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Brexit: implications for policing and criminal justice cooperation

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1. Summary

EU law on criminal justice and policing cooperation can be divided into five areas:

- Mutual recognition of criminal decisions and cooperation ;
- Participation in EU agencies; and
- Information sharing
- The substantive criminal law (the definition of criminal offences);
- Criminal procedure;

The UK currently has an arrangement whereby it can choose which laws it wishes to adopt, and opt out of others.

In relation to the substantive criminal law and criminal procedure, the measures that the UK has chosen to adopt essentially affect domestic law. As such, they would not necessarily need to be altered as a result of the UK's withdrawal from the EU.

By contrast, the mutual recognition of decisions, information sharing and participation in agencies involve cooperation between Member States. Therefore, alternative arrangements would have to be put in place of existing measures if the UK wished to maintain similar levels of cooperation.

The Government has indicated that it wishes to maintain a close relationship with the EU in this area, reflecting the mutual benefits of the current arrangements. Experts from law enforcement, the legal profession and academia have highlighted the importance of certain existing measures, including the European Arrest Warrant; membership of agencies such as Europol and Eurojust; and information exchange via mechanisms such as the second generation Schengen Information System (SIS II).

A number of factors are likely to affect the outcome of negotiations in this area. The UK will in some cases be seeking unprecedented access to measures for a non-EU, non-Schengen country. It remains to be seen whether the UK's pre-existing relationship with the EU, and the contribution it currently makes in relation to cross border crime and security, will be sufficient to secure this access.

The UK will also have to adhere to data protection standards that are broadly equivalent to those in the EU on an ongoing basis, if it is to retain access to information sharing measures.

Further, the Government has indicated that it does not intend to continue to accept the jurisdiction of the Court of Justice of the EU (CJEU). An alternative mechanism for resolving disputes as to the interpretation and implementation of any agreements reached will therefore need to form part of those agreements.

2. The UK's opt out from EU policing and criminal justice measures

2.1 EU competence in home affairs and justice: background

Justice and Home Affairs (JHA) did not initially fall within the ambit of the European Community. In 1990 a group of Member States agreed under the Schengen Treaty to abolish their border controls. At the same time a package of police cooperation measures were agreed to deal with criminals who might misuse this new freedom.

This was followed by the Treaty of Maastricht in 1992, which made provision for certain forms of criminal justice legislation, known as the 'third pillar'. These arrangements were dealt with on an intergovernmental basis and were subject to a different legal framework in which the role of EU institutions was more restricted.

In 1999 the Schengen *acquis* (body of law) was incorporated into the framework of the EU by the Treaty of Amsterdam. Although the *acquis* does not apply to the UK and Ireland, special rules mean that both countries can request that some or all of the rules do apply to them. The UK currently participates in the policing and criminal justice aspects of the Schengen *acquis*, but not the immigration aspects.

Prior to 2009, the Member States of the EU agreed on approximately 130 measures relating to police and criminal justice cooperation. These included aspects of the substantive criminal law; mutual recognition in criminal matters; harmonisation of criminal procedure; exchange of information; and EU law enforcement agencies.

The Treaty of Lisbon incorporated these pre-2009 third pillar measures into the main body of EU law, to which the enforcement powers of the Commission and CJEU apply. From this point the UK had the ongoing option of opting in to any new measures in this area, and of opting out of any laws that were adopted before the Treaty.

Participation in these measures is principally governed by Protocols 19 and 21 of the Lisbon treaty:

- JHA (Title V) opt-in Protocol 21: The UK, and separately Ireland, may choose, within three months of a proposal being presented to the Council, whether it wishes to participate in the adoption and application of any such proposed measure. If the UK notifies the President of the Council of its intention to participate within that three month period, there is no possibility of opting out later. If the measure is adopted, the UK is bound, the CJEU has jurisdiction over the measure, and the Commission has the power to enforce in respect of any failure to implement the measure. If the UK does not opt in by the three month point, it is still entitled to a seat at the negotiating table, but has no vote and, as a result, has reduced negotiating weight with which to shape the

proposal. However, the UK may, at any stage after a measure has been adopted, indicate its wish to participate, though the Commission has to approve and the Commission and Council can impose conditions.

- Schengen 'opt-out' Protocol 19: Article 4 of Protocol 19 on the Schengen *acquis*, provides that the UK (and Ireland respectively) may request to take part in some or all provisions of the Schengen *acquis*, with respect to police and judicial cooperation. The UK does not participate in the border control elements. The UK is deemed to be in any measures which build on those parts of the Schengen *acquis* in which it already participates unless, within three months of the publication of the proposal or initiative, it notifies the Council that it does not wish to take part in the measure. If the UK does not opt out within that three-month period, it is automatically bound. If the UK opts out, the Commission and Council can decide to eject the UK from all or part of the rest of Schengen to the extent considered necessary if such non-participation seriously affects the practical operability of the system, but the Protocol states explicitly that it must seek to retain the UK's widest possible participation.¹

As a result of these rules, the UK has what has been described as a "special status" in relation to EU cooperation on Justice and Home Affairs matters, meaning that the UK's involvement is limited to those areas that successive UK Governments have deemed to be in the national interest.

2.2 The UK's approach to JHA cooperation since 2009

Under Article 10(4) of Protocol 36 of the Lisbon Treaty, the UK was entitled to withdraw from all existing measures in the field of police cooperation and judicial cooperation in criminal matters. Article 10(5) entitled the UK to notify the Council thereafter of its wish to participate in specific measures.

In 2011, the Government announced a package of measures aimed at strengthening Parliamentary scrutiny in the area of Justice and Home Affairs. These included:

- A written or oral statement to Parliament reporting all opt-in decisions on new EU measures in the area of Justice and Home Affairs;
- In the case of particularly strong Parliamentary interest in an opt-in decision, a debate and vote in both Houses on the Government's recommended approach to the opt-in.²

In July 2013, the UK notified the Council of its decision to opt out of the pre-Lisbon Treaty measures. It immediately sought to opt back in to 35 of the same measures, accepting the enforcement powers of the

¹ The JHA opt-in Protocol and Schengen opt-out Protocol, gov.uk

² [HC WS 20 Jan 2011, c51](#). The Government has also published a [Code of Practice on the Scrutiny of Opt-in and Schengen Opt-out Decisions in Justice and Home Affairs Matters](#), available at Gov.uk

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Commission and CJEU jurisdiction with regard to them. Of approximately 100 measures that the UK chose not to opt back in to, the majority related to the substantive criminal law.

During a debate in Parliament on the decision to opt back in to certain measures, then Home Secretary Theresa May outlined the Government's position:

We are seeking to rejoin the European supervision order, which allows British subjects to be bailed back to the UK rather than spending many months abroad awaiting trial. ... I am sure that the whole House also wants to see foreign national offenders sent back to their own country. The prisoner transfer framework decision provides for non-consent-based transfers throughout the European Union, and the Government want to opt back into that measure and send criminals back home. We also want our law enforcement agencies to be able to establish joint investigation teams with colleagues in other European countries. ... It is also quite clear that many other EU member states and their law enforcement agencies rely on measures of this sort to provide the necessary framework for practical cooperation in the fight against crime. In most instances, bilateral agreements would simply not work as effectively and our co-operation would suffer. ... I want to protect victims of crime, and I am determined to give our law enforcement the tools they need to do that. The Government's policy is clear. We have exercised the United Kingdom's opt-out and are negotiating to rejoin a limited number of measures where we believe that it is in the national interest to do so.³

The Government published its [*Decision pursuant to Article 10\(5\) of Protocol 36 to the Treaty on the Functioning of the European Union*](#),⁴ setting out the 35 measures that the UK was seeking to opt back in to in July 2014, in advance of seeking Parliamentary approval.

