northern Ireland (PSNI) and An Garda Síochána (ASG) launched a Joint Cross-border Policing Strategy, which aims to disrupt criminal activity across the border.²⁰ In addition to these more formal structures, the Joint Manual of Guidance aims to support police and prosecution services across both jurisdictions dealing with investigations that have a cross border element. In November 2015, the UK and ROI governments and the Northern Ireland Executive agreed to the creation of a Joint Agency Task Force as part of a concerted and enhanced effort to tackle organised and cross-jurisdictional crime led by senior officers from the PSNI, An Garda Síochána (AGS), the Revenue Commissioners and HM Revenue and Customs. However, the absence of an Executive in Northern Ireland between 2017 and 2020 has meant that the work of the task Force has been less visible than it could otherwise have been. Every year the PSNI and AGS hold a Cross Border Conference on Organised Crime aimed at enhancing cooperation.²¹

Part 2 – risks for the Irish border

Despite the close working relationship between the PSNI and AGS Brexit presents a risk of increased criminality between Northern Ireland and the Republic of Ireland at a time when loss of EU police and judicial co-operation mechanisms could negatively impact operational effectiveness. Transnational crime by its nature crosses border and any changes to a border can impact the volume or the manner in which criminal gangs exploit the border. The extent to which these risks are realised depends on several factors. Foremost is what the relationship between the EU and the UK looks like after the transition period ends. The more tangible the border and the greater the regulatory divergence between the two states the greater the impact will be on crime. Confusion and unfamiliarity at the border could create an incentive to increase illegal operations but equally a robustly monitored border will deter offending.²² The greater the loss of EU cooperation mechanisms the harder it will be to deal with transnational crime. There are three distinct ways in which changes brought about by Brexit could lead to increased levels of criminality across the Island of Ireland. Firstly, this could manifest itself in the form of immigration crime. Secondly there could be an increase in smuggling of commodities. Thirdly terrorist violence could see a resurgence in the wake of any intensification of inter-communal tensions. Risks of increased criminal activity could be further compounded by a belief that loss of the European Arrest Warrant (EAW) and other EU criminal justice cooperation mechanisms decreases the risk of detection and/or arrest and that the border could be used to avoid/delay prosecution. The PSNI have highlighted that ‘until Organised Crime Groups have time

¹⁹ See <http://www.justice.ie/en/JELR/Pages/Criminal_justice_co-operation> accessed 03 November 2020

²⁰ Available at <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/cross-border-policing-strategy-2016.pdf>> accessed 03 November 2020

²¹ Written answer from Minister for Justice and Equality, 03 October 2019 available at <<https://www.oireachtas.ie/en/debates/question/2019-10-03/19/>> accessed 03 November 2020

²² Northern Ireland Affairs Committee, Cross-border co-operation on policing, security and criminal justice after Brexit, oral evidence, Wednesday 04 November 2020 available at <<https://parliamentlive.tv/event/index/c565f81a-0af5-4c25-9093-f82a34e79c28>> accessed 04 November 2020

to assess the vulnerabilities and opportunities EU Exit and the Protocol on Ireland/Northern Ireland present, it is unclear what criminal opportunity it presents.’ It is therefore important that these risks are constantly assessed in the coming years.

Immigration crime

The UK and Ireland have never participated in Schengen and both have always maintained separate immigration policies in relation to non-EU citizens. Prior to Brexit free movement of people meant that the UK and Ireland had the same approach to the circa 445 million EU citizens. In the event of a no deal the UK plans to make it harder for serious criminals to enter the UK by introducing a tougher UK criminality threshold.²³ A new European Temporary Leave to Remain Scheme for EEA citizens and their families will be brought in,²⁴ a new immigration system will apply to people arriving in the UK from 01 January 2021 and EU citizens wishing to work in the UK will need a visa.²⁵ At the same time the UK Government has promised that ‘there will be no routine immigration controls on journeys within the Common Travel Area, and none on the land border between Northern Ireland and Ireland’.²⁶ Historically there has always been a significant degree of practical cooperation and policy coordination in immigration control between the UK and Ireland as a risk of exploitation of the CTA has always been present. However future divergence of immigration rules between the UK and the EU means there will be an increase in those who are able to enter Ireland without any form of visa who are not permitted to enter the UK. There will need to be an increase of cooperation and resourcing to reflect this. There is already some capacity to deal with immigration crime and human trafficking as is demonstrated by Operation Gull. This longstanding operation aims to prevent the movement of undocumented migrants crossing the Irish land border and the sea border with Britain by conducting periodic document checks at Northern Ireland’s air and seaports. This had less impact than originally anticipated because of a failure to recognise and effectively prevent racial profiling risks.²⁷ The use of racial profiling was heavily criticized by the Northern Ireland Human Rights Commission and O’Hagan has called for a human rights centred approach to border controls post Brexit.²⁸ Whilst there has always been the possibility that those entering Ireland legally were not legally allowed to enter the UK the numbers will increase after the transition period. As an example, as of 01 January 2021 the UK government is proposing that EU citizens who have served more than a year in jail will face an automatic ban from entering the UK. We

²³ Oliver Wright, ‘Britain will bar EU citizens who have served a year in jail, says Priti Patel’, The Telegraph, 22 October 2020

²⁴ See details of announcement at <<https://www.gov.uk/government/news/government-announces-immigration-plans-for-no-deal-brexite>> accessed 03 November 2020

²⁵ See details of announcement at <<https://www.gov.uk/guidance/employing-eu-citizens-in-the-uk>>

²⁶ <<https://www.gov.uk/guidance/visiting-the-uk-after-brexite>> accessed 03 November 2020

²⁷ Northern Ireland Human Rights Commission, Submission to the Committee for the Elimination of all Forms of Racial Discrimination, January 2011 available at <<https://www.nihrc.org/documents/advice-to-government/2011/submission-on-international-convention-elimination-racial-discrimination-february-2011.pdf>> accessed 03 November 2020

²⁸ Fidelma O’Hagan, ‘Brexit and Immigration Control in Northern Ireland’, BrexitLawNI available at <<https://brexitlawni.org/blog/brexit-immigration-control-northern-ireland/#:~:text=The%20use%20of%20racial%20profiling%20has%20been%20criticised,human%20rights%20groups%20for%20its%20lack%20of%20transparency>> accessed 03 November 2020

need to have a better understanding of the impact of such a policy and how it will be enforced, particularly across the Irish border.

Whilst sea ports across the south of England are still the most common entry point, in the last few years there has already been an increase in the use of Northern Ireland via the Republic as an entry route to the rest of the UK.²⁹ Northern Ireland has a well-documented problem with organized crime and these gangs are well placed to exploit perceived weaknesses in immigration control.³⁰ A close working relationship between border control agencies in both countries is needed to minimise the risk of undetected arrival in Ireland which would then facilitate entry to the UK through the border. Arrival in Ireland makes it very easy to move to the UK through the Common Travel Area,³¹ and it is therefore vital that there is investment in collaborative border procedures and efficient data sharing. Currently much of this cooperation is underpinned by EU instruments, particularly Prüm and the PNR Directive. Although Ireland has not implemented SIS II, it plans to do so imminently, and the PSNI regularly use it at borders and are concerned about its loss. Current data exchange does not all fall within EU mechanisms. It was noted in evidence to the British-Irish Parliamentary Assembly in 2016 that the British and Irish border agencies had plans to enhance biometric collection for example.³² In December 2011 the UK and Irish governments signed a non-binding joint statement on cooperation measures to secure the external Common Travel Area and a Memorandum of Understanding on visa data exchange.³³ Information exchange is vital. The benefit of high-quality exchange of information can be seen from a pilot exchange to check data provided in 1,700 Irish visa applications lodged in Nigeria against UK immigration records. This identified over 200 persons applying to come to Ireland who had adverse UK immigration history.³⁴ Cooperation in this area of information exchange has been superseded by EU mechanisms such as Prüm and is now overseen, from a data protection perspective, by the Law Enforcement Directive. If the UK leaves the EU without a agreement and without an adequacy decision this not only means that access to EU data would be denied from 1 January 2021, but even the bilateral exchange of data between the UK and Ireland could be put into jeopardy in the medium term. This is discussed in greater detail below.

