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**“EU cross – border policing provisions, the view from one of the Schengen opt out states”.**

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## 1. Introduction

At first sight the development of cross-border operational capabilities for policing are a welcome development within the “post-national” setting of the EU”.<sup>1</sup> Organised crime is no respecter of borders or of differing national legal jurisdictions. Attempts made by criminals to exploit the differences across the EU in combating crime must be addressed. The deeper however we delve into the issues which come with cross-border policing, the more complex the picture becomes. The very nature of “policing”, however, differs from one jurisdiction to another, with some of the policing role in one jurisdiction being allocated to non-police law enforcement officers in another. While the core policing role “is basically the same”, however “historically the role of the police force as part of society and its modes of action are quite varied”.<sup>2</sup> Acting as agents for their states, the police reflect the differences in “the cultures of government” in each of their countries, which “probably vary quite a lot.”<sup>3</sup> While domestic debates on “law and order are increasingly situated within a European context”,<sup>4</sup> the “plethora of policy actors involved within the (European) policing policy”<sup>5</sup> has constructed a complex web of policy and legal documents, building on political compromise which resulted in the PJCCM pillar of the EU. They do not form part of a coherent whole. In fact the “European constitution,” or legal framework can be seen more as a “vector, rather than as a point”,<sup>6</sup> given its constantly evolving status, and it is very much a framework “under construction.” Nevertheless the generally pragmatic approach of the EU’s policing professions has managed to make operable an unlikely legal framework.

The deep political concerns of EU governments in the policy area of PJCCM, which go to the core of state sovereignty, cannot be ignored. These concerns have resulted in academic and practitioner commentary on democratic accountability and issues of human rights, and concerns about state protection. At a practical level, the uneven implementation of the EU law enforcement provisions, in particular, due to the express “opt out” stance of certain EU member states, in particular, the United Kingdom, also raises concerns. Further “variable geometry”<sup>7</sup> is to be anticipated with respect to the forthcoming EU wide discussions on the Treaty of Prüm. Added to these difficulties in cross-border police enquiries and operations, the police role has been described as being “explicitly impartial owing to their express purpose of controlling adherence to jointly agreed norms”.<sup>8</sup> These jointly agreed norms, while to a limited extent will be directed by an evolving EU legal framework, as in the case of

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<sup>1</sup> Jo Shaw; Postnational Constitutionalism in the European Union, *Journal of European Public Policy* 6:4 Special Issue 1999: 579-97, at page 587.

<sup>2</sup> Juha Tapio Kääriäinen; Trust in the Police in 16 European Countries, A Multilevel Analysis, *European Journal of Criminology*, Vol. 4(4): 409-435, at page 410.

<sup>3</sup> *Ibid.*

<sup>4</sup> Stephen Cope and Peter Starie; The Europeanization of Law and Order: Editorial Introduction, *International Journal of the Sociology of Law* 1996, 24, 347-352, at page 351.

<sup>5</sup> *Ibid.* at page 350.

<sup>6</sup> *Op. cit.* footnote no. 1 at page 590.

<sup>7</sup> John Usher “Variable Geometry or Concentric Circles: Patterns for the European Union”; *I.C.L.Q.* 1997 46(2), 243-273.

<sup>8</sup> *Op. cit.* footnote no. 2, at page 413.

the EU Framework Decisions on Terrorism<sup>9</sup> or Drug Trafficking,<sup>10</sup> for the most part will be set internally within each EU member state, and must therefore differ, to a greater or lesser extent, from one EU member state to another.

In this complex area of relations between states, within the context of the inter-governmental rather than the traditional international level, one element of International Relations theory becomes useful, that of Constructivism. Developed by Onuf, it “is applicable not simply to the level of states, but to humans in any dimension of their social activity, international relations being merely one, albeit an extremely important one, among many”.<sup>11</sup> The “extended police family” both within the UK and across the EU, to include the “growing international community ...of... practitioners with a professional focus on transnational crime and its investigation”<sup>12</sup> can be so classified as “layers of mutually constructed relations”.<sup>13</sup> In particular the “professional pragmatism upon which this community is founded” is leading to the development of “a distinct political community and autonomous capacity, authority and allegiance,” with “institutions have been created precisely to facilitate cooperation.”<sup>14</sup> The pragmatic approach to the bridging of gaps in institutional frameworks and policing methodologies is required, not only within the EU, but also for police enquiries and operations incoming into the UK, where the control of policing is not centralised.

Also relevant to this debate, is the differing allocation of the criminal investigation role across the EU member states. Policing within the UK includes the leading of police investigations, with senior police officers fulfilling what would be recognised in some other EU member states as being the role of the investigating magistrate. UK police would additionally, have a direct interest in Eurojust, to the extent that Eurojust deals with criminal investigations.

## **2. The UK definition of “Policing”.**

In the context of the EU and its evolving legal framework, the term “policing” is problematic, as the EU definition includes both low and high policing. The high policing role,<sup>15</sup> traditionally defined as the protection of the state, more recently classified as the counter-terrorism role, has been allocated to intelligence services in some EU countries, and to the police in others. The leading of counter-terrorism

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<sup>9</sup> Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L 164, 22.6.2002, p. 3–7.

<sup>10</sup> Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ L 335, page 8.

<sup>11</sup> Vendulka Kubálková *The Twenty Years’ Catharsis: E.H.Carr and IR*, Chapter 2, Vendulka Kubálková, Nicholas Onuf, Paul Kowert, eds, *International Relations in a Constructed World*. M.E. Sharpe, New York, 1998, at page 52.

