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UK-Irish Criminal Justice Cooperation Network

CROSS-BORDER COOPERATION IN POLICING AND CRIMINAL JUSTICE BETWEEN THE UK AND IRELAND AFTER BREXIT

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INTRODUCTION

The UK-Irish Criminal Justice Cooperation Network is a collaboration between Northumbria University, Queen's University Belfast and the Association for Criminal Justice Research and Development in Ireland (ACJRD) and is funded by the Arts and Humanities Research Council. The aim of the network is to understand the challenges the UK and Ireland might face in relation to criminal justice cooperation after Brexit and to explore how these challenges might be mitigated. The network held a total of five events from 2018 to 2020. A conference planned for April 2020 has been postponed until 2021 due to the Covid-19 pandemic. Throughout the duration of the network over 70 stakeholders participated in events from a broad range of criminal justice institutions, including police, prosecutors and border control, across Great Britain, Northern Ireland and the Republic of Ireland, along with policy makers and academics. A special edition of the Journal of Criminal Law, published in November 2020, includes four papers which emanate from the network. All of these papers have sought to understand the close relationship between British and Irish criminal justice agencies and explored ways of ensuring this relationship is protected and even enhanced in the coming years, regardless of the eventual relationship between the UK and the EU.

This briefing paper is based on the following articles:

Gemma Davies, **'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'** (2020) The Journal of Criminal Law

Paul Arnell and Gemma Davies, **'Extradition Between the UK and Ireland after Brexit: Understanding the past and present to prepare for the future'** (2020) The Journal of Criminal Law

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SUMMARY

Whatever the final relationship between the UK and the EU post-Brexit the relationship 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 be available. The UK and Ireland will therefore have to find alternative ways of ensuring that cooperation between the two countries continues to flourish. A UK-EU comprehensive agreement is the optimal way of achieving this. In the event of the UK and the EU not reaching such a deal it is important to understand that the advent of GDPR and the Law Enforcement Directive mean that informal cooperation will be much less effective than it has been in the past. 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 Council despite four different types of relationship between its constituent members and the EU.

Secondly, in the event of a non-negotiated outcome between the UK and the EU the UK and Ireland should explore bilateral agreements. A bilateral agreement on extradition is particularly needed. The EAW depoliticised extradition North and South and whilst there is political will on both sides for this to continue, falling back on the 1957 Convention forces extradition back into the political space. There are few legal limitations on a bilateral extradition agreement which could, in some respects, even offer improvements to the EAW. Bilateral agreements cannot replace EU databases and EU data protection rules will apply to any agreement which includes the exchange of personal information. An EU data adequacy decision would make the conclusion of bilateral arrangements much easier. However, in the absence of such a decision the UK and Ireland will need to work together to ensure Irish LEAs can be satisfied that appropriate safeguards are in place.

1. UNDERSTANDING THE HISTORICAL CONTEXT

Ireland and the United Kingdom have enjoyed free movement of people by virtue of the Common Travel Area (CTA) since Ireland declared independence in 1922. 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. Ireland and the UK joined the European Community in 1973 and most aspects of the CTA were gradually overtaken by developments in EU law. Inevitably the close but informal cooperation in criminal matters enjoyed by the UK and Ireland, 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. This process of divergence might have continued were it not for the role of the EU which became a driving force for convergence.

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) as it emerged from direct rule by the UK Government during the Troubles. 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. A human rights focused approach to policing was a necessary part of the peace process as policing had been so bound up with community tensions following the independence of Ireland. 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.

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 enhance and develop more effective North-South cooperation and coordination and includes a programme of secondment between the two police forces. 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. 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, 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 that it could otherwise have been. Every year the PSNI and AGS hold a Cross Border Conference on Organised Crime aimed at enhancing cooperation.

