

Written evidence submitted by Colin Murray and Clare Rice (CB0010)

Author Biographies

Mr Colin Murray is a Reader in Public Law at Newcastle University. He is the principal investigator on the ESRC project *Performing Identities: Post-Brexit Northern Ireland and the reshaping of 21st-Century Governance* (ES/S006214/1), examining the impact of Brexit on the relationship between Ireland and the United Kingdom (and in particular Northern Ireland).

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Given our areas of expertise, we are addressing the Committee's specific questions on:

- what new barriers will be created to cross-border security co-operation between the UK and the Republic of Ireland when the transition period ends, including if no deal on the UK-EU future relationship is agreed;
- what steps need to be taken by the UK Government, in collaboration with the Irish Government, to replace any loss of access to the European Arrest Warrant as a tool for law enforcement co-operation between the UK and the Republic of Ireland in the context of a future relationship deal or no deal being agreed.

This evidence does not represent the views of the ESRC or of Newcastle University.

Policing and Prosecution Cooperation After Brexit

- [1] The Joint Agency Task Force established by the Fresh Start Agreement 2015 to tackle cross-border crime comprises of members from An Garda Síochána, the Police Service of Northern Ireland (PSNI), the Revenue Commissioners and HMRC Revenue and Customs. Supported by the British-Irish Intergovernmental Conference framework, these arrangements are not subject to change as a direct result of Brexit.
- [2] However, there are a number of other important elements of cross-border cooperation which are threatened by the UK's exit from the EU. In particular, aspects of cooperation conducted under European Agencies are endangered. One area is Europol (the EU Agency for Law Enforcement Cooperation). Only EU Member States are permitted full access to this. A number of non-EU states enjoy partnerships with the body, while some others which operate bureaux of law enforcement officers alongside those of EU Member States.
- [3] A second EU body is Eurojust, which works to improve cooperation between investigatory and prosecutorial authorities across Europe. While EU Member States benefit from the full powers of this body, it also maintains cooperation agreements with third countries, including Norway, Switzerland and the United States of America, which provide for the exchange of liaison prosecutors. Brexit removes the UK from both Europol and Eurojust,

and in both cases, the options currently offered to non-EU states provide only partial access to these arrangements.

- [4] There are a number of information sharing routes mechanisms relied upon by UK authorities, including by the PSNI, which will be impacted by Brexit. These include:
- a. The Europol Information System (EIS) – information on criminal actors across EU Member States;
 - b. The European Criminal Records Information System (ECRIS) – a secure electronic platform for sharing information between states on criminal records;
 - c. The Prüm Decisions – permits searches within EU Member States for biometric and vehicle registration data;
 - d. The Schengen Information System (SIS II) – provides alerts about ongoing law enforcement investigations across most of the EU. While the UK is privy to this information, Ireland is not, demonstrating the extent of UK integration;
 - e. Passenger Name Records (PNR) – assists in the tracking of serious criminals.
- [5] Although cross-border policing on the island of Ireland rests upon well-developed connections between the PSNI and Gardaí, their cooperation is underpinned by information sharing through such mechanisms. EU law provides the basis for much of this, not least due to reasons relating to data protection laws. Given that data protection is an EU competence, Ireland's authorities will not be able to continue such general information sharing with UK authorities, including in Northern Ireland, if the EU does not recognise the adequacy of the UK's data protection arrangements following a UK-EU Future Relationship Agreement. EU institutions will likely be resistant to any arrangement which permits data sharing if the UK takes steps post-Brexit which hollow out data protection or its ECHR commitments. It is notable in this regard that in *Schrems*, the CJEU focused upon the lack of scrutiny of the United States' data protection standards in striking down EU/US data sharing arrangements.¹
- [6] For Northern Ireland in particular, as a result of the land border, the existing limitations to information sharing are already apparent. For example, the inability of regulation authorities to share information on activity in breach of environmental rules as police authorities can has exacerbated cross-border waste management issues. If police and other authorities are likewise restricted in sharing information, similar challenges for tackling a broad range of crimes could be expected to result. In addition, the shared land border on the island of Ireland means that pursuits where police are following a suspect are not permitted to continue where the suspect crosses the border into the other jurisdiction.² This is an on-going problem for police forces on both sides. In contrast, the Schengen Agreement makes provision for cross-border pursuits. Although Brexit therefore produces distinct challenges, especially for data sharing, which can only be addressed through UK-EU negotiations, there are also opportunities for such pre-existing gaps in arrangements to be addressed on a bilateral level.

Justice System Cooperation After Brexit

- [7] Bilateral cooperation on the exchange of suspected criminals between jurisdictions has historically been a fraught element of relations between the UK and Ireland.³ Throughout the Northern Ireland conflict extradition processes were laborious and frequently subject

¹ C-362/14 *Schrems v Data Protection Commissioner* [2016] 2 CMLR 2 (Grand Chamber, CJEU).

² The Schengen Acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders OJ L 239 (22 September 2000) Article 41.