²⁹ McGuinness, Gower and Wilkins, *supra* n(8) at page 8: “According to a BBC report of July 2015, in 2014/15 468 irregular migrants were intercepted at ports in Northern Ireland trying to reach other parts of the UK, compared to 274 in 2012/13. The Home Office attributed the rise to increases in migration movement patterns and increased enforcement activity”

³⁰ John Jupp and Matthew Garrod, ‘Legacies of the Troubles: The Links between Organised Crime and terrorism in Northern Ireland’ (2019) *Studies in Conflict and Terrorism*, published online 04 Nov 2019

³¹ Immigration Act 1971, section 1(3) - people seeking entry to the UK from the Republic of Ireland are not subject to immigration control. Paragraph 15 of the Immigration Rules and section 9 of the 1971 Act contain further provisions related to the CTA. However, there are some exceptions, as specified in the Immigration (Control of Entry through Republic of Ireland) Order 1972 (as amended).

³² British-Irish Parliamentary Assembly, Committee B (European Affairs), Report on Visas, 5 July 2016

³³ See

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/99045/21197-mea-sec-trav.pdf> accessed 03 November 2020

³⁴ Department of Justice and Equality, Ireland, Press Release 20 December 2011 available at <<http://www.inis.gov.ie/en/INIS/Pages/IRELAND-UK%20ACCORD%20TO%20FURTHER%20SECURE%20THE%20COMMON%20TRAVEL%20AREA>> accessed 03 November 2020

Whilst there has been no current suggestion that the PSNI will be involved in immigration checks at the border there has been recent legislation which paves the way for this. The Counter Terrorism and Border Security Act 2019 “ensures that the police and security services have the powers they need... to keep the public safe”³⁵ and provides a new power to stop, question, search and detain an individual at a port or border area to determine whether they are, or have been, involved in hostile state activity without the need for reasonable suspicion.³⁶ The border area is defined as one mile from the Irish border or the first place at which a train travelling from the Republic of Ireland stops.³⁷ There is also a separate power to question a person in the Northern Ireland border area in order to establish whether the person is in that area for the purpose of entering or leaving Northern Ireland.³⁸ Whilst these powers are limited to counter terrorism cases Walker has stated that “the new powers have the potential to cause friction with Border communities”.³⁹ The PSNI have repeatedly stressed that it is essential for the maintenance of peace in Northern Ireland that they can remain a policing service and they are not seen as a border security service.⁴⁰

Smuggling of commodities

Historically between the 1920s and 1960s smuggling across the border to avoid paying duty on everyday goods was widespread. More recently this has remained a feature of the border notwithstanding the customs union as there remained differing tax regimes in relation to fuel, cigarettes, and alcohol. Elaborate fuel laundering operations which are estimated to have cost the tax-payer £40 million in 2017 alone are an example of this sort of activity.⁴¹ Northern Ireland has seen a rise in organised crime in recent years which has been linked to ‘paramilitary diversification’.⁴² Such organisations are well placed to take advantage of different excise duties, VAT regimes and other differences in regulation or standards after 1 January 2021. How to manage the movement of goods between Great Britain and Northern Ireland after Brexit whilst maintaining an open border between Ireland and Northern Ireland has been a continual thorn in the side of both the UK and the EU. The history of violence

³⁵ Rt Hon Ben Wallace MP, Minister of State for Security and Economic Crime see Home Office, Counter-Terrorism and Border Security Act 2019 Overarching Fact Sheet available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/912084/2019-02-12_Overarching_Fact_Sheet_RA.pdf> accessed 03 November 2020

³⁶ Counter Terrorism and Border Security Act 2019, section 22 and schedule 3, paragraph 1(1)

³⁷ Counter Terrorism and Border Security Act 2019, schedule 3, paragraph 64(6)

³⁸ Counter Terrorism and Border Security Act 2019, schedule 3, paragraph 2. It is essentially a precursor power to enable an examining officer to determine whether the conditions in schedule 3, paragraph 1 are met.

³⁹ Clive Walker, written evidence submitted to the Northern Ireland Affairs Committee, Cross-border co-operation on policing, security and criminal justice after Brexit, published 21 October 2020

⁴⁰ Julian O’Neill, ‘Brexit: PSNI ‘won’t police customs checkpoints’, says chief constable’, BBC News 03 October 2019

⁴¹ Written evidence from Alex Wood, Minister of the Environment to the Northern Ireland Affairs Committee, 14 November 2011 available at <<https://publications.parliament.uk/pa/cm201012/cmselect/cmniaf/writev/fuel/m12.htm>> accessed 03 November 2020

⁴² John Jupp and Matthew Garrod, ‘Legacies of the Troubles: The Links between Organized Crime and Terrorism in Northern Ireland’ (2019) *Studies in Conflict and Terrorism*, published online 04 November 2019

in Northern Ireland, means that the form of policing and other controls on the border between Ireland and Northern Ireland remains deeply sensitive. The Good Friday (Belfast) Agreement 1998 and the fragile peace that followed have been made possible, in part, because of the removal of visible signs of the border.

The Ireland/Northern Ireland Protocol in the UK EU Withdrawal Agreement⁴³ gives Northern Ireland a unique status: both within the UK internal market and customs territory, and de facto in the EU's single market for goods and subject to the Union Customs Code (UCC).⁴⁴ This is designed so that goods circulating in Northern Ireland can cross the border in Ireland (i.e. into the EU's single market) without checks. One benefit of this is that there would be no significant changes to the UK/EU customs frontier and this should mean the incentive to smuggle goods would not radically expand beyond the pre-existing incentive of avoiding VAT and excise duty. However, the Protocol effectively creates a customs and regulatory border down the Irish Sea and Hayward has highlighted that the degree to which this will cause an incentive for smuggling between the Great Britain and Northern Ireland depends, at the time of writing,⁴⁵ on a number of presently unanswered questions.⁴⁶ Firstly, whether there is a UK-EU free trade agreement (FTA). Such an agreement would minimise incentives for smuggling across the Irish Sea because there will be no scope to exploit tariff differentials. If there is no FTA, then there will be increased incentives for smuggling across the Irish Sea from GB in order to access the EU single market and thus avoid paying tariffs levied on legitimate GB to EU trade. This risk will be greatest for those goods which could face the highest EU tariffs. In such a no deal scenario, there will also be increased risk of smuggling of goods into GB from the Republic of Ireland in order to avoid tariffs on imports to the UK (GB) coming from the EU. This could come directly from Ireland (e.g. Dublin-Holyhead) or via Northern Ireland. The degree of risk depends on how the movement in goods from NI to GB is managed, and on how goods qualify as 'Northern Irish' for unfettered access. This is still to be determined. However, the risk of smuggling across the Irish Sea is lower than that of smuggling across the Irish border given the added logistical difficulties and the costs of movement across a sea border impacts the profitability of such smuggling. It is also simpler to effectively manage and control entry and exit of goods from specified air and seaports rather than across a 500km land border of some 280 crossings.⁴⁷

Secondly, the risk of smuggling depends on the degree to which the UK diverges from EU standards. Under a strict conformity with the protocol Northern Ireland would continue to follow EU rules when it comes to the production of goods and state aids.

