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Brexit: implications for national security

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Contents:

Contents

Summary

According to the Treaty on European Union, national security remains the sole responsibility of member states.

Consequently, the sharing of secret intelligence is generally conducted on an intergovernmental level, outside of the EU framework, and beyond the jurisdiction of the Court of Justice. The UK will remain at liberty to maintain such relationships and agreements, or to enter into new ones, regardless of the outcome of the Brexit negotiations. It has thus been argued that the impact of Brexit in this area will be minimal.

Further, proponents of Brexit have suggested that the UK's withdrawal from the EU will bring positive gains in the area of national security, allowing greater control over immigration and borders, and freedom from the jurisdiction of the Court with respect to issues such as data protection.

Conversely, representatives from law enforcement and the security and intelligence communities have emphasised the importance of EU wide cooperation in tackling security threats, through the sharing of information and data, participation in agencies, and a coordinated strategy. The importance of British leadership and influence in this area has been repeatedly emphasised in evidence to parliamentary committees, and concerns expressed about the impact of its loss.

During the referendum campaign in 2016, the Government sought to highlight the benefits of EU membership for national security, and since the referendum it has indicated a desire to maintain close links in this area.

However, comments by government ministers focusing on the UK's strengths in the fields of intelligence, security and counter-terrorism have led to warnings that future cooperation should not be used as bargaining chip in the wider Brexit negotiations.

The mutual benefit in maintaining cooperation with the EU with respect to national security gives reason for optimism that an acceptable way forward will be found. However, such an agreement will require the navigation of the complex issue of data sharing between the EU and third countries, which has proved something of a stumbling block in past agreements of this kind.

1. National security and EU law

Article 4 of the Treaty on European Union (TEU) states that "national security remains the sole responsibility of each Member State".[1]

The impact of this exception is that EU institutions are not competent to act with regard to matters of national security.

Article 72 of the Treaty on the Functioning of the European Union (TFEU)[2] provides that Title V of the Treaty relating to the Area of Freedom, Security and Justice

> shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of national security.

Article 73 provides that

> It shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security.

The EU does however enjoy some competence in this area under Article 67 TFEU, which states that the EU

> shall endeavor to ensure a high level of security through measures to prevent and combat crime … and through measures for coordination and cooperation between police and judicial authorities and other competent authorities … .[3]

The scope of "national security" in this context, and therefore of the exception, has not be clearly defined.

Following the Edward Snowden revelations concerning the mass collection of data, the "Article 29 Working Party" on data protection published an Opinion about the collection of electronic data through surveillance for national security purposes.[4] The Opinion acknowledged that

> Surveillance programmes run by the EU Member States will in general not be subject to EU law, following the national security exemption written into the European treaties.

However, it suggested nonetheless that limitations to fundamental rights must be interpreted restrictively, following case law from the European Court of Human Rights and the Court of Justice of the European Union (CJEU). It also stated that

> … there is no automatic presumption that the national security argument used by a national authority exists and is valid. This has to be demonstrated.

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[1] Treaty on European Union, Article 4, para 2, eur-lex.europa.eu
[2] Treaty on the Functioning of the European Union, eur-lex.europa.eu
[3] Para 3
[4] Article 29 Data Protection Working Party, "Opinion 04/2014 on surveillance of electronic communications for intelligence and national security purposes", 819/14/EN, WP 215, 10 April 2014

It is generally agreed that "core" intelligence sharing takes place outside the EU framework, on an intergovernmental level, and the direct effect of Brexit in this area would thus be minimal.

For example, the Government's former reviewer of terrorism legislation, David Anderson QC, said in evidence to the Brexit Committee:

> If we are talking about the operation of the Five Eyes agreement, that is not affected by EU law, because it is generally recognised that that sort of cooperation at the highest intelligence level is simply not something that is touched by EU law at all.[5]

Sir Julian King, EU Commissioner for the Security Union, described the situation as follows in evidence to the Home Affairs Committee

> As you say, there are exchanges on the core intelligence side, but they take place outside the EU framework; there is no reason why those, in their current form, should be affected by this process. There are extensive exchanges within the EU framework, which we can talk about if you would like. Those cover, notably, agencies, information systems and, obviously, the legislative framework. I think those make a significant contribution to the security to all of the EU member states. That is why I am doing this job: to support the further development and strengthening of that cooperation within the EU framework, because it delivers extra security for EU citizens.[6]

[5] Committee on Exiting the European Union, Oral evidence session, 28 February 2017, HC 1072, Q1213

[6] Home Affairs Committee, Oral evidence: EU Policing and Security Issues, 28 February 2017, HC 806, Q80

2. Intergovernmental intelligence sharing

It was argued during the referendum campaign that bilateral and multilateral intelligence sharing agreements were more significant for national security than cooperation within the EU.

