acjrd

TWENTIETH ANNUAL CONFERENCE

The Brexit Impact on Criminal Justice Cooperation in Ireland

Spencer Hotel, IFSC, Dublin.

6th October 2017

Mission Statement

ACJRD informs the development of policy and practice in justice

Vision Statement

Innovation in justice

Founded in 1996, the Association for Criminal Justice Research and Development (ACJRD) seeks to promote reform, development and effective operation of the criminal justice system.

It does so mainly by providing a forum where experienced personnel can discuss ways of working in an informal setting, by promoting study and research in the field of criminal justice and by promoting the highest standards of practice by professionals associated with criminal justice.

Its activities are designed to lead to increased mutual understanding and provide insights into the problems with which all are confronted. In opening unofficial channels of communication, it improves cooperation between the different parts of the criminal justice system.

For more information on the ACJRD, please see our website www.acjrd.ie.

ACJRD Council

The ACJRD is governed by the ACJRD Council:

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- Pauline Shields, Chief Inspector, An Garda Síochána Inspectorate
- Rowena Toomey, Office of the Revenue Commissioners

In addition to our Council and membership (www.acjrd.ie/membership) the ACJRD has a number of member Working Groups. For more information on these groups please see www.acjrd.ie/workinggroups.

"THE BREXIT IMPACT ON CRIMINAL JUSTICE COOPERATION IN IRELAND" REPORT CONTENTS

Foreword from the Chairperson

Maura Butler, Chairperson, ACJRD

The 20th Annual ACJRD Conference "*The Brexit Impact on Criminal Justice Cooperation in Ireland*" featured distinguished speakers from Ireland, joined by speakers from the European Union, Northern Ireland and England.

I was personally alerted to the need for discussion on the 2017 conference theme when contacted by colleagues at Northumbria University, Newcastle, UK, who were looking for an Irish perspective on the Brexit papers they were putting together for a House of Commons presentation. Subsequent to that interaction I was delighted that my fellow colleagues on the Council of the ACJRD embraced the idea of looking at Brexit from a criminal justice perspective. Everybody remembers what it used to be like to have a closed border on this Island and everybody is very aware of the levels of cooperation that have happened post the Good Friday agreement. Nobody wants rollback on any of that and I think that it's an underlying fear that we have. We want to maintain the cooperation that's there. So in good ACJRD tradition we thought let's unpick this, let's have a conversation, let's begin to look at what the possible impact will be and hence it became the topic for our 2018 Annual Conference. Happily some of the Northumbria University colleagues referred to above took part in the conference as presenters and as audience members,

The conference structure facilitated the presentation of plenary sessions supported by workshops, where delegates from the criminal justice community shared their views, experiences and expertise.

ACJRD sincerely thanks the expert presenters and applauds their tenacity, courage, optimism and generosity in addressing the conference audience on this evolving topic. ACJRD is also grateful to plenary speakers who subsequently wrote a paper for this publication and to all those who contributed during conference discussions.

The Conference Plenary speakers included*:*

- Charlie Flanagan T.D., Minister for Justice and Equality
- Thérèse Blanchet, Director, Justice and Home Affairs, Council Legal Service
- Jimmy Martin, Assistant Secretary, Department of Justice and Equality
- Ray Briscoe, Principal Prosecution Solicitor and Deputy Head of the Superior Courts Section, Office of the Director of Public Prosecutions.
- Adam Jackson, Associate Professor and Deputy Director, The Northumbria Centre for Evidence and Criminal Justice Studies, University of Northumbria, Newcastle
- Gemma Davies, Senior Lecturer, Law School, University of Northumbria, Newcastle
- Marie-Claire Maney, Assistant Secretary/Revenue Solicitor and Head of Investigations and Prosecutions, Revenue Commissioners
- Brian Gormally, Director, Northern Ireland Committee on the Administration of Justice
- HMA Robin Barnett, CMG, British Ambassador to Ireland

The conference workshop presenters included: Hugh Dockry, Chief State Solicitor's Office; Hugh Quigley, The Wheel; Gerry McNally, Assistant Director, The Probation Service and President of the Confederation of European Probation; Detective Inspector Michael Heffernan, Head of the Garda International Counter-Terrorism Unit, An Garda Síochána; Michael Gilligan, Head of Central Investigations Branch and Director Customs Drug Law Enforcement, Revenue Commissioners, Investigations and Prosecution Division, and Executive Director, Maritime Analysis and Operations Centre - Narcotics, Portugal; Jack Nea, BL; Dr. Ciara Smyth, School of Law, National University of Ireland Galway; and Professor Cathal McCall, School of History, Anthropology, Philosophy and Politics, Queen's University Belfast.

The Chatham House Rule was invoked as necessary, to facilitate free discussion.

The ACJRD Council is confident that the papers in this publication will benefit all practitioners, policy makers and all who now take the time to peruse them.

Launch of Conference

Charlie Flanagan T.D., Minister for Justice and Equality

I would like to officially open the Association for Criminal Justice Research and Development (ACJRD)'s 2017 Annual Conference and welcome you all to this event.

The Association performs a key role in bringing together officials, academics and legal practitioners in the field of criminal justice and affording them an open space for the discussion of key policy issues in this area.

I particularly wish to thank Maura, Danelle and Katherine for all their hard work in putting together what promises to be a really interesting agenda for the day on the theme of 'The Brexit Impact on Criminal Justice Cooperation in Ireland'.

The work of the Association in looking at the impact of Brexit on this key area is very timely and the various expert plenary speakers and workshop presenters will provide very useful food for thought for all of us working in this area.

It is especially encouraging that there are speakers from this jurisdiction, from Northern Ireland, from the EU - Madame Thérèse Blanchet of the Council Legal Service - and the British Ambassador to Ireland, Mr Robin Barnett, to offer their differing perspectives.

As a former Minister for Foreign Affairs, I would like to first talk about the overall approach of the Irish Government before briefly touching on some of the criminal justice specific issues that are relevant to my current role as Minister for Justice and Equality.

Jimmy Martin, Assistant Secretary for International Policy (including Brexit matters) will elaborate on the key criminal justice issues in more detail in his speech later this morning.

Ireland's overall position

I want to re-emphasise at the outset that Ireland remains a fully committed member of the European Union and we are fully behind European Commission Chief Negotiator Michel Barnier and the mandate agreed by the EU27.

EU membership remains central to the success of our open, competitive economy and has been the foundation for much of the economic and social progress we have made over the last four decades.

We did not wish to see the UK leaving the EU but the decision has been made. We have strong relationships with both the EU and the UK and we are intent on keeping both.

Our national response to the impact of Brexit is unrelenting and we are under no illusions about the complexity of the situation. The potential impacts of Brexit are profound, with specific sectors such as agri-food particularly challenged.

Our own research on the medium to long term economic impact of Brexit confirms the results of other international analyses - that the UK will be negatively affected by Brexit, and that Ireland will in turn be particularly negatively affected by this.

Our Government's enterprise agencies continue to work with companies, helping them to deal with Brexit - making them more competitive, diversifying market

exposure, and up-skilling teams. We will also continue to support business and the economy through Government measures, programmes and strategies.

The magnitude of the impact in Ireland will of course depend critically on the nature of the UK's post-exit arrangements with the EU, and at this point there is still a lot of uncertainty around what these will be.

From Ireland's perspective, at all times since the Brexit vote, we have made our headline priorities clear:

- Minimising the impact of Brexit on trade and the economy
- Protecting the Northern Ireland Peace Process
- Maintaining the Common Travel Area
- Influencing the future development of the European Union

Ireland's goal is to negotiate effectively as part of the EU27 with the objective of reaching an agreement that sees the closest possible relationship between the EU and the UK, while also ensuring a strong and well-functioning EU.

Ireland/Northern Ireland

Of specific concern to us is the situation with regard to Northern Ireland and the Good Friday Agreement.

As co-guarantor of the Good Friday Agreement, the Government has a responsibility to ensure that the gains of the hard-won peace on the island of Ireland are protected.

While there will be a political border between Ireland and the UK, there should not be an economic border on the island of Ireland. The border needs to remain invisible.

The Irish Government supports the EU Guiding Principles paper on Ireland and Northern Ireland. It reflects our priorities and our concerns.

We must avoid a hard border on the island of Ireland. Such a border would be a threat to the progress we have achieved together.

The hard-won peace on the island of Ireland has brought many dividends, including a vibrant cross-border economy with benefits for competitiveness, growth and jobs.

The border issue is not just economic but also about the lives and livelihoods of the people living in the region - it is fundamental to the peace process. There are on average 30,000 border crossings every day for work or study and many other personal journeys.

Ireland's unique situation will require tailor-made solutions. It is the UK's responsibility to propose workable solutions when it comes to the border.

The particular challenges and disruption facing certain sectors given our geography and trading relationship with the UK will be particularly acute in the border region. The UK staying in the Customs Union and Single Market, or as close as possible to that, would of course be the best solution.

I welcome the constructive tone of Prime Minister May's speech in Florence last month and her restatement of the UK's commitment to protecting the Good Friday Agreement and the Common Travel Area. Prime Minister May's reiteration that the UK will not accept any physical infrastructure at the border now needs to be backed by workable solutions from the UK.

Common Travel Area and Justice Matters

Both the Irish and British Governments have underlined the importance of the Common Travel Area (CTA) and I very much welcome the good progress which has been made in the Article 50 discussions to ensure that the CTA can be maintained following UK exit.

A broader set of Justice issues will also need to be addressed, but as part of the next phase of the negotiations dealing with the future relationship between the EU and the UK.

In particular, I want to ensure that the efficiencies introduced by the European Arrest Warrant can remain and I am very concerned about the potential fall out if the EU and the UK had to revert to the previous Extradition Convention.

Other key instruments where continued cooperation with the UK on criminal justice matters is essential include Mutual Legal Assistance, EUROPOL, Prüm for checking fingerprints, DNA and car registration and the Passenger Name Record Directive.

Similarly, the need to avoid operational gaps for law enforcement agencies and judicial authorities in the UK and the EU is also essential to ensuring the continuation of the very effective cooperation we currently enjoy.

The UK's future partnership position paper on Security, Law Enforcement and Criminal Justice published last month is a welcome outline of their thinking in this regard, but the detailed work of finding workable, practical solutions is key.

In addition, critically, sufficient progress must be made in phase one of the negotiations on all of the exit issues - citizens' rights, the financial settlement and the Irish issues - so that European leaders can make a decision that parallel discussions on the EU's future relationship with the UK can begin.

For this reason, we are encouraged by the positive nature of the most recent round of the negotiations. Some progress has been made, and clarity brought to bear on certain points. But there remains work to be done and there is a way to go before EU leaders will be in a position to decide that sufficient progress has been made in phase one.

Conclusion

In conclusion, Ireland welcomes the work carried out to date by Michel Barnier and the rest of the EU negotiating team.

The fact that the Common Travel Area and the Good Friday Agreement have featured so prominently in phase one of the discussions is testament to the efforts of Irish Ministers, politicians and civil servants to emphasise their importance. But it also reflects the importance that our fellow EU members and our near neighbours in the UK place on these issues and on our concerns about them.

There are huge challenges ahead for all of us in ensuring that the post-Brexit landscape does not adversely affect our relationships with Northern Ireland, with the rest of the UK or with our EU partners. This is particularly important in the criminal justice area, where so much progress has been made to enhance cooperation in recent years. It is crucial to ensure that we do not undo that progress.

Thank you for your attention and I wish you all well with what is sure to be a very informative ACJRD Annual Conference today.

Transitional Arrangements for On-Going Criminal Procedures

Thérèse Blanchet, Director, Justice and Home Affairs, Council Legal Service

Thanks - I am honoured and happy to be here with you in Ireland - As negotiations are ongoing, I can and will only speak today on a personal basis - I will limit my intervention to withdrawal issues, not future relationship.

Being here in Ireland, talking about the UK exiting the EU acquis on criminal law matters, I certainly feel a little bit like an *ancien combattant*, a feeling of *déjà vu*. We have been there already, close to the edge, three years ago in 2014, when the UK had triggered its block opt-out from the 130 acts or so of the ex-third pillar acquis, only to re-join 35 of them. Already then we heard words like "*taking back control*", "*clawing back competences*". The block opt-out was the last episode in the long tormented love-hate relationship between the UK and the EU on Justice and Home Affairs (JHA) matters, a history of red lines, opt-outs, pick and choose, foot-dragging, but also a history of strong support and cooperation on many issues.

It's a bit sad that we had to wait until the 18th September, 2017, to receive from the UK such a warm and enthusiastic declaration of love for our JHA acquis as it did in its position paper on *Security, law enforcement and criminal justice*.

At least, the practical advantage of this *déjà vu* is that we had already envisaged at the time the possibility of a cliff-edge exit by the UK from all that acquis in case the re-opting in to the 35 measures wouldn't have gone through. I distinctly remember the discussions I had with our Irish friends on the possible perspective of the European Arrest Warrant stopping overnight with tens of suspects or criminals possibly having to be freed.

The small group of people who followed this file back then was therefore more ready than others for what is coming now. We already had the lists of acquis, we already had envisaged possible transitional rules, we had already been confronted with this cold wording in the Treaty - "*shall cease to apply*" - the same wording both in Article 50(3) Treaty of the European Union (TEU) and in Article 10(4) of Protocol 36, and the timing of when this would take place had already been set: at midnight, Brussels time.

So here we are now, in the business of orderly withdrawal or disentanglement, as we say nowadays in Brussels.

The EU is like a knitted fabric. The Member States are closely tied to each other through the knots. With Brexit, a Member State wants to get disentangled from the knitting. The challenge now is to unpick the stiches.

- I will first recall why and how we got to the knitted fabric in the EU's JHA area. This is important to remember when we look at the kind of relations we have established with our different non-EU partners.
- I will then explain the unpicking of the stitches, telling you about the current thinking for an orderly withdrawal in JHA matters.
- I will then conclude by briefly recalling what kind of knots we have tied with two circles of third countries, and why.

1. Why and how did we get to such a closely knitted fabric as the current EU's JHA acquis and how much is the UK tied to it

A strong link with free movement of persons

The Maastricht Treaty of 1993, which started the institutionalised cooperation on JHA matters, the Third Pillar, says it all: in the 10th recital of the ex-TUE, the Authors of the Treaties "[reaffirmed] *their objective to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by including provisions on justice and home affairs in this Treaty*".

The development of the JHA acquis was always linked to the Union objective of free movement of people. Already in the 70s and 80s, while JHA was still in its infancy, the European Council started to link its call for a People's Europe, true free movement and the completion of the single market with the development of cooperation in fighting crime. This was always considered a necessary flanking or complementary measure to free movement of persons. It also requires a high level of trust between Member States, in particular to operate mutual recognition instruments. Here, the role of the Court and of the Commission is important. Over the years, this area of cooperation which started outside the Treaties was fully integrated into the Treaties.

In June 1985, the historical push for completing the single market, the famous Delors White Paper in view of the IGC on the Single European Act, advocated both the establishment of area without internal frontiers, including the removal of internal border controls on persons and goods, and measures to fight crime: there would need to be free movement of investigations and judgments against circulation of criminals and cross-border crime.

However, on the very day Mr. Delors issued his White Paper, five Member States (Belgium, Netherlands, Luxembourg, France and Germany), because they knew that this part would not be delivered due to the opposition of some Member States, among which the UK, decided to sign between them the Schengen Agreement whereby they committed to abolishing checks on persons at common borders.

This would live for fifteen years besides the Treaties and contained, among others, elaborate provisions on police and judicial cooperation in criminal matters and on the creation of a big data base, the Schengen Information System (more than one third of the 142 articles).

Like a magnet, Schengen would attract all EU Member States but two, as well as four close neighbours: Norway, Iceland, Switzerland and Liechtenstein, who also apply full free movement of persons with the EU, with Norway, Iceland and Liechtenstein applying internal market rules through the EEA.

The police and judicial cooperation Schengen provisions would serve as an inspiration for the provisions of the Third Pillar in Maastricht Treaty of 1993, before Schengen was integrated into the Treaties in 1999 through the Amsterdam Treaty.

The UK's specific position (opt-outs and block-opt-out)

The price to pay for this integration of Schengen into the Treaties and for the "communitisation" of a number of provisions from the Third Pillar was to craft the opt-out Protocols for the UK and

Ireland [and also for Denmark, but this was the result of the 1992 Edinburgh Decision following the negative referendum on Maastricht].

Ever since, the EU always accommodated the red lines of the UK particularly in the JHA area, including by going as far as allowing it (and Ireland), in the Lisbon Treaty in 2009, not to opt-into an act amending a basic act by which it is already bound (Article 4a of Protocol 21) and by allowing it, up to six months before the end of the five-year transitional period after which the Court and the Commission would get full ordinary control powers on the ex-third pillar acquis, to opt-out *en bloc* from that acquis. As we know, that's what the UK did.

It decided, essentially, to opt-out from all the acquis harmonising substantial criminal law, as well as from a number of cooperation instruments, for which no transitional provisions were made. 80 legal instruments simply ceased to apply on 1st December, 2014. This included the two EU-US extradition and mutual legal assistance agreements, the decision on prevention and settlement of conflicts of jurisdiction, mutual recognition of judgments and probation decisions, a number of networks of liaison officers, etc. For clarity, a full list was published in the Official Journal of the European Communities (C 340, 1.12.14).

The only transitional period which was decided was to prolong *en bloc* for one week (until 7th December, 2014) the application to the UK of the 35 instruments to which it would re-opt in. This was to avoid the risk of any gap in the application, in case an accident would have occurred in the adoption on 1st December or the interpretation (the seconds around midnight) of the two decisions authorising the UK to re-opt in the 35 measures (Article 1 of Council Decision 2014/836 of 27th November, 2014).

The UK asked to re-participate only in the 35 measures it considered the most important, among which the European Arrest Warrant, Europol, Eurojust, the "Naples II" Convention on mutual assistance between customs, Joint Investigation Teams, the so-called "Swedish initiative" on exchange of information and intelligence between law enforcement authorities, transfer of prisoners and the European Criminal Records Information System (ECRIS).