The reasons for opting into these measures were well rehearsed at the time, and the decision was subject to scrutiny by several parliamentary Committees.⁵ According to the then Home Secretary (Mrs Theresa May), they were chosen on the grounds that they "make a positive difference in fighting crime and preventing terrorism".⁶

In November 2014 the House of Commons voted by 421 to 29 to approve draft [*Criminal Justice and Data Protection \(Protocol No. 36\) Regulations 2014*](#). These Regulations did not cover all 35 measures but only 11 that required further transposition into national law. Nonetheless the Government took the view that the vote should represent an endorsement of all 35 measures.

Since this decision, the UK has chosen to opt in to further policing and criminal justice measures, according to the same process. Significant measures include the European Investigation Order and the Prüm

³ [HC Deb 7 April 2014](#), cc 31-2

⁴ Cm 8897, HM Government, July 2014

⁵ The European Scrutiny, Home Affairs and Justice Committees published reports: see [*The Government's response to the Committee's Reports on the 2014 block opt-out decision*](#). First Joint Report from the European Scrutiny, Home Affairs and Justice Committees of Session 2013-14, HC 1177, 26 March 2014

⁶ [Speech](#) made by the then Home Secretary, *The UK, the EU and our place in the world*, 25 April 2016

measures.⁷ Both are intended to support the cross-border investigation of serious crimes. The UK also opted into the EU Passenger Name Records (PNR) Directive and EU PNR agreements with Australia, the US and Canada.

Its approach to deciding whether or not to opt in is described thus:

The Government has undertaken that all JHA proposals will be assessed on a case-by-case basis. The Government will put the national interest and the benefits to our citizens and businesses at the heart of our decision-making and will consider each decision under the Protocols with a view to maximising our country's security; protecting civil liberties; preserving the integrity of our criminal justice and common law systems; and controlling immigration.⁸

Pre-Lisbon measures have also been revised, and new versions of earlier instruments adopted.

The Government committed to publishing an annual report on decisions taken. This takes the form of an updated document describing JHA opt-in and Schengen opt-out decisions taken between 1 December 2009 and the present. It lists the proposals, plus those the government is currently considering and those on which a decision is expected in the next few months: [Decisions taken: JHA \(Title V\) opt-in and Schengen opt-out decisions](#)

According to the recent White Paper *The United Kingdom's exit from and new partnership with the European Union*,⁹ cooperating in the fight against crime and terrorism is one of the 12 principles which will guide the Article 50 exit negotiations. The Government believes that it will be in a strong negotiating position in this area:

Our pre-existing security relationship with the EU and its Member States means that we are uniquely placed to develop and sustain a mutually beneficial model of cooperation in this area from outside the Union. We are starting from a position of strong relations with EU Member States, where we have been at the forefront of developing a number of EU tools which encourage joint working across the continent to protect citizens and our way of life."

As we exit, we will therefore look to negotiate the best deal we can we with the EU to cooperate in the fight against crime and terrorism. We will seek a strong and close future relationship with the EU, with a focus on operational and practical cross-border cooperation.

⁷ For further detail of which, see below

⁸ The JHA opt-in Protocol and Schengen opt-out Protocol, [gov.uk](#)

⁹ [Cm 9417, HM Government, February 2017](#), para 11.2

3. Existing policing and criminal justice measures

The following is a selection of the key measures in which the UK currently participates.

Information sharing

Schengen Information System

The Second Generation Schengen Information System (SIS II) is a database of real time alerts about individuals and objects (such as vehicles) of interest to EU law enforcement agencies.¹⁰ It includes information on people wanted under a European Arrest Warrant, suspected foreign fighters and missing people.

It contains around 70 million “alerts” on individuals or objects likely to be of interest to border control, customs and law enforcement authorities. Alerts created in any of the 29 countries operating SIS II are stored in a central database and are immediately accessible to around two million end-users.

SIS II alerts are made available to the police through the Police National Computer and to Border Force officers at ports of entry.

The Government has highlighted its importance in tackling the terrorist threat from foreign fighters returning from Syria and Iraq, tracking them as they travel around Europe.¹¹

European Criminal Records Information System

The European Criminal Records Information System (ECRIS) provides a system for the exchange of information on criminal convictions between Member States.¹² Member States are obliged to inform each other when they convict one of their nationals.¹³ Member States are also required to respond to requests for previous convictions for criminal proceedings. This means that previous convictions in another Member State can be taken into account for sentencing purposes and in decisions about deportation. ECRIS can also be used to run criminal record checks against individuals where required under national law, for example to screen individuals seeking a firearms licence or applying for a job involving vulnerable groups, such as children.

The Government has said that the system

has allowed the police to build a fuller picture of offending by UK nationals and allowed the courts to be aware of previous offending of EU nationals being prosecuted. The previous convictions information can be used for bail, bad character and

¹⁰ [Council Decision 2007/533/JHA](#)

¹¹ [The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues](#), HM Government, 9 May 2016

¹² [Decision 2009/316/JHA](#)

¹³ [Council Framework Decision 2009/315/JHA](#)

sentencing, as well as by the prison and probation service when dealing with the offender once sentenced.¹⁴

Passenger Name Records

Passenger Name Records (PNR) is information collated by a carrier as part of the travel booking process, such as contact details and travel itinerary. The EU adopted legislation in April 2016 on the use of PNR data for flights flying into the EU, for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.¹⁵

Prüm

The so-called Prüm Decisions are EU Council Decisions¹⁶ which embed into EU law a pre-existing Convention between several EU member states, providing mechanisms to exchange information between member states on DNA, fingerprint and vehicle registration data for the prevention and investigation of cross-border crime and terrorism.

Prüm will reduce the time taken to run an initial check against biometric data (DNA profiles and fingerprints) from days or even weeks to around 15 minutes.

In 2015, Parliament approved the Government's recommendation for the UK to re-join the Prüm legal framework.

During the Commons debate on the measures, the then Home Secretary Theresa May emphasised the support of senior law enforcement officers and stated that attempts to exchange data in other ways would require intergovernmental agreements and the building of separate systems.¹⁷

Fourth EU Money Laundering Directive

[Directive 2015/849](#) calls for the intensification of information exchange and collaboration between national financial intelligence units (FIUs). FIUs are empowered to exchange any information that may be relevant to money laundering or terrorist financing investigations.

Agencies

Europol

The main objective of Europol is to support and strengthen action by Member States' law enforcement authorities and facilitate cooperation between these authorities in preventing organised crime, serious crime and terrorism, where the crimes affect two or more Member States. It provides support for UK law enforcement investigations and has analytical capabilities, processing data and making links between crimes in different countries.

¹⁴ [Cm 8671, HM Government](#), para 209

¹⁵ [Directive 2016/681](#)

¹⁶ Council decisions 2008/615/JHA (Articles 3,4,9 and 12) and 2008/616/JHA, Framework Decision 2009/905/JHA

¹⁷ HC Deb, 8 December 2016, c914-916

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Europol officers may take part in Joint Investigation Teams but have no direct powers of arrest and no authority to use coercive measures.¹⁸ Europol hosts a number of investigative hubs:

- the [European Counter Terrorism Centre](#), which provides operational support to Member States investigating terrorist offences;
- the [European Cybercrime Centre](#), which operates as a central hub for information and analysis on cybercrime;
- and the [EU Internet Referral Unit](#) which seeks to combat terrorist propaganda and related violent extremist activities on the internet. The Europol Information System (EIS) pools information on criminals and terrorists from across the EU.

Seconded Liaison Officers from the 28 EU Member States and certain third countries are based at its headquarters in The Hague.

