

Criminal Justice and Police Cooperation between the EU and the UK after Brexit

Towards a principled and trust-based partnership



Report of a CEPS and QMUL Task Force

Chairs: Peter Hustinx
Michael Kennedy

Rapporteurs: Sergio Carrera
Valsamis Mitsilegas
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August 2018

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**Centre for European Policy Studies (CEPS)
Brussels**

The Centre for European Policy Studies (CEPS) is an independent think tank based in Brussels, whose mission is to produce sound analytical research leading to constructive solutions to the challenges facing Europe today. This report is based on discussions in the Task Force jointly set up by CEPS and the School of Law at Queen Mary University of London (QMUL) on the Future of EU, UK and US Cooperation in Criminal Justice and Police Cooperation. The Task Force met four times between February and May 2018.

Task Force members engaged in debates during the meetings and submitted comments on earlier drafts of this report. Its contents reflect the general tone and direction of the discussion, but its findings do not necessarily represent a full common position among Task Force members or the views of any individual participant (unless explicitly mentioned in this report). A full list of members, participants and invited speakers appears in the appendix.

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Where the oral evidence of witnesses before the UK Parliament is quoted and referred to as “uncorrected”, this means that neither Members of the Parliamentary Committee nor witnesses have had the opportunity to correct the record. The report was finalised on 29 June 2018. Minor amendments were made in July and early August 2018 to update the text in light of new documents and judgments.

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Contents

| | |
|---|-----|
| Preface..... | i |
| Executive Summary | iii |
| Introduction..... | 1 |
| Part I. EU Constitutional Framework for UK Participation in the AFSJ before and after Brexit | |
| 1 Current Position of the UK in the AFSJ..... | 6 |
| 1.1 Approach to the EU’s post-Lisbon criminal justice system..... | 6 |
| 1.2 Effects of selective participation in the AFSJ..... | 9 |
| 1.3 Contributions to the development of EU criminal law and police cooperation..... | 12 |
| 2 Brexit and the AFSJ: Ongoing negotiations and cross-cutting issues | 15 |
| 2.1 The Withdrawal Agreement | 16 |
| 2.2 EU and UK stances on a post-Brexit security partnership..... | 20 |
| 2.2.1 EU law benchmarks for post-Brexit criminal justice and police cooperation..... | 26 |
| 2.2.2 Dispute resolution and role of the Court of Justice in security and justice matters..... | 29 |
| 2.3 The exchange of data for law enforcement and criminal justice purposes..... | 33 |
| 2.3.1 Scope of the adequacy test: Assessing UK national security and data protection legislation | 36 |
| 2.3.2 Ways towards adequacy and viable alternatives..... | 43 |

Part II. UK–EU Cooperation in Criminal Justice and Police Matters after Brexit

| | | |
|-------|--|-----|
| 3 | UK Participation in EU Mutual Recognition Instruments and Future Options | 48 |
| 3.1 | Negotiating positions on instruments of mutual recognition | 49 |
| 3.2 | European Arrest Warrant | 50 |
| 3.2.1 | Extradition after Brexit: Common issues and concerns | 57 |
| 3.2.2 | Options for extradition after Brexit | 62 |
| 3.3 | European Investigation Order | 77 |
| 3.3.1 | Options for judicial cooperation in criminal matters after Brexit | 81 |
| 3.4 | Mutual recognition of freezing and confiscation orders | 86 |
| 4 | EU Agencies and Bodies | 91 |
| 4.1 | Europol and Eurojust | 91 |
| 4.2 | Europol and Eurojust’s agreements and relationships with third countries | 97 |
| 4.2.1 | Joint investigation teams and alternative legal bases | 107 |
| 4.3 | The European Public Prosecutor’s Office | 109 |
| 5 | EU Databases and Information-sharing Tools | 116 |
| 5.1 | SIS II, ECRIS and Prüm: State of play | 117 |
| 5.1.1 | Challenges after Brexit | 122 |
| 5.2 | Exchange of passenger name record data | 128 |
| 5.2.1 | Challenges for a future EU–UK PNR agreement | 131 |
| 5.3 | Enhancing mutual trust after Brexit: The importance (and risks) of ‘soft’ cooperation measures | 135 |

Part III. Key Findings and Ways Forward

| | | |
|-----|--|-----|
| 6 | Options for the Future | 141 |
| 6.1 | The transition period | 142 |
| 6.2 | An EU-UK security and justice partnership: A new treaty and sectoral agreements | 143 |
| 6.3 | Judicial cooperation in criminal matters: Extradition, mutual legal assistance, and seizure and confiscation | 145 |
| 6.4 | Data exchange for law enforcement purposes | 149 |
| 6.5 | Access to EU databases and information-sharing mechanisms..... | 152 |
| 6.6 | EU JHA agencies and bodies and the importance of ‘soft’ cooperation measures | 153 |
| 6.7 | Role of the Court of Justice in the future EU-UK security and justice partnership | 156 |
| | References | 158 |
| | Appendix. Task Force Members and Invited Speakers | 168 |

List of Figures

| | | |
|-----------|--|----|
| Figure 1. | Brexit timeline..... | 16 |
| Figure 2. | The withdrawal Agreement and beyond: Options and consequences in the field of security | 18 |

List of Tables

| | | |
|----------|--|-----|
| Table 1. | EAWs exchanged between and executed in the EU and the UK ... | 55 |
| Table 2. | Declarations pertaining to the EU-Norway and Iceland Agreement on the surrender procedure as of 10 April 2018..... | 68 |
| Table 3. | Number of JITs supported by Eurojust, top 10 countries..... | 97 |
| Table 4. | Statistics on SIS II (eu-LISA), top 8 countries | 118 |
| Table 5. | Statistics on the most active users of ECRIS, top 5 countries..... | 120 |
| Table 6. | European Arrest Warrant and its alternatives | 148 |

ABBREVIATIONS

| | |
|-----------|---|
| AFSJ | Area of freedom, security and justice |
| CJEU | Court of Justice of the European Union |
| CLOUD Act | Clarifying Lawful Use of Overseas Data Act |
| CPS | Crown Prosecution Service |
| DRIPA | Data Retention and Investigatory Act |
| EAW | European Arrest Warrant |
| ECHR | European Convention on Human Rights |
| ECJ | European Court of Justice |
| ECRIS | European Criminal Records Information System |
| ECRIS-TCN | European Criminal Records Information System for Third-Country Nationals |
| ECtHR | European Court of Human Rights |
| EDP | European delegated prosecutor |
| EDPS | European Data Protection Supervisor |
| EIO | European Investigation Order |
| EIS | Europol Information System |
| EPPO | European Public Prosecutor's Office |
| ETIAS | European Travel Information and Authorisation System |
| eu-LISA | European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice |
| Eurodac | European Asylum Dactyloscopy Database |
| Eurojust | EU Judicial Cooperation Unit |

| | |
|--------------|--|
| Europol | EU Agency for Law Enforcement Cooperation |
| EWHC (Admin) | England & Wales High Court (Administrative Court) |
| GDPR | General Data Protection Regulation |
| IPA | Investigatory Powers Act |
| JHA | Justice and home affairs |
| JIT | Joint investigation team |
| MI5 | Military Intelligence, Section 5 - UK (internal) Security Service |
| MI6 | Military Intelligence, Section 6 - UK (external) Secret Intelligence Service |
| MLA | Mutual legal assistance |
| MLAT | Mutual legal assistance treaty |
| PFA | Protection of Freedom Act |
| PIU | Passenger information unit |
| PNR | Passenger name record |
| SIS II | Second-generation Schengen Information System |
| TEU | Treaty on the European Union |
| TFEU | Treaty on the Functioning of the European Union |
| UNCAC | United Nations Convention against Corruption |
| UNTOC | United Nations Convention against Transnational Organized Crime |
| VIS | Visa Information System |

PREFACE

The exit of the UK from the EU is planned to take place on 29 March 2019. The UK's withdrawal from the bloc poses a number of questions and challenges for the future EU-UK relationship in the field of criminal justice and police cooperation.

The Centre for European Policy Studies (CEPS) in Brussels and the School of Law at Queen Mary University of London (QMUL) set up a Task Force to examine the key issues, main options and alternative models for EU-UK cooperation on issues related to security and justice after Brexit. The CEPS/QMUL Task Force provided a closed-door platform for debate that enabled a selected group of academics, experts, practitioners, policy-makers and private sector representatives to scrutinise how the UK's participation in EU criminal justice and police cooperation instruments may evolve in different post-Brexit scenarios.

The rapporteurs would like to express their gratitude to Peter Hustinx, former European Data Protection Supervisor (EDPS), and Michael Kennedy, former President of the College of Eurojust, for their active and supportive role and inputs as chairs of the Task Force. They would also like to thank all the Task Force members and participants for their cooperation and invaluable contributions during the process leading to the completion of this report.

The report draws on the debates that took place – under the Chatham House rule – in four meetings:

- Lunchtime meeting, held at QMUL on 2 February 2018;
- Task Force meeting on “EU-UK criminal justice cooperation and access to evidence across the Atlantic: Current challenges and possible options after Brexit”, which took place at CEPS in Brussels on 21 February 2018;

- Task Force meeting on “EU-UK cooperation in the fight against crime and terrorism: Available instruments and ways forward after Brexit”, held at CEPS in Brussels on 4 April 2018; and
- Final Task Force meeting, which was organised at QMUL on 16 May 2018. Before this final meeting, a preliminary version of the report was circulated among the members of the Task Force, who provided extremely useful comments and observations.

The full list of the Task Force members, participants and speakers invited to these meetings appears in the appendix.

The rapporteurs would like to thank the experts and officials who kindly agreed to be interviewed in the context of this research. In all, 13 interviews were conducted with representatives of EU institutions and agencies (Eurojust, Europol, eu-LISA and the European Commission), senior or retired UK officials working for the National Crime Agency, the Crown Prosecution Service and the Serious Fraud Office, as well as leading UK lawyers and barristers specialised in criminal law (especially in extradition and mutual legal assistance). All of the interviewees agreed to be quoted as part of this research in exchange for being granted anonymity.

The report was finalised at the end of June 2018. Minor amendments were made in July and early August to update the text in light of new documents and judgments.

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EXECUTIVE SUMMARY

The EU and the UK have a mutual interest in maintaining strong cooperation in the fields of security (police) and criminal justice. However, as of Brexit day, scheduled for 29 March 2019, the UK will become a third country vis-à-vis the EU. To ensure strong criminal justice and police cooperation after Brexit, the EU and the UK need to develop a legal framework that meets the reciprocal demands of maintaining an effective relationship to fight cross-border crime, which at the same time is principled (value-based) and compliant with rule of law and fundamental rights standards.

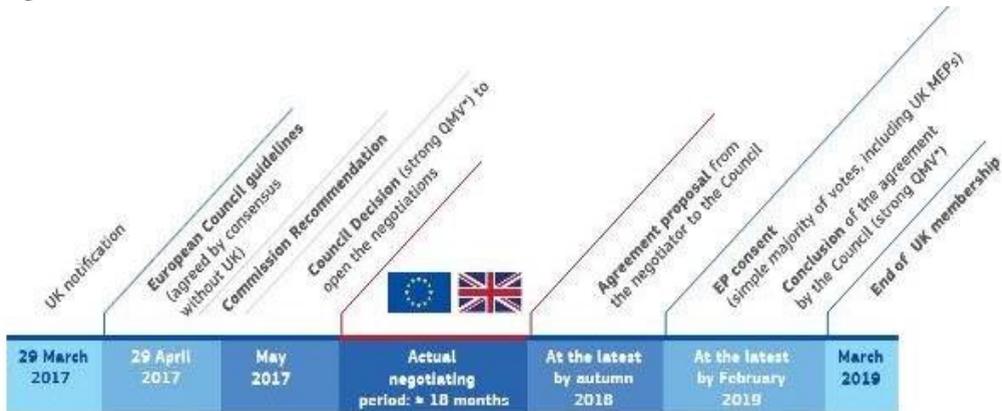
Respect for the benchmarks set forth in EU primary law and in the European Convention on Human Rights (ECHR) represents an essential precondition to maintain trust and sustain EU-UK cooperation after Brexit. Any departure of the parties from these principles would lead to the freezing and potential termination of any future EU-UK security and justice treaty post-Brexit.

EU-UK criminal justice and police cooperation after Brexit

The extent to which EU law will apply to the UK as of Brexit day and until the end of the so-called transition or implementation period depends on the Withdrawal Agreement, the conclusion of which is essential to avoid a 'cliff-edge' situation where the UK exits EU instruments and bodies of judicial and police cooperation without any transition provisions. The transition period, which would run from Brexit day until the end of 2020, would also allow the parties more time to work on the shape and content of their post-withdrawal arrangements.

If an agreement is not found by the autumn of 2018 at the latest, the parties could decide to extend the period available to negotiate and conclude the Withdrawal Agreement. To this end, Article 50(3) of the Treaty on European Union requires unanimity in the European Council and the agreement of the UK (Figure ES1).

Figure ES1. Brexit timeline



Note: QMV = qualified majority voting; EP = European Parliament.

* Strong QMV: 72% of the 27 Member States, i.e. 20 Member States representing 65% of the EU-27 population.

Source: European Commission (https://ec.europa.eu/ireland/file/brexit-timeline-webjpg_en).

The shift in the UK's status from EU Member State to third country raises the question of how to develop and sustain – after the end of the transition period – a new EU-UK partnership on security and criminal justice. Regardless of the legal framework that will regulate future EU-UK relations, the negotiation and conclusion of any international agreement between the UK and the EU will be subject to the rules on the EU's external action in the field of criminal justice and police cooperation.

The UK Government is seeking to create a new model of cooperation with the EU encompassing practical operational cooperation (i.e. joint investigation teams (JITs) and mutual recognition instruments), EU agencies (namely Europol and Eurojust) and data-driven law enforcement. Under EU law, cooperation on security and criminal justice is governed by different principles and subject to a different set of rules.

The EU needs to take into account these specificities when engaging in post-Brexit cooperation with the UK, regardless of the political willingness of the parties to develop comprehensive and far-reaching relationships in these areas. There is no precedent for an agreement between the EU and third non-Schengen countries in the area of freedom, security and justice (AFSJ) that would match the UK's requests for a 'security treaty'. While negotiations should strive to establish a partnership that may allow judicial and police cooperation to continue as smoothly as possible, any future EU-UK cooperation will depend on the extent to which the UK is found to comply with key EU law standards.

EU law benchmarks for criminal justice and police cooperation after Brexit

The fields of criminal justice and police cooperation are radically different from other EU policy areas. Measures adopted in the frame of the AFSJ impinge on fundamental rights and freedoms of individuals, and they encroach upon punitive powers at the heart of Member States' sovereignty. EU action in the domains of judicial and police cooperation in criminal matters is based on fundamental rights, as enshrined in the EU Charter and as interpreted by the Court of Justice of the European Union (CJEU).

Respect of these legal standards represents the essential condition for any future partnership on judicial and police cooperation between the EU and the UK. To ensure trust, cooperation on these matters should be conditional upon the UK's continued participation in the ECHR. The European Commission has stressed that future cooperation could be terminated if the UK departs from the ECHR. Any post-Brexit agreement between the EU and UK on criminal justice and police matters should include a freezing mechanism providing for the possibility for either of the parties to suspend cooperation in cases where human rights violations are ascertained.

After Brexit, a paradoxical situation is likely to emerge: if the UK wishes to have close cooperation with the EU on security and criminal justice, it would have to accept more EU law than it presently does as an EU Member State. The UK's willingness to continue to reap the security benefits of EU cooperation may be contingent on the UK complying with the EU *acquis*, including the *acquis* on the protection of fundamental rights, part of which it is currently at liberty to disregard under its opt-outs. This *acquis* covers EU suspects and victims' rights in criminal proceedings as well as

data protection and privacy standards. The legality of post-Lisbon legislation on defence rights is inextricably linked with the effective operation of mutual recognition in criminal matters, including the Framework Decision on the European Arrest Warrant (EAW). Yet, in the Brexit negotiations, little attention has been paid so far to the panoply of EU instruments concerning guarantees and safeguards in criminal proceedings.

Instruments of mutual recognition: Status quo and alternative options

The UK's proposal to sustain cooperation on the basis of existing EU measures does not chime with the EU's position, according to which third countries do not benefit from any privileged access to EU instruments.

Participation in EU mutual recognition instruments (e.g. the EAW and the European Investigation Order) builds on some underpinning principles – mutual trust at the forefront – that apply only to EU Member States. Mutual trust is based on the presumption that each Member State ensures a high level of protection of fundamental rights and rule of law standards, including an independent judiciary upholding effective judicial protection of individuals. The recent CJEU ruling in *Aranyosi and Căldăraru* clarified that 'mutual trust' does not mean 'blind trust': human rights compliance must be queried and ascertained on the ground, and on the basis of concrete evidence. So far, no third countries have joined EU mutual recognition instruments.

At the same time, reverting to extra-EU instruments – such as the Council of Europe or United Nations conventions – to frame EU-UK judicial cooperation in criminal matters after Brexit would be inefficient. Defendants are likely to raise more claims in extradition proceedings after Brexit. Nevertheless, and despite the expected impact on the length of the procedures, this might enhance the protection of the rights of suspects involved in extradition proceedings.

Among the arrangements on extradition, the Agreement between the EU and Iceland and Norway on the surrender procedure between the latter and the EU ('EU-Norway and Iceland Agreement on surrender') could be a model to follow, as it would keep EU-UK extradition proceedings judicialised. Most of the rules that have sped up the surrender procedure in the EU feature in this agreement as well, yet their application is optional. Outside the EU framework, Member States are on average inclined to introduce a number of rules and exceptions that have been waived in the

EAW Framework Decision, notably the bar on the extradition of own nationals. Unlike Norway and Iceland, however, the UK does not participate in the Schengen *acquis* on the free circulation of people. Even though participation in the Schengen *acquis* may not represent a legal prerequisite for cooperation on extradition under the EU–Norway and Iceland Agreement on surrender, the issue is extremely relevant at the political level and the Commission attaches great importance to it.

To maintain smooth cooperation in the field of mutual legal assistance (MLA), the parties may explore the feasibility of a new MLA agreement, which should go beyond the existing arrangements between the EU and third countries. Confiscation and seizure of assets should also be addressed in future EU–UK arrangements. The current alternatives – to be found in MLA treaties – do not provide for rules and procedures that are comparable with existing EU instruments in terms of speed and ease of cooperation

If the UK concludes an extradition agreement with the EU, the EU Charter of Fundamental Rights will apply to the extradition proceedings with the UK because of that same agreement. Among other provisions, Article 19 of the Charter – which prohibits extradition to a state where there is a serious risk that the extradited person would be subjected to torture or other inhuman or degrading treatment or punishment – will apply to the extradition requests that the UK sends to EU countries. In the absence of an agreement, the Charter will apply provided that the case before the national judicial authorities falls within the scope of EU law, e.g. because the person whose extradition is sought has exercised his or her right to freely move within the EU.

Data protection and the exchange of data for law enforcement and criminal justice purposes

In *Schrems*, the CJEU set out some principles to follow when third countries' standards on data protection are assessed: third countries should ensure a level of protection of fundamental rights that is "essentially equivalent" to that guaranteed by EU law read in light of the Charter.

The procedure, based on an adequacy decision, would establish a comprehensive framework of cooperation for EU–UK data exchange after Brexit. The Commission has called for a 'guillotine clause' for the future EU–UK partnership in the field of security and justice, if the adequacy decision is withdrawn or declared invalid by the CJEU.

Although the UK is in the process of implementing the EU data protection package, this would not necessarily be sufficient to obtain a straightforward adequacy decision. The Commission will have to periodically scrutinise UK law, and its application, even in fields that are currently out of the reach of EU law, such as national security. UK international commitments and some pieces of UK legislation, such as the Investigatory Powers Act 2016, may be stumbling blocks for finding that the UK ensures a level of protection of fundamental rights that is essentially equivalent to that guaranteed by EU law.

In addition to the adequacy decision, personal data can also be exchanged when appropriate safeguards with regard to the protection of personal data are provided for in a legally binding instrument. These appropriate safeguards may be given in sectoral agreements, such as a UK–Europol agreement. This piecemeal approach, however, may prolong the negotiations.

Post-Brexit access to EU databases

The UK's participation in EU databases could not be maintained after Brexit. ECRIS (the European Criminal Records Information System) is an information-exchange system to which only EU countries have access, whereas SIS II (the second-generation Schengen Information System) is a Schengen-related measure. There may be some leeway to accommodate the UK's participation in the Prüm framework, as the latter is not linked to the Schengen *acquis*.

Despite the UK having pushed for the adoption of EU Directive 2016/681 on the use of passenger name record (PNR) data for law enforcement purposes, it could not be part of this instrument as a third country. Should the UK wish to access PNR data concerning intra-EU flights, it could conclude a PNR agreement with the EU, which would have to abide by the data protection standards that the CJEU set out in its Opinion 1/15.

Until recently, Brexit talks between the EU and the UK have not addressed interoperability. As a Member State, the UK decided to opt into the proposed EU interoperability legislation in May 2018. That notwithstanding, the country has also agreed that by the end of the transition period it “shall cease to be entitled to access any network, any information system, and any database established on the basis of Union law” (Article 7 of the draft Withdrawal Agreement).

The main problem with regard to the UK joining the interoperability legislation is that the latter may run counter to the principle of purpose limitation. By opting into the Commission's new interoperability proposals, the UK would not only be able to gain access to large troves of sensitive data (including, inter alia, EU citizens' biometrics) during the transition period, but it might also be in a position to copy and retain them once it becomes a third country, i.e. after the completion of its withdrawal from the bloc. This scenario would pose profound legal and fundamental rights challenges under EU law.

UK participation in EU agencies after Brexit

The UK will need ad hoc agreements to continue to exchange personal data with Europol and Eurojust. This approach might keep a relationship with Eurojust that could be partially similar to the current one. The UK may post liaison prosecutors at Eurojust and may continue to participate in JITs financed by the agency, yet it is likely to lose its leading role in the field. The Second Protocol to the 1959 Convention on Mutual Legal Assistance in Criminal Matters could represent the legal basis for JITs with EU Member States. The impact of Brexit on the UK's future relationship with Europol is likely to be more visible. There is no precedent of granting a third country direct access to Europol's databases or allowing it to lead Europol's operational projects. The position of Denmark is not comparable with the status that the UK will have after Brexit.

It will be mostly in the interest of the EU to push for the recognition of the European Public Prosecutor's Office (EPPO) as a competent authority in extradition and MLA proceedings with the UK. It will be also in the interest of the UK to keep a strong relationship with the EPPO, as the latter may be in possession of information or evidence that UK authorities will need to access.

The EU and the UK could deepen forms of 'soft' cooperation (e.g. the secondment of UK officials in EU Member States, and vice versa), which can enhance trust on the ground among judicial authorities, along the lines of what currently happens within the European Judicial Network or similar fora. Still, the exchange of information in an informal way between EU and UK authorities, outside clear legal frameworks, may be problematic from a rule of law perspective and does not bode well for the protection of fundamental rights. The EU and UK's commitment to shared values after

Brexit will be crucial to guarantee smooth cooperation between the parties. This should include a firm commitment to continued participation in the ECHR and compliance with the European Court of Human Rights' standards. At present, the EU's approach to the future EU-UK partnership on security and criminal justice includes a guillotine clause, if the UK leaves the Convention or is condemned by the Strasbourg Court for non-execution of a judgment in the area concerned.

Role of the Court of Justice in the future EU-UK security and justice partnership

In existing EU agreements with third countries concerning judicial cooperation and in the Schengen Association Agreements, the CJEU does not have the power to settle disputes among the parties on the application of the Treaties. Yet, independent of the future outlook for EU-UK arrangements, the case law of the CJEU will have a relevant impact on the UK after Brexit, as the Court will remain competent to ultimately and authoritatively interpret EU law. Within the EU, national authorities will continue to have the power or the obligation to ask the CJEU to rule on the compatibility of the UK's requests for criminal justice and police cooperation with EU law. The CJEU may also prevent the entry into force of any EU-UK agreements.

INTRODUCTION

During the last two decades, the European Union has actively engaged in the development of an area of freedom, security and justice (AFSJ). Underpinned by EU fundamental rights and rule of law standards, the criminal justice and police cooperation policies developed in the framework of the AFSJ are governed by a dynamic body of secondary legislation. Different legal instruments have been progressively adopted to address the complex relationship between the repressive and the defensive facets of criminal law. These pieces of EU legislation regulate specific aspects of cross-border judicial cooperation in criminal matters, such as extradition and exchange of evidence, but they also establish common minimum procedural safeguards for people involved in criminal proceedings. These instruments lay the foundations of the criminal justice-led approach to criminality in the Union.¹

In the pursuit of its own security strategy, the EU has increasingly focused on an ‘intelligence-led’ or data-driven approach to operational cooperation in respect of policies aimed at countering crime and terrorism.² This approach largely relies on measures enabling a preventive justice logic involving law enforcement authorities’ access to and exchange of information of individuals across the EU, as well as with transatlantic partners like the US and Canada. Such preventive justice measures prioritise the collection and transfer of data as a way to monitor risk factors and potential security threats that are assessed constantly, and regardless of whether concrete criminal acts have been committed. This preventive justice

¹ Carrera and Mitsilegas (2017), p. 113.

² Occhipinti (2013).

approach permeates the measures adopted in the framework of the EU ‘Security Union’. The latter has also led to the creation of an increasing number of large-scale databases, which are expected to be interconnected soon for the purpose of police and judicial cooperation in criminal matters, and to be made accessible to a wide range of actors involved in security and policing.³

Furthermore, EU agencies and bodies have become key players in coordinating and supporting the activities of competent national authorities, and they also serve as information-gathering hubs. They include Europol (EU Agency for Law Enforcement Cooperation), Eurojust (EU Judicial Cooperation Unit), eu-LISA (European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice), and the future European Public Prosecutor’s Office (EPPO). These bodies also engage in criminal justice and police cooperation with third countries in different ways.

The UK has a mixed record in the development of EU cooperation policies on criminal justice and law enforcement. The UK has adopted a ‘wait and see’ approach to new EU criminal justice initiatives and it has opted out from, or altogether not opted into a number of EU instruments. On the other hand, the UK has played a significant role in shaping EU criminal law, for instance championing the intelligence-led approach to the fight against criminality and application of the principle of mutual recognition in the field of criminal justice.

While heading towards its withdrawal from the Union, the UK calls for a “new, deep and comprehensive partnership” with the EU, which is capable of “maintaining and strengthening” current levels of law enforcement and criminal justice cooperation.⁴ UK negotiators are also calling for a special deal that ensures a continued, uninterrupted and secure flow of personal data, including for law enforcement purposes, between the EU and the UK after Brexit.⁵ However, a high degree of uncertainty still exists as to EU-UK relationships in the field of criminal justice and police cooperation in a post-Brexit scenario.

³ European Commission (2017a).

⁴ HM Government (2018a), p. 4.

⁵ HM Government (2018b), p. 7.

The EU has concluded some international agreements that cover different security matters, as well as the transfer of data for law enforcement purposes. The extent to which future EU-UK arrangements in these areas may replicate, build on or depart from these agreements depends on a variety of different factors.

The (political) willingness of the UK and the EU to constructively engage in the negotiations required to design solutions meeting the mutually recognised need to sustain strong cooperation between the parties is a precondition. Yet, the room for manoeuvre to explore creative solutions is not unfettered, as the EU will have to act within the boundaries of its legal and institutional framework laid down in the 2009 Lisbon Treaty. The 'Lisbonisation' of the AFSJ has meant the transfer of policies on criminal justice and policing to shared legal competence between the EU and its Member States. It has also extended (chiefly since 2014) a full role to the European Commission in enforcing national implementation of EU legal standards in these domains, as well as their democratic scrutiny by the European Parliament and judicial control by the Court of Justice of the European Union (CJEU).

Upon analysis of existing models of EU cooperation with third countries and of the EU legislation regulating Member States and third countries' participation in the relevant AFSJ instruments, this report examines the feasibility of keeping the current EU-UK framework for criminal justice and police cooperation and explores possible alternatives. Despite the current narrative, which tends to conflate these areas of police (security) and judicial cooperation into a single framework, it seems appropriate to keep them separate: cooperation in the field of security (police) and cooperation in the field of criminal justice have their own principles and rules that pose different challenges for both the EU's internal policy and its external relations with third countries.

Part I of this report focuses on the EU constitutional framework regulating the UK's current and future position within the AFSJ. Attention is paid to the *sui generis* status of the UK as a Member State, which opted back into 35 criminal justice and police cooperation instruments and is now in the process of leaving the bloc. After discussing the UK's approach to post-Lisbon EU criminal law, and some cross-cutting issues of the Brexit negotiations, part I identifies the key EU rules that apply in respect of third countries' participation in the AFSJ. These include the hotly debated issue of

dispute resolution and the role of the CJEU, as well as the conditions to be met for the transfer of data to third countries for law enforcement purposes.

Part II examines the impact of Brexit on judicial and police cooperation in criminal matters and the existing options for the UK to participate in AFSJ instruments and bodies after its withdrawal from the EU. Specific attention is devoted to the three areas in which the UK Government has expressed its desire to remain as close as possible to the EU, i.e. mutual recognition in criminal justice matters, justice and home affairs (JHA) agencies and bodies, and access to databases/information-sharing mechanisms.⁶ The analysis will take into account the latest normative and policy developments aimed at enabling access, collection, storage and exchange of data for the purposes of law enforcement cooperation, as they are unfolding on both sides of the Atlantic. Part II also discusses the added value and the risks of enhancing 'soft' measures of cooperation, such as posting UK liaison officers in EU countries.

Part III concludes by summarising the main findings of the Task Force. It highlights the key issues and conditions required for post-Brexit EU-UK cooperation in the fields of security and justice to be handled in a way that meets the reciprocal demands of ensuring an effective relationship to fight cross-border crime, which is at the same time principled (value-based) and compliant with rule of law and fundamental rights standards enshrined in the EU Charter and in other regional human rights instruments, and crucially the European Convention on Human Rights (ECHR).

⁶ Other relevant topics could not be included in this report, such as sanctions, customs cooperation and the issues connected with the UK's participation in EU directives harmonising criminal law and procedural safeguards, although a number of those issues will be touched upon in some parts of the following analysis. Likewise, the report does not engage with the problems related to the competence of UK devolved jurisdictions in the field of criminal justice, and the impact of Brexit on them. For this reason, further references to the UK should be understood as referring to the English and Welsh criminal justice systems only.

PART I

EU CONSTITUTIONAL FRAMEWORK FOR UK PARTICIPATION IN THE AFSJ BEFORE AND AFTER BREXIT

1 CURRENT POSITION OF THE UK IN THE AFSJ

Criminal law has been one of the most contentious areas of EU competence to legislate over the past 20 years,⁷ and even more so since the entry into force of the Lisbon Treaty. Many perceive EU action in this field as a challenge to state sovereignty and to the state's monopoly over the use of force. The perceived challenge of EU action in criminal matters has generated a degree of scepticism in certain EU Member States as to the desirability of further European integration in this regard. Perhaps nowhere else in the EU has this scepticism been expressed more vocally than it has been in the United Kingdom. The first subsection examines the UK's approach to post-Lisbon EU criminal law, while section 1.2 zooms in on the choice of the UK to opt back into 35 EU instruments in December 2014. The last section (1.3) describes the significant contribution by the UK to the development of EU criminal law.

1.1 Approach to the EU's post-Lisbon criminal justice system

The entry into force of the Lisbon Treaty has led to efforts by the UK to extend the pre-Lisbon provisions enabling UK opt-outs in the field of EU migration law to the field of EU post-Lisbon criminal law. Protocol No. 21 to the Lisbon Treaty extended the right of the UK not to participate in EU law to the whole of the Treaty on the Functioning of the European Union (TFEU)

⁷ Mitsilegas (2016c), pp. 517ff., from which the following two sections draw.

Title V on the area of freedom, security and justice, including criminal law measures.⁸ The right not to participate also extends to legislation amending existing measures that are binding upon the UK. The UK Government decides on its participation in post-Lisbon measures on a case-by-case basis.⁹

The UK has a mixed record regarding participation in post-Lisbon EU criminal law pursuant to Protocol No. 21. The UK has participated in the major judicial cooperation instrument adopted after Lisbon, Directive 2014/41 on the European Investigation Order (EIO), which applies the principle of mutual recognition in the field of evidence.¹⁰ The UK's participation in the EIO Directive may be seen as having been achieved against the odds in view of the increasingly Eurosceptic political climate at Westminster but may be explained by the necessity to ensure that the UK remains in the first category of countries in a progressively integrated system of judicial cooperation. Less encouraging is the UK's participation in post-Lisbon measures of EU criminal procedural law granting rights to individuals. While the UK has opted into the first two post-Lisbon measures on the rights of suspects and defendants in criminal proceedings,¹¹ it has not participated in the other three measures, including Directive 2013/48 on the right of access to a lawyer.¹² The non-participation of the UK in this measure may come as a surprise given the fact that the Directive introduces minimum standards, which would arguably lead to minimum – if any – legislative changes to domestic criminal procedure. A number of our interviewees agreed that the UK criminal justice system already complies with the guarantees set out in EU legislation.

⁸ Protocol No. 19 covers the UK's participation in the Schengen *acquis*.

⁹ See Arts 3 and 4 of Protocol No. 21.

¹⁰ OJ L 130/1, 1.5.2014 ('EIO Directive'). See more in section 3.3, part II below.

¹¹ Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, OJ L 280/1, 26.10.2010; Directive 2012/13/EU on the right to information in criminal proceedings, OJ L 142/1, 1.6.2012.

¹² OJ L 294/1, 6.11.2013. The UK has not opted into either Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65/1, 11.3.2016 or Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297/1, 4.11.2016.

Non-participation may be explained by the UK Government's reluctance to take part in a constitutionalised post-Lisbon framework where institutions such as the Commission and the CJEU play a key role in evaluating the domestic implementation and interpretation of EU directives. More specifically, there are clear UK Government concerns about participating in post-Lisbon EU criminal law in terms of its impact on domestic law in light of judicial scrutiny by the Court of Justice. These concerns also explain the latest tendency by the UK Government not to opt into the text of the Commission's proposals, but rather to try to influence – to the extent possible – negotiations and opt into them post-adoption if the adopted measure appears to be acceptable to the UK. This is the strategy, for example, that the UK has followed in relation to Directive 2011/36 on trafficking in human beings.¹³

This 'wait-and-see' strategy is increasingly coupled with a strategy attempting to broaden the field of measures where the UK opt-out applies. With respect to international agreements, the UK has argued that Articles 1 and 2 of Protocol No. 21 "are not restricted to provisions in agreements concluded under a Title V legal base, but to those adopted or concluded 'pursuant to' Title V".¹⁴ Moreover, the UK has questioned the legal basis of measures adopted outside Title V of the TFEU but which are deemed to include a criminal law component (such as the Fourth Anti-Money Laundering Directive (2015/849))¹⁵ and has challenged legal basis choices, intervening in legal basis litigation before the Court of Justice with limited success.¹⁶ This approach may at times prolong the legal and political uncertainty regarding the commitment of the UK to participating in key aspects of the EU criminal justice system.

¹³ OJ L 101/1, 15.4.2011.

¹⁴ House of Lords, European Union Committee (2015), para. 38.

¹⁵ OJ L 141/73, 5.6.2015.

¹⁶ See Case C-431/11, *United Kingdom v Council*, Judgment of 26 September 2013; Case C-137/12, *Commission v Council*, Judgment of 22 October 2013; Case C-377/12, *Commission v Council* (the Philippines case), Judgment of 11 June 2014; Case C-81/13, *United Kingdom v Council* (the Turkey case), Judgment of 18 December 2014.

1.2 Effects of selective participation in the AFSJ

UK concerns regarding the impact of the entry into force of the Lisbon Treaty on the transfer of sovereign powers to the EU in the field of criminal justice resulted in a further political compromise. This compromise addressed measures that had been adopted *before* the entry into force of the Lisbon Treaty, under the largely intergovernmental third pillar. Protocol No. 36 on transitional provisions can be seen as an attempt by the British Government to argue that the entry into force of the Lisbon Treaty would not lead to a transfer of sovereignty from the UK to the EU – and thus avoiding a referendum on the Lisbon Treaty. Protocol No. 36 retained the pre-Lisbon limited powers of EU institutions with regard to third pillar law for five years after the entry into force of the Lisbon Treaty.¹⁷ At least six months before the end of that period, the UK could notify the Council of its non-acceptance of the full powers of the EU institutions in third pillar law.¹⁸ In the case of a decision not to accept these powers, third pillar law would cease to apply to the UK,¹⁹ but the latter may subsequently notify its wish to participate in such legislation that has ceased to apply to it.²⁰

This transitional period came to an end on 1 December 2014, a date that marked a significant step forward towards constitutionalising EU criminal law by granting EU institutions their full powers of scrutiny with regard to third pillar law still in force after Lisbon. In addition to the enhanced powers of the Commission and the CJEU to monitor the implementation of third pillar law by Member States, a pivotal constitutional change in this context is the normalisation of the Court's jurisdiction to give preliminary rulings. This impact is particularly visible in the case of the UK, which did not grant its judiciary the power to interact with the Court of Justice through the preliminary ruling procedure under the third pillar.

In July 2013, the UK notified the presidency of the EU that, pursuant to Article 10(4) of Protocol No. 36, it did not accept the powers of the EU institutions; accordingly, third pillar law would cease to apply in the UK

¹⁷ Art. 10(1) and (3) of Protocol No. 36; the Lisbon Treaty entered into force on 1 December 2009.

¹⁸ Art. 10(4) of Protocol No. 36.

¹⁹ *Ibid.*

²⁰ Art. 10(5) of Protocol No. 36.

from 1 December 2014.²¹ The UK eventually indicated, however, that it would seek to opt back into 35 (out of around 133) third pillar measures, which included the vast majority of measures applying the principle of mutual recognition in criminal matters (including Framework Decision 2002/584/JHA on the European arrest warrant (EAW)),²² legislation establishing Europol and Eurojust, legislation on joint investigation teams (JITs) and criminal records. Third pillar law that has ceased to apply to the UK since 1 December 2014 includes, *inter alia*, several measures on substantive criminal law and the Framework Decision (2008/947/JHA) on the mutual recognition of probation decisions.²³

The current position of the UK, based on a ‘pick-and-choose’ model of differentiated integration in criminal matters is nevertheless problematic in an interdependent and increasingly integrated EU area of criminal justice after Lisbon.²⁴ The opting back into the EAW Framework Decision is a case in point, as the UK does not participate in a crucial measure on the rights of suspects and accused persons in criminal proceedings, namely Directive 2013/48 on access to a lawyer. It could be argued that from a black letter perspective the current position of the UK is tenable: under the Lisbon Treaty, the UK can opt into (or opt out from) any post-Lisbon legislative proposal in the field of criminal justice on a case-by-case basis (and has decided not to participate in Directive 2013/48).

At the same time, this argument runs counter to a teleological approach that respects the objectives and the integrated nature of the AFSJ. The selective participation of the UK in this context is problematic not only from the perspective of the protection of fundamental rights, but also from the perspective of the coherence of EU law.²⁵

The legal basis for Directive 2013/48 (as with the other directives implementing the Stockholm roadmap) is Article 82(2) TFEU. This provision

²¹ Council doc. 12750/13, 26.7.2013.

²² OJ L 190/1, 18.7.2002 (‘EAW Framework Decision’).

²³ For a full list, see notice 430/03, OJ C 430/17, 1.12.2014.

²⁴ See also McCartney (2013); Weyembergh (2017), pp. 289–91; written evidence of Fair Trials International to the Home Affairs Sub-Committee of the House of Lords’ Select Committee on the European Union, “Brexit: The proposed UK–EU security treaty”, PST0010, 25 May 2018, para. 11.