⁴³ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19 October 2019

⁴⁴ Available at <https://ec.europa.eu/taxation_customs/business/union-customs-code/ucc-introduction_en#:~:text=The%20Union%20Customs%20Code%20%28UCC%29%20%E2%80%93%20Introduction.%20The,adapted%20to%20modern%20trade%20models%20and%20communication%20tools> accessed 03 November 2020

⁴⁵ As of 03 November 2020

⁴⁶ Katy Hayward, 'How does the UK Internal Market Bill relate to Northern Ireland', October 19 2020 <<https://blogs.lse.ac.uk/brexit/2020/10/19/how-does-the-uk-internal-market-bill-relate-to-northern-ireland/>> accessed 03 November 2020

⁴⁷ See Butler, Davies, Hayward, written evidence to the Northern Ireland Affairs Committee on the Cross-Border co-operation on policing, security and criminal justice after Brexit inquiry, published 07 October 2020 available at <<https://committees.parliament.uk/work/534/crossborder-cooperation-on-policing-security-and-criminal-justice-after-brexit/publications/>> accessed 03 November 2020

Goods would not be allowed into Northern Ireland unless they met those standards. If the UK remains largely aligned in practice to EU standards, then the need for controls will be minimal. The UK Internal Market Bill⁴⁸ means that if one part of Great Britain decides to lower standards, then those goods will not be confined to that part of Great Britain but can circulate freely across it. A 'race to the bottom' would mean that there will be a need for tighter controls on goods entering NI from GB.⁴⁹ Foods produced to lower standards are cheaper to produce and the incentives to smuggle such goods into Northern Ireland, and in some cases for onward transmission into Ireland, would be greatest where the price differential is significant.

Thirdly, the risk of smuggling across the Irish Sea is not just about GB or EU goods but those from the Rest of the World (ROW). Differentials between the UK Global Tariff and EU Common External Tariff could affect the attractiveness of smuggling across thousands of product lines. Where the differences are greatest (e.g. in processed agricultural produce), then the incentive for the ROW imports into GB and then into the EU via NI will be the highest. It is for this reason that the EU Commission proposed that tariff differentials form the basis for the definition of goods as being "at risk" of being smuggled into NI from GB (and would thus be subject to tariff payment in advance). This issue will remain live as the UK secures new FTAs around the world.

On 1 January 2021 the basis on which Northern Ireland trades with other parts of the United Kingdom is expected to change overnight and a range of new legal arrangements and systems should come in to place. Predicated even on full implementation of the protocol the Northern Ireland Affairs Committee concluded 'the Protocol will undoubtedly create new opportunities for smuggling and fraud.'⁵⁰ Organised criminal gangs already operate in Northern Ireland and 'such criminals will undoubtedly attempt to exploit the new situation created by the Protocol and will seek to profit illegally from the new trading arrangements in Northern Ireland.'⁵¹ Following the introduction of the UK Internal Market Bill [and the much greater prospect of a no deal outcome for the 2020 negotiations] the opportunities created for criminals as a result of Brexit anticipated by the Northern Ireland Select Committee in July 2020 may be substantially greater. While it is impossible at the time of writing to offer a clear assessment of the potential range and impact of smuggling that will emerge at the end of the transition period, it is clear that it will contribute to significantly higher threats that will require increased criminal justice cooperation within the CTA and concomitant increases in resources.⁵²

The Institute for Government believes that the UK authorities will not be ready to implement the Protocol effectively from 1 January 2021 stating that "at its most severe, non-compliance with the protocol may generate the need for the Irish government to impose checks elsewhere on the island of Ireland, potentially creating political and

⁴⁸ Currently at Committee stage in the House of Lords on 22 October 2020

⁴⁹ Katy Hayward, 'What does the UK Internal Market Bill mean for Northern Ireland?', Belfast Telegraph, 09 September 2020

⁵⁰ Northern Ireland Affairs Committee Report, 'Unfettered Access: Customs Arrangements in Northern Ireland after Brexit', published 14 July 2020, Chapter 5, paragraph 116 and 117.

⁵¹ Ibid

⁵² Written evidence submitted by the PSNI to the Northern Ireland Affairs Committee, Cross-border co-operation on policing, security and criminal justice after Brexit published 7 October 2020

security risks in Northern Ireland.”⁵³ The introduction of a new customs arrangements is an opportunity for new kinds of fraud and this will need to be monitored closely moving forward. The EU will be keen to assess the scale and immediacy of the subsequent risk for smuggling/criminality exploiting a poorly enforced sea border. Such risks are enhanced in a no deal scenario. A key element to ensuring effective enforcement of the new arrangements will be close cooperation between police and border authorities in the UK and Ireland.⁵⁴ The new arrangements, particularly in a no deal scenario, will require a greater level of cooperation at a time when operational effectiveness is undermined through loss of key data sharing mechanisms.

Resurgence of domestic terrorism

The Good Friday (Belfast) Agreement 1998 was supposed to take ‘the border out of Irish politics’.⁵⁵ Gormley-Heenan and Aughey argue that Brexit was presented in Northern Ireland along nationalist and unionist lines which served to confirm old divisions.⁵⁶ Brexit means that the border of the European Union now runs through the island of Ireland and that not only has implications for the free movement of people and goods as discussed above but also it is ‘freighted with meanings of identity’⁵⁷ This inevitably has implications for political stability in Northern Ireland. Hayward and Murphy have highlighted that the 1998 Agreement ‘redefined relations across these islands in a way that has defused the border as a cause for political conflict and violence’⁵⁸. Central to the 1998 Agreement was the context provided by the UK and Ireland’s membership of the European Union which enabled cooperation to be normalized and depoliticized. This can be seen in the agreement itself which stated that both countries were committed to the agreement as ‘friendly neighbours and as partners in the European Union’.⁵⁹ Hayward and Murphy also highlighted that:

The impact of Brexit is such that two states will now diverge, leaving Northern Ireland in the awkward place between. After Brexit, without a careful arrangement for managing UK/EU (and British–Irish) relations, divergence will happen in law, trade, security, values, the fundamental rights of citizens, and politics—all such areas reach to the very core of the Good Friday Agreement and put it at risk of deep fissures.⁶⁰

⁵³ Jess Sargeant et al. ‘Implementing Brexit: The Northern Ireland protocol’, Institute for Government, May 2020

⁵⁴ Cathal McCall, ‘Smuggling in the Irish borderlands – and why it could get worse after Brexit’ The Conversation, 11 February 2019

⁵⁵ Cathy Gormley-Heenan, Arthur Aughey, ‘Northern Ireland and Brexit: Three effects on ‘the border in the mind’ (2017) 19(3) The British Journal of Politics and International Relations 497

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Katy Hayward and Mary Murphy, ‘The EU’s Influence on the Peace Process and Agreement in Northern Ireland in Light of Brexit’ (2018) 17(3) Ethnopolitics 276