Since 2009 Europol has been led by Rob Wainwright, the former head of the international division of the UK's Serious and Organised Crime Agency (now the National Crime Agency). His term of office is due to end in 2017 and the new director will be appointed under the rules of a new Regulation.

Europol currently operates on the basis of a Council Decision adopted in 2009. A new Europol Regulation was adopted in May 2016, and the Government subsequently made the decision to opt in to that Regulation. It will come into force on 1 May 2017.¹⁹ According to the Minister for Policing and the Fire Service, Brandon Lewis:

Opting in will maintain operational continuity for UK law enforcement ahead of the EU exiting the EU, ensuring our Liaison Bureau at Europol is maintained, and that law enforcement agencies can continue to access Europol systems and intelligence. This decision is without prejudice to discussions on the UK's future relationship with Europol when outside the EU.²⁰

Eurojust

Eurojust²¹ provides support and coordination to investigations and prosecutions in cases of cross-border crime. This may involve advising on the requirements of different legal systems, supporting the operation of mutual legal assistance arrangements, facilitating the execution of arrest warrants, bringing national authorities together to agree strategy in specific cases, and providing legal, technical and financial support to Joint Investigation Teams (JITs). Its mission is

... to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of

¹⁸ Further information about Europol is available on the [Europol website](#).

¹⁹ Explanatory Memorandum on the UK Government's intention to opt in to Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/945/JHA and 2009/986/JHA, Cabinet Office, November 2016

²⁰ [Letter](#) dated 14 November 2016 to the Chair of the European Scrutiny Committee.

²¹ Council Decision 2002/187/JHA

operations conducted and information supplied by the Member States' authorities and by Europol.²²

Eurojust's headquarters in The Hague is made up of representatives of the Member States (prosecutors, judges or police officers of equivalent competence) through whom the investigation and prosecution of specific acts may be co-ordinated and arranged, and JITs may be set up. Acting collectively as a college Eurojust may request a specific investigation or prosecution, and seek to resolve conflicts as to which Member States' authorities should investigate or prosecute. These functions include supporting the operation of mutual legal assistance such as the European Arrest Warrant.

The 2015 [Annual Report](#) indicated that Eurojust was requested to assist in 2,214 cases, and 120 Joint Investigation Teams were supported.

Cooperation between Member State authorities and mutual recognition

European Arrest Warrant

The European Arrest Warrant (EAW)²³ facilitates extradition between Member States, and is based on the principle of mutual recognition of legal systems within the EU. Unlike extradition arrangements with countries outside the EU, the EAW requires acceptance of a foreign warrant by national judicial authorities without an inquiry into the facts or circumstances giving rise to the warrant. It also limits the grounds on which extradition may be refused, and provides for the extradition of Member States' own nationals (which is prohibited under many other extradition agreements). It was intended to streamline the process of extradition and relies on trust between Member States, premised on the presumption of compliance with the European Convention on Human Rights.

Prisoner Transfers

Council Framework Decision [2008/909/JHA](#) established a system for transferring convicted prisoners back to their country of nationality or habitual residence, provided they have 6 months to serve. Deportation may take place without the consent of the convicted person. The scheme is based on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty.

The Government chose to opt back in to this measure in 2014. It gave two reasons for this decision:

- It would help to reduce the Foreign National Offender population and therefore result in savings in the form of prison places; and
- It is important in the context of the European Arrest Warrant, because it will enable UK nationals convicted elsewhere in the EU to serve their sentence in the UK.²⁴

²² Article 86 TFEU

²³ [2002/584/JHA](#)

²⁴ [Ministry of Justice measures in the JHA block opt-out](#), Justice Committee, HC 605, 2013

Previous convictions

Council Framework Decision [2008/675/JHA](#) requires courts to take account of a defendant's previous convictions in any other Member State to the same extent national previous convictions are taken into account.

European Supervision Order

The European Supervision Order (ESO)²⁵ established a system under which a suspect or defendant subject to non-custodial pre-trial supervision may on a voluntary basis be returned to their home member state to be supervised there until the trial.

European Protection Order

The European Protection Order (EPO)²⁶ enables a judge to impose 'protection measures' in order to protect a person against a criminal act which may endanger his or her life, physical or psychological integrity, dignity, personal liberty or sexual integrity. Protection measures may be prohibitions or restrictions imposed on a person causing the danger, and can constitute an order not to enter certain places, not to contact the subject, or to keep a specified distance from them.

The aim of the EPO is to ensure that crime victims who are granted protection from their aggressor in one Member State are able to get similar protection if they move to another.

European Investigation order

The European Investigation Order (EIO)²⁷ applies the principle of mutual recognition in criminal matters to the field of evidence. This means that there will be a presumption that that each state will recognise and execute a request for evidence (although it will be possible to refuse on specified grounds).

The EIO covers investigative measures including:

- Interviewing witnesses;
- Obtaining of existing information of evidence; and
- Information on bank accounts

The EIO will replace most existing laws on the transfer of evidence between Member States in criminal cases from May 2017.²⁸ It will therefore become the sole legal instrument regulating the exchange of evidence and mutual legal assistance between Member States.

Criminal offences

There are a number of EU measures aimed at establishing minimum standards in relation to certain serious crimes with a cross-border dimension. The UK has opted into a small number of these, including:

²⁵ Council Framework Decision [2009/829/JHA](#)

²⁶ [Directive 2011/99/EU](#)

²⁷ [Directive 2014/41/EU](#)

²⁸ Current rules are contained in Council of Europe and EU mutual assistance agreements and the Framework Decision on the European Evidence Warrant.

- The People Trafficking Directive,²⁹ which requires Member States to criminalise certain intentional acts associated with human trafficking and further provides that investigating and prosecuting these offences must not be dependent on reporting by the victim, and that victims are provided with support and protection. The UK initially exercised its opt out in respect of this Directive but later applied to opt in.
- [Directive 2011/92/EU](#), aimed at combating the sexual abuse and sexual exploitation of children and child pornography.

Procedure

A number of EU measures concern aspects of criminal procedure, aimed at providing assurance that all Member States adhere to the same basic standards in the context of mutual recognition measures. The UK has opted in to some of the measures concerning the rights of defendants, including:

- [Directive 2010/64/EU](#) on the right to interpretation and translation
- [Directive 2012/13/EU](#) on the right to information in criminal proceedings

²⁹ [Directive 2011/36/EU](#)

4. Cooperation from outside the EU

4.1 Current arrangements with third countries

Norway

Norway has concluded an agreement with the EU on the implementation of the Schengen *acquis*. Under Article 2(1) of the Schengen Association Agreement with Iceland and Norway, Norway must transpose and apply the provisions listed in Annex A to the Agreement.³⁰

In areas not covered by the Schengen *acquis*, additional agreements have been negotiated. These include agreements on participation in Europol³¹ and Eurojust.³² The agreements with these Agencies emphasise the importance of data security, requiring Norway to guarantee minimum levels of protection.³³ Norway is also bound to adhere to the principles and rules set out in the Council Decision setting up Eurojust, meaning that it must adhere to European legal standards for the protection of data security so that it can participate in exchanges of data.³⁴

The agreements also provide for the presence of Norwegian liaison officers at Europol and Eurojust. Europol also has a liaison officer stationed with the competent Norwegian authorities.³⁵

Disputes relating to the agreements are settled by an arbitration tribunal.³⁶

Norway has access to SIS II, by virtue of its participation in the Schengen *acquis*.

Norway has concluded an agreement to participate in certain aspects of the Prüm decisions.³⁷ This emphasises the need for the Schengen states to cooperate closely in the fight against crime.

Norway does not have access to ECRIS (which is limited to EU Members States), and instead must rely on the European Convention on Mutual Assistance in Criminal Matters.