²⁵ Mitsilegas et al. (2014).

grants express competence to the EU to legislate on aspects of criminal procedure (including explicitly the rights of the defence) where necessary to facilitate the operation of the principle of mutual recognition in criminal matters. The legality of post-Lisbon legislation on defence rights, including Directive 2013/48, is thus inextricably linked with the effective operation of mutual recognition in criminal matters, including the EAW Framework Decision. As the Treaty is currently worded, defence rights measures under Article 82(2) TFEU cannot exist independently of measures on mutual recognition. Participating in the enforcement measures but not in the measures granting rights in order to facilitate judicial cooperation thus challenges the coherence of Europe's area of criminal justice.

The marked preference for EU law enforcement measures informs the current UK position in the Brexit negotiations, while little attention has been paid to the panoply of EU instruments concerning guarantees and safeguards in criminal proceedings. Some of our interviewees nonetheless claimed that the latter instruments – and especially Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime²⁶ – have had a positive impact on persons involved in criminal proceedings in the UK, although those instruments did not bring about any radical change in the UK criminal justice system.

After Brexit, a paradoxical situation is likely to emerge: the UK's willingness to continue to reap the current security benefits of EU cooperation may be contingent on the UK complying with the EU *acquis*, including the *acquis* on the protection of fundamental rights, part of which it currently is at liberty to disregard under its opt-outs as an EU Member State. Brexit is likely to put the UK in the position of having to accept more EU law than it presently does as an EU Member State.

The request of the Irish Supreme Court for a preliminary ruling in the *O'Connor* case, recently overtaken by the request in *R O*, may be seen as corroborating this stance.²⁷ The Irish Court has requested the CJEU to rule

²⁶ OJ L 315/57, 14.11.2012. The Law Society of Scotland lists this directive among the instruments of priority for future EU–UK relations (written evidence of the Law Society of Scotland to the Home Affairs Sub-Committee of the House of Lords' Select Committee on the European Union, "Brexit: The proposed UK–EU security treaty", PST009, 25 May 2018, p. 5).

²⁷ Irish Supreme Court, *Minister for Justice v O'Connor* [2018] IESC 3, 1 February 2018, which has been recently overtaken by *R O* (Case C-327/18 PPU).

on whether EAWs coming from the UK should continue to be executed, even when the surrendered person is likely to serve (part of) his or her sentence in UK prisons after Brexit, namely when that person will no longer be able to enjoy his or her rights under the Treaties, the Charter of Fundamental Rights of the European Union or relevant EU legislation. The Court of Justice has not issued its judgment yet;²⁸ still, this decision of the Irish Court shows that the EU AFSJ rests on a bundle of rights and obligations from which it is not easy or in some cases possible to extricate certain instruments, especially from the outside.²⁹

1.3 Contributions to the development of EU criminal law and police cooperation

Despite the *sui generis* approach, the UK has been an active contributor to the development of EU criminal law and police cooperation, particularly as regards the latter, on four different levels: operations, strategy, legislation and implementation.³⁰

At the operational level, the UK is one of the leading drivers of and highest contributors to EU databases and EU information-sharing mechanisms.³¹ Discussions during the Task Force highlighted that the non-participation of the UK in these tools and mechanisms post-Brexit may prove costly for the UK and the EU, as each could lose access to important information that is stored by the other party and which may be crucial to prevent or detect serious crime in the EU or in the UK.

The UK has also contributed to EU criminal law in terms of strategy. As the UK House of Lords' European Union Committee points out, the UK has been a leading protagonist in shaping the nature and direction of

²⁸ Just before this report was finalised, Advocate General Szpunar delivered his Opinion, where he argues that EAWs issued by the UK before the default Brexit date (29 March 2019) should continue to be executed (Opinion of Advocate General Szpunar, Delivered on 7 August 2018, Case C-327/18 PPU, R O).

²⁹ See also Bárd (2018), pp. 4–6.

³⁰ Mitsilegas (2017), pp. 246ff., upon which this section draws.

³¹ See chapter 5, part II below.

cooperation on police and security matters.³² A recent example of the UK pushing for further EU action in the field of security is calls for the adoption of an EU passenger name record (PNR) system.³³ The UK has also assumed a leading role in furthering European integration while trying to stave off integration attempts that were deemed to challenge unduly state sovereignty in criminal matters. A key example has been the UK's leadership in securing application of the principle of mutual recognition in the field of criminal law, an idea put forward by the then UK Home Secretary Jack Straw at the Cardiff European Council in 1998.

The strategic input of the UK is also linked with the considerable impact that UK officials have made in the development, drafting and implementation of secondary EU criminal law. UK Government officials have participated actively in the negotiations of EU instruments in Brussels³⁴ and UK Members of the European Parliament have significantly contributed to the adoption of some of these instruments.

Another UK contribution lies at the level of implementation of EU criminal law at the national level. Here, the high level of both advocacy and parliamentary scrutiny within the UK has resulted in substantive contributions in reshaping the relationship between criminal law and fundamental rights at the domestic level. A recent example has been the amendment of the UK Extradition Act 2003 to include proportionality as an express ground for refusal to execute an EAW. While this ground for refusal arguably goes beyond current EU law in the field, the emphasis on the limits of mutual recognition on the grounds of protecting human rights and on proportionality (which has been debated in the UK for a long time) has recently been mirrored in both secondary EU law instruments (e.g. the EIO Directive) and in the CJEU's case law on the EAW.³⁵

All these examples demonstrate the multi-faceted contribution of UK actors to the development of the EU criminal justice and police cooperation *acquis*. The EU will develop criminal law with the UK's influence being less marked after Brexit. It remains to be seen whether this will have an impact

³² House of Lords, European Union Committee (2016), para. 27.

³³ See section 5.2, part II below.

³⁴ Nowell-Smith (2012).

³⁵ See section 3.2, part II below.

on the content and direction of EU criminal law in the future. Some experts and a number of our interviewees voiced concerns that EU legislation will pay less attention to principles and rules of common law and adversarial systems of criminal justice.³⁶

³⁶ Written evidence of the Scottish Crown Office and Procurator Fiscal Service to the Home Affairs Sub-Committee of the House of Lords' European Union Committee, "Brexit: Future UK-EU security and police cooperation", FSP0003. See also Hanratty (2018), p. 7.

2 BREXIT AND THE AFSJ: ONGOING NEGOTIATIONS AND CROSS-CUTTING ISSUES

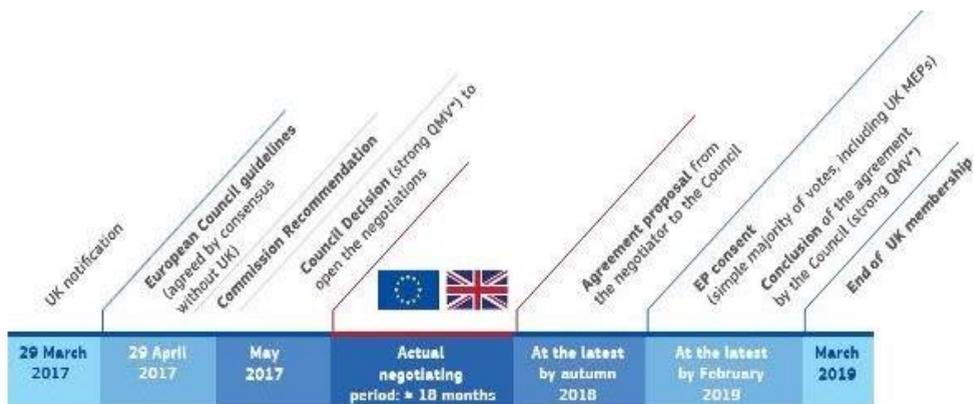
On 29 March 2017, the UK Government formally notified the European Council of its intention to leave the EU. Article 50 of the Treaty on the European Union (TEU) sets out a timeframe of two years for the UK to withdraw from the EU (see Figure 1).

The UK will remain a Member State until the formal date of departure.³⁷ As of Brexit day, scheduled for 29 March 2019, the UK will become a third country vis-à-vis the EU. The Withdrawal Agreement will determine the extent to which EU law applies to the UK as of Brexit day and until the end of 2020, that is, until the end of the so-called transition or implementation period. According to the latest version of the draft Withdrawal Agreement, the EU and the UK have agreed upon the date of 31 December 2020 as the end of the transition period.³⁸

³⁷ Łazowski (2017).

³⁸ European Commission, “Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made (coloured version) in the negotiation round with the UK of 16–19 March 2018” (2018e) (‘draft Withdrawal Agreement’).

Figure 1. Brexit timeline



Notes: QMV = qualified majority voting; EP = European Parliament.

* Strong QMV: 72% of the 27 Member States, i.e. 20 Member States representing 65% of the EU-27 population.

Source: European Commission (https://ec.europa.eu/ireland/file/brexit-timeline-webjpg_en).

2.1 The Withdrawal Agreement

The Withdrawal Agreement is meant to regulate the UK's 'exiting status' during the transition period and the role of this country within EU institutions and decision-making processes over the same time span. At the time of writing, the last version publicly available of the draft Withdrawal Agreement is that published by the Commission in March 2018. The relevant provisions for the purposes of this report can be found in Title V on ongoing police and judicial cooperation in criminal matters (Articles 58-61), and Title VII on data and information processed or obtained before the end of the transition period (Articles 66-71).

The draft Withdrawal Agreement is based on the principle that, during the transition period, the UK remains bound by EU acts applicable to it upon its withdrawal, unless otherwise agreed.³⁹ This applies to the AFSJ measures that already bind the UK, and the latter may choose to participate in instruments amending, replacing or building upon such measures. The UK,

³⁹ Art. 122(1) of the draft Withdrawal Agreement.

however, is not allowed to opt into new measures during the transition period,⁴⁰ although the EU may invite the UK “to cooperate in relation to these new measures”, “under the conditions set out for cooperation with third countries”.⁴¹ Negotiators have agreed upon these rules.

Since EU law on judicial and police cooperation will continue to apply until the end of 2020, the first question that arises is what will happen to those cooperation proceedings that are ongoing on 31 December 2020. The current version of the draft Withdrawal Agreement provides that they will remain subject to EU law until their completion, if initiated before the end of the transition period. That is, if the request or order to execute (e.g. an EAW or EIO), or the judgment to recognise, is received by the competent authority before the end of the transition period.⁴² The same principle applies to ongoing law enforcement and police cooperation proceedings, and to the procedures concerning exchange of information: they will remain subject to EU law if initiated (i.e. the competent authority has received the request) before the end of the transition period (see Figure 2).⁴³ Notably, the negotiators have *not* found an agreement yet on any of these provisions concerning ongoing judicial and law enforcement cooperation proceedings.

Likewise, there is not yet an agreement on Article 82 of the draft Withdrawal Agreement, which states that the Court of Justice continues to have jurisdiction for the proceedings that are initiated before the end of the transition period (e.g. if the requests for preliminary rulings have already been referred to it).⁴⁴ Albeit not yet agreed, Article 83 of the draft Withdrawal Agreement also foresees the possibility to extend the jurisdiction of the CJEU after the end of the transition period. This could be allowed if a UK court or tribunal believes that a question concerning EU law, “relating to facts that occurred before the end of the transition period”, “is necessary to enable it to give judgment in that case”.⁴⁵ In such cases, UK courts may request the CJEU to give a preliminary ruling in accordance with Article 267 TFEU.

⁴⁰ Art. 122(5) of the draft Withdrawal Agreement.

⁴¹ *Ibid.*

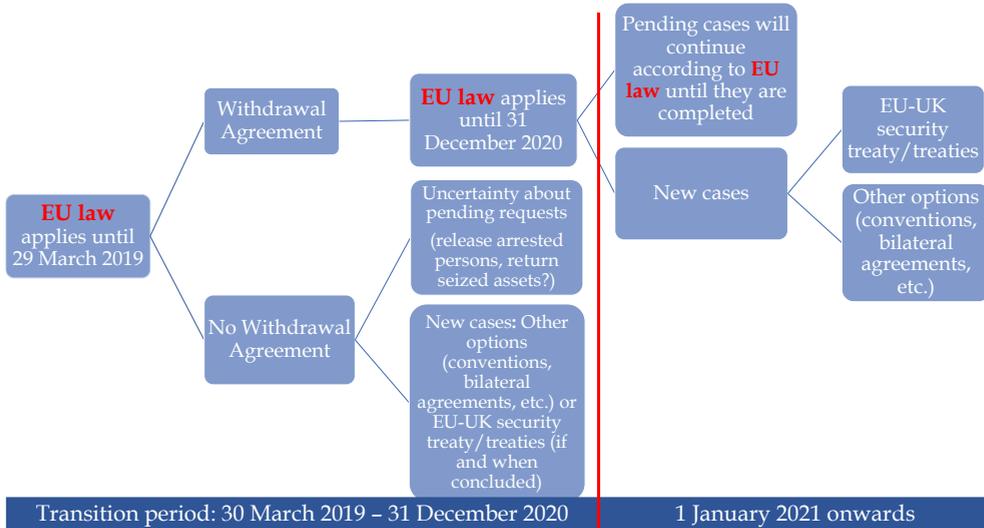
⁴² Art. 58 of the draft Withdrawal Agreement. For the slightly different rules on the EAW, see section 3.2, part II below.

⁴³ Art. 59 of the draft Withdrawal Agreement.

⁴⁴ Art. 82 of the draft Withdrawal Agreement.

⁴⁵ Art. 83(2) of the draft Withdrawal Agreement.

Figure 2. *The Withdrawal Agreement and beyond: Options and consequences in the field of security*



Source: Authors’ elaboration.

The Withdrawal Agreement will be a fully-fledged EU international agreement, and as such it must be negotiated and concluded in accordance with Article 218(3) TFEU.⁴⁶ That notwithstanding, and unlike other EU international agreements, the parties only have two years from the moment when Article 50 TEU was triggered to conclude the Withdrawal Agreement. If no agreement is reached within this period, and “unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period”,⁴⁷ EU primary and secondary law will cease to apply to the withdrawing Member State on the day of its departure, and the UK’s membership of the EU will end abruptly.

⁴⁶ Art. 50(2) TEU. At the end of the negotiation period, the Union negotiator will present an agreement proposal to the Council and the European Parliament, taking into account the framework of the future relationship of the UK with the EU. The European Parliament must give its consent, by a vote of simple majority, including Members of the European Parliament from the UK. The Council will conclude the agreement, by a vote of qualified majority. The UK must also ratify the agreement according to its own constitutional arrangements.

⁴⁷ Art. 50(3) TEU.

This scenario is commonly referred to as the ‘cliff-edge’. Against this backdrop, it appears particularly worrying that no agreement whatsoever has been achieved between the parties on some key provisions of the text under negotiation, including the rules concerning judicial and police cooperation. This may be due to the fact that the draft Withdrawal Agreement has been produced by the EU, and the extent to which the competent UK authorities were allowed to engage in the determination of its content has so far been limited. This is reflective of the conundrum that the EU is facing when, on the one hand, it pretends that with the UK as a Member State it is ‘business as usual’ and, on the other, already treats that Member State as a third party in the negotiation of new agreements.

The negotiators, however, have found agreement on other important provisions regulating the future status of the UK. First, as of Brexit day the country will no longer participate in the decision-making of the EU institutions, nor in the governance of EU agencies.⁴⁸ As Brexit talks currently stand, it seems therefore that the UK will be excluded from the AFSJ system of governance from 29 March 2019, regardless of whether a Withdrawal Agreement is agreed upon and concluded by that date. Second, negotiators have agreed that – at the end of the transition period and unless otherwise provided in the Withdrawal Agreement – the UK “shall cease to be entitled to access any network, any information system, and any database established on the basis of Union law”.⁴⁹

In essence, the UK will be a third country after 29 March 2019 as it will exit the EU and it will not participate in the decision-making or governance of EU bodies, offices or agencies. If an agreement on the transition period is found,⁵⁰ EU law should continue to apply to the UK during the transition period. At the end of this period, EU law will cease to apply to the UK, although the ongoing judicial and law enforcement cooperation proceedings will continue to be subject to EU law until their completion.

⁴⁸ Art. 6 of the draft Withdrawal Agreement.

⁴⁹ Art. 7 of the draft Withdrawal Agreement.

⁵⁰ It ought to be noted that, according to a recent report of the Home Affairs Committee of the House of Commons on EU-UK cooperation in the field of security and criminal justice, “[a] ‘no deal’ Brexit is an increasingly plausible outcome”. In the same document, the Committee declared that it was “unconvinced that the Government is planning adequately to prevent the most unthinkable of outcomes from becoming a reality” (House of Commons, Home Affairs Committee (2018b), para. 65).

2.2 EU and UK stances on a post-Brexit security partnership

The shift in the UK's status from EU Member State to third country raises the question of how to develop and sustain – after the end of the transition period – a new EU-UK partnership in the fields of security and criminal justice.

Both EU and UK leaders have confirmed the intention to cooperate on criminal justice and police matters after Brexit. This is a field where there is a clear common interest in replicating the current scenario to the largest extent possible, and some of our interviewees were positive about the swift conclusion of one or more agreements between the EU and the UK. As they argued, the EU and the UK “will find an agreement because they have to”. Others have been more sceptical, especially since the first phase of Brexit negotiations has neglected issues related to criminal justice and police cooperation, which are likely to require intense and long discussions between the parties.

The UK Government has been vocal about its wish to strike a “new Treaty”⁵¹ in the field and set out its view in a document published in May 2018 (“Framework for the EU-UK Security Partnership”, hereinafter also ‘2018 Framework’).⁵² In July 2018, the UK Government issued a White Paper on the future UK-EU relationship. As the House of Commons noted, in this White Paper there is no reference to a security treaty,⁵³ although the Government refers to a “coherent and legally binding agreement on internal security”.⁵⁴ At this stage, it is not clear whether there is any difference between the two proposals. However, as the White Paper’s “core principles ... are broadly consistent with previous statements”,⁵⁵ including the 2018 Framework, the following analysis will stick to the latter’s wording.

⁵¹ Theresa May, “PM speech at Munich Security Conference: 17 February 2018” (www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018).

⁵² The security partnership envisaged by the UK includes issues related to external security but the following remarks will focus on internal security.

⁵³ House of Commons, Home Affairs Committee (2018b), para. 27.

⁵⁴ HM Government (2018d), p. 56.

⁵⁵ House of Commons, Home Affairs Committee (2018b), para. 27.

The UK Government calls for a “new internal security treaty”⁵⁶ with the EU. The UK proposes to sustain “cooperation on the basis of *existing EU measures*”, as this “represents the most efficient and effective means of achieving our shared objectives”.⁵⁷ This new “internal security treaty” would ensure that the UK – after Brexit – continues to participate in EU measures concerning the field of judicial and police cooperation. The UK Government seeks the conclusion of a treaty that replicates some existing models concerning other fields, such as trade and aviation. In the technical note concerning the security partnership, the UK Government mentions some examples, namely the Schengen Association Agreements, the European Economic Area Agreement and the European Common Aviation Area Agreement, and it clarifies that

the UK is not seeking to join the [European Economic Area] or [Schengen Association Agreements]. But these precedents demonstrate that the UK’s proposals are legally viable, and based on EU precedent in other fields. ... Each of the above-mentioned models has the same basic structure – a treaty enabling cooperation on the basis of EU measures in a specific field, with the relevant EU measures ... then listed in annexes.⁵⁸

It also adds:

Building on these precedents an Internal Security Treaty should:

- a. Provide a legal base for cooperation between the parties on EU measures in a specific field;
- b. Specify a clear scope, with relevant EU measures falling within that scope on which the parties agree to continue cooperating listed in an annex;
- c. Contain provision that, where mutually beneficial, new EU measures falling within scope may be added to the annex by mutual agreement to ensure a dynamic relationship;

⁵⁶ HM Government (2018a), p. 15.

⁵⁷ Ibid. (emphasis added).

⁵⁸ HM Government (2018c), p. 7.

- d. Set out horizontal provisions to govern the relationship, which would cover governance and safeguards (e.g. in relation to human rights).⁵⁹

The UK Government is therefore seeking to create a new model of cooperation with the EU in the field of criminal justice and police cooperation. According to the UK's position, the agreement should especially focus on three areas: practical cooperation, EU agencies and data-driven law enforcement. Practical cooperation includes JITs⁶⁰ and mutual recognition instruments, notably the EAW and the EIO. With regard to EU agencies, the UK Government highlights the added value of Eurojust and Europol and it states that it "is critical that the strength of these bodies are not weakened".⁶¹ The new treaty should also facilitate "*data-driven law enforcement* as real time information sharing has proved to be invaluable in recent years".⁶² The Government mentions a number of EU databases and information-sharing mechanisms to which it wishes to have access in the future (the second-generation Schengen Information System (SIS II), the European Criminal Records Information System (ECRIS) and exchange of PNR data). Finally, the UK Government lists a number of horizontal issues that the new treaty should address, such as dispute resolution mechanisms, a secondment programme and adequate guarantees for human rights.

In substance, the UK proposal is to bring under the same 'security treaty framework' different cooperation instruments that pertain to two distinct areas of EU law, namely security (police) and justice. Despite the current narrative, which tends to conflate these two areas into a single framework, they should be kept separate. In fact, cooperation in the field of security (police) and cooperation in the field of criminal justice are each governed by their own principles and a specific set of rules that the EU needs to take into account when engaging in arrangements with third countries, regardless of the political willingness of the parties to develop comprehensive and far-reaching relations.

The fields of criminal justice and police cooperation are furthermore radically different from other fields: measures adopted in the frame of the

⁵⁹ Ibid.

⁶⁰ See section 4.2, part II below.

⁶¹ HM Government (2018a), p. 19.

⁶² Ibid., p. 21 (emphasis in the original). See more in chapter 5, part II below.

AFSJ impinge on fundamental rights and freedoms of individuals, and they encroach upon punitive powers at the heart of Member States' sovereignty. The latter have agreed over the years to give up some of their longstanding prerogatives to set up a system of unprecedented cooperation, yet this has been possible within the context of the European Union, where a number of rules and guarantees, including fundamental rights standards set out in the Charter, are binding on all Member States and are subject to the oversight of the Court of Justice.

Ultimately, this is the premise allowing for the application of the mutual recognition principle in the field of criminal justice within the EU. This principle is in fact based on the (rebuttable) assumption that all EU countries' legal and institutional systems share common standards and provide sufficient protection for fundamental rights and rule of law safeguards. This understanding informs the current EU position, which does not square with the demands of the UK.

The Commission envisages a future partnership based on four building blocks: effective exchange of information; support for operational cooperation between law enforcement authorities; judicial cooperation in criminal matters; and measures against money laundering and terrorism financing.⁶³ As for the shape of such a partnership, it only clarified that internal security will be "a component of a wider EU-UK partnership" and that the "detailed modalities" of cooperation in the field will be "designed at the end of negotiations, as the form follows the content".⁶⁴

At the same time, according to the Commission the UK will be considered a "3rd country outside Schengen"⁶⁵ for future police and judicial cooperation. In early June 2018, the EU's chief negotiator noted that the UK is seeking to "maintain the status quo, ... which is paradoxical seeing as the country decided itself to leave the European Union".⁶⁶ Michel Barnier added that the UK "seems to want to maintain the benefits of the current relationship, while leaving the EU regulatory, supervision, and application

⁶³ European Commission (2018d), p. 5.

⁶⁴ *Ibid.*, p. 8.

⁶⁵ European Commission (2018c).

⁶⁶ Press statement by Michel Barnier following this week's round of negotiations, Brussels, 8 June 2018 (http://europa.eu/rapid/press-release_STATEMENT-18-4105_en.htm).

framework”,⁶⁷ clarifying that “these benefits are not accessible outside the EU system”.⁶⁸

This chimes with the position of the European Parliament, according to which “third countries (outside the Schengen area) do not benefit from any privileged access to EU instruments, including databases, in this field”.⁶⁹ It calls for “separate arrangements ... to be found with the UK as a third country as regards judicial cooperation in criminal matters, including on extradition and mutual legal assistance, instead of current arrangements such as the European Arrest Warrant”.⁷⁰

It seems difficult to reconcile the positions of the EU and of the UK as regards their future partnership in the fields of security and justice. The issue is likely to gain increasingly more attention closer to Brexit day, while so far “[i]nternal security ... has involved little more than an hour’s discussion with Task Force 50”.⁷¹

A comprehensive EU-UK security partnership would clearly demonstrate “political commitment to the relationship between the UK and the EU”.⁷² However, such an agreement will have to address several legal issues that, falling under distinct fields of EU law (such as police cooperation, exchange of personal information and participation in EU agencies, on the one hand, and extradition and mutual legal assistance on the other), pose very different challenges. The CJEU may also have different powers as regards each of these issues.⁷³ At the time of writing and from an EU perspective, the conclusion of separate post-Brexit EU-UK agreements

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ European Parliament, Resolution of 14 March 2018 on the framework of the future EU-UK relationship, para. 26.

⁷⁰ Ibid., para. 27.

⁷¹ Uncorrected oral evidence of R. Jones, Director of Future European Policy, Home Office, to the Home Affairs Sub-Committee of the House of Lords’ Select Committee on the European Union, “Brexit: The proposed UK-EU security treaty”, 15 May 2018, Q82.

⁷² Uncorrected oral evidence of H. Farrand-Carrapico, Senior Lecturer in Politics and International Relations, Aston University, to the Home Affairs Sub-Committee of the House of Lords’ Select Committee on the European Union, “Brexit: The proposed UK-EU security treaty”, 21 March 2018, Q16.

⁷³ Regarding the role of the CJEU, see more in subsection 2.2.2, part I below.

concerning different matters appears therefore more acceptable in legal and political terms. This solution may also provide more legal certainty than a holistic approach in as far as it does not blur police and criminal justice cooperation instruments. On the other hand, the result may be more cumbersome from a procedural point of view.

Whatever the shape and content of the future EU-UK partnership, the EU is likely to be careful in handling the negotiations with the UK. Excessive concessions to the latter may cause upset among other EU partners, especially among those countries that – unlike the UK – are also part of the Schengen *acquis*.⁷⁴ It is telling that, in an internal Commission document published at the beginning of 2018, the “risk of upsetting relations with other countries” features among the “factors determining the degree of the EU cooperation with third countries”.⁷⁵ Although the UK will be a *key* partner of the EU, it is also true that it will be only *one* partner, with the consequence that the “creativity”⁷⁶ that the UK is asking for from the EU cannot be without limits. Nonetheless, the negotiations should strive to establish a partnership that may allow judicial and police cooperation to continue as smoothly as possible. If the UK ceased abruptly to participate in, and contribute to, EU procedures and instruments of cooperation, there would be “a clear mutual loss of operational law enforcement and criminal justice capability”.⁷⁷ That said, the UK is likely to suffer more from a ‘hard Brexit’

⁷⁴ “There is a strong sense in Brussels that they cannot give the UK better treatment than they are giving to third countries that are part of Schengen. That is a very important thing, which I did not feel some months ago. It is growing more and more in the debate on these questions in Brussels” (uncorrected oral evidence of C. Mortera-Martinez, Research Fellow and Brussels Representative, Centre for European Reform, to the Home Affairs Sub-Committee of the House of Lords’ Select Committee on the European Union, “Brexit: The proposed UK-EU security treaty”, 28 March 2018, Q24).

⁷⁵ European Commission (2018a), p. 7. As Michel Barnier himself declared, “we must ensure that we do not discriminate against third countries” (Speech by Michel Barnier at the Berlin Security Conference, Berlin, 29 November 2017 (http://europa.eu/rapid/press-release_SPEECH-17-5021_en.htm)).

⁷⁶ Theresa May, “PM speech at Munich Security Conference: 17 February 2018” (www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018).

⁷⁷ HM Government (2018a), p. 13.

scenario, given that this would sever the country's possibility to rely on EU cooperation instruments in its relations with the remaining 27 EU partners.

2.2.1 EU law benchmarks for post-Brexit criminal justice and police cooperation

Regardless of the legal framework that will regulate future EU-UK relations, the negotiation and conclusion of any international agreement between the UK and the EU will be subject to the rules on the EU's external action in the field of criminal justice and police cooperation. The EU is currently entrusted with the (shared) competence to develop external action in a number of AFSJ-related matters, including criminal justice and law enforcement cooperation and cybercrime, as well as data protection. A consistent body of Union law and international agreements has in fact been developed in these policy areas over the years.⁷⁸ The ever-more prominent international role played by the EU in these fields has progressively allowed the Union to develop cooperation with some strategic partners (namely the US) while ensuring its own normative benchmarks.

As such, future EU-UK cooperation will depend on the extent to which the UK is deemed to comply with crucial EU law standards and EU human rights and values.⁷⁹ For instance, it is worth noting that the new EU-US 'Umbrella Agreement'⁸⁰ provides for the respect of EU data protection standards in transatlantic data transfers, also when personal information is exchanged for reasons relating to the prevention, investigation, detection and prosecution of criminal offences. A central principle set forth in this agreement is that the transborder data flow should not compromise the data protection standards to which EU citizens are eligible under EU law.⁸¹

⁷⁸ Carrera et al. (2015).

⁷⁹ The *Petruhhin* judgment of the CJEU is a case in point (see subsection 3.2.1, part II below).

⁸⁰ Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences, OJ L 336/3, 10.12.2016 ('Umbrella Agreement').

⁸¹ See the speech at the Center for Strategic and International Studies by Věra Jourová, Commissioner for Justice, Consumers and Gender Equality, "EU-U.S. data flows and data protection: Opportunities and challenges in the digital era", 31 March 2017 (http://europa.eu/rapid/press-release_SPEECH-17-826_en.htm).

In other words, EU external action must be consistent with EU internal action, with the TEU affirming that the Union must not only respect, but also promote its internal values in its external action. EU standards on human rights will be the benchmark for the external action of the EU and of its Member States.⁸² The Commission attaches great importance to such standards, which encompass the safeguards provided for by the ECHR. The Commission has already singled out the continued participation of the UK in the ECHR as a prerequisite for future partnership with the EU in the field of police and criminal justice. The current EU approach to this partnership foresees the inclusion of a “guillotine clause” to be activated “if the UK leaves the Convention or is condemned by the European Court of Human Rights ... for non-execution of an ECHR judgment in the area concerned”.⁸³ This proposal implies that from the EU’s perspective, the UK’s participation in the ECHR constitutes a key safeguard and an essential condition for maintaining cooperation on criminal justice and police matters after Brexit.⁸⁴

According to some experts, the UK could already enter the “exit mode” and “kick start setting-up its own external relations regime straight away”.⁸⁵ Yet, EU external competence in the field of law enforcement cooperation pre-empts Member States from engaging in external action, at least in cases where a bilateral initiative could undermine primary and secondary EU law standards.

Therefore, if the UK and EU Member States conclude bilateral agreements, EU Member States will be under the duty to comply with EU law in their relationships with the UK, especially in cases where the EU has

⁸² See also section 2.3 below.

⁸³ European Commission (2018d), p. 7. Among many others, the importance of the UK’s commitment to remain a party to the ECHR has been stressed by Fair Trials International in its written evidence to the Home Affairs Sub-Committee of the House of Lords’ Select Committee on the European Union, “Brexit: The proposed UK-EU security treaty”, PST0010, 25 May 2018, para. 12.

⁸⁴ In the White Paper of July 2018, the UK Government stated that the future EU-UK partnership in the field of security and criminal justice “should also include a mutual commitment to individuals’ rights, noting that the UK will remain a party to the ECHR after it has left the EU” (HM Government (2018d), p. 56).

⁸⁵ Wessel and Łazowski (2017).

acted internally.⁸⁶ Furthermore, EU officials interviewed for the purpose of this report doubted the actual willingness of EU Member States to engage in bilateral commitments, especially when it comes to data exchange. The EU has developed models of cooperation that provide a baseline for future data transfer arrangements with third countries. The Commission has already stressed its intention to explore the possibility to replicate the Umbrella Agreement model with third countries.⁸⁷

Finally, in terms of procedure, Article 218 TFEU should apply to the conclusion of future EU international agreements with the UK. This procedure grants new roles to the European Commission and the European Parliament, the latter being required to give its consent to the conclusion of the agreement. The same procedure will also apply to any future UK agreements with EU agencies, such as Europol and Eurojust, which are no longer allowed to directly conclude international agreements with their partners from the entry into force of the Lisbon Treaty.⁸⁸

Any treaty negotiated between the UK and the EU could also be subject to referral to the CJEU prior to its ratification. Should this be the case, the Court will have to assess the compatibility with EU Treaties⁸⁹ and, if it finds that the agreement is not compliant with EU law, that agreement “may not enter into force unless it is amended or the Treaties are revised”.⁹⁰ This was for instance the fate of the Agreement between Canada and the EU on the exchange of PNR data, which has been struck down by the Court of Justice and will have to be renegotiated.⁹¹ As for the timing of these potential judicial proceedings, it is worth noting that the European Parliament adopted the resolution on seeking an opinion from the CJEU on the EU-Canada Agreement on 25 November 2014 and the judgment was issued on 26 July 2017, namely more than two and a half years later.

⁸⁶ Mitsilegas (2017), pp. 243–44.

⁸⁷ Commission (2017b).

⁸⁸ Until the new Eurojust Regulation enters into force, Eurojust is still allowed to conclude international agreements with third countries. See more in section 4.1, part II below.

⁸⁹ Art. 218(11) TFEU.

⁹⁰ *Ibid.*

⁹¹ See more in section 5.2, part II below.

2.2.2 *Dispute resolution and role of the Court of Justice in security and justice matters*

After the triggering of Article 50 TEU, the issue of post-Brexit dispute resolution has been subject to fierce debates.⁹² With regard to the field of judicial and police cooperation, some of our interviewees and other experts have argued that the expression “dispute resolution” is inappropriate. As Sir Francis Jacobs put it,

[i]f one is looking at enforcement of criminal judgments and the European arrest warrant and suchlike, the only dispute mechanism that you can have ... is a court. ... The court must have the jurisdiction to review and if necessary quash any decision, or alternatively to decide to give effect to it. ... Although the language of arbitration is used in this context ... , that is a totally inappropriate concept Of course there could always be measures on the interstate level for ironing out disagreements in the way in which a particular arrangement is being applied. ... But in terms of what we ordinarily understand by resolving disputes, it must affect the individual, and that can only be done by a court.⁹³

Discussions on dispute resolution seem to have conflated at least three different facets. The first is dispute resolution *stricto sensu*, namely the disagreement about a specific clause of any future EU-UK agreement. Second, dispute resolution sometimes seems to be confused with, or used as an inappropriate synonym for, interpretation of the Withdrawal Agreement, of any other EU-UK agreement, and even of EU law, should the UK continue to apply part of it in some specific sectors. Third, debates on dispute resolution have sometimes concerned issues related to the access of citizens to courts, including the CJEU and/or a new EU-UK court, if ever the latter is established.

⁹² See, for instance, the several documents published in the inquiry on “Brexit: Enforcement and dispute resolution” of the Justice Sub-Committee of the House of Lords’ Select Committee on the European Union. See also Hogarth (2017).

⁹³ Oral evidence of F. Jacobs, Professor of Law, King’s College London and former Advocate General, to the Home Affairs Sub-Committee of the House of Lords’ Select Committee on the European Union, “Brexit: Judicial oversight of the European Arrest Warrant”, 29 March 2017, Q5.

The draft Withdrawal Agreement deals with dispute settlement mechanisms related to this Agreement only – and thus concerns the transition period. Article 157 provides for the establishment of a joint committee, comprising representatives of the EU and of the UK. In accordance with Article 162(1), if any dispute in the interpretation or application of the Withdrawal Agreement arises, it may be brought before the joint committee by the EU or the UK. This article has not been agreed yet, as it also provides that the joint committee may decide to submit the dispute to the CJEU for a ruling, which would be binding on the EU and the UK. The UK Government does not agree with this provision as it “is very rare for the highest court of one party to an international agreement to be the final arbiter of disputes under that agreement where another nation state is involved”.⁹⁴

This seems a valid legal point if one looks at the existing EU agreements in the fields of security and justice. The EU has struck some sectoral agreements with a few third countries, such as Norway and Iceland (extradition and mutual legal assistance), Japan (mutual legal assistance), Australia (exchange of PNR data), and the US (extradition, mutual legal assistance and exchange of PNR data).⁹⁵ The agreement with Norway and Iceland concerning the association of these countries with the implementation, application and development of the Schengen *acquis* (“Schengen Association Agreement of Norway and Iceland”) is also worth mentioning.⁹⁶ These agreements will be discussed in the next sections. At this stage, it has to be noted that none of them provides for the competence of the Court of Justice to settle disputes concerning their application or interpretation. By and large, these agreements lay down a political or diplomatic mechanism to solve potential conflicts (usually consultation between the parties). They may also foresee the possibility to suspend, or even terminate the agreement if the dispute is not solved.⁹⁷

Still, the lack of binding powers of the CJEU in respect of dispute resolution *stricto sensu* does not mean that the UK will not be affected by the

⁹⁴ Ibid., Q49.

⁹⁵ The Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data is to be renegotiated after Opinion 1/15 of the CJEU. See more in section 5.2, part II below.

⁹⁶ OJ L 176/36, 10.7.1999.

⁹⁷ See, for instance, Art. 11(3) of the Schengen Association Agreement of Norway and Iceland.

case law of the Court of Justice. On the contrary, the latter will play a critical role in any future EU-UK relationship, and especially in the fields of security and justice. As seen above, the UK will have to comply with EU law if it wishes to pursue meaningful cooperation with EU Member States, and the CJEU will remain competent to ultimately and authoritatively interpret EU law. First, in addition to the scrutiny of any EU-UK agreement before its entry into force, the Court will be entrusted with the review of the legality of any EU act concerning future EU relationships with the UK. For instance, if the Commission adopts an adequacy decision concerning the UK, so allowing the transfer of personal data to this country, the Court may annul that decision if it deems it incompatible with EU data protection standards.⁹⁸

Second, upon request of national courts of EU Member States, the CJEU can interpret any EU-UK agreement after its entry into force. If the EU and the UK regulate their future extradition arrangements in a treaty ad hoc or in the context of a broader EU-UK security treaty, for example, EU national judges will always have the right (or even the duty) to ask the CJEU whether the agreement on which extradition is sought is compatible with EU law. If the CJEU rules in the negative, extradition should not be granted.⁹⁹

Third, national judges could refer a preliminary question to the CJEU even in the absence of any future EU-UK agreement in some instances. For example, EU national courts may ask for the intervention of the CJEU if the UK's request for extradition is believed to be in breach of EU fundamental rights, as enshrined in the Charter, should there be a connection with EU law in that case.¹⁰⁰

In her Mansion House speech (March 2018), Prime Minister Theresa May admitted that “even after we have left the jurisdiction of the [European Court of Justice], EU law and the decisions of the ECJ will continue to affect

⁹⁸ The Commission's adequacy decision concerning the transfer of personal data to the US in the field of trade was annulled by the CJEU in *Schrems* (Case C-362/14). See section 2.3, part I below.

⁹⁹ See more in subsection 3.2.1, part II below, where the *Pisciotti* case (Case C-191/16) is discussed.