<sup>12</sup> Clive Harfied; SOCA: a paradigm shift in British Policing, *British Journal of Criminology*, 2006, 46(4):743-761, at page 757.

<sup>13</sup> Op. cit. footnote no. 11 at page 53.

<sup>14</sup> Op. cit. footnote no. 12, at page 757.

<sup>15</sup> Barry Vaughan and Shane Kilcommins: *Terrorism, Rights and the rule of Law; Negotiating Justice in Ireland*, Willan Publishing, 2008, at page 72 et seq.

investigations is largely allocated to the Security Service<sup>16</sup> and the Secret Intelligence Service<sup>17</sup> in the UK, both having a role in supporting the police services in cases of serious organised crime, with the police normally providing back up when arrests and detentions are required in counter-terrorism cases. The UK Police Working Group on Terrorism (PWGOT) were very active in contributing to the development of the EU's current counter-terrorism provisions.<sup>18</sup> Given the complex arrangements dealing with counter-terrorism operations within the UK, these will not be dealt with in this paper.

“Low” policing,<sup>19</sup> the focus of this paper, otherwise known as criminal policing, is the core function of all of the UK police forces and agencies. It is increasingly being affected by “the complex relationships that are emerging between state, supra-state and non-state entities”.<sup>20</sup> Even within the context of “low” policing, the definition of policing within the UK is problematic. The increasing privatisation of policing role within the UK has an effect on the first point of contact for incoming police enquiries and operations into the UK, the Serious Organised Crime Agency, (SOCA).<sup>21</sup> SOCA has been designated as a police force for the purposes of cross – EU cooperation, in the Schengen Police co-operation hand book.<sup>22</sup> However none of its staff are recognised as being police officers within the various UK legal jurisdictions, but as civilians with powers of investigation and arrest”.<sup>23</sup>

The control of “low” or criminal policing within the UK has been devolved, for the most part, to regional sub-national governance, to the Scottish Parliament, and to the Northern Ireland Assembly, the control of policing in the latter being coloured by the many years of civil unrest. In addition, within each of these jurisdictions, policing is split into a variety of local police forces, with different accountability structures and political masters. In Scotland the Scottish Crime and Drugs Enforcement Agency (SCDEA)<sup>24</sup> also operates. The approach to policing within these differing forces and agencies also varies greatly.

Traditionally the style of policing adopted in the UK has been community oriented policing, with an input from the local community in police boards, etc. While community policing continues to be maintained, other approaches to policing, to include problem-oriented policing, and Compstat, a “police managerial accountability mechanism”,<sup>25</sup> have been adopted over the years. More recently, intelligence led policing, as originally devised by Kent County Constabulary,<sup>26</sup> has come to the fore, backed up by the development and implementation of the National Intelligence Model (NIM). All of the previous models continue to exist, the UK “policing philosophy

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<sup>16</sup> S.1 of the Security Services Act 1989.

<sup>17</sup> S. 1 of the Intelligence Services Act 1994.

<sup>18</sup> John Benyon *et al*; Police co-operation in Europe: an investigation, Leicester Centre for the Study of Public Order, University of Leicester, 1993, at page 134.

<sup>19</sup> Op. cit. footnote no. 15, at page 72 et seq.

<sup>20</sup> Clifford Shearing: Policing our Future, Chapter 11 in Transformations of Policing; Alistair Henry and David J. Smith, The Edinburgh Centre for Law and Society, 2007, at page 266.

<sup>21</sup> Established pursuant to s.1 of the Serious Organised Crime and Police Act 2005.

<sup>22</sup> Op. cit. footnote no. 12, at page 756.

<sup>23</sup> Newburn, T.; The Future of Policing in Britain, Chapter 10 in Henry A. and Smith, David J: Transformations of Policing; The Edinburgh Centre for Law and Society, 2007, at page 233.

<sup>24</sup> Established pursuant to s.12 of the Public Order and Criminal Justice (Scotland) Act 2006.

<sup>25</sup> Jerry Ratcliffe; Intelligence-Led Policing, Willan, 2008, at page 76.

<sup>26</sup> J.W.E. Sheptycki; Issues in Transnational Policing, Routledge, 2000, at page 181.

[includes] a “continuum of provision” from neighbourhood policing through protective services to the defence of the nation against transnational organised crime”.<sup>27</sup>

As Hough<sup>28</sup> has observed in the context of UK “low” policing, the “institutions of the criminal justice system evolved in Victorian times into a shape that is still recognizable today”. The developments at an EU level in PJCCM will increasingly require a rethink within UK policing as to how best to interact with the evolving EU structures, in particular in light of the continuing partial Schengen opt outs. To a certain extent this rethink has started with the development of SOCA, and its SOCA Multilateral/ SOCA International case clearance house service to all UK law enforcement agencies. It is to be anticipated that as the volume of traffic through this office grows, and the experience of different types of police/ law enforcement practitioner develops in dealing with EU cross border policing, further developments to meet perceived need, will follow. This would be in line with the constructivist’s argument that “people and societies, agents and structures, construct, or constitute, each other”.<sup>29</sup> Just as constructivism’s “knowledgeable agents” use structures, so both the agents and the structures change, with these actors, originally embedded in national structures in practices, increasingly interacting with their counterparts in the other EU member states, so their perceived needs for structures to alter and change will develop.

