



THE UNIVERSITY of EDINBURGH  
Edinburgh Law School



## Scottish Universities Legal Network on Europe

---

### Criminal Justice

Written by  
Maria Fletcher, University of Glasgow  
Leandro Mancano, University of Edinburgh

Contact:  
Maria.fletcher@gla.ac.uk  
Leandro.mancano@ed.ac.uk

Before going into a detailed analysis of the possible impact of the United Kingdom (UK)'s exit from the European Union (EU) on criminal justice-related rights, this section provides a short summary of EU criminal law and the UK's relationship to it.

EU criminal and policing law - Articles 82-89 Treaty on the Functioning of the EU (TFEU) - broadly comprises:

- a) substantive criminal law (ie the definition of offences and level of penalties);
- b) mutual recognition in criminal matters. Mutual recognition in criminal matters implies that a judicial order with a cross-border element issued by a Member State (gathering evidence in another EU country, or asking another country to hand over a fugitive to face a trial or serve a sentence) is recognised and executed in another MS without further formality, except when grounds for refusal apply;
- c) harmonisation of criminal procedure;
- d) exchange of police information; and
- e) EU agencies (Eg Europol and Eurojust)

The UK does not participate fully in this policy field – indeed it has been highly selective about which measures it takes part in. Pursuant to various Protocols annexed to the EU Treaties it can opt out of (or into) any individual EU laws on criminal law or policing proposed *after* the entry into force of the Treaty of Lisbon. The UK also secured, via Protocol no. 36, the power to opt out of EU criminal laws which it had already agreed to *before* the entry into force of the Treaty of Lisbon. It could invoke this power as of 1 December 2014. The UK government used this to opt out of all but 35 of the EU criminal law instruments adopted before the Treaty of Lisbon.

Since the 1999 Tampere European Council, mutual recognition is the cornerstone of judicial cooperation in criminal matters within the EU. Mutual recognition is premised on mutual trust, which arises from the highly debated presumption in EU law that fundamental rights are fully respected throughout the EU. However, the application of mutual recognition in more recent times has been less 'automatic' with better protection of fundamental rights in mind (e.g. the judgment of the Court of Justice of the European Union (CJEU) C-404/15 *Aranyosi and Căldăraru*). Also, since the Lisbon Treaty, parallel measures to harmonise national legislation on criminal procedure have been adopted (Article 82(2)(b) TFEU). The UK has opted in to some, but not all of them and since the primary purpose of these measures is to create a set of individual rights for suspects and defendants which can be protected and enforced in EU law, the two measures applicable to the UK will be the primary focus of this paper, along side the so-called 'victims' rights Directive.' This paper also touches briefly on the EU data protection regime that applies to the processing of personal data by a UK competent authority which is carried out for the purposes of the prevention, investigation, detection or prosecution of a criminal offence or the execution of a criminal penalty.

This paper does not reflect on the Charter of Fundamental Rights of the EU ('the Charter') provisions relevant to criminal justice since protection of fundamental rights after 'Brexit' constitutes the specific focus of another commissioned briefing paper in this series. Suffice to say here that the implementation of EU instruments mentioned below must currently take place in compliance with the Charter.

### **Explain the key rights that are protected and are therefore at risk following the UK's exit from the EU?**

The key rights that are protected and are at risk following the UK's exit from the EU regard four main areas: 1. rights to interpretation and translation in criminal proceedings; 2. right to information in criminal proceedings; 3. rights of victims of crime; 4. data protection in police and judicial

cooperation within the EU. These rights are protected at EU level by the following instruments: Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU on the right to information in criminal proceedings; Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA; Framework Decision 2008/977/JHA on data protection in police and judicial criminal cooperation.

*Scotland* has implemented the directives by means of: 1. Scottish Statutory Instrument 2014 No 95 – The right to Interpretation and Translation in Criminal Proceedings (Scotland) Regulation 2014; 2. Scottish Statutory Instrument 2014 No 159 -The Right to Information (Suspects and Accused Persons) (Scotland) Regulations 2014; 3. amendments to Victims and Witnesses (Scotland) Act 2014 and Scottish Statutory Instrument 2015 No 444 – The Victims’ Rights (Scotland) Regulations 2015. *The UK* has implemented Framework Decision 2008/977/JHA via the 5. Criminal Justice and Data Protection (Protocol No.36) Regulations 2014 (No 3141).