³⁰ For further detail see [Consequences of Brexit for the realm of justice and home affairs: Scope for future EU cooperation with the UK](#), Research Section for European Affairs, German Bundestag, 18 August 2016, section 5.2

³¹ [Agreement between the Kingdom of Norway and the European Police Office](#)

³² [Agreement between the Kingdom of Norway and Eurojust](#)

³³ [Consequences of Brexit for the realm of justice and home affairs: Scope for future EU cooperation with the UK](#), section 5.2.3

³⁴ [2002/187/JHA](#)

³⁵ Agreement between the Kingdom of Norway and the European Police Office, Article 15

³⁶ Article 18 of the Eurojust Agreement and Article 17 of the Europol Agreement.

³⁷ [Council Decision 2010/482/EU](#)

Norway does not participate in the EAW, but has concluded a surrender agreement with the EU.³⁸ The agreement makes provision for a uniform arrest warrant and a simplified extradition procedure, including setting time limits for the execution of arrest warrants. It contains certain exemptions which do not apply to the EAW, including the possibility for countries to refuse to extradite their own nationals. It has not yet entered into force.

Switzerland

Switzerland has also concluded agreements relating to the Schengen *acquis*³⁹ and with EU Agencies.

The Swiss agreement with Europol enables Switzerland to exchange strategic and operational information.⁴⁰ It also contains provisions on data protection and allows Switzerland to send liaison officers to Europol.

Switzerland has an agreement with Eurojust covering cooperation in all its areas of responsibility, including drug trafficking, illegal trade in nuclear substances, human trafficking, terrorism, money laundering and cybercrime. The main form of cooperation is exchange of information, but there is also provision for the secondment of a liaison prosecutor and financial and personnel contributions.

As with Norway, disputes are settled by an arbitration tribunal.

Non-EU countries

Rules were created for Europol and Eurojust which authorise them to conclude data-exchange agreements with non-EU countries that do not participate in the Schengen system.⁴¹ External countries are required to ensure an adequate level of data protection. In the case of Eurojust, this may be established either by specific assessment or on the basis of the country being subject to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. In the case of Europol, the country in question must have the adequacy of its level of data security confirmed, and it must be entered into a list adopted by the Council.⁴²

According to research conducted by the German Bundestag, comparisons between the agreements concluded between Europol and Norway, and those with non-EU countries, reveal differences:

If the Europol agreements with Norway and Albania are compared, it emerges, for example, that there is divergent scope for exchanges of personal data. If a request for information contains no indication of its purpose and reason, Europol cannot forward personal data to Albania. Under the agreement with

³⁸ [Council Decision 2006/697/EC](#) Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway.

³⁹ [Swiss Schengen Association Agreement](#)

⁴⁰ Article 2 of the [Agreement between the Swiss Confederation and the European Police Office](#)

⁴¹ Article 23 of Council Decision [2009/371/JHA](#) and Article 26a of Council Decision [2002/187/JHA](#)

⁴² Council Decision [2009/935/JHA](#)

Norway, by contrast, personal data may be exchanged without a specific request. The provisions on information exchange in Australia's agreement with Europol, on the other hand, resemble those in the Norwegian agreement more closely than those in the Albanian agreement. While the Albania-Europol agreement, like its Norwegian counterpart, provides for a liaison officer, the Australia-Europol agreement merely envisages the secondment of a liaison officer on the basis of a possible future agreement.

The EU has signed treaties on the exchange of passenger name records with non-EU countries, such as the USA, Canada and Australia. It has also agreed mutual legal assistance treaties with the USA and Japan.

4.2 Possible future arrangements

As can be seen from the examples above, cooperation between the EU and non-Schengen countries involves separate negotiation in each area of activity, in which the EU seeks to ensure that its legal principles are not infringed.

The main avenues for future cooperation from outside the EU are as follows:

- To conclude agreements with the EU on judicial and police cooperation, such as the agreements between EU and Norway and Iceland on the EAW and Prüm;
- To conclude cooperation agreements with agencies such as Europol and Eurojust, such as those already agreed with third countries;⁴³
- To conclude bilateral agreements with EU Member States.⁴⁴

However, it appears unlikely that any of these options would provide an equivalent level of co-operation as that currently enjoyed by the UK. Nor would they enable complete independence from EU law.

Three factors are likely to limit the extent of future cooperation:⁴⁵

- On an operational level, it is unlikely that UK requests (for information or cooperation) from outside the EU would take the same priority as they do from within the EU. The process may be more akin to mutual legal assistance agreements with other countries, rather than the instant or automated process involved in EU measures.
- On a political level, the UK will not have the same ability to influence the development of the EU law in this area.
- There may also be legal limitations, as a result of the UK no longer being subject to the jurisdiction of the CJEU (for example, in relation to data sharing).

⁴³ As EU agencies, Eurojust and Europol are legally independent, and are able to conclude agreements directly with third countries

⁴⁴ Although this option may be limited to areas in which the EU does not have "exclusive competence" – ie areas not regulated by EU law.

⁴⁵ For example: Mitsilegas, V, 'The Uneasy Relationship between the UK and European Criminal Law. From Opt-Outs to Brexit?', *Criminal Law Review*, Issue 8, 2016, 519-538

It has also been suggested that the UK may be in a different position in negotiations to that of Norway and Switzerland, on account of the fact that it is not a member of the Schengen system. For example, it was in view of Norway's Schengen membership that the EU Council put forward the idea of concluding a surrender agreement.⁴⁶

One issue that will need to be resolved as part of any negotiation in this area is how disputes are to be resolved. The Government has made it clear that it does not propose to remain subject to the jurisdiction of the CJEU in the future, and that any new arrangements would need to be the subject of "bespoke adjudication arrangements".

It is the norm for agreements between the EU and third countries in this field to have some form of dispute resolution procedure. These vary from attempting to resolve disputes through consultations, to an agreement to submit to binding arbitration.

However if the aim of an agreement with the EU is to enable the UK to participate in an EU body or regime, the relevant judgments of the CJEU remain important as they bind the Member States and if not followed by the third country lead to divergence. Thus the Extradition Treaty between the EU and Iceland and Norway provides for the constant review of CJEU case law.

4.3 Specific measures

Agencies

Europol

Europol currently has two types of agreement with non-EU countries: strategic cooperation partners, including Russia, Turkey and Ukraine; and operational cooperation partners, including the USA, Australia, Canada, Colombia, Norway and Switzerland.

Strategic partners do not have access to personal data, whereas operational partners do have indirect access to information and intelligence, but are not involved in the management of the organisation.

Differences between Europol provisions for Member States and third country operational partners include:

- Access to data – Third countries must ask Europol to conduct searches in the Europol Information System on their behalf;
- Access to Europol's Secure Information Exchange Network Application (SIENA) – third countries require an additional bilateral agreement to access SIENA;
- Decision-making – third countries do not sit on Europol's Management Board; and

⁴⁶ *Consequences of Brexit for the realm of justice and home affairs: Scope for future EU cooperation with the UK*, Research Section for European Affairs, German Bundestag, 18 August 2016, section 6.1

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- Liaison – third countries can only have a liaison bureau at the Europol Headquarters with the agreement of the Management Board.⁴⁷

Articles 23 and 26 of Europol Council Decision 2009/934/JHA define the current procedure for Europol to negotiate and conclude agreements with third countries. This requires the European Council first to determine a list of the countries with which Europol can conclude agreements, in consultation with the European Parliament. The Director of Europol negotiates the agreement, provided that the Management Board of Europol has decided that the country has adequate standards of data protection. The Director then submits a draft agreement to the Management Board, which must endorse it before it is sent to the Council for approval.⁴⁸

Lord Kirkhope (former MEP and European Conservative spokesman on Justice and Home Affairs) suggested in evidence to the House of Lords European Union Committee that it has “taken five to seven years to negotiate any Europol co-operation agreements” and that “it takes even longer when we are dealing with the exchange of data – the actual specifics – where nine to 12 years in an average”.⁴⁹

It is not yet clear whether the UK will have to await its exit from the EU before it can negotiate its relationship with Europol as a third country.