### 3. The UK policing structure

SOCA is the lead organisation within the UK’s Europol delegation. Incoming police operations can be for a broader range of crimes<sup>30</sup> than those of direct interest to SOCA. As with many organisations which operate at an EU level, SOCA Multilateral/ SOCA International services are provided to those agencies or operations which are not within SOCA’s core area,<sup>31</sup> in the interest of having a coherent framework and a “one stop shop” facility for both incoming<sup>32</sup> and outgoing enquiries. This should

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<sup>27</sup> Clive Harfied; SOCA: a paradigm shift in British Policing, *British Journal of Criminology*, 2006, 46(4):743-761, at page 759, quoting from HMIC (2005) *Closing the Gap: A Review of the “fitness for Purpose” of the current Structure of Policing in England and Wales*, London.

<sup>28</sup> Mike Hough, *Policing London, 20 years on*, Chapter 8 Transformations of Policing; Alistair Henry and David J. Smith, *The Edinburgh Centre for Law and Society*, 2007, at page 208.

<sup>29</sup> Elisabeth Prúgl: *Feminist struggle as social construction*, chapter 6, page 123, in Vendulka Kubáľková, Nicholas Onuf, Paul Kowert, eds, *International Relations in a Constructed World*. M.E. Sharpe, New York, 1998, at page 128

<sup>30</sup> For example, crossing the border pursuant to a covert observation operation pursuant to Article 40 Schengen Convention 1990, which the UK has opted back into, has the following list of crimes: Assassination, murder, [Serious offence of a Sexual nature] (Council Decision 2003/725/JHA), arson, [counterfeiting and forgery of means of payment] (Council Decision 2003/725/JHA), armed robbery and receiving of stolen goods, extortion, kidnapping and hostage taking, traffic in human beings, illicit traffic in narcotic drugs and psychotropic substances, breach of the laws on arms and explosives, use of explosives, illicit carriage of toxic and dangerous waste, [- serious fraud; smuggling of aliens; money laundering; illicit trafficking in nuclear and radioactive substances;] (Council Decision 2003/725/JHA) participation in a criminal organisation (defined in Council Joint Action 98/733/JHA); and terrorist offences (defined in Council Framework Decision 2002/475/JHA)]. (Council Decision 2003/725/JHA).

<sup>31</sup> As set out in s.2 of the Serious Organised Crime and Police Act 2005.

<sup>32</sup> Pursuant to Article 2 of Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the

greatly facilitate a streamlined interface between the UK and its other EU member states, particularly in light of the complexity of the policing landscape within the UK.

SOCA's core functions are the "preventing and detecting of serious organised crime"<sup>33</sup> and the contribution to the "reduction of such crime in other ways and to the mitigation of its consequences".<sup>34</sup> While the first point of contact for other EU police officers will be SOCA, the incoming police enquiry or operation may need to develop contacts further within the UK, either in one or more of the regional forces, or within one of the devolved government jurisdictions, in order to deal with their direct counterpart in any specific policing operation. It is well recognised that knowledge is "considerably more intangible than data",<sup>35</sup> with data being something which can be provided for by the Europol information system or the Schengen Information System. Knowledge, however, "remains forever locked up inside the heads of detectives and analysts",<sup>36</sup> unless mechanisms can be put in place to overcome "organisational and cultural barriers to knowledge transfer",<sup>37</sup> something not always resolved by "a technological solution"<sup>38</sup> but rather requiring face to face contact, or at least force to force contact, not only within jurisdictions, but across jurisdictions, in order to effectively deal with a particular cross border crime problem. As stated by Ratcliffe, relying on Collier *et al*,<sup>39</sup> "technology needs to be integrated with working practices in order to reduce organisational reliance on informal methods of communication".<sup>40</sup>

The UK's many legal jurisdiction also includes the offshore UK islands<sup>41</sup> which are not members of the EU. The main legal jurisdictions are the combined legal jurisdiction of England & Wales, although the devolved Welsh assembly may increasingly have an impact on domestic policing policy over time, and the separate legal jurisdictions, with devolved parliaments, of Northern Ireland and Scotland. Criminal law and the Rules of Evidence in these two latter jurisdictions can differ quite considerably from each other and those of the main England & Wales jurisdiction, as can police structures, legal frameworks, and practices. Unlike all other police forces, SOCA, along with Security Service<sup>42</sup> and the Secret Intelligence Service,<sup>43</sup> has a UK wide remit, to include Jersey, Guernsey and the Isle of Man,<sup>44</sup> making it the ideal provider of the "one stop shop" facilities. SOCA has a direct relationship with each of the territorially defined police forces within each of the legal jurisdictions,<sup>45</sup> special police forces,<sup>46</sup> law enforcement agencies,<sup>47</sup> and with the

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Schengen *acquis*, OJ L 131, 01/06/2000 p. 43, with the (National Criminal Intelligence Service role now having been taken over by SOCA.

<sup>33</sup> S.2.1 a. of the Serious Organised Crime and Police Act 2005.

<sup>34</sup> S.2.1 b. of the Serious Organised Crime and Police Act 2005.

<sup>35</sup> Op. cit. footnote no. 25, at page 96.

<sup>36</sup> Ibid. at page 98.

<sup>37</sup> Ibid. at page 96.

<sup>38</sup> Ibid.

<sup>39</sup> Collier, P.M., Edwards, J.S. and Shaw, D, "Communicating knowledge about police performance", International Journal of Productivity and Performance Management, 53(5): 458 – 467, at page 466.

<sup>40</sup> Op. cit. footnote no. 25, at page 97.

<sup>41</sup> *Inter alia*, Jersey, Guernsey and the Isle of Man.