³ See C. Campbell, 'Extradition to Northern Ireland: prospects and problems' (1989) 52 *Modern Law Review* 585.

to legal objections. The European Arrest Warrant (EAW) not only addressed ambiguities in the pre-existing extradition arrangements under the Council of Europe Convention on Extradition, but it removed the political tension that such arrangements generated in the past.⁴ The EAW changed the nature of the process to one of suspect transfer based on mutual recognition of judicial processes. Brexit has the potential to reverse these gains.

- [8] The EAW was designed to facilitate the transfer between justice systems of individuals facing criminal prosecution. The UK makes considerable use of this system, both in terms of suspects transferred into and out of its jurisdiction. In the Northern Ireland context, over two thirds of EAWs sought by the PSNI between 2007 and 2017 involved Ireland. The EAW operates on a presumption that EU Member States maintain equivalent protections for defendants in their criminal justice systems, thus removing a number of practical, as well as political, obstacles to the effective extradition of criminals and suspects between EU Member States, providing for a more efficient process.
- [9] Brexit has, however, given rise to a number of preliminary references to the CJEU which questioning whether the UK's withdrawal undermines the operation of the EAW.⁵ The outcome of these cases, coupled with the Withdrawal Agreement, ensured that the UK can avail of the EAW until the end of Brexit's transition/implementation phase on 31 December 2020. Ireland has legislated to provide for the reactivation of its Extradition Act 1965 arrangements once the Brexit transition/implementation period ends.⁶ This, however, is a pale substitute for the speed and effectiveness of EAW processes. It is imperative for cross-border cooperation on the island of Ireland that an arrangement is reached in relation to suspect surrender that does not involve reverting to reliance on the Council of Europe Convention of Extradition and the difficulties it entails.
- [10] The suspect surrender agreements that the EU maintains with Norway and Iceland provide examples of how an arrangement equivalent to the EAW could be constructed between the UK and EU without imposing the CJEU's jurisdiction.⁷ This is, indeed, the basis on which Future Relationship negotiations are predicated. The Norway/Iceland arrangements operate upon an expectation of few disputes arising in light of both parties maintaining close regard for the development of each other's jurisprudence and being committed to ECHR protections. They also include political offence exceptions and parties can importantly refuse to transfer their own citizens. Further, these countries' membership of the Schengen free movement area facilitates these arrangements. The prospects for replicating these arrangements in a UK-EU Future Relationship Agreement are assessed in the next section.
- [11] Under EU law, cooperative justice arrangements provide for an expedited system of prisoner transfer between EU Member States. Compulsory arrangements concluded as part of transfer agreements under the EU Prisoner Transfer Framework Decision potentially allow for transfer of prisoners without their consent.⁸ Ireland, however, has not

⁴ EU Council Framework Decision 2002/584/JHA (13 June 2002).

⁵ In Case C-327/18 *Minister for Justice and Equality v RO* (2018) EU:C:2018:733, para 62, the CJEU confirmed that 'substantial grounds' would need to be shown that the affected individual's EU Charter rights were at risk as a result of Brexit before an EAW would be halted.

⁶ Miscellaneous Provisions (Withdrawal of the United Kingdom from the European Union on 29 March 2019) Act 2019, Part 14.

⁷ EU Council Decision 2014/835/EU (27 November 2014) on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway [2014] OJ L343/1; EU Council Decision 2006/697/EC (27 June 2006) on the signing of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway [2006] OJ L292/1.

concluded a compulsory prisoner transfer agreement with the UK under these EU arrangements. The effect of compulsory transfer of Irish citizens incarcerated in UK prisons upon Ireland's already densely populated prison infrastructure would be dramatic. As such, there is little likelihood that Ireland's position towards prisoner transfers will change, irrespective of Brexit.

- [12] Since the enactment of the UK Borders Act 2007, the Home Secretary has been able to order the deportation of any 'foreign criminal' who has been convicted of one of a range of specified criminal offences and sentenced to a term of imprisonment of more than twelve months. While this provision can cover Irish citizens imprisoned in the UK, the CTA's removal of immigration checks on travel between the UK and Ireland means that such deportations would have negligible practical effect. Further, successive UK Governments have made assurances that deportation of Irish citizens from the UK would only happen under recommendation from a judge or where it is deemed necessary by the Home Secretary.⁹ Irish law does not provide for comparable arrangements for post-sentence deportation of UK citizens sentenced to imprisonment in Ireland. Prisoner transfer arrangements between the UK and Ireland are thus limited, and are therefore unlikely to severely impacted as a result of Brexit.
- [13] A further area of importance relates to child protection. In the instance of child abduction, for example, which is inclusive of the removal of a child from one EU Member State to another by a parent in contravention of child custody arrangements, an EU law basis exists through the Brussels II arrangements which expedites return of the child to the original jurisdiction. Judicial authorities in the state to which an order is made are obliged to reach a decision on this within six weeks. Frameworks under international law, namely the Hague Conventions, provide for a slower process in cases such as this, and thus entail protracted processes for the families involved. These are the default arrangements that will come into play in the absence of an agreed set of arrangements between the UK and the EU as part of a future relationship.
- [14] The proximity and ease of passage between Northern Ireland and Ireland, and indeed the UK and Ireland, mean that there is additional incentive to ensure that meaningful replacement arrangements are put in place after Brexit. Like the EAW, the Brussels II process assumes mutual understanding of judicial procedure and human rights between countries. Implicitly, any such agreement on similar rules will need to be mindful of this, and there must be recognition that divergences in these regards in the future could disrupt its operation.