In the following, we present the key features and rights protected by these instruments.

1. The Right to Interpretation and Translation in Criminal Proceedings (Scotland) Regulation 2014

These Regulations implement, in part, Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings. They do not implement Articles 2(7) and 3(6) of the Directive, which relate to a reserved matter (extradition) under Section B11 of Part II of Schedule 5 to the Scotland Act 1998 (c.46). The Regulations extend to Scotland only.

The Regulations confer the right to interpretation assistance in criminal proceedings to a person who: is in police custody; or attends voluntarily at a police station or other premises or place for police questioning; or is the subject of criminal proceedings before a court. The person concerned is entitled to the right to interpretation assistance where s/he does not speak or understand English.

Likewise, where a person is in police custody or subject of criminal proceedings before a court and does not understand English, or has a hearing or speech impediment, s/he has the right to a written translation of all essential documents. Alternatively, and as long as this does not prejudice the fairness of the police proceedings or criminal proceedings, an oral translation or oral summary of an essential document instead of a written translation can be provided. The right to translation regards only the relevant part(s) of an essential document. It is for the competent court to decide which kinds of documents are to be considered as essential (other than those specified in the Regulations).

On a case by case basis, the decision on the entitlement of the person concerned to interpretation or translation is made by an appropriate constable or a court. This decision, as well as the quality of the interpretation assistance or translation, shall be amenable to review on the part of an appropriate constable or a court.

2. The Right to Information (Suspects and Accused Persons) (Scotland) Regulations 2014

The Regulations implement, in part, Directive 2012/13/EU on the right to information in criminal proceedings. They do not implement Article 5 of the Directive, which relates to a reserved matter (extradition). They extend to Scotland only.

According to the Regulations, persons in police custody are provided with information about their rights, verbally or in writing. These include being informed of: the right of access to a lawyer; any entitlement to free legal advice and the conditions for obtaining such advice; the right to be

informed of the accusation; the right to interpretation and translation; the right to remain silent; the right to be provided without undue delay with the Letter of Rights.

The Letter of Rights has to contain information about the following rights as they apply under national law: the right of access to the materials of the case; the right to have consular authorities and one person informed; the right of access to urgent medical assistance; and the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority. Furthermore, the Letter of Rights shall contain basic information about any possibility, under national law, of challenging the lawfulness of the arrest; obtaining a review of the detention; or making a request for provisional release. The Letter shall be drafted in a language that suspects or accused persons understand. Where this is not possible, the persons concerned shall be informed of their rights orally in a language that they understand.

A person arrested or detained, or their lawyers, shall have access in due time to documents that are essential to challenging effectively the lawfulness of the arrest or detention. If access is refused on grounds of public interest, the decision shall be subject to judicial review.

The chief constable is to publish guidance describing the documents that are accessible, how requests must be handled and how a person can obtain a review of any failure or refusal to make such documents available.

### 3. The Victims' Rights (Scotland) Regulations 2015

The Regulations implement, in part, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime. The Regulations amend the Victims and Witnesses (Scotland) Act 2014 ("the 2014 Act") and they extend to Scotland only. Therefore, we refer to the enumeration of the 2014 Act, as updated by The Victims' Rights (Scotland) Regulations 2015.

The Regulations add a number of important provisions to the 2014 Act. The most important novelties are the following. New S.4 of the 2014 Act introduces the right to a review of a decision not to prosecute a case reported to public prosecutor (COPFS). A presumption of vulnerability applies to additional categories of victims (victims of sexual assault, domestic abuse, trafficking and stalking) and all witnesses under 18, which entitles them to certain special measures to allow them to give their best evidence at court (ss 10-22).

The EU directive requires significant rights to information and support for victims of crime. Accordingly, rights to obtain case specific information are strengthened and laid down in SS 3B and 3C of 2015 Regulations. According to S.3A, a victim may challenge before the competent authority an alleged breach of the victim's rights under the 2014 Act or an alleged breach of the authority's obligations under the Act. Section 3E(2) provides that a victim has a right to (be assisted to) understand and be understood. In this respect, the competent authority is to ensure that communications with a victim are as clear and easy to understand as possible, by also taking into account the personal characteristics of the victim. Pursuant to S.3F, victims have the right to interpretation for the purposes of questioning, interviewing, making a complaint about an offence or alleged offence and giving evidence.