<sup>42</sup> S. 1.3 of the Security Services Act 1989.

<sup>43</sup> S.5.3 of the Intelligence Services Act 1994, as amended.

<sup>44</sup> S.3.3.b of the Serious Organised Crime and Police Act 2005.

<sup>45</sup> s.3.3 Serious Organised Crime and Police Act 2005 "The police forces within this subsection are –(a) police forces in the United Kingdom, and (b) the States of Jersey Police Force, and salaried police force of the Island of Guernsey and the Isle of Man Constabulary."

Serious Fraud Office,<sup>48</sup> which operates within England, Wales and Northern Ireland.<sup>49</sup> It also has a direct relationship with HM Customs & Excise,<sup>50</sup> and the recently created UK Borders Authority,<sup>51</sup> which also has a UK wide remit.<sup>52</sup> At the international level SOCA is empowered to furnish “such assistance as it considers appropriate in response to requests made by any government or other body exercising functions of a public nature in any country or territory outside the United Kingdom.”<sup>53</sup>

SOCA is an unusual construct. It is the successor not only to the National Criminal Intelligence Service,<sup>54</sup> but also the National Crime Squad, and also contains “elements of the security services, customs and immigration”.<sup>55</sup> Its staff, while comprising in large part of former police officers, also comprise staff formerly from customs, immigration and the intelligence services. SOCA staff have “a cocktail of powers at its disposal... alongside enhanced intelligence capability drawing directly upon the experience of the Security Service and others.”<sup>56</sup> The focus of SOCA, outwith its EU/ International role, is that of “a genuinely intelligence- led organisation,<sup>57</sup> with traditional boundaries “between the intelligence community and the law enforcement community”<sup>58</sup> being blurred. This development of, all be it, highly trained, civilians in policing, is part of “the changing landscape of policing” in the UK,<sup>59</sup> which involves an “increasing resort to private policing”.<sup>60</sup> This mix of staffing, and the tight focus on intelligence-led policing, is also reflected in a “paradigm shift” in focusing on harm reduction, with “intervention and prevention [having] and equal if not greater role than enforcement”.<sup>61</sup> These developments in the UK would also appear to be part of the post Treaty of Amsterdam EU PJCCM framework.<sup>62</sup>

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<sup>46</sup> s.3 (5) Serious Organised Crime and Police Act 2005 In this Chapter “special police force” means – (a) the Ministry of Defence Police, (b) the British Transport Police Force, (c.) the civil Nuclear Constabulary, or (d) the [Scottish Crime and Drug Enforcement Agency].

<sup>47</sup> Law enforcement agency are defined by s.3.4 of the Serious Organised Crime and Police Act 2005, as “(a) the Commissioners or any other government department, (b) the Scottish Administration, (c.) any other person who is charged with the duty of investigating offences or charging offenders, or (d) any other person who is engaged outside the United Kingdom in carrying out of activities similar to any carried on by SOCA or a police force.”

<sup>48</sup> S.2.3. a of the Serious Organised Crime and Police Act 2005.

<sup>49</sup> S1.1 of the Criminal Justice Act 1987.

<sup>50</sup> S.2.8 of the Serious Organised Crime and Police Act 2005.

<sup>51</sup> S. 48 of UK Borders Act 2007 created a Border and Immigration Inspectorate.

<sup>52</sup> Section 60 of the UK Borders Act 2007, but is subject to three exceptions for Scotland, sections 1 to 4, (immigration officer powers) s.25 (forfeiture of detained property) and s.31 (1) and (2) (people trafficking provisions).

<sup>53</sup> S.5.5 of the Serious Organised Crime and Police Act 2005, with the exception of requests that should be made pursuant to section 13 of the Crime (International Cooperation) Act 2003, (requests by overseas authorities to obtain evidence), (s.5.6a).

<sup>54</sup> S.1.3 of the Serious Organised Crime and Police Act 2005.

<sup>55</sup> Op. cit. footnote no. 23, at page 233.

<sup>56</sup> Op. cit. footnote no. 12, at page 755.

<sup>57</sup> Ibid. at page 746.

<sup>58</sup> Ibid. at page 746.

<sup>59</sup> Ibid., at page 755.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid. at page 759.

<sup>62</sup> Ibid.

In Scotland, SCDEA was established in 2006,<sup>63</sup> by the devolved Scottish Parliament, to whom most policing provisions were allocated, with, *inter alia*, counter-terrorism<sup>64</sup> and fire arms provisions<sup>65</sup> being retained UK competences.<sup>66</sup> As a result of the SCDEA, SOCA operational capability in Scotland is limited to “an offence which it suspects has been committed (or is being committed)”, with the agreement of the Lord Advocate.<sup>67</sup> The role of the Lord Advocate, together with that of the Solicitor - General for Scotland, is a hybrid role, providing the government of Scotland with legal advice, and being head, and deputy head, respectively, of the Scottish criminal prosecution service.<sup>68</sup> No such restrictions have been put on SOCA’s operational capability in Northern Ireland. Nevertheless, SOCA can provide support for any police force or agency, within the UK, on a voluntary basis,<sup>69</sup> thereby increasing the flexibility of SOCA’s operational capability north of the Scottish – English border. Scotland is also treated differently for SOCA directed arrangements, from that of the rest of the UK.<sup>70</sup> The SCDEA is operated by the Scottish Police Services Authority (SPSA)<sup>71</sup> with the function of “preventing and detecting serious organised crime”, and “contributing to the reduction of such crime in other ways and the mitigation of its consequences.” In addition SCDEA has been allocated the role of “gathering, storing and analysing information relevant to (i) the prevention, detection, investigation or prosecution of offences; or (ii) the reduction of crime in other ways or the mitigation of its consequences”.<sup>72</sup> This information can be disseminated throughout the UK, as deemed appropriate.<sup>73</sup> In addition, at an international level, SCDEA “may furnish such assistance as it considers appropriate in response to a request made by any government or other body carrying out functions of a public nature in any country or territory outwith the United Kingdom.”<sup>74</sup>