Shortly before the EU referendum, Rob Wainwright, Director of Europol, said that the UK would become a “second tier member of our club” if it left the EU. He warned that the UK’s future relationship with the organisation may mirror Norway and Iceland, denying UK agencies direct access to Europol data.⁵⁰

The National Crime Agency (NCA) has stated that the types of arrangements that currently exist with third countries would not be sufficient to meet the UK’s needs.⁵¹ It emphasised in particular the importance of access to the Europol Information System (EIS), which pools information on suspected and convicted criminals and terrorists from across the EU. Without access to the EIS, the NCA said:

all our inquiries would have to be made on a law enforcement to law enforcement basis through liaison, rather than us having direct access to the system. That would be a major issue.⁵²

The NCA suggested that instead of looking at existing precedents, the UK should aim for a closer partnership.

⁴⁷ HM Government, The UK’s cooperation with the EU on justice and home affairs, and on foreign policy and security issues – [background note](#)

⁴⁸ Council of the European Union, [Discussion paper on Europol’s agreements with third countries](#), 17 September 2013

⁴⁹ [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, HL Paper 77, 16 December 2016, cited at para 58

⁵⁰ *The Guardian*, [Europol chief says Brexit would harm UK crime-fighting](#), 22 June 2016

⁵¹ [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, HL Paper 77, 16 December 2016, para 55

⁵² [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, HL Paper 77, 16 December 2016, para 56

The Government took the view that the UK's pre-existing relationship with Europol put it in a strong position to negotiate a bespoke arrangement.⁵³

The Government believe that this position is bolstered by the UK's contribution to information sharing mechanisms such as the Secure Information Exchange Network Application (SIENA) and EIS, which make it a valuable partner.⁵⁴

However, others have pointed out that the UK's refusal to accept the jurisdiction of the CJEU, and the need to ensure equivalence in terms of data protection standards, may be a constraint on future negotiations.⁵⁵

Professor Steve Peers of Essex University gave evidence to the House of Lords EU Home Affairs Sub-committee. With respect to future cooperation with Europol he said:

First, a non-member of the EU cannot be a member of Europol. The people on the leave side are certain that it can, but it cannot. However, it can be an affiliate member and participate in a lot of what Europol does. The limits are that it cannot be on the management board, even absent having the director, as we have at the moment. We would have less access to databases and less involvement in joint investigation teams. We could try to argue, "Our participation has been historically so valuable; why do you want to lose it? Please let us try and overcome some of those difficulties". I do not think you can get a compromise on the management issue, because it seems logical that only member states are involved in that, but we ought to be able to make a strong case for access to information. I think you would have to amend the legislation as well, so we would have to go back to the drawing board a little on that.

One point to observe ... is our data protection framework has to be assessed if we want to participate in Europol. It is built in if you are an EU member state, but there is a separate assessment of it if you are a non-member applying to participate. We have to make sure that our data protection law is roughly equivalent to European Union standards. This is across the board but particularly for policing in this context, otherwise there will be problems in police co-operation in general and for Europol, and indeed in the digital industry and economy in the non-policing area as well.⁵⁶

The European Parliament has recently approved new governance rules for Europol, which will result in a Joint Parliamentary Scrutiny Group (JPSG) overseeing the work of the organisation. The JPSG's membership will include all 60 members of the European Parliament's Civil Liberties Committee, along with a member from each national parliament's

⁵³ [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, HL Paper 77, 16 December 2016, para 61

⁵⁴ Evidence of Bill Hughes, former Director General of the Serious Organised Crime Agency, [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, HL Paper 77, 16 December 2016, para 65

⁵⁵ [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, HL Paper 77, 16 December 2016, paras 62-63

⁵⁶ [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, [Evidence session 1, 14 September 2016](#)

home affairs committee (or equivalent), or a member from each chamber from bicameral parliaments.

The new rules come into force on 1 May 2017. The UK Government has decided to opt into them in order to remain a full member of Europol. However, it may not be possible to maintain representation on the JPSG after leaving the EU.

Any new relationship with Europol once the UK leaves the EU will be governed by the new Regulation. The Regulation authorises the transfer of personal data to third countries in the following circumstances:

- the Commission has adopted an “adequacy decision” establishing that the third country ensures an adequate level of data protection; or
- the EU has concluded an international agreement with the third country based on Article 218 TFEU — the likely legal base for any future relations agreement between the EU and the UK — “adducing adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals”.

Denmark currently participates fully in Europol but has an opt out of all post-Lisbon EU justice and home affairs measures, meaning that it is unable to participate in the new Europol Regulation. An agreement has been reached to designate Denmark as a third country with respect to Europol, thereby making it possible for Europol and Denmark to conclude a cooperation agreement. A Joint Declaration issued in December 2016 by the Presidents of the European Council (Donald Tusk) and the European Commission (Jean-Claude Juncker) and the Danish Prime (Lars Lokke Rasmussen) states:

Such arrangements must be Denmark-specific, and not in any way equal full membership of Europol, i.e. provide access to Europol's data repositories, or for full participation in Europol's operational work and database, or give decision-making rights in the governing bodies of Europol. However, it should ensure a sufficient level of operational cooperation including exchange of relevant data, subject to adequate safeguards.

This arrangement would be conditioned on Denmark's continued membership of the European Union and of the Schengen area, on Denmark's obligation to fully implement in Danish law [Directive \(EU\) 2016/680/EU](#) on data protection in police matters by 1 May 2017 and on Denmark's agreement to the application of the jurisdiction of the Court of Justice of the EU and the competence of the European Data Protection Supervisor.⁵⁷

Eurojust

Eurojust has cooperation agreements with the following third countries: Ukraine, Montenegro, Moldova, Lichtenstein, Switzerland, FYR of Macedonia, USA, Iceland and Norway. It also has Liaison Prosecutors from the USA, Switzerland and Norway.

The current [Eurojust Decision](#) contains an extensive code for the protection of data. It also specifically envisages Eurojust concluding agreements with third countries and international organisations, subject

⁵⁷ [Press release 15 December 2016](#), Europa.eu [accessed 24 February 2017]

to requirements to protect personal data.⁵⁸ Failure to comply can lead to the Joint Supervisory Board suspending further exchange of data with the state concerned (subject to an exception for emergencies).

A proposed new Eurojust Regulation would also allow such agreements; but data transfer would be subject to a data protection adequacy Decision or specific agreement with the country concerned for the protection of personal data, or, in specific one-off cases, stringent conditions.

