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This report provides an analysis of existing justice and security cooperation between the UK and the EU, as well as the evolving justice arrangements post-Brexit, with a particular focus on the human rights implications.

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1 https://pure.qub.ac.uk/portal/en/persons/amanda-kramer(6bf216e8-a01c-4633-95dc-745e52393dc0).html

2 Dr Kramer has also taught in the area of human rights and equality at QUB since 2013.

3 For more, please see the project website: https://brexitlawni.org/

4 For more, please see: https://brexitlawni.org/project-outputs/

5 Dr Dickson has taught in the area of legal theory, EU law and fundamental rights since 2013 at QUB and Strathclyde.

6 Leverhulme Trust Emeritus Professor Fellowships 2017.

7 Dr Pues has taught transnational criminal law, international human rights law and international law and security at the Universities of Glasgow and Dundee.

8 *E and F v Germany*, C550/09, 29 June 2010, http://curia.europa.eu/juris/document/document.jsf;jsessionid=C8F1519F99593 BF-984626C9E17E3BF2E?text=&docid=84750&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2547020

9 For a list of publications see her website at https://www.gla.ac.uk/schools/law/staff/annipues/#/

10 See http://www.europeanfutures.ed.ac.uk/article-7072

ICO	Information Commissioner's Office
ILOR	International Letter of Request
JATF	Joint Agency Task Force
J-CAT	Joint Cybercrime Action Taskforce
JHA	Justice and Home Affairs
JIT	Joint Investigation Team
MAP	Mutual Assistance Procedures
NCA	National Crime Agency
NPCC	National Police Chiefs Council
NI	Northern Ireland
OFMDFM	Office of the First Minister and Deputy First Minister
PNR	Passenger Name Record
PPS	Public Prosecution Service
PSNI	Police Service of Northern Ireland
ROI	Republic of Ireland
RUC	Royal Ulster Constabulary
SIS II	Schengen Information System II
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UKSC	United Kingdom Supreme Court
VRD	Vehicle Registration Data

INTERCONNECTEDNESS AND HUMAN RIGHTS

Another key theme emerged in our research, that the web of interconnected measures was designed with human rights in mind. As EU measures must be compatible with European human rights standards, when protection gaps or rights violations are uncovered, efforts to address these typically follow. The UK must bear this in mind in relation to the negotiation of a future partnership to ensure that domestic human rights standards do not fall below those found within the EU as this is likely to impact its ability to secure a satisfactory arrangement.

DELAY AND UNCERTAINTY

The numerous impacts potentially caused by delay, was the third major theme present throughout our research. Delay resulting from either the lack of an agreement in place on exit day or relying on sub-optimal measures can impact requested persons, victims and witnesses; the operational capabilities of criminal justice officials; the efficiency of the criminal justice systems; human rights protections; and public confidence in the criminal justice system.

PUBLIC SAFETY AND COMMUNITY CONFIDENCE

The final cross-cutting theme we discovered was the potential impact of Brexit on both public safety and community confidence. Delay, or a lack of clarity surrounding the criminal justice system, can result in a reduction of public confidence. This includes an impact on people's perception of living in a human rights based society. Linked in with this was general worry expressed about the future ability of practitioners to keep people safe without access to important EU tools and the knock-on implications for community confidence.

Key Recommendations

1. Because of the interconnectedness of EU measures in the area of justice and security, it is strongly recommended that any future arrangement should aim to be as comprehensive as possible and cover judicial and police cooperation as well as any data sharing arrangements. All experts interviewed for this project highlighted that maintaining access to all of the current EU justice and security arrangements would be ideal. In order to secure the effectiveness of law enforcement systems, it is imperative to retain as many of the existing tools as possible through a future partnership agreement.

2. The UK and the EU should secure continued policing and prosecutorial cooperation. In particular, it is recommended the UK retains access to Europol and Eurojust cooperation frameworks to ensure that operational capabilities and collaboration in the area of policing and criminal justice continue. However, it is noted that third-country access options may be limited and in this case, the UK should work to minimise disruption.

3. The UK and the EU should secure the continuation of data sharing arrangements. Access to tools such as SIS II and ECRIS facilitate speedy information sharing and retrieval, whereas a loss of these measures would result in delays in proceedings. To that end, joint data protection standards are pivotal to facilitate mutual trust with EU Member States and ensure protection for citizens.

4. The approach must encompass a strong commitment to the protection of human rights. The foundation of mutual trust in the legal process is only justified if the legal processes encompass a commitment to the rule of law, the protection of human rights and, as part of this, a commitment to data protection.