The UK in operating the National Intelligence Model (NIM) classifies intelligence levels as being local, level 1 where “local commanders are answerable to the police chief, and police chiefs to their [normally local] political masters.”<sup>75</sup> Level 2 deals with “factors that address a whole force or region”.<sup>76</sup> Level 3 is classified as “serious and organised crime” with a UK wide, or international scope.<sup>77</sup> While it would be expected that SOCA would be leading on Level 3 international operations, it is to be stressed that the EU legal framework for cross-border policing operation and co-

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<sup>63</sup> Pursuant to the Police, Public Order and Criminal Justice (Scotland) Act 2006.

<sup>64</sup> Section B8 of Schedule 5 of the Scotland Act 1998.

<sup>65</sup> Section B4 of Schedule 5 of the Scotland Act 1998.

<sup>66</sup> All powers were devolved to the Scottish Parliament, s. 28, except those which were expressly reserved to the UK Parliament, at Westminster, under s.30 of the Scotland Act 1998. Reserved matters are set out in Schedule 5 to the Scotland Act 1998.

<sup>67</sup> S.22 of the Serious Organised Crime and Police Act 2005.

<sup>68</sup> Robert M. White and Ian D. Willock, *The Scottish Legal System*, 4<sup>th</sup> ed, Tottel Publishing, 2007, at page 60.

<sup>69</sup> S.23 of the Serious Organised Crime and Police Act 2005.

<sup>70</sup> S.24 of the Serious Organised Crime and Police Act 2005, provides for directed arrangements generally with s.25 giving the SOCA directed provisions for Scotland.

<sup>71</sup> S.1.1 Police, Public Order and Criminal Justice (Scotland) Act 2006.

<sup>72</sup> S.2.2 of the Police, Public Order and Criminal Justice (Scotland) Act 2006.

<sup>73</sup> S.2.3 of the Police, Public Order and Criminal Justice (Scotland) Act 2006.

<sup>74</sup> S.17.3 of the Police, Public Order and Criminal Justice (Scotland) Act 2006, with the exception of requests that should be made pursuant to section 13 of the Crime (International Cooperation) Act 2003, (requests by overseas authorities to obtain evidence), (s.17.4).

<sup>75</sup> *Op. cit.* footnote no. 25, at page 102.

<sup>76</sup> *Ibid.* at page 101.

<sup>77</sup> *Ibid.*

operation is not just focused on what the UK would classify as level 3 crime, but could easily include level 2 or exceptionally, say in a one off murder case, a level 1 crime.

Despite the fact that the highly integrated Customs Union is located within the first pillar of the EU, and is dealt with by the more efficient and effective supranational EC law, “the role of customs officers is important”<sup>78</sup> in respect to cross border policing, particularly when dealing with trafficking type offences.<sup>79</sup> Customs, or as it is known in the UK, Her Majesty’s Customs and Excise (HMRC) remains outside the UK policing framework, being most recently provided for by the Commissioners for Revenue and Customs Act 2005, which provides powers of arrest,<sup>80</sup> for a limited number of offences.<sup>81</sup> In addition a customs officer has the power to seize cash believed to be the proceeds of crime,<sup>82</sup> as well as exercising usual customs functions. Customs functions would be highly centralised at an EC level, given the EC’s status as a customs union, to include *inter alia*, the control of drugs precursors.<sup>83</sup>

#### **4. The impact of the UK Schengen opt out.**

The UK opt out,<sup>84</sup> and subsequent partial opt back in again,<sup>85</sup> with regard to Schengen gives a particular perspective on the UK’s involvement in the EU’s cross border policing provisions. Effectively the UK has opted back into most of the Schengen policing provisions and Schengen Information System provisions, but remains out of the provisions in pillar I EC, covering “visas, asylum, immigration and other matters dealing with the free movement of 3<sup>rd</sup> country nationals”. An exception to the UK involvement in the cross border policing provisions is the non-involvement

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<sup>78</sup> Op. cit. footnote no. 18, at page 356.

<sup>79</sup> Communication from the Commission to the European Parliament and the Council: enhancing police and customs cooperation in the European Union [COM (2004) 376 final - Not published in the Official Journal].

<sup>80</sup> Section 33 of the Commissioners for Revenue and Customs Act 2005.

<sup>81</sup> Under sections 30 to 32 of the Commissioners for Revenue and Customs Act 2005, namely impersonation of a Commissioner, or an officer of revenue and customs, obstruction of a revenue and customs officer, or in the case of an assault on a revenue and customs officer.

<sup>82</sup> Schedule 2, Paragraph 13 and 13A of the Commissioners for Revenue and Customs Act 2005.

<sup>83</sup> Council Regulation (EC) No. 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors, OJ L 22/1, 26.1.2005, and Regulation (EC) No 273/2004 of the European Parliament and of the Council 1<sup>st</sup> February 2004, OJ L 47/1, 18/2/2004, on drug precursors (within the EU).