In particular, the "Five Eyes" agreement between the UK, USA, Canada, Australia and New Zealand is often cited as the most significant of the UK's intelligence sharing agreements.

Beginning in 1946, this alliance of English-speaking countries developed a series of bilateral agreements that became known as the UKUSA Agreement for the purpose of sharing intelligence, primarily signals intelligence.

Very little information on the agreement is publicly available.[7] However, various documents leaked by Edward Snowden were reported to be classified for release to the Five Eyes countries.[8]

In an article for *Prospect* magazine, David Anderson described the Five Eyes alliance as the most effective intelligence-sharing arrangement in history "by some distance". He further suggested that while enhanced intelligence and operational links between the UK and Europe were particularly important in the current context of jihadists travelling between Europe and Syria, links could be maintained from outside the EU, and "The most effective collaboration today is often on a bilateral basis".[9]

Nonetheless, he concluded that there were terrorism-related reasons for the UK to remain in the EU, and that they outweigh the countervailing factors. These include:

- Effective EU mechanisms, such as the European Arrest Warrant (EAW) and shared databases, which can alert officers at UK ports to the arrival of persons of interest;
- British leadership in counter-terrorism strategy, including managing the EU-US relationship;
- The benefit of EU arrangements being underwritten by international human rights standard, which provide a strong legal counterbalance and legal accountability which is absent from ad hoc intergovernmental arrangements

In a subsequent article for *Prospect* magazine, former head of MI6 Sir Richard Dearlove expressed the contrary view that "the truth about

[7] Some detail is available from the National Archives in the form of released GCHQ files: UKUSA Agreement [accessed 24 March 2017]
[8] See The Five Eyes, Privacy International, www.privacyinternational.org [accessed 24 March 2017]
[9] David Anderson, "Brexit would hinder the fight against terrorism", *Prospect Magazine*, 3 March 2016

Brexit from a national security perspective is that the cost to Britain would be low".[10] He provided several reasons for this proposition:

- The importance of existing EU cooperation measures, such as the EAW, have been overstated;
- Britain is a leader and net contributor on intelligence and security matters within Europe, and other European countries will therefore wish to retain existing relationships for their own benefit;
- Existing European and Brussels-based security bodies are of little practical significance and are vulnerable to compromise by the less professional intelligence and security services that they must accommodate.

He also identified two possible security advantages of leaving the EU: the potential to withdraw from the European Convention on Human Rights; and, greater control over immigration from Europe.

He suggested that the practical business of counter-terrorism and counter-espionage is conducted principally through bilateral relationships, even within Europe. This can be attributed to a principle known as the "Third Party Rule", under which the recipient of intelligence from one nation cannot pass it on to a third without the originator's agreement.

This article provoked controversy in the run up to the referendum, with other figures from the intelligence community disagreeing. For example Rob Wainwright, Director of Europol and formerly of GCHQ, suggested that in the 10 years since Sir Richard Dearlove left MI6, Europol had developed a far stronger capability to fight crime.[11]

Subsequently, in evidence to the Home Affairs Committee, Mr Wainwright said:

> There are important bilateral models of cooperation, as you know, some of which exist within the EU and very important ones that do not, especially in the intelligence community … . There is also recognition, however, that the growing internationalisation of crime and the growing cross-border elements that we see force a need upon the community to act together, in concert, and therefore through channels of cooperation and coordination such as Europol.[12]

When questioned about his comments on the *Prospect* magazine article, Mr Wainwright explained that they had been based on the fact that a lot of progress had been made in the years since Sir Richard Dearlove was head of MI6. He gave examples such as the EAW, Schengen Information System (SIS II), and data sharing, including counter-terrorist data within Europol. He further explained

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[10] Richard Dearlove, "Brexit would not damage UK security", *Prospect Magazine*, 23 March 2016

[11] "Europol chief: Brexit would be a mistake for UK security", *The Guardian*, 24 March 2016

[12] Home Affairs Committee, Oral evidence session: EU policing and security issues, 7 March 2017, HC 806, Q149

> In all of these areas, what we see is a maturing capability of EU instruments on which the UK is becoming increasingly dependent to secure its interests in fighting crime and terrorism. It is not so mature, of course, that it is exclusive in its use by the UK. As a former member of the intelligence community, I absolutely accept the vital importance of the intelligence cooperation that is done outside the EU framework, but, again, this is not a zero-sum basis. The UK does a very good job of maximising its world-leading strength in the intelligence community while also receiving complementary capability from its access to EU and other police co-operation instruments.[13]

[13] Home Affairs Committee, Oral evidence session: EU policing and security issues, 7 March 2017, HC 806, Q166

3. Border security

Control over immigration, while not directly related to security cooperation with the EU, has nonetheless been identified as a factor that may have an impact on national security post Brexit.