The UK exited also at the time from the Prüm acquis (on access to DNA, fingerprint and vehicle registration data bases) as re-participating would have meant exceeding the, by then, almost magical maximum number of 35 measures for re-opt in. This led to a rather convoluted solution whereby the UK would conduct a "business and implementation case" on the merits of a re-opting in after one year (Art. 2 of Decision 2014/836). It did eventually re-opt in on 21 May 2016.

During this period, the UK was prevented from accessing the Eurodac database for law enforcement purposes (Art. 3 of Decision 2014/836) and, had it decided not to re-opt in, it would have had to repay the 1.5 million euros it had received from the EU budget for implementing the Prüm acquis (Decision 2014/837).

2. Unpicking the stiches: getting to an orderly withdrawal in the Brexit negotiations

First a few words about the process

Following the UK notification on 29th March, 2017, the EU side moved very

quickly: within 2 months it had adopted the European Council Guidelines (29th April) and the Council Decision on the Negotiating Directives (22nd May) which designated the Commission as the Union negotiator. All these, as well as the EU position papers, are publicly available.

As provided by Art. 50 in the TEU, the withdrawal agreement to be concluded is only about "*setting out the arrangements for the* [UK's] *withdrawal, taking account of the framework for its future relationship with the Union*" (Article 50(2)). It therefore cannot regulate the future relationship between the EU and the UK as a third country

Article 50 confers on the EU, as the Negotiating Directives put it, "*an exceptional horizontal competence to cover in this agreement all matters necessary to arrange the withdrawal*". This competence is of a "one-off nature" and can cover issues belonging to Member States' competences without depriving them of their competences (no exclusivity by exercise, no ERTA effect) (para. 5). The Withdrawal Agreement can contain everything that relates to withdrawal, including any transitional provisions (by definition limited in time) as well as deal with matters such as JHA provisions, without this triggering the application of the Danish or Irish opt-out Protocols (because Art. 50 TEU does not belong to Title V of part Three of the Treaty on the Functioning of the European Union (TFEU)).

The Council also established its internal structure to deal with the negotiations: an Art. 50 Task Force within the General Secretariat of the Council (GSC), and a dedicated stream of work at 27 on all matters pertaining to the withdrawal of the UK, with an ad hoc Working Party chaired by the Director of the Task Force, which is replicated at each level (Coreper, Council and European Council). For all other matters, work continues at 28 until 29th March, 2019.

The negotiations between the Commission, as Union negotiator, and the UK started on 19th June, 2017. Last week was the 4th round and next week the 5th. Three negotiating groups have been set up: citizens' rights, financial settlement and "*other separation issues*" which covers several issues (Euratom, ongoing Union procedures, governance, PPI, goods, ongoing police, criminal and civil procedures, etc.). In addition, a "dialogue" has been launched between the Coordinators (high officials) on Ireland/Northern Ireland. Each round is opened and closed by the Principals (Mr Barnier and Mr Davis) (see Commission/UK agreed "Terms of Reference" of 19th June, 2017).

The negotiations follow a phased approach: the first phase is on the matters relevant for separation, while the second phase (about an overall understanding on the framework for the future relationship and the possible bridges or transition towards that) will start when the European Council decides that sufficient progress has been made on the three matters (citizens, financial settlement and Ireland) considered as central to creating the necessary mutual trust between the parties (we'll see in December).

Transition in the JHA area: the respective EU and UK positions

The necessary transitional provisions in the area of police and judicial cooperation in criminal matters are being discussed in the third group on "*other separation issues*". Both the Guidelines (para. 14)

and the Negotiating Directives (para. 13) mandate to address the matter of judicial cooperation in criminal matters and law enforcement, with the Negotiating Directive more specifically requesting that the Withdrawal Agreement ensures that procedures, whether judicial or law enforcement, "*which are ongoing on the withdrawal date* (…) *remain governed until their completion by the relevant provisions of Union law applicable before the withdrawal date*" (para. 32 and 34).

On this basis, the Union position paper on "*ongoing police and judicial cooperation in criminal matters*" which the Union negotiator transmitted to the UK on 13th July, 2017, (TF50(2017)8/2) listed 15 JHA instruments, among which 10 on judicial cooperation in criminal matters, for which such transitional provisions for ongoing procedures should be provided in the Withdrawal Agreement:

1) European Arrest Warrant (Council Framework Decision 2002/584/JHA);
2) European Investigation Order (Directive 2014/41/EU);
3) 2000 Convention on Mutual Assistance in Criminal Matters (and its 2001 Protocol);
4) Execution of orders freezing property or evidence (Framework Decision 2003/577/JHA);
5) Recognition of confiscation orders (Framework Decision 2006/783);
6) Mutual recognition of financial penalties (Framework Decision 2005/214/JHA);
7) Recognition of supervision measures (Framework Decision 2009/829/JHA);
8) Recognition of custodial sentences ("transfer of prisoners") (Framework Decision 2008/909/JHA);
9) ECRIS (Framework Decisions 2009/315/JHA and 2009/316/JHA);
10) European protection order (Directive 2011/99/EU).

[The five other are law enforcement cooperation measures:
1) Exchange of information and intelligence between law enforcement authorities ("Swedish initiative") (Council Framework Decision 2006/960/JHA);
2) PNR (Directive (EU) 2016/681);
3) Cooperation between asset recovery offices (Decision 2007/845/JHA);
4) Joint Investigation Teams (Council Framework Decision 2002/465/JHA);
5) Mutual assistance and cooperation between customs administrations ("Naples II") (Council Act of 18th December, 1997).]

For each procedure, the withdrawal agreement should identify the procedural stage that has to have been reached for the procedure to continue being governed by the relevant provisions of EU law applicable on the withdrawal date.

All procedural rights under Union law should continue to apply. The UK only participates in very few of the harmonisation directive on criminal procedure, but the guarantees in the Charter are there to cement the gaps.

In addition, it should be made possible to continue using in such proceedings information and data, including personal data, obtained before the withdrawal data, subject to these continuing to be protected by the relevant Union law provisions applicable on the withdrawal date. A more general EU position paper was issued on data protection and classified information (20th September).

There is also the issue of the role of the EU Court of Justice regarding those EU law provisions which would continue applying to ongoing procedures. This aspect is not specific to the JHA chapter of the negotiations. It relates to the so-called

"governance" issue on which an EU position paper was also published on 13th July. I will not elaborate on it today.

In its Paper of 18th September, 2017, ("Security, Law Enforcement and Justice – A Future Partnership Paper") which is mainly beside the point as it concerns the future relationship, the UK addresses the issue of ongoing police and judicial procedures only in the Annex. The result is that the UK basically agrees with the EU that procedures that are ongoing on the date of withdrawal should continue to be governed by EU law until completion and that the relevant procedural threshold should be identified in the Agreement for that purpose.

The UK position adds that the procedural point of completion, or "end point", should also be identified and it would like to add four more law enforcement cooperation instruments to the list (Prüm, FIUs, SIS II and Art. 39 and 40 of the Schengen Convention), as well as have transitional rules for "looser" forms of cooperation.

Experience could be drawn from existing transitional provisions

We have examples of transitional provisions in the area of judicial cooperation in criminal matters. Where new instruments replaced older ones, we needed to determine the procedural stage from when the procedure would continue to be governed by the old instruments. I will show you two examples.

First, the Refit Regulation, which repealed obsolete legislation, among which the European Evidence Warrant. Only European Evidence Warrants already executed continued to be governed by the repealed legislation until the end of the relevant criminal proceeding:

"*Any European evidence warrant executed under Framework Decision 2008/978/JHA* [on the evidence warrant] *shall continue to be governed by that Framework Decision until the relevant criminal proceedings have been concluded with a definitive decision*"(Art. 2, Regulation 2016/95)

Second, the European Investigation Order, which replaced other forms of cooperation such as mutual legal assistance and decisions to freeze evidence. For both, the procedural stage was set at the receipt of the request or decision:

"*Mutual assistance requests received before 22 May 2017 shall continue to be governed by existing instruments relating to mutual assistance in criminal matters. Decisions to freeze evidence by virtue of Framework Decision 2003/577/JHA and received before 22 May 2017 shall also be governed by that Framework Decision*" (Art. 35(1), Directive 2014/41).

A similar exercise will need to be carried out for each of the instruments in order to identify the triggering procedural stage from when the procedure will continue to be governed by EU legislation. But this should not be too difficult a task.

3. A few concluding remarks on existing models for relations with third countries in JHA

By way of conclusion, although it's too early to try and imagine the kind of future relationship the EU would be willing to establish with the UK on JHA matters, we could briefly look at what types of cooperation with third countries have been in place and more importantly the reasons underlying them.

There are two categories of third countries, two circles: those with which

there is free movement of persons, and those where there is none, hence the difference in the intensity of cooperation, given the link between the two.

In the first circle are four countries, Norway, Iceland, Switzerland and Liechtenstein which are closely tied to the EU through full application of free movement of persons as well as through full participation in the Schengen acquis (and the Dublin acquis in the field of asylum) in a dynamic way (acceptance of all amending or new rules, with a guillotine clause in case not). In addition, three of them (Norway, Iceland and Liechtenstein) are part of the European Economic Area (EEA), which is equivalent to the internal market.

With those countries, the EU has intense cooperation in place. The Schengen acquis includes several police and judicial cooperation provisions in criminal matters (including the 2000 MLA Convention and its 2001 Protocol). The EU has concluded with Norway and Iceland an agreement to allow them to take part in the Prüm acquis and is negotiating a similar agreement with Switzerland and Liechtenstein.

With regard to extradition, in addition to the Schengen Convention provisions, the EU has concluded with Iceland and Norway a surrender agreement (not yet in force) which resembles very much the European Arrest Warrant, the main significant difference being that it is possible to refuse extradition for a country's own nationals.

In the second circle are the other third countries. With European ones, Member States apply the 1957 Council of Europe Convention on Extradition which is a much less integrated and effective tool than the European Arrest Warrant (EAW) (no direct contacts between judicial authorities, no strict time limits for execution, no obligation to extradite own nationals and dual-criminality condition).

The EU has also concluded an extradition agreement with the US, which is not as effective as the EAW or the Norway/Iceland surrender model.

It also has in place mutual assistance agreements with the USA and Japan. Those agreements are examples of "classic" international cooperation in criminal matters, but do not go as far as the EU criminal justice tools.

This distinction between the two circles and the reasons for it will continue to be, I believe, an important element in the upcoming debates.

Brexit - the Response of the Department of Justice and Equality

Jimmy Martin, Assistant Secretary, Department of Justice and Equality

The Background – Timeline

On 23rd June, 2016, the British people voted to leave the European Union. The Leave campaign did not have a coherent vision of what it wanted and the British administrative machine was not contemplating a Leave success so virtually no realistic research had been done on the implications of withdrawal in the UK for the criminal justice system.

The key Justice issues were summarised in the Prime Minister's speech of 17th January, 2017:

- An end to the jurisdiction of the European Court of Justice in Britain;
- Maintaining the Common Travel Area;
- Controlling immigration (and therefore leaving the single market);
- Continued cooperation with EU in the fight against crime and terrorism.

On 29th March, 2017, the UK invoked article 50 of the Treaty. On midnight 29th March, 2019, the treaties shall cease to apply to the UK unless the period is unanimously extended, a withdrawal agreement is agreed with a different commencement date or possibly if the UK changes its mind. I would emphasise that extending the negotiation period requires unanimity within the Council while the agreement on withdrawal requires a qualified majority and the consent of the European Parliament.

On 22nd May, 2017, the Council authorised the commencement of negotiations and adopted the EU negotiating Directive. This envisages a two-phase process. The first phase is the withdrawal phase which covers citizens' rights, financial aspects and Northern Ireland. It also covers "ongoing judicial cooperation in civil, commercial and **criminal matters** between Member States under Union" and I will come back to this later. These negotiations have already started. The second phase is the future relationship between the EU and the UK.

UK position

I want to turn now to the UK position. Obviously this involves an element of speculation on my part.

Firstly we knew from previous contacts that the UK criminal justice community would wish to maintain their participation in all of the relevant EU instruments. We also know that the vast majority of EU countries want to maintain close links with the UK.

However, the fact that the UK is leaving the European Union and the fact that it is official UK Government policy to "end to the jurisdiction of the European Court of Justice in Britain" pose serious and complex obstacles.

We have consistently made the point informally that-

- there is no way an agreement covering all the EU instruments in police and judicial cooperation could be agreed and brought into force by April 2019 and therefore it would facilitate matters if the UK should seek to stay in the relevant EU instruments for a period after 2019 and
- one should not underestimate the importance of data protection to ensuring the continued exchange of police information.

I will explain later why these two points are so vital.

The UK position on withdrawal negotiation crystallised in Theresa May's speech in Florence in September 2017.

The first sign of light from our perspective was the UK Government paper on future customs arrangements published in mid-August which included a statement *"The Government believes a model of close association with the EU Customs Union for a time limited interim period could achieve this*". This was the first indication that they needed more time to avoid a cliff edge.

In September 2017, their paper on security, law enforcement and criminal justice was published. This confirmed that they wanted effectively to stay in everything in the law enforcement area under a new style of partnership agreement. On the positive side it acknowledged the issue of data protection and it also for the first time alluded to the need to have a transitional phase and stated "*but the aim should also be to ensure legal certainty about cooperation that continues during any interim period, should one be required."*

This was taken up in the speech by Theresa May in Florence in late September where she said "*during the implementation period…. Britain also should continue to take part in existing security measures*".

Turning now to the response of the Department

When the question of Brexit first arose, while alarmed, to some degree we had a sense of déjà vu as we had gone through a similar but smaller crisis in 2013/2014. Protocol 36 to the Treaties gave an option to the UK to opt out of the 130 "ex-third pillar measures" before 31st May, 2014. Some of these measures included critical criminal justice cooperation measures such as the European Arrest Warrant. For internal political reasons the UK decided in July 2013 to opt out of all 130 measures and then later decided to opt back into 35 key measures. This meant the Department had to assess the potential implications of the full opt out and then when the UK decided to opt back in we had to analyse what might happen if there was a gap between opting out and opting back in again. Fortunately after a lot of work, a legally seamless opt out and opt back in was arranged which happened on 1st December, 2014.

Therefore, while much of our homework was already done, Brexit was obviously on a much larger scale. We went through more than 700 EU instruments to assess which might be affected and what the implications would be. We held a number of internal seminars. We are also part of the Government structures established to deal with Brexit. This is coordinated by the Department of the Taoiseach and the Department of Foreign Affairs and Trade and involves all the key Government Departments.

The key areas for the Department that we identified were:

- The Common Travel Area
- Police and judicial cooperation in criminal matters
- Asylum policy
- Judicial cooperation in civil matters and
- Data Protection.

I am going to start on the **Common Travel Area**. I know that it is only indirectly relevant to criminal justice cooperation but it will give you a good idea of what is involved. Firstly, we had to do a lot of research on the Common Travel Area to establish its basis and delineate the legal

and administrative arrangements associated with it. This meant research going back to the 1920s as it derives from the fact under British law we remained subjects of the Crown up to 1948. It extended beyond the scope of this Department. The Common Travel area is mentioned in Protocol 20 to the Treaties and we had to explore the legal implications of that with the Attorney General's office. We, as part of team led by the Taoiseach's Department and Foreign Affairs, then put forward the case that it was a valid pre-existing bilateral arrangement that did not conflict with EU law. Fortunately, the UK from the outset made clear their intent to maintain the Common Travel Area and the Commission was conscious of its importance in the context of Northern Ireland. The Common Travel Area is part of the first phase of negotiations and we are happy with the progress made there.

Turning now to the meat of **criminal justice cooperation**, this is going to feature primarily in the second phase of negotiations.

Before going into detail, I just want to mention one long-term effect. Within the EU, following Brexit, the Common Law system will now be the preserve of a small number of small states - Ireland being the largest. It is going to be increasingly difficult to get EU measures to take account of Common Law requirements. It would be idle to speculate what will happen so we will just note that and move on to more immediate problems.

The really critical issues for criminal justice cooperation are those relating to

- The European Arrest Warrant
- Europol
- Information Exchange.

<u>European Arrest Warrant (EAW)</u>

I will start with the good news. The EU negotiating guidelines specifically address the issue of what should happen to those proceedings that are in being but not complete on the day the UK withdraws. These are part of the first phase of the negotiations and include proceedings under the European Arrest Warrant so at least that issue should be resolved. As I mentioned earlier one of our big concerns in 2013/2014 was that people arrested under the EAW would have to be released and extradition abandoned in mid process.

But what of the future of the EAW? As far as we know, all states including the UK want the UK to stay in the EAW. However the UK has stated as a matter of principle that the European Court of Justice is not to have jurisdiction. Its current thinking seems to be that they will leave the existing instrument and aspire to negotiate a parallel agreement. There are hundreds of instruments where the UK will be looking for parallel agreements and I cannot see how any of the parties will have the capacity to negotiate this number of parallel agreements in a reasonable time frame. For example, negotiations started in 2001 on an EU agreement with **Iceland and Norway** on arrest warrants. It was finalised in 2006 and only approved formally by the Council in November 2014. You could be talking about ten to fifteen years before new agreements enter into force.

This is why we wanted the UK to look at the question of a delayed departure from the Justice and Home Affairs (JHA) area and the Florence speech suggests that they now may be doing so.

What happens if they leave with no new agreement in place?

We had a bilateral agreement on extradition with the UK before but that is now defunct. That means the fall back situation is the 1957 Council of Europe Convention on Extradition. This has many flaws:

- In the best case scenario the time period for extradition would go from less than twelve months to four or five years under the 1957 convention.
- Worst case scenario is that extradition breaks down in politically sensitive cases.

The only ray of hope that I see at the moment is the idea of an interim arrangement. There may be some hope that the UK might seek not to leave the EAW for an interim period after they leave the EU and during this period the European Court of Justice would continue to have jurisdiction.

There are many other EU instruments for judicial cooperation in criminal matters and similar issues arise with them.