<sup>84</sup> The Schengen *acquis* was integrated into the EU legal framework pursuant to a protocol attached to the Amsterdam Treaty 1997, the Protocol Integrating the Schengen Acquis into the Framework of the European Union. The opt out positions of the UK and Ireland, and together covered in the following two protocols also attached to the Amsterdam Treaty 1997; the Protocol on the Application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and Ireland and the Protocol on the Position of the United Kingdom and Ireland.

<sup>85</sup> Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*, OJ L 131, 01/06/2000 p. 43, and the Council Decision 2004/926/EC of 22 December 2004 on the putting into effect of parts of the Schengen *acquis* by the United Kingdom of Great Britain and Northern Ireland, OJ L 395, 31/12/2004 p. 70.

by the UK in the hot pursuit provisions.<sup>86</sup> This may be explained by the Republic of Ireland's approach to their opt back into Schengen.<sup>87</sup> The Schengen hot pursuit provisions were only for crossing land borders. As the UK's only land border is with Ireland, which only permits foreign officers to operate within its territory if they are formally posted there, then there would be no point in the UK engaging with the Schengen hot pursuit provisions unless and until Ireland changes its view on foreign police officers operating within its territory. Section 56 of the Police (Northern Ireland) Act 2000 does provide that the Police Service of Northern Ireland (PSNI) will "implement any arrangements made in pursuant of an agreement" between the UK and Irish governments dealing with cross border police co-operation at a bi-lateral level on the island of Ireland.

The UK is operating the cross border surveillance provisions,<sup>88</sup> providing incoming operations having to be formally notified to, what at the time of the opt back in, was the National Criminal Intelligence Service,<sup>89</sup> but is now, as discussed above, SOCA. Where competent ministries have to be contacted "without prejudice to the option to use diplomatic channel", for the purposes of extradition requests,<sup>90</sup> the Home Office has been nominated as the "competent Ministry" for England, Wales and Northern Ireland, with the Scottish Executive being nominated for Scotland.<sup>91</sup> Officers authorised to cross borders for the purpose of cross border surveillance<sup>92</sup> are "officers from police forces in the United Kingdom and officers of Her Majesty's Customs and Excise", which would include a SOCA "police officer".<sup>93</sup> Interestingly, the non- EC/EU territory of Gibraltar, with the consent of the Spanish authorities, has been included in many of the Schengen provisions by the UK.<sup>94</sup> Another UK variation to the cross-border EU policing provisions is the UK declaration attached to Article 20 of the EU Convention on Mutual Assistance in Criminal Matters 2000, which deals with the "interception of telecommunications without the technical assistance of another member state". The UK has stated that in the UK these provisions will apply for both police and HM Customs & Excise warrants, but also to Security Service warrants, issued "in support of an investigation presenting the characteristics"<sup>95</sup> of a "criminal investigation... following the commission of a

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<sup>86</sup> Article 41 Schengen.

<sup>87</sup> Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*, OJ L 64, 07/03/2002 p. 20.

<sup>88</sup> Article 40 Schengen.

<sup>89</sup> Article 2.2 of Council Decision 2000/365/EC, of 29<sup>th</sup> May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*, OJ L 131/43.

<sup>90</sup> Article 65 Schengen.

<sup>91</sup> Article 3 of Council Decision 2000/365/EC.

<sup>92</sup> Article 2.1 of Council Decision 2000/365/EC.

<sup>93</sup> S. 83 of the Crime (International Co-operation) Act 2003, which inserted a new S.76A into the Regulation of Investigatory Powers Act 2000, s.76A (11) now providing that a "United Kingdom officer" means – (a) a member of a police force; (b) a member of the National Criminal Intelligence Service (now SOCA), (c) a member of the National Crime Squad (now SOCA) or of the Scottish Crime Squad (within the meaning of the regulation of Investigatory Powers (Scotland) act 2000, (now SCDEA); (d) a customs officer, with intrusive surveillance being authorised by s.32 of the Investigatory Powers Act 2000, which, *inter alia*, refers expressly to SOCA.

<sup>94</sup> See for further details documents attached to Council Decision 2004/926/EC, of the 22<sup>nd</sup> September 2004 on the putting into effect of parts of the Schengen *acquis* by the United Kingdom of Great Britain and Northern Ireland, OJ L 395/70.

<sup>95</sup> UK Declaration Attached to Article 20 of the EU Convention on Mutual Assistance in Criminal Matters 2000.

specific criminal offence, including attempts in so far as they are criminalised under national law, in order to identify and arrest, charge, prosecute or deliver judgment on those responsible”.<sup>96</sup> Despite the devolution of policing to the Scottish Executive, provisions dealing with the UK’s external co-operation in active policing are enshrined in the Crime (International Co-operation) Act 2003, as the Scottish Executive,<sup>97</sup> agreed that give the mix of devolved and reserved powers about to be enacted, that the provisions should be all in one piece of legislation, in order to ensure that “no gaps and loopholes are left” in the legal framework.