⁵⁹ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland’ which forms part of the Good Friday Agreement, signed 10 April 1998 available at

<https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/northernireland/good-friday-agreement.pdf>> accessed 03 November 2020

⁶⁰ Hayward and Murphy, supra (n58)

Bognador has noted how Brexit imposes serious strains on the GFA. With Unionist politicians regarding any special status for Northern Ireland in the Brexit readjustment process as weakening ties to the rest of the UK. While Nationalist leaders - having seen Unionist support for Brexit as a unilateral repudiation of the compromises that the GFA entailed - advocated such special arrangements, whether the whole island of Ireland EU membership pledge or going further than the customs and regulatory arrangements envisaged in the Withdrawal Agreement.⁶¹

The extent to which Brexit creates a risk of a resurgence in domestic terrorism in the coming years is unclear but academics have argued that Brexit places peace at risk.⁶² Since the cease fire and agreement there has still been residual terrorist activity which increased in the run-up to the Scottish referendum. The sensitivity of the border comes in to play when we look at how to mitigate the risks of illegal migration and smuggling of commodities discussed above. Research suggests that any physical manifestation of a border would be a prime target particularly for the Republican movement:

It is eminently possible that post-Provisional IRA elements could mobilise a more determined and effective effort were robust popular support – which did not exist before 1969 – to emerge on the basis of the tangible costs of Brexit, pecuniary and otherwise, to the nationalist community and cause.⁶³

Dissident Republican terrorists have in the past used the land border to frustrate counter-terrorism operations, while they and other organised crime gangs breached bail and crossed the land border to avoid prosecution. A 2017 study highlighted that 42% of respondents were concerned about Brexit resulting in a return to the conflict.⁶⁴ Almost half of respondents were not willing to accept any 'technological; means of border control.⁶⁵ Just as the process of European integration was one of the catalysts for the depoliticization of Irish/Northern Irish cross-border cooperation the UK's departure from the EU removes this context and reintroduces a political dimension to co-operation. The UK must resist a knee-jerk reaction to crime threats at the border which will undermine the fragile peace agreement. The current domestic terrorist threat level in Northern Ireland is already graded as 'severe' by MI5. In recent months Operation Arbacia demonstrated that the terrorism threat in Northern Ireland is very real.⁶⁶

Part 3 – loss of EU cooperation measures

⁶¹ Bognador supra (n 11) pg. 232-238.

⁶² Guelke, Adrian, 'The Risk to Northern Ireland' (2017) 28(1) Journal of Democracy 42

⁶³ Jonathan Stevenson, 'Does Brexit Threaten Peace in Northern Ireland?' (2017) 59(3) Global Politics and Strategy 111

⁶⁴ Brexit at the Border: Voices of Local Communities in the Central Border Region of Ireland / Northern Ireland. Available at: https://www.qub.ac.uk/brexit/Brexitfilestore/Filetoupload_824444,en.pdf accessed 03 November 2020

⁶⁵ Ibid.

⁶⁶ Cormac O'Keeffe, Nine people arrested as part of operation targeting New IRA, Irish Examiner, Wednesday 19 August 2020

Despite the positive number of bi-lateral police cooperation arrangements between the AGS and PSNI outlined in Part 1, EU processes and institutions still facilitate much of the cooperation between the PSNI and the AGS. Both forces have made clear that such arrangements enable them to provide a quicker, more efficient and dynamic response to crime and criminality and allow significant coordinated operations particularly against organised criminal gangs.⁶⁷ The ability to accurately and quickly access up-to-date information and criminal intelligence has been the hallmark of EU police and criminal justice measures since the Hague Programme⁶⁸ which introduced the concept of availability as the guiding concept for law enforcement information exchange.⁶⁹ The expansion of the EU, including the introduction of the Schengen borderless area and the well-established principle of free movement of persons has continually strengthened the need for criminal justice cooperation and the sharing of personal data between Member States.⁷⁰ The entry into force of the Lisbon Treaty in 2009 fundamentally transformed the EU's power to adopt police and criminal justice measures. Since the entry into force of the Treaty of Lisbon the United Kingdom has benefited from a bespoke arrangement which allowed it to use a 'wait and see' strategy which permitted for opt in on a case by case basis after adoption based on the final text. This exceptional status for the UK (and Ireland) can be argued to have led to "risks of deep imbalances for the European criminal justice area."⁷¹ The potential loss of the European Arrest Warrant (EAW) and information databases are frequently cited as being of most concern to law enforcement.⁷² The loss of the EAW is discussed by Arnell and Davies elsewhere in this special issue and therefore this article focuses on the loss of data-sharing tools. The most important databases for UK law enforcement are: the exchange of biometric data under the Prüm Instruments (Prüm); the exchange of criminal records information via the European Criminal Records Information System (ECRIS); the exchange of intelligence data under the Second Generation Schengen Information System (SIS II) the Swedish Initiative and Naples II. Each of these databases serves a different purpose and therefore has a different legal basis. Whilst this has in the past been only of technical interest it comes to the fore in negotiating the UK's post Brexit relationship with the EU. The purpose of each database and the barriers to post Brexit access will be briefly explored. Briefly discussed will also be other EU tools of importance to prosecutors and Customs and Exercise.

Exchange of biometric data under Prüm Instruments

The Prüm Decisions are EU Council Decisions⁷³ that provide a mechanism for exchanging DNA, fingerprint and vehicle registration data between Member States for the prevention and investigation of cross-border crime and terrorism. Prüm provides for the exchange of DNA profiles in just 15 minutes, fingerprints within 24 hours and vehicle registration data in as little as 10 seconds. The speed of the response times and the automated nature of Prüm ensure its usefulness as an operational tool. The

⁶⁷ House of Lords European Union Sub-Committee, 'Brexit: the proposed UK-EU security treaty', Chapter 7

⁶⁸ The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005/C 53/01

⁶⁹ Under which law enforcement agencies within Member States are entitled to make and have acted upon requests for information from their counterpart agencies in other member state. Ibid. C53/7, [2.1]

⁷⁰ See for example Article 67(3) of the Treaty on the Functioning of the European Union 2012/C 326/01

⁷¹ Weyembergh, 'Consequences of Brexit for European Criminal Law', (2017) NJECL Vol. 8(3) 284

⁷² Butler, Davies and Hayward, *supra* (n 47)

⁷³ EU Council Decisions 2008/615/JHA and 2008/616/JHA of 23 June 2008

UK government initially opted out of Prüm but voted to re-join in 2015.⁷⁴ The Prüm database is decentralised and operates on a hit/no hit basis. If a match is found full access to the profile has to then be requested as the initial automated search excludes any personal information. Mutual legal assistance channels can then be used to follow up on the hit to obtain personal or other information associated with the DNA profile or fingerprint.