Europol

While traditionally the Gardaí have had very strong bilateral links with UK police forces, Europol is increasingly playing a role in facilitating cross border police operations particularly when there are more than two countries involved. The UK is a key player in Europol and you can be certain that the British police wish to continue their involvement in Europol. However, the legal basis for Europol limits its membership to member states of the European Union. Its job is to support member states. It can engage and have agreements with third countries but it is subject to restrictions. Denmark for reasons that are not relevant to us did not participate in the EU regulation on Europol. It has concluded a special agreement with Europol to maintain some access. Clearly, a third country is unlikely to get a better agreement with Europol than Denmark. It looks like the UK will have no direct access to Europol databases as regards providing or receiving information.

This will have a significant effect on police cooperation generally but may be less serious for Ireland because of the existing close links with the UK police.

Information Exchange

Key instruments in police cooperation include the police aspects of the Schengen Information System (SIS II), Prüm for checking fingerprints, DNA and car registration, European Criminal Records Information System (ECRIS) for criminal records and Passenger Name Records (PNR). One of the flaws shown up by recent terrorist attacks in Europe was that these information systems do not interact with one another and that there is no consistent scanning of people entering and leaving the European Union. There has been a big push to make sure everybody entering the Schengen area is checked against these databases and that they be interoperable. Ireland has been accelerating its participation in these data bases. Already you may notice when you land in Ireland your passport is now scanned. This is to check if it has been reported lost or stolen to Interpol. The UK now receives advance passenger information for flights from Ireland so they can check for persons of interest. We are investing in technology so that we can do the same under the PNR directive for persons entering Ireland.

The UK is one of the leaders in this field and is pretty determined to maintain its links with the EU. Again, it is not clear how they propose to do it. However recently they re-joined Prüm (this was one

of the instruments they opted out of in 2013). The UK at a working party referred to article 218 of the **Treaty on the Functioning of the European Union** (TFEU) and the agreement between the Union and Iceland and the Union and Norway to use Prüm, the UK stated that this illustrates that there can be third country agreements. However, the idea of parallel agreements faces the same issues that I mentioned for the European Arrest Warrants.

Again because of our small size, geographic isolation and close links with the UK, these databases are not quite as vital to us as they are to large countries like the UK. However, even the more traditional avenues of police cooperation will face challenges.

By May 2018, the movement of data relating to the prevention (Directive 2016/680 will govern investigation, detection or prosecution) of criminal offences and the movement of most other data will be regulated by Regulation 2016/679 (Data relating to national security is exempt). Under these regimes, data can only be sent to jurisdictions which are deemed by the EU Commission to have adequate data protection regimes. If the UK does not comply with the EU data protection regime, there will only be very restricted avenues for transferring data to the UK. The new EU data protection instruments do provide for the Commission the "adequacy" of arrangements in third countries. The UK in their paper issued on "The exchange of protection of personal data" on 24th August, 2017, makes it clear that when they leave the EU they will be fully compliant with EU data protection regime and want to build on the adequacy model to maintain the free flow of data. Compared to some of the challenges we face, this one has a viable solution because if not resolved it would present serious difficulties for us to exchange information such as passenger name records to police intelligence.

The recent decision of the European Court of Justice on the Canadian Passenger Name Records agreement adds a further level of complication. Any agreement with the UK may have to be agreed by member states, the European Parliament and possibly pass muster with the European Court of Justice.

<u>Concluding remarks</u>

I am confident that we have done our homework in identifying the issues that need to be addressed in the area of criminal justice cooperation.

We have continually stressed how important instruments such as the European Arrest Warrant are. However, at the end of the day we are in the hands of the UK and the EU. We have a voice but we do not have a veto.

We have looked at the worst-case scenario but we are also already looking at the mechanics of how we can implement the Withdrawal agreement. However, it is still too early to anticipate what the outcome will be.

Thank you for listening.

European Arrest Warrant Procedure in a Post-Brexit Landscape

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(The views expressed in this paper are the author's own and do not purport to represent the position of the DPP's office).

Context

In January 2004, the European Arrest Warrant (EAW) system came into force across Europe replacing the existing complicated, unilateral based extradition system. The EAW system provided a unified, streamlined method of ensuring that the 28 European Member States surrendered individuals accused or convicted of crimes in another Member State efficiently and without delay.

The efficiencies achieved by the EAW system in contrast to the system that it replaced was probably best summarised by Alison Saunders, the current Director of Public Prosecutions for England and Wales stating '*It's three times faster to use an EAW and it is four times less expensive for us to be able to do that as well*".

After 40 years of EU membership the United Kingdom's (UK) membership will cease on the 30th March, 2019, at 00.00 Brussels time. Following on from the UK Prime Minister's speech in Florence earlier this month it appears that rather than falling over an immediate 'cliff edge' at the end of April 2019 there will be a further two year transitional period. During this proposed period the UK will continue paying into the EU budget which will facilitate the phased withdrawal by the UK from the numerous EU cross border measures in a much more controlled manner than would occur in the aftermath of an immediate exit on the 29th April, 2019.

The UK is perhaps unsurprisingly Ireland's largest 'trading partner' in terms of European Arrest Warrants. By way of demonstration, in 2015 a total of 92 Outgoing EAWs were issued by the Irish authorities of which 66 were transmitted to the UK for execution. The potential negative ramifications for Ireland when the UK leaves the EAW system are clear.

A self-imposed red line issue for the UK as stated by the UK Prime Minister is to "*bring an end to the jurisdiction of the European Court of Justice in Britain"* (ECJ). She has criticised the idea of the ECJ having "*direct legal authority in our country*" and has stated that the continued influence of the ECJ in the United Kingdom post-Brexit would be tantamount to "*not leaving the EU at all".*

Various speakers including the Director of Public Prosecutions for England and Wales have called for the UK to remain in an EAW style system in order to ensure that prosecutors retain the ability to effectively fight cross border crime. However it will be difficult to reconcile the desire of the UK to remain within an EAW style system post-Brexit when one of the cornerstones of that system is built upon the principal of the supremacy of EU law (to ensure uniformity and coherency in approach).

Ministers in the UK have recently conceded that the UK courts will still be required to use European case law to inform their rulings around UK domestic legislation derived from the EU. In addition to considering an effective replacement for dealing with extradition between the UK and the EU post-Brexit there also is a requirement to put in place

intermediate procedures to deal with European Arrest Warrants which issued prior to the date of the UK leaving the EAW system but which will be executed post this date.

There is a general consensus from both the EU and the UK positions that those 'intermediate' EAWs will still be governed by the existing rules. There is one notable exception to this consensus in that David Davis, the Brexit Secretary, has publicly stated that the UK Supreme Court will act as the final body of appeal for British citizens facing extradition under the European Arrest Warrant instead of EU courts i.e. the ECJ.

A UK government spokesperson recently stated "*We have been clear that as we leave the EU, the direct jurisdiction of the European Court of Justice in the UK must come to an end, however, we want to provide maximum certainty so the Repeal Bill will ensure that for future cases, UK courts continue to interpret EU-derived law using the ECJ's case law, as it exists on the day we leave the EU.*"

Lord Neuberger, the UK Supreme Court president, has called for clarity about how the judiciary should handle the issue and it appears he is anxious that judges should not face the blame for misinterpretations "*when parliament has failed to do so".* The question therefore remains as to how this will work in practice both in terms of any intermediate arrangement dealing with EAWs and beyond.

The EU (Withdrawal) Bill sets out the framework for the UK's future beyond the EU and is currently under consideration in the UK. The purpose of this proposed legislation is to convert existing EU law into national law in the UK by the day that Brexit takes effect. It is interesting to note that at this point the Bill explicitly excludes the conversion of the EU Charter of Fundamental Rights into UK national law, which means that specific human rights enshrined in the Charter will no longer be enforceable in the UK post-Brexit.

On 18th September, 2017, the UK published its most recent position paper entitled 'Security, Law Enforcement and Criminal Justice - a Future Partnership Paper'. The paper outlined in detail the benefits of the close working relationship that the UK currently enjoys with the EU on cross border matters. It suggested that given the close working relationship developed over the last decades together, with the importance of joint cooperation particularly in the fields of serious crime and terrorism, that the UK should not be treated as being a third party once it leaves the EU per Article 50 of the Lisbon Treaty.

While the UK position paper provided extensive details on the advantages of continuing close cooperation post-Brexit with the EU, the paper did not provide comprehensive details in terms of concrete solutions. So the question remains, what are the potential long term solutions for conducting extradition procedures post-Brexit?

Solution 1: The UK enters into a harmonised EAW style system (with the remaining 27 EU Member States, which includes Ireland).

This solution would clearly be the most beneficial from both the UK and the EU perspectives (and indeed by extension for Ireland) as it would preserve and potentially build upon the successes of the current EAW system. The UK and the 27 remaining EU Member States would come together collectively to reach one

coherent extradition agreement. The biggest obstacle as highlighted above is that in all likelihood it would be necessary as a pre-condition for the UK to continue to accept the principle of the supremacy of EU law.

One suggested way of overcoming this issue would be to utilise the precedent set by the extradition agreement which now exists between the EU and Norway / Iceland, namely by following the precedent established under Council Decision 2006/697/EC of the 27th June, 2006 (the 'Directive').

That Directive in reality extended the use of EAWs to Iceland and Norway (both non EU Member States). It is virtually identical in its terms to the EAW Framework Decision with one crucial exception, namely, that the principle of the supremacy of EU law does not apply. The national courts of Norway and Iceland are not subordinate to the European Court of Justice (ECJ). Under the terms of the Directive any dispute can be referred to a '*meeting of representatives of the governments…with a view to settlement within six months'.*

To promote uniformity in the interpretation of law, Iceland and Norway have agreed to keep their domestic case law under '*constant review*'. This means that while not accepting to be bound by ECJ judgments concerning EAWs there was an acceptance of the persuasive value of those judgments.

Compatibility issues arise, considering both Iceland's and Norway's systems of law as members of the European Free Trade Association (EFTA) and the 'Schengen acquis' (the EU's border free zone) are compatible with the EU Member States. This position contrasts with the campaign to restore the UK's ability to exert control over the free movement of people.

The extradition agreement between Iceland, Norway and the EU Member States took several years to negotiate and after the passage of a further several years the agreement (the Directive) is still not in effect in Ireland. On 27th November, 2014, the agreement was finally concluded between the EU and Norway / Iceland by virtue of Council Decision 2014/835/EU. Despite the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 facilitating by virtue of Part Two of the Act, for Ireland to extend extradition to Norway and Iceland under this agreement, to date no Statutory Instrument has been implemented to give effect to the agreement in Ireland. Clearly the UK the EU and in particular Ireland could ill afford such a time line applying again.

Solution 2: Ireland and the UK fall back upon pre-existing extradition procedures.

Extradition between Ireland and the UK was originally governed by Section 29 of the Petty Sessions (Ireland) Act 1851 which was quite simple in its operation in that any arrest warrant issued by a court in the UK, the Channel Islands, the Isle of Man or indeed in Ireland was immediately effective throughout all of those jurisdictions.

This system came to end with the introduction of Part III of the Extradition Act 1965 in Ireland and correspondingly by the Backing of Warrants (Republic of Ireland) Act 1965 in the UK. On 1st January, 2004, Part III of the Extradition Act 1965 was repealed in Ireland when

the EAW system was introduced in its place.

The 'old' pre-existing legislation has been repealed and it is therefore no longer in existence in Ireland. It cannot as a result be relied upon as *'back up or contingency solution'* if post-Brexit there are no functioning extradition procedures in place between the UK and the EU.

Solution 3: The European Convention on Extradition 1957 remains in existence – could this be used as the basis for future extraditions?

The European Convention on Extradition (the 'Convention') is a multilateral extradition treaty which although introduced in 1957 remains in force today. Prior to the introduction of the European Arrest Warrant, the Convention provided a system for the extradition of persons between the Member States of the European Union together with certain specified 'Third' States.

The European Convention on Extradition 1957 was 'replaced' in Ireland after 1st January, 2004, (by Article 31 of the Framework Decision) and in each of the Member States with the European Arrest Warrant system, which streamlined extradition procedures between the Member States. The Convention remains to this day in existence between EU Member States and the other specified Third States e.g. South Africa.

The current EAW system acts '*without prejudice*' to '*existing extradition agreements*' between Member States and '*Third States*' which is the category that the UK will fall into post-Brexit. The UK will therefore be in a similar position to, for example, the '*Third*' States of Jersey or South Africa with which Ireland has successfully extradited persons from utilising this Convention.

There would however be significant practical issues arising if the UK and Ireland were forced into using the Convention to achieve extradition in circumstances where there was no other alternative in place.

- The first issue in using the Convention as the basis of a potential solution would be relatively easily overcome. Ireland has specifically removed the UK from Part II of its Extradition Act 1965 so a new Statutory Instrument would be required formally extending Part II of the 1965 Act to specifically cover the UK
- In contrast to the current EAW system it would be necessary in all cases to prove that the criminal offences listed in an extradition request made to the UK under the Convention corresponded to offences both in Ireland and the UK. Given the historical links it is unlikely that this would present a substantial issue.
- Using the Convention as a means to achieve extradition would undoubtedly be slower and less effective than the EAW system currently in place e.g. the diplomatic transmission of extradition documents being a requirement.
- The main issue preventing this from being a viable solution is that while the UK does not have a prohibition on extraditing its own citizens to Ireland this contrasts with the position in Ireland. Ireland by virtue of Section 14 of the Extradition Act 1965 as substituted '*shall not*' grant the extradition of a person to the UK if that person '*is a citizen of Ireland unless the relevant extradition provisions…provide*'. The exceptions to this bar are set out in and limited to

the EAW system and extraditions made pursuant to Ireland's current Bilateral Extradition Treaties with the United States of America and Australia. This means in effect that if the U.K made an extradition request to Ireland under the Convention (as opposed to the current EAW system) for the extradition of an Irish citizen such a person would have an automatic defence preventing their extradition to the UK

Solution 4: Ireland and the UK, in the absence of any other practical alternative, enter into a Bilateral Extradition Treaty.

In common with many other areas, Ireland would be disproportionately affected in comparison with many other Member States by Brexit if the EU and the UK fail to enter into a timely effective extradition system.

As a matter of last resort, certainly on an interim basis, it is possible for Ireland and the UK to consider entering into their own bespoke extradition agreement to govern future extradition requests. Such an agreement could take the form of either entering into a new Bilateral Extradition Treaty between the two States or alternatively by enacting reciprocal primary legislation in both jurisdictions similar to that which previously existed.

There would be clear disadvantages in implementing this as a solution e.g. the coherency and the economies of the present EAW system would be lost. At the same time as Ireland supports and remains part of the unified EU position it still retains the ability, as one spokesperson for the Irish Government recently stated, to conduct '*exploratory discussions on ongoing bilateral issues, including those which will need to be sorted out'*.

The famous assertion that 'no deal is better than a bad deal' is, as demonstrated above in extradition terms at least, simply not accurate.

Pictured L-R: ***Ray Briscoe**, Office of the DPP, **Maura Butler,** ACJRD Chairperson, **Charlie Flanagan** T.D. Minister for Justice and Equality, **Thérèse Blanchet**, Council Legal Service, and **Jimmy Martin**, Department of Justice and Equality*

UK-Irish Criminal Justice Cooperation: Finding Solutions to a Multi-faceted Problem

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Executive Summary

Much of the cooperation on criminal justice matters between the United Kingdom of Great Britain and Northern Ireland (UK) and the Republic of Ireland (ROI) is based on EU level instruments. Devolution of responsibility for criminal justice to the Northern Ireland Executive has not diminished the need for cooperation between Dublin and London. The extent of EU facilitated cooperation and the complexity of maintaining the Common Travel Area has not been fully explored in any UK position statement released to date. Research needs to be undertaken to fully understand the extent to which cooperation between the ROI and the UK is dependent on the various EU cooperation mechanisms and what the alternative options are if access to those mechanisms is lost. The Department of Justice of Northern Ireland and the House of Commons Northern Ireland Committee seem well placed to consider these issues in greater detail.

Whilst there has been much discussion 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 the ROI and Northern Ireland, more detailed consideration must be given to the effect that Brexit may have on continued criminal justice cooperation across the border. In respect of this, we highlight the lack of a consistent approach to consideration of these issues by the UK government not least because of the division of responsibility for various aspects of criminal justice cooperation matters between government departments. We highlight the risk that if effective criminal justice cooperation mechanisms are not maintained the Irish border may become a focus for criminal activity.

Cooperation between the United Kingdom of Great Britain and Northern Ireland (UK) and the Republic of Ireland (ROI) in policing and criminal matters has long predated membership of the European Union (EU) and much cooperation between the two countries is outside of the EU framework. Today cross-border cooperation between the ROI 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 (The Garda) 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. More recently, 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, the Garda, the Revenue Commissioners and HM Revenue and Customs.

The devolution of responsibilities for policing and justice to the Northern Ireland Executive from April 2012 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. Even before this date the House of Commons Northern Ireland Affairs Committee in their 2009 report 'Cross–border co-operation 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 have never run more smoothly*." 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*". 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.

Despite the positive number of bi-lateral police cooperation arrangements between the Garda and PSNI, George Hamilton, the PSNI Chief Constable giving evidence before the Northern Ireland Affairs committee in December 2016, highlighted that EU processes and institutions still facilitated much of the cooperation between the PSNI and the Garda. National Crime Agency data reveals that between 2010 and 2015 Ireland issued 270 European Arrest Warrants (EAWs) to the UK resulting in 179 surrenders. Whilst this was a relatively small proportion of warrants received by the UK, Ireland issued more EAWs to the UK than to any other country. Conversely, Ireland surrendered 129 individuals to the UK over the same period equating to just over 16% of all the surrenders to the UK. This data is one indicator of both the complexity and the depth of criminal justice cooperation across and between the UK and the ROI, which is in large part supported by EU level cooperation mechanisms.