A somewhat more problematic situation arising from the UK’s ongoing partial Schengen opt out, is the non involvement with the rest of the EC’s visas, asylum, and immigration issues, and the non-membership by the UK of Frontex.<sup>98</sup> This has lead, *inter alia*, to confusion at the ECJ level, with the UK bringing two cases against the Council,<sup>99</sup> with various member states of the EU backing both sides of the argument. Case 137/05 *United Kingdom v. Council* focused on the UK’s efforts to join the EC’s rules on security features and biometrics in passports and travel documents.<sup>100</sup> The Council’s view was that this piece of supranational EC law did not apply to the UK as it built on pre-existing Schengen *acquis*, of which the UK did not take part. Presumably the UK could voluntarily change its own rules to match those of its fellow EC member states, without requiring its laws on this point to be governed from Brussels. More seriously however, was the point in question in Case C-77/05 *United Kingdom v. Council*, when the UK was prevented from joining Frontex, on the same basis. Given that the UK, along with Ireland and Denmark, wish to continue to maintain their independence in setting out their rules on visas, asylum and immigration into their territories, pursuant to their various Schengen opt out provisions, the interest of the UK in joining Frontex, an intelligence led frontier organisation,<sup>101</sup> would be to access Frontex’s intelligence products, in order to better protect the UK. This issue of access by the UK to Frontex’s intelligence products may well have been fully addressed, all be it following a complicated legal document trail, by Council Decision 2008/633/JHA.<sup>102</sup> This Council Decision deals with the “prevention, detection and investigation of terrorist offences and of other serious criminal offences”, and while it builds on the Schengen *acquis*, which the UK is not part of, on the basis of the Pillar III legal provisions, which does fully involve the UK,<sup>103</sup> “information contained in the VIS<sup>104</sup> can be provided to the United Kingdom

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<sup>96</sup> Article 20.1 of the EU Convention on Mutual Assistance in Criminal Matters 2000.

<sup>97</sup> In November 2002.

<sup>98</sup> Which was set up pursuant to Council Regulation 2007/2004, establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25/11/2004 p. 1

<sup>99</sup> Case C-77/05 *United Kingdom v. Council*, [2007] ECR I-11459, and Case- 137/05 *United Kingdom v. Council*, [2007] ECR I-11593.

<sup>100</sup> As provided for in Council Regulation (EC) No 2252/2004, of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States OJ 2004 L 385, p. 0001.

<sup>101</sup> From the Frontex web site, <http://www.frontex.europa.eu/>.

<sup>102</sup> Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, OJ L 218, 13/08/2008 p. 12

<sup>103</sup> Specifically Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, OJ L 386, 18.12.2006, p.89.

and Ireland by the competent authorities of the Member States whose designated authorities have access to the VIS pursuant to this Decision.”<sup>105</sup> Equally UK and Irish national visa register data can be “provided to the competent law enforcement authorities of the other Member States”. Direct access from the UK and Irish central authorities to the VIS remains a problem however, due to the countries current level of participation in the Schengen *acquis*. Reference is made to Council Framework Decision 2006/960/JHA,<sup>106</sup> to which all EU member states, together with Norway, Iceland<sup>107</sup> and Switzerland,<sup>108</sup> are party. This provides for information and intelligence exchange by law enforcement authorities<sup>109</sup> for criminal investigations and criminal intelligence operations,<sup>110</sup> with national security matters expressly excluded.<sup>111</sup> Reflecting the fact that only less onerous obligations can be placed on the non- EU parties to this agreement, there is no additional obligation to store information for the purpose of onward transmission to other member states,<sup>112</sup> or obligations to obtain further information or intelligence,<sup>113</sup> both issues which are dealt with elsewhere in the EU legal framework. Information can, *inter alia*, be transmitted directly, or of interest to the UK in the context of its Frontex dilemma, through “any existing channels for international law enforcement cooperation,<sup>114</sup> and can be exchanged with both Europol and Eurojust.<sup>115</sup>

The UK has been permitted by other EU member states, to opt into a number of provisions building on the Schengen *acquis* in the first pillar, which has been explained by AG Trstejak in Case C-77/05 *United Kingdom v. Council* as a result of a distinction between “Schengen – integral measures” and “Schengen – related measures,”<sup>116</sup> using the logic that Article 5 of the Schengen Protocol, which provides a unilateral declaration of intent, by either the UK or the Republic of Ireland, “cannot exist autonomously,”<sup>117</sup> but requires the observance of the procedure as set out in Article 4, which requires the consent of the Schengen member states. The AG goes on to say that “application of the procedure under Article 5 of the Schengen Protocol without the application of Article 4 ... is possible only in the case of a measure building on that *acquis* which can be applied autonomously”.<sup>118</sup> Of concern, on this point, is the reference to academic commentators in the English language taking a divergent view to academic commentators in other EU languages.<sup>119</sup>

Given the formal non-involvement of the UK in pillar I Schengen developments, and its problems with joining Frontex, it is interesting to note that the

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<sup>104</sup> Visa Information System.

<sup>105</sup> Paragraph 15 of the preamble to Council Decision 2008/633/JHA.

<sup>106</sup> Op. cit. footnote no. 103.

<sup>107</sup> Paragraph 13 of the preamble to Council Framework Decision 2006/960/JHA.

<sup>108</sup> Paragraph 14 of the preamble to Council Framework Decision 2006/960/JHA.

<sup>109</sup> Article 3.1 of Council Framework Decision 2006/960/JHA.

<sup>110</sup> Article 2 of Council Framework Decision 2006/960/JHA.

<sup>111</sup> Article 2A of Council Framework Decision 2006/960/JHA.

<sup>112</sup> Article 1.3 of Council Framework Decision 2006/960/JHA.

<sup>113</sup> Article 1.5 of Council Framework Decision 2006/960/JHA.

<sup>114</sup> Article 6.1 of Council Framework Decision 2006/960/JHA.

<sup>115</sup> Article 6.2 of Council Framework Decision 2006/960/JHA.

<sup>116</sup> Case C-77/05 *United Kingdom v. Council*, [2007] ECR I-11459, at paragraph 84 of the AG ‘s opinion.