¹⁰⁰ See the *Petruhin* case (Case C-182/15), which is summarised in subsection 3.2.1, part II below.

us”.¹⁰¹ A few weeks earlier, she stated that, in the field of security, “when participating in EU agencies the UK will *respect the remit* of the European Court of Justice”.¹⁰² The European Union (Withdrawal) Act 2018 states that the case law of the CJEU – after Brexit – will not be binding on the UK,¹⁰³ rather persuasive, as it could be taken into account by UK courts.¹⁰⁴ The UK prime minister acknowledged that if “Parliament passes an identical law to an EU law, it may make sense for our courts to look at the appropriate ECJ judgments so that we both interpret those laws consistently”.¹⁰⁵ The 2018 Framework issued by the UK Government simply states that in the future EU-UK security treaty there should be “a strong and appropriate form of dispute resolution ... in which both sides can have the necessary confidence”.¹⁰⁶

Finally, in the White Paper issued in July 2018, the UK Government reiterated that “[w]here the UK participates in an EU agency, the UK will respect the remit of the Court of Justice of the European Union”,¹⁰⁷ which would mean that “if there was a challenge to a decision made by an agency that affected the UK, this could be resolved by the CJEU, noting that this would not involve giving the CJEU jurisdiction over the UK”.¹⁰⁸ It is interesting to note that the House of Commons commented on the point, arguing that “[i]f the Government is willing to respect the remit of the European Court in relation to Europol, we see no reason why it should not

¹⁰¹ Theresa May, “PM speech on our future economic partnership with the European Union” (Mansion House Speech), 2 March 2018 (www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union).

¹⁰² Theresa May, “PM speech at Munich Security Conference: 17 February 2018” (www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018) (emphasis added).

¹⁰³ “[A] court or tribunal *may* have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal” (s. 6(2) of the European Union (Withdrawal) Act 2018, emphasis added).

¹⁰⁴ HM Government, Department for Exiting the European Union (2018), pp. 2–3.

¹⁰⁵ Theresa May, “PM speech on our future economic partnership with the European Union” (Mansion House Speech), 2 March 2018 (www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union).

¹⁰⁶ HM Government (2018a), p. 25.

¹⁰⁷ HM Government (2018d), p. 62.

¹⁰⁸ *Ibid.* (2018d), p. 92.

apply this principle to other forms of security cooperation, including data protection and extradition".¹⁰⁹

Ultimately, the post-Brexit dispute settlement will depend on the nature and the rules of future EU-UK arrangements. The more that EU law will apply to the UK after Brexit, the less can the role of the CJEU be curtailed in EU-UK agreements. If the parties regulate their future relationships in the domains of security and justice along the lines of existing EU agreements with third countries, the 'red line' of the UK Government on the end of the CJEU's jurisdiction in the UK¹¹⁰ is likely not to be crossed: the CJEU does not usually have binding powers in settling disputes concerning EU agreements between the EU and third countries. Even so, any EU-UK relationship will remain under the scrutiny of the CJEU from the EU side and the CJEU's case law will continue to have a significant impact on the UK and on its future cooperation with the EU.

2.3 The exchange of data for law enforcement and criminal justice purposes

Data protection and the exchange of information (including personal data) represent crucial issues for the future of EU-UK criminal justice and police cooperation.

A number of provisions dealing with the processing of data and information have been included in Title VII of the draft Withdrawal Agreement. No agreement has yet been reached by the negotiators on Article 67, which provides for the application of EU data protection rules to data concerning data subjects outside the UK that are obtained or processed by the UK *before the end* of the transition period or processed by the UK *after the expiry* of the transition period on the basis of the Withdrawal Agreement. The parties have instead agreed on the policy objective of Article 68 of the draft Withdrawal Agreement,¹¹¹ according to which requests for assistance received before the end of the transition period will continue to be subject to EU rules. These rules are Article 61 of the General Data Protection Regulation

¹⁰⁹ House of Commons, Home Affairs Committee (2018b), para. 55.

¹¹⁰ HM Government (2017b), p. 13.

¹¹¹ The text, however, requires drafting changes or clarifications.

(GDPR)¹¹² and – more importantly for the purposes of this report – Article 50 of Directive 2016/680 on protecting personal data processed for the purpose of criminal law enforcement,¹¹³ which applies to mutual assistance requests covering, inter alia, information requests and requests to carry out prior authorisations and consultations, inspections and investigations.

The EU and the UK have a mutual interest in maintaining strong cooperation on the cross-border transfer of personal data for law enforcement purposes after Brexit.¹¹⁴ The UK has played an important role in shaping the content of EU instruments enabling the collection and exchange of a wide range of personal data for law enforcement purposes,¹¹⁵ and EU-UK police and judicial cooperation largely depends on the sharing of such data.¹¹⁶ However, these data flows between EU Member States, relevant EU bodies (e.g. Europol and Eurojust) and UK law enforcement and judicial actors can only be ensured in a post-Brexit scenario where the UK as a third country complies with EU legal standards applying to transfers of data for reasons related to the prevention, investigation, detection or prosecution of criminal offences.

In particular, EU external action on criminal justice, policing and surveillance must be compatible with the EU Charter and secondary EU law on data protection. The powers of the Commission and the standards to be respected when exchanging personal data with third countries as part of an activity falling within the scope of Union law have been progressively clarified by the CJEU. In *Schrems*,¹¹⁷ the Court found that the decision of the

¹¹² OJ L 119/1, 4.5.2016.

¹¹³ Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, OJ L 119/89, 4.5.2016.

¹¹⁴ Alegre et al. (2017), p. 60.

¹¹⁵ Mitsilegas (2017), pp. 237–38.

¹¹⁶ See Oral evidence of N. Hurd, Minister for Policing, to the House of Commons' Home Affairs Committee, "Home Office delivery of Brexit: Policing and security co-operation", 23 January 2018, Q148.

¹¹⁷ Case C-362/14, *Maximilian Schrems v Data Protection Commissioner*, Judgment of 6 October 2015, para. 73. The following remarks on this judgment build on Mitsilegas (2016b), pp. 57–58.

European Commission on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce was invalid.¹¹⁸ The Court of Justice looked at the wording of Article 25(6) of Directive 95/46 on data protection (now Article 45 of the GDPR),¹¹⁹ which provided for the adoption by the European Commission of adequacy decisions concerning the transfer of personal data to third countries.

The Court recognised that a third country cannot be required to ensure a level of protection identical to that guaranteed in the EU legal order.¹²⁰ At the same time, the phrase “adequate level of protection” should be understood as requiring the third country to ensure a level of protection of fundamental rights and freedoms that is “*essentially equivalent* to that guaranteed within the European Union by virtue of Directive 95/46 *read in light of the Charter*”.¹²¹ The Court explained that, if there were no such requirement, the objective of ensuring a high level of data protection would be disregarded, and this high level of data protection could easily be circumvented by transfers of personal data from the EU to third countries for processing in those countries.¹²²

Directive 95/46 on data protection did *not* apply to the processing of personal data in the field of criminal law¹²³ and the principles set out by the Court of Luxembourg in *Schrems* did not concern the field of security. Yet they now apply to EU and Member States’ external action in the field of criminal justice and police cooperation, as the EU legislative bodies have recently codified these principles in Directive 2016/680. This directive concerns specifically the processing of personal data for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, while all the other activities concerning

¹¹⁸ OJ L 215/7, 25.8.2000.

¹¹⁹ OJ L 281/31, 23.11.1995.

¹²⁰ Case C-362/14, *Maximillian Schrems v Data Protection Commissioner*, Judgment of 6 October 2015, paras 70–72.

¹²¹ *Ibid.*, para. 73 (emphasis added).

¹²² *Ibid.*

¹²³ Art. 3(2) of Directive 95/46.

the processing of personal data falling within the scope of EU law are addressed in the GDPR.

According to Directive 2016/680, transfer of data to a third country is only allowed when some requirements are met.¹²⁴ These chiefly concern the necessity, proportionality and legality of the transfer for law enforcement purposes.¹²⁵ Above all, data can be transferred to a third country only when the latter ensures an adequate level of protection of human rights or where it provides for appropriate safeguards.

The transfer of personal data to a third country therefore needs to rely on an EU legal basis ensuring that such criteria and standards are respected.¹²⁶ There are two different legal options available to do this. First, the Commission may adopt an adequacy decision ascertaining that the third country ensures an “adequate level of protection”,¹²⁷ to be interpreted in light of the *Schrems* principles. Second, in the absence of such a decision, “appropriate safeguards” may be “provided for in a legally binding instrument”,¹²⁸ and personal data may be exchanged on this basis. In the absence of both an adequacy decision and appropriate safeguards, the transfer of personal data may take place in exceptional circumstances and on a case-by-case basis.¹²⁹

2.3.1 Scope of the adequacy test: Assessing UK national security and data protection legislation

The adequacy decision is adopted by the Commission upon the in-depth assessment of the third country’s relevant institutional and legal framework and of the conformity of the latter with EU rule of law and fundamental rights standards. As recently submitted by the European Commission, the adequacy decision “allows the free flow of personal data from the EU

¹²⁴ See Art. 35(1) of Directive 2016/680.

¹²⁵ Art. 35(1)(a) of Directive 2016/680.

¹²⁶ Art. 35(1)(d) of Directive 2016/680.

¹²⁷ Art. 36(1) of Directive 2016/680.

¹²⁸ Art. 37 of Directive 2016/680.

¹²⁹ Art. 38 of Directive 2016/680.

without the EU data exporter having to implement any additional safeguards or being subject to further conditions”.¹³⁰

Interviews conducted for this report confirmed that the Commission’s scrutiny is not only formal (i.e. limited to analysis of the content of the relevant rules), but it also looks at the way in which the third country’s legislation is implemented in practice. Among others, the adequacy mechanism is designed to assess the third country’s capacity to enforce data subject rights through effective judicial and administrative redress mechanisms, and the Commission thus evaluates both the existence and the effectiveness of independent supervisory authorities for data protection. The adequacy assessment is dynamic, as it involves a periodic review of the third country’s normative and policy developments in all relevant fields.¹³¹

The adequacy assessment covers the entirety of the third country’s national legislation and international commitments, including legislation and policies that fall outside the scope of EU law, as the Commission’s evaluation extends to legislation on “national security” and “defence”.¹³² As a result, the surveillance practices of UK security services that, in principle, remain under the “sole responsibility”¹³³ of national authorities by virtue of the distribution of powers between the EU and its Member States, will become subject to the Commission’s adequacy evaluation after Brexit.¹³⁴

This will most probably lead the Commission to scrutinise the UK’s Investigatory Powers Act (IPA) 2016, which has been described as “the most significant piece of surveillance legislation to be passed in recent years”.¹³⁵ Several stakeholders, including the UK House of Commons¹³⁶ and the UK

¹³⁰ European Commission (2018b), p. 1.

¹³¹ Art. 36(3) of Directive 2016/680.

¹³² Art. 36(2) of Directive 2016/680.

¹³³ Art. 4(2) TFEU.

¹³⁴ See the oral evidence of L. Woods, Director of Research, School of Law, University of Essex, to the House of Commons’ Home Affairs Committee, “Home Office delivery of Brexit: Policing and security co-operation”, 5 December 2017, Q75.

¹³⁵ House of Commons, Home Affairs Committee (2018a), para. 96.

¹³⁶ *Ibid.*, paras 113ff.

information commissioner,¹³⁷ have expressed serious concerns about the IPA's compliance with EU data protection standards. Nicknamed the 'Snoopers' Charter', the IPA has also recently been challenged before UK courts by the National Council for Civil Liberties (Liberty).¹³⁸

In this regard, it is worth noting that the CJEU, in *Tele2 and Watson*,¹³⁹ had a chance to scrutinise the IPA's predecessor, the Data Retention and Investigatory Act 2014 (DRIPA). As the latter allowed for the bulk retention of telecommunications' data to be used by UK police and security agencies,¹⁴⁰ it was found to fall foul of EU law. Building on *Digital Rights Ireland*,¹⁴¹ the CJEU ruled that the EU fundamental rights to privacy and data protection preclude national legislation that prescribes general and indiscriminate retention of data. The Court admitted that derogations to these EU fundamental rights safeguards are only possible in so far as the limitations are "strictly necessary" for the purpose of "fighting serious crime".¹⁴² In *Tele2 and Watson*, the CJEU found the DRIPA's data retention scheme to be unlawful precisely because it exceeded the "strict necessity" test.

Compared with the DRIPA, the IPA provides a higher threshold to be met for UK authorities to proceed with the retention of communications data. Retention should be limited to those data relating to "serious crimes" sanctioned with a custodial sentence of six months or more.¹⁴³ The IPA also foresees the creation of a new Office for Communications Data

¹³⁷ See the oral evidence of E. Denham, Information Commissioner, to the House of Commons' Home Affairs Committee, "EU policing and security issues", 5 December 2017, Q76.

¹³⁸ Further information may be found on Liberty's website (www.libertyhumanrights.org.uk/campaigning/people-vs-snoopers-charter).

¹³⁹ Joined Cases C-203/15 and C-698/15, *Tele2 Sverige and Tom Watson*, Judgment of 21 December 2016.

¹⁴⁰ Kuşkonmaz (2017a).

¹⁴¹ Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, Judgment of 8 April 2014.

¹⁴² Joined Cases C-203/15 and C-698/15, *Tele2 Sverige and Tom Watson*, Judgment of 21 December 2016, paras 96 and 155.

¹⁴³ Home Office, "Investigatory Powers Act 2016: Consultation on the Government's proposed response to the ruling of the Court of Justice of the European Union on 21 December 2016 regarding the retention of communications data", November 2017 (www.gov.uk/government/consultations/investigatory-powers-act-2016).

Authorisations responsible for authorising communications data requests. Still, it is far from certain that the mere reference to the seriousness of a crime alone can be a lawful justification for the necessity and legitimacy of data retention. This is also confirmed by a recent request for a preliminary ruling made by a Spanish court in the *Ministerio Fiscal* case, which is now pending before the CJEU.¹⁴⁴ The CJEU's Advocate General has already stressed that the circumstances under which law enforcement authorities can have access to electronic data remain circumscribed even in the presence of a serious crime. In the Advocate General's view, access to personal data sought as part of a criminal investigation cannot be authorised in a general and indiscriminate manner, but it must target the persons concerned and be limited in duration.¹⁴⁵

In the UK, there is disagreement as to the consistency with EU law of the bulk-data acquisition powers granted by the IPA upon UK security services (e.g. MI5 and MI6). This emerges clearly from a recent referral for a preliminary ruling made to the CJEU by the Investigatory Powers Tribunal. The latter asked precisely whether the acquisition and use of bulk communications data by the security services falls under EU law.¹⁴⁶ A positive response by the CJEU may lead to further amendments to the IPA. As for the IPA provisions granting the UK secretary of state the power to issue "retention notices" to telecommunications operators (section 87(1) part 4 of the IPA), their incompatibility with EU law (and in particular with the EU Charter) has been expressly recognised in the recent case *Liberty v Secretary of State for the Home Department*.¹⁴⁷ The High Court of England and Wales concluded that the legislation must be amended within a reasonable time, and that a reasonable time would be 1 November 2018.¹⁴⁸

¹⁴⁴ Case C-207/16, Request for a preliminary ruling from the Audiencia provincial de Tarragona, Sección cuarta (Spain) lodged on 14 April 2016 – *Ministerio Fiscal*.

¹⁴⁵ Opinion of Advocate General Saugmandsgaard Øe, Delivered on 3 May 2018, Case C-207/16, *Ministerio Fiscal*.

¹⁴⁶ Case C-623/17, Reference for a preliminary ruling from the Investigatory Powers Tribunal, London (United Kingdom) made on 31 October 2017 – *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others*.

¹⁴⁷ See National Council for Civil Liberties (Liberty), R (On the Application Of) v Secretary of State for the Home Department & Anor [2018] EWHC 975 (Admin), 27 April 2018.

¹⁴⁸ *Ibid.*, paras 186–87.

Some obstacles standing in the UK's way towards adequacy may also derive from the Data Protection Act 2018, which has implemented EU data protection rules into the UK legal system.¹⁴⁹ While it has been recognised that the Data Protection Act contains “numerous rights for data subjects”, it is criticised for not explicitly incorporating Article 8 of the Charter into the UK legal system.¹⁵⁰ Also problematic are the Act's proposals to exempt the Home Office and other UK security agencies from crucial data protection obligations when personal information is collected and processed for reasons related to “immigration control” or for the “investigation or detection of activities that would undermine the maintenance of effective immigration control”.¹⁵¹ These exemptions translate into restrictions of the rights of (documented and undocumented) third country nationals as data subjects. Such restrictions would affect their right to rectification and erasure, as well as their right to know who is processing which data and for what purpose.¹⁵²

In the view of the UK Government, the Act aims to set “new standards for protecting personal data, in accordance with recent EU data protection laws, giving people more control over use of their data”.¹⁵³ From this perspective, EU-UK adequacy talks could potentially be rather ‘straightforward’, for the UK will negotiate from “a very different starting point from many of the other adequacy decisions that are effectively looked at”.¹⁵⁴ This is not just because of the UK's history “in terms of being a trusted party on data inside the EU” but also because of the Data Protection Act, which will guarantee that the UK leaves the EU “on a fully aligned basis”.¹⁵⁵ As noted above, however, the full alignment of UK law with the GDPR and

¹⁴⁹ See also Gutheil et al. (2018b), pp. 56–57.

¹⁵⁰ House of Lords and House of Commons, Joint Committee on Human Rights (2018), p. 12. See also the Note from the Deputy Counsel on the Human Rights Implications of the Data Protection Bill to the Joint Committee on Human Rights, 6 December 2017.

¹⁵¹ Data Protection Act 2017, Schedule 2, Part 1, para. 4(1)(a) and (b).

¹⁵² *Ibid.*, para. 1(a)-(b).

¹⁵³ Data Protection Bill, Explanatory Notes (2018) (<https://publications.parliament.uk/pa/bills/lbill/2017-2019/0104/18104en.pdf>), p. 7.

¹⁵⁴ Oral evidence of N. Hurd, Minister for Policing, to the House of Commons' Home Affairs Committee, “EU policing and security issues”, 23 January 2018, Q187.

¹⁵⁵ *Ibid.*

Directive 2016/680 on protecting personal data processed for the purpose of criminal law enforcement will not necessarily be sufficient to pass the adequacy test, as the Commission's assessment encompasses legislation and practices concerning fields that are currently outside the scope of EU law, including national security.

Several UK civil society organisations, some of which were also heard in the context of the Task Force, have instead warned that the Data Protection Act allows for intrusive monitoring of migrants' lives, resulting in discrimination between UK and third country nationals.¹⁵⁶ The EU GDPR only permits exemptions to its data protection regime in so far as they do not undermine the essence of the fundamental rights and freedoms enshrined in the EU Charter (privacy and human dignity), and to the extent that they represent a necessary and proportionate measure to protect one of the legitimate aims identified in the regulation.¹⁵⁷ The exceptions proposed under the UK Data Protection Act seem to fall outside these circumstances. Not only is immigration control as such not included among the legitimate aims that under the GDPR can justify restrictions to EU data protection rules, but also the derogations for immigration control purposes foreseen in the Data Protection Act appear to challenge the freedom from discrimination granted under EU primary law. They expressly target non-UK nationals (which in the future will also include EU citizens), and as a result are disproportionate in light of the intrusive monitoring of migrants' lives and of the unfettered data sharing between agencies that they enable. Quoting a public statement made by the chair of the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE), a recent report by the House of Commons on UK-EU security cooperation after Brexit flagged that this aspect of the Act would "flout" EU protections on fundamental rights, and consequently reduce the UK's "chances of obtaining an adequacy decision".¹⁵⁸ In July 2018, the House of Commons reiterated its suggestion to the Government to "*remove the immigration exemption from the Data*

¹⁵⁶ National Council for Civil Liberties (Liberty) (2017). See also the criticism of J. Ruiz Diaz, Policy Director at Open Rights Group, in his uncorrected oral evidence to the Home Affairs Sub-Committee of the House of Lords' Select Committee on the European Union, "Brexit: The proposed UK-EU security treaty", 25 April 2018, Q53.

¹⁵⁷ Art. 23(1)(a-i) of the GDPR.

¹⁵⁸ House of Commons, Home Affairs Committee (2018a), para. 118. See also Moraes (2018).

Protection Act – both to ensure proper transparency in its immigration policy, and to avoid undermining a data adequacy decision”.¹⁵⁹

The adequacy assessment would also cover the UK’s external cooperation with key strategic partners. On 23 March 2018, US President Donald Trump signed the US government spending bill, which also included the “Clarifying Lawful Use of Overseas Data (CLOUD) Act”.¹⁶⁰ The CLOUD Act allows the US executive to enter into “executive agreements” with qualifying foreign governments in order to directly access data held by US IT companies and service providers. Foreign governments qualify to conclude an executive agreement when the US attorney general certifies that they meet the human rights standards set out in the Act. Upon the conclusion of such agreements, the parties have the ability to cooperate outside the traditional channels of a mutual legal assistance treaty (MLAT) (i.e. without the oversight of independent judicial authorities, and “without following each other’s privacy laws”).¹⁶¹

Downing Street announced in February that the UK prime minister had spoken to President Donald Trump about data sharing on serious crime and terrorism.¹⁶² This statement appears as a reference to the new CLOUD Act. It follows previous UK-US discussions¹⁶³ on a bilateral agreement that would enable UK-based law enforcement authorities to request stored communications and live intercepts directly from US-based providers, including content data, as an alternative to the MLAT currently in force between the two countries (on a reciprocal basis).¹⁶⁴ In substance, by foreseeing the possibility to conclude an executive agreement under the CLOUD Act, the UK Government reiterated its intention to foster UK-US cooperation practices directed at facilitating the cross-border exchange of

¹⁵⁹ House of Commons, Home Affairs Committee (2018b), para. 37 (emphasis added).

¹⁶⁰ CLOUD Act, S. 2383, H.R. 4943.

¹⁶¹ Fischer (2018).

¹⁶² HM Government, Press release, “PM call with President Trump: 6 February 2018” (<https://www.gov.uk/government/news/pm-call-with-president-trump-6-february-2018>).

¹⁶³ Letter of P.J. Kadzik, Former US Assistant Attorney General, to Joseph R. Biden, 15 July 2016 (www.aclu.org/sites/default/files/field_document/doj_legislative_proposal.pdf).

¹⁶⁴ Daskal (2016); Lin and Fidler (2017).

personal data between US and UK authorities, and outside the EU framework.

The UK has been negotiating a bilateral data-sharing agreement with the US since 2015, but no such an agreement has been concluded to date. In the meantime, the UK has taken initiative at the domestic level in order to pave the way for future cooperation with the US under a CLOUD Act executive agreement with the US. On 27 June 2018, the UK Government introduced in the House of Lords the Crime (Overseas Production Orders) Bill.¹⁶⁵ If adopted, this piece of legislation would enable UK law enforcement agencies and prosecutors to apply through the UK courts for an ‘overseas production order’ requiring service providers outside the UK to produce or grant access to electronic data for the purposes of investigating and prosecuting serious crimes. Applications for an overseas production order could only be made if there was an international agreement in place between the UK and the territory where the relevant provider was based.¹⁶⁶

As an EU Member State, the UK would be pre-empted from the conclusion of an executive agreement with the US on the exchange of personal data for law enforcement purposes, at least to the extent that such an agreement would undermine EU fundamental rights and rule of law standards. The Commission has recently noted that bilateral agreements with non-EU countries would lead to “fragmentation”, which might hamper international cooperation in the investigation and prosecution of crime.¹⁶⁷ Moreover, an executive agreement concluded by the UK as a third country (i.e. after Brexit) would fall within the scope of the Commission’s adequacy assessment.

2.3.2 *Ways towards adequacy and viable alternatives*

In addition to the challenges that the above-mentioned pieces of UK legislation on surveillance and data protection may raise, the procedure to obtain an adequacy decision may also turn out to be quite long. There are

¹⁶⁵ Crime (Overseas Production Orders) Bill, HL Bill 113 of 2017–19, which was scheduled to have its second reading on 11 July 2018.

¹⁶⁶ House of Lords, “Crime (Overseas Production Orders) Bill [HL] HL Bill 113 of 2017–19”, Library Briefing (2018).

¹⁶⁷ European Commission, SWD(2018) 118 final (2018), p. 78.

ongoing adequacy talks with South Korea and Japan, while adequacy decisions have been adopted so far with regard to the following countries and jurisdictions: Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland, Uruguay and the US (limited to the Privacy Shield framework).¹⁶⁸ Still, none of these adequacy decisions cover police and judicial cooperation, as this field was excluded from the scope of Directive 95/46. A senior EU official interviewed in our research noted that the pages regarding motivations attached to the already adopted decisions have become more numerous over time (over 50 pages for the most recent ones), and this is indicative of the progressively more demanding assessment carried out by the Commission.

In the case of Japan, the adequacy assessment started in May 2017 and is expected to be concluded after summer 2018. This suggests that adequacy talks with third countries, including the post-Brexit UK, may take considerable time. Furthermore, the involvement of the European Data Protection Board, with which the Commission should consult when assessing the level of data protection in third countries,¹⁶⁹ may extend the length of the adequacy proceedings. The Board should provide the Commission with an “opinion for the assessment of the adequacy of the level of protection in a third country”;¹⁷⁰ to this end, the Commission should provide the Board with all necessary documentation, including correspondence with the government of the third country.¹⁷¹ Directive 2016/680 on protecting personal data processed for the purpose of criminal law enforcement does not set out an explicit obligation for the Commission to stick to the content of the opinion of the Board, yet it is difficult to imagine how the Commission would openly depart from it.

¹⁶⁸ This information was retrieved from the European Commission’s website (https://ec.europa.eu/info/law/law-topic/data-protection/data-transfers-outside-eu/adequacy-protection-personal-data-non-eu-countries_en).

¹⁶⁹ Recital No. 68 of Directive 2016/680. See the similar wording of Recital No. 105 of the GDPR.

¹⁷⁰ Art. 51(1)(g) of Directive 2016/680, which is phrased in a way that is similar to Art. 70(1)(s) of the GDPR.

¹⁷¹ Art. 51(1)(g) of Directive 2016/680, which corresponds to the second part of Art. 70(1)(s) of the GDPR.

Although the adoption of a Commission adequacy decision would be “the obvious way to go”¹⁷² to keep data flows after Brexit, it is not the only available alternative. As mentioned, Directive 2016/680 allows data exchange after Brexit through “legally binding instruments” providing for “appropriate safeguards”¹⁷³ with regard to the protection of personal data. This could be represented, for instance, by an international agreement concluded by the UK and the EU. The broad wording of Directive 2016/680 would also cover sectoral agreements, such as those concerning the exchange of personal data solely with EU agencies (e.g. Europol and Eurojust). At the same time, this approach would be a more cumbersome way forward, applying a piecemeal approach to data transfer for the purpose of law enforcement and criminal justice cooperation.

The UK has called for a “new agreement between the EU and UK”,¹⁷⁴ which should “[build] on standard adequacy”¹⁷⁵ and will “*maintain the free unhindered flow* of personal data between the EU and UK”.¹⁷⁶ According to the UK Government, this bespoke agreement would operate in parallel to the new internal security treaty.¹⁷⁷ However, it is not yet clear what an agreement on the exchange of personal data ‘building on the existing adequacy model’ would look like. In the White Paper issued in July 2018, the Government stated:

The UK believes that the EU’s adequacy framework provides the right starting point for the arrangements the UK and the EU should agree on data protection but wants to go beyond the framework in two key respects:

- a. on stability and transparency, it would benefit the UK and the EU, as well as businesses and individuals, to have a clear, transparent framework to facilitate dialogue, minimise the risk of disruption to

¹⁷² Oral evidence of L. Woods, Director of Research, School of Law, University of Essex, to the House of Commons’ Home Affairs Committee, “Home Office delivery of Brexit: Policing and security co-operation”, 5 December 2017, Q75.

¹⁷³ Art. 37(1)(a) of Directive 2016/680.

¹⁷⁴ HM Government (2018b), p. 16.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.* (emphasis in the original).

¹⁷⁷ HM Government (2018a), p. 25.

data flows and support a stable relationship between the UK and the EU to protect the personal data of UK and EU citizens across Europe; and

b. on regulatory cooperation, it would be in the UK's and the EU's mutual interest to have close cooperation and joined up enforcement action between the UK's Information Commissioner's Office (ICO) and EU Data Protection Authorities.¹⁷⁸

From the EU perspective, the adequacy decision would be the preferred approach, as stated by Michel Barnier: "the only possibility for the EU to protect personal data is through an adequacy decision".¹⁷⁹

¹⁷⁸ HM Government (2018d), p. 74.

¹⁷⁹ Speech by Michel Barnier at the 28th Congress of the International Federation for European Law (FIDE), Lisbon, 26 May 2018 (http://europa.eu/rapid/press-release_SPEECH-18-3962_en.htm). See also European Commission (2018c).

PART II

UK-EU COOPERATION IN CRIMINAL JUSTICE AND POLICE MATTERS AFTER BREXIT

3 UK PARTICIPATION IN EU MUTUAL RECOGNITION INSTRUMENTS AND FUTURE OPTIONS

During its EU presidency in 1998, the UK Government put forward the idea of applying the mutual recognition principle in the field of criminal law.¹⁸⁰ In the 1999 Tampere Conclusions, setting up a five-year agenda for EU justice and home affairs, the European Council endorsed the principle of mutual recognition, which in its view “should become the cornerstone of judicial cooperation”¹⁸¹ in criminal matters. The 2004 Hague Programme and the 2010 Stockholm Programme reiterated this stance.¹⁸² Eventually, with the Treaty of Lisbon, EU primary law has recognised that judicial cooperation in criminal matters in the EU “shall be based on the principle of mutual recognition of judgments and judicial decisions” (Article 82 TFEU).

The application of the principle of mutual recognition soon became the motor of European integration in criminal matters. The adoption in 2002 of the EAW Framework Decision – a prime example of mutual recognition in criminal matters – constituted a key development for EU criminal law and

¹⁸⁰ Mitsilegas (2009), pp. 115ff., upon which this section draws.

¹⁸¹ European Council (1999), para. 33.

¹⁸² See, respectively, European Council (2004), para. 3.3.1, and European Council (2010), para. 3.1.

was followed by the adoption of a series of further mutual recognition measures. The principle of mutual recognition implies a high degree of automaticity in the execution of judicial decisions, in the frame of judicial procedures in which political authorities do not participate. Cooperation among judicial authorities should take place within a limited timeframe, under strict deadlines, and on the basis of a pro forma document that is usually annexed to the relevant framework decisions or directives.

Criminal justice cooperation through mutual recognition procedures is one of three areas in which the UK Government has expressed its desire to remain as close as possible to the Union (together with EU JHA agencies and bodies and access to databases/information-sharing mechanisms). At the same time, the possibility of maintaining the status quo after Brexit faces a set of legal and political challenges. Outside the framework provided by EU mutual recognition instruments, there are a number of alternatives to ensure that the parties maintain judicial cooperation in criminal matters.

3.1 Negotiating positions on instruments of mutual recognition

According to the “Framework for the UK–EU Security Partnership”, the UK Government aims to have “[a]ccess to streamlined, consistent procedures for practical operational cooperation”,¹⁸³ which include mutual recognition procedures. As noted above, the European Parliament is of the opinion that future relationships with the EU in the field should be regulated in keeping with existing agreements with non-Schengen third countries. It is thus largely uncertain whether the UK could manage to continue to have access to EU mutual recognition instruments after Brexit.

It should be noted that mutual recognition creates extraterritoriality:¹⁸⁴ in a borderless AFSJ, the will of an authority in one Member State can be enforced beyond its territorial legal borders and across this area. The acceptance of such extraterritoriality requires a high level of mutual trust between the authorities that take part in the system and is premised upon the acceptance that membership of the European Union means that all EU

¹⁸³ HM Government (2018a), p. 17.

¹⁸⁴ Nicolaidis and Shaffer (2005).

Member States fully respect fundamental rights as well as the rule of law,¹⁸⁵ including the independence of the judiciary and the general principle of effective judicial protection.

Because of the inextricable link between mutual trust, mutual recognition, respect for fundamental rights and membership of the EU (which includes the jurisdiction of the CJEU), no third country has so far been allowed to join EU mutual recognition instruments. As the European Commission pointed out, “[t]here is no presumption of mutual trust outside of the EU institutional framework underpinned by common principles”.¹⁸⁶ Even the EU Agreement with Norway and Iceland on surrender, which mostly replicates the EAW Framework Decision, does not allow these countries to exchange EAWs with EU Member States but it creates a parallel system of extradition between the latter and Norway and Iceland.¹⁸⁷ The red line of the UK on the Court of Justice and its status as a non-Schengen country are likely to raise further obstacles to the continued participation of this country in EU mutual recognition instruments. As a consequence, “Brexit is likely to have the biggest impact on the operation of mutual recognition instruments in proceedings and investigations involving the UK”.¹⁸⁸

The following sections examine the three instruments of mutual recognition that the UK authorities and our interviewees have identified as the most important tools to cooperate with their EU counterparts, namely the EAW (3.2), the EIO (3.3), and the mutual recognition of freezing and confiscation orders (3.4).

3.2 European Arrest Warrant

The EAW Framework Decision is the most emblematic and widely implemented EU criminal law instrument. It aims to compensate for the freedom of movement enabled by the abolition of internal borders by

¹⁸⁵ Mitsilegas (2016a), p. 126. As set out in the sections below, recent case law of the CJEU and recent EU legislation show that this presumption is far from irrebuttable.

¹⁸⁶ European Commission (2018d), p. 10.

¹⁸⁷ See more in subsection 3.2.2, part II below.

¹⁸⁸ Alegre et al. (2017), p. 16 (emphasis added).

ensuring that Member States' justice systems can reach extraterritorially to bring individuals to face justice should the latter have taken advantage of the abolition of borders to flee the jurisdiction. The EAW Framework Decision has established a speedy and automatic system that requires the recognition of EAWs and the surrender of individuals wanted for prosecution or to serve a custodial sentence with a minimum of formality.¹⁸⁹ Unlike the traditional extradition procedures, the EAW Framework Decision offers the following improvements:

- introduces a surrender procedure where EAWs are exchanged among judicial authorities;¹⁹⁰ Member States can designate central authorities to assist the competent judicial authorities;¹⁹¹
- abolishes, in principle, the bar on the extradition of own nationals;¹⁹²
- exempts the executing authority from assessing double criminality, if the offence at issue is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and it falls within one of the 32 categories of offences listed in Article 2(2) of the EAW Framework Decision;
- provides for only three mandatory grounds of non-execution (amnesty, *ne bis in idem* and minor age) and lists seven grounds for optional non-execution of EAWs;¹⁹³
- does not provide for the political offence exception;¹⁹⁴ and
- obliges the executing authorities to take a final decision on the execution of the EAW within strict deadlines, with a maximum of 90

¹⁸⁹ Mitsilegas (2017), p. 230.

¹⁹⁰ Art. 6 of the EAW Framework Decision.

¹⁹¹ Art. 7 of the EAW Framework Decision.

¹⁹² See, however, Art. 4(4) of the EAW Framework Decision, which provides that if the EAW has been issued for the purposes of execution of a custodial sentence or detention order, the executing authority may refuse to execute the EAW "where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law".

¹⁹³ Arts 3 and 4 of the EAW Framework Decision.

¹⁹⁴ See, however, Recital No. 12 of the EAW Framework Decision.

days after the arrest of the requested person in the most complex cases.¹⁹⁵

In the UK, the EAW Framework Decision has been implemented by the Extradition Act 2003. Part 1 of the Extradition Act regulates extradition from the UK to EU countries (and Gibraltar) – the so-called category 1 territories – whereas extradition *to* the UK is dealt with in Part 3. The National Crime Agency is the central authority that receives incoming EAWs from other EU countries and transmits to them outgoing EAWs.

In the implementation of the EAW Framework Decision, the UK has introduced some rules that are not included in the EU instrument. For instance, section 13 of the Extradition Act (“Extraneous considerations”) is worded in a way that allows UK courts to refuse extradition for politically motivated offences.¹⁹⁶ Furthermore, although the operative provisions of the EAW Framework Decision do not include a ground for refusal to execute an EAW based on human rights considerations,¹⁹⁷ section 21 of the Extradition Act imposes on the judge the duty to decide whether the person’s extradition would be compatible with the ECHR within the meaning of the Human Rights Act 1998.¹⁹⁸ If the judge decides the question in the negative, he or she must order the person’s discharge.¹⁹⁹

Other EU Member States have likewise ‘gold-plated’ the transposition of the EAW Framework Decision by expressly including human rights grounds for refusal in national implementing law. Significantly, in the recent *Aranyosi and Căldăraru* ruling, the CJEU has confirmed that execution of EAWs may be postponed, and eventually refused, on human rights grounds. The Court clarifies the steps to be taken in order for the executing authority

¹⁹⁵ Art. 17 of the EAW Framework Decision.

¹⁹⁶ See Baker et al. (2011), p. 377. The Extradition Act 2003 still refers to “extradition” rather than to “surrender”.

¹⁹⁷ Art. 1(3) of the EAW Framework Decision simply states that the Framework Decision “shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Art. 6 of the Treaty on European Union”. See also Recital No. 12.

¹⁹⁸ The Human Rights Act 1998 is the piece of UK legislation implementing the European Convention of Human Rights.

¹⁹⁹ S. 21(2) Extradition Act 2003.

to evaluate whether “there are *substantial grounds* to believe that the individual concerned” by the EAW “will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State”.²⁰⁰ If “the existence of that risk cannot be discounted within a reasonable time”, the Court concludes that “the executing judicial authority must decide whether the surrender procedure should be brought to an end”.²⁰¹ The Court’s ruling is significant not only in affirming for the first time that execution of an EAW may be refused in certain circumstances, but also in negating a system of mutual recognition based on automaticity and blind trust: human rights compliance must be queried and ascertained on the ground, and on the basis of concrete evidence.

A second avenue that allows the UK to address human rights concerns arising from the operation of the EAW system is the scrutiny of the compliance of such a system with the principle of proportionality. In the EU, the prevailing view has thus far been for proportionality to be dealt with in the *issuing* and not in the executing Member State.²⁰² Nevertheless, since 2014, the UK has treated non-compliance with proportionality as a ground for refusal to execute an EAW.²⁰³ Section 21A of the Extradition Act 2003 provides for an exhaustive list of matters to be considered by the judge when ruling on proportionality.

The UK – which has been pioneering in introducing human rights safeguards in the EAW – will therefore leave the system at the very time when EU institutions appear to have begun to take these human rights considerations seriously.²⁰⁴ The CJEU was recently asked to broaden the fundamental rights test set out in *Aranyosi* towards a wider rule of law test.²⁰⁵

²⁰⁰ Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, Judgment of 5 April 2016, para. 104 (emphasis added).

²⁰¹ *Ibid.*

²⁰² European Commission (2017c), pp. 19 and 49.

²⁰³ See s. 21A(1)(b) Extradition Act 2003, as amended by the Anti-Social Behaviour, Crime and Policing Act 2014.

²⁰⁴ Mitsilegas (2017), pp. 230–33.

²⁰⁵ Carrera and Mitsilegas (2018).

In the *Celmer* case (*Minister for Justice and Equality v LM (Deficiencies in the system of justice)*),²⁰⁶ the Irish High Court asked the CJEU to rule on whether a suspect can be surrendered to a Member State (Poland) where the independence of the judiciary is blatantly at stake. In his Opinion, the Advocate General stated that it would be for the High Court in Dublin to assess whether “a real risk of flagrant denial of justice on account of deficiencies in the system of justice”²⁰⁷ exists in Poland. According to the Advocate General, if the Irish court finds that the alleged lack of independence of the Polish courts is so serious that it would exclude the fairness of the trial of the person wanted, extradition could be refused.²⁰⁸ In a similar vein, the CJEU has ruled that, when the executing judicial authority “has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial ..., on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State’s judiciary”, the executing authority “must determine, specifically and precisely, whether ... there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State”.²⁰⁹ If the executing authority cannot discount the existence of such a real risk, it “must refrain from giving effect to the European arrest warrant”.²¹⁰

The EAW is highly valued by UK authorities, experts and politicians, including the current prime minister, whose appreciation for the EU surrender procedure dates to the time when she was secretary of state.²¹¹ The statistics published by the National Crime Agency are indicative of the extreme importance of this instrument in the everyday EU and UK fight against crime (see Table 1).

²⁰⁶ Irish High Court, *Minister for Justice and Equality v Artur Celmer*, 12 March 2018.