The Prüm regime offers a number of safeguards to ensure adequate protection of individual rights related to the cross-border exchange of personal data. In addition to stipulating that automated searches may only be undertaken in individual crimes each Member State identifies the data that is accessible to other Member States and determines the conditions for automated searching.⁷⁵ Member States will never obtain personal data about the DNA profile or fingerprints if there is not a match for a submitted profile. The UK has one of the most robust regimes for the disclosing of information via Prüm providing that that only DNA crime scene profiles with more than eight loci will be shared with other Member States via Prüm as a method of ensuring the number of false hits is kept to a minimum.⁷⁶ Personal data relating to a profile will only be shared if 10 or more loci are matched reducing the likelihood of a false match event further. Finally the UK only allows Member States to search the profiles or fingerprints of those who have been convicted in the UK and information relating to those under 18 will only be shared if a formal Letter of Request via mutual legal assistance channels is used. The safeguards which are already embedded in the Prüm decisions, the additional safeguards introduced by the UK and the fact that it is already operational has always eased the way for the UK to continue to have access to Prüm after Brexit. Importantly Prüm is not technically part of the Schengen acquis and therefore non-Schengen participation should not be a bar to access. The draft text of the Agreement on the New Partnership with the United Kingdom published by the EU on 18 March 2020 offers access to Prüm.⁷⁷

Exchange of criminal records information via the European Criminal Records Information System (ECRIS)

The European Criminal Records Information System (ECRIS) provides a decentralised system for the exchange of information on criminal convictions between Member States. Through ECRIS Member States are able to request criminal conviction information from the Member State which is the country of origin of an individual. Member States convicting a foreign national who is a citizen of another Member State are obliged to inform the country of origin about the conviction so that the country of origin may store that information. The UK is the fourth largest user of ECRIS and access to this database has been cited as a particular priority for the UK.⁷⁸

⁷⁴ HC Deb 8 December 2015, vol. 603 cols 914–963 and HL Deb 9 December 2015, vol. 767 cols 1636–1648.

⁷⁵ See Council Decision 2008/616/JHA para 13 and 18

⁷⁶ Oriola Sallavaci, 'Strengthening cross-border law enforcement cooperation in the EU: the Prüm network of data exchange' (2018) 24 Eur J Crim Policy Res 219

⁷⁷ Draft text of the Agreement on the New Partnership with the United Kingdom, 18 March 2020, part 3, chapter 2

⁷⁸ House of Lords European Union Committee, 'Brexit: Future UK-EU Security and Police Cooperation', 7th Report of Session 2016–2017.

The UK also opted in to a draft proposal in 2016 which aims to expand ECRIS to include third country nationals.⁷⁹ Losing access to ECRIS could lengthen response times for requests of a foreign national's criminal record back to an average of 66 days rather than the 10 days provided for under ECRIS. As with SIS II there is no precedent for a non-EU country accessing ECRIS (not even non-EU Schengen countries do). The proposed EU treaty does not offer access to ECRIS but does offer some improvements to the European Convention on Mutual Assistance in Criminal Matters 1959. The treaty proposes communication of criminal record information on each other's nationals once a month rather than once a year and provides for electronic exchange, although the technical details of this are not yet published. If a deal is arranged which ensures enhancement of the 1959 Convention this could be broadly comparable to the Council Framework Decision 2009/315/JHA particularly if the EU would agree to the UK using the current technical platform. This would mean that whilst the underpinning legislation would alter the means by which criminal records are exchanged would not. The extent to which the UK would have access to a comparable system to ECRIS in the event of a deal being made on security remains to be seen.

Exchange of intelligence data under the Second Generation Schengen Information System (SIS II)

The Second Generation Schengen Information System (SIS II) "is a highly efficient large-scale information system that supports external border control and law enforcement cooperation in the Schengen States"⁸⁰. SIS II operates a series of "real time" alerts which can be accessed by law enforcement agencies and border control officials. Under SIS II border officials can enter and consult alerts in respect of persons whose entry or stay in the Schengen Area has been refused.⁸¹ As the UK is not currently part of the Schengen Area it does not have access to this aspect of SIS II. Another aspect of SIS II relates to law enforcement cooperation in which competent authorities are able to create and consult alerts relating to missing persons and persons or objects related to criminal offences.⁸² This may, for example, relate to persons who are subject to a European Arrest Warrant. The UK currently has access to this aspect of SIS II along with the ability of vehicle registration services to access alerts on vehicles, registration certificates and number plates.⁸³ It has taken the UK several years to connect to SIS and the database only went live in 2017 at a cost of £39 million. The UK government is understandably keen to continue to have access observing that 'from April 2015 to April 2016, over 6,400 foreign alerts received hits in the UK, allowing UK enforcement agencies to take appropriate action, whilst over

⁷⁹ European Commission. Proposal for a Directive of the European Parliament and of the Council Amending Council Framework Decision 2009/315/JHA, as Regards the Exchange of Information on Third Country Nationals and as Regards the European Criminal Records Information System (ECRIS), and Replacing Council Decision 2009/316/JHA, COM (2016) 7 final, 2016/0002 (COD): 1–38.

⁸⁰ More information available at <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system_en> accessed 03 November 2020

⁸¹ Regulation (EC) No 1987/2006

⁸² Council Decision 2007/533/JHA

⁸³ Regulation (EC) No 1986/2006

6,600 UK-issued alerts received hits across Europe.⁸⁴ Access to SIS provides officers on the street with the ability to check alerts in real time.

Currently 30 countries operate the SIS II system including four 'Schengen Associated Countries'.⁸⁵ Alerts on SIS II are stored in a central database and are immediately accessible to around two million end-users. The current rules provide that data processed in SIS II (which include biometric information) "shall not be transferred or made available to third countries". Changes proposed by the European Commission (expected to take effect after 2021) would go further, extending the prohibition to any "related supplementary information" provided by a Member State in connection with a SIS alert⁸⁶. There is no legal basis in the EU treaties for a non-EU, non-Schengen country to participate in SIS II. Third party countries can only obtain SIS information by asking Europol to run a search for them. In 2010 the UK requested to join the Visa Information System⁸⁷ for law enforcement purposes but was denied. Although non-EU, Schengen countries like Iceland, Norway and Switzerland have access they must pay into the EU budget and have to accept the supremacy of the CJEU in relation to disputes and have incorporated the relevant parts of the Schengen acquis into their domestic law. They must also apply EU data protection standards. The EU has repeatedly stated that access to SIS II can not be granted even if an overarching deal on security cooperation could be made.⁸⁸ However the EU treaty does provide of 'cooperation on operational information. This is discussed in further detail below but would be the only replacement for the capabilities currently provided for by SIS II. This means that information is provided in response to a request rather than through real time access to the database. There will therefore not be a replacement which mirrors the capabilities of SIS II. This would also apply to The Secure Information Exchange Network Application (SIENA) via Europol. The EU draft treaty provides ongoing cooperation with Europol via liaison officers but there are limitations on the exchange of personal and non-personal data which would not provide direct access to SIENA.

The Swedish Initiative

The Swedish Initiative provides a common legal framework for the effective and expeditious exchange of existing information and criminal intelligence between EU Member States law enforcement authorities.⁸⁹ It also regulates the conditions for exchanging information and intelligence among EU Member States, including time limits and justifications for refusing to share data. Member States must ensure that conditions for obtaining information are not stricter than those provided for at national level. The proposed EU Treaty includes provisions for the sharing of operational

⁸⁴ HM Government, 'The United Kingdom's exit from and new partnership with the European Union', Cm 9417, Feb 2017

⁸⁵ Switzerland, Norway, Liechtenstein and Iceland

⁸⁶ Proposal for a regulation of the European Parliament and of the council on establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration) COM(2017) 794 final

⁸⁷ VIS contains fingerprints and digital photographs of those applying for a Schengen visa.

⁸⁸ House of Lords European Union Committee, 'Brexit the proposed UK-EU security treaty' (HL 2017-19 164). See C. Mortera-Martinez's evidence at Q26 which highlighted that access to SIS II was always unlikely.