Different tests apply to EU and non-EU nationals with respect to exclusion on national security grounds.[14] Proponents of Brexit suggested during the referendum campaign that there will be a security dividend in the UK obtaining greater control over its borders, and thus being able to apply the more stringent test to EU nationals.[15]

During a Brexit Committee evidence session, Dominic Raab asked David Armond, Deputy Director of the National Crime Agency, whether or not he agreed with the proposition that

> … as we leave the EU we should apply the existing EU threshold or the UK test that we apply to non-EU nationals across the board, given that there is clearly a security dividend, in terms of preventative checks, in the non-EU rules that we currently apply?[16]
>
> …
>
> I just wondered whether you had any assessment … as to the advantage to the UK in applying the current non-EU threshold in relation to EU nationals as a matter of preventative checks.[17]

Mr Armond pointed out that membership of the EU meant that significant numbers of people could be removed from the country using the EAW, but concluded that

> Anything we can do to prevent the entry into this country or remainder in this country of people who represent a threat to our national security is advantageous, so I agree with your position.[18]

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[14] EU nationals may be excluded where there is a serious, present and genuine threat; non-EU nationals may be excluded where their presence is not conducive to the public good. For further information see Home Office guidance: *Exclusion of EEA nationals and their family members from the UK*

[15] See for example: "Iain Duncan Smith: UK risks Paris-style attacks by staying in the EU", *The Guardian*, 21 February 2016; "EU referendum: Rules giving 'free pass' to terror suspects", 30 March 2016, bbc.co.uk

[16] Committee on Exiting the European Union, Oral evidence session, 28 February 2017, HC 1072, Q1144

[17] Committee on Exiting the European Union, Oral evidence session, 28 February 2017, HC 1072, Q1146

[18] Committee on Exiting the European Union, Oral evidence session, 28 February 2017, HC 1072, Q1146

4. The EU security framework

The UK currently has an arrangement whereby it can choose whether or not to opt in to EU justice and home affairs measures. The UK has chosen to opt into a number of police information sharing measures which have implications for security, as well as participating in EU agencies such as Europol, which target serious organised crime and terrorism. The Government has previously suggested that mutual recognition in criminal matters, specifically the EAW, is also important for security.[19]

4.1 Information sharing and cooperation

The following measures have been identified as being of particular significance to national security.

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.[20] It includes information on people wanted under an EAW, suspected foreign fighters and missing people. SIS II alerts are made available to the police through the Police National Computer and to Border Force officers at the immigration controls 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.[21]

The European Commission has proposed changes to SIS II which are not expected to take effect until 2021. The changes are intended to strengthen controls at the EU's external border and improve the sharing of information on terrorist suspects and returning foreign terrorist fighters.

Passenger Name Records

Passenger Name Records data (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.[22]

Prüm

The Prüm Decisions are EU Council Decisions[23] which embed into EU law a pre-existing Convention between several EU member states,

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[19] For a fuller account of the UK's participation in EU policing and criminal justice cooperation, see CBP7650 *Brexit: implications for policing and criminal justice cooperation*

[20] Council Decision 2007/533/JHA

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

[22] Directive 2016/681

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

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.

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.[24]

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. The Europol Information System (EIS) pools information on criminals and terrorists from across the EU.

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.[25]

4.2 Policy

There are a number of EU bodies focused on coordinating or facilitating the EU's approach to countering terrorism.

Security Union

The European Commission adopted a Communication in April 2016 which sought to set out the way forward towards the achievement of an effective "Security Union". It provided

> a roadmap identifying a number of priority areas in the fight against terrorism where the adoption and implementation of measures proposed by the Commission … is needed.[26]

The measures include improvements to some of the information sharing mechanisms in which the UK already participates, for example, the extension of European Criminal Records Information System to third country nationals.

It also calls on Member States to implement new measures aimed at preventing the use of the financial system for money laundering or

[24] HC Deb, 8 December 2015, c914-916

[25] 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. See Cabinet Office News item, 14 November 2016, Gov.uk

[26] European Agenda on Security: Paving the way towards a Security Union, 20 April 2016

terrorist financing. The UK already participates in various existing measures in this area.[27]

Counter-Terrorism Coordinator

The position of Counter-Terrorism Coordinator was established after the terrorist attacks in the Madrid in 2004.

