

POLICING IN A EUROPEAN CONTEXT

Maria O'Neill, BCL, LL.M., M.Ed. PhD,
Solicitor
Lecturer in Law
University of Abertay Dundee,
m.oneill@abertay.ac.uk

Summary: The European Union is currently constructing an area of law called Police and Judicial Co-operation in Criminal Matters (PJCCM). It is the result of a compromise between politics and the needs of the law enforcement communities. As a result it is flawed, but it does provide a framework for cross border crime investigation and enforcement. The law enforcement community in Scotland, together with its counterparts across the EU, needs to contribute to its further development, in order to ensure that current and future developments interact as seamlessly as possible with the existing Scottish legal and law enforcement framework.

INTRODUCTION

The European Community, set up in 1958 as a regional integration organisation, led to increasing mobility of goods, persons, services and capital across the borders of its member states. With this legitimate activity has come a corresponding increase in cross border illegal activity. Cross border crime, or its effects, are being encountered at every level of law enforcement. The developed cross border legal relationships which had evolved over 50 years in the commercial field were to be the foundation for the development of cross border co-operation in criminal law and its enforcement between the member states of the EC.

CURRENT ISSUES

The Maastricht Treaty 1992 created the European Union as a three pillar structure; the first pillar being the continuing EC, the second, the Common Foreign and Security Policy (CFSP), and the third pillar, the Justice and Home Affairs. The decision making, the relationship with its member states, interaction of the principal institutions, and the nature and dynamic of the law differs considerably between the three pillars. The Justice and Home Affairs pillar was renamed the Police and Judicial Co-operation in Criminal Matters (PJCCM) once the Maastricht Treaty was reformed by the Amsterdam Treaty in 1997. Informed by developments in international law at the UN and the Council of Europe (the Human Rights organization in Strasbourg), PJCCM has developed, amongst its now 27 member states, a more coherent and effective structure for itself, than exists in international law, in order to address the law enforcement and criminal justice community of the EU. EU initiatives with regard to policing, while primarily located in pillar III, PJCCM, can be found across all three pillars. For example, within pillar I, the more coherent EC law, with the supremacy of EC law over national law, and its usability in every court and tribunal within the member states, provides the legal basis for customs co-ordination, 'visas, asylum, immigration and other matters dealing with the free movement of persons' provisions, together with Frontex, the organisation co-coordinating the immigration services and border guards, operating in all of the EU member states except the UK, Ireland and Denmark. Anti-money laundering provisions have been successfully located in pillar I, EC, where they form part of the 'free movement of capital' provisions. Counter-terrorism provisions are located both in pillar II and III. Pillar II, CFSP, is where the military approach to terrorism is addressed by EU Joint Situation Centre (SitCen).

Within pillar II, PJCCM, Europol, the EU intelligence analysis and exchange agency for the variety of police forces which operate across the EU, is active in the law enforcement and non-military intelligence aspects of terrorism, as is the European Judicial Network (EJN) in Criminal Matters, which as its title suggests, assists the criminal judiciary in executing foreign court orders in criminal matters. Recognising the need for Europol, Eurojust and the EJN to interact effectively and frequently, both Europol and Eurojust are located at The Hague, with the EJN being placed in the same building as Eurojust.

Similarly, what is covered by the term 'policing', however, differs from one member state to the next. A policing responsibility in one member state, e.g. counter-terrorism, may belong to the security services in another. Equally the control of an investigation may be a policing operation for some, but may be vested in investigating magistrates in others. This would require Scottish police to interact not only with Europol, but also with Eurojust, which services the investigating and prosecuting magistrates of the EU.

The Schengen Convention 1990 started life as international law between some of the member states of the then EC. Schengen, (the body of law based on the Schengen Convention 1990) covers two distinct areas of law, one dealing with 'visas, asylum and immigration,' which neither the UK nor the Republic of Ireland are party to, and a body of policing provisions, which both countries, after some delay, have both since signed up to. The 'visas, asylum and immigration' provisions, to which Denmark also maintains an 'opt out' position, are now part of pillar I EC law, with the policing provisions now part of PJCCM law. Non-EU member states, Norway, Iceland and Switzerland have also implement parts of the PJCCM aspects of Schengen.

Best known of the policing relevant Schengen Provisions is the Schengen Information System (SIS) known in the UK as Sirene. Sirene UK enables UK police forces to conduct cross EU police enquiries and investigations, locate missing or absconding persons, recover stolen goods, and address the issue of cross-EU identity fraud. Schengen member states also benefit from the Schengen 'Hot pursuit' provisions, or the chasing of a criminal across a land border in a marked police car. This does not operate by or into either the UK or Republic of Ireland. Covert surveillance across borders also operates under Schengen, but not by or in the Republic of Ireland. PJCCM laws also enable Joint Investigation Teams (JITs) can be set up, either with or without Europol intervention, by the 'competent authorities' in member states. 'Competent authorities' could include investigating magistrates, police, security services, customs, or other specialised bodies operating in the area of law enforcement in a particular member state.

With the exception of Germany and Poland, who are encountering national constitutional problems with its provisions, the European Arrest Warrant (EAW) is currently in force. Both Germany and Poland are currently examining whether they need to change their national constitutions in order to facilitate the EAW's operation. This will be only the first of many legal tools to come into force in PJCCM. Already on the cards is the proposed European Evidence Warrant and mutual recognition of pre-trial supervision measures. It is expected that the full range of court orders operating in a domestic criminal jurisdiction will operate for transnational criminal investigations and prosecutions in due course, with police in one jurisdiction regularly investigating and preparing evidence for cases to be heard in another jurisdiction, taking the criminal law and evidence of that jurisdiction into account when detaining suspected criminals, taking witness statements, or seizing assets. Like the Schengen Convention 1990, the Treaty of Prüm 2005 has started out as an experiment in international law between 15 of the 27 member states of the EU, excluding the UK. It deals with *inter alia*, the exchange of DNA profiles, fingerprint evidence, and vehicle registration data. It is proposed to adopt the contents of this Treaty into the PJCCM legal framework, if agreement can be reached with the other EU member states.

PJCCM legislation is already in force dealing with organised crime, terrorism, drug trafficking and manufacture and trafficking in human beings, (which includes child pornography). This area of law has only existed since 1992, and in its present format since 1997. Increasing use of the PJCCM systems already in place will raise further areas for development, in order to increase their effectiveness, and to cover a broader range of crime. Practitioners from all legal jurisdictions, Scotland included, will have to make their input in order to contribute to the development of an effective legal and law enforcement structure within the EU.

SOURCES OF FURTHER INFORMATION

O'Neill M, 2008. A critical analysis of the EU legal provisions on Terrorism. *Terrorism and Political Violence* 20, 1-23. ISSN: 0954/6553 (in print).

Peers S. *EU Justice and Home Affairs Law*, 2nd ed., Oxford University Press, ISBN13: 9780199290550 ISBN10: 0199290555.

Europa Website – Activities – Justice, Freedom and Security, maintained by the European Commission.
<http://www.europa.eu.int>.