2. WHAT EFFECTS BREXIT MAY HAVE ON CROSS-JURISDICTIONAL CRIMINALITY

Despite the close working relationship between the PSNI and AGS, Brexit presents a risk of increased criminality between Northern Ireland (NI) and Ireland at a time when loss of EU police and judicial cooperation mechanisms could negatively impact operational effectiveness. Transnational crime – by its nature – crosses borders, and any changes to a border can impact the volume of crime or the way criminal gangs exploit borders. The extent to which the risks outlined below are realised depends on what the final relationship between the EU and the UK looks like. The more tangible the border and the greater the regulatory divergence, the greater the impact will be on crime; and the greater the loss of EU police and criminal justice cooperation, the greater the impact on cross-border policing.

2.1 Immigration crime

The UK and Ireland have never participated in Schengen and maintained separate immigration policies in relation to non-EU citizens. Prior to Brexit, free movement of people meant that they had the same approach to circa 445 million EU citizens. The UK will soon be free to alter its immigration policies in relation to EU citizens, and these policy changes will likely mean there is an increase in the number of people who are eligible to enter Ireland but not the UK. 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 NI and Ireland'. Whilst UK and Irish authorities have always worked cooperatively, informal information exchange has been superseded by EU measures. Not only does a significant amount of information come through EU databases, but EU data protection law governs how all personal data is shared between member states. Brexit could negatively impact the quality of information police and border officers have access to, particularly in a no deal scenario.

2.2 Commodities smuggling

The extent to which Brexit might impact smuggling demand depends on how the Northern Ireland Protocol is implemented and whether there is a UK-EU free trade agreement (FTA). If there is this would minimise incentives for smuggling because there would 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 Great Britain (GB) in order to access the EU single market and thus avoid paying tariffs levied on legitimate GB to EU trade. The risk will be greatest for those goods which could face the highest EU tariffs. 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.

The risk of smuggling could also increase if the application of the UK Internal Market bill means that the UK diverges from EU standards and those goods can freely circulate in NI. A 'race to the bottom' would mean that there will be a need for tighter controls on goods entering NI from GB. Foods produced to lower standards are cheaper to produce and the incentives to smuggle such goods into NI and/or onward into Ireland, would be greatest where the price differential is significant. The introduction of a new customs arrangements is an opportunity for new kinds of fraud, and this will need to be monitored closely. The EU will be keen to assess the scale and immediacy of the subsequent risk for smuggling which could exploit a poorly enforced sea border, particularly in a no deal scenario.

2.3 Resurgence of domestic terrorism

The extent to which there is a risk of a resurgence in domestic terrorism in the coming years is unclear, but Brexit was presented in Northern Ireland along nationalist and unionist lines which has served to confirm old divisions. Dissident Republican terrorists have in the past used the border to frustrate counter-terrorism operations, while they and other organised crime gangs breached bail and crossed the land border to avoid prosecution. The political sensitivity of the border comes in to play when we look at how to mitigate crime risks across the border. There is evidence of strong opposition to any kind of physical manifestation of a border which could become a target, particularly for the Republican movement. The UK must resist a knee-jerk reaction which could undermine the fragile peace agreement in NI.

3. LOSS OF EU COOPERATION TOOLS AND DATABASES

Despite the positive number of bi-lateral police cooperation arrangements between the AGS and PSNI EU tools and databases still facilitate much of the cooperation between the two. 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. 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 Programme which introduced the concept of availability as the guiding concept for law enforcement information exchange. 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. The entry into force of the Lisbon Treaty in 2009 fundamentally transformed the EU's power to adopt police and criminal justice measures. The loss of the European Arrest Warrant (EAW) and information databases are frequently cited as being of most concern to law enforcement. 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 UK and the EU have both stressed their desire to maintain a close relationship in this area after Brexit and both have published draft texts. However, with such a short time left until the end of the transition LEAs are earnestly preparing for a no deal scenario.

3.1 What would a deal look like for criminal justice information sharing?

According to the EU's draft text published in March 2020 the only databases the UK would have full access to, even in a deal scenario, is Prüm and PNR. There is no precedent for a non-EU country accessing ECRIS (not even non-EU Schengen countries do), although the agreement proposed by the EU does offer some improvements to the European Convention on Mutual Assistance in Criminal Matters 1959 which could be broadly comparable to ECRIS, 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 manner by which criminal records are exchanged would not. The extent to which the UK would have access to a comparable system in the event of a deal being made on security remains to be seen.