Taking into account the high level of criminal justice cooperation necessary to ensure security across the Common Travel Area and the extent to which EU mechanisms underpin much of this, we would expect this aspect of Brexit to be considered in detail. However the recent Government paper 'Security, law enforcement and criminal justice: A future partnership paper' released in September 2017 gives Ireland only a glancing consideration. The paper recognises that it is EU instruments that underpin strong cooperation across the island and states it "*will be important to ensure that the new relationship with the EU ensures ongoing effective cooperation between Northern Ireland and the Republic of Ireland*". The earlier UK Government's Position Paper on Northern Ireland and Ireland, published on 16th August, 2017, does not deal directly with criminal justice cooperation at all but does note that the "*effective management of the security environment*" on the island post-Brexit will be critical to political stability. The paper also accepts that the operation of the Common Travel Area depends on

cooperation, which includes "*increased data sharing to inform immigration and border security*". It is of concern that neither paper chose to set out in greater detail the issues unique to criminal justice cooperation between the UK and the ROI, particularly in relation to data sharing, and we recommend that this area be given greater consideration. Research is needed to understand the extent to which cooperation between the ROI and the UK is dependent on the various EU cooperation mechanisms and what the alternative options are if access to those mechanisms is lost. The Department of Justice of Northern Ireland and the House of Commons Northern Ireland Committee seem well placed to consider these issues in greater detail.

The UK, ROI and EU have all placed discussion about the Irish border high on their respective agendas. This is an issue which is to be dealt with in phase 1 of the negotiations and all parties seem to have broadly the same objectives:
1) respect and protect the Good Friday Agreement
2) ensure there is no return to a hard border
3) maintain the Common Travel Area.

The EU seems receptive to creative solutions with Michel Barnier accepting that "*the solution for the border issue will need to be unique. It cannot preconfigure the future relationship between the EU and the UK*." Although such statements are a welcome invitation to find novel solutions to a multi-faceted problem some legal commentators have questioned the compatibility of Brexit with the Good Friday agreement. In any case, the question remains, where does criminal justice cooperation fit in respect of the negotiation of the border?

The UK government's "future partnership paper" on Future Customs Arrangements published in August 2017 identifies three strategic objectives which include ensuring UK-EU trade is as "frictionless as possible" and avoiding a return to a 'hard border' between the ROI and Northern Ireland in addition to establishing an independent international trade policy. Despite these stated objectives, the reality is that a physically invisible border is not the same as a frictionless one. If the UK and EU do not agree a zero tariff deal then there is a real possibility that the border could increasingly become an economic resource with the effect of encouraging the smuggling of products and people and which in turn may further stimulate organised criminal gangs and very possibly paramilitary organisations. When political scientists on the island of Ireland are engaging in dialogue about the border, many of the issues they raise have direct relevance to policing and more particularly, policing across the border. The reversal cannot be said for legal academics engaging in discussion about criminal justice cooperation between the ROI and the UK and this is something that needs to change.

One potential difficulty from the UK perspective is that thinking in relation to this area is not as joined up as it is in the ROI. In the ROI, criminal justice, border controls and data protection all come under the remit of the Department of Justice and Equality. In the UK these areas fall variously under the purviews of the Ministry of Justice, the Home Office and Department for Digital, Culture, Media and Sport respectively. This might go some way to explaining why neither the UK position paper on criminal justice cooperation or the paper on the UK-Irish border engage fully with the issue of criminal justice cooperation between the

UK and the ROI after Brexit. We need more joined up thinking from the UK Government between those considering the solutions for the Irish border and those considering the solutions for criminal justice cooperation. We urge the Government to ensure that all aspects of Brexit relevant to the Irish border are considered together with representatives of the three departments and those of the devolved administrations with a criminal justice function.

Despite the UK government's insistence that on-going effective cooperation is a top priority it is nonetheless clear that the process of withdrawing from the EU will make the need for cooperation between the ROI and the UK simultaneously more vital and more difficult. There is an urgent need to prepare for the changing conditions and environment for criminal justice cooperation so that continuity is maintained and current good practice is protected. In order to start achieving these goals we need the UK and the EU to move beyond the rhetoric and to reach agreements about the extent of criminal justice cooperation, how that cooperation will be operationalised and what transitional arrangements will be in place. Only then can we go on to assess the true impact of Brexit for criminal justice cooperation with Ireland.

There is a possibility that the level of cooperation between the UK and EU, particularly in the area of data sharing, post-Brexit will not be sufficient for the Common Travel Area and additional bi-lateral agreements will be needed. The difficulty with this is that the ROI is not entirely free to agree bi-lateral agreements if they would impact on the autonomy of the EU legal order. In order to reach this point the UK Government has the difficult task of resolving a number of sticking points, which include how the UK will comply with EU data protection provisions and the extent to which the UK retains any kind of operational input into Europol and Eurojust. Of critical importance is an understanding of what will happen in relation to the key EU cooperation mechanisms which include the European Arrest Warrant (EAW), European Criminal Records Information System (ECRIS), Second Generation Schengen Information System (SIS II), the Prüm Decision (Prüm), the Passenger Names Records Directive (PNR) and the European Investigation Order (EIO).

The reality for the UK and the ROI is that we appear to be rapidly moving towards a cliff edge. Currently the UK has until March 2019 to agree a deal and any extension would need to be agreed by the European Council unanimously. The mantra that "no deal is better than a bad deal" is certainly not true when it comes to criminal justice cooperation. One example of a consequence of such a "no deal" can be seen if the UK is no longer able to participate in the European Arrest Warrant. The UK's ability to extradite from Ireland to Northern Ireland or any other part of the United Kingdom would cease the day after Brexit. The only realistic alternative option is for the UK to agree a bi-lateral extradition Treaty with Ireland that would then need to be approved and enacted in both national legislatures. One of a number of issues with this is that currently Ireland does not, outside of the EAW, allow its own citizens to be extradited. The cliff edge consequences of a "no deal" mean the UK could soon become a haven via the Irish border for criminals seeking to escape the web of mechanisms available in Ireland and across the rest of the EU to detect and extradite them. In the event of a "no deal" scenario it will be vital that Ireland

and the UK are ready and able to come to bi-lateral agreements in the area of criminal justice cooperation without delay. Ireland and the UK are in a unique position as the Common Travel Area is the only example of a borderless area between an EU and a non-EU country that is outside of Schengen. The uniqueness of this position provides a justification for seeking greater cooperation than any other non-EU country has been able to previously enjoy. Of course, such bi-lateral arrangements will carry a cost alongside general increases to policing across a more complex border. The UK needs to accept that maintaining security across a Common Travel Area, which falls outside of the European Union and Schengen Area, will require additional resources.

There is already evidence from the courts that Brexit is likely to be a source of legal challenge in the coming years unless the UK is able to participate comprehensively in the area of Justice and Home Affairs. The case of *Minister for Justice and Equality v O'Connor [2017] IESC 48* is a clear example of this. Whilst the case was wholly unsuccessful, the appellant, Mr O'Connor, attempted to avoid extradition from Ireland to the UK for a £5million fraud on the basis that the EAW was unenforceable post-Brexit due to an absence of rights protection. This challenge was brought before Article 50 had even been triggered. Although the appeal was unsuccessful it highlights the potential for legal challenges to arise if there are unclear post-Brexit arrangements or cooperation is too piecemeal to the point that it undermines the mutual trust and recognition which underpins EU cooperation across the area of JHA. The patchwork of EU instruments in this area cannot be easily disaggregated as many mechanisms support or underpin each other. The efficacy of a particular measure often depends upon the availability of a range of other cooperation mechanisms. For example, the willingness of member states to engage with the EAW process is assisted by other cooperation measures that ensure extradited individuals are treated fairly after conviction such as the European Prisoner Transfer agreement which enables individuals to serve custodial sentences in their home country.

Conclusion

Although many of the issues surrounding the Irish border (including trade, the Common Travel Area and the Good Friday Agreement) are being considered as part of the ongoing Brexit negotiations it appears that, as yet, there is no coherent strategy for dealing with the question of how effective criminal justice cooperation between the UK and the ROI will be maintained post-Brexit. It is imperative that effective criminal justice cooperation between the UK and the ROI is maintained, not least because of the special status of the border given its position as the only land border between the UK and the EU, the need to maintain an open border and the mutual benefit in avoiding an increase in border related criminal activity.

Revenue Perspectives – Joint Agency Cooperation

Marie-Claire Maney, Assistant Secretary/Revenue Solicitor and Head of Investigations and Prosecutions, Revenue Commissioners

Good afternoon, Ladies and Gentlemen. I am delighted to have been invited to speak at this prestigious event.

My name is Marie-Claire Maney. So, who am I? In a nutshell, I am a lawyer and a senior civil servant. To paraphrase Oscar Wilde, to be a member of one unpopular group seems unfortunate but to be a member of two, seems somewhat careless. I hold two posts in Revenue and they are both the best jobs in the world. So, I am very fortunate to wear two interesting hats.

Firstly, I am the Revenue Solicitor with responsibility for managing and directing the legal function within Revenue from tax appeals, commercial litigation, insolvency proceedings, prosecutions and everything in between. In addition, nearly three years ago, I was asked to become the Head of the Division which has national responsibility for enforcement policy and national and international operations.

So, I am I suppose at the coalface in terms of effects of Brexit both as a practising lawyer and the head of the enforcement function. Our judicial system and case law are influenced by our closest common law neighbour and our fight against crime is hugely assisted by the same. I feel personally at the coalface of Brexit, being Northern Irish, and I was struck this week by Matt O'Toole's article in the Irish Times on the concept of "identity". They say identity politics is waning but certainly the concept of "identity" has currency.

Today, I am going to speak in my second role in Revenue, that of Head of the Division with national responsibility for national and international operations tackling abuse in the area of marked oils, drugs, tobacco, counterfeit goods, tax and excise evasion. Essentially, all areas that are catnip to the world of organised crime gangs.

I am not going to speak about Brexit and I hope I am forgiven for this omission but it is important that we understand the "now" and the current level of cooperation. So I am going to speak about the "now" and some very positive initiatives, which have had positive benefits in all our lives. I shall leave it to others to figure out how things will change but it is critically important that the level of cooperation in the field of tackling organised crime, between the 27 Members States and the United Kingdom continues post-Brexit. That, it is assumed, would be agreed by everyone.

There have been two major cross jurisdictional initiatives between the Irish and British that have made considerable inroads into cross border crime.

Firstly, there was joint co-ordination between the British and Irish Revenue authorities in the development of a marker for diesel. As you will be aware it was relatively straightforward to launder what is colloquially known as 'red' and 'green' diesel. This laundering has a corrosive effect on the environment, the excise revenue but even more so on society. When criminal activity takes hold and becomes "the norm", then it has a damaging effect.

I worked on the project which asked the marketplace to invent a new marker that would be much more of a challenge to remove. It was an innovative gamble to ask the marketplace to tender for a product they had not yet invented. This is what makes the public sector so interesting to work in and so life enhancing.

I am delighted to say that a new marker was invented and it has been added to diesel in the United Kingdom and Ireland for the last few years. Excise receipts have increased substantially and also the environmental pollution is much reduced from laundered sludge. This was a direct result of cross jurisdictional cooperation.

Another really positive initiative was the Joint Agency Taskforce. In November 2015, the political parties in Northern Ireland, and the British and Irish governments concluded the Fresh Start Agreement. One of the agreed provisions was the establishment of a Joint Agency Taskforce to identify strategic priorities for combatting cross border organised crime and to oversee operational co-ordination.

I was appointed the Revenue representative on the Strategic Group of the Joint Agency Taskforce and Mick Gilligan, who is conducting one of the workshops, is the Revenue representative of the Operational Group of the Joint Agency Taskforce. The Strategic Group sets the priorities and the roadmap and the operational group has to then put in place plans to "operationalise" that roadmap.

So, has it worked?

Well, from Revenue's perspective it has been a success and the cooperation on the island of Ireland between the various agencies has been very much enhanced by the Joint Agency Taskforce. It is the first time all the agencies have sat together and that has enhanced intelligence sharing and operational effectiveness.

For the first year the priorities were set on crime types with the second year focussing on specific targets and crime gangs.

The first priority which was pertinent to Revenue was excise fraud. With any attempt to tackle organised crime, diversion activities commence. Intelligence in 2015 alerted that substitute fuels may have increased, as a way around the new marker I have just spoken about.

In early 2016 Revenue commenced an investigation jointly with HM Revenue and Customs (HMRC) into suspicious movements of substitute fuel with potential for considerable loss of excise and vat. This operation which was supported by HMRC and the PSNI resulted in 390,000 litres of product being seized in Northern Ireland, and over two million litres of historic movements identified through Dublin and Belfast ports and there were arrests. The operation took place over many countries and indeed counties in Ireland and then moving to Northern Ireland.

This operation won the outstanding collaboration category at the UK Government Counter Fraud Awards in September 2016.

From that work, further operations have been successful this year but it is too premature to speak of these now as some are still ongoing. But that is the nature of successful cooperation and operations, it leads on to other success.

The Joint Agency Taskforce has this last year moved into joint targets of the agencies and recently Revenue supported five other agencies on a cross jurisdictional raid on many premises for money laundering and disruption of an organised crime gang.

There is no doubt in my mind that the Joint Agency Taskforce is working and is having real success. The various legislative frameworks under the Fresh Start Agreement and EC Treaties and Conventions are critical to its success. But as important are the relationships between all the personnel. I am confident that all those in the law enforcement community will continue to work and cooperate post-Brexit. My key message is that whatever happens in a post-Brexit environment, relationships will continue and we shall find a way of continuing our good work. It is my distinct good fortune to work in such an interesting field and with great colleagues in all the agencies in all the jurisdictions.

I shall leave you with an Oscar Wilde quote. Oscar Wilde wrote that women are to be loved, not understood. I hope I may have proved him wrong and you understood something of what I have spoken of today.

I hope you enjoy the rest of your Conference and thank you again for asking me to speak.

Human Rights on the Island after Brexit

Brian Gormally, Director, Northern Ireland Committee on the Administration of Justice

Committee on the Administration of Justice (CAJ)

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation working for human rights and affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the Community and it takes no government funding.

Introduction

This paper looks at the possible threats to human rights and accordingly to the operation of criminal justice across the island in the aftermath of Brexit. It will only examine the issues that arise that are particular to the Irish situation, not how the impact of Brexit on EU-wide criminal justice cooperation may impact on this island. In particular, we will look at the threats to the peace agreement as any disruption of the constitutional settlement which has applied for the past twenty years would have profound consequences for the rule of law in this region.

Of course, many of the human rights impacts of Brexit are going to be in the North. Northern Ireland will lose the protection of the Charter of Fundamental Rights, the oversight of the European Court of Justice and the effect of EU law, especially equality directives. Furthermore, although the xenophobic character of the anti-EU campaign was more evident in England, the DUP in particular forged links with "alt-right" funders who are fundamentally racist. Any boost to sectarian and racist elements will be felt mainly in the North.

However, much of the threat to human rights comes from the undermining of the peace agreement that Brexit represents. From a human rights perspective, although different constitutional arrangements can provide equal protection for rights, the particular configuration of the 1998 settlement brought the conflict to an end. No plausible alternative has been proposed that would not run the risk of a return to conflict and a consequent bonfire of human rights. It is therefore the first line of defence for human rights activists.

The Agreement itself was an all-island affair, cemented by a British-Irish Treaty and affirmed by an act of self-determination of the people of Ireland as a whole in simultaneous referenda. Although the main direct effects are felt in Northern Ireland, the peace and prosperity of the South is also dependent on the continuing success of the peace process. The development of the rule of law based on human rights standards across the island also depends on maintaining the peace. Many of the issues, especially around citizens' rights, can only be resolved by the active participation of the Irish Government, hopefully spurred on by active civil society participation.

Brexit and the Belfast Good Friday Agreement

The Belfast/Good Friday Agreement (BGFA), in addition to being approved by referenda, North and South, was incorporated as a treaty between the UK

and Ireland and lodged with the UN (UK Treaty Series no. 50 Cm 4705) and entitled the British-Irish Agreement 1998. Article 2 of the treaty binds both Governments to implement the provisions of the annexed Multi-Party Agreement which corresponded to their respective competencies. From a human rights point of view, although rights can be protected in a range of constitutional forms, the current reality of Northern Ireland is that the Agreement represents the best current safeguard of peace and human rights and must be protected.

The Agreement creates a unique constitutional context for Northern Ireland. One of its purposes was declared to be that the British and Irish governments wished:

To develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union; [Preamble; British Irish Treaty 1998]

There is therefore a presumption that the Treaty and the attached Multi-Party Agreement are to be understood in the context of the common membership of the European Union (EU) of Ireland and the UK. The departure of the UK from the EU (Brexit) will therefore have significant effects on the operation of the Agreement.

More generally, the withdrawal of the UK from the EU will have a profound effect on the legal and constitutional underpinning of the present jurisdiction of Northern Ireland, its relations with the Irish state and UK-Ireland bilateral relations. The UK and Ireland's common membership of the EU was an assumption in the Belfast Good Friday Agreement (BGFA) and the UK's adherence to EU law regulates the powers and legislative operations of the devolved institutions. The equal rights of Irish and British citizens, a principle of the BGFA, in great part relies on the equal rights of both as having EU citizenship. The lack of significant border regulation is largely due to common membership of the EU, North and South, as well as the improved security situation. Many equality and anti-discrimination provisions in Northern Ireland, which have particular importance in a divided society, rely on EU law. For more detail on the human rights and equality implications of Brexit see CAJ's conference report "Brexiting and Rights" https://caj.org.uk/2016/09/30/brexiting-rights-conference-papers/.

All of these impacts could have a destabilising effect on the constitutional, political and legal settlement that, in the main, ended the violent political conflict which devastated the people of Northern Ireland and gravely affected those in the rest of the UK and Ireland. While it is unlikely that any one particular effect of leaving the EU would destroy the peace settlement, the cumulative impact could begin to unravel it. In particular, any diminution in the protection of rights of the people living on the island could reduce trust in the BGFA institutions and any unravelling of the settlement would be disastrous for human rights. A continuing preoccupation of CAJ will therefore be the protection of the integrity of the peace settlement and the various agreements that make it up. As we have said, given that violent conflict always involves abuse of human rights, protecting the peace settlement is our top priority.

Let us look more closely at some of the ways in which Brexit may have a negative effect on the peace settlement.