Maintaining some kind of relationship has been identified as a priority by law enforcement experts. The Director of Public Prosecutions (DPP), Alison Saunders, suggested in evidence to the House of Lords EU Home Affairs Sub-Committee, that the ability to do things in real time and to work multilaterally were the most useful features of Eurojust.⁵⁹

The DPP and the NCA also highlighted the importance of Joint Investigation Teams (JITs), which are put together to focus on a particular investigation or on a thematic basis. However, both felt that it would be possible to participate in JITs from outside the EU. Professor Peers noted that such arrangements already exist for Norway, Iceland and Switzerland.⁶⁰

The DPP highlighted limitations in the arrangements that third countries currently have with Eurojust, namely:

- they are not part of the management board;
- they do not have access to the case management system, which enables cross checking of cases;
- negotiations took a long time

As with Europol, it has been suggested that the impact of Brexit on Eurojust would be particularly significant in light of the UK's influence to date:

Brexit would come as a shock in this area as the UK has been instrumental in shaping the evolution and role of these bodies: two out of four of the Presidents of Eurojust thus far have come from the UK (Aled Williams and Eurojust's inaugural President, Mike Kennedy) ...⁶¹

The Crown Office and Procurator Fiscal suggested that this lack of influence may mean that the system evolves over time in a way that ceases to fit with the UK's adversarial systems.⁶²

Mutual recognition

It has been suggested that the UK could fall back on a number of Council of Europe Conventions, which currently form the basis on

⁵⁸ Article 26a.

⁵⁹ [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, [evidence session, 2 November 2016](#)

⁶⁰ [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, HL Paper 77, 16 December 2016, para 81

⁶¹ Mitsilegas, V, 'The Uneasy Relationship between the UK and European Criminal Law. From Opt-Outs to Brexit?', *Criminal Law Review*, Issue 8, 2016, 519-538

⁶² [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, HL Paper 77, 16 December 2016, para 77

which the UK and other Member States cooperate with certain non-EU countries,⁶³ such as the Council of Europe Convention on Extradition 1957. However, these instruments are generally regarded as being less effective than the EU instruments, and in other areas there is no existing Convention to fall back on.

Helen Malcolm QC gave evidence on behalf of the Bar Council to the House of Lord EU Home Affairs Sub-Committee.⁶⁴ Asked what she saw as the main priorities in this area, she highlighted the fact that many measures are interconnected, as a result of which, their retention cannot be considered in isolation:

As a court user, at the end of an investigation process, I want to see efficient and fair extradition maintained. I want to see the ability to obtain evidence overseas and the ease with which currently we can use it. That is the sort of thing that Eurojust helps with; setting up a video link with a court in Germany so that I can call evidence whether I am prosecuting, defending, or indeed appearing in a judicial capacity. I want to be able to get hold easily of previous convictions of people appearing in front of me in other European states, as we can at the moment. I want to maintain what is called euro-bail, the European supervision order. Having been personally quite involved in that for so many years, I am reluctant to see it go but I also think, more importantly, it mitigates some of the problems with the European arrest warrant, so I want to see that maintained, and, at the end of the process, I want to see asset freezing and asset confiscation with the ease that we can do it at the moment.⁶⁵

A similar point was also made by the DPP. Asked which tools and capabilities should be retained post-Brexit, she said:

There is a package of measures that we think are really important. They are not just the obvious ones such as the European arrest warrant, which is absolutely vital and of which we make a great deal of use. It starts right at the beginning; the package around the European arrest warrant works because we also have SIS II—the Schengen information system. That helps us because, when we issue a European arrest warrant, we do not just issue it to a particular country; it can go to all 27. Certainly we have examples of cases when we did not really know exactly which European country an individual was in. The SIS II enabled us to put out a European arrest warrant, find somebody and bring them back very quickly. That package is absolutely vital.⁶⁶

⁶³ See for example, Spencer, J. R. 'What would Brexit mean for British criminal justice?', *Archbold Review*, Issue 5, 22 June 2016

⁶⁴ [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, [evidence session, 14 September 2016](#)

⁶⁵ [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, [Evidence session 1, 14 September 2016](#)

⁶⁶ [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, [Evidence session 6, 2 November 2016](#)

EAW

Given its record of support for the EAW, the Government may wish to negotiate an extradition or surrender agreement that operates in a similar way. However, during her last evidence session (as Home Secretary) before the Home Affairs Committee in May, Theresa May said:

If we are not in the European Union, we would almost certainly not have access to the European arrest warrant. Norway, for example, started negotiating with the European Union on access to something similar to the European arrest warrant in 2001. An agreement has been reached, but has not been implemented yet. It includes, as I understand it, the caveat that could mean that nationals of some countries could not be extradited. There are some countries that will not extradite their nationals unless it is under a European arrest warrant. I think that would have a real impact on our ability to deal with criminals.⁶⁷

The UK may be in a more challenging position in relation to the EAW than Norway and Iceland, which are members of the Schengen zone. On signing the agreement, the Council of EU Member States noted that “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”.⁶⁸

A Government briefing published prior to the referendum noted that there is no guarantee that the UK could secure a similar agreement whilst remaining outside of the Schengen zone.⁶⁹

Another option would be to revert back to the 1957 Council of Europe Convention on Extradition, However, there would be a number of limitations:

- As with the Norway surrender treaty, a reservation to the existing Council of Europe Convention on Extradition allows contracting States to refuse to extradite their own nations.
- The EAW involves a transaction between judicial authorities, whereas applications under the Convention would be made through diplomatic channels, with the Secretary of State being responsible for making decisions at a number of points in the process.
- The EAW framework imposes time limits at each stage of the process, unlike the Convention. The time frame for processing extradition requests would therefore be likely to increase significantly.

⁶⁷ Home Affairs Committee, [Oral evidence: The Work of the Home Secretary](#), 10 May 2016, Q326

⁶⁸ European Commission, [Proposal for a Council Decision](#) on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, 17 December 2009

⁶⁹ HM Government, [The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues](#) (background note), May 2016

Giving evidence to the House of Lord EU Home Affairs Sub-Committee, Professor Steve Peers discussed the possibility of reverting back to the pre-existing Convention:

We can go back to a Council of Europe system, of course. There is a convention there with four protocols and there will be transition literature about how we will do that, but be aware that it will mean not only transitional challenges, which we are getting already, but significantly fewer people extradited, taking significantly longer and quite possibly more expensive in each case.⁷⁰

Professor Peers also noted the importance of maintaining existing arrangements as part of any transitional process:

[T]he Article 50 agreement and the separate deal on the actual mechanics of leaving ... has to deal with transitional issues and pending requests for European arrest warrants and exchange of data and evidence and so on. That issue is already arising. There are already some cases in the Irish courts which are trying to say, "Don't execute arrest warrants coming from the UK because it is going to Brexit and will not have the various protections that come with the European arrest warrant in future". I think it is the beginning of what we will see increasingly throughout the process, of people saying that there are transitional issues which could frustrate what they need to do. Of course, those transitional issues will have to be designed to link to our future relationship so they have to be negotiated in parallel, as Article 50 says.⁷¹

The Permanent Secretary to the Home Office, Mark Sedwill, has likewise suggested that there could be complications for existing European Arrest Warrants if the UK is forced to leave the EU before negotiating a surrender agreement as a third country.⁷²

The [NCA's written evidence](#) to the Justice Committee posits that "leaving the EAW would ... pose a huge public protection risk to the UK".⁷³

Further:

Without the EAW, extraditions will become more complicated and costly, take longer, and be more likely to be refused. There is the added risk of existing MS putting UK requests to the 'bottom of the pile' while they continue to use the EAW with other Member States.