The Counter-Terrorism Coordinator's functions include:

- coordinating the work of the European Council in combating terrorism;
- presenting policy recommendations and proposing priority areas for action to the Council, based on threat analysis and reports produced by the EU Intelligence Analysis Centre and Europol;
- monitoring the implementation of the EU counter-terrorism strategy;
- maintaining an overview of all the instruments at the European Union's disposal, to report to the Council and follow up Council decisions;
- coordinating with the relevant preparatory bodies of the Council, the Commission and the EEAS and sharing information with them on his activities;
- ensuring the EU plays an active role in the fight against terrorism; and
- improving communication between the EU and third countries in this area

The EU counter-terrorism strategy was adopted by the European Council in 2005.[28] Its stated aim is to combat terrorism globally while respecting human rights, and to make Europe safer, allowing its citizens to live in an area of freedom, security and justice. This strategic commitment is comprised of four strands of work: prevent, protect, pursue, and respond.

British leadership and influence

The UK is acknowledged to have led the way with respect to various security related measures. For example, the UK consistently pressed for the introduction of an EU-wide framework for the collection, processing and use of PNR data.

In a speech in April 2016, the then independent reviewer of terrorism legislation, David Anderson QC, suggested that there would be significant differences between our current arrangements and any future agreement to retain associate membership of organisations and access to databases:

> But we need to understand that an arrangement along those lines would be wholly different in nature from what we have at the

[27] For example the *Terrorist Asset Freezing etc Act 2010* implements Council Regulation (EC) No 2480/2001

[28] The European Union Counter-Terrorism Strategy, 14469/4/05 REV 4

> moment – which is, to put it bluntly, a position of leadership where European counter-terrorism policy is concerned.
>
> Thanks to British influence:
>
> a) European instruments require all Member States to have terrorism laws of a type that we were the first to introduce.
>
> b) The EU action plan on terrorism, drafted during a UK Presidency, is heavily modelled on the UK's own CONTEST programme, whose four elements (Pursue, Prevent, Protect, Prepare) have been translated into the only slightly less alliterative Pursue, Prevent, Protect, Respond.
>
> c) It is the UK which has taken the lead in producing EU policies on counter-radicalisations, both internally and in third countries; on aviation security; on risk and threat analysis; and on the sale of dangerous goods.
>
> d) *Europol*, some 10% of whose cases concern counter-terrorism, has developed under UK leadership into an effective hub.
>
> e) And the UK has, as one would expect, been exceptionally useful in managing the relationship between the EU and the USA.
>
> This leadership did not fall into our lap: it was hard won, because we saw earlier than most the importance of an effective counter-terrorism response across the continent. That response is a work in progress, which we continue to guide in our own interests and those of the rest of Europe.[29]

Mr Anderson reiterated this point in his December 2016 *Report on the Terrorism Acts in 2015*, in which he said:

> The UK has benefitted not only from its participation but from its leadership. At the legislative level, a number of important EU initiatives (most recently the Passenger Name Record Directive of 2016) have been driven or strongly influenced by the UK Government in the Council and by UK MEPs in the European Parliament.
>
> …
>
> The UK's ability to lead European policy and promote European laws in the counter-terrorism field (as in other areas) will presumably diminish or disappear should Brexit become a reality.[30]

In evidence to the Brexit Committee, David Armond, Deputy Director of the National Crime Agency, spoke about the advantages of having a British Director of Europol:

> In 2008, it is fair to say, we did not have a firm opinion about Europol or its merits. It was considered to be an agency with some potential that had not been realised. The decision was taken to put a British candidate forward to try to make the organisation as useful as it possibly could be. Rob Wainwright seized the seat and is still in position today, coming to the end of his tenure.

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[29] David Anderson QC, Terrorism and the law, Graham Turnbull Lecture, 21 April 2016, available from: www.lawsociety.org.uk [accessed 30 March 2017]

[30] David Anderson QC, *The Terrorism Acts in 2015*, December 2016, paras 3.16-3.17

> he has managed to turn the organisation from what looked like a talking shop into a structured, pan-European organisation that produces an annual threat assessment, collects intelligence in relation to those crime threats, analyses it, shares it and co-ordinates activity across Europe. One of the features of globalisation is that serious organised criminals and terrorists know no boundaries. It is important that we cooperate in a coordinated fashion with our European partners.
>
> We are, jointly with the Germans, the biggest the biggest contributors to the intelligence systems, and there are protections around that intelligence that ensure it is protected and does not go anywhere we do not want it to go. Then there is a series of operational groups that co-ordinate activity across the key threats, which are managed through the COSI – the European security committee. In those areas, the UK is leading 40% of the work and is engaged in the vast majority of it. The benefits go beyond good co-operation. They go through a structured, ordered approach that improves the effectiveness and efficiency of the European response to the threat.[31]

He agreed that it would be possible to maintain ongoing cooperation with the rest of Europe, but suggested that the UK would lose any ongoing influence over the future of Europol as a result of not having a British Director, senior staff, or representation on the management board.