²⁰⁷ Opinion of Advocate General Tanchev, Case C-216/18 PPU, *Minister for Justice and Equality v LM (Deficiencies in the system of justice)*, delivered on 28 June 2018, para. 121.

²⁰⁸ *Ibid.*, para. 131.

²⁰⁹ Case C-216/18 PPU, *Minister for Justice and Equality v LM (Deficiencies in the system of justice)*, Judgment of 25 July 2018, para. 79.

²¹⁰ *Ibid.*, para. 78.

²¹¹ “Theresa May: Fight Europe by all means, but not over this Arrest Warrant”, *The Telegraph*, 9 November 2014 (www.telegraph.co.uk/news/politics/conservative/11216589/Theresa-May-Fight-Europe-by-all-means-but-not-over-this-Arrest-Warrant.html).

Table 1. EAWs exchanged between and executed in the EU and the UK, 2004–16

| Calendar year | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | Total |
|---------------------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|--------|--------|--------|---------------|
| All requests | | | | | | | | | | | | | | |
| Wanted from the UK | 1,865 | 5,986 | 5,020 | 2,280 | 3,307 | 3,826 | 4,369 | 6,512 | 6,290 | 5,522 | 13,460 | 12,613 | 13,797 | 84,847 |
| Wanted by the UK | 96 | 131 | 126 | 198 | 218 | 246 | 252 | 226 | 271 | 219 | 228 | 228 | 349 | 2,788 |
| Arrests | | | | | | | | | | | | | | |
| Wanted from the UK | 46 | 154 | 408 | 513 | 661 | 884 | 1,307 | 1,332 | 1,331 | 1,775 | 1,519 | 2,041 | 1,843 | 13,814 |
| Wanted by the UK | 30 | 79 | 91 | 92 | 99 | 130 | 141 | 151 | 148 | 170 | 156 | 150 | 185 | 1,622 |
| Surrenders | | | | | | | | | | | | | | |
| Wanted from the UK | 24 | 77 | 151 | 332 | 515 | 673 | 1,038 | 1,079 | 1,025 | 1,126 | 1,097 | 1,149 | 1,431 | 9,717 |
| Wanted by the UK | 19 | 63 | 76 | 99 | 96 | 99 | 133 | 136 | 136 | 127 | 143 | 121 | 156 | 1,404 |

Note: On the same webpage of the National Crime Agency, there is also the caveat that the “number of requests received by the UK does not represent the number of wanted people in the UK. Some Member States issue requests to numerous Member States when they do not know where a subject may be. A large proportion of the requests received by the UK will be for people who are not, and never have been, in the UK.”

Source: National Crime Agency (www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics).

In 2016, according to the National Crime Agency, the UK arrested more than 1,800 individuals and surrendered more than 1,400 people on the basis of an EAW; in the same year, 156 people were extradited to the UK from EU Member States. From 2004 to 2016, the UK surrendered almost 10,000 individuals and more than 1,400 requested people were returned to the UK. From a quantitative perspective, and without taking into account a qualitative assessment of its effects over defendants' rights, this confirms that the EAW is a successful instrument of judicial cooperation at the EU level.

Hence, for the UK prosecuting authorities, the first priority to be addressed in the future EU-UK relationship is the conclusion of an agreement – in whatever form – that resembles the current EAW system as much as possible. UK prosecutors are also examining potential issues raised by the 'legacy cases', i.e. those EAW cases that have been initiated under EU law but which will not be completed before Brexit takes place (or before a new agreement on security or on extradition is concluded by the EU and the UK). According to the provision of the current version of Article 58(1)(b) of the draft Withdrawal Agreement – on which an agreement has not yet been found – the EAW Framework Decision will continue to apply to EAW cases where the requested person was *arrested* before the end of the transition period for the purposes of the execution of an EAW. Moreover, during these proceedings, Directive 2010/64 on the right to interpretation and translation and Directive 2012/13 on the right to information will continue to apply.²¹² As noted above, the arguable future inapplicability of the Charter to the UK has already raised some concerns about the execution of EAWs issued by UK authorities before Brexit.²¹³

In the cliff-edge scenario where there is no agreement on the transition deal or on a future EU-UK arrangement concerning extradition, the EAWs that have already been exchanged between UK and EU authorities may not be given any practical follow-up, and new extradition requests might have to be issued to replace EAWs. Meanwhile, people whose extradition had been requested in accordance with the 2002 Framework Decision may be released, both in the UK and in the EU. As noted by one interviewee, this

²¹² Art. 61 of the draft Withdrawal Agreement.

²¹³ See section 1.2, part I above, with regard to the request for a preliminary ruling in the *O'Connor* and *R O* cases.

could be avoided if, for instance, the UK passes a law designating EU countries as category 2 territories and therefore applies to their extradition requests the rules set out in Part 2 of the Extradition Act 2003. As discussed further below, category 2 territories include countries that are or were Commonwealth countries or that have signed a bilateral or multilateral extradition agreement with the UK.

3.2.1 *Extradition after Brexit: Common issues and concerns*

Before discussing in more detail, the future options for extradition, it is appropriate to zoom in on some common issues that are likely to arise if the UK exits the EAW system:

i) Any alternative to the EAW is likely to be costlier and less effective.

Several interviewees claimed that, without the EAW, there are serious concerns for the effectiveness of future EU and UK investigations in which extradition will have to be sought from and to the UK. Likewise, in her oral evidence to the House of Lords, the director of public prosecutions declared that, in comparison with the other potential alternatives, “it is three times faster to use an EAW and four times less expensive”.²¹⁴ This was echoed by the prime minister in her speech at the Munich Security Conference in February 2018. From the prosecution side, there is unanimous agreement that the loss of the EAW will have a tremendous – perhaps “catastrophic”²¹⁵ – impact on UK cross-border investigations and prosecutions, as none of the currently available options would be an effective replacement.

Independent of which, if any, of the current models of cooperation is adopted for the future EU-UK relationship, one of the main concerns of UK prosecuting authorities is that UK extradition requests to other EU Member States, after Brexit and outside the EAW framework, could fall ‘to the bottom of the pile’. Exiting the EAW system means giving away the above-mentioned improvements that the EU surrender procedure has brought about. Some interviewees pointed out that, whereas an EAW-like form may be drafted and used in future EU-UK extradition procedures,

²¹⁴ Oral evidence of A. Saunders, Director of Public Prosecutions, Crown Prosecution Service, to the House of Lords’ European Union Committee, “Brexit: Future UK-EU security and police cooperation”, 12 November 2016, Q55.

²¹⁵ House of Commons, Home Affairs Committee (2018a), para. 69.

what is to be missed is the automaticity and speediness of the surrender procedure envisaged by the EAW Framework Decision. A minority of experts have been slightly more positive in that regard, claiming that it is unlikely that Brexit will have such an impact on the way EU authorities will deal with UK extradition requests.

Another concern that has been voiced in the literature and by our interviewees relates to the fact that the UK may lose access to SIS II, which is deemed by authorities to be ‘helpful’ when the location of the person whose extradition is sought is not known to the investigating authorities.²¹⁶

ii) It is unlikely that the UK will introduce a bar on the extradition of UK nationals (unless perhaps under reciprocity).

The UK criminal justice system does not provide for a bar on the extradition of UK nationals. However, this may turn out to be a serious obstacle for the extradition from some EU Member States to the UK, since a number of EU countries do not extradite their own nationals.²¹⁷ In many of these systems, such a prohibition has been lifted with regard to the EAW system only, but there are no guarantees that such an exemption will be extended to future EU (or Member States’) agreements with the UK. The sensitivity of the issue is significantly mirrored in the draft Withdrawal Agreement, where it is provided that – already during the transition period – EU Member States may decide not to extradite their own nationals to the UK.²¹⁸ If this is the case, according to the same provision the UK may declare that it will not extradite its own nationals to those Member States either,²¹⁹ although one interviewee noted that this is unlikely, as previously the UK has not generally had a nationality bar.²²⁰

iii) Extradition to the UK might be refused if there is a serious risk that the extradited person would be subjected to inhuman or degrading treatment or punishment.

²¹⁶ See section 5.1, part II below.

²¹⁷ See also Alegre et al. (2017), pp. 34–35.

²¹⁸ Art. 168 of the draft Withdrawal Agreement. At the time of writing, the policy objective of this provision has been agreed, yet the text requires drafting changes or clarifications.

²¹⁹ Ibid.

²²⁰ See also Baker et al. (2011), pp. 59–60 on the historical reasons behind the lack of a nationality bar in UK extradition law.

After Brexit, EU Member States may claim that extradited persons may be subjected to inhuman or degrading treatment in the UK, and therefore refuse extradition to the UK. In *Petruhhin*, the CJEU has indeed submitted that, when a Member State receives a request from a third state seeking the extradition of a national of another Member State, that first Member State must verify that the extradition will not prejudice the rights referred to in Article 19 of the Charter. This provision prohibits the extradition to a state where there is a serious risk that the extradited person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.²²¹

Petruhhin concerns an extradition request from Russia, i.e. a third country with which the EU has not signed an extradition agreement. Thus, the Court reached its conclusion by noting that the case came within the scope of EU law because Mr Petruhhin had exercised his freedom of movement within the EU, given that he was an Estonian national who had been arrested in Latvia. Nevertheless, if the UK were to conclude an extradition agreement with the EU, there is no doubt that extradition proceedings with the UK would a fortiori fall within the scope of EU law – even without any issue related to the freedom of movement – because of that same agreement;²²² as a consequence, Article 19 of the Charter would apply to the extradition requests that the UK sends to EU countries.

It is perhaps unlikely that extradited persons would be subjected to inhuman or degrading treatment or punishment in the UK. Nonetheless, some commentators and interviewees have not entirely ruled out this possibility, in light of the current prison conditions in the UK.²²³ Other interviewees rebutted that, as after *Aranyosi and Căldăraru* there is already an avenue to scrutinise prison conditions in the UK, the absence of any proceedings concerning such conditions means that, for the time being, the issue is more theoretical than practical.

iv) Extradition to the UK might be refused if EU Member States wish to prosecute their own nationals who live in another Member State and whose extradition is requested by the UK.

²²¹ Case C-182/15, *Petruhhin*, Judgment of 6 September 2016, para. 60.

²²² See, to that effect, Case C-191/16, *Pisciotti*, Judgment of 10 April 2018, paras 31 and 35.

²²³ See, for instance, Bárd (2018), pp. 8–9.

In the *Petruhhin* judgment, the CJEU also ruled that, in order to prevent the risk of impunity, a Member State is not required to grant every EU citizen who has moved within its territory the same protection against extradition as that granted to its own nationals. Nevertheless, before extraditing the citizen, the Member State concerned must prioritise the exchange of information with the Member State of origin and allow that state to request the citizen's surrender for the purpose of prosecution. In *Pisciotti*, which concerned the case of an Italian citizen living in Germany and whose extradition had been requested by the US, this principle has been extended to third countries having an extradition agreement with the EU. The requested Member State should put the competent authorities of the Member State of which the citizen is a national in a position to seek the surrender of that citizen pursuant to an EAW.²²⁴ Therefore, as noted by Peers, "the Court's approach – give a Member State the possibility of prosecuting its own nationals first, where it has jurisdiction – will necessarily limit extradition to the UK after the end of the transition period".²²⁵

v) Relinquishing the presumption of mutual trust might have a positive impact on the protection of human rights.

According to some leading experts in the field of extradition interviewed for this study, if Brexit leads to a departure from the system of mutual recognition and mutual trust, this might have positive effects on the protection of human rights of individuals whose extradition is requested by EU countries. Presently, the overarching – albeit not absolute – principle of mutual trust makes it challenging to engage UK courts in terms of human rights and fair trial. A presumption of good faith applies to any extradition request,²²⁶ and state parties to the ECHR are presumed to be compliant with the European Convention's rights.²²⁷ Some interviewees argued that, on average, UK courts are more willing to go beyond these presumptions when non-EU countries are concerned. Hence, after Brexit, domestic courts could even have "greater opportunity to scrutinise human rights issues in relation

²²⁴ Case C-191/16, *Pisciotti*, Judgment of 10 April 2018, para. 56.

²²⁵ Peers (2018b).

²²⁶ Baker et al. (2011), pp. 123–24.

²²⁷ See also Blackstone's Criminal Practice (2017), p. 2184.

to EU extradition requests than was previously the case”.²²⁸ Other interviewees and experts are instead more sceptical about this alleged improvement in the protection of human rights, as UK courts have long been considering human rights issues, and especially prison conditions of other EU Member States (e.g. Romania and Bulgaria), as potential obstacles to surrender. As a consequence, “Brexit will have little impact, at least on this very specific point”.²²⁹ There nonetheless seems to be agreement that in principle the defence will have far more opportunities to raise human rights issues that the UK courts will have to deal with. This could substantially prolong the duration of future extradition proceedings.

vi) Future extradition requests to the UK might concern only the most serious cases.

According to some of our interviewees, the UK – without the EAW – could receive fewer extradition requests, and those requests would realistically concern the most serious cases. In that regard, some have also noted that the current extradition requests received from outside the EU usually do not concern trivial cases. If this prediction turns out to be true, UK courts would no longer be engulfed by extradition requests for petty offences. Other interviewees, however, did not share this view, for two main reasons. First, those countries – like Poland – that adopt the principle of legality (mandatory prosecution) are likely to continue to send extradition requests to the UK even for minor cases. Second, the increasing familiarity that EU judicial authorities have acquired with the extradition process over the years, thanks to the EAW and its success, may represent a further reason why the number of future extradition requests to the UK might not substantially decrease.

²²⁸ Davidson et al. (2016), p. 762.

²²⁹ Niblock and Oehmichen (2017), p. 126.

3.2.2 *Options for extradition after Brexit*

The UK Government has been vocal about concluding a security treaty that would allow the UK to continue to have access to the EAW after Brexit.²³⁰ In the White Paper of July 2018, the Government posited that, in its view, “the arrangements for the EAW during the implementation period, which will take account of constitutional barriers in some Member States, should be the basis for the future relationship on extradition”.²³¹ EU institutions have instead ruled out such a possibility,²³² with the EU’s chief negotiator declaring that “the UK cannot take part in the European Arrest Warrant”.²³³

In the absence of further clarity on future EU-UK cooperation on criminal justice, future EU-UK extradition procedures may be regulated by other arrangements:

- an EU-UK extradition agreement similar to the agreement that the EU has signed with Iceland and Norway;
- the 1957 Council of Europe Convention on Extradition and its Protocols; and
- bilateral agreements between the UK and EU Member States; in this case, the EU and the UK may conclude an agreement that complements those bilateral agreements, as is currently the case with the EU-US extradition agreement.²³⁴

Extradition to the countries that have signed a bilateral or multilateral extradition agreement with the UK, i.e. category 2 territories, is regulated in Part 2 of the Extradition Act 2003. Extradition from these territories to the

²³⁰ HM Government (2018a), pp. 17–18. See also uncorrected oral evidence of S. Fernandes to the Justice Sub-Committee of the House of Lords’ Select Committee on the European Union, “Brexit: Enforcement and dispute settlement”, 27 March 2018, Q51.

²³¹ HM Government (2018d), p. 60. The “constitutional barriers” at hand concern the ban on the extradition of own nationals, which is enshrined in the constitutions of some Member States, as discussed in the previous section.

²³² European Commission (2018d), pp. 4ff; European Parliament, Resolution of 14 March 2018 on the framework of the future EU-UK relationship, para. 27.

²³³ Speech by Michel Barnier at the European Union Agency for Fundamental Rights, Vienna, 19 June 2018 (http://europa.eu/rapid/press-release_SPEECH-18-4213_en.htm).

²³⁴ On these options see, among many others, Mortera-Martinez (2017); Parry (2017).

UK is not addressed in the Extradition Act, as the extradition requests are issued under the royal prerogative and are sent to the third countries by the Home Office through the diplomatic route.²³⁵

First option: Norway/Iceland model

The Agreement between the EU and Iceland and Norway on the surrender procedure between the latter and the EU²³⁶ ('EU-Norway and Iceland Agreement on surrender') introduces a system of surrender with the two countries that is largely similar to the EAW. Most of the provisions of this Agreement, regulating the 'arrest warrant' to be used in the surrender procedures, are copy-pasted from the EAW Framework Decision. The following differences between the two instruments are the most important:

- double criminality, which is not required for the usual list of 32 categories of offences only *if* the EU, Norway and Iceland so declare; otherwise, double criminality remains the rule, so that extradition may take place only when "the acts for which the arrest warrant has been issued constitute an offence under the law of the executing State, whatever the constituent elements or however it is described" (Article 3(2));
- the political offence exception, which EU Member States, Norway and Iceland *may* reintroduce, except for terrorist crimes (Article 6);
- the bar on extradition of own nationals, which EU Member States, Norway and Iceland *may* reintroduce (Article 7);
- the *option* for EU Member States, Iceland and Norway to designate the Minister of Justice as the competent authority for the execution of an arrest warrant, "whether or not the Minister of Justice is a judicial authority under the domestic law of that State" (Article 9(2)); and
- the rules on time limits for the decision to execute the arrest; although these rules replicate the provisions of the EAW Framework Decision (60 or 90 days), they also allow EU Member States, Norway and Iceland

²³⁵ See more on the UK Government webpage dedicated to extradition (www.gov.uk/guidance/extradition-processes-and-review#extradition-to-the-uk).

²³⁶ OJ L 292/2, 21.10.2006.

to indicate the cases in which these time limits will *not* apply (Article 20(5)).

Further differences follow from the different institutional settings in which the EAW Framework Decision and the EU-Norway and EU-Iceland Agreement on surrender have been adopted. The latter includes the following rules:

- dispute settlement, providing that any dispute may be referred “to a meeting of representatives of the governments of the Member States of the European Union and of Iceland and Norway, with a view to its settlement within six months” (Article 36);
- case law of the CJEU and of the competent courts of Iceland and Norway – the EU, Norway and Iceland “shall keep under constant review the development of the case law of the Court of Justice of the European [Union], as well as the development of the case law of the competent courts of Iceland and Norway relating to these provisions and to those of similar surrender instruments. To this end a mechanism shall be set up to ensure regular mutual transmission of such case law” (Article 37); and
- common review of the Agreement within five years (Article 40) and termination of the Agreement, which may be decided by any of the contracting parties (Article 41).

The negotiations of the EU-Norway and Iceland Agreement on surrender began in July 2001 and the Agreement was signed in 2006. As Iceland eventually notified the completion of the relevant internal procedures in April 2018, the Agreement should enter into force soon. Norway had already made its notification in May 2013,²³⁷ while the Council of the European Union approved the text at the end of 2014.²³⁸ The lengthy procedures to conclude this Agreement represent a source of serious concern

²³⁷ This information has been retrieved from the webpage of the Council of the European Union dedicated to the EU-Norway and Iceland Agreement on surrender (www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2006056).

²³⁸ OJ L 343/1, 28.11.2014.

for future EU–UK extradition relationships.²³⁹ That being said, it has been suggested that “the length of time taken to conclude the [EU–Norway and Iceland Agreement on surrender] may reflect the relative political importance placed by the EU on extradition to and from those countries”.²⁴⁰ In this view, the high number of extraditions between the UK and EU “might provide *impetus* for both parties to conclude an agreement more speedily”.²⁴¹

Others have also argued that future EU–UK negotiations may not necessarily suffer from the same delays, which – as Peers notes –were “due to Iceland’s non-ratification, rather than problems with EU Member States”.²⁴² In a similar vein, Suominen points out that the EU–Norway and Iceland Agreement on surrender was negotiated before the Treaty of Lisbon, when “previous decision-making was time-consuming and especially the unanimity requirement resulted in the agreement process being stalled by the Hungarian Constitutional Court, when it declared the agreement contrary to the Hungarian Constitution”.²⁴³ It is worth noting that, after Lisbon, EU international agreements are now approved by the Council with a qualified majority voting decision.²⁴⁴

It is still debatable whether the UK may conclude a similar agreement with the EU, because Norway and Iceland – unlike the UK – participate in the Schengen measures concerning the abolition of checks at internal borders and the movement of persons. As mentioned, the EAW Framework Decision aims to compensate for the freedom of movement enabled by the abolition of internal borders, and the same rationale seems to underpin the Agreement on surrender with Norway and Iceland. The Commission’s proposal for a Council Decision on the conclusion of the Agreement at issue stated that “[d]espite the decision not to link the European arrest warrant to Schengen,

²³⁹ See, among many others, House Lords, European Union Committee (2016), para. 141.

²⁴⁰ Deane and Menon (2017), p. 42.

²⁴¹ *Ibid.* (emphasis added). See also the uncorrected oral evidence of J. Spencer, Professor Emeritus of Law at the University of Cambridge, and N. Vamos, previously head of extradition for the Crown Prosecution Service and Partner, Peters & Peters, to the Home Affairs Sub-Committee of the House of Lords’ Select Committee on the European Union, “Brexit: The proposed UK–EU security treaty”, 18 April 2018, Q36.

²⁴² Quoted in Deane and Menon (2017), p. 42.

²⁴³ Suominen (2017), p. 259.

²⁴⁴ Art. 218(8) TFEU. See section 2.2, part I above.

the Council agreed that it would be useful to apply the surrender procedure model to the Schengen countries, given their privileged partnership with the EU Member States".²⁴⁵

Hence, it seems that the privileged partnership of Norway and Iceland with the EU has played an important role in the decision to strike the Agreement on surrender, yet it does *not* look like a (legal) precondition for the conclusion of that Agreement. Likewise, the Council decisions on the signing and conclusion of the EU-Norway and Iceland Agreement on surrender are not considered to be measures of the Schengen *acquis* in the field of police and judicial cooperation in criminal matters.²⁴⁶ Nonetheless, the European Parliament and the Commission seem of the opposite view, as they have stated that future cooperation as regards internal security "can be developed on the basis of *non-Schengen* third-country arrangements".²⁴⁷ Similarly, the European Council highlighted the importance of EU-UK cooperation in criminal matters after Brexit, yet "taking into account that the UK will be a third country outside Schengen".²⁴⁸

Since the EU-Norway and Iceland Agreement on surrender has not yet entered into force, it is impossible to assess whether, in practice, it is a valid alternative to the EAW. As it mostly replicates the EAW Framework Decision, it may represent – at least on paper – a plausible course of action for future EU-UK arrangements in the field of extradition.²⁴⁹ Some of our interviewees suggested that EU Member States may even remain category 1 territories for the purposes of applying the Extradition Act 2003, which

²⁴⁵ COM(2009) 705 final, 17 December 2009, p. 2.

²⁴⁶ List of Union acts adopted before the entry into force of the Lisbon Treaty in the field of police cooperation and judicial cooperation in criminal matters which cease to apply to the United Kingdom as from 1 December 2014 pursuant to Art. 10(4), second sentence, of Protocol (No. 36) on transitional provisions (2014/C 430/04), OJ C 430/17, 1.12.2014.

²⁴⁷ European Parliament, Resolution of 14 March 2018 on the framework of the future EU-UK relationship, para. 28 (emphasis added). See also European Commission (2018c). Gutheil et al. (2018b) argue that "the status of the UK as a non-Schengen third country is generally considered as a challenge in terms of the political considerations of achieving the highest degree of cooperation" (p. 54).

²⁴⁸ European Council, Guidelines (Art. 50), 23 March 2018, para. 10(i).

²⁴⁹ For a similar, albeit slightly more cautious, conclusion, see House of Lords, European Union Committee (2017), para. 141.

would thus only have to be amended to a minor extent to accommodate an agreement like the EU–Norway and Iceland one on surrender.²⁵⁰

The degree of effectiveness of the EU–Norway and Iceland Agreement is likely to depend on the declarations of the parties. Most of the rules that have sped up the surrender procedure in the EU feature in the EU–Norway and Iceland Agreement as well, yet their application is *optional* and depends on whether the two Schengen countries and the EU Member States decide to apply them. At the time of writing, Norway, Iceland and 26 Member States have made their declarations.²⁵¹

Unlike the UK and some EU countries (11 Member States), Norway and Iceland will not require double criminality for the 32 categories of offences listed in the Agreement, if they meet the threshold of penalty set out in the Agreement.²⁵² In addition, six Member States have declared that they will not extradite their own nationals under any circumstance, although a larger number of Member States (around ten), as well as Norway and Iceland, have declared that the surrender may or shall be subject to the condition that the person concerned is returned to the state of his or her nationality to serve the sentence passed against him or her in the issuing state. Unlike Norway and the UK, Iceland and nine EU Member States will apply the political offence exception (except for terrorist crimes), while the Ministries of Justice have been notified as the competent authorities to decide on the execution of arrest warrants by Norway (in limited cases, though) and the Slovak Republic. The UK has instead notified the Home Office as the competent executing authority. Hungary and the Slovak Republic will not apply the rules on the time limits for the decision to execute the arrest warrant in limited cases, while the UK stands out as the only country availing itself of the option not to apply those strict limits to “any arrest warrant”²⁵³ that it receives.

Table 2 summarises these positions, which do not take into account the declarations of Finland and Sweden, as these declarations relate only to

²⁵⁰ See also Davidson et al. (2016), p. 759.

²⁵¹ Council of the European Union (2018d).

²⁵² Poland is among these countries but it does not waive the dual criminality rule if the requested person is a Polish national.

²⁵³ Council of the European Union (2018d), p. 86.

surrender cases also concerning a third EU country (e.g. in case of transit). These two countries, as well as Denmark,²⁵⁴ will continue to apply the rules of the Nordic Arrest Warrant to the extradition proceedings between them and Norway and Iceland. The table includes information concerning Ireland, although the Irish position is still “provisional”.²⁵⁵

Table 2. Declarations pertaining to the EU–Norway and Iceland Agreement on the surrender procedure as of 10 April 2018

| | 23 EU Member States (EU-28 without DK, FI, IT, SE, UK) | UK | Norway | Iceland |
|---|--|--------------------|----------------------|----------|
| Declaration that dual criminality does not apply to 32 categories of offences – Art. 3(4) | 11 (AT, CY, EL, ES, HU, LT, NL, PL,* PT,** RO, SI) | X | ✓ | ✓ |
| Application of the political offence exception (excluding terrorism) – Art. 6(2)) | 9 (BE, EL, ES, FR, HR, IE, LU, MT, PL) | X | X | ✓ |
| Absolute ban on the extradition of own nationals – Art. 7(2) | 6 (CZ, DE, FR, IE, SI, SK) | X | X | X |
| Minister of justice or other minister as the competent executing authority – Art. 9(2) | 1 (SK) | ✓ (Home Office) | ✓ (limited cases) | X |
| Minister of justice as competent authority to receive and transmit arrest warrants – Art. 10(2) | 4 (EE,*** EL, LU, SK) | X | X | X |
| Declaration that the strict time limits for the decision to execute the arrest warrant do not apply – Art. 20(5) | 2 (HU, SK – limited cases****) | ✓ | X | X |

* Poland applies double criminality when the requested persons are Polish nationals.

** As set out in Council of the European Union (2018d), the “submission by Portugal of a declaration waiving verification of double criminality ... is a policy option for decision at a higher level. If the option of such a declaration is taken up, its content could be as follows: ... ‘Portugal waives the right to verify double criminality in the circumstances set out in Article 3(4) of the Agreement’” (p. 62).

*** In Estonia, the Ministry of Justice is only competent to receive arrest warrants.

²⁵⁴ Denmark does not take part in the EU–Norway and Iceland Agreement on surrender (see Council Decision 2014/835/EU on the conclusion of the Agreement, OJ L 343/1, 28.11.2014).

²⁵⁵ Council of the European Union (2018d), p. 21.

**** The Slovak Republic will not apply the time limits in the cases of postponed or conditional surrender (Article 27 of the Agreement). The declaration of Hungary concerns cases in which the requested person seeks asylum or temporary protection.

Sources: Authors' elaboration based on Council of the European Union (2018d).

The table shows that, on the one hand, Norway and Iceland have limited their declarations with the aim of setting up an extradition system that is as similar as possible to the EAW. Having the same goal, the UK could take the same path, although its declaration on the general non-applicability of time limits does not bode well. On the other hand, EU Member States have taken a cautious approach to extradition outside the context of the EAW, as shown by their declarations concerning the extradition of own nationals and by the fact that several EU Member States will require double criminality. Outside the context of EU law, Member States have shown on average that they are inclined to introduce a number of rules and exceptions that can slow down extradition proceedings, if compared with EAW proceedings, and one may wonder whether the relationship

The similarity of the EU–Norway and Iceland model to the EAW system may be appealing to the UK Government, even more so because the Agreement lays down rules on dispute settlement and mutual transmission of case law that would be compatible with the UK's position on the jurisdiction of the CJEU. The choice of leaving any potential dispute between the EU and the UK in the hands of a meeting of representatives of the governments fits the stance of the UK Government. In addition, if the Norway/Iceland model is adopted, UK courts would not be obliged – at least formally – to abide by the case law of the CJEU, since the Agreement on surrender only provides that the parties to the Agreement keep 'under constant review' the case law of the other parties' courts.

Although this is "a very basic form of co-ordination"²⁵⁶ and some would prefer a clearer rule requiring UK courts to align with the case law of the CJEU, a number of other experts we interviewed praised the Norway/Iceland model on dispute settlement and mutual transmission of case law. In fact, in international (extradition) treaties, it is not usual to have a court, and more precisely the court of one party only, to solve potential disputes and interpret the agreement. On the contrary, solutions such as the

²⁵⁶ Oral evidence of F. Jacobs to the Home Affairs Sub-Committee of the House of Lords' Select Committee on the European Union, "Brexit: The European Arrest Warrant", 29 March 2017, Q7.

ones endorsed in the EU–Norway and Iceland Agreement on surrender are much more common and sensible. In practice, the courts of the parties to the agreements are encouraged to look at each other to allow the extradition procedures to continue smoothly. When issues arise, they are discussed – and usually solved – at the diplomatic level. Nevertheless, these valid arguments cannot overshadow the fact that, as argued above, the case law of the CJEU will in any case have an extremely relevant impact on the UK after Brexit.

Second option: 1957 Council of Europe Convention on Extradition

In the absence of any EU–UK arrangement on extradition, extradition procedures between the UK and EU Member States are likely to fall back on the 1957 European Convention on Extradition, signed under the aegis of the Council of Europe (‘1957 Convention’). Later supplemented by four Protocols, the 1957 Convention follows the traditional path of international extradition agreements, as it does not provide for any time limit for the execution of extradition requests and it includes, inter alia, rules providing for the following aspects:

- double criminality;²⁵⁷
- political offence exception;²⁵⁸
- prohibition of the extradition of own nationals, if state parties so declare;²⁵⁹ and
- communication through diplomatic channels, although it is provided that “[o]ther means of communication may be arranged by direct agreement between two or more Parties”;²⁶⁰ the fourth Protocol to the Convention, signed in 2012, amended this provision, by providing that the extradition request “shall be in writing. It shall be submitted by the

²⁵⁷ Art. 2(1) of the 1957 Convention.

²⁵⁸ Art. 3 of the 1957 Convention. In accordance with Art. 1 of the first Protocol to the 1957 Convention, the most serious crimes (e.g. crimes against humanity and war crimes) shall not be covered by this exception.

²⁵⁹ Art. 6 of the 1957 Convention, which is based on the *aut dedere aut iudicare* principle.

²⁶⁰ Art. 12 of the 1957 Convention. The third Protocol to the 1957 Convention, which was signed in 2010 and entered into force in 2012, introduced a simplified procedure to be applied in some cases.

Ministry of Justice or other competent authority of the requesting Party to the Ministry of Justice or other competent authority of the requested Party".²⁶¹

Furthermore, as for dispute settlement, it is for the European Committee on Crime Problems of the Council of Europe to do "whatever is necessary to facilitate a friendly settlement of any difficulty which may arise out of [the] interpretation and application"²⁶² of the Convention and its Protocols. To this end, the Committee – which is formed by delegates of each Council of Europe Member State, representatives of the EU and other observers²⁶³ – has to be kept informed of the application of the Convention and its Protocols.

As the extradition to the state parties to the 1957 Convention is regulated in the UK by Part 2 of the Extradition Act 2003, falling back on the 1957 Convention could simply imply 'transferring' EU Member States from the list of category 1 territories to the list of category 2 territories. However, our interviewees warned that further practical details will to have to be sorted out as well.

Unlike Part 1, Part 2 of the Extradition Act does not include any rule on the proportionality check. Moreover, Part 2 provides for the intervention of the secretary of state in extradition proceedings. The secretary of state must issue a certificate when he or she receives extradition requests sent to the UK, if they comply with the requirements set out in the Extradition Act.²⁶⁴ The request is then transmitted to the competent judicial authorities that will evaluate whether there are any bars to extradition. If there is no obstacle to the extradition, the case is then sent to the secretary of state to make the final decision on extradition.²⁶⁵ According to some of our interviewees, these two issues would not be stumbling blocks for the UK's post-Brexit extradition proceedings with EU countries. On the one hand, the secretary of state has hardly any discretionary power, as the law lists the grounds to be followed

²⁶¹ Art. 2 of the fourth Protocol to the 1957 Convention.

²⁶² See Art. 8 of the fourth Protocol to the 1957 Convention.

²⁶³ See more on the website of the European Committee on Crime Problems of the Council of Europe (www.coe.int/en/web/cdpc/european-committee-on-crime-problems).

²⁶⁴ S. 70 Extradition Act 2003.

²⁶⁵ S. 93 Extradition Act 2003.

in making the decisions.²⁶⁶ On the other hand, as Part 2 of the Extradition Act provides for a human rights bar that is identical to that of Part 1,²⁶⁷ issues of proportionality may be (and are) raised before the competent UK courts claiming that the extradition would be a disproportionate interference with the individual's right to respect for private and family life, in violation of Article 8 ECHR.

Furthermore, extradition to category 2 territories is based on dual criminality,²⁶⁸ which may represent a concern to address in the extradition proceedings and may cause further delays. Even so, most of our interviewees were rather positive in that regard, noting that it is rare that UK courts find that this condition is not met.²⁶⁹

Part 2 of the Extradition Act also requires that (some) third countries provide a *prima facie* evidential case. If the person whose extradition is sought has not been convicted in the third country, UK courts "must decide whether there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him".²⁷⁰ Still, it is worth noting that the *prima facie* requirement does not apply to extradition requests issued by state parties to the 1957 Convention.²⁷¹ As all EU Member States are parties to the Convention, there is no reason to believe that – after Brexit – the *prima facie* requirement would be reintroduced with regard to extradition requests coming from the EU.

Some of the concerns that sometimes come up in the debates on post-Brexit extradition do not seem well-founded. In spite of this, there is almost unanimous agreement that the extradition procedures pursuant to the 1957 Convention would be far less effective than those based on the EAW

²⁶⁶ See Baker et al. (2011), p. 25: "The Secretary of State has no general discretion to decline to order extradition."

²⁶⁷ S. 87 of the Extradition Act 2003, which is phrased in the same way as s. 21 of the Extradition Act 2003.

²⁶⁸ Ss 137 and 138 of the Extradition Act 2003.

²⁶⁹ See also Davidson et al. (2016), p. 760.

²⁷⁰ S. 84(1) of the Extradition Act 2003.

²⁷¹ S. 84(7) of the Extradition Act 2003. Nor does it apply to extradition requests from the US, Australia, Canada or New Zealand.

Framework Decision.²⁷² Regardless of whether the provision on dispute settlement finds favour, all the other main rules of the 1957 Convention do not bode well for the effectiveness of extradition proceedings. Currently, extradition proceedings under Part 2 are much longer than procedures under Part 1. There are no deadlines and, albeit limited, the involvement of the secretary of state represents an additional layer.²⁷³ As submitted by the Defence Extradition Lawyers Forum, under Part 2

there is an in-built delay of up to two months from a District Judge's decision to the making of an order for extradition signed by a Home Office Minister. A return to the [1957 Convention] for every state currently operating the EAW will be subject to additional delays caused by the Home Office's consideration of each case unless legislative change removes this burden.²⁷⁴

What is more, as stressed by one of our interviewees, the police can only arrest the requested person and thus begin extradition proceedings on the basis of a domestic warrant, which the competent court will have to issue if there are no bars to extradition. By contrast, when extradition is sought by means of an EAW, the police can arrest the requested person on the basis of the EAW alone, without any further domestic warrants.²⁷⁵

As a consequence, some interviewees noted that these cumbersome extradition proceedings are likely to be more expensive than current EAW procedures for the UK, as more authorities will be involved, more steps will be necessary to extradite individuals, and so on. In 2014, in reply to a written question of an MP, the then minister for security and immigration at the Home Office declared that “[o]n average it costs £13,000 to extradite

²⁷² All our interviewees agreed on the point. See also, among many others, House of Lords, European Union Committee (2016), para. 141; House of Commons, Home Affairs Committee (2018a), para. 69.

²⁷³ As one of our interviewees added, once the judicial procedure is over, individuals may also flag new human rights issues to the secretary of state; if they seem founded and have not been raised before, the secretary of state should send the case back to court for a new assessment.

²⁷⁴ Written evidence of the Defence Extradition Lawyers Forum to the Home Affairs Sub-Committee of the House of Lords' Select Committee on the European Union, “Brexit: The proposed UK–EU security treaty”, PST003, 25 May 2018, para. 7.2.3.

²⁷⁵ The same goes when national judicial authorities call on Interpol to transmit an EAW (the ‘Art. 26’ alerts).

someone using the EAW, and £62,000 using the [1957 Convention]”.²⁷⁶ Likewise, as argued by the Defence Extradition Lawyers Forum, “[m]ore delays mean increased cost for all parties, but perhaps are felt most keenly by the defendant detained without a clear end point”.²⁷⁷

Be that as it may, the number of people extradited to the UK may decrease.²⁷⁸ At least ten EU Member States, for instance, have declared that they will not extradite their own nationals under the umbrella of the 1957 Convention, and at least four others will extradite their citizens only in specific circumstances.²⁷⁹ In addition, the fourth Protocol to the Convention, introducing some rules to streamline the exchange of extradition requests, has entered into force in only four EU Member States so far, including the UK.²⁸⁰ According to some interviewees, further problems in reverting to the 1957 Convention could relate to the fact that some EU Member States – such as Ireland – have repealed their legislation implementing the Convention, which therefore will need to be revived to extradite people from and to the UK.²⁸¹

At the time of writing, the Commission seems to be looking at this option to regulate future extradition proceedings with the EU, although it is ready to introduce some ad hoc rules aimed at “streamlining the procedure,

²⁷⁶ Written question asked by Lady Hermon answered by James Brokenshire, European Arrest Warrants: Written question – 214393 (www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2014-11-11/214393). Still, our interviewee from the Crown Prosecution Service noted that there are some limitations in comparing the costs of current extradition to third countries under the 1957 Convention with what extradition might be like with EU countries under the same Convention after Brexit.

²⁷⁷ Written evidence of the Defence Extradition Lawyers Forum to the Home Affairs Sub-Committee of the House of Lords’ Select Committee on the European Union, “Brexit: The proposed UK–EU security treaty”, PST003, 25 May 2018, para. 7.2.3.

²⁷⁸ *Ibid.*, para. 7.7.1.

²⁷⁹ Declarations to the 1957 Council of Europe Convention on Extradition can be found on the Council of Europe’s website (www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024/declarations?p_auth=ymYp9WQM).

²⁸⁰ The list of countries that ratified the Fourth Protocol to the 1957 Council of Europe Convention on Extradition can be found on the Council of Europe’s website (www.coe.int/en/web/conventions/full-list/-/conventions/treaty/212/signatures?p_auth=ymYp9WQM).

²⁸¹ See also Alegre et al. (2017), p. 34; Campbell (2017), p. 10.

facilitating processes, introducing time-limits".²⁸² This could help to overcome (some of) the difficulties that UK and EU authorities may meet when resorting to the 1957 Convention.