UK-EU Future Relationship Negotiations (and alternative bilateral processes)

- [15] It is unsurprising that the UK has consistently expressed an interest in retaining as many of the current cross-border cooperation arrangements as possible. However, the UK has also consistently spoken in terms of sovereignty and the pursuit of a path independent of EU frameworks. It still remains unclear, therefore, how these two positions will be reconciled. But it is evident that it remains in the UK's interests that this is achieved.
- [16] In July 2018, the UK Government recognised there would be a role for the CJEU in any future dispute resolution mechanism. It also noted that the UK would 'remain a party to the ECHR' post-Brexit.¹⁰ Both of these commitments provided important underpinnings to

⁸ EU Council Framework Decision 2008/909/JHA (27 November 2008), Article 6.

⁹ See L. Byrne, HC Debs, vol. 457, col. 4WS (19 February 2007). These commitments were reaffirmed in the course of legislating for the Immigration and Social Security Co-ordination (EU Withdrawal) Bill currently before the UK Parliament.

¹⁰ HM Government, *The Future Relationship between the United Kingdom and the European Union* (2018)

the potential for any deal being achieved in relation to cross-border cooperation of the nature addressed here. However, under Boris Johnson's premiership, the UK Government has been reluctant to explicitly recommit to this position. The Norway/Iceland suspect surrender arrangements which would be the model for a UK-EU arrangement after Brexit's transition/implementation period are dependent on mutual recognition of judicial processes and will therefore almost certainly become tied to the UK Government making commitments with regards to the ECHR remaining incorporated within the UK's legal systems as a vital safeguard within its criminal justice processes.

- [17] At the time of writing, concern is mounting that a deal will not be reached. Without a formal deal being concluded on a future relationship between the UK and the EU, the default outcome will be a reversion to largely pre-existing arrangements, which as has been highlighted, are slow, cumbersome, in aspects ineffective and will be to the detriment of the UK in terms of effective policing and justice capabilities. If no agreement can be reached between the UK and the EU there is, however, potential for a bilateral suspect surrender arrangement to be concluded between Ireland and the UK.
- [18] As early as March 2018, a research paper prepared by one of the authors of this evidence recommended that the UK and Ireland make steps towards bilateral alternatives to the EAW and for enhancing police cooperation as a contingency should there be no UK-EU agreement on these issues.¹¹ The EAW, after all, with its focus upon speedy exchange between judicial authorities, has not been subject to successful constitutional challenge in Ireland.¹² But as with any UK-EU Agreement, UK-Ireland suspect surrender arrangements would rely upon the mutual recognition of judicial processes, and would thus be dependent upon the UK and Ireland making human rights commitments. Unlike the EAW, where CJEU rulings have limited close consideration of the mutuality of safeguards by national judicial authorities,¹³ Ireland's courts would not be constrained in assessing the effectiveness of UK commitments under a bilateral arrangement.

Conclusion

- [19] Effective working relations between law enforcement agencies in Ireland and Northern Ireland are important, but the current tools for cross-border policing and justice are to a large extent found in EU law, and not in bilateral arrangements between the UK and Ireland. It will be difficult to establish workable bilateral substitutes for some of EU justice and policing tools after Brexit if no Future Relationship Agreement is concluded, because Ireland will be obliged to continue to meet its EU law obligations towards EU citizens.
- [20] The UK must prioritise the establishment of an EAW-type set of arrangements within the Future Relationship negotiations. The Council of Europe Convention on Extradition is not desirable long-term basis for effective cooperation on the island of Ireland. Reaching a Future relationship deal which encompasses an agreement on the aspects of justice, policing and security cooperation addressed herein is nonetheless predicated on the UK maintaining some degree of alignment with EU law insofar as maintaining judicial procedures and human rights are concerned.

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Cmnd.9593, p56.

¹¹ C. Murray, A. O'Donoghue and B. Warwick, *Discussion Paper on Brexit* (NIHRC, 2018) p.IX (recommendations 30-35).

¹² R. Farrell and A. Hanrahan, *The European Arrest Warrant in Ireland* (Clarus Press, 2011) 5.

¹³ In C-399/11 *Melloni v Ministerio Fiscal* [2013] 2 CMLR 43, para.54, CJEU'S Grand Chamber affirmed that the EAW operates on a presumption that EU Member States maintain equivalent protections for defendants in their criminal justice systems.