Rob Wainwright himself gave evidence to the Home Affairs Select Committee on the impact of a loss of British leadership at Europol. He suggested that the loss would be significant. At present, the UK is leading or coordinating half of the top priority operational projects in the fight against serious and organised crime. British personnel also hold other senior positions within the organisation which enable the UK to exercise leverage and influence. The UK has also been a leading voice on the Europol management board "and has therefore been able to chart the development of Europol in ways that many people would see as quite a British-friendly institution".[32]

[31] Committee on Exiting the European Union, Oral evidence session, 28 February 2017, HC 1072, Q1151

[32] Home Affairs Committee, Oral evidence session: EU policing and security issues, 7 March 2017, HC 806, Q146

5. Future cooperation

The UK's negotiating position

The Government has indicated that one of its negotiating priorities will be to maintain strong security cooperation with the EU. The Secretary of State for Exiting the European Union has said that the Government's aim is to "keep our justice and security arrangements at least as strong as they are".[33]

The Brexit White Paper states:

> 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 ... .[34]

However, the Prime Minister's letter of 29 March 2017 to Donald Tusk, notifying the EU of the UK's intention to leave, caused controversy by including what was seen as a threat to withdraw future security cooperation in the event that a satisfactory deal could not be struck

> If, however, we leave the European Union without an agreement the default position is that we would have to trade on World Trade Organisation terms. In security terms a failure to reach agreement would mean our cooperation in the fight against crime and terrorism would be weakened.[35]

This interpretation was subsequently denied by members of the Government.[36]

The Government has highlighted the importance of a number of specific measures and suggested that it will seek a bespoke solution for future UK participation, rather than relying on existing precedents. For example, in relation to Prüm, Home Office Minister Brandon Lewis has said:

> We have a strong history of working closely with Member States as partners and allies on security cooperation. We have significant technical expertise in relation to fingerprints and DNA. Our law enforcement agencies use biometric information more effectively than many others in Europe and maintain a significant database of the fingerprints and DNA of convicted persons.
>
> 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

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[33] HC Deb 10 October, c40
[34] The United Kingdom's exit from and new partnership with the European Union, HM Government, Cm 9417, February 2017
[35] Prime Minister's letter to Donald Tusk triggering Article 50, 29 March 2017, available from Gov.uk [accessed 31 March 2017]
[36] See for example, "David Davis says article 50 letter was not a threat to EU on security", *The Guardian*, 30 March 2017

> any other nation's model and any future relationship will be agreed in the context of the wider exit negotiations.[37]

Some experts have agreed that the UK may be in a strong negotiating position with respect future cooperation. For example, in evidence to the Brexit Committee, David Anderson described the UK as the "initiators of any number of good ideas", he went on:

> We also, of course, provide not only the sort of intelligence that we are talking about today, but also the much higher level of intelligence from people like GCHQ and MI6, which is not governed by EU law or EU mechanisms, but which other countries know perfectly well has been instrumental in averting atrocities on their own soil.[38]

During the same evidence session, David Armond suggested that

> Leadership from British law enforcement and from the intelligence agencies is sought globally, not just within Europe. There is then the quality of the intelligence that the UK can provide at every level, from national security down to law enforcement intelligence, which is very well sought after. These are the two issues that we bring to the table in significant quantities.[39]

However, Mr Anderson also suggested that criminal justice, policing and security were not areas in which Brexit presented opportunities (by contrast, perhaps, with other areas). Instead, he took the view that the priority should be to preserve as much as possible of the current arrangements. He expressed concern that it will not be possible to replicate the leadership the UK has shown in the past, and that if the negotiations become toxic, there may be a risk that the necessary agreements will not be in place by the time the UK leaves.[40]

In an interview in February 2017, when asked directly whether the risk of a terrorist attack on the EU would increase after Brexit, Mr Anderson said

> The peoples of the European Union account for something like 7 per cent of the population of the world, and it is a dangerous and uncertain world. I would have thought that, as a matter of principle, we are safer to the extent that we can stand together. My concern would be, given the toxicity of other aspects of the negotiation, whether the terms of the divorce or free movement, that the necessary political focus is not directed to the security elements and we end up with something less than we need.[41]

The shared interest in ongoing cooperation has also been highlighted by Rob Wainwright, who suggested that the professional policing and security community do not see the negotiation as one in which the spoils are divided between two parties. Rather it is about the collective

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[37] Letter to Chair of the European Scrutiny Committee, 22 November 2016
[38] Committee on Exiting the European Union, Oral evidence session, 28 February 2017, HC 1072, Q1181
[39] Committee on Exiting the European Union, Oral evidence session, 28 February 2017, HC 1072, Q1183
[40] Committee on Exiting the European Union, Oral evidence session, 28 February 2017, HC 1072, Q 1200
[41] "Interview: David Anderson – post-Brexit we could end up with less security than we need", *Prospect Magazine*, 21 February 2017

security interests of Europe at an important time in terms of the heightened threat of terrorism, people smuggling and cybercrime.[42]

Practicalities

It is unclear how long it may take to negotiate any ongoing cooperation agreements. Examples of other negotiations with third countries vary, but several have extended beyond 10 years. In the event that such negotiations take longer than the two years available following the triggering of Article 50 on 29 March 2017, some form of transitional arrangement may be required.