The process was and is an all-island one

While there are three strands of the Agreement (BGFA), its all-island character is not restricted to Strand 3 (North-South). The Irish government was intimately involved in the negotiations, the BGFA was sealed with a British-Irish Treaty, all-island cross-border bodies were established, there is the concept of "equivalence" in human rights protections, the recognition of the "birthright" of people who live in Northern Ireland to Irish citizenship makes that concept an all-island one and many of the outworkings of the peace process involve both parts of the island.

The fact that both jurisdictions on the island were part of the EU supported progress towards harmonisation in many areas of economy and society, freedom of movement across an increasingly notional Border and made economic integration easier and apparently inevitable. All of that will be stopped in its tracks. How are cross-border bodies, for example, to operate in two different economic and social as well as political regimes? Any move towards a border that is controlled in any way, by fixed checkpoints, electronic surveillance or in-country spot checks, will not only cause economic and social inconvenience but also accentuate the distinction between jurisdictions which was becoming usefully blurred.

The process was founded on the exercise of self-determination

The BGFA recognised that "*It is for the people of the island of Ireland alone…without external impediment, to exercise their right of self-determination*." The people of the whole island voted for or against the Agreement on the same day and on the same question. Depending on the point of view, this was an act of self-determination by all the people of Ireland or of the people of Northern Ireland with a supportive vote in the South. Either way, the principle of the people living on this island deciding their own future was a foundation stone of the Agreement. It is notable that the UK Government's Position Paper on Northern Ireland and Ireland in Para 53 ignores the role of the will of the people of the South in accepting or not the choice of the people of the North in relation to the constitutional status of Northern Ireland.

The UK-wide Brexit vote involved a complete disregard for the principle of self-determination as regards both Northern Ireland and the island of Ireland. The North has been explicitly subordinated to the will of the UK as a whole. The vote to leave the EU was not a "national" matter without any particular impact on Northern Ireland. On the contrary, the effect of the Brexit vote will be, unless some kind of remedial action is taken, to change irrevocably the relationship between North and South. That the North's clear wishes on that subject have been ignored puts a question mark over the whole recognition of self-determination painstakingly built up since the language of the Downing Street Declaration in 1992 opened up the route to the ceasefires of 1994. The hopes of some that constitutional law would have developed far enough to recognise the rights of the devolved regions were dashed by the Supreme Court in the *Agnew* case - there is currently no legal means of expressing this fundamental pre-condition of a successful peace process.

The "birthright" of the ability to be Irish or British or both by individual choice is a fundamental pillar of the Agreement

For most people, the passport of choice is not just an identity accessory like a Gaelic

top or a Rangers shirt but a declaration of national aspiration and indeed allegiance. The BGFA proposes the disentangling of national identity from its expression by residence in a nation state. The promise of this process was to create conditions where people with different national allegiances could share the same political and geographical space. At the present time the nation state governing Northern Ireland is the UK but the BGFA expressly recognises the right of the people of NI to express their wish to join the Irish State by simple majority vote. Currently, Irish citizenship for Northerners is an extra-territorial claim of right; in the future British citizenship might have a similar character. That there be complete equality in the rights accruing to these citizenship choices is an indispensable implication of the whole concept.

The formal situation in relation to nationality choice has not been changed by Brexit but the content of that choice has. Given that for many purposes the rights of all EU citizens in the EU were similar, before Brexit there was no practical impact whatever citizenship choice was made. The EU has already said that Northern Irish citizens will remain EU citizens, though what that will mean in practice needs to be examined. Northern British citizens will have no such status. So there is now a clear difference between the two citizenships on offer - that could have a significant impact on the basis of the peace agreement.

Equality in the broadest sense is a key element of the peace process

Equality between the two main communities is, of course, a basic principle of the BGFA and is explicitly recognised in the concepts of "equality of treatment" and "parity of esteem," though the extent to which these concepts have been implemented in practice is another matter. However, Sec 75 of the Northern Ireland Act and associated measures cover a broad range of categories. To overcome the negative characteristics of a divided society, it is necessary not just to confront the headline prejudice (sectarianism) but also to attempt the creation of an equal society, accepting of diversity, at least as regards aspects of personal identity. Given the inter-sectionality of diverse forms of prejudice, confronting sectarianism requires a broad based equality agenda.

Significant elements of equality standards derive from EU law and regulation. These are not simply a static set of rules but a whole system of law with its associated jurisprudence, methods of enforcement and dynamic of progress. Moreover, these standards are external to Northern Ireland and currently bind the devolved institutions including the legislature. Their loss will represent a blow to the project of "de-sectarianising" Northern Ireland society through the development of high standards of equality enforcement across all relevant grounds. It will be necessary to envisage and propose how the equivalent effect of these directives and regulations can be achieved post-Brexit.

Human rights protections are a basic part of the Agreement but have only been implemented partially and may be threatened

All the weaknesses and failures identified in, for example CAJ's report "Mapping the Rollback"(https://caj.org.uk/2013/11/19/mapping-rollback-human-rights-provisions-belfastgood-friday-agreement-15-years/) have reduced the robustness and resilience of the institutions and the peace process as a whole. There is a continuing need to fulfil and go beyond

the protections envisaged in the BGFA and succeeding agreements. This is all the more important in view of the long term ambition of elements within the Conservative Party to repeal the Human Rights Act and perhaps also to denounce the European Convention on Human Rights.

The fragility of the peace settlement without the implementation of rights guarantees that could regulate the behaviour of elected politicians and public authorities has been demonstrated by the recent fall of the institutions. The collapse of the institutions was itself, no doubt, partly a result of the arbitrary abandonment of basic assumptions about the peace agreement and the rejection of the special constitutional status of Northern Ireland. It is important that a way of reintroducing the guarantees around citizenship, nationality and equality, as well as more general rights protections, is found. The fulfilment of the commitment to a Bill of Rights for Northern Ireland could meet some of these needs.

A "hard" border and the Common Travel Area

The complex constitutional context of Northern Ireland and the mutual recognition rights regarding Irish or British citizenship, as well as the north-south and east-west arrangements under the Agreement, provide a compelling case that the right to freedom of movement should be considered as applying across the island of Ireland. Para 20 of the UK Government's Position Paper on Northern Ireland and Ireland refers to "the principle of free movement between the UK and Ireland" which, of course, must include across the border between North and South. Moreover, while international human rights standards generally permit border controls at the boundaries of a state, human rights are engaged where there is racial discrimination or internal border controls impacting on freedom of movement within a state. In this sense, the re-creation of a "hard" border across the island of Ireland would disrupt the basis of the BGFA and potentially make it the site of racial discrimination thus violating international human rights standards.

In this context we should draw attention to the phrase in the Agreement which speaks of citizenship birthrights being afforded to "all of the people of Northern Ireland." This phrase constitutes the one occasion when the British and Irish governments have re-interpreted the meaning of the BGFA. This was in 2004 when Ireland held a referendum to change legislation to remove the rights of citizenship from all the people born on the island of Ireland as an automatic right, and instead enshrine Irish citizenship as more of a right of descent, as in other countries. This was the Irish Nationality and Citizenship Act 2004. In accordance with that, the British and Irish governments resolved to interpret the meaning of "all of the people of Northern Ireland" to make sure that it meant only people who were born with an Irish or British parent or a parent who would otherwise have a right of permanent residence. This could be seen as an ominous precedent as to what might now happen in the context of negotiating the outworking of Brexit and the land border.

It has been argued that the UK leaving the EU will have no impact on the border between the two jurisdictions on this island nor, indeed, on free movement between Ireland and the UK in general because of the existence of the Common Travel Area (CTA) between the two states.

This pre-dates the two states' membership of the EU and is not governed by EU law. The CTA is not underpinned by a bilateral treaty, only "understandings" implemented by legislation in both jurisdictions which can be changed. We are now in a very new situation. There has never been a CTA when one state is in the EU and one state is out. We now have the prospect of the external frontier of the EU being drawn in the middle of Ireland.

From the UK side, if one of the motives of "Brexit" is to "take control" of the UK's borders with the purpose of restricting immigration, including from EU countries, then there will be a clear threat to the CTA and therefore to free movement across the border. If the CTA remains for Irish and British citizens, anyone whose appearance or accent suggests they may not be one or the other are likely to be fair game for stop-checks. This would be clear racial profiling.

There is also the question as to what extent future arrangements between the UK and an Irish state within the EU will require customs controls. While this is a separate matter to immigration controls, in the UK both disciplines are now part of the same agency, having been put together within a unified UK Border Force. To deploy such an agency on the border with an immigration role, even whilst officially there for customs purposes, risks mission creep at the very least. CAJ is also concerned about ensuring that the ethos and accountability arrangements for the UK Border Force comply with the post-Patten policing architecture in Northern Ireland. The Police Ombudsman can now investigate "serious" complaints against customs or immigration officers when engaged in "enforcement" actions but there is no other accountability mechanism.

Even if there are no or few controls on the border itself, relatively free movement across the island could see the territory of Northern Ireland targeted by UK authorities for particularly severe and intrusive immigration checks including raids on workplaces and increased detention of migrants. Concern about this is increased by the leak of an extremely hard line policy paper on immigration after Brexit being considered by the UK Government. Amongst other things, such a security clampdown outside the police accountability mechanisms painstakingly built up since 2001 would have a negative effect on public confidence in the rule of law.

Clearly, the prospect of a border, however "invisible" it is, also raises the spectre of increased smuggling and organised crime. That has to be a concern for law enforcement agencies in both parts of the island. We know there are links between organised crime and the political ideologies of both dissident republicanism and dissident loyalism; a new border gives a new opportunity and location for criminality and the weakening of the peace settlement gives a pseudo-political justification for it.

How all this will impact on criminal justice cooperation across the island will have to be considered by the relevant people and agencies North and South. Discussions we have had with some senior PSNI officers indicate that informal ties with the Garda Síochána will remain strong but some of the formal mechanisms for cooperation may get more complicated. However, the main issue is to ensure that the integrity of the Belfast Good Friday Agreement is maintained, the threat to human rights

repelled and hence confidence in the rule of law throughout the island is strengthened. CAJ has been working with colleagues in an attempt to propose practical solutions to some of these problems; below are some of our preliminary views.

Legislating and negotiating to defend the Agreement

A great many people have been pointing out the dangers and threats that Brexit poses to the peace process; fewer have been to the fore in proposing solutions. This is partly because of the complexity of the issues, partly because the UK Government seems to have no clear idea what it wants from the negotiations and partly because some of the potential solutions raise huge issues such as whether the UK should stay within the single market and/or the customs union. However, the fact that the "Irish" question is one of the three issues in the Brexit negotiations on which substantial movement needs to be made before the European Union is prepared to move on to discuss a Withdrawal Agreement, creates a level of urgency, as does the current passage of the Withdrawal Bill through Parliament.

CAJ has been working with colleagues to put forward suggestions (rather than firm policy positions) that might help in the short and long term. What follows is a brief summary of our thinking so far.

1) **Amending the Withdrawal Bill to make the British-Irish Treaty legally enforceable**

The Belfast Good Friday Agreement is made up of two parts: the text of the "Multi-Party Agreement" itself, made between some Northern Ireland parties (not including the Democratic Unionist Party, who opposed it) and the British and Irish Governments, and an Agreement between the Governments of the United Kingdom and Ireland, which has the status of an international treaty and is lodged at the United Nations. The treaty is attached as an Annex to the Agreement and, amongst other things, contains the "solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement" by both governments.

Unfortunately, neither the treaty nor the Agreement itself is directly enforceable in the courts. The UK Government's Position Paper on Northern Ireland and Ireland accepts that "the British-Irish Agreement is binding on the UK Government and Irish Government, and gives the commitments on equality, parity of esteem and citizenship legal force in international law" (Para 13), but there is no mechanism for adjudicating when an act or law breaches the Agreement nor to enforce adherence to it. Legislation, including the "constitution-like" Northern Ireland Act 1998, implements many of the structural provisions of the Agreement but not all of the commitments made therein.

One way of the UK Government demonstrating its oft-repeated commitment to the Agreement would be to make the treaty provisions enforceable in UK domestic law and hence in the courts. A simple amendment of the Withdrawal Bill to the effect that all public authorities must act compatibly with the British-Irish Agreement could accomplish that.

2) **Maintenance of EU human rights and equality protections**

The Withdrawal Bill, as passed at its Second Reading, specifically removes the protection of the EU Charter of Fundamental Rights. Amendments have

already been put in to reverse this and we would support those moves together with any other amendments designed to maintain human rights and equality protections.

3) Equality of citizenship – a reciprocal agreement

After Brexit, there will be large populations of both Irish and British citizens living in Northern Ireland. Irish citizens will continue to be EU citizens, with the right *inter alia* to move freely to and within the EU and to live and work there without discrimination; British citizens will not. This will mark a major distinction between the citizenships and thereby undermine the equality on which the BGFA was based.

One possibility to resolve the issue is that those British citizens whose eligibility for UK citizenship arises from being born in Northern Ireland could be regarded as EU citizens along with their Irish neighbours. It seems unlikely that the EU negotiators would consider any movement outside the established categories of citizenship except on the basis of reciprocity. In other words, if all those born in Northern Ireland with Irish or British citizenship were to retain EU citizen rights throughout the 27 member states, other EU citizens would have to have the same rights within Northern Ireland.

The reciprocal measure would therefore be to guarantee that the rights that EU citizens currently possess would, in Northern Ireland, continue undiminished, as far as practically possible. The proposal would therefore be ***that all EU citizens, not just current residents, would have the right to enter, live and work in Northern Ireland on a similar basis as at present***. This is envisaged as ***the UK side of a reciprocal agreement with the EU that grants EU citizenship, or at least the rights thereof, to all those born in Northern Ireland with the right to be Irish or British, irrespective of which national citizenship they choose.***

4) A duty on the UK Government to guarantee equality of rights of Irish and British citizens

Given that the citizenships are those of two sovereign states (plus at the moment citizenship of the EU) there must be both appropriate legislation relating to the North (which could be the Bill of Rights) and also some level of agreement or reciprocity with Ireland (and in the context of Brexit) with the EU.

5) Prohibition of immigration controls on the border

Various agreements have been made between Ireland and the UK around the Common Travel Area, most recently in 2014, but these are explicitly not legally binding. The only way the right to freedom of movement between Ireland and Northern Ireland can be legally enforceable in the UK is through legislation (which could be the Bill of Rights or some other legal instrument).

6) Guarantee of equivalence of rights across the island

The concept of equivalence has to work both ways to have any meaning. The aim can be expressed as ensuring that the rights of an individual are protected equally wherever they may be on the island, though the mechanisms will be different as they are those of the two sovereign states involved. This is essential to make free movement across the island a reality.

As noted, CAJ also believes that some of the unfulfilled human rights and equality commitments in the Agreement should be

incorporated in a Bill of Rights for Northern Ireland and has made a separate submission on that here: https://caj.org.uk/2017/08/29/s467-cajs-submission-bill-rights-project-august-2017/ We will be working with colleagues to develop these and other proposals as the tortuous process of negotiation and legislation continues.

Pictured L-R: ***Brian Gormally**, Northern Ireland Committee on the Administration of Justice, **Marie-Claire Maney**, Revenue Commissioners, **Maura Butler**, ACJRD Chairperson, **Gemma Davies** and **Adam Jackson**, University of Northumbria, Newcastle*

Conference Closing

HMA Robin Barnett, CMG, British Ambassador to Ireland

The British Ambassador to Ireland delivered the conference closing remarks, addressing the meeting in a closed Chatham House Rule capacity. ACJRD is grateful for his contribution to the conference.

CONFERENCE WORKSHOPS

1. Pros for the Cons – European Arrest Warrants Post-Brexit for Ireland and the UK

Presenter: Hugh Dockry, Chief State Solicitor's Office (CSSO)
Chairperson: Catherine Pierse
Rapporteur: Catherine Friend

The issue of the validity of the European Arrest Warrant (EAW) is a practical, visible and immediate problem in the post-Brexit world. The aim of this workshop was to discuss what can be done to alleviate the possible problems to the Irish criminal justice system arising from Brexit. EAWs deal with the most serious crimes which are cross-border related such as narcotics and human trafficking. Political geographical borders give opportunities to exploit weaknesses for profit, such as legal or tax differences between countries. Work is continuing to develop the EU investigation warrant.

The European Justice Policy aims to reduce exploitation and to create trust and citizen confidence. It aims to create a coherent system of legislation to prevent and punish serious offences within EU states. The EAW originated at an EU Summit in Tampere, Finland, in 1999, and is designed to help create an "area of freedom, security and justice". The following legislative pieces contributed to the legislative development and use of the EAW in Ireland:

- Criminal Justice Act 1994
- European Arrest Act 2003
- Criminal Justice (Terrorist Offences) Act 2005
- Criminal Justice (Mutual Assistance) Act 2008
- Criminal Justice (Miscellaneous Provisions) 2009
- European Arrest Warrant (Application to Third Countries and Amendment) and Extradition Act 2012.

Now, Ireland will become the primary Common Law system left in the EU and this may leave us isolated legalistically and with a particular vulnerability in dealing with the UK post-Brexit in the criminal justice and home affairs areas.

Currently the EAW incorporates strict time limits of 60 days (sometimes increased to 90 days) to be implemented. Occasionally this limit fails domestically due to the lengthy processes which Irish legislation requires to complete actions (three to seven months). Concepts of the EAW include 'Double Criminality' where jurisdictions do not have to find common rule outside of the 32 categories offered in the EAW punishable by at least 3 years' imprisonment in the Issuing State. Otherwise, the jurisdictions must find a domestic offence which corresponds with EAW. The EAW guarantees to review life sentence, the right to serve detention in the executing country, or to explore a transfer of the sentence to a home country. Another concept includes 'double jeopardy' or "Ne bis in idem", where an individual cannot be tried twice for the same thing in two different countries. Legal recourse or mediation for EAWs are available through the Court of Justice of the European Union (CJEU) founded on the European Convention on Human Rights (Act 2003) and European Charter of Fundamental Rights.