Third option: Bilateral agreement (with or without a 'framework agreement')

The third path that the UK may take after Brexit is the conclusion of bilateral extradition agreements. This seems to be the least attractive option for EU-UK extradition arrangements after Brexit, even though, from the EU's perspective, this could be a "pragmatic solution", as noted by one of the experts we interviewed.²⁸³ The extradition to EU Member States would fall within Part 2 of the Extradition Act 2003 and the UK would need a considerable amount of time to conclude 27 different bilateral agreements with EU Member States, although some existing models may be used to streamline the negotiations.²⁸⁴

The UK has signed a number of extradition agreements with third countries, such as the US.²⁸⁵ Although broadly similar, each of these agreements has its own peculiarities and raises different issues concerning their interpretation and application.²⁸⁶ The replication of such a fragmented scenario with regard to EU Member States would undoubtedly lead to a far worse situation than the current system. The conclusion of bilateral agreements might be rather straightforward with some EU countries that have a strong interest in keeping a close relationship with the UK in the field, such as Poland and Ireland. The extradition between the UK and Ireland was regulated, up to 2004, by the Backing of Warrants (Republic of Ireland) Act

²⁸² Speech by Michel Barnier at the European Union Agency for Fundamental Rights, Vienna, 19 June 2018 (http://europa.eu/rapid/press-release_SPEECH-18-4213_en.htm).

²⁸³ See also Deane and Menon (2017), p. 43.

²⁸⁴ See, for instance, the 1990 United Nations Model Treaty on Extradition.

²⁸⁵ Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, 31 March 2003 ('UK-US Extradition Treaty').

²⁸⁶ See the uncorrected oral evidence of N. Vamos, previously head of extradition for the Crown Prosecution Service and Partner, Peters & Peters, to the Home Affairs Sub-Committee of the House of Lords' Select Committee on the European Union, "Brexit: The proposed UK-EU security treaty", 18 April 2018, Q37.

1965. Although this Act was thought to “provide a simple and expeditious procedure between neighbouring countries”,²⁸⁷ it may represent a model to follow in striking future agreements with other EU Member States, since it introduced a system that was similar to the EAW.²⁸⁸

In the case of bilateral agreements, it is likely that the UK and the EU will decide to conclude at least some sort of ‘framework agreement’, which could complete rather than replace the bilateral agreements signed by the UK and EU Member States. The Agreement on extradition between the European Union and the United States (‘EU-US Extradition Agreement’) would represent a precedent in that regard.²⁸⁹ Among others, Article 5 of the EU-US Extradition Agreement provides that requests for extradition and supporting documents shall be exchanged via the diplomatic channel, and this rule also applies in the UK-US relationship.²⁹⁰ It additionally requires extradition to take place on the basis of dual criminality²⁹¹ and it includes a generic rule on dispute settlement, the resolution of which should be facilitated by consultations between the EU and the US.²⁹² An even lighter wording may be found in the UK-US Extradition Treaty, which states that “[t]he Parties may consult with each other in connection with the processing of individual cases and in furtherance of efficient implementation of [the] Treaty”.²⁹³ Finally, although both the EU-US and the UK-US extradition agreements are silent on whether the courts of each party should take into account the case law of foreign courts, the UK practice of extradition with the US has shown that courts usually look at the case law of their counterparts, to enable the extradition procedures to run as smoothly as possible.

²⁸⁷ Baker et al. (2011), p. 48.

²⁸⁸ *Ibid.*, pp. 46ff.

²⁸⁹ OJ L 181/27, 19.7.2003.

²⁹⁰ See Art. 8 of the UK-US Extradition Treaty.

²⁹¹ Art. 4 of the EU-US Extradition Agreement.

²⁹² Art. 15 of the EU-US Extradition Agreement.

²⁹³ Art. 21 of the UK-US Extradition Treaty.

3.3 European Investigation Order

Being much younger than the 16-year-old EAW, the EIO has understandably received limited attention during Brexit debates. The EIO is a judicial decision issued (or validated) by national judicial authorities of a Member State to have one or more specific investigative measure(s) carried out in another Member State, with the aim of obtaining evidence.²⁹⁴ Like the EAW, in practical terms the EIO is a form to be completed by a national competent authority, which will send it to the executing state where the needed evidence can be found. Once the EIO is executed, the executing authority has to transfer, without undue delay, the evidence obtained or already in its possession to the issuing state.

The EIO Directive thus applies the principle of mutual recognition in the field of evidence and, for the Member States bound by it,²⁹⁵ it has replaced the corresponding provisions of the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters and its Protocols ('1959 MLA Convention'), the Convention Implementing the Schengen Agreement, and the 2000 Convention on Mutual Legal Assistance in Criminal Matters between the Member States ('2000 EU MLA Convention') and its Protocol. The EIO Directive has also replaced the Framework Decision on the European Evidence Warrant and the provisions of the Framework Decision on the mutual recognition of freezing orders, as regards freezing of evidence. In this manner, the EIO Directive has become the sole instrument regulating the exchange of evidence and mutual legal assistance (MLA) between EU Member States.²⁹⁶

The EIO has brought about several improvements in the field of judicial cooperation in criminal matters:

- EIOs are exchanged among competent national authorities, without any involvement of political bodies,²⁹⁷ but Member States can designate central authorities;²⁹⁸ in addition to courts, competent

²⁹⁴ Art. 1 of the EIO Directive.

²⁹⁵ That is, all EU Member States except for Ireland and Denmark.

²⁹⁶ Mitsilegas (2017), pp. 233–34.

²⁹⁷ Art. 7 of the EIO Directive.

²⁹⁸ Art. 7(3) of the EIO Directive.

authorities may also be public prosecutors or any other authority “acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law”;²⁹⁹

- the EIO Directive exempts the executing authority from assessing double criminality, if the EIO relates to an offence that is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and falls within one of the 32 categories of offences listed in Annex D to the Directive;³⁰⁰
- there is no express political offence exception;³⁰¹ and
- executing authorities should take a final decision on the execution of the EIO and carry out the required investigative measure(s) with the “same celerity and priority as for a similar domestic case”³⁰² and, in any case, within the strict time limits provided in the Directive.³⁰³

Moreover, following on from ongoing concerns regarding the potential adverse human rights implications of automatic mutual recognition, the EIO Directive has introduced some provisions seeking to protect human rights and to prevent arbitrary and unlawful use of the system:

- non-compliance with fundamental rights as a ground for refusal to recognise and execute an EIO (Article 11(1)(f)), with the Preamble also stating that the presumption of compliance of Member States with human rights is rebuttable (Recital No. 19);
- a proportionality check in the issuing state, providing that the issuing authority may only issue an EIO where this is “necessary and proportionate” (Article 6(1)(a)) and where the investigative measures indicated in the EIO could have been ordered under the same conditions in a similar domestic case (Article 6(1)(b)); and

²⁹⁹ Art. 2(c)(ii) of the EIO Directive.

³⁰⁰ Art. 11(1)(g) of the EIO Directive. This list replicates Art. 2(2) of the EAW Framework Decision.

³⁰¹ See, however, Recital No. 39.

³⁰² Art. 12(1) of the EIO Directive.

³⁰³ These are 30 days from receipt of the EIO for the decision on the execution (extendable by another 30 days in specific cases) and 90 days from the taking of the previous decision for the adoption of the required investigative measure(s) (Art. 12(3)–(5) of the EIO Directive).

- recourse by the executing authority to an investigative measure other than that indicated in the EIO, “where the investigative measure selected by the executing authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO” (Article 10(3)).

Recognising its evident added value, the UK opted into the EIO Directive, which has been implemented via the Criminal Justice (European Investigation Order) Regulations of 2017 (‘EIO Regulations’). Incoming EIOs should be sent – with limited exceptions – to the UK central authority, the Home Office.³⁰⁴ Outgoing EIOs may be sent by, among others, the director of the Serious Fraud Office, the director of public prosecutions and any crown prosecutor.³⁰⁵

Although the EIO Regulations entered into force only a year ago (31 July 2017), our interviewees submitted that the EIO has already shown its potential to substantially improve judicial cooperation throughout the EU. According to the last publicly available data, the Crown Prosecution Service (CPS) issued 129 EIOs in the period 31 July 2017–31 March 2018.³⁰⁶ Given that over the same time span the UK sent out about 140 requests for mutual legal assistance, it has been commented that “the EIO is already catching up and will soon overtake MLA requests”.³⁰⁷ In terms of incoming EIOs, the number is believed to be – for that same period – between 400 and 500.³⁰⁸

The CPS regards the EIO as a very valuable instrument of cooperation, while noting the estimate that it is marginally more expensive for UK prosecutors to draft an EIO than a traditional MLA request. According to the CPS, however, it is likely that once UK prosecutors will have become acquainted with the EIO, administrative costs connected with EIO procedures will decrease. From the defence side, the EIO Regulations replicate the norms of the Extradition Act on the protection of human rights.

³⁰⁴ Regulation 2(2)(a).

³⁰⁵ See Schedule 1 of the Criminal Justice (European Investigation Order) Regulations 2017.

³⁰⁶ Uncorrected oral evidence of D. Price, Head of International Justice, Crown Prosecution Service, to the Home Affairs Sub-Committee of the House of Lords’ Select Committee on the European Union, “Brexit: The proposed UK–EU security treaty”, 15 May 2018, Q104.

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

Therefore, EIOs cannot be executed in the UK if there are substantial grounds for believing that either such an execution would be incompatible with any of the ECHR rights³⁰⁹ or the EIO was issued for the purpose of investigating or prosecuting a person “on account of that person’s sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions”.³¹⁰

Furthermore, the EIO Directive provides that the suspected or accused person, or the lawyer on his or her behalf, may require the issuing of an EIO, “within the framework of applicable defence rights in conformity with national criminal procedure”.³¹¹ In the UK, this provision has been implemented in Regulation 6(3)(c), which allows a party to the proceedings to make an application for the issuing of an EIO, after the proceedings have been instituted. Our interviewees pointed out that, even before the EIO, the defendant had the right to ask the court, again after being charged, to issue an MLA request on his or her behalf.³¹² Although the decision of the court is still discretionary, the EIO Regulations list the issues that the court has to take into account in the evaluation of the defendant’s application.³¹³ Furthermore, the defendant can be confident that, once foreign authorities have received the EIO, they will be under a considerable pressure to execute it, as it is indeed an order coming from another EU judicial authority rather than an ordinary MLA request.

Finally, as for the EIOs exchanged during the transition period, the EIO Directive should apply in respect of EIOs that have been “*received* before the end of the transition period by the central authority or the executing authority”.³¹⁴ Still, no agreement on this provision has been found. Our interviewees noted that, compared with the EAW, a more limited number of EIOs will be circulating in the UK (and the EU) on Brexit day, so it could be comparatively less difficult to handle these pending cases. In the worst-case scenario, where no agreement was reached on the Withdrawal Agreement and on EU-UK arrangements for future cooperation in the field of criminal

³⁰⁹ Schedule 4, para. 6 of the EIO Regulations.

³¹⁰ Schedule 4, para. 7(a) of the EIO Regulations.

³¹¹ Art. 1(3) of the EIO Directive.

³¹² See s. 7(3)(c) of the Crime (International Co-operation) Act 2003.

³¹³ See Regulation 6(4).

³¹⁴ Art. 58(1)(k) of the draft Withdrawal Agreement (emphasis added).

justice, it cannot be excluded that the requests of EU and UK judicial authorities submitted via the EIO will need to be made again via the traditional MLA channels.

3.3.1 *Options for judicial cooperation in criminal matters after Brexit*

At the time of writing, the position of the parties on judicial cooperation in criminal matters after Brexit mirrors that on extradition: the UK would like to continue to use EIOs,³¹⁵ while the EU has ruled out this option, although it is “ready to facilitate cooperation on mutual legal assistance and find solutions for effective assistance in judicial cases and evidence sharing between the EU27 and the UK”.³¹⁶

In the absence of any EU-UK arrangement on the cross-border exchange of evidence, cooperation between UK and EU judicial authorities could fall back on some existing non-EU instruments, namely:

- the 1959 MLA Convention and its Protocols;
- the 2001 Council of Europe Convention on Cybercrime (‘Budapest Convention’);
- United Nations conventions, such as the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (‘Vienna Convention’), the 2000 UN Convention against Transnational Organized Crime (UNTOC), and the 2003 UN Convention against Corruption (UNCAC); and
- bilateral agreements between the UK and third countries.

None of the above-mentioned instruments provides for judicial cooperation procedures that may be comparable with a system based on the principle of mutual recognition. As the EIO has been used in the UK only since July 2017, the fall-back options do not look as suboptimal as the alternatives to the EAW in the field of extradition. Exiting the EIO system is perceived as a loss of a potential benefit rather than as a profound change for the worse in cross-border judicial cooperation. Nonetheless, interviewees

³¹⁵ HM Government (2018a), p. 17.

³¹⁶ Speech by Michel Barnier at the European Union Agency for Fundamental Rights, Vienna, 19 June 2018 (http://europa.eu/rapid/press-release_SPEECH-18-4213_en.htm).

agreed that the risk that future UK MLA requests may, on average, fall to the bottom of the pile is rather serious, as one could expect that the competent authorities in the EU – obliged to execute EIOs from other EU countries within strict time limits – would give priority to EIOs rather than to UK MLA requests. That is precisely the reason why, in 2017, the UK Government decided to opt into the EIO Directive. This does not bode well for the effectiveness of cross-border investigations, which are notoriously affected by the lengthy procedures to obtain evidence via Letters of Request.

As for the above-mentioned options, the 1959 MLA Convention – which has been implemented by all EU Member States including the UK – is severely outdated, although some provisions were improved by the Second Additional Protocol of 2001. Among others, the Protocol introduces some rules on hearings by video conference, a relevant and problematic issue in judicial cooperation procedures with Spain. It is therefore to be welcomed that, in March 2018, Spain eventually implemented this Protocol. Among EU countries, the Second Additional Protocol is still not in force – at the time of writing – in Italy, Greece or Luxembourg.³¹⁷ Akin to the field of extradition, however, EU Member States may have amended their legislation in a way that makes it difficult to fall back on the Convention and its Protocol.³¹⁸

The Budapest Convention lays down some rules on mutual legal assistance in the field of cybercrime, although they only apply in the absence of other agreements or treaties between the concerned parties.³¹⁹ Likewise, the provisions on judicial cooperation of the UN conventions, which apply only with regard to the crimes they deal with (illicit drug trafficking, transnational organised crime and corruption), come into consideration when no other agreements are in place.³²⁰

Finally, the UK has signed a number of bilateral agreements on mutual legal assistance with third countries. The UK may explore the avenue of bilateral agreements to enhance judicial cooperation with some EU countries

³¹⁷ The list of countries that signed and ratified the Protocol can be found on the Council of Europe's website (www.coe.int/en/web/conventions/full-list/-/conventions/treaty/182/signatures?p_auth=qh6Zrw6j).

³¹⁸ Alegre et al. (2017), p. 34.

³¹⁹ See the Explanatory Report to the Convention on Cybercrime, Budapest, 23 November 2001, p. 46.

³²⁰ See Art. 18(7) UNTOC, Art. 46(7) UNCAC and Art. 7(7) of the Vienna Convention.

that are key partners in the fight against cross-border crime, such as Spain, Italy and France. The length of negotiations in that regard can only be a matter of speculation, although our interviewees noted that each of the existing UK bilateral agreements – despite broad similarity with one another – has its own peculiarities and raises slightly different issues. Bilateral negotiations might thus be delayed by extenuating bargaining on matters that each EU Member State considers sensitive or problematic according to its own (constitutional) traditions. Still, as is the case with extradition, the bilateral agreements may be supplemented by a ‘framework agreement’ setting the standards to be followed in future EU-UK MLA agreements.

The EU has signed MLA agreements with some third countries:

- the 2003 Agreement with Iceland and Norway on the application of certain provisions of the 2000 EU MLA Convention and its Protocol (‘EU-Norway and Iceland MLA Agreement’);
- the 2003 Agreement on mutual legal assistance between the European Union and the US (‘EU-US MLA Agreement’), which was signed together with the EU-US Extradition Agreement; and
- the 2011 Agreement between the European Union and Japan on mutual legal assistance in criminal matters (‘EU-Japan MLA Agreement’).

The three agreements are different in nature. The EU-Norway and Iceland MLA Agreement mostly provides that several rules of the 2000 EU MLA Convention and its 2001 Protocol apply to Iceland and Norway as well. Unlike the Agreement on surrender, the MLA Agreement is clearly connected with the Schengen *acquis*,³²¹ and this link was already enshrined in the 2000 EU MLA Convention.³²² As a consequence, and again unlike the Agreement on surrender, the EU-Norway and Iceland MLA Agreement “shall” be terminated in the event of termination of the Schengen Association Agreement with Norway and Iceland.³²³ Due to its inextricable links with the

³²¹ See the Preamble to the EU-Norway and Iceland MLA Agreement.

³²² See Art. 29(1) (“Entry into force for Iceland and Norway”) of the 2000 EU MLA Convention, which sets out the rules on when the provisions referred to in Art. 2(1) of that Convention would enter into force for Iceland and Norway.

³²³ Art. 8(3) of the EU-Norway and Iceland MLA Agreement. Cf. Art. 41 of the EU-Norway and Iceland Agreement on surrender.

Schengen *acquis*, the EU–Norway and Iceland MLA Agreement may not be an appropriate model for future EU–UK arrangements on mutual legal assistance.

Akin to the EU–US Extradition Agreement, the EU–US MLA Agreement complements existing bilateral treaties and amends some of their provisions, if they provide for less effective avenues of cooperation between EU Member States and the US.³²⁴ As submitted by the European Commission, the Agreement “largely relies on existing and future bilateral agreements with particular [Member States]”.³²⁵ Nonetheless, for Member States that do not yet have an agreement with the US, the EU–US MLA Agreement may provide a suitable legal basis for cooperation.³²⁶ Although the UK and the EU may conclude a similar ‘framework agreement’ after Brexit, in addition to bilateral treaties, the content of the EU–US Agreement is quite limited if compared with the existing instruments of judicial cooperation to which UK and EU authorities may resort. The EU–US Agreement lays down some rules on the identification of bank accounts, video conferencing, expedited transmission of requests and mutual legal assistance to administrative authorities.³²⁷ As is usually the case in traditional procedures of judicial cooperation, one of the major issues that the EU–US MLA Agreement does not solve lies in the delays that have been experienced in the execution of MLA requests.³²⁸ In other words, if a post-Brexit EU–UK framework agreement were to complement UK bilateral agreements on judicial cooperation, that framework agreement could hardly build on the EU–US MLA Agreement, as it should include much more far-reaching and ambitious provisions. In addition, it is questionable whether the provisions of the EU–US MLA Agreement on the exchange of data are compatible with EU law, and this should represent a further issue to consider in future EU–UK negotiations.³²⁹

³²⁴ See Art. 3(2)(a) of the EU–US MLA Agreement.

³²⁵ European Commission (2018a), p. 23.

³²⁶ Art. 3(3)(a) of the EU–US MLA Agreement.

³²⁷ Respectively, Arts 4, 6, 7 and 8 of the EU–US MLA Agreement.

³²⁸ European Commission (2016), pp. 17–18.

³²⁹ See more in Mitsilegas (2016b), pp. 41–44.

Finally, the EU–Japan MLA Agreement is different from the EU–US MLA Agreement because it is the “first ‘*self-standing*’ mutual legal assistance agreement between the EU and a third country, making up for the absence of bilateral agreements with Member States”.³³⁰ Among others, it includes detailed rules on several investigative measures and activities,³³¹ it provides that MLA requests should be exchanged between the central authorities rather than via the diplomatic channel³³² and it allows the spontaneous exchange of information.³³³ However, the EU–Japan MLA Agreement does not cover a number of issues, such as the transfer of proceedings, enforcement of sentences other than confiscation,³³⁴ wiretapping, controlled deliveries or JITs.³³⁵ On average, the time it takes to execute requests in Japan is eight months, while it is five/six months in the EU.³³⁶ Although the Agreement seems to be working rather well,³³⁷ a new EU–UK agreement on mutual legal assistance should go beyond this model, which falls short of the panoply of instruments of judicial cooperation that are currently available to UK authorities.³³⁸

In sum, none of the three existing EU MLA agreements is likely to be a palatable option for future EU–UK cooperation in the field. Nevertheless, as is the case with extradition, their rules on dispute settlements and on the status of the case law of the CJEU may be in keeping with the UK Government’s red lines. The MLA agreements with the US and Japan only

³³⁰ “EU–Japan Day on 14 July 2016 – Final report”, Council doc. 9003/17, 11 May 2017, p. 2 (emphasis added).

³³¹ For instance, the taking of testimony or statements (Art. 15), hearing by videoconference (Art. 16), obtaining of items (Art. 17), information on bank accounts (Art. 18), and examination of persons, items or places (Art. 19).

³³² Arts 4 and 5 of the EU–Japan MLA Agreement.

³³³ Art. 26 of the EU–Japan MLA Agreement.

³³⁴ Art. 1(2) of the EU–Japan MLA Agreement. Nor does the Agreement cover extradition.

³³⁵ “EU–Japan Day on 14 July 2016 – Final report”, Council doc. 9003/17, 11 May 2017, p. 9.

³³⁶ *Ibid.*, pp. 5–6.

³³⁷ *Ibid.*, p. 21.

³³⁸ It might be for this reason that, in a Commission internal document of January 2018 on the future of police and judicial cooperation in criminal matters, the EU–Japan MLA Agreement is not mentioned when the “models for MLA cooperation with third countries” are discussed in more detail (European Commission (2018a), p. 23).

include a similar, short provision on dispute settlement, simply stating that any issue concerning the application or the interpretation of the Agreement has to be addressed by means of consultations between the parties.³³⁹

The rules of the EU-Norway and Iceland MLA Agreement are similar to those of the EU-Norway and Iceland Agreement on surrender, as they provide that any dispute concerning the interpretation or the application of the Agreement may be referred to “a meeting of representatives of the governments” of EU Member States and of Iceland and Norway, “with a view to its settlement within six months”.³⁴⁰ The parties to the Agreement should keep under constant review the development of the case law of both the CJEU and the competent courts of Iceland and Norway relating to the provisions of the Agreement.³⁴¹ Norwegian and Icelandic courts are not allowed to request a preliminary ruling from the CJEU, but Iceland and Norway should at least be entitled to submit statements of case or written observations to the CJEU, if the referred question concerns the interpretation of provisions of the EU 2000 MLA Convention that apply to Norway and Iceland.³⁴² Should similar rules be included in future EU-UK arrangements, they would be consistent with the UK’s ‘red line’ on the CJEU.

3.4 Mutual recognition of freezing and confiscation orders

In addition to the EAW and the EIO, UK prosecuting authorities highly value mutual recognition of confiscation and freezing orders. This is regulated by Framework Decision 2003/577/JHA on the execution in the EU of orders freezing property or evidence³⁴³ and Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation

³³⁹ Art. 11 of the EU-US MLA Agreement and Art. 28(2) of the EU-Japan MLA Agreement. The latter also requires the competent central authorities to hold consultations to resolve “any difficulties with regard to the execution of a request, and facilitating speedy and effective assistance under [the] Agreement” (Art. 28(1) of the EU-Japan MLA Agreement).

³⁴⁰ Art. 4 of the EU-Norway and Iceland MLA Agreement.

³⁴¹ Art. 2(1) of the EU-Norway and Iceland MLA Agreement, which also provides for the setting-up of a mechanism to ensure regular mutual transmission of such case law.

³⁴² Art. 2(2) of the EU-Norway and Iceland MLA Agreement.

³⁴³ OJ L 196/45, 2.8.2003.

orders.³⁴⁴ The provisions of Council Framework Decision 2003/577/JHA as regards freezing orders issued for purposes of securing evidence have been replaced by the EIO Directive, for those Member States that are bound by this Directive. Thus, the rules of the 2003 Framework Decision only apply to freezing orders issued for the purpose of subsequent confiscation of property.³⁴⁵

In accordance with the two framework decisions, freezing and confiscation orders issued in a Member State should be speedily executed in other Member States, on the basis of a pro forma certificate annexed to the two framework decisions. The latter sets up a swift judge-to-judge procedure,³⁴⁶ with limited grounds for refusal or postponement.³⁴⁷ There is no dual criminality for the known 32 categories of crime, if the usual threshold of penalties is met.³⁴⁸ Yet, the implementation of the two framework decisions has not been satisfactory throughout the EU. As a consequence, the European Parliament and the Council are in the process of adopting a regulation on mutual recognition of freezing and confiscation orders,³⁴⁹ which will repeal the two framework decisions and will improve cross-border cooperation in this field. It will be the first EU *regulation* dealing with mutual recognition, and the choice of this instrument – rather than a directive – is indeed justified by the wish to iron out the discrepancies and inconsistencies that have emerged in the last decade. The regulation will also cover criminal non-conviction-based confiscation and will introduce strict time limits for the execution of freezing and confiscation orders.

³⁴⁴ OJ L 328/59, 24.11.2006.

³⁴⁵ Art. 3(1)(b) of Framework Decision 2003/577/JHA.

³⁴⁶ Arts 4 and 5 of Framework Decision 2003/577/JHA and Arts 4, 5 and 7 of Framework Decision 2006/783/JHA.

³⁴⁷ Arts 7 and 8 of Framework Decision 2003/577/JHA and Arts 8 and 10 of Framework Decision 2006/783/JHA.

³⁴⁸ Art. 3(2) of Framework Decision 2003/577/JHA and Art. 6(1) of Framework Decision 2006/783/JHA.

³⁴⁹ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, COM(2016) 819 final, 21 December 2016.

The UK transposed the two framework decisions on freezing and confiscation orders in 2014.³⁵⁰ The UK also opted into the draft regulation on mutual recognition of confiscation and freezing orders in July 2017, i.e. a year after the Brexit referendum, and this is “a sign that the UK would like to continue to cooperate with the EU in this area”.³⁵¹ As declared by the minister of state for security, “[o]pting in at this point shows our continued positive engagement with this measure, and demonstrates our commitment to work together with our European partners to fight crime and prevent terrorism now and after we leave the European Union”.³⁵²

The CPS is the competent central authority, except for complex fraud, bribery and corruption cases, in which the Serious Fraud Office takes over the case. Senior officials at CPS interviewed for this study have praised the direct access of prosecutors to these instruments and explained that, since most of the challenges against the orders have to take place in the issuing state, the procedure of execution is often straightforward. In addition, when freezing and confiscation orders for sums above £10,000 are successfully executed in the UK, the money recovered is equally split between the UK and the requesting EU Member State. This represents a further incentive for UK authorities to make the system of mutual recognition work.³⁵³ According to the CPS, to date the UK has “restrained about £80 million on behalf of other EU countries” and has requested “about £4.5 million to be restrained on its behalf by other EU Member States”.³⁵⁴

According to the draft Withdrawal Agreement, the two framework decisions should continue to apply in respect of orders *received* before the end of the transition period by the central or the competent authority in the

³⁵⁰ See the written statement of Ben Wallace (Minister of State for Security), 20 July 2017.

³⁵¹ Alegre et al. (2017), p. 31.

³⁵² Written statement of Ben Wallace (Minister of State for Security), 20 July 2017.

³⁵³ See the oral evidence of A. Saunders, Director of Public Prosecutions, Crown Prosecution Service, to the EU Home Affairs Sub-Committee of the House of Lords, “Brexit: Future UK-EU security and police cooperation inquiry”, 2 November 2016, Q58.

³⁵⁴ Uncorrected oral evidence of D. Price, Head of International Justice, Crown Prosecution Service, to the Home Affairs Sub-Committee of the House of Lords’ Select Committee on the European Union, “Brexit: The proposed UK-EU security treaty”, 15 May 2018, Q104. She added, however, that there is “the big caveat there as to how much is actually realised” (ibid.).

executing state.³⁵⁵ There is not yet an agreement on this provision. Once the UK will have definitely left the EU, and in the absence of other arrangements, assistance in freezing and confiscation of assets could be obtained via the MLA procedures addressed in the previous section, namely:

- the Council of Europe conventions, such as the 1959 MLA Convention and its Protocols, and especially the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism,³⁵⁶ which, however, include very general and broad rules on international cooperation in the field at issue;
- United Nations conventions, such as the Vienna Convention, UNTOC and UNCAC; and
- bilateral agreements between the UK and third countries. In addition, some interviewees suggested that the avenue of civil actions in EU Member States, according to their own laws and procedures, may be explored on a case-by-case basis, as this was the traditional way to carry out seizures and confiscations abroad in the absence of any convention or agreement.

From the EU side, the three MLA agreements (Norway/Iceland, the US and Japan) are sometimes used to seek assistance in this field. Only the EU-Japan MLA Agreement includes a provision in that regard (Article 25), although practitioners have argued that it “is much quicker to use Interpol to freeze a bank account in Japan”.³⁵⁷ Some obstacles have arisen in the relationship with the US as well.³⁵⁸

Against this backdrop, and building on the above considerations, none of these texts provides for a system of cooperation that is comparable with the existing EU instruments. Although the number of freezing and confiscation orders is relatively limited, post-Brexit procedures are expected

³⁵⁵ Art. 58(1)(c) and (e) of the draft Withdrawal Agreement.

³⁵⁶ The 2005 Convention has not yet been implemented by seven EU Member States (www.coe.int/en/web/conventions/full-list/-/conventions/treaty/198/signatures?p_auth=xhopTs5M).

³⁵⁷ “EU-Japan Day on 14 July 2016 – Final report”, Council doc. 9003/17, 11 May 2017, p. 11.

³⁵⁸ European Commission (2016), pp. 15 and 17.

to be longer and costlier, requests could have to be sent to and from the Home Office rather than to the CPS or the Serious Fraud Office, and so on. As the minister of state for security explained, the UK's decision to opt into the draft regulation on mutual recognition of freezing and confiscation was necessary as "[a]sset recovery in some EU states has traditionally been difficult through mutual legal assistance routes, which are lengthy and cumbersome".³⁵⁹ By the same token, our interviewees mentioned that EU prosecuting authorities sometimes become frustrated when they seek UK assistance beyond the scheme of mutual recognition, as UK legislation requires high standards to be met, such as the risk of dissipation of assets.

Therefore, one of the current top priorities for the UK prosecuting authorities is the conclusion of an EU-UK agreement that may replicate, to the largest extent possible, the existing rules on mutual recognition of freezing and confiscation orders.³⁶⁰

³⁵⁹ Written statement of Ben Wallace (Minister of State for Security), 20 July 2017.

³⁶⁰ See House of Lords, European Union Committee (2016), paras 147-50.

4 EU AGENCIES AND BODIES

Brexit raises a number of questions as to the future relationship that the UK will entertain with Europol and Eurojust, especially given that the ‘Lisbonisation’ of the legal framework of these two agencies has had far-reaching consequences concerning the way in which they carry out and frame their activities vis-à-vis both EU Member States and third countries.

4.1 Europol and Eurojust

Since their inception, Europol and Eurojust have progressively affirmed themselves as key actors in EU internal security. Despite relying on different sets of structures, financial and human resources, expertise and tools for the discharge of their tasks, these EU agencies³⁶¹ are similarly mandated to “support and strengthen”³⁶² EU Member States’ authorities in the fight against cross-border crime.

Europol’s activity is aimed at supporting police officers and law enforcement services coping with “serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy”.³⁶³ The chief added value of Europol lies in its

³⁶¹ Albeit commonly referred to as an ‘agency’, Eurojust is in fact a ‘body’ of the EU. It will formally become an ‘agency’ with the entry into force of the new Eurojust Regulation. A provisional agreement on the final text of the Eurojust Regulation was reached by the European Parliament and the EU Member States on 19 June 2018.

³⁶² Art. 85(1) TFEU (Eurojust) and Art. 88(1) TFEU (Europol).

³⁶³ Art. 88(1) TFEU.

large-scale processing of personal data and information: Europol analyses the information sent by national authorities and shares the results with them, contributing to their investigations.³⁶⁴

Eurojust's mission is to enhance the cooperation among investigating and prosecuting authorities dealing with "serious crime affecting two or more Member States or requiring a prosecution on common bases".³⁶⁵ In most of its cases, Eurojust organises coordination meetings among prosecutors involved in the investigation of cross-border crime. During these meetings, Eurojust provides the competent national authorities with the necessary expertise and support to address issues such as the choice of forum, the collection of cross-border evidence, the opportunity to issue EAWs, and so on. Eurojust may also help them in organising joint action days, where seizures, arrests, searches and the like take place at the same time in the different Member States.³⁶⁶

Both based in The Hague, Europol and Eurojust are entrusted with largely complementary powers that, as argued by some of our interviewees, may sometimes be considered (to some extent) overlapping.³⁶⁷ Overall, Europol and Eurojust provide platforms through which law enforcement actors and prosecutors can access strategic and operational information, as well as communicate, collaborate and establish formal and informal relations and networks with their colleagues from within and outside the EU. The liaison officers in Europol are a significant example in this respect, as they constitute an important channel through which individual EU countries can have access to liaison officers posted from other EU Member States and third countries. The two agencies are therefore valuable "service providers"³⁶⁸ and supranational venues for practitioners working in a wide range of EU Member States and non-EU countries.

³⁶⁴ For more details on Europol's activities and tasks, see Mitsilegas and Giuffrida (2017), pp. 73–77.

³⁶⁵ Art. 85(1) TFEU.

³⁶⁶ For an overview of the role of Eurojust in supporting national authorities dealing with cross-border crime, see Mitsilegas and Giuffrida (2017), pp. 64–71.

³⁶⁷ Weyembergh et al. (2014), p. 14.

³⁶⁸ Wade (2014), p. 57.

Europol and Eurojust membership depends on participation in the EU secondary law measures that currently regulate the functioning and activities of the two agencies. The three Council decisions providing the legal basis for Eurojust were among the 35 pre-Lisbon measures that the UK re-joined in December 2014.³⁶⁹ The UK has not yet opted into the draft regulation concerning Eurojust but it may decide to do so at any time after its adoption and until the end of the transition period.³⁷⁰ This would be consistent with the ‘wait-and-see’ approach of the UK, which opted into the Europol Regulation after its adoption (November 2016).³⁷¹ The choice of fully participating in Europol after the Brexit referendum had a very clear political meaning: as the House of Lords put it, “there is now an additional, strategic value in remaining a full member of Europol and its Management Board during a period when the modalities of the UK’s future partnership with the EU on police and security matters are under negotiation”.³⁷²

Full membership of these agencies is highly valued by UK authorities, first of all from a strategic perspective.³⁷³ Presence with full voting rights on Europol’s Management Board and in the College of Eurojust allows the UK to steer the strategic priorities and direction of the agencies. The UK Metropolitan Police highlighted that “one of the key priorities in the strategic assessment this year [2018] in Europol was firearms. It was not going to be

³⁶⁹ Council Decision 2002/187/JHA, OJ L 63/1, 6.3.2002, as amended by Council Decision 2003/659/JHA, OJ L 245/44, 29.9.2003, and by Council Decision 2009/426/JHA, OJ L 138/14, 4.6.2009.

³⁷⁰ See Art. 122(5) of the draft Withdrawal Agreement, which provides for the application during the transition period – *mutatis mutandis* – of Art. 4(a) of Protocol No. 21 to the Treaties. The latter provision allows the UK to opt into measures proposed or adopted pursuant to Title V of the TFEU on the AFSJ and that amend an existing measure by which the UK is bound.

³⁷¹ OJ L 135/53, 24.5.2016. The European Parliament and the Council had agreed on the text in May 2016.

³⁷² House of Lords, European Union Committee (2016), para. 50.

³⁷³ Oral evidence of D. Armond, Deputy Director General, National Crime Agency, to the Home Affairs Sub-Committee of the House of Lords’ European Union Committee, “Brexit: Future UK-EU security and police cooperation”, 12 October 2016, Q50.

in there until we influenced that and said, 'It is very, very important to the UK'."³⁷⁴

Full membership also grants the UK the possibility to have its own nationals posted at the top of the agencies' hierarchies (i.e. the directorate of Europol and the presidency of Eurojust), and to play an important role in the development of their current business models, as happened with the 'exportation' to the EU of the UK 'intelligence-led' approach to policing.

Furthermore, the practical and operational reasons supporting the UK's choice to participate as a full member in Europol chiefly relate to the wish to retain direct access to "law enforcement information" from other EU Member States entered into the Europol Information System (EIS).³⁷⁵ The possibility to lead Europol's operational analysis projects, and to make full use of Europol's analysis and expertise in cross-border cases, have also been mentioned by senior Europol officials as key driving forces behind the choice to opt into the Europol Regulation. These operational advantages are in fact only granted to EU countries that are full members of Europol.

At present, the UK Government seems much keener on maintaining strong relationships with Europol than it is with Eurojust. In her Munich speech, the UK prime minister mentioned Europol three times, but Eurojust not even once.³⁷⁶ As some of our interviewees noted, the added value of Europol – and primarily of its information and data analysis – seems in a way more evident and 'quantifiable' than that of Eurojust. Nonetheless, Eurojust is an important partner of UK prosecutors dealing with cross-border crime, especially for the opportunity it offers to UK national prosecuting authorities to work multilaterally (mainly via coordination meetings) rather than bilaterally (e.g. via liaison prosecutors posted in each

³⁷⁴ Uncorrected oral evidence of R. Martin, Deputy Assistant Commissioner, Metropolitan Police, to the Home Affairs Sub-Committee of the House of Lords' Select Committee on the European Union, "Brexit: The proposed UK-EU security treaty", 2 May 2018, Q63.

³⁷⁵ House of Lords, European Union Committee (2016), para. 56.

³⁷⁶ Theresa May, "PM speech at Munich Security Conference: 17 February 2018" (www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018).

EU Member State in accordance with bilateral agreements).³⁷⁷ Some of the experts we interviewed declared that they are in contact with the UK National Desk at Eurojust on a weekly basis.

In addition, our interviews revealed how UK and EU authorities value Eurojust for its role in supporting JITs. In the context of investigations on cross-border crime, JITs offer a platform where the members of the team can exchange evidence without the need to rely on MLA requests. Furthermore, “if investigative action is required in a state that is party to the JIT, a team member from that country can instigate such an action directly, exactly as they would have done in their home country”.³⁷⁸ Eurojust provides financial support to JITs, covering the expenses connected with the travel, accommodation and interpretation costs met by members of the team.³⁷⁹ It also provides the necessary logistic support and plays a valuable role in coordinating the investigative activities of the competent national authorities involved in the case.

Europol’s JIT-founding capabilities have also been progressively enhanced. This happened, in the first place, through the conclusion in 2014 of a “Delegation Agreement” between Europol and the Commission (DG Home),³⁸⁰ and second with the adoption of the new Europol Regulation, which expressly entrusts the agency with the competence to directly finance JITs.³⁸¹ While the overall increase of funding channels may lead to an overall increase in the use of JITs, the new financing role attributed to Europol might also change the way in which JITs are currently used. Europol can in fact count on JIT-funding capabilities that are presently stronger than Eurojust’s

³⁷⁷ Oral evidence of A. Saunders, Director of Public Prosecutions, Crown Prosecution Service, to the House of Lords’ European Union Committee, “Brexit: Future UK-EU security and police cooperation”, 12 November 2016, Q51.

³⁷⁸ Spapens (2011), p. 249.

³⁷⁹ Eurojust (2018b), p. 2.

³⁸⁰ This agreement empowered Europol to finance operational actions (including JITs) falling within the priorities of the European Multidisciplinary Platform Against Criminal Threats (EMPACT), the funding of which derives from the EU Internal Security Fund (Police). See Weyembergh et al. (2014).