A number of factors have been identified which may influence the ease and speed with which an agreement is reached:

- The fact that the situation is unprecedented, in that no negotiation has previously taken place with a departing Member State which already participates in the measures in relation to which continued cooperation is sought;
- The UK's willingness to adhere to existing EU laws in relation to the relevant measures, and any agreement about how disputes might be resolved, and how future developments in the law will be accounted for;
- The extent to which the UK will seek access or arrangements that are currently unavailable to other third countries, such as real time access to databases, for example;
- Whether or not the UK Government seeks to use security measures as a "bargaining chip" in wider negotiations;[43]
- Political expediency.[44]

Despite the shared interest in maintaining security cooperation, it has been noted that a clear distinction is drawn in practice between member states and third countries. In evidence to the Brexit Committee, David Anderson highlighted the joint declaration of the Presidents of the European Council and Commission and the Danish Prime Minister about future Danish participation in Europol (in light of Denmark's opt out):

> Such arrangements must be Denmark-specific, and not in any way equal full membership of Europol, ie provide access to Europol's repositories, or for full participation in Europol's operational work and database, or give decision making rights in the governing bodies of Europol.[45]

Mr Anderson suggested that this demonstrated that the distinction still applies, even in the case of a third country which had previously participated in a measure.

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[42] Home Affairs Committee, Oral evidence session: EU policing and security issues, 7 March 2017, HC 806

[43] See Committee on Exiting the European Union, Oral evidence session, 28 February 2017, HC 1072, Qs1136-1138

[44] Rob Wainwright, Director of Europol, stated in evidence to the Home Affairs Committee that the conclusion of an agreement between Europol and Denmark had taken only a few months, for this reason: Home Affairs Committee, Oral evidence session: EU policing and security issues, 7 March 2017, HC 806, Q143

[45] Press release 15 December 2016, Europa.eu [accessed 24 February 2017]

Rob Wainwright described the position of Denmark as being a "hybrid position, somewhat between being a full member and a third party".[46] He explained that this meant that Denmark will no longer have access to the Europol database, but will have observer status on the management board.

He also pointed out that existing operational agreements previously agreed with non-member states were agreed under existing regulatory arrangements at Europol. The UK may become the first country to seek operational cooperation under the new arrangements, which come into force on 1 May 2017, and will thus have to test the new procedure. Under the new arrangements, Europol will no longer be able to conclude agreements directly with third countries, and instead will have to implement international agreements concluded with the EU. One form of agreement with the EU that could form the basis for a cooperation agreement with Europol would be a data protection adequacy decision for police cooperation.[47] This, he explained, has only been done in the context of civil matters until now, but a new directive means that data protection adequacy decisions can now apply in relation to law enforcement matters.[48]

Mr Wainwright suggested that a critical question for the UK would be whether such an agreement could be concluded with the EU alongside the article 50 negotiations, or whether it would have to be done separately. This would be important to resolve in order to avoid a "cliff edge" scenario at the point at which the UK leaves the EU.

In the event that it proved impossible to reach an agreement concerning ongoing access to the relevant measures, a number of alternative options have been identified, including:

- Data exchange via Interpol;
- Mutual legal assistance treaties;
- Measures to compensate for a lack of data, such as additional searches and questioning at ports

However, these have been described as less effective and efficient than the existing EU arrangements.[49] Rob Wainwright questioned the suggestion of Interpol being a substitute for Europol, on the basis that they are "90% different, if not more so, in terms of what they do."[50] In particular he highlighted Europol's ability to do high-end analysis work in intelligence cooperation, and its extensive databases.

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[46] Home Affairs Committee, Oral evidence session: EU policing and security issues, 7 March 2017, HC 806, Q141

[47] See section 6 below, for further information on data adequacy

[48] Directive 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

[49] Committee on Exiting the European Union, Oral evidence session, 28 February 2017, HC 1072, Q1174

[50] Home Affairs Committee, Oral evidence session: EU policing and security issues, 7 March 2017, HC 806, Q 168

6. Data protection and CJEU jurisdiction

6.1 Adequacy

Cooperation on law enforcement between the EU and the UK after withdrawal would involve the UK exchanging data with EU Member States either directly or by accessing EU databases. In either case, the UK as a third country would have to offer safeguards equivalent to EU privacy and data protection rules in order to receive and handle EU data. This might be achieved either by an EU law enforcement "adequacy" decision similar to the EU-US Privacy Shield[51] (on data exchange for commercial purposes) or an international agreement on sharing law enforcement data similar to the EU-US Umbrella Agreement.[52]

These instruments took two years and five years respectively to be agreed by the parties. Both will be reviewed jointly by the EU and US administration, after one year and three years respectively.