Section 9A provides a number of safeguards for victims during criminal investigations (such as conducting interviews without delay after the complaint is made, keeping interviews and medical examinations to a minimum and only interviewing the victim where necessary). New S.9D obliges – with exceptions - a competent authority to take reasonable steps to enable a victim and the victim's family to avoid contact with the person suspected, accused or convicted of the offence in question,

whereas S. 9E obliges a competent authority to take reasonable steps to protect the privacy of victims.

#### 4. The Data Protection Regulations 2014

Part 4 of the Criminal Justice and Data Protection (Protocol No.36) Regulations 2014 (No 3141) implements in the UK, EU Framework Decision 2008/977/JHA on data protection in police and judicial criminal cooperation. The 2014 Regulations deal with the processing of personal data by a UK competent authority carried out for the purposes of the prevention, investigation, detection or prosecution of a criminal offence or the execution of a criminal penalty and in the course of activities within the scope of a relevant EU measure. They apply to personal data transmitted or made available between Member States, to an EU authority or information system established on the basis of Title VI of the Treaty on European Union (as it had effect before entry into force of Lisbon on 1 May 2009) or to a UK competent authority by an authority or information system established on the basis of Title VI of the Treaty on European Union (as it had effect prior to 1 May 2009).

According to S.30, personal data must be collected only for specified, explicit and legitimate purposes; processed lawfully and only for the purposes for which the data were collected; adequate, relevant and not excessive in relation to the purposes for which they were collected. Pursuant to S.31, a UK competent authority must rectify inaccurate personal data, and erase or make them anonymous where they are no longer required for the purposes for which they were lawfully collected or processed. Where a competent authority refuses to do so at request of the data subject, the latter must be informed of the decision within a reasonable period, as well as of the possibility to make a complaint to the Information Commissioner (IC). The IC informs the data subject of whether or not the competent authority acted properly. A UK competent authority must establish time limits for the periodic review of the need for continued storage of personal data and for its erasure, and ensure that those time limits are observed (S.32). Section 34 stipulates that the legitimate interests of the data subject must be protected, where s/he is affected by a decision based solely on automated processing of data intended to evaluate certain personal aspects relating to the data subject.

Under S.36, a UK competent authority transmitting or making available personal data to non-UK authority or certain UK authorities must notify the recipient of the time limits established for its retention. A data subject must be informed of the collection or processing of personal data by a UK competent authority in accordance with national law, unless those data have been transmitted or made available by a non-UK competent authority and the latter has not provided its consent yet (S.43). Where a UK authority refuses to provide information or restricts access to personal data, the data subject must be informed of: the decision, its factual or legal reasons on which the decision is based; his/her entitlement to appeal to the IC or to a court (S.44). Section 45 establishes the right to compensation for those individuals who have suffered damage and any distress caused by the contravention, on the part of a UK competent authority, of any of the requirements laid down in Part 4 of the Regulations. On the basis of S.47, a UK competent authority must protect personal data from accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access.

**For the purposes of considering how Scotland may continue to protect these rights following an exit from the EU and for exploration of further future devolution of powers in certain areas to Scotland, please explain whether the rights fall within areas devolved to Scotland or currently reserved areas.**

Schedule 5 to the 1998 Scotland Act provides a list of reserved matters. In relation to criminal justice, these reservations include ones relating to the following areas: (a) misuse of drugs; (b) firearms; and (c) road traffic offences. Where a matter is not reserved it is devolved – thus, although some significant areas of criminal law are reserved, most of this topic is devolved.