⁸⁹ Council Framework Decision 2006/960/JHA

information to law enforcement authorities. However, it states that no data processed in databases established on the basis of Union law shall be provided to the United Kingdom in response to a request. The EU proposals mirror the Swedish Initiative in that States must ensure the conditions for accessing information and intelligence are not stricter than those applicable at domestic level. States should respond to a request within eight hours to urgent requests. Spontaneous exchanges of information are also provided for.⁹⁰

Naples II

The Naples II Convention is designed for mutual assistance and cooperation between customs administrations and other law enforcement agencies responsible for enforcing the law in relation to customs infringements.⁹¹ Mutual assistance between customs authorities is given following a request for information, surveillance, enquiries or notification; or spontaneously, without prior request, including covert surveillance and spontaneous provision of information. Customs administrations must provide each other with the necessary staff and organisational support when cooperating on cross-border issues such as hot pursuit, cross-border surveillance, covert investigations; joint special investigation teams; and controlled deliveries. Article 40 Schengen Convention provides for police authorities and customs authorities to continue surveillance across the border of another State subject to conditions. The UK hopes to agree an International Customs Co-operation and Mutual Administrative Assistance Agreement with the EU.⁹² In the event of a no deal bilateral agreements would be the only way forward.⁹³

Data adequacy

Exchange of data with a “third country” (any non-EU or EEA Member State) is subject to a guarantee that the personal data will receive an “adequate” level of protection. The Data Protection Act 2018 aims to ensure UK compliance with the GDPR, the Law Enforcement Directive, and the Council of Europe’s Convention No. 108.⁹⁴ However, since the Act does not reproduce verbatim the said instruments, and was intended to be read alongside the GDPR, whilst compliance is likely, it is not guaranteed. A bigger threat remains how the UK will ensure future compliance with evolving EU data protection standards post Brexit. This question is not only crucial to the obtaining of an agreement with the EU but is also necessary for bilateral cooperation with any

⁹⁰ Draft text of the Agreement on the New Partnership with the United Kingdom, published 18 march 2020, Part three, Title I, Chapter four

⁹¹ Close cooperation between EU customs administrations (Naples II Convention)

⁹² For more information see < https://ec.europa.eu/taxation_customs/business/international-affairs/international-customs-cooperation-mutual-administrative-assistance-agreements_en> accessed 03 November 2020

⁹³ Northern Ireland Affairs Committee, Cross-border co-operation on policing, security and criminal justice after Brexit, oral evidence, Wednesday 04 November 2020 available at <<https://parliamentlive.tv/event/index/c565f81a-0af5-4c25-9093-f82a34e79c28>> accessed 04 November 2020

⁹⁴ Convention for the Protection of Individuals with Regard to the Processing of Personal Data

Member State. The EU draft text requires a data adequacy decision as a precondition for cooperation. This is a unilateral assessment by the Commission that the UK's data protection regime is 'essentially the same' as EU data protection laws. It is noteworthy that adequacy decisions adopted under the Data Protection Directive and the GDPR do not cover data exchanges in the law enforcement sector. Therefore, an ad-hoc adequacy decision under the Law Enforcement Directive will also be necessary. As the UK is starting from a point of unprecedented alignment with EU data protection rules this has not been anticipated as a problem. However, the UK draft text seeks to agree bespoke data protection provisions with the EU which would mean cooperation would not depend on data adequacy. This is because the UK wants to be free to explore its own data protection policy after Brexit rather than remaining tied to EU data protection policy. Whether the UK is willing to compromise on this position has yet to be seen.

The European court has been active in recent years in the field of data protection. In the case of *Schrems*⁹⁵ the court made it clear that adequacy decisions do not necessarily provide a stable solution by invalidating the European Commission's adequacy decision underlying the EU-US Safe Harbour agreement. In *Schrems II*⁹⁶ the court invalidated the adequacy rating of the US 'Privacy Shield', the successor of Safe Harbour, on the basis, inter alia, of a lack of necessary limitations and safeguards on the power of the authorities in the US. In a recent case brought by Privacy International⁹⁷ challenging the practice of bulk communications data in the UK the CJEU ruled that the e-Privacy Directive⁹⁸ precludes national legislation from ordering telecommunication companies to transfer data in a "general and indiscriminate" manner to security agencies even for the purposes of national security. These cases demonstrate the CJEU's strong affirmation of data protection and have implications going beyond data transfers to the US. It is clear that practices relating to national security measures although outside of the competence of the EU fall within the remit of the court as they pertain to EU data protection. The Privacy International case throws doubt on whether the UK data protection regime would be awarded "adequacy" or not. Secondly, even if it is, *Schrems II* demonstrates that the CJEU is willing to robustly assess mechanisms for granting adequacy decisions and has the power to strike them down. The Luxembourg court appears to be requiring a standard of protection close to that of GDPR and has little interest in third country norms. The UK and EU will need to ensure transparency in any data adequacy decision to ensure its ongoing stability. If the UK wants to exchange data in the field of police and criminal justice, it will have to comply with evolving EU data protection law without any say in how that law evolves. Another relevant CJEU case is the decision to strike down a bespoke PNR agreement with the US and Canada on the basis that it was incompatible with the fundamental rights recognised by the EU. Particularly problematic was the retention and possible subsequent transfer of that data to non-member countries for the purposes of combating terrorism and forms of serious transnational crime. The case demonstrates that it will be easier for the UK to seek

⁹⁵ Case C-362/14 Maximilian Schrems v Data Protection Commissioner.

⁹⁶ Case C-311/18, "Schrems II"

⁹⁷ Case C-623/17

⁹⁸ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

an associated status to the existing EU scheme rather than negotiate a bespoke PNR agreement and then keep in step legally and technically with the EU and other associated state members. The need for inter-governmental machinery for the UK to be able to efficiently negotiate and implement changes to keep UK-EU criminal justice cooperation measures in step with developments in the AFJS *acquis* is considered in some detail by Wilson in this special issue.⁹⁹

The EU Charter of Fundamental Rights and Freedoms and the ECHR

The EU Charter of Fundamental Rights and Freedoms is also now central to EU data protection law, with a number of cases rely on Article 8 of the Charter in preference to other EU data protection provisions. The UK Government has excluded the Charter of Fundamental Rights from 'EU retained law' after Brexit.¹⁰⁰ Human rights are not only essential to data adequacy, but human rights are bundled into criminal justice and security cooperation more broadly.¹⁰¹ The EU wants cooperation to be conditional on a commitment from the UK to the ECHR and domestic implementation of it. If the UK abrogates its effect the agreement would be immediately suspended. It is usual for the EU to ask for ECHR compliance in third country agreements, but the UK argues that this level of compliance is unprecedented and is an unreasonable constraint on the UK's ability to determine an aspects of its own internal legal order. The UK proposed draft text states that the UK recognises that concerns about the level of protection of human rights, fundamental freedoms, democracy and the rule of law may be a grounds for suspending or terminating cooperation, but makes no direct reference to the ECHR or the Human Rights Act 1998. However, the UK has shown recent signs of compromise and it is reported in the press that the UK has agreed "not to materially alter the spirit" of the Human Rights Act 1998. Offering credible guarantees about future human rights compliance is essential for ongoing cooperation on criminal justice and security as it is underpinned by the principles of mutual recognition and mutual trust. Much of that mutual trust is based on adherence to ECHR standards. Fundamental rights are not only at the heart of the EU project but also distilled into the internal legal orders of Member States. Heffernan has demonstrated that 'the ECHR is therefore a valuable bridge in shoring up fundamental rights commitments in the arrangements that will define the UK's future relationship with the EU'.¹⁰² However compliance with the ECHR is not only a pre-requisite for cooperation with the EU it is also likely to prove to be essential for any bilateral cooperation with Member States such as Ireland, even when based on Council of Europe conventions.¹⁰³

⁹⁹ TJ Wilson, 'Prisoner Transfer within the Irish-UK Common Travel Area (CTA) after Brexit: human rights between politics and penal reform' in this issue.