A new EU General Data Protection Regulation[53] and a new Directive on law enforcement data exchange[54] will both apply from May 2018. The Government has made it clear that it will apply these data protection rules until the UK's departure.[55]

The Brexit White Paper states:

> As we leave the EU, we will seek to maintain the stability of data transfer between the EU Member States and the UK.[56]

Continuing to align UK law with EU data protection law after withdrawal would help to meet adequacy requirements. However complications might arise as a result of being outside the jurisdiction of the CJEU and the application of the EU Charter of Fundamental Rights. Legal challenges both to EU-third country and EU internal data protection instruments could present future problems, as illustrated by various recent examples:

- The EU has concluded PNR agreements with Australia, Canada and the US to regulate the transmission and use of PNR data. However, the European Parliament has asked the CJEU to consider whether the agreement with Canada is compatible with the data protection provisions in the EU Treaties and the EU

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[51] For further information, see the European Commission *EU-US Privacy Shield Factsheet*, July 2016, available on Europa.eu [accessed 30 March 2017]

[52] For further information, see the European Commission Fact Sheet, *Questions and answers on the EU-US Data Protection "Umbrella Agreement"*, December 2016, available on Europa.eu [accessed 30 March 2017]

[53] Regulation (EU) 2016/679

[54] Directive 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

[55] David Jones, Minister of State for Exiting the European Union, HC Deb 18 January 2017, c 1020

[56] The United Kingdom's exit from and new partnership with the European Union, HM Government, Cm 9417, February 2017, para 8.4

Charter of Fundamental Rights. In September 2016, the Court's Advocate General issued a preliminary opinion stating that some provisions of the agreement are incompatible with the Charter.[57] For example, it would allow the processing of sensitive data (information revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, or information about a person's health or sex life) under certain conditions. The agreement would also allow data to be processed for purposes which the AG does not consider to be strictly necessary to prevent and detect terrorist offences and other serious transnational crimes. The Court's ruling will potentially have important implications for any future agreement between the EU and the UK to share PNR data once the UK leaves the EU. It seems likely that the EU will have exclusive competence to negotiate a PNR agreement with the UK as the EU has already adopted internal rules on the collection, processing and use of PNR data.[58] This means that the UK will not be able to enter into separate bilateral agreements with the other EU Member States. A comprehensive PNR agreement with the EU will be necessary as the EU PNR Directive only allows Member States to transfer PNR data to a third country on a case-by-case basis and subject to certain conditions.

- In the *Schrems* case,[59] the CJEU invalidated the EU-US "Safe Harbor" decision, the predecessor to Privacy Shield, because the US did not provide safeguards equivalent to those of the EU.
- In *Digital Rights Ireland*,[60] the CJEU invalidated the EU Data Retention Directive. This lead to the enactment of emergency legislation in the UK, the *Data Retention and Investigatory Powers Act 2014* (DRIPA).

6.2 *Secretary of State for the Home Department v Watson* and the Investigatory Powers Act 2016

In December 2016 the CJEU gave judgment in a case brought by Tom Watson MP (and originally David Davis MP, who withdrew when he joined the Government) challenging the data retention provisions of DRIPA. The Court expanded on its previous ruling in *Digital Rights Ireland* holding that any national legislation providing for "general and indiscriminate" retention of data is incompatible with EU law, including the Charter. The issue was referred to the Court by the UK Court of Appeal as part of a judicial review of DRIPA. Although DRIPA ceased to apply at the end of 2016 the judgment has significance for the *Investigatory Powers Act 2016* (IPA), which now provides for data retention powers. The Court of Appeal is yet to give judgment in the

[57] CJEU Press Release, *Advocate General's Opinion in the Request for an Opinion 1/15, 8 September 2016*, Europa.eu
[58] The PNR Directive was formally adopted in April 2016 and has to be implemented by 25 May 2018.
[59] *Schrems v Data Protection Commissioner* C-362/14
[60] *Digital Rights Ireland and Seitlinger and Others* C-293/12 and C-594/12

case but it seems likely that the IPA may require amendment if UK law is to be compatible with EU law.[61]

When questioned by the Brexit Committee on the impact of the judgment, David Anderson QC noted that the UK Court of Appeal was still considering the matter, and that

> … there is a national security exception in the treaty, which I suspect the Government will be pinning quite a lot of hopes on, and nobody knows quite what this means.[62]

In response to questions from Michael Gove, the premise of which was that the judgment had the effect of overriding and undermining the express will of Parliament to "keep this nation and its citizens safe", Mr Anderson agreed that it was very concerning for law enforcement in the UK and other member states.