<sup>117</sup> *Ibid.* at paragraph 103 of the AG’s opinion.

<sup>118</sup> *Ibid.* at paragraph 107 of the AG’s opinion.

<sup>119</sup> *Ibid.* at paragraph 104 of the AG’s opinion.

UK has managed to become involved in some of the developments in this area, whether or not they can be formally classified as “Schengen – integral measures” or “Schengen – related measures”, as classified by AG Trstejak. Co-operation by Frontex with the UK and Ireland had always been envisaged, as set out in Article 12 of Council Regulation 2007/2004.<sup>120</sup> In addition Article 2.2. of the regulation provides that “without prejudice to the competencies of the agency, Member States [of Frontex] may continue cooperation at an operational level with other Member States and/or third countries at external borders<sup>121</sup> where such cooperation complements the action of the Agency”. The Frontex regulation is designed with the intention of applying to the borders of Gibraltar, however is suspended, pursuant to Article 12.3 “until the date on which an agreement is reached on the scope of the measures concerning the crossing by persons of the external borders of the Member States”. While the Schengen Border Code is now in force,<sup>122</sup> it is unclear from the EU legislation whether the provisions dealing with Gibraltar with regard to Frontex are still suspended. In addition Article 20, covering the powers of the Management Board of Frontex deals with the procedures to be followed “should Ireland and/or the United Kingdom request to participate in the Agency’s activities”, with both countries being “invited to attend the meetings of the Management Board.”<sup>123</sup>

Having managed to successfully opt back into some Pillar I Schengen activities, the UK is fully involved in using a uniform format for residence permits for third country nationals.<sup>124</sup> It is also fully involved in the immigration liaison officers network,<sup>125</sup> the secure web-based Information and Coordination Network for Member States’ Migration Management Services, to the extent that the UK is investigating the organisation of illegal immigration,<sup>126</sup> illegal immigrant smuggling being a Pillar III crime, as opposed to the illegal immigration itself, which is a Pillar I offence. The UK is also fully participating in the legal obligations of carriers to communicate passenger data,<sup>127</sup> and the organisation of joint flights to return illegal immigrants to their home countries.

## 5. Conclusion.

The complexities which arise from the UK’s policing structures, and its current Schengen status, as evidenced by the ECJ case law, are not just academic issues. They cause considerable confusion for law enforcement personnel who are required to use

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<sup>120</sup> Council Regulation 2007/2004, OJ L 349, 25/11/2004 p. 1.

<sup>121</sup> It is unclear whether these “external borders” are those of “Schengen land”, i.e. the members of Frontex, or of the EU.

<sup>122</sup> Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13/04/2006 p. 1

<sup>123</sup> Article 23.4 of Council Regulation 2007/2004.

<sup>124</sup> Council Regulation (EC) No 380/2008 of 18 April 2008 amending Regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third-country nationals, OJ L 115, 29/04/2008 p. 1.

<sup>125</sup> Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network, OJ L 64, 02/03/2004 p. 1.

<sup>126</sup> Council Decision 2005/267/EC establishing a secure web-based Information and Coordination Network for Member States’ Migration Management Services, OJ L 83, 01/04/2005 p. 48.

<sup>127</sup> Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, OJ L 261, 06/08/2004 p. 24.

these frameworks, often in the course of urgent police operations, without the luxury of a team of lawyers versed in this area. The time that can be allocated to the proper consideration of these issues in academic debate, or in the preparation of a case for trial, are not available to an investigating police officer pursuing an organised crime gang, on a 24/7 basis. Constructivism argues that law “is persuasive when it is perceived as legitimate by most actors.”<sup>128</sup> It must also be useable for the context for which it is designed. As law enforcement organisations across the EU interact with the current legal framework, the “plural cultural influences”<sup>129</sup> of the forces, coming from a variety of nationalities and policing backgrounds within those countries, will have an impact on the interaction of the UK with the wider EU policing community. Frameworks initially designed for organised crime or drug trafficking operations will have to be adopted for use for specialists in terrorism, murder, forgery, or serious offences of a sexual nature.<sup>130</sup> The “interactional view of law”<sup>131</sup> is very much to the fore. Just as these structure evolve, together with their supporting legal framework, so the users of the structures will also shift their perceptions of self, with the interactions of the participants in the networks affecting and developing “expectations about appropriate behaviour”<sup>132</sup> in cross border policing operations, which will be very much “rooted in deeds of human urgency”.<sup>133</sup> It will be a challenge for EU and national policy makers and lawyers to keep up with the perceived needs and requirement for development within the EU law enforcement community.

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<sup>128</sup> Jutta Brunnée and Stephen J. Toope; *International Law and Constructivism: elements of an Interactional Theory of International Law*, (2000-2001) 39 *Columbia Journal of Transnational Law* 19, at page 70.

<sup>129</sup> *Ibid.* at page 65.

<sup>130</sup> Since the enactment of Council Decision 2003/725/JHA, of 2 October 2003 amending the provisions of Article 40(1) and (7) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders, OJ L 260, 11/10/2003 p. 37

<sup>131</sup> *Op. cit* footnote no. 128, at page 65.

<sup>132</sup> *Ibid.* at page 21.

<sup>133</sup> Craig Simon; *Internet Governance Goes Global*, Chapter 7 at page 147, in Vendulka Kubáľková, Nicholas Onuf, Paul Kowert, eds, *International Relations in a Constructed World*. M.E. Sharpe, New York, 1998, at page 155/156.

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