The instruments discussed above add important rights and principles to Scots law. As shown, this is case in respect of data protection and victims' rights, as well as of the right to translation and information in criminal proceedings. An example in this regard is given by the comparison between the Letter of Rights as drafted before and after the implementation in Scotland of the relevant EU directives, with the latter adding e.g. the right to a translation of at least the relevant parts of important paperwork of the case.<sup>1</sup>

However, the EU criminal procedure and victim's rights enshrined in the devolved instruments outlined above, can remain on the statute book and thus enforceable as Scots law after the UK leaves the EU. There is nothing to stop these instruments and the rights contained therein being maintained after Brexit (or indeed repealed or amended.) The devolved authorities might also decide (unilaterally or ideally in cooperation and agreement with Westminster authorities) to track and mirror future EU law developments on these matters. For instance, interpretations offered by the CJEU on the procedural rights directives could be regarded as authoritative and future legislative amendments could be mirrored by amending domestic statutes. Of course, unless agreed otherwise as part of negotiations on the future relationship between the EU and UK, EU law would no longer be an enforceable source of law in the domestic legal system after Brexit, and access to the EU law remedies would not be available.

Certain considerations are worth highlighting to policy-makers in the context of Brexit and future post-Brexit developments with a view to encouraging collaboration North and South of the border. There are currently instances where EU law-derived rights interface with both reserved and devolved criminal justice domains; i.e., such rights are implemented using devolved instruments but are raised in the context of proceedings that fall within matters reserved to Westminster, such as extradition and revenue and customs.

First, with reference to their scope of application, the Directives (1) on interpretation and translation, and (2) on information, apply in the context of criminal proceedings *and* European Arrest Warrant procedures. Framework Decision 2002/584/JHA on the European Arrest Warrant has been implemented by the UK, as an issue of reserved matter, via the Extradition Act 2003. Therefore, it is the Parliament of Westminster that is competent with regard to issues related to European Arrest Warrant procedures.

The second variable concerns the type of criminal offence of which the person is accused or by which a victim has been affected. We refer, for instance, to revenue and custom-related offences. The 2014 regulations mentioned above apply to constables of Police Scotland, but do not apply to those carrying out reserved functions. The functions of HM Revenue and Customs are reserved matters that remain within the competence of the Westminster Parliament, rather than the Scottish Parliament. People arrested by HMRC in Scotland fall outside the scope of the Scottish regulations. The UK government has issued a code of practice regarding HM Revenue and Customs

---

<sup>1</sup> See in this regard <http://www.gov.scot/Publications/2013/07/1305>

(HMRC) criminal justice working practices for suspects in Scotland only, concerning the right to information in criminal proceedings.<sup>2</sup>

These examples of competence overlap which create the need for operational cooperation north and south of the border to ensure the appropriate enforcement of rights will not (necessarily) disappear when the UK leaves the EU.

In relation to the *data-protection rights* discussed above the UK, in the interests of national security, may choose to negotiate access to EU’s various intelligence data-sharing regimes (eg., SIS II) and associate membership of EU agencies (eg., Europol). This would be on basis of an EU/UK treaty, which of course needs negotiation and approval, and would also open to CJEU challenge: (eg. See *CJEU Opinion 1/2015*). The EU would likely make access to such databases and agencies conditional upon acceptance by the UK of the data protection regime (and note that UK would likely be required to implement Directive 2016/680/EU which replaces Framework Decision 2008/977/JHA).

### The main EU and implementing (UK/Scotland) legal sources

| EU  | Domestic   |
|---|--|
| Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings   | Scottish Statutory Instrument 2014 No 95 – The right to Interpretation and Translation in Criminal Proceedings (Scotland) Regulation 2014 (DEVOLVED) |
| Directive 2012/13/EU on the right to information in criminal proceedings  | Scottish Statutory Instrument 2014 No 159 - The Right to Information (Suspects and Accused Persons) (Scotland) Regulations 2014 (DEVOLVED)           |
| Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. | Victims and Witnesses (Scotland) Act 2014<br>Scottish Statutory Instrument 2015 No 444 – The Victims’ Rights (Scotland) Regulations 2015. (DEVOLVED) |
| Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters                  | Criminal Justice and Data Protection (Protocol No.36) Regulations 2014 (No 3141)<br>(RESERVED)   |

<sup>2</sup> <https://www.gov.uk/government/publications/hmrc-eu-directives-code-of-practice-for-eu-directive-201213eu/hmrc-code-of-practice-for-eu-directive-201213eu-the-right-to-information-in-criminal-proceedings>