6.3 Impact on future cooperation

The difficulties that such issues may cause with respect to future cooperation agreements was highlighted in evidence to the Brexit Committee by David Anderson. In response to a question from Dominic Raab as to whether there was any reason in principle why the UK should not be able to conclude agreements on measures involving data sharing, given that other third countries have done so, he said:

> Yes, but be careful. Just look at what is happening at the moment with the EU-Canada PNR agreement, which similarly was forged for completely pragmatic reasons, but which appears to be running into quite serious problems in the European Court. Put that together with the Davis-Watson case, which is very hostile to this whole idea of the blanket collection and retention of data, and you find quite a neuralgic issue that could arise between the UK and Europe.
>
> It is going to arise whether we are in the EU or outside the EU, but the perception, which I think is accurate, is that we have been the ones in Europe pushing for greater operational efficiency, and the Germans and the east Europeans have been pushing for more data protection. Because we have been involved we got the PNR directive through, just as we got the data retention directive through in 2006. That was largely because of British influence, not only in the Council but in the Parliament.
>
> In our absence, it seems to me, the relative fondness of the remaining 27 for data protection is only going to increase. … Everything you say is right, and it is true that we produce a lot of intelligence and everybody likes that, but it would be quite wrong to deduce from that that the world is simply going to fall at our feet if we snap our fingers and say, "We want a unique

[61] It has recently been reported that the Government is preparing to make a concession with respect to independent authorisation for access to communications data, in response to the CJEU judgment. An online tender document refers to the judgment and to the creation of an "independent communications data authorising body": "Snooping by police to be monitored by independent authority", *The Guardian*, 28 March 2017

[62] Committee on Exiting the European Union, Oral evidence session, 28 February 2017, HC 1072, Q1206

> relationship with these bodies", because we also have some special demands.[63]

Professor Steve Peers, of the University of Essex, also suggested that difficulties are likely to arise with respect to data protection during the same evidence session:

> There are specific issues with data protection, because there is a separate approval process to say that the UK has adequate levels of data protection. That can be challenged, not just by the EU institutions or a member state in the EU court … but also by individuals.
>
> …
>
> There will be some great difficulty from the point of view of data protection. That is going to be the single biggest difficulty. The challenge is not so much convincing the EU institutions to go along with it, as it is quite right to say that the Ministers and the authorities are quite happy to continue cooperation with the UK. The problem is the activists who will go to court and bring these legal challenges. They cannot be easily negotiated away, because they are based on the European Charter of Fundamental Rights. As a primary law of the European Union, that cannot be easily negotiated away. The EU will not agree an amendment to the Charter for the sake of a departing member state. That really is the biggest problem by far in this area.[64]

He explained, in response to further questions, that if the UK did not comply with EU data protection requirements, so as to benefit from an adequacy decision, this would create a broader barrier to data sharing, because it would affect the whole system. Further, in some instances, such as with respect to agreements with Europol and on PNR, a decision on data adequacy has to be taken before the agreement can be approved.

David Anderson suggested that if the data of EU citizens was liable to be collected and retained by the UK in ways that it considered to constitute indefensible violations of privacy, this would have consequences in terms of the EU's willingness to share data.[65]

When pressed on the question of whether the UK would be safer outside of the EU, because it would be free to ignore the judgments of the CJEU and thus to collect as much data on its own citizens at it wished, he said

> We could do what we liked with data collection in this country if we had no interest in getting our hands on the personal data of Europeans. If we took that autarchic line and said, "We are not interested in anything you send us and we are just jolly well going to do things our own way", then we could do it untrammelled by the European Court. I am saying that, if we want records of various kinds for various purposes, be they financial, travel records or whatever, then even our domestic powers of collection are

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[63] Committee on Exiting the European Union, Oral evidence session, 28 February 2017, HC 10722017, Q1140

[64] Committee on Exiting the European Union, Oral evidence session, 28 February 2017, HC 1072, Q1155

[65] Committee on Exiting the European Union, Oral evidence session, 28 February 2017, HC 1072, Q1210

> going to come under scrutiny, much as they are under scrutiny at the moment.[66]

He went on to suggest that the UK may have a little more leeway outside the EU than within it, because it would not be subject to fines and penal proceedings. However, on the other hand, the UK would lose the ability to influence the court or the way that decisions are made.

Mr Anderson also voiced concerns about the impact of the judgment in an interview with *Prospect* magazine in February 2017, suggesting that he could not think of another that was likely to cause as many problems for the UK Government.[67]

[66] Q1225
[67] "Interview: David Anderson – post-Brexit we could end up with less security than we need", *Prospect Magazine*, 21 February 2017

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