³⁸¹ See Art. 61 of Regulation (EU) 2016/794, which provides the new legal basis for Europol.

and this might lead Eurojust (and consequently judicial authorities) to become “marginalized” in JITs.³⁸²

To avoid double-funding and facilitate applications for funding, on 1 June 2018, the two agencies signed a Memorandum of Understanding (MoU) establishing the rules and conditions on JIT founding.³⁸³ While it is too early to assess how this MoU will be implemented in practice, it remains clear that JITs continue to be valuable instruments for the investigation and prosecution of crime, especially when the crimes under investigation call for structured and comprehensive cooperation among competent authorities from the very beginning of investigative activities, such as in the field of international human trafficking and slavery.

UK authorities seem to value their current participation in JITs from both a qualitative and a quantitative point of view. In an interview for our research, a former senior official of the UK Serious Fraud Office described the role of Eurojust with regard to JITs as “magic”. The deputy director of the National Crime Agency recognised that JITs are “immensely important and successful”³⁸⁴ and senior officials from the CPS interviewed for this study fully agreed. Overall, the UK participates in the highest number of JITs supported by Eurojust, as the last annual report of the agency confirms (see Table 3).

³⁸² See Weyembergh et al. (2014). A similar view was also expressed by a Eurojust national member interviewed in the context of this research.

³⁸³ Eurojust, “Eurojust and Europol sign Memorandum of Understanding on JIT funding”, News and announcements, 4 June 2018 (http://www.eurojust.europa.eu/press/News/News/Pages/2018/2018-06-04_EJ-EP-MoU-on-JIT-funding.aspx).

³⁸⁴ Oral evidence of D. Armond to the Home Affairs Sub-Committee of the House of Lords’ European Union Committee, “Brexit: Future UK-EU security and police cooperation”, 12 October 2016, Q53.

Table 3. Number of JITs supported by Eurojust, top 10 countries, 2017

| | JITs signed in 2017 | JITs ongoing from previous years | Total |
|------------------------|---------------------|----------------------------------|-------|
| United Kingdom | 24 | 41 | 65 |
| Romania | 25 | 21 | 46 |
| France | 17 | 18 | 35 |
| Czech Republic | 11 | 18 | 29 |
| Germany | 7 | 21 | 28 |
| Belgium | 16 | 10 | 26 |
| The Netherlands | 6 | 16 | 22 |
| Slovakia | 10 | 11 | 21 |
| Sweden | 9 | 8 | 17 |
| Spain | 9 | 7 | 16 |

Sources: Authors' elaboration based on data from Eurojust (2018c), p. 21.

Given the increasingly important role played by Eurojust and Europol in the context of day-to-day cooperation between criminal justice and police authorities within and outside the EU (e.g. in the framework of JITs), and the UK's interest in participating in the agencies' activities after Brexit, the question arises as to what models exist for these EU bodies to cooperate with third countries.

4.2 Europol and Eurojust's agreements and relationships with third countries

Maintaining the status quo within Europol and Eurojust is a priority for future UK cooperation with the EU in security matters. The UK Government's "Framework for the UK-EU Security Partnership" states that a "new internal security treaty should facilitate multilateral cooperation through EU agencies and protect the capabilities that underpin this".³⁸⁵

³⁸⁵ HM Government (2018a), p. 19. As for Europol, this stance of the UK Government is based on the oft-repeated argument that the UK "is one of the biggest contributors of data,

However, no third country currently enjoys the same benefits that EU Member States reap from their participation in EU agencies. In addition, as the UK will no longer be involved in the governance of EU agencies during the transition period,³⁸⁶ it will lose access to both Europol and Eurojust's managerial structures as of Brexit day (29 March 2019).³⁸⁷

An agreement with the agencies thus seems needed to redefine the terms and conditions of the UK's participation in both Europol and Eurojust. Europol and Eurojust can exchange (personal and strategic) data with third countries only in so far as the latter have an agreement in place with the agencies, and the exchange of personal data is subject to further strict requirements that are discussed below. If originally Europol and Eurojust were able to negotiate and strike agreements directly with third countries, in the aftermath of the Lisbon Treaty the power to conclude international agreements now lies with the Council.

Both the Europol and Eurojust Regulations subject the conclusion of cooperation agreements with third countries to the standard procedure established under Article 218 TFEU, which grants a new role to the Commission and the European Parliament. Until the new Eurojust Regulation enters into force, Eurojust is still able to conclude international agreements with third states, pursuant to Article 26(a) of the Eurojust Council Decision. That being stated, on 19 June 2018 a provisional agreement was reached by the European Parliament and the EU Member States on the final text of the Eurojust Regulation, which now only needs formal approval by the European Parliament and the Council of the EU in order to enter into force.³⁸⁸ Once the Eurojust Regulation enters into force, the agency will no

information and expertise to Europol" (ibid., emphasis in the original). The House of Lords has recently expressed some concerns over the "transactional approach to negotiations on Europol: the UK is indeed a major contributor of data, but the Government should not for that reason underestimate the impact that UK withdrawal will have upon its role and influence in Europol, as in other EU institutions" (House of Lords, European Union Committee (2018), para. 95).

³⁸⁶ European Commission (2018a).

³⁸⁷ Speech by Michel Barnier at the Berlin Security Conference, Berlin, 29 November 2017 (http://europa.eu/rapid/press-release_SPEECH-17-5021_en.htm). See also Art. 6 of the draft Withdrawal Agreement.

³⁸⁸ Council of the European Union (2018a).

longer have the power to negotiate any cooperation agreement with third countries, including the UK after Brexit.

Eurojust and Europol are nevertheless still empowered to conclude working arrangements with third countries. However, according to EU law these agreements (which are 'technical' in nature and therefore concluded outside any form of democratic control at the EU or national level) can only provide for basic and mostly strategic cooperation, and as such do not allow for the (lawful) exchange of personal data.³⁸⁹ The international agreements allowing the exchange of personal data between the UK and the two agencies – which is crucial for the purposes of investigation and prosecution – will be negotiated by the Commission and concluded by the Council in accordance with Article 218 TFEU, and the procedures may be longer than in the past.

Different types of agreements or models of cooperation govern Europol and Eurojust's relationships with third countries. Europol has so far signed both strategic and operational cooperation agreements with its partners. Both types of agreements enable third countries to post their law enforcement authorities at the premises of the agency, as well as the reciprocal appointment of contact points. A difference exists as to the types of data that can be exchanged. Strategic cooperation agreements – such as the ones concluded by Europol with China and Russia – only allow for limited data exchange, which is restricted to information of a strategic and technical nature. By contrast, Europol's operational agreements concluded with countries such as Australia, Canada, Norway, Switzerland and the US provide for the establishment of a more comprehensive information-exchange framework, which also covers personal and classified data.

Overall, third countries' participation in Europol activities is significantly limited when compared with that to which full members of the agency are entitled. Law enforcement authorities of third countries with an operational agreement with Europol are allowed to input data but also to make inquiries for information stored in the EIS, yet their access to the agency's databases is indirect. This means that incoming third countries' requests to search the EIS are channelled through the liaison officer(s) posted

³⁸⁹ See Art. 23(1) and (4) of the Europol Regulation. As for Eurojust, see Art. 38(1) and (2a) of the last version publicly available of the draft Eurojust Regulation (Council doc. 6643/15, 27 February 2015).

at the agency's headquarters, and they are then forwarded to the competent Europol Unit. Also, third parties are not granted the same "from the field" access to the EIS currently granted to UK and EU police authorities.³⁹⁰

Third countries' participation in Europol's operational projects is only allowed upon unanimous agreement of all EU Member States that are full members of the agency. Operational partners of Europol cannot act as "project leaders" or "co-leaders" of projects implemented in the priority areas (smuggling, human trafficking, cybercrime, etc.) identified as part of the EU policy cycle.³⁹¹ Europol operational partners can, however, exchange messages (also via multiple access points) through the agency's Secure Information Exchange Network Application (SIENA). Operational agreements may also facilitate the establishment of JITs and may allow a third country to attend meetings of Europol's analysis groups and to be informed of the groups' work on the analysis work files.³⁹²

In other words, leaving Europol would mean losing the support of this agency in the fight against cross-border crime, especially as regards analysis and exchange of personal data. This is the reason why not even Interpol, which may represent a good forum of cooperation between UK law enforcement authorities and their EU counterparts in the short term, can be considered an effective substitute for Europol.³⁹³ In the words of Rob Wainwright,

Europol and Interpol are 90% different, if not more so, in terms of what they do. Interpol is also an important platform for co-operation. Both organisations provide complementary strengths. Interpol would not be able to substitute for Europol's ability to do *high-end analysis work in intelligence co-operation*, and it does not have anything like the *databases* that we have.³⁹⁴

³⁹⁰ Oral evidence of R. Wainwright, former Director of Europol, to the Home Affairs Committee of the House of Commons, "EU policing and security issues", 7 March 2017, Q141.

³⁹¹ *Ibid.*, Q168.

³⁹² Brière (2018), p. 15.

³⁹³ For further remarks on the reasons why, albeit useful, Interpol cannot be a substitute for Europol, see Hufnagel (2016b), pp. 77–78.

³⁹⁴ Oral evidence of R. Wainwright, former Director of Europol, to the Home Affairs Committee of the House of Commons, "EU policing and security issues", 7 March 2017, Q168 (emphasis added).

Albeit aware of these limitations,³⁹⁵ the UK Government is allegedly evaluating whether it should resort to I-24/7, the Interpol database, which is “suboptimal compared to what we have now” and “would slow us down fundamentally”,³⁹⁶ not least because some EU Member States do not use it.³⁹⁷

With respect to Eurojust, the agreements concluded by the agency with third countries grant access to services that are similar to those offered to full members. Agreements concluded by Eurojust with countries including Iceland, Liechtenstein, Moldova, Montenegro, the former Yugoslav Republic of Macedonia, Norway, Switzerland, the US and Ukraine allow for the exchange of information including personal data. In the case of Norway, Switzerland and the US, they also foresee the secondment of liaison prosecutors to Eurojust. When third countries post their authorities at Eurojust, they can benefit from the support of the agency almost as if they were EU Member States. As seen above, this is hardly applicable to Europol. As the House of Lords’ European Union Committee noted, a “third-country agreement with Eurojust involving a Liaison Prosecutor ... may come closer to meeting the UK’s needs than the equivalent precedents for third country-agreements with Europol” [*sic*].³⁹⁸ Likewise, the UK Government has acknowledged that resorting to the precedents of third countries cooperating with Europol would lead to a “significant capability gap”, while the precedents with Eurojust would be characterised by a “smaller capability gap”.³⁹⁹ A significant gap will nonetheless become apparent at the strategic and managerial level given that after Brexit day the UK will no longer be entitled to have a seat in the agency’s College.

Interviews have revealed how the conclusion of Eurojust’s agreements with third countries has often been conditional upon extensive scrutiny by Eurojust of the third country’s national legislation, in particular as regards its consistency with EU data protection standards. A senior Eurojust official

³⁹⁵ See the oral evidence of B. Lewis, Minister for Policing, to the EU Home Affairs Sub-Committee of the House of Lords’ European Union Committee, “Brexit: Future UK-EU security and police cooperation”, 12 October 2016, Q29.

³⁹⁶ Uncorrected oral evidence of R. Martin, Deputy Assistant Commissioner, Metropolitan Police, to the Home Affairs Sub-Committee of the House of Lords’ Select Committee on the European Union, “Brexit: The proposed UK-EU security treaty”, 2 May 2018, Qs 62–63.

³⁹⁷ *Ibid.*

³⁹⁸ House of Lords, European Union Committee (2016), para. 83.

³⁹⁹ HM Government (2018a), p. 14.

interviewed in the context of this report mentioned some cases where, in order to conclude an agreement with Eurojust, third countries were required to amend national legislation to ensure the adequate protection of personal data required under EU law. This included legislative amendments aimed at establishing and regulating independent national data-protection authorities. The *ex ante* scrutiny of a third country's national legislation, and the *ex post* monitoring of its implementation conducted by Eurojust, were described by our interviewees as a lengthy and 'time-consuming' process. It may be added that requests for amendment of the data protection laws of third countries are made by Eurojust after an assessment conducted by the Data Protection Officer of the agency. The latter, pursuant to Article 17(1) of the Eurojust Council Decision, "shall act independently" in the performance of its duties. Article 26a(2) of the Eurojust Council Decision also provides that agreements with third countries may only be concluded after the approval by the Council and after consultation by Eurojust with the independent Joint Supervisory Body concerning the provisions on data protection. Upon the entry into force of the new Eurojust Regulation, the exchange of data between the agency and third countries will be possible – among the others – upon the adoption of an adequacy decision by the Commission or on the basis of an international agreement concluded by the Council with the previous consent of the European Parliament, in accordance with Article 218 TFEU. Besides, the new Eurojust Regulation provides for the involvement of the European Parliament and of national parliaments in the evaluation of Eurojust's activities, pursuant to Article 85 TFEU. Eurojust also cooperates with third countries that do not have a cooperation agreement in place, in particular through the appointment of contact points that can assist on prosecutions and investigations on an ad hoc basis.⁴⁰⁰ Likewise, the competent authorities of third countries may be invited to take part in the agency's coordination meetings, on a case-by-case basis and without the need for a cooperation agreement.⁴⁰¹

Agreements concluded by the agencies in the past, and now by the Council, are flexible cooperation tools allowing third countries to engage in particular activities on a case-by-case basis, and in a way that can adapt to different national priorities. The intensity of cooperation is also determined

⁴⁰⁰ Further details on Eurojust's cooperation with third countries can be found at <http://www.eurojust.europa.eu/about/Partners/Pages/third-states.aspx>.

⁴⁰¹ See Eurojust's "Annual Report 2016" (2017), p. 15.

by (and reflected in) the number of third countries' officials stationed within the agencies. The considerable presence of the US within Europol, for instance, is indicative of the extent to which this country uses the agency as a cooperation platform. Yet, in the case of Eurojust, the personnel and financial resources currently available to provide support to large third country desks are limited. As Eurojust offers its services to third parties free of charge, interviews conducted with Eurojust officials revealed that supporting the UK as a non-paying third country could have a significant impact on the agency's financial and human resources.

Several factors influence and determine the 'model of cooperation' that different countries have with Europol and Eurojust. The agencies have focused on the development of closer cooperation with European Economic Association Member States, with countries that are part of the EU Stabilisation and Association Process,⁴⁰² and with strategic partners of the EU such as the US, Canada and Australia. The status of these countries vis-à-vis the agencies is linked with the wider relationships they have with the EU and its Member States (e.g. in the framework of the Schengen system).⁴⁰³ Factors like geographical proximity to the EU's external border might also influence the type and intensity of cooperation established by the EU agencies with third countries, as confirmed by the Commission's recent Communications recommending the opening of negotiations for agreements allowing for the transfer of personal data between Europol and southern Mediterranean countries, including Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Turkey.⁴⁰⁴

An example of how the agencies' relationships with third parties are tailored to each country's specific status is the *sui generis* agreement between Europol and Denmark,⁴⁰⁵ which was concluded following the decision of this

⁴⁰² Brière (2018), p. 7.

⁴⁰³ Curtin (2017a), pp. 189ff.

⁴⁰⁴ European Commission, "Security Union: Commission presents new measures to better protect EU citizens", Press release, Brussels, 18 October 2017 (europa.eu/rapid/press-release_IP-17-3947_en.htm).

⁴⁰⁵ Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and the European Police Office (2017) ('Europol-Denmark Agreement') (www.europol.europa.eu/publications-documents/agreement-operational-and-strategic-cooperation-between-kingdom-of-denmark-and-europol).

EU Member State not to take part in the adoption of the new Europol Regulation.⁴⁰⁶

Denmark negotiated this agreement as an EU Member State, although it was regarded as a “third country with respect to Europol”.⁴⁰⁷ As the agreement was discussed and concluded *before* the entry into force of the new Europol Regulation, Denmark entered into discussions with Europol rather than with the Council, in accordance with the procedures set out in the previous Europol Council Decision.⁴⁰⁸ These circumstances appear to have facilitated the conclusion of the agreement, which entered into force in April 2017 upon the approval of the Council, while other EU institutions – and in particular the Commission and the European Parliament – were not involved in the process. This might explain why the agreement was finalised in “a matter of months”.⁴⁰⁹

Denmark has been granted an observer’s place within the agency’s Management Board, and it is thus entitled to attend meetings where strategic decisions are discussed and adopted. Danish participation in this forum is not equivalent to that of the other EU Member States, however, as it is upon invitation only, and it does not include voting rights. The operational agreement with Denmark also establishes a special model for indirect access to data held by Europol. Although access “from the field” is not granted to Danish authorities,⁴¹⁰ the latter can now access Europol operational data through a 24/7 contact point. Indirect access to data stored in Europol databases is ensured by the appointment of some Danish-speaking officers

⁴⁰⁶ Denmark enjoys a permanent opt-out with regard to the AFSJ measures (Protocol No. 22 to the Treaties).

⁴⁰⁷ Council Implementing Decision (EU) 2017/290 amending Decision 2009/935/JHA as regards the list of third States and organisations with which Europol shall conclude agreements, OJ L 42/17, 18.2.2017.

⁴⁰⁸ Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), OJ L 121/37, 15.5.2009, which has been repealed by the Europol Regulation.

⁴⁰⁹ Oral evidence of R. Wainwright, former Director of Europol, to the Home Affairs Committee of the House of Commons, “EU policing and security issues”, 7 March 2017, Q143.

⁴¹⁰ Apparently, Denmark had asked to keep such direct access, together with its voting rights in the Management Board, but both requests were rejected: see Deane and Menon (2017), p. 34.

at Europol, who are called upon to handle Danish requests, namely to input and retrieve data provided by Danish authorities.

The agreement between Denmark and Europol is the most advanced form of operational cooperation so far established by the agency with a 'third country'. This level of cooperation was deemed necessary to avoid delays in information exchange between Europol and Denmark. Even so, the Danish model falls short of providing access to Europol's full membership package to which other EU Member States are entitled. This limited form of cooperation also affects Europol and Denmark's relationships with third countries, as for instance the onward transfer of data received by one party "must be consented to" by the other party.⁴¹¹

Denmark was able to enter into an agreement with Europol upon a number of conditions. First, Denmark agreed to ensure its continued membership of the EU and the Schengen area, as the agreement unequivocally states: "if Denmark was no longer bound by the Schengen *acquis*, the ... Agreement would as a consequence be terminated".⁴¹² Second, Danish authorities must comply with the provisions included in Directive 2016/680 on protecting personal data processed for the purpose of criminal law enforcement. Incidentally, it is worth noting that at the time of concluding the agreement with Europol, the European Commission recognised that the status of Denmark as an EU Member State allowed for the agreement to be concluded without the need for a preliminary assessment of the existence of an adequate level of data protection.⁴¹³

Third, Denmark had to accept that the implementation of the agreement is subject to the oversight of the European Data Protection Supervisor (EDPS). Under the Europol Regulation, the latter has the power to supervise Europol's compliance with the obligation to conduct the necessary checks on the lawfulness of data processing when data are provided to the agency by other EU bodies, third countries and international

⁴¹¹ Art. 13 of the Europol-Denmark Agreement.

⁴¹² Recital No. 12 of the Europol-Denmark Agreement.

⁴¹³ European Commission, "Commission welcomes Europol's new mandate and cooperation agreement with Denmark", Statement, Brussels, 29 April 2017 (http://europa.eu/rapid/press-release_STATEMENT-17-1169_en.htm).

organisations. The EDPS is also able to receive complaints from data subjects claiming a violation of the agency's data processing rules.⁴¹⁴

Fourth, Denmark had to explicitly recognise the jurisdiction of the CJEU on all matters related to the validity and implementation of the agreement. The jurisdiction of the Court over the agreement is not limited to contractual litigation, but also entails the right for data subjects to bring actions before the CJEU if they consider that they have suffered damage from unlawful data processing by the agency, as well as to obtain judicial review of the decisions of the EDPS. Fifth, Denmark contributes to the Europol budget.⁴¹⁵

In sum, the position of Denmark is not comparable with the status that the UK will have after Brexit, as admitted by the UK minister of state for policing⁴¹⁶ and by the EU commissioner for security,⁴¹⁷ and it seems unlikely that the EU could guarantee the UK rights and conditions analogous to the Danish ones. In the White Paper of July 2018, the UK Government acknowledged that participation in EU bodies and agencies after Brexit would involve some commitments:

First, it may be appropriate for the UK to make a *financial contribution*, the form and structure of which would depend on the type of working relationship agreed. Second, the UK would respect the rules under which those bodies or agencies operated. Third, the UK would respect the remit of the CJEU such that if there was a challenge to a decision made by an agency that affected the UK, *this could be resolved by the CJEU*, noting that this would not involve giving the CJEU jurisdiction over the UK.⁴¹⁸

⁴¹⁴ Art. 47 of the Europol Regulation.

⁴¹⁵ Oral evidence of R. Wainwright, former Director of Europol, to the Home Affairs Sub-Committee of the House of Lords' Select Committee on the European Union, "Brexit: The proposed UK-EU Security Treaty", 7 March 2018, Q6.

⁴¹⁶ Oral evidence of B. Lewis, Minister for Policing, to the EU Home Affairs Sub-Committee of the House of Lords' European Union Committee, "Brexit: Future UK-EU security and police cooperation", 12 October 2016, Q28.

⁴¹⁷ Oral evidence of J. King, Security Commissioner, to the House of Commons' Home Affairs Committee, "EU Policing and Security Issues", 28 February 2017, Q82.

⁴¹⁸ HM Government (2018d), p. 92 (emphasis added).

4.2.1 *Joint investigation teams and alternative legal bases*

If the draft Withdrawal Agreement is approved in its current version, the UK's competent authorities will continue to participate in JITs that have been set up before the end of the transition period.⁴¹⁹ With regard to future cases, it is worth noting that third countries can participate in JITs supported and financed by Eurojust, which may also reimburse the expenses incurred by third countries' authorities.⁴²⁰ The number of JITs with third countries has increased in the last few years,⁴²¹ although they are still much less common than JITs solely among EU Member States.⁴²² According to Eurojust's recent Second JIT Evaluation Report, two elements usually facilitate the setting-up of JITs with third countries, namely the involvement of these countries in Eurojust's coordination meetings and, with regard to Switzerland and Norway, their presence at Eurojust by means of liaison prosecutors.⁴²³

Even though this bodes well for the future participation of the UK in EU-funded JITs, at least three disadvantages could follow from exiting the EU. First, the UK could not take the lead in the establishment of JITs via Eurojust, but could only be invited by other EU Member States to join them. Bearing in mind that, for instance, the UK has instigated all the JITs (more than 20) in which it currently participates in the field of international human trafficking and slavery, our interviewees expressed concerns about this potential consequence of Brexit. The UK may set up JITs at its own expense and then invite the competent authorities of EU Member States to join, although this seems a suboptimal solution in comparison with the current situation.

Second, the involvement of a third country may require "specific issues to be addressed",⁴²⁴ including data protection and specific confidentiality requirements, and in some instances "the JIT may be required to adapt the

⁴¹⁹ Art. 58(2) of the draft Withdrawal Agreement. This provision has not been agreed yet.

⁴²⁰ Eurojust (2018b), p. 1.

⁴²¹ Eurojust (2018a), p. 33.

⁴²² According to Eurojust's "Annual Report 2017" (2018c), 11 new JITs involving third countries were set up with the support of Eurojust in 2017. In the same year, more than 160 JITs were set up among EU Member States (p. 21).

⁴²³ Eurojust (2018a), p. 33.

⁴²⁴ Ibid.

'EU approach' and adjust to the specific legal requirements in the countries concerned".⁴²⁵ Therefore, the participation of the UK in EU-funded JITs might become more complicated than it is today.

Finally, concerns about the legal basis for the establishment of JITs may arise. Currently, Member States set up JITs in accordance with Article 13 of the 2000 EU MLA Convention and with the 2002 Framework Decision on JITs.⁴²⁶ After Brexit, EU and UK national authorities will have to rely on other legal bases. Some options are already available, such as Article 20 of the Second Additional Protocol to the 1959 MLA Convention.⁴²⁷ As seen above, however, the Protocol is not in force in Italy, Greece or Luxembourg. The above-mentioned United Nations conventions do not represent a legal basis to set up JITs, as they only encourage state parties to "*consider* concluding bilateral or multilateral agreements or arrangements whereby ... the competent authorities concerned may establish joint investigative bodies".⁴²⁸ Where there are no such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis.⁴²⁹ As for EU agreements on mutual legal assistance, the EU-Norway and Iceland MLA Agreement provides for the applicability of Article 13 of the 2000 EU MLA Convention to these countries as well. The MLA Agreement with Japan does not cover JITs, unlike Article 5 of the EU-US Agreement, which is notably worded in a way recalling the UN conventions. The EU and the US are required, to the extent they have not already done so, to take such measures as may be necessary to enable JITs to be established and operated in their respective territories. The Commission's review of the EU-US MLA Agreement, carried out in 2016, reveals that this provision has raised some practical and legal problems and that only one JIT agreement has been concluded so far.⁴³⁰

⁴²⁵ *Ibid.*, p. 34.

⁴²⁶ OJ L 162/1, 20.6.2002.

⁴²⁷ See also Hufnagel (2016a), p. 173; Campbell (2017), p. 8.

⁴²⁸ Art. 19 UNTOC and Art. 49 UNCAC (emphasis added). Although phrased in a slightly different way, Art. 9(1)(c) of the Vienna Convention conveys the same meaning.

⁴²⁹ Art. 19(3) UNTOC and Art. 49 UNCAC.

⁴³⁰ European Commission (2016), pp. 6 and 10-11.

From the UK side, however, the only option available for the time being would be the Second Protocol to the 1959 MLA Convention. Section 88(7) of the Police Act 1996 recognises three main legal bases for the UK's participation in JITs. In addition to the 2002 Framework Decision on JITs and the 2000 EU MLA Convention and its Protocol, the third legal basis is represented by "any international agreement to which the United Kingdom is a party and which is specified for the purposes of this section in an order made by the Secretary of State".⁴³¹ Pursuant to the home secretary's International Joint Investigation Teams (International Agreement) Order 2009, the Second Protocol to the 1959 MLA Convention has been recognised as a legal basis to set up JITs with the participation of UK authorities.

It is worth noting that Eurojust has already "supported several JITs that were set up in accordance with a combination of international instruments (not all the States involved had implemented the same legal basis allowing the participation of the third State)".⁴³² In other words, Eurojust seems well equipped to assist Member States and third countries, including in the future the UK, in the choice of the appropriate legal basis/bases for JITs. At least with regard to JITs, Brexit should not have any dramatic consequence, as there are already other legal instruments facilitating the establishment of JITs between the UK and EU Member States, or at least the majority of them. Nonetheless, the UK could lose its leading role in the field and this may have negative repercussions for common security in Europe.

4.3 The European Public Prosecutor's Office

Pursuant to Article 86 TFEU, the Council adopted the Regulation establishing the EPPO in October 2017, by means of enhanced cooperation.⁴³³ At the time of writing, 22 Member States are participating in the enhanced cooperation. The EPPO is in the process of being set up and it will be operational between the end of 2020 and the beginning of 2021. The EPPO is the first EU body that will be competent to adopt decisions vis-à-vis

⁴³¹ S. 88(7)(c) of the Police Act 1996.

⁴³² Eurojust (2018a), p. 33.

⁴³³ OJ L 283/1, 31.10.2017 ('EPPO Regulation').

individuals in the sensitive field of criminal law, as it will be empowered to investigate and prosecute crimes affecting the financial interests of the EU.⁴³⁴ In accordance with Article 86(4) TFEU, the European Council may unanimously decide to broaden the mandate of the EPPO to include other forms of serious crime having a cross-border dimension. Terrorism seems an ideal candidate for this expansion: in the 2017 State of the Union address, the president of the European Commission forecast that the Commission would table a Communication on the matter in September 2018.⁴³⁵

The EPPO is to be organised at a central level and a decentralised level. As for the latter, the EPPO will have at least two European delegated prosecutors (EDPs) in each Member State. The EDPs are to be national prosecutors who simultaneously may be members of the EPPO.⁴³⁶ This status is usually referred to as wearing a ‘double hat’, meaning that when the EDPs wear the national hat they may continue to be national prosecutors for all intents and purposes, whereas when they wear the European hat they will have to follow instructions from the central Office.⁴³⁷ The EDPs will play a major role in the EPPO: they will carry out investigations under the direction of the central Office and put into practice in their Member State the decisions taken by the central Office. The central Office is to be composed of different bodies, namely the College, the Permanent Chambers, the European prosecutors, and the European chief prosecutor and his or her deputies. For the purposes of this report, suffice to note that each Member State will appoint one European prosecutor to the central Office and that the European prosecutors will be assigned to some three-member Permanent Chambers. The Permanent Chambers will adopt the most relevant operational decisions of the Office, which subsequently will need to be enacted by the EDPs.⁴³⁸

⁴³⁴ Giuffrida (2017), p. 1, upon which this section draws.

⁴³⁵ European Commission, “State of the Union 2017: Roadmap for a more united, stronger and more democratic Union”, 13 September 2017.

⁴³⁶ See Arts 8 and 13 of the EPPO Regulation.

⁴³⁷ Ligeti (2016), p. 489.

⁴³⁸ In accordance with the detailed rules set out in the EPPO Regulation, the Permanent Chambers decide, *inter alia*, on whether a case should be brought to judgment or dismissed, on whether the competent EDP should initiate an investigation, and on the Member State(s) where investigation and prosecution should be carried out. See Art. 10 of the EPPO Regulation.

The UK has a longstanding antipathy towards the EPPO and it has not opted into the EPPO Regulation. Even so, the UK Government “has been fully engaged in this negotiation, and [has been] constantly reviewing the proposal”.⁴³⁹ Due to the non-participation of the UK in the Regulation, coupled with its traditional dislike of this body and with the fact that the EPPO does not exist yet, Brexit negotiations and debates have rarely, if ever, mentioned the EPPO as an issue to address. As the UK has not expressed any strong desire to be closely associated with the Office, its future relationship with the EPPO will realistically follow the rules concerning the arrangements between the EPPO and third countries.

For a start, the transfer of personal data to the UK should be based on the usual EU requirements for the transfer of personal data to third countries, including a previous adequacy decision adopted by the Commission or the existence of appropriate safeguards provided for by the UK.⁴⁴⁰ In addition, the EPPO may conclude working arrangements with the UK, which aim “to facilitate cooperation and the exchange of information between the parties”.⁴⁴¹ These agreements can never form the basis for allowing the exchange of personal data, as the exchanged information may only be of a strategic nature.⁴⁴² Finally, such working arrangements can concern the secondment of liaison officers to the EPPO, as well as the designation of the EPPO’s contact points in the UK.⁴⁴³ These rules replicate the existing situation at Eurojust, where some third countries have posted liaison officers and which has contact points in more than 40 countries. In fact, the EPPO may also rely on Eurojust when it has to deal with third countries – including the UK – as the EPPO may invite Eurojust “to provide support in the transmission of its decisions or requests for mutual legal assistance to, and execution in, ... third countries”.⁴⁴⁴

⁴³⁹ T. May, “Response to the House of Lords’ European Union Committee’s Report on ‘The impact of the European Public Prosecutor’s Office on the United Kingdom’”, 2015.

⁴⁴⁰ Arts 80-83 of the EPPO Regulation. See section 2.3, part I above.

⁴⁴¹ Art. 99(1) of the EPPO Regulation.

⁴⁴² Art. 99(3) of the EPPO Regulation.

⁴⁴³ Art. 104(1) and (2) of the EPPO Regulation.

⁴⁴⁴ Art. 100(2)(b) of the EPPO Regulation.

Unlike Eurojust, however, the EPPO will be a prosecuting authority to all intents and purposes. This raises a further question: Should the EPPO be allowed to issue and receive requests for mutual legal assistance or extradition in its capacity of European prosecutor or should it instead rely on the existing treaties and laws of each Member State?⁴⁴⁵ These two alternatives mirror two different understandings of the EPPO.

On the one hand, the “logic of succession”⁴⁴⁶ calls for the “succession of the EPPO to competencies of ... national prosecution services”⁴⁴⁷ in the field of extradition and mutual legal assistance. In other words, the EPPO would become the competent authority to issue and receive requests from third countries, replacing national prosecutors. On the other hand, according to the opposite “‘double hat’ principle”,⁴⁴⁸ the competence to interface with third countries’ authorities remains in the hands of the EDPs who will act, albeit on behalf of the EPPO, as *national* prosecutors in accordance with their own national laws and/or with the international agreements to which their Member States are signatories.⁴⁴⁹ In the double-hat scenario, Member States will keep the EPPO as close as possible to their national systems, while the logic of succession favours the *European* dimension of the EPPO. The current text of the EPPO Regulation strikes a balance between these two logics.

First, the EPPO will not have any power in its ‘European capacity’ in the field of extradition and it will act in accordance with the double hat model. When the competent EDP has to seek extradition from a third country, that EDP “may request the competent authority of his/her Member State to issue an extradition request in accordance with applicable treaties and/or national law”.⁴⁵⁰ The EPPO will not be a competent authority to issue and receive extradition requests and the competence to deal with such requests will rest with the national judicial and prosecuting authorities.

⁴⁴⁵ The issue arises also in respect of the EPPO’s relationships with EU Member States that do not participate in the EPPO (see Art. 105 of the EPPO Regulation), but it is not addressed in this report.

⁴⁴⁶ Council doc. 12340/16, 20 September 2016, p. 5.

⁴⁴⁷ *Ibid.*, p. 2.

⁴⁴⁸ *Ibid.*, p. 10 (emphasis added).

⁴⁴⁹ *Ibid.*, pp. 10–11.

⁴⁵⁰ Art. 104(7) of the EPPO Regulation.

Second, as for the other matters of mutual legal assistance, the EPPO Regulation provides several alternatives for the future relationships between the EPPO and third countries and it partially endorses the principle of succession. The most comprehensive way to regulate these relationships would be the conclusion of an international agreement pursuant to Article 218 TFEU,⁴⁵¹ by which the Union would recognise the EPPO as a competent authority for the purposes of MLA procedures. The EU may also designate the EPPO as a competent authority in accordance with the rules of those international agreements concerning mutual legal assistance in criminal matters to which the EU has already acceded or may accede as a regional organisation.⁴⁵²

In the absence of such international agreements, Member States “shall” recognise the EPPO as a “competent authority for the purpose of the implementation of multilateral international agreements on legal assistance in criminal matters concluded by them”.⁴⁵³ This rule, which may for instance cover notifications of the EPPO as a competent authority pursuant to the 1959 MLA Convention,⁴⁵⁴ embodies the principle of succession but it requires two further conditions to be met. The recognition of the EPPO as a competent authority should be “permitted under the relevant multilateral international agreement” and it has to be “subject to the third country’s acceptance”.⁴⁵⁵ In other words, EU Member States cannot unilaterally decide to let the EPPO deal with MLA requests to and from third countries if the latter have not consented.

The issue is not merely theoretical. In 2016, the House of Lords’ European Union Committee, when scrutinising the impact of the EPPO on the UK, expressed concerns about some statements made by Theresa May,

⁴⁵¹ Art. 104(3) of the EPPO Regulation. Building on this provision to regulate the relationship of the EPPO with third countries has been described as “ideal” by Z. Stofova (Managing Director at the Ministry of Justice of the Slovak Republic) in her presentation at the International Conference on “The Enhanced Cooperation for the Establishment of the EPPO”, organised by the Basso Foundation (24–25 May 2018).

⁴⁵² Art. 104(3) of the EPPO Regulation. For instance, in addition to EU Member States, the European Union participates in UNTOC and UNCAC as a regional organisation.

⁴⁵³ Art. 104(4) of the EPPO Regulation.

⁴⁵⁴ Council doc. 12340/16, 20 September 2016, p. 6.

⁴⁵⁵ Art. 104(4) of the EPPO Regulation.

at the time home secretary, who had declared that “the UK might not be legally obliged to respond to requests for assistance from the EPPO”.⁴⁵⁶ As the Committee noted, this stance could risk making the UK a “safe haven for illegally obtained EU funds”.⁴⁵⁷ The response of the then home secretary to these remarks was rather vague: “[W]hile we do not intend to undertake a specific consultation on the subject, I can reassure the Committee that we will continue to scrutinise the proposal as it develops and will continue to analyse it against our existing legal framework, which we keep under constant review.”⁴⁵⁸

Eventually, if cooperation is not possible on the basis of international agreements, two final options will be available to the EPPO. On the one hand, the EPPO may request legal assistance “in a particular case and within the limits of its material competence”,⁴⁵⁹ and it must comply with the conditions those authorities may set on the use of the information they provide. This is a case-by-case solution that will entirely depend on the goodwill of the foreign authorities.

On the other hand, the double hat model may again come to the rescue. The competent EDP may have recourse to the powers of a national prosecutor of his or her Member State to request legal assistance in criminal matters from authorities of third countries, on the basis of international agreements concluded by that Member State or applicable national law and, where required, through the competent national authorities.⁴⁶⁰

The EDP will have to inform third countries’ authorities that the final recipient of the reply to the request is the EPPO and that the evidence he or she collects will be used by the EPPO. As seen above, however, the recognition of the EPPO as a prosecuting authority by some EU Member States does not automatically bind third countries. Hence, the competent EDP should, where necessary, “endeavour to obtain consent”⁴⁶¹ from those authorities to use the requested evidence in the EPPO’s investigations.

⁴⁵⁶ House of Lords, European Union Committee (2014), para. 55.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ T. May, “Response to the House of Lords’ European Union Committee’s Report on ‘The impact of the European Public Prosecutor’s Office on the United Kingdom’”, 2015.

⁴⁵⁹ Art. 104(5) of the EPPO Regulation.

⁴⁶⁰ *Ibid.*

⁴⁶¹ *Ibid.*

Predictions are difficult when it comes to Brexit, and even more so when the future relationship with a contentious body, which does not exist yet, is at issue. The wording of the EPPO Regulation shows a clear preference, from the EU side, for the conclusion of international agreements with third countries in accordance with Article 218 TFEU. Thanks to such agreements, the EPPO's relationships with third countries would not depend on the different legislation of each Member State and/or on the consent of third countries to cooperate with the Office; on the contrary, they would rely on a binding piece of legislation that provides clarity and legal certainty.

In this instance, therefore, it will be mostly in the EU's interest to push for a relationship that is as effective as possible. Nonetheless, once the EPPO is up and running, there may be cases where UK authorities will need information or evidence that is already in possession of the Office and will ask for it. The competent EDP will decide on the matter, after consulting the Permanent Chamber and "in accordance with the national law of his/her Member State and this Regulation".⁴⁶² Therefore, it is also in the UK's interest to agree on some rules providing for a smooth and cooperative relationship between the EPPO and the UK's competent authorities – even more so should the EPPO be given further powers to investigate and prosecute terrorist offences.

⁴⁶² Art. 104(6) of the EPPO Regulation. The reference to the regulation in this provision should be understood as referring to the above-mentioned rules on the transfer of personal data to third countries.

5 EU DATABASES AND INFORMATION-SHARING TOOLS

The UK Government⁴⁶³ and law enforcement authorities⁴⁶⁴ have listed access to EU databases and participation in EU information-sharing mechanisms as a priority objective to achieve in the future security and justice partnership with the EU. The following section (5.1) focuses on SIS II,⁴⁶⁵ ECRIS⁴⁶⁶ and the mechanism established with the Prüm Decisions,⁴⁶⁷ which have been identified as particularly valuable sources of data and information in criminal matters. Once the system is fully-fledged, the same

⁴⁶³ Oral evidence of N. Hurd, Minister for Policing, to the House of Commons' Home Affairs Committee, "Home Office delivery of Brexit: Policing and security co-operation", 23 January 2018, Q117.

⁴⁶⁴ Oral evidence of D. Armond, Deputy Director General of the National Crime Agency, to the House of Commons' Home Affairs Committee, "EU Policing and Security Issues", 6 December 2016, Q73.

⁴⁶⁵ Council Decision 2007/533/JHA on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ L 205/63, 7.8.2007.