The highest number of EAW cases issued to Ireland by Member States in the years 2015-2016-2017 include a recent increase in requests from the UK accounting for 54% of warrants requests in 2017 and 37% of all warrants in the last three years. Mirroring this, the majority of EAW requests from Ireland to other European Member States are to the UK, with 79% in 2017 and 55% in the last three years. While it should also be noted that the UK has joined the Schengen movement area and Ireland has only limited access to date, tens of thousands of alerts are expected to be sent to Ireland in the close future. The issue of an Irish 'border' also provides further issues, even more so because of the politically contentious history.

The An Garda Síochána Extradition Unit admittedly has limited resources working towards the needs of the Director of Public Prosecutions Office and the Chief State Solicitor's Office amongst others. The unit relies on local investigations and arrests to help assist with skills or resource limits. Proportionality issues arise in analysing the seriousness of an offence and the related cost for a successful extradition. Perhaps advocating for an administration review of legislative suitability taking place in the issuing country instead would help to reduce workload and lengthy processing times.

Regarding Brexit and the European Court of Justice, the UK Supreme Court needs direction and clarity from British politicians to understand how Brexit will affect or mediate European Law in the UK and for how long. The risks posed for Ireland include a separation from a country which is a common travel area, has a shared language and familial ties and similar culture and history. The Ireland-UK relationship is greatly valued and Ireland will lose a huge ally within the EU. While recognising that other areas affected in Ireland also include trade and farming, we are all stakeholders and should coordinate to influence this change in a positive manner.

The workshop presentation ended with possible remedy recommendations to replace EAW limits in the face of Brexit which included harmonising laws across countries, utilising bilateral agreements and utilising our own legislation such as the Extradition Act 1965 Part III.

Discussion

The following subjects were discussed among the workshop participants:

The rise in UK European Arrest Warrant requests and required resources

Increased coordination of criminal justice agencies such as Europol is needed. Currently in the Chief State Solicitor's Office, seven solicitors cover EAWs and extradition, Mutual Assistance Requests, inquests, licencing and ministerial prosecutions. However, most of the resources go to EAWs alone and information technology limits in recording data of EAWs also remain.

Legislation to replace the European Arrest Warrant Act 2003 is needed to address the current and new systematic and political issues posed by a country leaving the EU membership.

The Irish Criminal Bar and Solicitors' Associations

The problems posed by Brexit are not just a matter of passing legislation but a need to implement new resources for education via EUROPOL and EUROJUST. The Irish Criminal Justice System needs to recognise that with membership of the

EU, comes the responsibility to provide an expert, expeditious and transparent system for surrender. This however, has not been matched with more resources to deal with this increase.

A budget to deal with required resources
Long term projects and planning are required to fully implement the necessary changes to improve our current EAW response system.

A new opportunity for Ireland
While we may be losing our ally at the European negotiating table, this could provide potential for Ireland to increase our involvement within the EU.

The role of the DPP Office
"Without a doubt we're more isolated". However, the EU has dealt with most big issues to date and Ireland must plan how to respond.

Northern Ireland
An imaginative approach is required to protect citizens of Northern Ireland. This is a difficult and charged situation where Northern Ireland is still legally under the jurisdiction of the United Kingdom and continues to be discussed.

Competency
Ireland does have the legal competency. However, this approach will be directed by the EU and support is needed from the EU to encourage harmonisation and other solutions for the Irish criminal justice system following Brexit. Ultimately, the fundamental rights of the Irish citizen should be ensured and protected going forward.

2. Anticipated Changes in the EU Funding Landscape

Presenter: Hugh Quigley, The Wheel
Chairperson: Dr. Susan Leahy
Rapporteur: Beth Duane

The Wheel is Ireland's support and representative umbrella network for community, voluntary and charitable organisations. It helps such organisations to 'get things done, represents their shared interests to Government and other decision-makers, and promotes a better understanding by the public of them and their work'. Access Europe is managed by The Wheel in the Republic of Ireland and is a joint initiative of thirteen grantees of the Atlantic Philanthropies, such as the Immigrant Council of Ireland, the Irish Penal Reform Trust and Free Legal Advice Centre. Access Europe aims to identify EU funding opportunities, assist in applying for EU funding, assist in managing EU grants, and assist in increasing impact and visibility of the sector at EU level.

How EU Funding Works
The Current Financial Process

- Seven year financial framework 2014-2020 sets annual spending limits - €960 billion over 7 years
- 1% of combined budgets of Member States
- Sets spending priorities
- Sets approximate national shares for spending and receipts

The Impact of Brexit

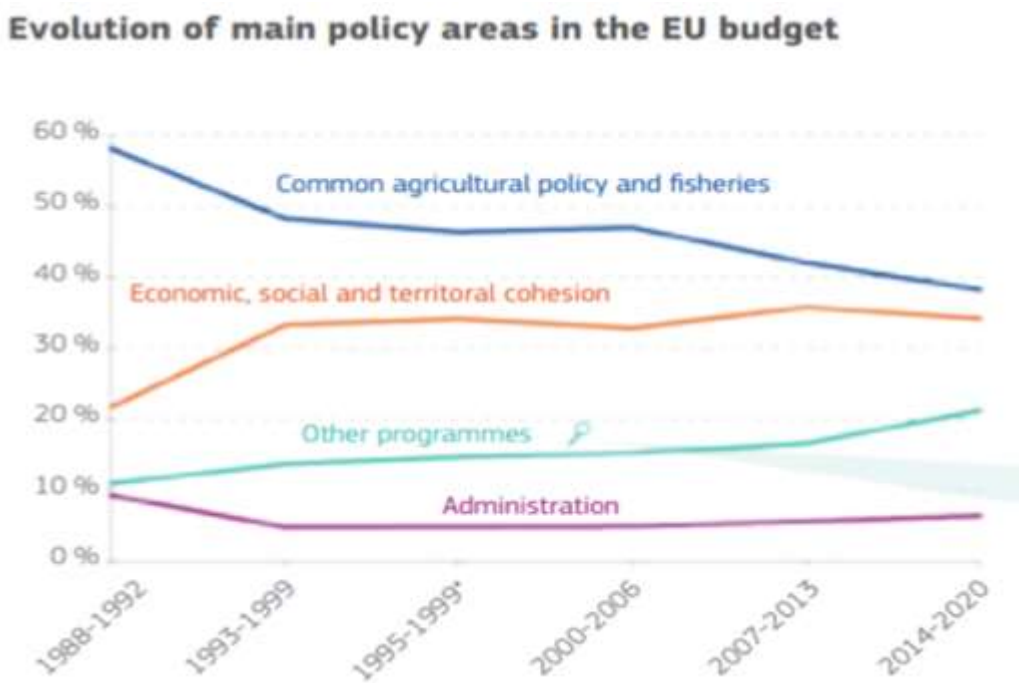
- 28 to 27 Member States
- 508 to 445 million citizens
- Total EU annual income/output of €14.5 trillion down to €12.1 trillion
- EU annual budget of €140/130 billion (1% of GDP)

- EU budget funded by: national contributions (+70%), share of VAT receipts (12%), and customs duties (13%)

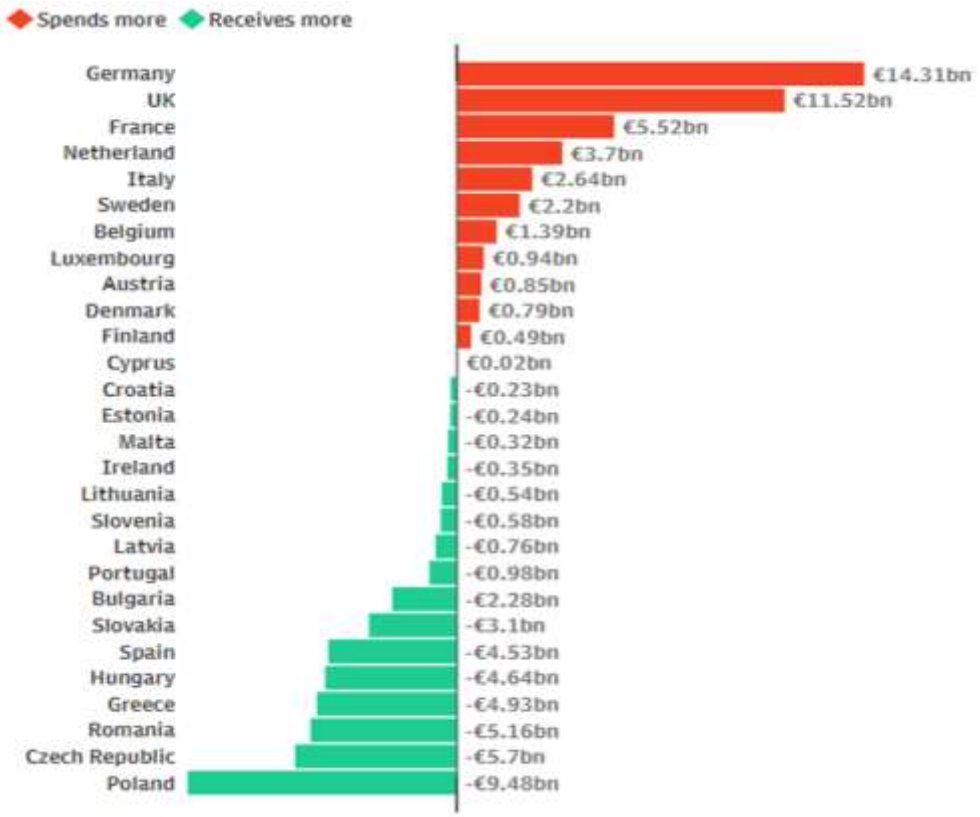
Policy Priorities - Current 2014-2020 Programme

- Research and Development - 3% of the EU's GDP to be invested in research and development. Ireland has invested 2%.
- Employment - 75% of the 20-64 year-olds to be employed. 71% are currently employed.
- Climate change and energy sustainability - 2020 targets: Greenhouse gas emissions 20% lower than 1990, 20% of energy from renewables, 20% increase in energy efficiency. There has been a reduction of 18% of greenhouse gas emissions, and 16.7% of renewables since 1990.
- Education - reducing the rates of early school leaving below 10%, at least 40% of 30-34 year-olds completing third level education. Ireland is well ahead on these targets.
- Fighting poverty and social exclusion - at least 20 million fewer people in or at risk of poverty and social exclusion.

Where the money goes



Who gives, Who gets?



Current Funding Programmes

- EU Budget - 52 headings (and 450 sub-headings) in the EU Budget
- EU Regulations for each main heading set priorities
- Annual (or bi-annual, or multi-annual) work programme
- Calls for proposals - currently being published on a regular basis

Funding to Ireland

Total of relevant funding: €3.3 billion (2014 - 2020): Most of the funding is to be absorbed by State agencies, private companies and research institutions. National level - operational programmes set out how Member States will spend that money.

There are around 20 programmes with potential funding opportunities for Irish NGOs. The Horizon programme is the largest EU Research and Innovation programme ever, with nearly €80 billion of funding available over seven years (2014 to 2020). Ireland can hugely benefit from this programme, which is why there is such a push from the Irish authorities to submit quality applications. Other programmes such as ESF, ERDF, Interreg, Transnational cooperation, and Peace have fixed funding quotas.

Future Priorities

The future of the European Union will depend heavily on how it deals with rising tensions. These tensions are caused by Brexit, Catalan's push for independence, and Eastern authoritarian countries. The future rests with Macron and Merkel who must effectively manage these tensions.

Commission President Jean-Claude Juncker's State of the Union Address 2017

outlined five policy priorities to strengthen the European Union and ensure that it continues to grow. They are:

- Strengthen the European trade agenda. This will be achieved by opening trade negotiations with Australia and New Zealand, for example.
- Make European industries stronger and more competitive. This will focus on industries such as motorised vehicles to be more innovative.
- Juncker stated how Europe must make the planet great again, by investing in climate change. This will be done by reducing carbon emissions from the transport sector.
- Protect Europeans in the digital age from cyber-attacks and terrorist propaganda and radicalisation.
- Migration. This policy aims to protect Europe's external borders and stem irregular flows of migrants away from the European Union.

Five Scenarios for the Future

- Steady as she goes
- Do less
- Some do more
- More with less
- Much more (new financial resources)

Discussion

Participants were curious about the effect that Brexit would have on the Irish criminal justice system. It was made clear that there would be no short term financial implications which would negatively affect the efficiency and day-to-day operations of criminal justice agencies. Additionally, the European economy is finally bouncing back after the financial crisis. Currently, there appears to be no negative effects which would have a large impact on Ireland's financial progress. However, the participants reiterated that there were still problems with inequality and poverty in Ireland and other European states and this needs to be addressed.

There was also a discussion on employment within the European Union. It was outlined how important it was to incorporate languages into university degrees, due to the fact that very few Irish candidates out of 55,000 applicants were successful in gaining employment in recent competitions. This was mainly due to the fact that Irish candidates displayed a lack of language skills. The participants underlined the importance of integration in the wake of Brexit, by gaining a deeper understanding of European culture and languages.

3. Community Sanctions, Framework Decisions and Mobility in the European Union

Presenter: Gerry McNally, President of the Confederation of European Probation (CEP) and Assistant Director, The Probation Service
Chairperson: Deirdre Manninger
Rapporteur: Michelle McCarthy

Introduction

Founded in 1981, the Confederation of European Probation (CEP) is the largest network organisation for Probation across Europe. The main objective of the CEP is to promote the rehabilitation and social inclusion of offenders through sanctions and measures implemented in the community. The CEP seeks to:

- unite all European wide probation organisations
- professionalise the probation sector in Europe by developing new standards across Europe, and

- raise the profile and promote the role of probation in the global arena of criminal justice systems.

CEP (www.cep-probation.org) has sixty member organisations deriving from 34 countries, with members ranging from universities to individual and affiliate members. The Confederation of European Probation uses an array of social media outlets such as *Twitter* and *LinkedIn* to relay its objectives, but the CEP website is perhaps the largest knowledge base where members of the public can access over 370 documents online which all promote the role of the offender in the community.

European Criminal Law

European criminal law is an umbrella term covering norms and practices of criminal and criminal procedural law across Europe. It is based on the law and activities of the European Union and the recommendations and conventions of the Council of Europe.

The criminal law of each Member State is the primary authority. European Union criminal law has worked towards harmonisation of criminal procedural law through the use of Framework Decisions, EU Directives and regulations. Framework Decisions require transposition into national legislation. The European Court of Justice retains limited enforcement powers.

The Lisbon Treaty abolished Framework Decisions and the EU can now enact directives and regulations in the area of criminal justice by means of the ordinary legislative procedure. Outstanding Framework Decisions, however, have still to be transposed and implemented.

Three Framework Decisions are of particular relevance and importance in this presentation.

Council Framework Decision 2008/909/JHA:

This Framework Decision refers to the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. This decision affects the transfer of prisoners in custody throughout Europe from one jurisdiction to another. The deadline for implementation was 5th December, 2011.

This framework decision does not rely upon the consent of the person in custody and if he/she can demonstrate no ties or connection to the State wherein they were convicted, then the prison can apply for the offender to be transferred to their home jurisdiction to serve their sentence. There is a 90-day deadline provided to complete the transfer.

Council Framework Decision 2008/947/JHA:

This framework decision refers to the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. This Framework Decision aims, with the consent of the person subject to supervision, to facilitate the social rehabilitation of sentenced persons, improve the protection of victims and the general public, and facilitate the application of suitable probation measures and alternative sanctions in the case of offenders who do not live in the State of conviction.

The deadline for implementation was 6th December, 2011, and apart from the United Kingdom, Ireland remains the last country to transpose and implement this decision.

While this Framework Decision is still in the early stages of implementation, there is already movement between jurisdictions with the Netherlands and Latvia being the busiest. The particular benefit of this Framework Decision is that it aids resettlement and rehabilitation by allowing persons to fulfil their community-based sanction and supervision in their home country rather than in a foreign jurisdiction where it is not their intention to remain.

Council Framework Decision 2009/829/JHA

This Framework Decision refers to the application, between EU member states, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. This Framework Decision aims to enhance the right to liberty and the presumption of innocence. In simple terms, it provides that a person could be granted bail in any EU Jurisdiction to return to their home State while awaiting trial while ensuring that the trial State has the authority to seek and enforce their return for the trial. The Framework Decision would have the effect of reducing the high number of EU foreign nationals remanded in custody awaiting trial in EU Member States and reduce that damaging impact on families and persons.

The deadline for the implementation of Framework Decision 2009/829/JHA was 1st December, 2012, and Ireland remains one of the last member states to transpose this into national law.

This Framework Decision is the least used, to date. There is a general lack of knowledge about it across Europe. CEP has recently undertaken to promote awareness and knowledge to support its use in practice.

A fundamental aspect of Framework Decisions is that they can only be effective when they are implemented and available in all Member States. While Framework Decisions have been slow in developing in practice due to an array of issues such as translation and language costs, lack of information, and local knowledge and expertise, they have considerable potential to support and maximise rehabilitation and resettlement and to reduce the excessive use of custody across Europe.

International Desk

An International Desk in national criminal justice agencies has been identified as a particularly valuable mechanism in facilitating cooperation between jurisdictions and promoting knowledge and understanding.

The International Desk in the Probation Service was established in 2010 and acts as the single point of contact regarding all queries related to the movement and transfer of persons subject to probation supervision in and out of Ireland. The purpose of the International Desk is to provide advice and information on relevant community sanctions in Ireland, while maintaining an up-to-date database on all transfers. In 2017 alone, the International Desk has already recorded ten transfers from the UK to Ireland, with a further three pending. This model has been applied in many European probation jurisdictions and has greatly improved the use and application of the three Framework Decisions.

Discussion
Participants were curious as to whether or not there has been any opposition to the type of person or offender to whom Framework Decision 2008/947/JHA can apply? It was clarified that there have been no categories of persons excluded but it could be anticipated that some caution would be exercised in relation to high risk or dangerous persons. Experience in practice will tell us more.

The work of the CEP is particularly important with regard to the practical implementation of the Framework Decisions, the shared access to resources and knowledge developed in other jurisdictions and partner services and the exchange of experience which will prove beneficial to Ireland when the Framework Decisions are implemented here.