Others have suggested that the UK would cease to exert a positive influence over the development of the law in this area. For example, the current Framework Decision does not specifically permit the refusal to execute a EAW on human rights grounds. However, a number of Member States including the UK have chosen to expressly provide for such grounds for refusal in national implementing law.⁷⁴ The CJEU

⁷⁰ [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, [Evidence session 1, 14 September 2016](#)

⁷¹ [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, [Evidence session 1, 14 September 2016](#)

⁷² *The Guardian*, [UK officials seek draft agreements with EU before triggering article 50](#), 22 July 2016

⁷³ Justice Committee, [Implications of Brexit for the justice system inquiry](#), National Crime Agency, [Written evidence](#)

⁷⁴ The *Extradition Act 2003*, in the UK

recently affirmed that a Warrant may be refused in certain circumstances, including where there is a real risk of the surrendered individual suffering a rights violation.⁷⁵ Thus:

A Brexit would have the consequences of the UK – which has been pioneering in introducing human rights safeguards in the European Arrest Warrant – leaving the system at the very time when EU institutions appear to have begun to take these very human rights considerations seriously.⁷⁶

Information sharing

To continue to participate in these systems after withdrawal from the EU, the UK will in some cases be seeking unprecedented access for a non-EU state outside of the Schengen zone. The EU has granted access to SIS II and Prüm to some non-EU states, but only to members of the Schengen zone. It has also signed treaties to enable third states access to passenger name records,⁷⁷ but it has not yet agreed to share criminal records (via ECRIS) with any non-EU countries.⁷⁸

SIS II

The NCA and the National Police Chiefs' Council (NPCC) have both emphasised the importance of ongoing access to SIS II, particularly in light of its link to the EAW.⁷⁹ The NCA also suggested that the intelligence agencies were concerned about the potential loss of SIS II, because of its role in tracking people under surveillance.⁸⁰

However, the rules currently provide that data processed in SIS II (which include biometric information) "shall not be transferred or made available to third countries". Changes proposed by the Commission (expected to take effect after 2021) would go further, extending the prohibition to any "related supplementary information" provided by a Member State in connection with an SIS alert.

Prüm

The Minister for Policing and Fire Services, Brandon Lewis, has stated:

The Government does not envisage the initial timeline for implementing Prüm being affected by the decision to leave the EU, and is continuing with the implementation of Prüm.⁸¹

He further suggested that an agreement along the lines of that agreed with Iceland and Norway should be possible, notwithstanding the fact that the UK is not a member of Schengen:

We have no reason to believe that such an international agreement could not be reached with the UK after the UK leaves

⁷⁵ Aranyosi (C-404/15) EU:C:2016:198

⁷⁶ Mitsilegas, V, 'The Uneasy Relationship between the UK and European Criminal Law. From Opt-Outs to Brexit?', *Criminal Law Review*, Issue 8, 2016, 519-538

⁷⁷ Agreements with Australia and the US have been in force since 2012, an agreement with Canada is not yet in force, pending a decision of the CJEU

⁷⁸ Professor Steve Peers, [EU Referendum Brief 5](#): How would Brexit impact the UK's involvement in EU policing and criminal law? 21 June 2016

⁷⁹ [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, HL Paper 77, 16 December 2016, paras 89-91

⁸⁰ [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, HL Paper 77, 16 December 2016, para 92

⁸¹ [Letter to the Chair of the European Scrutiny Committee](#), 19 October 2017

the EU. However at this stage it is premature to speculate on whether the Government will seek to make such an agreement.

The agreement with Iceland and Norway⁸² was concluded in July 2010 but is not yet in force. It extends all the substantive provisions of the Prüm measures to Iceland and Norway. It further requires the parties to the agreement to “keep under constant review” the development of case law relating to the Prüm measures by the Court of Justice and the competent courts in Iceland and Norway and to establish a mechanism to ensure “regular mutual exchange” of relevant case law. The agreement does not give the Court of Justice jurisdiction to make rulings which are binding on Iceland and Norway. Iceland and Norway must be notified of any proposed amendments to the Prüm measures and “shall decide independently whether to accept the content of the amendment and to implement it into their internal legal order”. If Iceland and/or Norway do not accept the amendment, the agreement will be suspended pending an examination of “all further possibilities” to reinstate the agreement, “including the possibility to take notice of equivalence of legislation”.

Early in 2016, Member States agreed to authorise the Commission to open negotiations with Switzerland and Liechtenstein on their future participation in Prüm.

EIS

As outlined above, the UK’s future access to Europol databases will be dependent on the terms of any operational agreement made with the agency, but third countries do not currently have access to the Europol Information System.⁸³

⁸² 2009/1023/JHA [Agreement with Iceland and Norway](#)

⁸³ HM Government, [The UK’s cooperation with the EU on justice and home affairs, and on foreign policy and security issues](#), May 2016

5. Government statements

- In a speech delivered before the EU referendum in April 2016, the then Home Secretary Theresa May identified “3 big, future challenges” for the UK — security, trade and the economy. On security, she identified the European Arrest Warrant, the Passenger Name Records (PNR) Directive and a number of EU information-sharing instruments as examples of measures which “make a positive difference in fighting crime and preventing terrorism”, adding:

These measures — the Arrest Warrant and PNR — are worthwhile because they are not about grandiose state-building and integration but because they enable practical co-operation and information sharing.⁸⁴

She said that the negotiation of the EU PNR Directive illustrated why it was better for the UK to remain within the EU:

First, without the kind of institutional framework offered by the European Union, a complex agreement like this could not have been struck across the whole continent, because bilateral deals between every single member state would have been impossible to reach. And second, without British leadership and influence, a Directive would never have been on the table, let alone agreed.

- In evidence to the Home Affairs Committee on 5 September, the Home Secretary Amber Rudd responded to a number of questions on Brexit. In relation to the UK’s future involvement in Europol she said:

I do believe that Europol has played an important role in keeping us safe and we will be having discussions about how to continue some form of involvement within the agencies of the EU that help to keep us safe. It is too early to say what form that will take but I can say that there is a strong desire from the Government and from other European countries to ensure that we find a way of working together so that they can have the benefit of our expertise and we can have the benefit of shared intelligence.

...

I can’t be drawn quite yet on how that would work and what role we would have within Europol but I can say that we want to have an arrangement within other agencies like Europol—like, perhaps, the European arrest warrant—where we can get the same benefit.⁸⁵

In response to a question about the UK’s future involvement in information sharing measures she said:

What you have drawn attention to is the fact that there are a number of European intelligence systems that are very effective for keeping us safe. The Schengen information system is certainly one of them. As part of leaving the European Union, we will want to find a way of giving the UK the benefits of being able to access as many of those systems as possible. It is my understanding, from my early conversations with other Interior Ministers, that they will

⁸⁴ [Home Secretary’s speech on the UK, EU and our place in the world](#), 25 April 2016, Gov.uk [accessed 24 February]

⁸⁵ [The work of the Home Secretary. Oral evidence, Q35](#)

want our participation as well because, as you rightly say, we are, for instance, one of the biggest contributors of information to Europol. I think there is a common interest in making this work. How that will actually work we don't know yet, but the good intention is there.

- In a statement on 10 October, David Davis told the House that one of the Government's four aims for the Brexit negotiations is to "keep our justice and security arrangements at least as strong as they are."⁸⁶
- Home Office Minister Brandon Lewis gave [evidence](#) to the House of Lords EU Committee on 12 October.

Questioned on the future relationship with Eurojust, Mr Lewis pointed to the fact that Norway, Switzerland and the USA have co-operative relationships. He also suggested that a lot of work in that area is done bilaterally.

On information sharing measures, Mr Lewis agreed that they help to cut crime and improve public safety, but suggested that other channels such as Interpol are also useful for information exchange.

He argued that the UK was recognised as a major contributor to all cooperative measures and that this would help in reaching future arrangements.