¹⁰⁰ European Union (Withdrawal) Act 2018

¹⁰¹ P. Hustinx, M. Kennedy, S. Carrera, V. Mitsilegas, M. Stefan and Fabio Giuffrida, 'Criminal Justice and Police Cooperation between the EU and the UK after Brexit' (2018) Centre for European Policy Studies)

¹⁰² Liz Heffernan, 'Irish Criminal Trials and European Legal Culture: A Backdrop to Brexit' in this issue.

¹⁰³ The extent to which EU law sets parameters for member state bi-lateral criminal justice cooperation with third states is considered in Wilson (n99)

Despite the positive number of bi-lateral police cooperation arrangements between the AGS and PSNI, data sharing is facilitated by participation in EU criminal justice cooperation measures. Between the UK and Ireland a huge amount of data is exchanged. This was estimated by network members to be between 60-70K items of shared information a year. Even if the UK and the EU were to reach an agreement broadly on the lines currently offered by the UK there would be a loss of SIS II data and a decrease in the operational effectiveness of criminal records exchange. A no deal scenario would result in the loss of Prüm, PNR and a substitute ECRIS. Such losses would be keenly felt. It is not simply a case of reverting to relying on 'goodwill' between the PSNI and AGS. Data protection has transformed data exchange in recent years. Without a data adequacy decision or a clear legal basis, exchange of information will not be possible for day to day policing. This is particularly concerning for the PSNI and AGS who have to deal with an open land border at a time when there is an increased risk of exploitation of that border for criminal gain and the imposition of physical barriers will inevitably increase tension and risk further destabilising the peace agreement.

Part 4 - Possible solutions and models of future cooperation

There are three primary possible solutions for the future relationship between the UK and the EU. Firstly the EU could conclude an agreement or multiple agreements with the UK; secondly the UK could sign a series of bilateral agreements between the UK and Member States which are completed with the agreement of the EU; thirdly the UK could default to existing Council of Europe mechanisms of cooperation. The first solution is favoured by both the EU and the UK as this would be the most efficient and legally sound option which ensures that EU competence in criminal matters is not undermined and the UK can cooperate with all partners using the same instrument. Both parties have been committed to an agreement but at the time of writing, with only weeks to go before the end of transition period, there are still significant barriers to overcome. The second option is sub-optimal for the UK because it would be time consuming and legally complex to cooperate with Member States on 26 different terms. However, functioning cooperation, particularly between the UK and Ireland has to be the highest priority. Bilateral agreements could be an intermediary route which allow for cooperation to continue with the UK's most important partners whilst a more permanent EU wide solution is found. If none of these measures are put into place quickly enough then the UK will, by default, fall back to existing Council of Europe mechanisms of cooperation.

Bilateral agreements with Ireland

The EU's competences are divided between areas of exclusive competence, where a member State is not permitted to make their own laws concerning that area, and shared competence where both the EU and the Member State may make laws. However, in areas of shared competence Member States can only exercise their competence to the extent that the EU has not exercised or has ceased to exercise its

own competence.¹⁰⁴ However the EU shall also have exclusive competence for the conclusion of ‘an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.’¹⁰⁵ Article 4 of the Treaty of the Functioning of the EU, provides for shared competence which includes the Area of Freedom, Security and Justice (AFSJ). It is argued that the AFSJ parts of the proposed EU treaty fall under Article 3(2) rather than Article 4 as the whole treaty is “an international agreement... provided for in a legislative act of the Union.” If this is the case, then Article 4 of the Directive Implementing the Withdrawal Agreement comes into effect. Article 4 allows for Ireland to seek permission to enter into a bi-lateral agreement "in areas of exclusive competence of the Union" if is necessary for the proper functioning of the arrangements provided for in the Northern Ireland protocol.¹⁰⁶ It may be possible for Ireland to obtain permission from the EU to enter into bilateral agreements with the UK in the area of police and criminal justice cooperation on the basis that such agreement(s) are required to maintain the Common Travel Area.

If this permission was denied would the UK and Ireland be free to enter into bilateral negotiations in the event of a no deal? AFSJ is an area of shared competence in which either the EU or Member States can adopt legal acts. Where the EU has exercised its shared competence, Member States are not free to exercise their competence, but may do so again once the EU ceases to exercise the competence. This would happen if the EU repealed a legislative act without replacing it.¹⁰⁷ However even if negotiations were to fail many aspects of criminal justice cooperation remain an area of competence of the EU. An example of this can be seen in the decision of the Commission to launch infringement proceedings in October 2019 against Austria, Bulgaria, Hungary and Romania for signing an agreement with 5 Western Balkan countries on the automated exchange of DNA data, dactyloscopy data and vehicle registration in 2018. The Commission considers the agreement is in breach of EU exclusive competence in the area as it is covered by the Prüm Council Decisions.¹⁰⁸ However, in extradition it is clear that states are free to enter into bilateral agreements with third parties.¹⁰⁹ The difference between an extradition agreement and an agreement to exchange DNA appears to be that the latter may involve access to EU databases. This places limits on the types of bilateral agreements that the UK can form with Member States. As the case has not progressed past a Letter of Formal Notice it is difficult to come to a clear conclusion but in the case of a no deal, Ireland would be free to enter into bilateral negotiations relating to extradition but not to

¹⁰⁴ Article 3 of the Treaty of the Functioning of the EU - The Union shall have exclusive competence in the following areas:

- (a) customs union;
- (b) the establishing of the competition rules necessary for the functioning of the internal market;
- (c) monetary policy for the Member States whose currency is the euro;
- (d) the conservation of marine biological resources under the common fisheries policy;
- (e) common commercial policy.

¹⁰⁵ Article 3, para 2 TFEU

¹⁰⁶ paragraph 12 of Council Decision 2020/135

¹⁰⁷ Article 2(2) TFEU

¹⁰⁸ European Commission, Infringement decisions, 10 October 2019 available at

https://ec.europa.eu/commission/presscorner/detail/en/INF_19_5950 accessed 03 November 2020

¹⁰⁹ See Arnell and Davies in this issue.

replicate database access. Other areas of potential bilateral agreement are possible but will be subject to a data adequacy agreement. Member States remain bound by GDPR and the law enforcement directive. Any bilateral agreement which related to the sharing of information would, considering the cases discussed above, fall under the purview of the CJEU. Any such agreement would be doomed without an adequacy agreement which demonstrates close alignment of the UK to EU data protection. In the event of a no deal an adequacy decision is therefore still very important. Without one there will be significant loss of data sharing as outlined above and this will be felt acutely by the PSNI in their working arrangements with AGS. A legal framework which enables the spontaneous sharing of information is vital for public safety across the Common Travel Area and must be a priority for the UK government in the event of a no deal.¹¹⁰ Any bilateral agreement should ensure that strong human rights protections are built in.¹¹¹