The European Union has taken steps in recent years to support and encourage coordination and cooperation between European Member States in promoting rehabilitation and resettlement developments in criminal justice to reduce re-offending, make communities safer for all and support the re-integration of ex-offenders. The three Framework Decisions discussed are important instruments in facilitating and progressing rehabilitation and cooperation across the European Union and borders within it in the interests of all citizens. It is important that we, in the criminal justice sector, are aware of the positive opportunities, maximise access and advance the benefits and positive outcomes for all.

4. Counter-Terrorism, Radicalisation and Brexit - The Irish Perspective

Presenter: Detective Inspector Michael Heffernan, An Garda Síochána
Chairperson: Pauline Shields
Rapporteur: Annita Harty

Detective Inspector Michael Heffernan began by discussing international communities, in particular the Muslim community. There are over 65,000 Muslims in Ireland, the majority of whom have good relationships with An Garda Síochána. Ethnic liaison Gardaí are working with Muslim communities to ensure further integration for them into Irish society. The Gardaí regularly attend Mosques on Friday afternoons to talk to the communities about any arising issues.

Fear mongering has become a popular trend amongst the media sphere. It needs to be understood that there have been no Islamic inspired attacks or attempted attacks in Ireland. Media outlets have been asking for years if Ireland is going to be the next target of a terrorist related attack. It is important to remember that terrorism is always rational. With growing Islamic networks, recruitment could become more common across Ireland. However, Ireland has a stable security landscape, despite dramatic media reporting.

It is imperative to ask if Brexit will increase the threat of terrorism to Ireland. If there is a threat posed to Ireland it will be related to immigration and the cross border movement of people. This particularly relates to the border between the North of Ireland and the Republic of Ireland.

D.I. Heffernan posed two different scenarios for the border between the North and South of Ireland.

Scenario One: 'The UK remains a part of the single market through membership of the European Economic Area or special arrangement.'
Likely outcomes

- Border customs posts likely
- Passport controls unlikely

Scenario Two: 'The UK cannot negotiate single market success, receives no special arrangement with the EU and trades on the basis of the World Trade Organisation rules.'
Likely outcomes

- Customs controls certain
- Passport controls possible but not certain, depending on EU derogation

Regardless of either scenario the border remains porous and cannot be sealed effectively. Given the possible hardening of UK borders compared with European borders, it may become the easiest way to enter the UK illegally. Brexit could increase illegal immigration. Foreign Terrorist Fighters in the future could travel through Ireland en route to Syria.

Case Study
A case study was presented which showed a young student who travelled through Birmingham, Scotland and Belfast before being finally intercepted in Dublin. He was trying to get to Turkey to continue being a terrorist fighter. These routes were quickly identified. It could be likely that cases like this may become more frequent in the future.

Returning Foreign Terrorist Fighters are considered to be the main danger to the West as they are:

- Experts in combat
- Trained
- Traumatised
- Have substantial mental health issues
- Have become further radicalised
- Could radicalise others in society

However, some Foreign Terrorist Fighters who have returned to other countries have disengaged from terrorism and reintegrated into their communities. There have been no known returning Foreign Terrorist Fighters to Ireland. Many who do go to fight do not return and are presumed dead.

How does a person get to this stage in life? The Answer - Radicalisation. 'Radicalisation is a process by which an individual or group comes to adopt increasingly extreme political, social, or religious ideals and aspirations that reject or undermine the status quo or undermine contemporary ideas and expressions of freedom of choice'.

The factors contributing to radicalisation include psychological, sociological or socio-economic. Radicalisation occurs through radicalising settings and targeting vulnerable individuals. It is unlikely that radicalisation would take place in the Irish context as Ireland is proving to be a stable society.

However, Brexit could affect domestic radicalisation. There may be increasing tension between Northern Ireland and Republic of Ireland. Dissident Republicans could use Brexit and the threat of a hard border to increase radicalisation on young impressionable people. There are many possibilities that could occur from Brexit. It is beneficial to know that, despite this, Irish authorities are following steps to ensure the safety of Irish people.

Discussion

Will Brexit affect information sharing through different countries?

Europol has proven very efficient and quick in circulating information to EU countries. However, it could impact the UK and the information they receive as they will no longer be a part of Europol. Likewise, any information which the UK has on potential terrorist plots may be delayed getting to relevant countries. Measures will have to be put in place to prevent any delays with information.

Why was the Muslim community looked at in relation to terrorist attacks if they are a relatively peaceful community?

The Muslim community has been typically associated with Islamic networks by media outlets. The Muslim community speaks with neighbours and keeps an eye out for one another. If there were any radicalisation emerging in their communities they would try put a stop to it or they would bring it to the attention of An Garda Síochána. High profile Imams discourage radicalisation within their communities.

What is being done about online radicalisation?

It is much harder to control online radicalisation. It is done by people who prey on vulnerable individuals. This can be the start of terrorist networks. These networks are less likely to start from places like Mosques, and are formed from smaller cohorts.

Is there a multiagency approach where Counter-Terrorism is concerned?

Counter-Terrorism in Ireland does not typically follow a multiagency approach. However, it does rely on casual and ad hoc information exchange. Appropriate interventions are necessary. It is important for people to be aware of the signs of Radicalisation. The UK has in the past made mistakes with counter-terrorism. Radicals and extremists feed off these mistakes which can lead to terrorist events. Ireland needs to be careful not to make these mistakes.

Are there similarities in terrorism and other areas of transnational crime, for example human trafficking?

Foreign Terrorist Fighters and individuals who are involved with human trafficking are similar as they both use illegal borders to move people. In other trafficking circumstances, weapons can be moved through borders illegally for the purpose of terror activities.

Concluding Remarks

Brexit should not affect Counter-Terrorism mechanisms in Ireland to a massive extent. Measures will need to be put in place to help with the sharing of information once Brexit comes into effect. What can we do to stay safe? Familiarisation with information on radicalisation and knowing the signs is a preventive measure that could save lives.

5. Brexit and the Implications for Customs Cooperation

Presenter: Michael Gilligan, Office of the Revenue Commissioners
Chairperson: Eugene Corcoran
Rapporteur: Beth Duane

Customs have a special role within the European Union (EU). In addition to the traditional collection of taxes, duties, levies and management of customs import and export regimes, Customs also protect the trading capacity of the EU and safeguard Member States against terrorism and transnational crime. Much

of this work is not done in isolation but in collaboration across a number of Member States. The result of the negotiations between the EU and the United Kingdom is therefore of great interest to all Customs Services across the Union as the final outcome will dictate, for instance, the relationship between HMRC and those services. It is essential that the level of cooperation which currently exists with the UK authorities is not diminished to such a degree that it would weaken the cooperative approach to transnational customs crime.

The Role of Customs

The role of customs has expanded to include national security, particularly the security of the international supply chain and the facilitation of legitimate trade from threats from transnational terrorism, organised crime, fraud, counterfeiting, and piracy. Given this role, the efficiency and effectiveness of customs procedures can significantly impact the economic competitiveness and social development of any given state.

The Irish Customs Service, as part of the Office of the Revenue Commissioners, has both a national role, and an EU role. The national role is dictated by the Department of Finance in managing national taxes and duties. In managing the collection of national taxes and duties such as excise, the Customs Service carries out a wide range of anti-fraud functions as well as other operational activities to counter organised criminality involved in fraud, evasion and smuggling as well as implementing controls in respect of national prohibitions and restrictions. In addition, it has a role to manage EU customs, duties and levies as well as implementing controls at EU borders.

Customs vs Excise

Customs duties are applied at an EU level and are consistent across all Member States. No matter where you bring in goods into the EU, the exact same duties, levies and other regimes apply. There is no benefit from a Customs perspective in importing goods into Ireland as opposed to the UK. Excise is very different. Excise is levies by the Irish Government on a range of goods. Most notably these goods (sometime called the 'old reliables') comprise fuel, alcohol and tobacco. The difference in rates of excise across the member States of the EU can be significant. Along the EU's Eastern Border cigarettes, for example, are not taxed to the same degree as they are in Western Europe and there is a smuggling trend of such products from East to West. The Customs role in Ireland is to tackle those involved in attempting to smuggle excise goods from low tax areas to Ireland. This function cannot be carried out in isolation. All Member States whose jurisdictions are used in moving such contraband will be involved in the investigation of such criminal activity and the legal instruments to support such investigations are based in EU regulations. Such regulations have underpinned most of the successful investigations undertaken by member States' Customs Services. Any changes to such Regulations would have an impact on how we operate in these matters. For instance under the current legislative regimes there are provisions for sharing intelligence, exchanging of Officers between Member States' Customs Services, the ability to set up Joint investigation Teams and the provision of evidence to the authority of other Member States to mention but a few.

Customs officials must also ensure that any issues that disrupt customs processes are resolved in line with EU legislation and

that trade facilitation is maximised. In protecting the global supply chain the safety and security of the citizens of the EU is a priority. Such protection is not just from criminals in the normal sense but also from possible breach of standards associated with everything from foodstuffs to toys.

The Relationship with United Kingdom

The relationship between the UK and Ireland is quite unique.

- Pre 1923, the Irish Customs Service was part of Her Majesty's Customs and Excise, now Her Majesty's Revenue and Customs.
- the UK is the only country Ireland shares a land frontier with.
- the UK and Ireland share the Common Law System.
- the UK and Ireland share common threats across the land frontier from organised criminals abusing the customs and excise regimes.

Therefore, success in combatting transnational organised crime can only be on the basis of a collaborative approach where both Services act jointly and in cooperation with each other.

Membership of the EU - Some Anomalies

Membership of the European Union is not straightforward. For example, Spain, Italy, Germany, the UK, Greece, France, and Holland all have overseas territories, departments and autonomous communities with special status arrangements in respect of their relationship with EU. As a result, it is a very complex situation which is not in any way straightforward. The EU has tentacles that spread everywhere resulting in various types of relationships and arrangements with the EU.

EU and International trade Arrangements

- EEA (European Economic Area (EU plus ¾ EFTA))
- EU-Norway Agreement
- EU-Swiss Agreement
- Association agreements, Economic Area Agreement, Partnership and Cooperation Agreements, Stabilisation and Association agreements, Global Agreements, Interim Association Agreement, Customs Union, Interim Trade Development and Cooperation Agreement, Free Trade Agreement, Cooperation Agreement, Association Agreement.

The importance of these trade agreements cannot be understated. These agreements allow for the exchange of information and ensure that cooperation between law enforcement agencies and customs administrations is ongoing. Additionally, negotiating trade agreements is a long process which can take years. This raises concerns for customs administrations which cooperate with the United Kingdom.

Provisions underpinning cooperation

The following treaties, conventions and legislative provisions are those most generally used:

- Article K.3 of the Treaty on European Union
- Council of Europe Agreement on Illicit Traffic by Sea implementing Article 17 of United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.
- Council Framework Decision 2006/960/JHA (Swedish Initiative).
- Council Regulation 515/97 concerning Mutual Administrative Assistance in Customs and agricultural matters.

In 2017, to date, fifty percent of the requests for Mutual Assistance issued by the Irish Customs Service were to the UK. In the same period approximately 60% of the Mutual Assistance requests received by Irish Customs were from the UK. Such Mutual Assistance arrangements were all carried out under EU Regulations. Other provisions will have to be implemented if the same level of cooperation is to continue in Mutual Assistance matters as anything which will impact these regulations, such as not being applicable to the United Kingdom, will have a serious impact on the cooperative effort between the relevant customs services and law enforcement agencies.

Recognition of cooperation

Cooperation in Customs matters between the UK and Ireland can only be described as excellent. There is almost daily communication between both services. In addition to the traditional fora for meeting and jointly operating, under the Fresh Start Agreement all law enforcement agencies in Ireland and the UK work together to counter the activities of those using the border for criminal activity. This Task Force has been very successful. In 2016 the UK Government made an award to the Irish Revenue and Customs who as a result of jointly working with HMRC, closed off major leakages to the UK exchequer through excise fraud. In addition, at the PSNI annual awards ceremony Revenue Customs received an award for outstanding collaboration and cooperation in respect of cross border operations tackling organised crime

The Future

There is an onus on Customs Services to assure continued economic development by securing the international supply chain and by doing so to facilitate the legitimate trade. Key to the success of such an objective is the ongoing cooperation between the Customs Services of every nation especially those nations who are neighbours.

Discussion

The participants highlighted a number of points on which they wanted to have an in-depth discussion. The first question was regarding manpower issues and how BREXIT would impact on current manpower levels. A related matter that was raised focused on the age profile of those experienced customs officials who would be contending with the new arrangements post any BREXIT arrangements.

Another point of discussion involved assessing the impact that Brexit would have on the role of Customs Services. The impact of BREXIT on the relationships between law enforcement agencies in Ireland and the UK is not an isolated matter. BREXIT may have an impact on the relationship between the UK law enforcement agencies and all the Member States' Law Enforcement agencies so Ireland is not unique in having to address this matter.

6. UK Responses to Commercial Economic Crime in the City of London: Possible Lessons for a Post-Brexit City of Dublin

Presenter: Jack Nea BL
Chairperson: Ben Ryan
Rapporteur: Lauren O'Connell

Introduction

This talk began by acknowledging the "City of London" as a major financial centre in the EU, but is also the location

for many instances of "commercial economic crime".

Following Brexit, however, there is a real prospect that access to the European Market for commercial entities will be limited. Could London's loss be Dublin's gain?

Should Brexit result in the further development of Dublin as a financial centre, this may bring an increased risk of "commercial economic crime" to Dublin.

This talk considered three UK criminal justice responses to "commercial economic crime":

- The Serious Fraud Office;
- "Failure to Prevent" offences; and
- Deferred Prosecution Agreements

with a view to outlining possible lessons for a post-Brexit "City of Dublin".

"Commercial Economic Crime"

The speaker defined "commercial economic crime" as crimes such as fraud, bribery or corruption, which take place in a commercial context, and can result in economic harm to individuals and economies. Such crimes can be difficult to detect, investigate and prove, because they may:

- take place across different jurisdictions;
- take place across complex organisational structures;
- involve complex transactions; and
- involve technical contraventions of law.

The Serious Fraud Office (SFO)

Following a series of scandals in the "City of London" in the 1970/80s, the *Roskill Report (1986)* recommended the establishment of a new organisation to detect, investigate and prosecute serious fraud cases due to fears that existing authorities could not effectively respond to these cases, resulting in a reduced deterrent effect and harm to the UK economy.

As a result, the SFO was established. Its goal is to investigate and prosecute a "small number" of offences which are at the highest level of criminality. In it, investigators and prosecutors work together to ensure that complex investigations are carried out with expertise and resources, from the off, to safeguard public interest by protecting the UK's economy.

What problem is the SFO responding to?

The SFO responds to the difficulty that investigating and prosecuting "commercial economic crime" is:

- resource intensive; and
- requires expertise.

How the SFO is a response to this problem

<u>(a) Resources</u>

The SFO expends significant resources. Aside from its core budget, the SFO has access to "blockbuster" funding for resource intensive cases. Given the potential harm caused by "commercial economic offending", it can be argued the SFO increasing deterrence is money well spent.

<u>(b) Expertise</u>

The SFO provides for investigation and prosecution to be carried out by one authority, allowing for joined-up, expert, thinking throughout the criminal justice response to, potentially, extremely complex cases.

Could/does the status quo in Ireland address that problem?

There are few examples of prosecutions of serious economic crime in Ireland, though it is unwise to assume that they don't

occur. The talk considered recent examples and their mixed results, expense, and need for investigative and prosecutorial expertise.

Specifically noted was that the *DPP v Fitzpatrick* (2016) prosecution was mounted following years of investigation, became the longest and potentially most expensive trial in the State's history, but collapsed after 126 days due to flaws in the investigation process.

The speaker asked whether better results would have been achieved in these cases, or whether more prosecutions of these offences may have been brought, if Ireland had its own specialist investigator-prosecutor. Upcoming reforms to the Office of the Director of Corporate Enforcement (ODCE) were noted.

"Failure to Prevent" offences

The *Failure to Prevent* model of offence was introduced in the UK in the *(UK) Bribery Act 2010*. This model creates a strict liability offence. An organisation will be guilty if:

- a person "associated" with a commercial organisation,
- committed a prescribed offence,
- to benefit the organisation,
- unless it can prove that it had organised itself adequately/reasonably to prevent this offending.

This model was also used in the *(UK) Criminal Finances Act 2017,* and the UK Ministry for Justice is currently considering more general use of this model for economic offences.

What problem is this model problem responding to?

Prior to the *Bribery Act*, a prosecutor had to satisfy the *identification doctrine* in order to prove a corporation's guilt for bribery. This required the prosecutor to prove a member of an organisation's high-management satisfied the fault and conduct requirements of an offence.

This doctrine placed significant burden upon prosecutors, and attracted criticism for failing to recognise the realities of organisational operations. The effect of the *doctrine* is that only small organisations, whose high-management engage in criminal conduct rather than delegating that conduct to employees, can be held accountable. This results in larger organisations essentially having immunity.

This issue is called the *Paradox of Size.*

How does this model respond to this problem?

This model is not susceptible to the *paradox of size,* as wrongdoing doesn't need to be identified in a member of high-management.

Could/does the status quo in Ireland address that problem?

There is uncertainty regarding what legal test applies in prosecutions of corporations for subjective fault based offences in Ireland, including many offences which would be used to respond to "commercial economic offending", *e.g.* fraud offences.

The *Criminal Justice (Corruption) Bill 2012,* includes a Failure to Prevent type offence. Once the heads of the *Criminal Justice (Corruption) Bill 2017* are published, it will be interesting to see if this remains.

The *Criminal Justice (Offences Relating to Information Systems) Act 2017* includes a narrow form of Failure to Prevent offence (relating to hacking offences).

The speaker noted that, whether there will be an expanded use of this model in this jurisdiction is yet to be seen.

Deferred Prosecution Agreements (DPAs)

DPAs were introduced in the UK in 2013 to provide an alternative means for the prosecutors to respond to "commercial economic offending".

A DPA is an agreement between a prosecutor and a commercial entity alleged to have committed certain "commercial economic offences". The entity agrees to certain terms while its prosecution is suspended. If, during this suspension, the entity abides by these terms the prosecution will be discontinued. The entity won't receive a conviction.