There is also no legal basis in the EU treaties for a non-EU, non-Schengen country to participate in SIS II. Non-EU Schengen countries such Switzerland and Norway can access SIS II but pay into the EU budget, accept the supremacy of the ECJ and incorporate the relevant parts of the Schengen acquis into their domestic law. The EU draft proposal offers provisions for the exchange of criminal justice information which are akin to the Swedish Initiative in that states must ensure the conditions for accessing information and intelligence are not stricter than those applicable at domestic level. However even in a deal scenario information is provided in response to a request rather than through real time access to the databases. There will not be a replacement which mirrors the capabilities of SIS II or the Secure Information Exchange Network Application (SIENA) via Europol. The UK will fall back on the Interpol I-24/7 database as a replacement for SIS II.

3.2 What would no deal look like for information sharing?

If the transition period ends without a comprehensive agreement the UK will lose access to Prüm, PNR, improvement to the 1959 Convention on criminal record exchange and a replacement for the Swedish Initiative. The UK will also no longer be able to use any personal data it received in the past from the EU. The ability to obtain personal data from EU partners will be impacted. Transfers from a UK LEAs to EU LEAs will be covered by a UK transitional data adequacy decision and will be permissible if the transfer is necessary for law enforcement purposes. However, transfers to the UK will become immediately uncertain as the UK will become a 'third country' for EU data protection purposes. Without an EU adequacy decision UK LEAs will need to satisfy EU partners that there are adequate data protection safeguards. All EU member states must comply with the transfer provisions of the GDPR and any national data protection law. UK LEAs are being advised by the Information Commissioner's Office that EU senders of data will probably require a contract or binding legal instrument or find some other way of assessing appropriate safeguards are in place. The UK is starting from a point of unprecedented alignment with EU data protection rules. 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. Whether the UK is willing to compromise on this position has yet to be seen. The ECJ, in the Schrems II decision, demonstrated the court is willing to robustly assess adequacy decisions and has the power to strike them down. The 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.

4. EXTRADITION BETWEEN THE UK AND IRELAND

After the creation of the Irish Free State and the establishment of the Common Travel Area extradition between the UK and Ireland was facilitated through a backing of warrants system. Whilst this worked well between Great Britain and Ireland this was not the case between the Republic and Northern Ireland. Having its origins in Irish case law, a functioning system of extradition broke down from 1928 to 1965 during which time there were no practically applicable arrangements between the two. New legislative provisions in 1965 sought to formalise extradition but were still a hybrid which incorporated aspects of orthodox international extradition agreements and the previously applicable backing of warrants system.

In 1973 both the UK and Ireland joined what was then the European Community. Whilst integration in the field of police and criminal justice matters was originally a challenge, it was eventually recognised that it must follow as a corollary of free movement. In this vein the Framework Decision on the European Arrest Warrant was adopted in 2002. Both Ireland and the UK have been part of the EAW since its inception and amended their law in accordance with it. The EAW facilitates a simplified procedure enabling surrender decisions to be made by judicial authorities on the basis of mutual recognition. The benefits of the system are heightened in the Ireland-UK historical and political context. They include the absence of a political offence exception and orthodox double criminality requirement. The EAW contains limited grounds for refusal, including no bar on the extradition of nationals. It has created an effective and efficient process which plays a crucial role in Ireland-UK criminal justice cooperation today.

4.1 What does a deal look like for extradition?

UK participation in the EAW is not possible after 31 December 2020. However, both the UK and EU have proposed a replacement which closely mirrors the agreement between the EU and Norway/Iceland, which in turn is similar to the EAW. A mutually agreeable deal on extradition is within touching distance, but a few key issues remain. A proportionality test for incoming requests and a test of trial readiness is requested by the UK. Both are tests that the UK has brought into domestic law to deal with concerns about the operation of the EAW. Secondly the EU states that the ECJ should have sole jurisdiction to interpret provisions or concepts of Union law. The UK wants no role for the ECJ and instead suggests political resolution of disputes via a joint committee. These issues are not insurmountable. However, time is now very short. Surrender is merely one part of a proposed comprehensive agreement between the EU and the UK. There are a considerable number of obstacles still standing in the way of conclusion of an agreement.