- On 19 October Mr Lewis wrote to the European Scrutiny Committee indicating that the Government intends to continue its preparations for implementing Prüm.⁸⁷ In anticipation of the Government seeking to continue such arrangements after the UK has left the EU, the Committee asked the Minister to provide details of the main features of the model of cooperation set out in the bilateral agreement on Prüm between the EU and Iceland and Norway, and for further information:

[W]e would also like to hear your views on the provisions concerning the uniform application and interpretation of the Prüm measures and on dispute settlement. These provisions require the parties to the agreement to "keep under constant review" the development of case law relating to the Prüm measures by the Court of Justice and the competent courts in Iceland and Norway and to establish a mechanism to ensure "regular mutual exchange" of relevant case law. The agreement does not give the Court of Justice jurisdiction to make rulings which are binding on Iceland and Norway. In light of your analysis, do you consider that the model of cooperation set out in the agreement would be suitable for the UK once it has left the EU? Given the Government's desire to keep justice and security arrangements "at least as strong as they are", would there be any operational or other detriment to the UK if it were to participate in Prüm on the basis set out in that agreement?⁸⁸

The Minister replied on 22 November 2016, stating:

⁸⁶ [HC Deb 10 October 2016, c55](#)

⁸⁷ Letter from Brandon Lewis to the Chair (37801), [Ministerial Correspondence](#), House of Commons European Scrutiny Committee

⁸⁸ *Ibid*, 26 October 2016

The Home Office is looking at all areas of law enforcement and security cooperation to assess what capabilities EU measures deliver and considering the options for what that future relationship on law enforcement and security might look like. The Government has made clear that the UK will not be replicating any other nation's model and any future relationship will be agreed in the context of the wider exit negotiations. It would be wrong to pre-empt the outcome of those negotiations and the operational impact these may have on specific areas of law enforcement cooperation. However, cooperation in this area remains a top priority – whilst we remain a member of the EU and when we leave.⁸⁹

- In her Lancaster House Speech on 17 January 2017, the Prime Minister highlighted the importance of cooperation in this area:

With the threats to our common security becoming more serious, our response cannot be to cooperate with one another less, but to work together more. I therefore want our future relationship with the European Union to include practical arrangements on matters of law enforcement and the sharing of intelligence material with our allies.⁹⁰

The Prime Minister envisaged that once an agreement has been reached on the UK's future partnership with the EU, there would need to be "a phased process of implementation" which might cover (amongst other things) "the way in which we cooperate on criminal justice matters".

- In a House of Commons debate on Leaving the EU and Security, Law Enforcement and Criminal Justice cooperation in January 2017, Mr Lewis, said:

We are considering the full range of possible options. We are looking at existing arrangements for third country co-operation with the EU, which can inform discussions, but it is important to be clear that we are not looking to replicate any other nation's model. We are in a unique starting point with a strong history of working closely with the member states as partners and allies. As I mentioned, we will make a key contribution to security and justice in Europe and globally, and will seek an agreement with the EU that recognises the unique position we hold.⁹¹

...

We are very clear that effective co-operation with EU member states on security and policing in order to combat terrorism will continue to be a top UK priority. Looking ahead, our EU-level relationships will, of course, have to change, but our shared goal of assuring and enhancing the security of our citizens will not. It is important that we can find a way forward that works for the UK and the EU jointly, for mutual benefit. We will approach the negotiations from the perspective of what is best for the safety of all our citizens, and what is worst for those who seek to cause serious harm to innocent people and democratic values.

During negotiations, we will look to maintain the excellent co-operation that currently exists with our European partners. We

⁸⁹ [Letter to the Chair of the European Scrutiny Committee](#), 22 November 2016

⁹⁰ [The government's negotiating objectives for exiting the EU: PM speech](#), 17 January 2017, Gov.uk [accessed 24 February]

⁹¹ [HC Deb 18 Jan 2017, c 959](#)

fully recognise that the nature of our future relationship can be decided only in negotiations with member states and EU institutions. We are confident, however, that all citizens will be safer if we continue to work together and co-operate. We recognise the challenges involved in negotiating a new relationship, but we are committed to finding innovative solutions that enable us to continue to work together for the collective security of Europe and all the citizens of the United Kingdom.⁹²

- The Secretary of State for Exiting the European Union, David Davis, has suggested that the UK will negotiate from a position of strength:

One of the things the Prime Minister has made plain is that we are not the supplicant, either in this negotiation or in what follows. Britain is the intelligence superpower in Europe; we are critical to the defence of Europe from terrorist threat, and we are critical to the military support of Europe and to dealing with migration, with our Navy at work. Those things will continue; they are very often on a bilateral basis anyway, but they will be done on a treaty basis that is equal to both sides.⁹³

- In February 2017 the Government published a White Paper on [the United Kingdom's exit from and new partnership with the European Union](#). This set out 12 principles to "guide the Government in fulfilling the democratic will of the people". Principle 11 was "cooperating in the fight against crime and terrorism". The paper set out key aspects of the existing arrangements, noting that the UK is one of the biggest contributors to Europol systems and participates in all of its current operational projects, as well as being a prolific user of information exchange measures. It concluded that the Government will:

... look to negotiate the best deal we can with the EU to cooperate in the fight against crime and terrorism. We will seek a strong and close future relationship with the EU, with a focus on operational and practical cross-border cooperation. We will seek a relationship that is capable of responding to the changing threats we face together. Public safety in the UK and the rest of Europe will be at the heart of this aspect of our negotiation.

⁹² C 963

⁹³ [HC Deb. 17 January 2017, col. 801](#)

6. EU Home Affairs Sub-Committee Inquiry

In December 2016, the House of Lords EU Home Affairs Sub-Committee published a report of its inquiry into [Future UK-EU Security and Policing Co-operation](#).

The report concluded that maintaining strong cooperation with the EU should be one of the Government's top four overarching objectives in negotiations. It also noted that

Only two years ago, many of the EU measures the UK is now due to leave were deemed vital by the then Home Secretary in order to "stop foreign criminals from coming to Britain, deal with European fighters coming back from Syria, stop British criminals evading justice abroad, prevent foreign criminals evading justice by hiding here, and get foreign criminals out of our prisons".⁹⁴

Law enforcement witnesses were consistent in identifying certain measures as the priority for retention or renegotiation, namely:

- Europol;
- Eurojust;
- SIS II;
- EAW;
- ECRIS;
- The Prüm Decisions; and
- PNR

In some instances, the report concluded that existing agreements with non-EU countries provided precedents for credible substitutes. However in other areas, there was either no precedent for access for non-EU or Schengen countries, or the precedents that do exist would not meet the UK's operational needs.

The Committee did accept the Government's view that the UK's pre-existing relationship with the EU, and its data expertise, may mean that further models of cooperation will be available, beyond the existing precedents.

Nonetheless, it suggested that it was inevitable that there would be some practical limits on future cooperation due to the lack of oversight of the CJEU, as a result of which the people of the UK and the rest of the EU may be less safe.

It also noted the impact of the loss of UK influence on future developments in this area, namely, a risk to the UK's ability to protect its security interests. Consequently, the Committee observed that

One of the challenges for the future, therefore, is whether, and if so how, the UK can retain that sort of influence among its

⁹⁴ [Brexit: Future UK-EU Security and Police Cooperation](#), House of Lords European Union Committee, HL Paper 77, 16 December 2016, page 2

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European neighbours and allies when it is no longer a full member of the EU structures in which the strategic direction of travel is set.⁹⁵

The Committee took the view that future adjudication arrangements may pose a particular hurdle in negotiations, as a result of which, the Government may encounter a tension between two of its negotiating objectives: bringing back control of laws to Westminster and maintaining security cooperation. The safety of the people of the UK should be the overriding consideration in attempting to resolve that tension, the Committee suggested.⁹⁶

⁹⁵ Para 28

⁹⁶ Para 39

7. Other inquiries

A number of other Committees are currently conducting inquiries in this area, including:

- Home Affairs Committee, [EU policing and security issues inquiry](#);
- Justice Committee, [Implications of Brexit for the justice system inquiry](#)
- Existing the European Union Committee, [UK's negotiating objectives for withdrawal from the EU inquiry](#)

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