⁴⁶⁶ Council Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States, OJ L 93/23, 7.4.2009; Council Decision 2009/316/JHA on the establishment of the European Criminal Records Information System (ECRIS) in application of Art. 11 of Framework Decision 2009/315/JHA, OJ L 93/33, 7.4.2009.

⁴⁶⁷ Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210/1, 6.8.2008; Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA, OJ L 210/12, 6.8.2008.

is expected from the exchange of PNR data, which is addressed in section 5.2. In line with the previous analysis, the options for future EU-UK arrangements in this field are explored. Section 5.3 concludes with a few remarks on the need for both the EU and the UK to foster mutual trust ‘on the ground’ among practitioners, while at the same time ensuring that this form of cooperation does not end up in the exchange of personal data outside clear legal frameworks.

5.1 SIS II, ECRIS and Prüm: State of play

As an EU Member State, the UK has invested considerable political and financial efforts in the development and roll-out of the above-mentioned instruments. The UK minister for policing stated before the House of Commons’ Home Affairs Committee that “[t]here is a very good level of mutual interest protecting the capabilities that we have worked very hard to create over a number of years. They work. They’re valued by us all. We’re a very big player in them.”⁴⁶⁸ The strong interest expressed by UK executive and law enforcement authority representatives in maintaining participation in SIS II, ECRIS and Prüm can be explained in light of the ways and extent to which the country makes use of these information-sharing tools. These databases have been instrumental in fostering the data-led approach to police and criminal justice cooperation that the UK has promoted at the EU level.

This is particularly evident in the case of SIS II, which is used to share real-time law enforcement alerts. The UK, which uses SIS II only for law enforcement purposes, has been connected to this database since 13 April 2015. National authorities can enter an EAW into SIS II and the competent authorities of the other Member States are instantly informed that the given person is wanted for surrender.⁴⁶⁹ Despite only three years having passed since the UK began using SIS II, the latest data made available by the

⁴⁶⁸ Oral evidence of N. Hurd, Minister for Policing, to the House of Commons’ Home Affairs Committee, “EU policing and security issues”, 23 January 2018, Q133.

⁴⁶⁹ See, for instance, the uncorrected oral evidence of N. Vamos, previously head of extradition for the Crown Prosecution Service and Partner, Peters & Peters, to the Home Affairs Sub-Committee of the House of Lords’ Select Committee on the European Union, “Brexit: The proposed UK-EU security treaty”, 18 April 2018, Q30.

European Agency for the operational management of large-scale IT systems in the AFSJ (eu-LISA) show that the UK heavily relies on SIS II (see Table 4).

Table 4. Statistics on SIS II (eu-LISA), top 8 countries, 2017

| Member State | Total queries (manual + automated) | CUDs | | | | CUDs | Total number of accesses (queries + CUDs) |
|----------------|------------------------------------|-----------|---------|---------|-----------------------|-----------|---|
| | | Create | Update | Delete | Change of expiry date | | |
| France | 987,281,773 | 2,764,891 | 661,210 | 520,902 | 347,110 | 4,294,113 | 991,575,886 |
| Spain | 581,794,881 | 1,038,064 | 639,408 | 143,152 | 1,219,088 | 3,039,712 | 584,834,593 |
| United Kingdom | 539,382,244 | 1,436,916 | 79,023 | 356,691 | 3,140 | 1,875,770 | 541,258,014 |
| Germany | 493,623,435 | 1,809,041 | 600,943 | 929,767 | 137,759 | 3,477,510 | 497,100,945 |
| Poland | 350,340,215 | 550,932 | 190,682 | 104,536 | 8,567 | 854,717 | 351,194,932 |
| Italy | 337,505,714 | 3,267,981 | 118,056 | 377,214 | 588,033 | 4,351,284 | 341,856,998 |
| Romania | 331,432,261 | 240,213 | 4,354 | 14,786 | 1,384 | 260,737 | 331,692,298 |
| Croatia | 168,422,951 | 56,917 | 245 | 6,745 | 14 | 63,921 | 168,486,872 |

Note: CUDs = Create/update/delete/change expiry date transactions.

Sources: Authors' elaboration, based on data from eu-LISA

(www.eulisa.europa.eu/Publications/Reports/2017%20SIS%20II%20Statistics.pdf, p. 7).

The UK is among the top three EU Member States accessing SIS II, accounting for 10% of the total number of accesses to this database in 2017.⁴⁷⁰ The volume of UK accesses is certainly significant, but alone it does not show the actual effectiveness of this tool in countering crime or terrorism. What it reflects is the interest that the UK will arguably have in being able to connect to SIS II even after Brexit. However, concerns have already arisen as regards the UK's current use of this system. British authorities have allegedly copied the data contained in SIS and handed it over not only to the UK border police force and other government offices, but also to private contractors (including US companies) hired to run information systems (e.g. the "Warning Index")

⁴⁷⁰ Data provided by the UK instead account for 1.6% of the total number of alerts issued. See eu-LISA, SIS II – 2017 Statistics, February 2018 (<https://www.eulisa.europa.eu/Publications/Reports/2017%20SIS%20II%20Statistics.pdf>), p. 8.

on behalf of the Home Office at different UK airports.⁴⁷¹ These reported data breaches amount to serious violations of EU legal standards on data protection and police cooperation as enshrined inter alia under the SIS II Regulation, and are likely to undermine the legitimacy of UK requests to maintain access to this database post-Brexit.

The Interpol red alert system may provide an alternative,⁴⁷² although it is commonly regarded as less effective than SIS II,⁴⁷³ also because Interpol Red Notices “are not as case ready as European arrest warrants are”;⁴⁷⁴ in other words, UK law enforcement authorities cannot arrest the requested person upon receiving Interpol Red Notices as they have to obtain a domestic arrest warrant first. Moreover, the CPS clarified that the UK has not made extensive use of Red Notices, either before or after the entry into force of the EAW Framework Decision.

The UK’s participation in ECRIS is likewise crucial. ECRIS is an information-sharing mechanism relying on information stored in national databases but which is shared upon the request of other Member States’ authorities. It allows national authorities to exchange and obtain information on the criminal records of persons who are citizens of other EU Member States. Member States are also under the obligation to mutually share the information of any EU national convicted in their courts. The UK Home Office admitted that before ECRIS it knew “virtually nothing” about the offending histories of EU nationals being prosecuted in the UK.⁴⁷⁵

The importance of ECRIS has been confirmed by UK law enforcement practitioners, who have emphasised the role of the system – among others – in “assisting custody sergeants with pre-court bail decisions, based on

⁴⁷¹ Nielsen (2018).

⁴⁷² Already within the EAW system, the issuing authorities may call on Interpol to transmit EAWs (see Art. 10(3) of the EAW Framework Decision).

⁴⁷³ See also Weyembergh (2017), p. 295.

⁴⁷⁴ Uncorrected oral evidence of R. Martin, Deputy Assistant Commissioner, Metropolitan Police, to the Home Affairs Sub-Committee of the House of Lords’ Select Committee on the European Union, “Brexit: The proposed UK–EU security treaty”, 2 May 2018, Q63.

⁴⁷⁵ “Leaked document: The Home Office assessment of post-Brexit terror and crime risks”, *The Times*, 23 August 2017.

previous convictions handed down by EU courts”.⁴⁷⁶ According to the latest statistics made available by the Commission, which are related to 2016, the UK is among the most active users of ECRIS as regards notifications on new convictions and requests for information of previous convictions (Table 5). The UK is in the top quarter for operations interconnections.⁴⁷⁷ Still, post-Brexit access to this database cannot be justified purely on the basis of quantitative accounts. ECRIS contains sensitive information pertaining to EU citizens and no third country is allowed direct access to it.

Table 5. Statistics on the most active users of ECRIS, top 5 countries, 2016

| | Notifications on new convictions | Requests sent | Replies sent | Total | Share of total volume (%) |
|-----------------------|----------------------------------|---------------|--------------|---------|---------------------------|
| Germany | 83,588 | 140,669 | 21,849 | 246,106 | 24.9 |
| United Kingdom | 32,889 | 97,425 | 13,000 | 143,314 | 13.7 |
| Italy | 62,971 | 34 | 17,851 | 80,856 | 7.7 |
| Poland | 2,334 | 6,311 | 60,929 | 69,574 | 6.6 |
| Romania | 232 | 892 | 56,836 | 57,960 | 5.5 |

Sources: Authors’ elaboration based on data from the European Commission (2017d), p. 9.

With regard to Prüm (which allows access to information on DNA, fingerprints and vehicle registration stored in Member States’ databases), the UK opted into the relevant Council decisions in November 2016. The added value of the UK’s participation in Prüm cannot yet be quantified, mainly because the Government has planned to establish “a full connection by 2020”.⁴⁷⁸

⁴⁷⁶ House of Commons, Home Affairs Committee (2018a), para. 77.

⁴⁷⁷ European Commission (2017d), p. 7.

⁴⁷⁸ House of Lords, European Union Committee (2016), para. 107.

That notwithstanding, other EU Member States have already expressed concerns with regard to the way in which the UK is implementing its national DNA data-retention policies in order to re-join the Prüm data exchange system. These concerns were raised during discussions in the Council's Working Party on Information Exchange and Data Protection (DAPIX). They related specifically to the UK's decision to create separate databases containing the DNA profiles of different categories of individuals (distinguished between those convicted and suspected), and to limit the exchange of DNA profiles through the Prüm system to data contained in databases pertaining to convicted individuals.⁴⁷⁹ The UK delegation proposed that, as a temporary alternative to the Prüm information-sharing system, other Member States could use 'Interpol channels' in order to seek access to the data of suspected (not convicted) individuals in the UK.

The UK decision to limit DNA data exchange under the Prüm system to profiles of convicted individuals has been justified by the UK in light of the 2012 Protection of Freedoms Act (PFA). Adopted in response to the decision by the European Court of Human Rights (ECtHR) in the *S. & Marper* case,⁴⁸⁰ this piece of UK legislation established legal limits to the retention of DNA data pertaining to non-convicted individuals in the UK. At the same time, it has been calculated that around 3% of the total DNA profiles contained in the UK's national DNA databases pertains to non-convicted people (i.e. approximately 150,000 individuals).⁴⁸¹ In fact, the grounds on which the PFA allows the (temporary or indefinite) retention of DNA data of non-convicted individuals are defined quite broadly. For instance, indefinite data retention is allowed when the suspect individual has a previous conviction for a "recordable offence". The PFA's definition of the latter is "one for which the police are required to keep a record", and

⁴⁷⁹ See Council of the European Union (2018b).

⁴⁸⁰ ECtHR, *S. and Marper v United Kingdom*, Application nos 30562/04 and 30566/04 1581. The ECtHR established that blanket retention of DNA samples and profiles of non-convicted individuals in order to enhance public protection cannot justify the indiscriminate expansion of databases. The ECtHR stressed that the indefinite retention of data of non-convicted people is stigmatising and interferes with the individual right to privacy.

⁴⁸¹ Statewatch, "UK to build new computer to hold DNA records on convicted people only and exclude the innocent in bid to rejoin the Prüm data exchange system", 18 June 2018 (www.statewatch.org/news/2018/jun/uk-eu-prum-problem-letter.htm).

encompasses a wide range of offences including, *inter alia*, begging, taxi touting or any behaviour leading to an arrest while participating in a demonstration that did not receive the approval of the authorities.⁴⁸²

The satisfactory implementation of the Prüm Council Decisions not only depends on the inclusion of DNA profiles of ‘suspects’ (i.e. those who are not convicted of a criminal offence in the UK) in the Prüm information-exchange system, but also – and foremost – on the compatibility of the UK data-retention regime with the fundamental rights benchmarks developed under EU and international law with regard to privacy and data protection. In the *Marper* case cited above, the ECtHR has already established that the indefinite retention of fingerprints, DNA profiles and biological samples of persons suspected but not convicted of offences constitutes a disproportionate interference with the right to respect for private life and cannot be regarded as necessary in a democratic society.

5.1.1 *Challenges after Brexit*

In the “Framework for the UK-EU Security Partnership”, the UK Government calls for the new EU-UK security treaty to facilitate “data-driven law enforcement as real time information sharing has proved to be invaluable in recent years”.⁴⁸³ The UK Government mentions a number of EU databases and information-sharing mechanisms (SIS II, ECRIS and exchange of PNR data) to which it would like to continue to have access after Brexit, and it points out that “[i]n some cases, for example ECRIS, there are no viable existing 3rd country alternatives. ... The UK/EU partnership should ensure that these capabilities are maintained.”⁴⁸⁴

At the end of the transition period, the UK will no longer participate in the EU legislative instruments underpinning these information tools. This should imply that – unless the parties agree on the bespoke agreement that the UK Government is calling for – the UK could not remain ‘plugged in’ to EU databases or participate in EU information-exchange mechanisms as if it were an EU Member State. At the same time, there are no precedents of non-

⁴⁸² See National Police Chief’s Council and Home Office, “National DNA Database Strategy Board: Annual Report 2015/2016”, 23 February 2017, p. 38.

⁴⁸³ HM Government (2018a), p. 21.

⁴⁸⁴ *Ibid.*

Schengen third countries, or third countries altogether in some cases, having concluded similar agreements.

Only EU Member States are allowed access to ECRIS. The only third countries that have thus far been provided access to SIS II, namely Iceland, Liechtenstein, Norway and Switzerland, are members of the Schengen area as well.⁴⁸⁵ Similarly, participation in the Prüm mechanism has so far been restricted to Iceland and Norway as they are Schengen countries. Yet, unlike SIS II, the Prüm Decisions are not Schengen-related measures. As already mentioned, the two Prüm Decisions have brought the previous (non-EU) Prüm Convention within the EU framework. The EU-Norway and Iceland Agreement on the participation of these countries in Prüm⁴⁸⁶ acknowledges that the relationships between the parties, including Norway and Iceland's association with the Schengen *acquis*, "demonstrate close cooperation in the fight against crime"⁴⁸⁷ – which would be arguably demonstrated by any kind of EU-UK partnership in the field of security after Brexit. Third countries' participation in the Prüm Decisions raises the same question concerning the EU-Norway and Iceland Agreement on surrender, namely to what extent such participation is conditional upon the third country being part of the Schengen area.⁴⁸⁸

A further set of issues emerges with regard to the UK's participation in EU interoperability legislation. Published in December 2017, the Commission's proposals for two regulations on establishing a framework for interoperability between EU information systems aim at tackling the 'fragmentary' and 'isolated' nature of a number of existing and proposed JHA databases.⁴⁸⁹ These include SIS II and other databases, such as the European Asylum Dactyloscopy Database (Eurodac), in which the UK is

⁴⁸⁵ Niblock (2017).

⁴⁸⁶ OJ L 353/3, 31.12.2009.

⁴⁸⁷ *Ibid.*, Preamble.

⁴⁸⁸ Alegre et al. (2017), pp. 68–69.

⁴⁸⁹ European Commission, Proposal for a Regulation on establishing a framework for interoperability between EU information systems (border and visa), COM(2017) 793 final, 12 December 2017; Proposal for a Regulation on establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration) and COM(2017) 794 final, 12 December 2017.

currently participating,⁴⁹⁰ the Visa Information System (VIS),⁴⁹¹ the Entry/Exit System,⁴⁹² the European Travel Information and Authorisation System (ETIAS),⁴⁹³ and ECRIS for Third-Country Nationals (ECRIS-TCN).⁴⁹⁴ While Eurodac, VIS and the Entry/Exit System have already been established under EU law, proposals for ETIAS and ECRIS-TCN have been tabled by the Commission and are currently under negotiation. The interoperability proposals seek to interconnect all these EU databases for security, border and migration management by 2020.

The goal of the interoperability proposals is to reduce the lack of communication that, in the words of an official heard in the context of this research, leads to the risk of “pieces of information slipping through the net and terrorists and criminals escaping detection by using multiple or fraudulent identities”.⁴⁹⁵ The proposals foresee the creation of new tools (a total of three new EU databases) to allow competent authorities to simultaneously query different databases (a ‘one-stop shop’). The main mechanisms envisaged include a European search portal, a multiple identity detector, a biometric matching service and a common identity repository.⁴⁹⁶ The very necessity and proportionality of the interoperability proposal

⁴⁹⁰ Regulation (EU) No. 603/2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints, OJ L 180/1, 29.6.2013.

⁴⁹¹ Council Decision 2004/512/EC establishing the Visa Information System (VIS), OJ L 213/5, 15.6.2004.

⁴⁹² Regulation (EU) 2017/2226 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, OJ L 327/20, 9.12.2017.

⁴⁹³ European Commission, Proposal for a Regulation establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No. 515/2014, (EU) 2016/399, (EU) 2016/794 and (EU) 2016/1624, COM(2016) 731 final, 16 November 2016.

⁴⁹⁴ European Commission, Proposal for a Regulation establishing a centralised system for the identification of Member States holding conviction information on third country nationals and stateless persons (TCN) to supplement and support the European Criminal Records Information System (ECRIS-TCN system) and amending Regulation (EU) No. 1077/2011, COM(2017) 334, 29 June 2017.

⁴⁹⁵ Statement by a participant in a panel discussion that formed part of this research, which was held at the CEPS Ideas Lab, 23–24 February 2018, Brussels.

⁴⁹⁶ For an in-depth analysis of these ‘solutions’, see Gutheil et al. (2018a), pp. 57–68.

remain largely contested and have been challenged by the EDPS,⁴⁹⁷ the Article 29 Working Party⁴⁹⁸ and the Fundamental Rights Agency.⁴⁹⁹

By contrast, the UK Government has been supportive of EU work on interoperability, and recognised the need to make the exchange of data within the EU “more efficient”.⁵⁰⁰ Work on interoperability has been one of the main priorities of the Security Union Commissioner, Sir Julian King, a British national himself.⁵⁰¹ On 18 March 2018, the head of the UK Representation to the EU in Brussels sent a letter to the Council presidency saying that the UK wants to opt into the proposed regulations establishing a framework for interoperability between EU information systems (on police and judicial cooperation, asylum and migration).⁵⁰²

While the UK is still entitled to opt into new EU instruments as a Member State, after Brexit day and during the transition period, this possibility will be limited and will depend on whether the opt-in builds on existing EU measures. Until recently, Brexit talks between the EU and the UK have not addressed interoperability. Nevertheless, in the Withdrawal Agreement the parties have already agreed that by the end of the transitional period the UK “shall cease to be entitled to access any network, any

⁴⁹⁷ EDPS, Opinion 4/2018 on the Proposals for two Regulations establishing a framework for interoperability between EU large-scale information systems, 16 April 2018.

⁴⁹⁸ Article 29 Data Protection Working Party, Opinion on Commission proposals on establishing a framework for interoperability between EU information systems in the field of borders and visa as well as police and judicial cooperation, asylum and migration, WP266, 11 April 2018.

⁴⁹⁹ Fundamental Rights Agency, “Interoperability and fundamental rights implications”, 19 April 2018.

⁵⁰⁰ The UK minister for policing mentioned the “likely level of usage” by UK law enforcement and immigration officials and “the high costs” involved in the implementation of the Commission proposals as factors to be evaluated before any opt-in decision. See Documents considered by the House of Commons’ Select Committee on 28 February 2018, “Interoperable EU information systems for security, border control and migration management”, para. 9.7.

⁵⁰¹ See the documents considered by the House of Commons’ Select Committee on 10 January 2018, “Developing interoperable EU information systems to enhance border management and security” (<https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-ix/30115.htm#footnote-009-backlink>).

⁵⁰² Council of the European Union (2018c).

information system, and any database established on the basis of Union law".⁵⁰³

To date, no in-depth analysis has been provided as to whether or how the Commission's interoperability proposals are likely to make it more or less difficult for the UK to negotiate its future access as a third country to databases such as SIS II. Still, it is significant that days after the UK's notification of its intention to opt into the interoperability proposals, the EU's chief negotiator warned that as a third country the UK would not have access to EU databases.⁵⁰⁴

The main problem with regard to the UK joining the interoperability legislation is that the latter questions the principle of purpose limitation. Once approved, these measures will have far-reaching impacts on the way in which EU law enforcement and security actors cooperate with each other. By enabling the cross-checking of databases, and introducing streamlined access conditions and similar data-retention periods, interoperability serves many purposes, which seem to go well beyond the objective of increasing the EU's border and migration management capabilities.⁵⁰⁵ In fact, it allows Europol and EU Member States' law enforcement authorities to access data (including biometrics) stored in EU border-management databases for the 'ancillary purpose' of preventing, investigating and prosecuting serious crime.

The UK's participation in this legal framework could allow a third country (after Brexit) to have access to biometric data stored in EU databases established for different purposes and with different links to Schengen. At the same time, and as we see in the analysis above, each EU database is closely tied to a specific EU policy area and legal framework. As a consequence, the databases are subject to their own standards/benchmarks demarcating third country cooperation. Also, one of these new EU databases would contain a copy of all the information stored in each of the other databases – and this could lead third countries like the UK to have access without limits to all the data stored, without any reasonable purpose. Through opting into the Commission's new interoperability proposal, the

⁵⁰³ Art. 7 of the draft Withdrawal Agreement.

⁵⁰⁴ M. Barnier, Speech at the European Union Agency for Fundamental Rights, Vienna, 19 June 2018 (http://europa.eu/rapid/press-release_SPEECH-18-4213_en.htm).

⁵⁰⁵ See Curtin (2017b).

UK would not only be able to gain access to large troves of sensitive data (including, *inter alia*, EU citizens' biometrics) during the transitional period, but it might also be in a position to retain them once it becomes a third country, *i.e.* after the completion of its withdrawal from the bloc.

As the interoperability package allows for the creation of very detailed profiles and opens up new venues of surveillance, the Commission proposals raise some concerns from a fundamental rights perspective. The package seems instrumental to a model of border control and mobility surveillance that sits uneasily with the prohibition of discrimination of third country nationals.⁵⁰⁶ As pointed out in one of our meetings, the risk is that by allowing security agencies and bodies to access sensitive data stored in IT systems originally established for migration and border-management purposes, interoperability will serve a "super purpose of identifying third-country nationals".

This will have a significant impact on British citizens once the UK leaves the EU and becomes a third country. After Brexit, UK nationals will be subject to the proposed EU border control and travel authorisation laws, similar to other non-EU citizens (including those who are not subject to EU visa rules).⁵⁰⁷ This means that their personal data may be stored in EU JHA databases (e.g. the proposed ETIAS) and automatically checked against data contained in databases including SIS II, VIS and the planned Entry/Exit System, Eurodac, and Europol and Interpol databases.⁵⁰⁸

UK nationals might also be included in a "watchlist" which, on the basis of information entered by Europol or EU Member States' authorities, profiles third country nationals "who are suspected of having committed or taken part in a terrorist offence or other serious criminal offence" or who may commit such offences in future, where there are "factual indications or reasonable grounds, based on an overall assessment of a person", to believe that.⁵⁰⁹

⁵⁰⁶ Vavoula (2017).

⁵⁰⁷ Carrera et al. (2016).

⁵⁰⁸ Peers (2018a).

⁵⁰⁹ See "Proposal for a Regulation of the European Parliament and of the Council establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No. 515/2014, (EU) 2016/399, (EU) 2016/794 and (EU) 2016/1624 – Analysis of the final

5.2 Exchange of passenger name record data

In April 2016, together with the GDPR and Directive 2016/680 on protecting personal data processed for the purpose of criminal law enforcement, the European Parliament and the Council adopted Directive 2016/681 on the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime ('EU PNR Directive').⁵¹⁰ This directive concerns the PNR data of passengers on extra-EU flights.⁵¹¹ Even so, all Member States participating in the EU PNR Directive have decided to apply it to intra-EU flights as well,⁵¹² in accordance with its Article 2.

Each Member State should establish or designate a passenger information unit (PIU), which will be competent to collect, process and exchange PNR data.⁵¹³ Such data – encompassing 19 categories of information listed in Annex I to the EU PNR Directive⁵¹⁴ – may be collected and processed only for the purposes of preventing, detecting, investigating and prosecuting terrorist offences and serious crime,⁵¹⁵ within the further limits set out in the directive.⁵¹⁶

The UK strongly advocated for, and thus opted into, the EU PNR Directive. As the Government claimed in 2017, “the UK was the *first EU country* to have a fully functioning Passenger Information Unit”.⁵¹⁷ The National Crime Agency has listed access to PNR data among its priorities for the post-Brexit scenario, as it is “absolutely essential in terms of the profiling

compromise text with a view to agreement”, Council doc. 7986/2018, 24 April 2018 (www.statewatch.org/news/2018/apr/eu-council-ESTA-final-compromise-7986-18.pdf).

⁵¹⁰ OJ L 119/132, 4.5.2016.

⁵¹¹ Art. 1(1)(a) of the EU PNR Directive.

⁵¹² Vavoula (2016). Only Denmark does not take part in the EU PNR Directive.

⁵¹³ Art. 4 of the EU PNR Directive.

⁵¹⁴ Among others, address and contact information, all forms of payment information, including billing address, complete travel itinerary, frequent flyer information, seat number and all baggage information.

⁵¹⁵ Art. 1(2) of the EU PNR Directive.

⁵¹⁶ See Art. 6(2) of the EU PNR Directive.

⁵¹⁷ HM Government (2017a), p. 4 (emphasis added).

that we do to protect the UK".⁵¹⁸ Likewise, the EU is likely to seek the maximum cooperation possible with the UK, not least because Heathrow Airport is the biggest airport in Europe in terms of passenger traffic.⁵¹⁹

At the time of writing, Article 59(g) of the draft Withdrawal Agreement – which has not yet been agreed – states that the EU PNR Directive will continue to apply to requests received before the end of the transition period by PIUs in accordance with Articles 9 and 10 of the EU PNR Directive. These provisions regulate the requests for access to PNR data from other PIUs or from Europol.

After Brexit, the UK – as any third country – will be bound neither by the EU PNR Directive, which is currently being implemented,⁵²⁰ nor by the existing PNR agreements that the EU has concluded with other third countries. The UK Government is nonetheless committed to concluding a security treaty that, *inter alia*, should allow UK authorities to exchange PNR data with EU partners as they currently do, since the existing alternatives are “sub-optimal, resulting in capability loss”.⁵²¹ By contrast, the Commission has been adamant in stating that “as of the withdrawal date, the EU rules for transfer of personal data to third countries apply”.⁵²² In this light, the UK should ensure an adequate level of protection for the processing of data shared with the EU. As noted in section 2.3, part I above, some UK pieces of legislation and practices may represent an obstacle to finding that the UK offers equivalent data protection standards to those of the EU.⁵²³

In principle, the UK Parliament might pass domestic law requiring all airlines flying into the UK, from all over the world, to transfer PNR data to British authorities. This would be possible without any international agreement, yet the UK could not – by means of domestic law – access PNR

⁵¹⁸ Oral evidence of D. Armond, Deputy Director General of the National Crime Agency, to the House of Commons’ Home Affairs Committee, “EU Policing and Security Issues”, 6 December 2016, Q36.

⁵¹⁹ See the statistic available on the website of the Airports Council International – Europe (www.aci-europe.org/policy/position-papers.html?view=group&group=1&id=11).

⁵²⁰ The deadline for transposition of the EU PNR Directive was 25 May 2018.

⁵²¹ HM Government (2018), p. 21.

⁵²² European Commission (2018b), p. 1.

⁵²³ For a detailed analysis of these potential obstacles, see also Alegre et al. (2017), pp. 62ff.

data related to flights to and from other countries, such as PNR data pertaining to intra-EU flights. The Commission has listed cooperation on the exchange of PNR data among the issues to address in future EU-UK arrangements in the field of security.⁵²⁴ Pending further details on the legal and political feasibility of an EU-UK arrangement that may replicate the current EU legislation on PNR data, there are two main alternatives for sharing PNR data with EU Member States after Brexit, in addition to bilateral agreements between the UK and EU Member States.

In the absence of any ad hoc agreement, PNR data may be transferred to the UK on a case-by-case basis, in accordance with Article 11 of the EU PNR Directive. This solution would represent a marked departure from the highly interconnected EU PNR system and the UK would be able to access very limited information, and only after providing several safeguards on the use of that information.

It thus seems likely that the parties would prefer a second and more structured avenue of cooperation in the long term, such as the conclusion of an EU-UK PNR agreement. The EU has already signed two PNR agreements with third countries, namely the US and Australia.⁵²⁵ According to the UK Government, however, EU cooperation with third countries is unavoidably less intense than cooperation within the EU, even though the PNR agreements have some advantages:

These agreements provide legal certainty for airlines required to disclose PNR data to third countries accessing PNR data from EU carriers, and provide clarity on how the PNR data may be used. Existing agreements do not allow third countries to work together on using PNR to identify travel patterns in the same way that EU countries can under the EU Directive.⁵²⁶

⁵²⁴ European Commission (2018d), p. 6.

⁵²⁵ Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security, OJ L 215/5, 11.8.2012 ('EU-US PNR Agreement'); Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service, OJ L 186/4, 14.7.2012 ('EU-Australia PNR Agreement').

⁵²⁶ HM Government (2017a), p. 13.

This was echoed by Lord Timothy Kirkhope of Harrogate, the European Parliament's rapporteur on the EU PNR Directive, in his oral evidence to the House of Lords' European Union Committee, as he claimed that "it may not be possible in future to access all the data, including specifically the intra-EU data for PNR".⁵²⁷ The Committee commented that "losing access to intra-EU PNR data would be a serious handicap".⁵²⁸

In addition to the US and Australia, the EU concluded a PNR Agreement with Canada,⁵²⁹ which the CJEU declared incompatible with EU law in Opinion 1/15.⁵³⁰ The negotiations with Canada are expected to resume soon to address the shortcomings that the CJEU flagged. A few remarks below on Opinion 1/15, as well as on the EU-US PNR Agreement, may help to shed light on the challenges that the UK will have to face should it aim to strike a PNR agreement with the EU.

5.2.1 Challenges for a future EU-UK PNR agreement

An earlier EU-US PNR Agreement was annulled in 2004 by the Court of Justice on procedural grounds and a new EU-US PNR Agreement was concluded in 2007.⁵³¹ Despite some resistance by the European Parliament and some scepticism in the US, the European Parliament approved the text in early 2012. The EU-US PNR Agreement raises serious questions about the extent to which individuals should expect a high level of protection under it, especially after Opinion 1/15 of the CJEU.⁵³²

The EU-US PNR Agreement contains a purpose limitation provision, allowing the collection, use and processing of PNR data by US authorities strictly for the purposes of preventing, detecting, investigating and prosecuting terrorist offences (defined by EU law) and other transnational crimes that are punishable by a sentence of imprisonment of three years or

⁵²⁷ Oral evidence of Lord T. Kirkhope of Harrogate to the House of Lords' European Union Committee, "Brexit: Future UK-EU security and police cooperation", 12 October 2016, Q22.

⁵²⁸ House of Lords, European Union Committee (2016), para. 123.

⁵²⁹ Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record, Council doc. 12657/5/13, 23.6.2014 ('EU-Canada PNR Agreement').

⁵³⁰ Opinion 1/15 of the CJEU, 26 July 2017.

⁵³¹ Mitsilegas (2016b), p. 25ff., upon which the following remarks draw.

⁵³² See Kuşkonmaz (2017b), pp. 150ff.

more.⁵³³ However, these purpose limitation safeguards are substantially watered down, as the agreement allows the use and processing of PNR data: i) on a case-by-case basis, “where necessary in view of a serious threat and for the protection of vital interests of any individual or if ordered by a court”;⁵³⁴ and ii) to identify persons who would be subject to “closer questioning or examination upon arrival to or departure from the United States or who may require further examination”.⁵³⁵

In addition, it is true that the EU-US PNR Agreement contains some specific data protection provisions,⁵³⁶ that it describes the US data protection framework as adequate,⁵³⁷ and that it operates on the basis of presumptions of equivalence to allow the onward transfer of PNR data after their transmission to the US Department of Homeland Security. Nonetheless, the credibility of these provisions and assurances of the EU-US PNR Agreement may be called into question by the case law of the CJEU, according to which legislation permitting public authorities to have access on a generalised basis to the content of electronic communications compromises “the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter”.⁵³⁸ Albeit laid down in a different context, these findings of the Court may be applicable to surveillance permitted under the EU-US PNR Agreement, and are likely to represent a benchmark for any future EU-UK PNR agreement.

An EU-UK agreement on the exchange of PNR data will also have to take into account the detailed observations of Opinion 1/15 of the CJEU. In this Opinion, the CJEU declared the incompatibility of the EU-Canada PNR Agreement with Articles 7, 8, 21 and 52(1) of the Charter in so far as the Agreement “does not preclude the transfer of sensitive data from the

⁵³³ Art. 4(1) of the EU-US PNR Agreement.

⁵³⁴ Art. 4(2) of the EU-US PNR Agreement.

⁵³⁵ Art. 4(3) of the EU-US PNR Agreement.

⁵³⁶ For instance, it includes provisions on automated individual decisions, non-discrimination, transparency, access for individuals, correction and rectification, and redress for individuals (Arts 7, 9, 10, 11, 12, and 13 of the EU-US PNR Agreement). The provision on redress, however, references US law, and the value it adds for European citizens is unclear.

⁵³⁷ Art. 19 of the EU-US PNR Agreement.

⁵³⁸ Case C-326/14, *Schrems*, Judgment of 6 October 2015, para. 94. See more in section 2.3, part I above.

European Union to Canada and the use and retention of that data”.⁵³⁹ The CJEU requires that the EU–Canada Agreement limits the retention of PNR data after the air passengers’ departure to that of passengers in respect of whom there is “objective evidence from which it may be inferred that they may present a risk in terms of the fight against terrorism and serious transnational crime”.⁵⁴⁰ According to the Court, the Agreement should also determine in a “clear and precise manner the PNR data to be transferred from the EU to Canada” and should provide that the “models and criteria used in the context of automated processing of PNR data will be specific and reliable and non-discriminatory”.⁵⁴¹

In addition, the CJEU assessed the rules of the EU–Canada PNR Agreement on the oversight of PNR data protection safeguards. The Agreement provided that the data protection safeguards for the processing of PNR data should be subject to “oversight by an independent public authority, *or* by an authority created by administrative means that exercises its functions in an impartial manner and that has a proven record of autonomy”.⁵⁴² The Court clarified that the independence of the supervisory authority is of the essence and, as a consequence, it did not find any violation with respect to the first part of the above-mentioned provision (“oversight by an independent public authority”). Rather, it was the “formulation in the alternative”⁵⁴³ (“*or* by an authority...”) that raised some concerns and that consequently should be amended, as the EU–Canada PNR Agreement

seems to permit the oversight to be carried out, partly or wholly, by an authority which does not carry out its tasks with complete independence, but which is subordinate to a further supervisory authority, from which it may receive instructions, and which is therefore not free from any external influence liable to have an effect on its decisions.⁵⁴⁴

⁵³⁹ Opinion 1/15 of the CJEU, Judgment of 26 July 2017, para. 232(2).

⁵⁴⁰ *Ibid.*, para. 232(3)(d).

⁵⁴¹ *Ibid.*, paras 232(3)(a) and (b).

⁵⁴² Art. 10(1) of the EU–Canada PNR Agreement (emphasis added).

⁵⁴³ Opinion 1/15 of the CJEU, Judgment of 26 July 2017, para. 230.

⁵⁴⁴ *Ibid.*

The wording of the other two PNR agreements is slightly different. On the one hand, the Australian information commissioner is competent to monitor the compliance with data protection rules by the Australian government authorities processing PNR data.⁵⁴⁵ In addition, individuals may also “lodge a complaint with the Commonwealth Ombudsman regarding their treatment by the Australian Customs and Border Protection Service”.⁵⁴⁶ On the other hand, according to Article 14(1) of the EU-US PNR Agreement, compliance with the privacy safeguards in the Agreement is “subject to independent review and oversight by Department Privacy Officers, such as the [Department of Homeland Security] Chief Privacy Officer who ... have a proven record of autonomy”.⁵⁴⁷ They should have the ability to “exercise effective powers of oversight, investigation, intervention, and review”⁵⁴⁸ and to refer violations of law related to the EU-US PNR Agreement “for prosecution or disciplinary action, when appropriate”.⁵⁴⁹ It is only *in addition* to this specific oversight mechanism that Article 14(2) provides for independent review and oversight by other bodies that may not be sufficiently independent, such as the DHS Office of Inspector General, the Government Accountability Office and the US Congress.⁵⁵⁰

The EU-US and EU-Australia PNR Agreements are similar in respect of dispute resolution mechanisms. In both cases, any dispute arising from the interpretation, application or implementation of the agreements should give rise to consultation between the parties with a view to reaching a

⁵⁴⁵ Art. 10(1) of the EU-Australia PNR Agreement.

⁵⁴⁶ Art. 10(4) of the EU-Australia PNR Agreement.

⁵⁴⁷ Art. 14(1)(a) of the EU-US PNR Agreement.

⁵⁴⁸ Art. 14(1)(b) of the EU-US PNR Agreement. See the similar wording of Art. 10(1) of the EU-Canada PNR Agreement.

⁵⁴⁹ Art. 14(1)(c) of the EU-US PNR Agreement. See the similar wording of Art. 10(1) of the EU-Canada PNR Agreement.

⁵⁵⁰ Art. 14(2) of the EU-US PNR Agreement.

mutually agreeable resolution.⁵⁵¹ If consultations fail, either party may suspend the agreement or even terminate it.⁵⁵²

Against this backdrop, the conclusion of a new EU-UK PNR agreement, albeit not at all impossible, is likely to take a considerable amount of time, as it will have to comply with the high EU data protection standards. As the House of Lords' European Committee submitted, "the CJEU's ruling on the EU-Canada PNR agreement does not bode well for the EU's ability to conclude similar agreements promptly and reliably in future".⁵⁵³ Should a future EU-UK PNR agreement fall foul of EU data protection standards, the CJEU could prevent the conclusion of such an agreement. Be that as it may, in light of the previous PNR agreements that the EU has concluded with third countries, the CJEU should be competent neither for the settlement of disputes that may arise nor for the oversight of the potential EU-UK PNR agreement.

Until a PNR agreement is adopted or the exchange of PNR data is regulated in a future security treaty, PNR data may be transferred to the UK only on a case-by-case basis, provided that the UK offers a level of data protection that is essentially equivalent to that guaranteed by EU law, read in light of the Charter.

5.3 Enhancing mutual trust after Brexit: The importance (and risks) of 'soft' cooperation measures

Regardless of the challenges that stand in the way of setting out the shape and content of the future EU-UK partnership in the field of criminal justice and policing, several participants in the meetings of the Task Force and some interviewees argued that it is of the essence that the EU and the UK develop

⁵⁵¹ Art. 24 of the EU-US PNR Agreement and Art. 23 of the EU-Australia PNR Agreement. Art. 25(1) of the EU-Canada PNR Agreement provides that the parties should resolve any dispute through diplomatic channels.

⁵⁵² Arts 24(2) and 25 of the EU-US PNR Agreement and Arts 23(2) and 25 of the EU-Australia PNR Agreement. See the similar wording of Arts 25(2) and 27 of the EU-Canada PNR Agreement.

⁵⁵³ House of Lords, European Union Committee (2016), para. 123.

some forms of soft cooperation,⁵⁵⁴ with a view to enhancing trust in each other's capabilities and strengths.

As for judicial cooperation, it has been suggested that the UK could expand its network of liaison magistrates, as they have been able to give considerable support to UK authorities dealing with cross-border crime.⁵⁵⁵ The UK has also posted criminal justice advisers in several third countries, although they are mostly entrusted with capacity building and policy work. Some interviewees and experts have praised the support that UK authorities currently receive from the European Judicial Network.⁵⁵⁶ By the same token, other experts have mentioned the positive results achieved by the European Judicial Training Network with regard to the enhancement of mutual trust among practitioners throughout the EU. Another good example of building mutual trust by means of soft measures is represented by the several expert groups set up by the European Commission. After all, as submitted by one of the participants at the last meeting of the Task Force, "the more you sit together the more you get to know each other".