DPAs seek to achieve desired consequences of a conviction by requiring:

- a public statement of the facts of offending;
- a financial penalty (similar in amount to a criminal fine); and
- required ongoing cooperation in criminal investigations.

DPAs also incentivise self-reporting and cooperation by, generally, requiring these as a pre-condition to entering a DPA.

DPAs are intended to allow for a flexible response to offending, and so other terms may also be agreed (such as restitution, disgorgement, and implementation of compliance procedures).

A DPA must be approved in public by the court, based upon whether it is:

- in the interests of justice; and
- fair, reasonable, and proportionate.

Where the commercial entity breaches the agreement the deferred prosecution may be resumed.

What problems are DPAs a response to?

A result of "commercial economic offending" being difficult to detect, investigate and prove is that their investigators, in many cases, cannot know of, or investigate offending without some combination of whistleblowing, self-reporting, cooperation, and expenditure of significant resources.

How DPAs respond to that problem

DPAs are intended to encourage commercial entities to self-report and cooperate by allowing them some beneficial treatment, while also achieving many of the consequences of conviction. Benefits include:

- avoiding a conviction and its collateral consequences;
- a reduced financial penalty; and
- avoiding the expense and negative publicity of a full investigation and prosecution.

UK DPAs seek to avoid the perception that commercial entities are "doing a deal" by requiring that the DPA's terms and approval, and the facts of offending are all published.

DPAs save investigation and prosecution resources, which can then be targeted at other cases.

Could/does the status quo in Ireland address that problem?

Ireland does not have a DPA scheme, but the Law Reform Commission is currently considering whether to recommend the introduction of one.

Conclusion
The speaker noted that the discussed measures were only a selection of steps which the UK justice system has developed to respond to "commercial economic offending".

It was noted that, should Brexit result in the further development of Dublin's financial centre, it would be foolish to think that "commercial economic offending" of the type seen in the "City of London" will not also threaten a "City of Dublin".

If such offending begins to further affect Ireland, we must have a discussion about whether we might wish to emulate our common law neighbours in some of the steps that they have taken.

Discussion
The discussion centred on the potential responses to "commercial economic offending" which Ireland might adopt, and debated topics including why a commercial entity might self-report their criminal conduct. The speaker suggested that the above responses, together, increase the likelihood of successful prosecution where wrongdoing is detected which, in turn, encourages self-reporting in order for commercial entities to access the comparative benefits of a DPA.

An attendee pointed out that, in the *DPP v Bowe, McAteer, Casey and Fitzpatrick* (2016), convictions were secured against Messrs Bowe and McAteer and upheld on conviction. Mr Casey was convicted, though there is one final issue for the Court on appeal. Mr Fitzpatrick was acquitted. It was suggested that this was the largest "commercial economic crime" investigation by the Gardaí, and the trial judge commented on the professionalism and thoroughness of the investigation.

It was also noted by an attendee that the reason why *the DPP v Fitzpatrick* (2016) was the longest trial in the state's history was because three months of the trial were spent in legal argument in relation to issues concerning the investigation.

The discussion included issues of procedural reform of the pre-trial process and rules of evidence in "commercial economic crime" prosecutions, with reference being made to reforms which have previously taken place in the UK following recommendations of the *Roskill Report.*

The Chair confirmed that a package of measures on Ireland's corporate, economic and regulatory framework was almost finalised and would cover many of the issues raised in the workshop.

7. The Asylum and Immigration Implications of Brexit

Presenter: Dr. Ciara Smyth, School of Law, NUI Galway
Chairperson: Jim Mitchell
Rapporteur: Tina Cronin

Dr. Ciara Smyth opened the presentation with a concise background on so-called 'third country national' immigration and asylum. To discuss the potential implications of Brexit in this area, Title V of the Treaty on the Functioning of the European Union (TFEU), Area of Freedom, Security & Justice, Chapter Two (Policies on border checks), asylum and immigration were explored. Chapter Two articles cover four areas which formed the focus of the presentation. These were:

- Schengen (Art 77)
- Control of irregular migration (Art 79)
- Facilitation of regular migration (Art 79)
- The Common European Asylum System (Art 78)

Schengen

Schengen is the combination of abolition of internal borders and 'flanking' measures for external EU borders to guarantee free movement within the Schengen area. To facilitate this, participating countries employ the below arrangements:

- Schengen Borders Code
- Visa Code
- Visa Regulations (Schengen 'Black' and 'White' lists which literally comes down to black or white)
- Visa Information System (VIS)
- Schengen Information System (SIS)
- European Border and Coast Guard Agency

Control of Irregular Migration

Secondary EU legislation governing the control of irregular migration includes:

- Returns Directive
- EU readmission agreements with third countries
- Directive defining and criminalising human smuggling
- Directive on preventing and combatting trafficking in human beings and protecting victims
- Directive on residence permits for victims of trafficking
- Employers' sanctions directive

Facilitation of Regular Migration

The EU needs immigrants (owing to declining and ageing population) and has sought to harmonise, to a very minimal degree, member state legislation on third country national entry and residence. There is not a single comprehensive directive but a sectoral approach, as outlined below. Third country nationals are supposed to be treated 'fairly' vis-à-vis EU citizens exercising free movement rights but on closer scrutiny the treatment is not equal.

- Regulation on uniform format for residence permits
- EU Blue Card directive
- Student's and researcher's directive
- Family reunification directive
- Long term residence directive
- Single permit directive
- Seasonal worker's directive
- Intra-corporate transferee's directive

The Common European Asylum System

Phase One:

- Dublin and Eurodac Regulation ('Dublin II')
- Reception Conditions Directive
- Asylum Procedures Directive
- Qualification Directive

Phase Two:

- Recast Dublin and Eurodac Regulations ('Dublin III')
- Recast Reception Conditions Directive
- Recast Asylum Procedures Directive
- Recast Qualification Directive
- EASO Regulation

Phase Three:

- Proposal for 2nd Recast Dublin and Eurodac Regulations ('Dublin IV')
- Proposal for 2nd Recast Reception Conditions Directive
- Proposal for Asylum Procedures Regulation
- Proposal for a Qualification Regulation
- Proposal for Regulation elevating EASO to an agency

Simplified scenario

A simplified scenario is imagined whereby Ireland is fully part of EU immigration and asylum law and Northern Ireland does not exist! Under this scenario, Brexit would have the following consequences:

- UK leaves EU and develops own immigration and asylum law
- Ireland stays in EU and continues to apply EU immigration and asylum law
- Ireland becomes the EU's Western external border which will cause 'flanking' measures along Ireland's border with the UK (NI)

Complicated (real) scenario

The situation is now complicated to accord with reality. There are two complications.

The first complication lies in the fact that neither Ireland nor the UK was ever fully part of the harmonised immigration and asylum zone. This is reflected in Protocols to the Lisbon Treaty, annexed to the TEU and TFEU:

- Protocol 19 on Schengen
- Protocol 21 on the AFSJ

As a result, Ireland and the UK can opt in (or not) to EU immigration and asylum measures. This has led to 'harmonisation à la carte' i.e. an extremely complicated patchwork of not entirely overlapping opt-ins! What does this mean for Ireland and the UK? It means that large areas of immigration and asylum are a matter of domestic law in these two jurisdictions.

The second complication relates to the Common Travel Area (CTA), an agreement between Ireland and the UK regarding free movement between the two jurisdictions. This is recognised in Protocol 20 annexed to TEU and TFEU on the right of UK and Ireland to maintain external border controls for as long as CTA is maintained. The Common Travel Area also has important peace-dividend/Belfast Agreement implications and militates against a 'hard' Northern Ireland border with the Republic. Consequently, the border and the CTA are important areas of negotiation between the UK, Ireland and EU.

Questions to be resolved?

Is it necessary to maintain the status quo? In other words, should we maintain greater alignment with UK rather than EU immigration and asylum policy? Do we retain our continued flexibility viz. EU immigration and asylum measures? The answer is complicated. The CTA mandates continued flexibility re Ireland's participation in Schengen because some Schengen measures would require a hard (external) border with Northern Ireland and abolition of (internal) border control between Ireland and mainland EU. But other immigration and asylum measures are different since many have no cross-border implications and some allow Member States to retain a high degree of sovereignty. Such measures would not necessarily be incompatible with the CTA or a 'soft' border.

In the alternative, ***Given Brexit, should Ireland be closer to Brighton or Berlin?*** In other words, is greater Ireland-EU harmonisation on immigration and asylum desirable? Again, it's complicated and a matter of perspective:

- State perspective ('sovereignty reflex')
- Human rights perspective
- EU integration perspective
- Economic, social & politico-cultural perspectives

Discussion

Participants were interested in understanding the ramifications of Brexit on the existing common standards

regarding asylum, particularly the Dublin regulation.

The UK is likely to want to remain bound by Dublin rules, which allocate responsibility for any given asylum claim to (generally) the first EU Member State which the asylum seeker enters. However, there is likely to be a legal challenge to transferring asylum seekers from Ireland (or any other EU Member State) to the UK if the UK is no longer bound by the other instruments of the Common European Asylum System, on safety grounds.

However, if there is no Dublin rules and no hard border, Ireland could become a 'back door' channel to the UK for asylum seekers. But this is more a problem for the UK than for Ireland.

Another question posed related to 'unaccompanied minors' in direct provision and whether a greater alignment with EU standards might improve their situation. Dr. Smyth explained that unaccompanied minors are no longer susceptible to direct provision and are relatively well looked after in a care context. However, accompanied children are not faring so well, with some children spending their entire childhoods in institutionalised living. If Ireland were to opt into the Reception Conditions Directive their situation would be improved somewhat.

The discussion highlighted a continual theme of Dr. Smyth's presentation - that is, in the case of Asylum and Immigration implications of Brexit 'there is no easy answer to difficult questions'.

8. Brexit, Bordering and the Free Movement of People

Presenter: Professor Cathal McCall, Queen's University Belfast
Chairperson: Tony O'Donovan
Rapporteur: Megan McGovern

Introduction
The complex issue of borders between the United Kingdom of Great Britain and Northern Ireland has come to prominence with the approaching date of Brexit. With the Irish border being the only land border that the UK shares with another European member state, the potential for conflict and the fear of re-occurring acts of the violent past come to mind.

Prime Minister Theresa May insisted that Britain will 'take back control' of its laws, a quote which proved central to inspiring the creation of Brexit. With state borders being the principal foci for retaining control, the issue as to the type of Border that will take precedence has arisen. It has been suggested that hard borders of the future may be increasingly reliant on technology. For instance, The Legatum Institute has proposed "the persistent surveillance of the border region" by drones after Brexit. However, experts believe that technology is not the solution. Taking into account the history of Northern Ireland's border security, it is clear that a difficult decision lies ahead.

Irish borders of the past
Images that come to mind of Northern Ireland's borders in the past are the memories of soldiers dressed in camouflage uniforms, armed with rifles. The 'Troubles' which was responsible for claiming more than 3,600 lives between the years of 1969 and 1996 serve as an important reminder that the past cannot be repeated and so the idea of a hard Irish

border after the implementation of Brexit seems like an absurd one.

The idea of bordering Britain first came to light in 1940. Following the fall of France to Germany that year, security concerns in Britain meant that travellers coming from Ireland had to carry passports or a certain amount of travel documents with them in order to successfully enter Britain. It was not until 1952 that a full return of freedom of movement in a common travel area was established once again.

Partial bordering of Britain became evident again in 1974 following the bombing of two pubs in Birmingham. Bombs exploded in two public houses in central Birmingham killing 21 people and injuring 182 others. With this came the Prevention of Terrorism Act 1974, which granted police in Britain the right to arrest, detain and bring people in for questioning if they were suspected of involvement in the preparation of an act of terrorism in Britain. The government was granted the power to deport people back to Ireland from Britain as well as prohibiting people from moving to Britain from the North. Following this was the devastation brought by the Belcoo-Blacklion Railway Bridge which was collapsed by the Royal Ulster Constabulary in 1976.

The idea of re-introducing a hard Irish border following the post 1998 era of minimal border security threat is certainly controversial. We must stop looking at problems and focus on potential locations for border control regimes.

Where could a Brexit border control regime be established?

Post-Brexit, the Republic of Ireland will continue to remain open to European citizens. The assumption that the Irish border will be the key element for asserting control is problematic. The reasons for this are

- The Irish border meanders for approximately 500km across the Island of Ireland
- The island of Ireland has approximately 200 crossing points
- Ireland has the densest cross-border road network in Europe
- Key arterial roads can cross the border more than once (for example the direct route from Cavan town to Dungannon crosses the border a minimum of five times)

Even at the height of the troubles in the 1970s and 1980s in Ireland, the border security regime remained partial. This was a result of the British government recognising that a continuous hard border would play into the hands of Irish Republican insurgents.

The future of borders

After the Brexit referendum, the Prime Minister, Theresa May, stated that 'nobody wants a return to the borders of the past'. If so, then what can we expect the borders of the future between the Republic of Ireland and the North to look like? The intervention of the Frontex European Border Guard Teams, which currently travel the EU's external frontier searching for migrants, could be a possibility. Unfortunately, the remit of Frontex doesn't run to the island of Ireland as a result of neither the State nor the UK being a member of the Schengen border regime.

Following the Brexit referendum in June 2016, it seemed that the UK government was cognisant of the risks involved with a hard control bordering of Ireland. If hard bordering were to be re-introduced, this could result in

- The re-introduction of customs checkpoints on cross-border arterial routes
- The closure of scores of secondary cross border roads and
- The establishment of a border security regime to assist in supporting infrastructure and vulnerable customs officials

What if Northern Ireland were to remain in the European Union Customs Union? It was suggested by the presenter of the workshop that a special non-tariff deal could be reached between a reinstated Northern Ireland Executive and the UK government on Northern Ireland's goods, capital and services which enter Britain. This alternative could be easier and less costly to establish and manage. It would also respect the majority of the Northern Irish who voted to remain in the European Union.

Conclusion

Britain is a de facto state and its borders are evidently fuzzy. The UK's government has shown disinterest in the border aspect in Brexit negotiations. For Britain's political class, it has been suggested that there isn't any express interest in Ireland and this extends to the media. Thus, the UK's borders as a principal for 'bringing back control' may retreat to Britain's quest for clear borders from those unwanted outsiders. Will technology play a key role? It is unclear what will happen and only time will tell.

Discussion

Participants recalled their memories of soldiers along the borders in the 1970s and 1980s. They expressed their views on how the border, which was once seen as symbolic, has been played down since the Belfast agreement.

It was suggested by participants that a border is of significant cultural importance and a key economic resource. Concerns were expressed about the potential re-introduction of a hard border. If Northern Ireland doesn't remain in the EU Customs Union, there's a possibility that Britain might not implement an alternative Customs Union resulting in opportunities for illegal activities to take place. Currently, there appears to be a lack of security checks on ferries coming in from the UK, and Brexit will result in increasingly stricter checks on the borders at the ports.

There was also a discussion on how the Common Travel Area has become like Schengen, which is a border security regime itself. It was acknowledged that the sharing of databases between Ireland and Britain is well advanced. It was also suggested that there is a security aspect to the common travel area which people do not recognise.

CONFERENCE ATTENDEES

NAME	ORGANISATION
HMA Robin Barnett,CMG	British Ambassador to Ireland
Judge Martina Baxter	
Thérèse Blanchet	Council Legal Service, Council of the European Union
Dr. Matt Bowden	Dublin Institute of Technology
Monica Boyle	Houses of the Oireachtas
Dr. Chloé Brière	Dublin City University
Ray Briscoe	Office of the DPP
Harriet Burgess	Courts Service
Maura Butler	ACJRD Chairperson
Hanna Byrne	Law Reform Commission
Laura Cooney	Department of Justice and Equality
Barbara Corcoran	Depaul Ireland
Asst. Comm. Eugene Corcoran	ACJRD Council
Clare Cresswell	PACE
Tina Cronin	ACJRD Volunteer
Supt. Alan Cunningham	An Garda Síochána
Supt. Gerry Curley	An Garda Síochána
Margaret Ann Cusack	University of Limerick
Dr. Yvonne Daly	ACJRD Council
Gemma Davies	The Northumbria Centre for Evidence and Criminal Justice Studies, University of Northumbria
Hugh Dockry	Chief State Solicitor's Office
Antoinette Doran	Department of Justice and Equality
Beth Duane	ACJRD Volunteer
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Colleen Gildernew	KOD Lyons Solicitors
Michael Gilligan	Office of the Revenue Commissioners
Ailish Glennon	The Probation Service
Brian Gormally	Northern Ireland Committee on the Administration of Justice
Helen Hall	Policing Authority
D/Garda Isobel Hannon	An Garda Síochána
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Dr. Susan Leahy	ACJRD Council
Marie-Claire Maney	Office of the Revenue Commissioners
Deirdre Manninger	ACJRD Council
Jimmy Martin	Department of Justice and Equality
Prof. Cathal McCall	Queen's University Belfast
Michelle McCarthy	ACJRD Volunteer
Niall McGlynn	Department of Justice and Equality
Megan McGovern	ACJRD Volunteer
Gerry McNally	The Probation Service and President of the Confederation of European Probation (CEP)
Oonagh McPhillips	Department of Justice and Equality
Jim Mitchell	ACJRD Council
Eithne Muldoon	Office of the DPP
Jack Nea BL	
Lauren O'Connell	ACJRD Volunteer
Ciara O'Connor	The Probation Service
Liz O'Donoghue	The Probation Service
Insp. Michael O'Donoghue	An Garda Síochána
David O'Donovan	
Tony O'Donovan	Irish Youth Justice Service
Geraldine O'Dwyer	The Probation Service
Paul O'Farrell	Department of Justice and Equality
Doncha O'Sullivan	Department of Justice and Equality
Richard Phillips	Tivoli Training Centre
Catherine Pierse	ACJRD Council
Robert Purcell	Law Society Criminal Law Committee
Hugh Quigley	The Wheel
Ursula Quill	Labour Party
Aoife Raftery	Office of the Revenue Commissioners
Paddy Richardson	Irish Association for the Social Integration of Offenders
Ben Ryan	ACJRD Council
Shirley Scott	Dublin Rape Crisis Centre
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