4.2 What does a no deal look like for extradition?

In the event of an agreement between the EU and UK not being concluded and ratified by 31 December 2020 the UK and Ireland will fall back on the European Convention on Extradition 1957 (ECE). This is clearly sub-optimal. The ECE operates through diplomatic channels and therefore extradition entails political approval in the extraditing country. Unlike the EAW, there are no strict time limits and states are not required to extradite their own nationals. Further, under the ECE there are no agreed exceptions to the dual criminality requirement and several safeguards for requested persons in part 1 of the Extradition Act 2003 would no longer be available. An important point affecting the efficiency of a future extradition process is the loss of the Schengen Information System II. Whilst distinct from the EAW, it operates alongside it by providing real time warrants and alerts. Its loss means Interpol red

notices using diplomatic channels will be relied upon. Most EU countries have ceased using Interpol inter se. Overall, the ECE is out-dated and little used amongst member states. This may lead to UK warrants not being dealt with as a priority and UK prosecution authorities having to rely on informal in-country relationships to a greater extent. Ireland has made legislative provision to fall back on the ECE for extradition with the UK and has not, as yet, started operating SIS II. UK and Irish prosecutors have close working relationships and have prioritised Brexit preparations. However, the ECE must follow diplomatic, not judicial channels and an increase in appeals and a slowing down of response times is inevitable.

5. MITIGATING THE RISKS OF BREXIT

EU criminal justice cooperation facilitates much of the joint work between the PSNI and the AGS. Both forces have made clear that participation in EU measures have enabled them to provide a quicker, more efficient, and dynamic response to crime. A UK-EU comprehensive agreement covering criminal justice cooperation is the optimum outcome for all parties. However, the role of the ECJ in dispute resolution and UK commitment to and domestic implementation of the European Convention of Human Rights currently stand in the way of a deal.

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. A recent example of their successful 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. Brexit has 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. 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.

5.1 Proposed Joint Operational Centre

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-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.[2]

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 cooperation 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. There are also models of cooperation

[2]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

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. 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.

5.2 Bilateral agreements in the event of a no deal

The Area of Freedom, Security and Justice is an area of shared competence in which either the EU or member states can adopt legal acts. However even if negotiations were to fail many aspects of criminal justice cooperation remain an area of competence of the EU. The Commission launched infringement proceedings against four states for signing an agreement with five Western Balkan countries on the automated exchange of DNA. This demonstrates that member states cannot enter into bilateral agreements which replicate EU databases. Other areas of bilateral exchange are possible but if they involve personal data exchange, they will fall under the purview of the ECJ and would be doomed to fail without close alignment of the UK to EU data protection. In the event of a no deal an adequacy decision is very important, and a legal framework which enables the spontaneous sharing of information is vital for public safety and must be a priority for the UK Government.

A possible solution to the loss of the EAW in the event of a no deal is a bilateral Ireland-UK extradition treaty. There is precedent for bilateral agreements on extradition which can closely mirror, or in fact surpass, the EAW in terms of efficiency. Five Nordic countries (not all of which are EU members) have a regional system of extradition termed the 'Nordic Arrest Warrant' (NAW). The NAW mirrors a number of aspects of the EAW and mutual recognition is made explicit. The notable differences are that there are even lower minimum penalties and double criminality is completely abolished under the NAW. Further, procedural time limits are shorter than those within the EAW. It is therefore possible for Ireland and the UK to conclude a bilateral extradition agreement with terms that provide for even closer cooperation than the EAW. The drivers for a regional Nordic system of extradition are equally present between the UK and Ireland. Nordic countries have a closely connected history, similarities in their legal systems and languages and removed their borders long before the advent of Schengen.