These and other similar measures, which do not necessarily require membership of the EU (e.g. the secondment of liaison magistrates), are worth exploring in the future, as they may enhance trust on the ground among practitioners. The UK Government shares this view and it has claimed that the UK and the EU "could establish a *reciprocal UK secondment programme*. This would cover EU and UK institutions and agencies. Secondments are beneficial to both the UK and the EU, providing a platform for a cadre of high caliber officials to gain and deploy skills, expertise and experience."⁵⁵⁷

⁵⁵⁴ See also Gutheil et al. (2018b), p. 31.

⁵⁵⁵ See the uncorrected oral evidence to the Home Affairs Sub-Committee of the House of Lords' Select Committee on the European Union, "Brexit: The proposed UK-EU security treaty" by T. Wilson, Professor of Criminal Justice Policy, Northumbria University Centre for Evidence and Criminal Justice Studies, 21 March 2018, Q17; J. Brisbane, Internal Assurance Officer and SRO (Senior Responsible Officer) for EU Exit, Crown Prosecution Service, and D. Price, Head of International Justice, Crown Prosecution Service, 16 May 2018, Q109.

⁵⁵⁶ See also the written evidence of the Scottish Crown Office and Procurator Fiscal Service to the Home Affairs Sub-Committee of the House of Lords' European Union Committee, "Brexit: Future UK-EU security and police cooperation", FSP0003.

⁵⁵⁷ HM Government (2018a), p. 24 (emphasis in the original).

Although it is unquestionable that the above-mentioned measures stop short of the much more comprehensive and effective support provided by Eurojust, they may lay down the foundation of a fruitful cooperation after Brexit. Once again in the words of the UK Government, a “stronger mutual understanding will ensure closer cooperation and coordination”.⁵⁵⁸

These soft measures foster the feeling of being part of a common endeavour, which is underpinned by shared values and principles. The EU and UK’s commitment to these shared values after Brexit will thus be crucial to guarantee the smooth cooperation between the parties. Already on a symbolic level, such future cooperation would benefit, for instance, from the UK complying with the Charter of Fundamental Rights⁵⁵⁹ and, more broadly, aligning with EU human rights principles, e.g. by showing that its legislation abides by EU standards concerning procedural safeguards in criminal proceedings. Above all, there is consensus on the view that the UK should not leave the ECHR. The UK has taken a critical stance towards the ECHR in recent years and this criticism was notably voiced, in different speeches, by the current prime minister when she was home secretary.⁵⁶⁰ At the same time, the ECHR represents a key component of the EU, and the UK’s commitment to the protection of fundamental rights should not be set aside in the future. Respect for the benchmarks set forth in the ECHR is an essential precondition to maintain trust and sustain EU–UK cooperation after Brexit. Any departure from these principles by either of the parties could lead to the freezing and potential termination of cooperation.

⁵⁵⁸ Ibid.

⁵⁵⁹ See the uncorrected oral evidence of A. Bradshaw, Member of the Law Society’s EU Committee and Partner, Peters & Peters, to the Home Affairs Sub-Committee of the House of Lords’ Select Committee on the European Union, “Brexit: The proposed UK–EU security treaty”, 21 March 2018, 9 May 2018, Q78: “it would be helpful for [the UK] to comply with the charter, and to be seen to be required to comply with the charter. It would, at least symbolically, improve the UK’s credibility in human rights arguments in the eyes of the EU 27”.

⁵⁶⁰ “Theresa May: Fight Europe by all means, but not over this Arrest Warrant”, *The Telegraph*, 9 November 2014 (www.telegraph.co.uk/news/politics/conservative/11216589/Theresa-May-Fight-Europe-by-all-means-but-not-over-this-Arrest-Warrant.html); see also the Home Secretary’s speech on the UK, EU and our place in the world, 26 April 2016 (www.gov.uk/government/speeches/home-secretarys-speech-on-the-uk-eu-and-our-place-in-the-world).

The above remarks seem even more convincing when applied to the field of police cooperation, as the latter is on average less formal than judicial cooperation and it may occur through less structured avenues. In the literature, it has been argued that “[s]trictly informal collaboration through direct communication, meetings and the presence of bilateral liaison officers not integrated within the EU Liaison Officers’ network ... will continue regardless of formal agreements, and a ‘hard Brexit’ may revive these old practices”.⁵⁶¹ Furthermore, according to the former director of Europol, the only effective substitute to Europol would be a “set of bilateral co-operation arrangements, where the UK would again have to build up a network of officers”.⁵⁶² This kind of cooperation, although it can hardly achieve the same results as the much more advanced EU instruments and agencies,⁵⁶³ may work better among law enforcement authorities than among judicial bodies, as was confirmed by a number of experts who participated in our meetings. As noted by one interviewee, the UK has already posted 44 liaison officers in 16 EU countries and this number may increase after Brexit.

Informal police cooperation seems more problematic than judicial cooperation in terms of compliance with rule of law and human rights standards. If the UK is left outside Europol and EU databases, the informal ‘under the radar’ ways of cooperating that will be sought to fill the gap left by Brexit in information-sharing mechanisms may violate EU fundamental rights related to data protection:

in the absence of an agreement, we may see back-door sharing agreements for data, through informal contacts, emergency provisions – the kind of clause that you find at the bottom of a treaty and thought would never be used – or intelligence agency sharing, where you go through MI5 or MI6, rather than through the police. Those could become the main avenues to continue the practicalities

⁵⁶¹ Alegre et al. (2017), p. 47.

⁵⁶² Oral evidence of R. Wainwright to the Home Affairs Committee of the House of Commons, “EU policing and security issues”, 7 March 2017, Q168.

⁵⁶³ See Hufnagel (2016b), pp. 77–78.

of day-to-day security. Obviously, that would be quite worrying. ...
[I]t would lower hugely the level of accountability.⁵⁶⁴

For the very same reason, the collaboration of the UK with its four partners in the context of the 'Five Eyes' (the US, Canada, Australia and New Zealand) has raised several concerns in light of the "lack of transparency and accountability".⁵⁶⁵

The Commission has stressed that future cooperation could be terminated if the UK departs from the ECHR. This report proposes that any post-Brexit agreement between the EU and UK in the field of criminal justice and policing should include a freezing mechanism providing for the possibility of either the parties to suspend cooperation in cases where human rights violations are ascertained.

⁵⁶⁴ Uncorrected oral evidence of J. Ruiz Diaz, Policy Director, Open Rights Group, to the Home Affairs Sub-Committee of the House of Lords' Select Committee on the European Union, "Brexit: The proposed UK-EU security treaty", 25 April 2018, Q50.

⁵⁶⁵ *Ibid.*, Q55.

PART III

KEY FINDINGS AND WAYS FORWARD

6 OPTIONS FOR THE FUTURE

Throughout the past decades, the UK has carved its own special status into the EU area of freedom, security and justice. The UK's position is based on a model of flexible and differentiated integration in EU criminal justice and police cooperation instruments. Despite its *sui generis* position in the AFSJ, the UK has been an active contributor to the development of EU criminal law and police cooperation. It has championed application of the principle of mutual recognition in the field of judicial cooperation. It has also promoted a model of 'intelligence-led' (data-driven) policing or preventive justice, where retention and exchange of data are the key tools to curb transnational crime and face (potential) security threats to the detriment of criminal justice standards and guarantees. The EU has espoused such a data-driven model of law enforcement to a large extent and has developed it further through new operations in the field of security, sometimes at the expense of a more 'criminal justice-led' approach to the fight against crime and terrorism.

The UK is leaving the AFSJ at a time when the EU is stepping up its internal and external security efforts, especially through the establishment and implementation of different mechanisms for the access, collection and exchange of data, and through the development of cooperation with important strategic partners like the US. The most recent Commission proposals on interoperability and on production and preservation orders

(the so-called e-evidence)⁵⁶⁶ provide significant examples of such policy and normative trends.

While the UK's influence on the development of the AFSJ will decrease after Brexit, day-to-day cooperation in security matters will continue between the EU and UK. As the UK plays a major role in EU criminal justice and police cooperation, the two parties have repeatedly stressed their mutual interest in maintaining strong cooperation in the field. The chief question that remains is under what conditions this cooperation can move forward in a principled (rule of law and human rights-compliant) and trust-based fashion.

In order to maintain the efficiency and consistency of the current system, a clear and high-quality legal framework should regulate future EU-UK criminal justice and police cooperation. This framework should be based on trust and shared values, and the UK's participation in the European Convention on Human Rights constitutes a precondition to sustain a principled partnership. This Task Force has examined a number of options for such a legal framework, which are set out in this part of the report along with possible ways forward in light of Brexit.

6.1 The transition period

The conclusion of the Withdrawal Agreement would ensure legal certainty as regards ongoing judicial and police cooperation proceedings and other crucial issues, such as the rules concerning data transfers and the role of the CJEU during the transition period.

According to the text currently under negotiation, during the transition period the UK should remain bound by EU law applicable to it upon its withdrawal, unless otherwise agreed. This applies to the AFSJ measures that already bind the UK, which can choose to participate in instruments amending, replacing or building upon such measures. The UK

⁵⁶⁶ European Commission, Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters, COM(2018) 225 final, 17 April 2018; Proposal for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, COM(2018) 226 final, 17 April 2018.

will not, however, be able to opt into new measures adopted during the transition period.

As for the judicial and law enforcement cooperation proceedings that will be ongoing at the end of the transition period (31 December 2020), the present version of the draft Withdrawal Agreement – which has not yet been agreed upon by the negotiators on this point – provides for the continued application of EU law until their completion.

In the best-case scenario, a common position on the Withdrawal Agreement would be reached by autumn 2018, when the Commission Task Force on Article 50 needs to submit a proposal to the Council on the conclusion of such an agreement. This could stave off a cliff-edge situation where the UK exits EU instruments and bodies of judicial and police cooperation without any transition provisions. The transition period would give the parties more time to work on the shape and content of their post-withdrawal agreements.

Should the parties decide to take the path of an adequacy assessment for future exchange of information, the UK would also be granted until the end of 2020 to prove that, as a third country, it provides adequate fundamental rights and rule of law safeguards to lawfully exchange data with the EU and its Member States for law enforcement-related purposes.

The UK Government has recently declared that it will conclude the Withdrawal Agreement (alongside the framework agreements for its future partnership with EU) “later this year” (2018).⁵⁶⁷ Yet, negotiators have not yet agreed on large parts of the draft Withdrawal Agreement, including key provisions related to the role of the CJEU and to data exchange regimes. If an agreement is not found by autumn 2018 at the latest, the parties could decide to extend the period available to negotiate and conclude the Withdrawal Agreement. To this end, Article 50(3) TEU requires unanimity in the European Council and the agreement of the UK.

6.2 An EU-UK security and justice partnership: A new treaty and sectoral agreements

The UK has recently tabled some proposals for its future relationship with the EU in the field of police and judicial cooperation. The UK calls for an

⁵⁶⁷ HM Government (2018a), p. 2.

“internal security treaty” to be concluded as a part of a wider “security partnership” that would cover not only law enforcement and criminal justice cooperation, but also cooperation on wider security issues, such as terrorism, irregular immigration, organised crime, cyber threats, and even natural hazards and protracted instability.⁵⁶⁸

An EU-UK security treaty would show a clear commitment of both parties to continue to cooperate although it will have to address several issues that pose very different challenges, such as police cooperation, the exchange of personal information and participation in EU agencies, on the one hand, and extradition and mutual legal assistance on the other. The Court of Justice may also have different powers vis-à-vis these issues. The proposal to conclude an overarching treaty where instruments established under different EU legal bases are put side by side with each other may risk blurring the boundaries between criminal justice and police cooperation. Security components inspired by the UK’s ‘intelligence-led’ policing model may prevail over a more ‘criminal justice-led’ approach to cross-border cooperation in the fight against crime, at the expense of the protection of fundamental rights. The conclusion of sectoral agreements in the field of criminal justice may therefore be politically and legally more acceptable than a holistic approach.

The arrangement proposed by the UK would ensure that cooperation between UK and EU Member States’ competent authorities will continue “on the basis of existing EU measures in a specific field, with relevant measures listed in annexes”.⁵⁶⁹ The UK Government mentions a range of EU agreements providing for comprehensive cooperation between the EU and some third countries: the Schengen Association Agreements, the European Economic Area Agreements and the European Common Area Agreement. There is no precedent, however, for similarly comprehensive agreements in the AFSJ with regard to third countries that are not full members of the Schengen area. The Commission has submitted that, while the UK seems to be seeking some “[s]ort of opt-ins to the EU JHA measures” post-Brexit, i.e. as a third country, “no third country has a choice to join the EU JHA [measures]”.⁵⁷⁰

⁵⁶⁸ Ibid., p. 6.

⁵⁶⁹ Ibid., p. 15.

⁵⁷⁰ European Commission (2018d), p. 12.

The UK's proposal on a new security treaty raises several questions from an EU constitutional law perspective and the Commission has already stressed the need for the EU to ensure the integrity of the AFSJ. The fields of criminal justice and police cooperation are radically different from trade and aviation. Judicial cooperation in criminal matters is based on 'mutual trust', which is underpinned by the presumption that each Member State ensures a high level of protection of fundamental rights, as well as its compliance with the rule of law, including an independent judiciary enabling effective judicial protection for individuals affected by these measures.

Fundamental rights, as enshrined in the EU Charter of Fundamental Rights and as interpreted by the Court of Justice, represent the benchmark of judicial and police cooperation within the EU. While EU primary law allows the UK as a Member State to 'pick and choose' the instruments in which it wishes to participate, no third country could have such an *à la carte* approach.

Somewhat paradoxically, if the UK wishes to have close cooperation with the EU in the field of criminal justice after Brexit, it would have to accept more EU law than it currently does as an EU Member State, as it would have to abide by the relevant EU *acquis* – including the *acquis* on the protection of fundamental rights. A new security treaty that essentially replicated the status quo would not offer sufficient guarantees that the UK will comply with this condition.

The Commission has stressed that future cooperation could be terminated if the UK departs from the ECHR. This report proposes that, to ensure the trust required to sustain post-Brexit cooperation, future EU and UK partnership agreements in the field of criminal justice and policing should include a freezing mechanism providing for the possibility of either of the parties to suspend cooperation in cases where human rights violations are ascertained.

6.3 Judicial cooperation in criminal matters: Extradition, mutual legal assistance, and seizure and confiscation

After the transition period, it would be inefficient to revert (where possible) to extra-EU instruments – such as the Council of Europe or United Nations conventions – or to conclude bilateral agreements with each EU Member State to regulate EU-UK judicial cooperation in criminal matters. The latter

alternative is at odds with the UK Government's objective and would result in a fragmented scenario, although some consistency may be gained if the parties conclude a 'framework agreement' along the lines of the EU-US Agreements on Extradition and Mutual Legal Assistance.

EU mutual recognition instruments have created a system where judicial decisions are executed throughout the EU with minimum formality and, on average, within strict deadlines. Should traditional international agreements on extradition and mutual legal assistance apply in future EU-UK relationships, extradition and MLA procedures could be expected to be longer and more expensive than they currently are. After Brexit, UK extradition and MLA requests are not likely to have the same priority in other EU countries, and this could prolong judicial cooperation proceedings.

At the same time, participation in mutual recognition instruments builds on some underpinning principles – mutual trust at the forefront – that only apply to EU countries. The UK's current participation in measures like the European Arrest Warrant and the European Investigation Order is justified upon the assumption that – as a member of the EU – this country complies with the EU fundamental rights *acquis*, and such compliance is subject to the scrutiny of the CJEU. So far, no third countries have joined EU mutual recognition instruments.

In EU law, different alternatives have been developed to enable judicial cooperation in criminal matters with third countries and outside mutual recognition instruments. Among the existing arrangements on extradition, the EU-Norway and Iceland Agreement on surrender could be a model to follow, as it would keep the extradition proceedings between the UK and EU Member States within the remit of competent judicial authorities. The EU-Norway and Iceland Agreement provides for an extradition system that replicates the one for European Arrest Warrants to a large extent. Most of the rules that have sped up the surrender procedure in the EU also feature in the EU-Norway and Iceland Agreement, yet their application is optional. The effectiveness of this Agreement is thus likely to depend on the declarations of the parties. This report has shown that – outside the EU framework – Member States are on average inclined to introduce a number of rules and exceptions that have been waived in the EAW Framework Decision, notably on dual criminality and the bar on extradition of own nationals.

The EU–Norway and Iceland Agreement on surrender lays down some rules on dispute resolution that would not cross the red lines of the UK Government on the CJEU. That said, unlike Norway and Iceland, the UK does not participate in the Schengen *acquis* on the free circulation of people. Even though participation in the Schengen *acquis* may not represent a legal prerequisite for cooperation on extradition under the EU–Norway and Iceland Agreement, the issue is extremely relevant at the political level and the Commission attaches great importance to it.

Although UK courts have been taking human rights issues into consideration in EAW proceedings, defendants are likely to raise more claims after Brexit. Despite the expected negative impact on the length of proceedings, this might enhance the protection of the rights of persons involved in extradition procedures. Still, there is no consensus on this potential outcome of Brexit.

The fall-back option for extradition could be represented by the 1957 European Convention on Extradition, which may require some amendments to domestic legislation (both in the UK and in EU Member States) in order to apply to extraditions to and from the UK. Albeit quite outdated if compared with the EAW, the 1957 Convention would at least have the advantage of providing a common procedure and framework for extradition proceedings with EU countries, something that would be lost should the UK rely on bilateral agreements with each EU Member State. We present the findings of our analysis on the EAW and the alternatives to it in Table 6.

As for cooperation in the field of mutual legal assistance, the Directive on the European Investigation Order has replaced the previous instruments of judicial cooperation in criminal matters within the EU and it has turned out to be a successful tool. As the EIO has been used in the UK only since July 2017, the fall-back options – such as the Council of Europe and the UN conventions – do not look as “catastrophic”⁵⁷¹ as the alternatives to the EAW in the field of extradition. Some of our interviewees agreed that exiting the EIO system is perceived as a loss of potential benefit rather than a massive change for the worse in cross-border judicial cooperation. To maintain smooth cooperation resembling the present scenario, the parties may explore the feasibility of a new MLA agreement, which should go beyond the existing arrangements between the EU and third countries.

⁵⁷¹ House of Commons, Home Affairs Committee (2018a), para. 69.

Table 6. *European Arrest Warrant and its alternatives*

| | EAW Framework Decision | EU-Norway/Iceland Agreement | European Convention on Extradition | EU-US Agreement |
|--|---|---|---|-----------------------------------|
| No dual criminality | ✓ | It depends on declarations | X | X |
| No political offence exception | ✓ | It depends on declarations | X | No provision |
| No ban on extradition of own nationals | ✓ | It depends on declarations | It depends on declarations | No provision |
| Judge-to-judge procedure | ✓ (there may be a central authority) | It depends on declarations | X (4 th Protocol allows judge-to-judge procedures) | X |
| Time limits | ✓ | It depends on declarations | X | X |
| Costs (expected)* | € | n.d. | €€€€ | €€€€ |
| Dispute settlement | n.a. | Meeting of representatives of the governments | European Commission on Crime Problems of the Council of Europe (ECCP) | Consultations between the parties |
| Transmission of case law | n.a. | ✓ | ECCP shall be kept informed of the application of the Convention | No provision |

Note: n.a. = not applicable; n.d. = no data (as the agreement has not yet entered into force).

* A cost-benefit analysis has not been carried out in the context of this research. The ratio represented in the table (1:4) builds on the views of the director of public prosecutions at the CPS, who declared that, compared with the alternatives, “it is three times faster to use an EAW and four times less expensive” (oral evidence of A. Saunders to the House of Lords’ European Union Committee, “Brexit: Future UK-EU security and police cooperation”, 12 November 2016, Q55). See more in section 3.2.1, part II.

Source: Authors’ elaboration.

Finally, confiscation and seizure of assets should also be addressed in future EU-UK arrangements. Our interviewees praised EU mutual recognition instruments on freezing and confiscation; in addition, the UK Government has opted into the draft regulation on the mutual recognition

of freezing and confiscation orders. The current alternatives – to be found in MLA treaties – do not provide for rules and procedures that are comparable with the existing EU instruments in terms of speed and ease of cooperation. The option of concluding ad hoc arrangements on the matter could be considered; such rules may also be included in a more general EU-UK MLA treaty.

As for cooperation in the field of mutual legal assistance, the Directive on the European Investigation Order has replaced the previous instruments of judicial cooperation in criminal matters within the EU and it has turned out to be a successful tool. As the EIO has been used in the UK only since July 2017, the fall-back options – such as the Council of Europe and the UN conventions – do not look as “catastrophic”⁵⁷² as the alternatives to the EAW in the field of extradition. Some of our interviewees agreed that exiting the EIO system is perceived as a loss of potential benefit rather than a massive change for the worse in cross-border judicial cooperation. To maintain smooth cooperation resembling the present scenario, the parties may explore the feasibility of a new MLA agreement, which should go beyond the existing arrangements between the EU and third countries.

Finally, confiscation and seizure of assets should also be addressed in future EU-UK arrangements. Our interviewees praised EU mutual recognition instruments on freezing and confiscation; in addition, the UK Government has opted into the draft regulation on the mutual recognition of freezing and confiscation orders. The current alternatives – to be found in MLA treaties – do not provide for rules and procedures that are comparable with the existing EU instruments in terms of speed and ease of cooperation. The option of concluding ad hoc arrangements on the matter could be considered; such rules may also be included in a more general EU-UK MLA treaty.

6.4 Data exchange for law enforcement purposes

The issue of data protection is likely to be among the most controversial after Brexit. In *Schrems*, the CJEU set out some clear principles to follow when third countries’ standards on data protection are assessed: third countries

⁵⁷² House of Commons, Home Affairs Committee (2018a), para. 69.

should ensure a level of protection of fundamental rights and freedoms that is “essentially equivalent” to that guaranteed by EU law “read in light of the Charter”.⁵⁷³

The UK Government calls for a “bespoke UK–EU model for exchanging and protecting personal data, which builds on the existing adequacy model”⁵⁷⁴ and which should complement the new internal security treaty. It is not clear what an agreement ‘building on the existing adequacy model’ would look like. Nevertheless, the European Council was adamant in stating that “Union rules on adequacy” should be followed to ensure “a level of protection essentially equivalent to that of the Union”.⁵⁷⁵ The Commission has been similarly clear in ruling out any “possibility to compromise on adequacy”⁵⁷⁶ and it even mentioned the possibility of including a “guillotine clause”⁵⁷⁷ on the future EU–UK partnership in the field of security and justice, if the adequacy decision is withdrawn or declared invalid by the CJEU.

The procedure based on the Commission’s adequacy decision would establish a comprehensive framework of cooperation for data exchange. Even though the UK is in the process of implementing the EU data protection package, this would not necessarily be sufficient to obtain a straightforward adequacy decision. The Commission will have to periodically scrutinise UK law, and its application, even in fields that are currently out of the reach of EU law, such as national security. The adequacy assessment would also cover the UK’s international commitments, such as the agreement that the UK and the US are planning to conclude under the US CLOUD Act.

UK international commitments and other pieces of UK legislation (e.g. the Investigatory Powers Act) may turn out to be stumbling blocks for the finding that the UK ensures a level of protection of fundamental rights that is essentially equivalent to that guaranteed by EU law read in light of the Charter. The existing case law of the CJEU does not bode well for the compatibility of UK data retention laws and surveillance practices with EU

⁵⁷³ Case C-362/14, *Maximilian Schrems v Data Protection Commissioner*, Judgment of 6 October 2015, para. 73.

⁵⁷⁴ HM Government (2018a), p. 25.

⁵⁷⁵ European Council, *Negotiating guidelines*, EUCO XT 20001/18, 23 March 2018, para. 14.

⁵⁷⁶ European Commission (2018d), p. 11.

⁵⁷⁷ *Ibid.*, p. 7.

standards. Furthermore, adequacy talks may drag on for years. If an adequacy decision is not obtained in due time (i.e. at the end of the transition period), the UK would not be allowed to lawfully obtain data from EU (public and private) exporters.

The adequacy decision is not the only option to exchange personal information after Brexit. Article 37(1)(a) of Directive 2016/680 on protecting personal data processed for the purpose of criminal law enforcement allows the transfer of personal data when “appropriate safeguards with regard to the protection of personal data are provided for in a legally binding instrument”. These appropriate safeguards may be given in sectoral agreements (e.g. an international agreement between the UK and Europol concluded in accordance with Article 25(1)(b) of the Europol Regulation), although this piecemeal approach may further prolong the negotiations. Moreover, it seems that such appropriate safeguards as regards data protection standards should be assessed in light of the *Schrems* principles, that is, the UK would still be required to ensure a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed by EU law read in light of the Charter.

In the absence of an adequacy decision adopted before the end of the transition period and of agreements between the UK and the EU providing for appropriate safeguards, there is a serious risk of a cliff-edge scenario. To mitigate the tremendous effects that this might have on EU-UK exchange of data, the option to prolong the transition period could be considered.

The EU-US ‘Umbrella Agreement’ could be used as a model for future EU-UK cooperation on data transfer, although it should go hand in hand with bilateral agreements between the UK and EU Member States. Indeed, the EU-US Umbrella Agreement “in and of itself shall not be the legal basis for any transfers of personal information”⁵⁷⁸ as it represents a “framework”⁵⁷⁹ for the protection of personal data that is exchanged between the US and EU Member States. A key principle set forth in this

⁵⁷⁸ Art. 1(3) of the EU-US Umbrella Agreement.

⁵⁷⁹ Art. 1(2) of the EU-US Umbrella Agreement.

Agreement is that the transborder data flow should not compromise the data protection standards to which EU citizens are eligible under EU law.⁵⁸⁰

6.5 Access to EU databases and information-sharing mechanisms

Cooperation in data-driven law enforcement is one of the main pillars of the ‘security partnership’ that the UK is seeking to obtain with the EU after Brexit. EU and UK negotiators have agreed that at the end of the transition period the UK will cease to be entitled to access any network, any information system or any database established on the basis of Union law. This means that UK’s current position in the field could not be maintained after Brexit. New legal and technical arrangements need to be designed for regulating the extent to which the UK as a third country will be able to lawfully access relevant EU JHA databases and information-sharing instruments.

ECRIS is an information-exchange system to which only EU countries have access, whereas SIS II is a Schengen-related measure. There may be some leeway to accommodate the UK’s post-Brexit participation in the Prüm framework, as the latter is not linked with the Schengen *acquis*.

Despite the UK having pushed for the adoption of the EU PNR Directive, it could not be part of this instrument as a third country. Should the UK wish to access PNR data concerning intra-EU flights, it could conclude a PNR agreement with the EU, which would have to abide by the data protection standards that the CJEU set out in Opinion 1/15. The experience with the EU–Canada and EU–US PNRs shows that the conclusion of PNR agreements can take a considerable amount of time.

To compensate for the exclusion of the UK from EU databases (EU and UK), police authorities may continue to exchange information in an informal way and without clear legal frameworks regulating similar exchanges. These ‘under the radar’ avenues of cooperation do not bode well for the protection of fundamental rights.

⁵⁸⁰ See the speech at the Center for Strategic and International Studies by Věra Jourová, Commissioner for Justice, Consumers and Gender Equality, “EU-U.S. data flows and data protection: Opportunities and challenges in the digital era”, 31 March 2017 (http://europa.eu/rapid/press-release_SPEECH-17-826_en.htm).

While ongoing Brexit talks have not addressed the Commission's new proposals aimed at furthering the interoperability of separately developed databases, the UK has recently decided to opt into these proposed regulations. Yet, the UK's participation in this legal framework after Brexit would pose profound legal challenges. The main problem with the regard to the UK joining the interoperability legislation is that the latter questions the principle of purpose limitation.

Through its decision to opt into the Commission's new interoperability proposal, the UK would not only be able to gain access to large troves of sensitive data (including, *inter alia*, EU citizens' biometrics) during the transitional period, but it might also be in a position to copy and retain them once it becomes a third country, *i.e.* after the completion of its withdrawal from the bloc. At the same time, each EU database is closely tied to a specific EU policy area and relies upon a legal framework setting forth different standards/benchmarks demarcating third country cooperation.

Allowing third countries' participation in the EU interoperability legislation could potentially lead to new forms of mass surveillance by foreign authorities (including UK authorities), which may put EU citizens and third-country nationals' fundamental rights at risk. It is significant that within a few days of the UK's notification of its intention to opt into the interoperability proposals, the EU's chief negotiator warned that as a third country the UK would not have access to EU databases.

The very necessity and proportionality of the interoperability proposals remain largely contested and challenged, among others, by the European Data Protection Supervisor and the Fundamental Rights Agency.

6.6 EU JHA agencies and bodies and the importance of 'soft' cooperation measures

The UK as a third country will have to sign *ad hoc* agreements with Europol and Eurojust to continue to exchange personal information with them. These agreements are to be concluded by the Council in accordance with Article 218 TFEU and not by the agencies themselves, as was the case in the past.

The UK may keep a relationship with Eurojust that could be partially similar to the current one and it may continue to rely on the support of this agency, albeit in a more limited fashion. The UK may post liaison prosecutors at Eurojust and may continue to participate in JITs financed by

the agency, yet it is likely to lose its leading role. The UK, which is the EU country that relies most on Eurojust's financial and logistic support for the establishment of joint investigation teams, will not be in a position to formally request the setting-up of JITs. Still, a legal basis for JITs with EU Member States can be provided by the Second Protocol to the 1959 MLA Convention.

The impact of Brexit on the UK's future relationship with Europol is likely to be more visible. There is no precedent of allowing third countries to have direct access to Europol's databases or to lead Europol's operational projects. The same goes for Denmark, which is considered a third country vis-à-vis the agency. The agreement with Denmark is the most advanced form of operational cooperation so far established by Europol with a 'third country'. However, the position of Denmark is not comparable with the status that the UK will have after Brexit. Among others, Denmark agreed to ensure continued membership of both the EU and the Schengen area and to explicitly recognise the jurisdiction of the CJEU on all matters related to the validity and implementation of its agreement with Europol (including issues concerning data protection).

It will be mostly in the interest of the EU to push for the recognition of the European Public Prosecutor's Office as a competent authority in extradition and MLA proceedings with the UK. Yet, it will also be in the interest of the UK to keep a strong relationship with the EPPO, as the latter may be in possession of information or evidence that UK authorities will need to access.

Several participants in the meetings of the Task Force and some interviewees also noted that, beyond the formal cooperation with EU agencies by means of agreements, it is of the essence that the EU and the UK develop further forms of soft cooperation. Judicial and police cooperation require efficient communication and exchange of information, views and practices among national competent authorities. The more the parties trust each other, the more such exchanges will be smooth and effective.

As for judicial cooperation, the UK could expand its network of liaison magistrates. Although these and other similar measures stop short of the much more comprehensive support provided by Eurojust, they are worth exploring in the future. The UK Government shares this view and it has

claimed that the UK and the EU could establish a reciprocal UK secondment programme.⁵⁸¹

Police cooperation is on average less formal than judicial cooperation and it may rely on less structured avenues of cooperation. The UK has posted 44 liaison officers in 16 EU countries and this number may increase. UK law enforcement authorities will continue to work together with their European colleagues after Brexit, yet cooperation outside clear legal frameworks may raise significant legal challenges, especially as regards data protection. Member States' law enforcement authorities will be allowed to cooperate with the UK as a third country to the extent that such bilateral collaboration does not undermine the coherent application of EU law standards. In other words, the unquestionable importance of informal avenues of cooperation should not overshadow the relevance of rule of law standards, which would call for the adoption of adequate, formal legal instruments setting out the rules to follow in the future EU-UK partnership.

Soft measures of cooperation can foster the feeling of being part of a common endeavour, underpinned by shared values and principles. The EU and UK's commitment to these shared values after Brexit will be crucial to guarantee smooth cooperation between the parties. Above all, there is consensus on the view that the UK should not leave the ECHR, which represents a key component of the EU and the UK's commitment to the protection of fundamental rights.

The Commission has already singled out the continued participation of the UK in the ECHR as a prerequisite for future partnership with the EU in the fields of police and criminal justice. In particular, the current EU approach to such a partnership foresees the inclusion of a "termination clause" that would condition the maintenance of cooperation on criminal justice on the UK's participation in the ECHR.⁵⁸² According to this proposal, if the UK leaves the ECHR or is condemned by the Strasbourg Court for non-execution of ECHR judgments in the area concerned, cooperation with the EU would be terminated.

⁵⁸¹ HM Government (2018a), p. 24.

⁵⁸² European Commission (2018d), p. 7.

The EU has already included a termination clause in relevant agreements with other third countries.⁵⁸³ In the specific case of the future EU-UK partnership, it could serve as an effective tool for ensuring a principled and trust-based way forward.

6.7 Role of the Court of Justice in the future EU-UK security and justice partnership

In the existing EU agreements with third countries on judicial cooperation and in the Schengen Association Agreements, the CJEU does not have the power to settle disputes among the parties on the application of the Treaties. Similar disputes are solved by means of political or diplomatic mechanisms, such as consultations. Moreover, third countries' courts are not bound by the decisions of the Court of Justice and there are some provisions to make sure that these courts and EU Member States' courts look at each other to ensure smooth application of the agreements.

The post-Brexit dispute settlement mechanism will ultimately depend on the nature and the rules of future EU-UK relationships. The more that EU law will apply to the UK after Brexit, the less can the role of the CJEU be curtailed in EU-UK agreements.

Independent of the future outlook of EU-UK relationships, the case law of the CJEU will have a significant impact on the UK after Brexit, as the Court will remain competent to ultimately and authoritatively interpret EU law. The main actors of judicial and police cooperation proceedings are national authorities, which, within the EU, will continue to have the power or the obligation to ask the CJEU to rule on the compatibility of the UK's requests for cooperation with EU law. Even before Brexit, the Irish Supreme Court requested the CJEU to decide whether EAWs issued by the UK should continue to be executed, as the surrendered person would be likely to serve (part of) his or her sentence in UK prisons after Brexit, when that person

⁵⁸³ See, for instance, the EU-Norway and Iceland MLA Agreement, which "shall" be terminated in the event of termination of the Schengen Association Agreement of Norway and Iceland.

would no longer be able to enjoy his or her rights under the Treaties and the Charter.⁵⁸⁴

The Court of Justice may also prevent the entry into force of any EU-UK agreement, if the latter does not comply with EU law, as happened with the EU-Canada PNR Agreement in the aftermath of Opinion 1/15.

⁵⁸⁴ Irish Supreme Court, *Minister for Justice v O'Connor* [2018] IESC 3, 1 February 2018, which has recently been overtaken by *R O* (Case C-327/18 PPU).

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APPENDIX. TASK FORCE MEMBERS AND INVITED SPEAKERS

Chairs

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| Peter Hustinx | Former European Data Protection Supervisor |
| Michael Kennedy | Consultant & Adviser on national & international criminal justice issues, former Chief Operating Officer at the Crown Prosecution Service and former President of Eurojust |

Rapporteurs

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| Sergio Carrera | Senior Research Fellow, Head of Justice and Home Affairs Section, CEPS |
| Fabio Giuffrida | PhD Candidate in EU Criminal Law, Queen Mary University of London |
| Valsamis Mitsilegas | Professor of European Criminal Law and Global Security, Head of the Department of Law, Queen Mary University of London |
| Marco Stefan | Research Fellow, Justice and Home Affairs Section, CEPS |

Task Force Members

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| Susie Alegre | Barrister and Consultant |
| Julia Bateman | Professional Support Lawyer, Kingsley Napley LLP |
| Anna Bradshaw | Member of the Law Society's EU Committee and Partner, Peters & Peters Solicitors LLP |

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| Pam Bowen | Senior Policy Advisor, Prosecution Policy and Inclusion Unit, Operations Directorate, Crown Prosecution Service |
| Tony Bunyan | Investigative journalist, Statewatch |
| Nick Collier | Global Head of Government and Regulatory Affairs, Thomson Reuters |
| Emilio De Capitani | Former Secretary of the European Parliament Civil Liberties Committee and Visiting Professor, Law School, Queen Mary University of London |
| Anand Doobay | Partner, Boutique Law LLP |
| Tom Dowdall | Deputy Director, Borders and OIC Vulnerabilities Command, National Crime Agency |
| Rudi Fortson | QC, Barrister, 25 Bedford Row and Visiting Professor of Law, Law School, Queen Mary University of London |
| Paul Garlick | QC, Consultant, Solicitors and Advocates Scarmans Limited |
| Nick Glynn | Senior Program Officer, Policing & Security Governance, OSIFE |
| Gloria González Fuster | Research Professor, Vrije Universiteit Brussel |
| Myles Grandison | Barrister, Temple Garden Chambers |
| Richard Hobbs | EU Public Policy & Regulatory Expert, UK Policing Lead, Deloitte MCS Limited |
| Mark Lange | Director, EU Institutional Relations, Microsoft, Brussels |
| Baroness Sarah Ludford | Liberal Democrat, Lords spokesperson on Europe, House of Lords and former Member of the European Parliament |
| Frank Meyer | Professor, Department of Criminal Law and Criminal Procedure Law, University of Zurich |
| Caroline Morgan | Senior Political Analyst, Representation of the European Commission in the UK |

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| Rebecca Niblock | Partner, Kingsley Napley LLP |
| Harvey Palmer | International Policy & Strategy Advisor, International Justice and Organised Crime Division, Crown Prosecution Service |
| Steve Peers | Professor of EU Law and Human Rights Law, University of Essex Law Department and Human Rights Centre |
| Helena Raulus | Head of Brussels Office, UK Law Societies Joint Brussels Office |
| Acadia Senese | Public Policy & Government Relations, Google's Brussels office |
| Wouter Van Ballegooij | Policy Analyst, European Parliament, Directorate-General for Parliamentary Research Services |
| Johannes Vos | Former official at the Council of the European Union |
| Tony Wilson | Former Head of Mutual Legal Assistance Unit, Serious Fraud Office |

List of Invited Speakers

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| Laure Baudrihayé-Gérard | Senior Lawyer, Fair Trials Europe |
| Jason A. Biros | Legal Adviser, US. Mission to the European Union, Brussels |
| Ralph Bunche | Regional Director, Fair Trials Europe |
| Lani Cossette | Senior Attorney, Office of Industry Affairs, Microsoft |
| Saskia M. Hufnagel | Senior Lecturer in Criminal Law, Queen Mary University of London |
| Richard E. Meyers II | Henry Brandis Distinguished Professor of Law, University of North Carolina School of Law |
| Andrea Ott | Full Professor of International and European Law, Faculty of Law, Maastricht University |

Brexit poses several challenges for future interaction between the EU and the UK in the areas of criminal justice and police cooperation. A new legal framework will be required to sustain the EU's relations with the UK – an active participant in numerous EU criminal justice and police cooperation instruments – once it leaves the Union. The negotiations on the exit of the UK from the EU must grapple with the crucial questions of how and to what extent can the two parties continue to maintain effective arrangements for fighting cross-border crime, while at the same time guaranteeing compliance with the rule of law and fundamental rights.

This report is the result of intensive deliberations among members of a Task Force set up jointly by CEPS and the School of Law at Queen Mary University of London, who met regularly throughout the first half of 2018. It examines the feasibility of retaining the current EU–UK framework for cooperation in these critical fields and explores possible alternatives to the status quo. It also delves into the conditions under which the UK could continue to participate in EU instruments and EU agencies engaged in cooperation in criminal matters and to have access to justice and home affairs databases and other information-sharing tools. In their conclusions, the members offer a set of specific policy options for the EU and the UK to consider after Brexit with a view to developing an effective partnership in the areas of criminal justice and security based on trust and shared values.