Creation of a joint operational centre

Cooperation between UK and Ireland in policing and criminal matters has long predated membership of the EU and much cooperation between the two countries is outside of the EU framework. Workshops held by the UK-Irish Criminal Justice Cooperation Network have revealed the extent of Brexit preparation by all criminal justice organisations in the UK and Ireland. The PSNI have a central academy for Brexit which is attempting to maximise existing structures and is making sure what currently exists works well, such as the cross-border agency taskforce. A recent example of a cooperative strategy can be seen in Operation Arbacia which worked to prevent planned attacks on police and prison officers in Northern Ireland in the run-up to the conclusion of the Brexit talks. From the Irish perspective AGS have focused its Brexit preparations on examining existing structures and ensuring they work. They have encouraged better relations at a district level between those working in the border area. Brexit has therefore not only created risks but also opportunities. It has increased the conversations about the international world, highlighted differences in legislation and approaches in the regions and overall relationships between the regions has improved as a result. Overall, there is more communication now between different agencies and relations between AGS and PSNI are better than they have ever been. However, there are external constraints. High level political rhetoric does not always transform into real forums where agencies can work on the issues that Brexit presents. No one can remove the fact that the border is deeply politically sensitive, and this can thwart progress.

Members of the UK-Irish Criminal Justice Cooperation Network felt that focus should not just be on maintaining cross-border relationships but on enhancing them and this could be achieved by the creation of a permanently established joint operational centre involving key personnel from across the island of Ireland as well as relevant UK organisations such as the NCA. This could operate on a model seen between multi-

¹¹⁰ Written evidence of the PSNI, supra (n52)

¹¹¹ Written evidence submitted by the Northern Ireland Human Rights Commission to the Northern Ireland Affairs Committee, Cross-border co-operation on policing, security and criminal justice after Brexit, published 07 October 2020

agency hubs for UK joint intelligence and operations but on a cross-border level. The PSNI have suggested to the Northern Ireland Affairs Committee that:

With the provision of a suitable data adequacy position and the opportunity to take forward bilateral arrangements between UK and Ireland we believe there are significant opportunities to develop new approaches such as the provision of a bespoke centre of excellence relating to crime cooperation and coordination. Appropriate integration of operational and investigative collaboration across a range of agencies and remits would enhance existing capacity and capability based on the traditional collaborative “taskforce” model.¹¹²

Such cooperation would work best if it had a legal basis. An example of highly functional police cooperation can be seen between the Nordic countries. Cooperation is based on formally signed international law instruments supplemented with intergovernmental protocols. Enhanced co-operation is premised on a shared history (not always harmonious), a common legal and policing culture and the removal of passport controls long before the advent of Schengen. Cooperation is driven by the Nordic Council which is the official body for inter-parliamentary cooperation. Adherence to the rule of law and human rights principles underpin cooperation.¹¹³ There are also models of cooperation between police in the South of England and France which, from a legal perspective, is ahead of what is available between the north and south of Ireland. The UK-France Coordination and Information Centre underpins cooperation between the UK and France. The centre’s legal basis comes from the Sandhurst Treaty.¹¹⁴ The UK should investigate with Ireland the appetite for agreeing a similar treaty and coordination centre with its own budget. Such a centre is more likely to succeed if under the remit of the British-Irish Council.

Conclusion

Brexit has resulted in political, economic and criminological risks that threaten the fragile stability of post-GFA Northern Ireland and ultimately could re-ignite inter-communal divisions over its constitutional status within the UK. The history of the Troubles complicates police response to border crime. The UK government should not forget the potential impact its policies surrounding immigration and the movement of goods can have on crime across the Common Travel Area. Whilst the PSNI and AGS remain committed to cooperating closely to minimise exploitation of the border they cannot operate as a border service. Maintenance of an open border is an essential aspect of the Good Friday Agreement and organised criminals cannot be allowed to undermine this. The PSNI and AGS are moving into an era where cooperation will be more important than ever but at a time when the legal architecture under which cooperation (informal as well as formal) has flourished will be removed before replacement structures can be negotiated and implemented. Data protection concerns

¹¹² Written evidence of the PSNI, supra (n52)

¹¹³ Henrik Stevnsborg, ‘Nordic police cooperation’ in John McDaniel, Karlie Stonard and David Cox, *The Development of Transnational Policing: Past Present and Future* (2019, Routledge: London 1st edition) also see G. Mathisen, ‘Nordic cooperation and the European arrest warrant; intra-Nordic extradition, the Nordic arrest warrant and beyond’ (2010) 79(2) *Nordic Journal of International Law* 1.

¹¹⁴ Home Office, ‘Joint UK-France centre opens in Calais to tackle criminality at border’ 27 November 2018 available at <<https://www.gov.uk/government/news/joint-uk-france-centre-opens-in-calais-to-tackle-criminality-at-border>> accessed 03 November 2020

in the event of a no deal or in the absence of an adequacy decision will quickly dry up information exchange. Even if the UK and the EU are to reach an agreement there will be new processes in place which many police officers and lawyers will have to familiarise themselves with. Legal challenges are likely to become more frequent. Cooperation between the PSNI and AGS has never been better and the desire to work together is palpable on both sides of the border but such goodwill cannot be a substitute for the necessary authorisation. Information will not be shared if there is no legal basis to do so. In the event of a no deal the UK needs to work quickly to secure a data adequacy agreement which is a prerequisite to many needed bilateral agreements. It should not be presumed that the political will needed for such agreements will be immediately forthcoming from Ireland. The sooner the UK and Ireland start working together the quicker any holes presented by a no deal Brexit can be plugged. Without this the lights will go out on 1 January 2020.

Post Brexit the landscape will not be the same. At least some of the instruments that have been utilised to great effect over the last 20 years will not all be available. The UK and Ireland will therefore have to find alternative ways of ensuring that cooperation between the two countries continues to flourish. Culturally, economically, and politically these islands have been inextricably linked for centuries and Brexit should not alter this. Network members were clear that the advent of GDPR and the Law Enforcement Directive mean that informal cooperation will be less effective than it has been in the past. A UK-EU security agreement is the optimal way of achieving this although in the event of no deal the UK and Ireland should pursue bilateral agreements where legally possible. Formalising police cooperation through legal instrument and establishing a joint operational centre offers a positive way forward. This is more likely to be successful if supplemented by high level forums for cooperation. What the UK negotiates with the EU about criminal justice cooperation both now and in the future uniquely impacts Northern Ireland. It is recommended that the remit of the British-Irish Council be expanded to include criminal justice cooperation. This would emulate the Nordic model which sees criminal justice cooperation driven by justice ministers in the Nordic Council¹¹⁵ despite four different types of relationship between its constituent members and the EU.¹¹⁶ 'Keeping the lights on' has always been the desired aim of the UK, the EU and Ireland but it is now time to ensure it becomes a reality.

¹¹⁵Nordic Council, 'Call for closer police co-operation' 01 June 2018 available at

<<https://www.norden.org/en/news/call-closer-police-co-operation>> accessed 03 November 2020

¹¹⁶ (i) Finland and Sweden as EU member states; (ii) Denmark EU as a member state but largely opted- out of the AFJS acquis; (iii) Iceland and Norway as EEA/Schengen members; and (iv) the complex relationship between some of those countries and the autonomous areas of the Faroe Islands, Greenland, and the Åland Island.