5. Any evolving justice and police cooperation system requires an independent judicial oversight mechanism with adjudicative powers to ensure effective protection and enforceability of human rights. This could be secured through a new court system, or – simpler, more cost effective, and avoiding any danger of disadvantages to UK citizens – the UK should retain access to the Court of Justice of the European Union (CJEU).

6. The UK's commitment to the European Convention on Human Rights should be built into any future justice and security agreement. This will help to ensure that there is no loss of human rights protections and safeguard trust with EU Member States. The UK should also reaffirm its commitment to Council of Europe legal instruments on cooperation in criminal law matters and efficiency of justice.

7. The UK should retain the Charter of Fundamental Rights of the European Union. If the UK does not retain the Charter, it must make an effort to update domestic protections to provide equivalent protections and make them accessible to the public. Additionally, the UK should retain commitments to human rights contained in secondary EU law, such as the Victim's Rights Directive, European Supervision Orders, and European Protection orders to indicate its commitment to rights protection.

8. An independently appointed panel of human rights experts should be tasked with completing *ex ante* human rights impact assessments. These panels must be comprised of equal representation from each of the jurisdictions making up the UK. It is suggested that they be composed, for example, of representatives from existing human rights bodies, such as National Human Rights Institutions. Further, due to the interconnectedness of justice and security measures, these assessments must be undertaken for each element of future arrangements. In the event that human rights issues are discovered, the agreements should be returned to negotiators to be addressed.

9. A human rights ground for refusal must be built into the future UK-EU extradition arrangement. The negotiation of a future extradition arrangement presents an opportunity for the UK and EU to better protect the human rights of individuals facing extradition. Building in a human rights bar would require the UK and the EU Member States to refuse extradition if it would be incompatible with an individual's Convention Rights (something which exists domestically in the UK, but is not part of the EAW).

10. The UK should commit to implement any progressive changes to human rights law that come out of the EU in the future. This will help to ensure continued cooperation and bolster the environment of mutual trust.

11. The future UK-EU justice and security arrangement should be forward looking. This means that the UK should keep pace with legal developments in the EU and build into the agreement the opportunity to opt-in to future justice and security mechanisms.

12. Any treaty on future cooperation in this area must refer to both justice and security in its title. This will avoid one element being subsumed by another.

13. It is essential that any future negotiations involving human rights issues are conducted in close cooperation between the UK Government and the devolved administrations in the UK. This will help to ensure respect for overlapping competencies that exist in the complex constitutional arrangements within the UK.

1. Introduction

In the lead up to the referendum on the UK's membership of the EU, many of the public discussions taking place focused on themes related to borders and immigration, trade, sovereignty, and the NHS.[11] With the exception of some limited discussion of terrorism,[12] virtually none of this public conversation related to the potential impact on the realms of justice and security in the UK. For this reason, the Joint Committee of the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission (the Joint Committee) commissioned this research report to explore the evolving justice arrangements post-Brexit.

BACKGROUND TO THE PROJECT

On 23 June 2016, the UK voted to leave the EU by a majority vote of 51.9 percent.[13] Since the referendum, academics and civil society have responded by examining the multitude of ways in which Brexit may have an impact upon the lives of people in the UK. This research has highlighted the potential consequences of the decision for areas such as human rights, constitutional law, trade, health, immigration, environmental law, and international relations. Comparatively, one area of vital importance has had very little attention: justice and security cooperation. This report aims to help fill this gap by providing an in-depth analysis of the ways in which Brexit may impact justice and security cooperation between the UK and the EU, with a particular focus on the human rights implications.

The UK currently participates in a wide-range of justice and security cooperation measures with the EU.[14] In 2014, after opting out of all the Justice and Home Affairs measures, the UK opted back in to 35 measures covering a range of areas, including: extradition, policing and prosecutorial cooperation, and data sharing.

The UK is in the privileged position of being able to opt-out of measures that it does not wish to adopt. Like its position on migration law, the UK negotiated an opt-out in relation to criminal law measures, reflected in Protocol 21 of the Lisbon Treaty. This means that the UK had the space to take informed and measured decisions to opt-in to the measures that it did. Each one of these was the subject of extensive debates, whereby it was ultimately decided to be in the best interests of maintaining comprehensive justice and security systems in the UK to opt-in. One of the main reasons for the current level of cooperation is the contemporary environment in which crime takes place: it is increasingly crossing borders, both physically and through the internet, and therefore requires cooperation to police and prosecute.

However, as highlighted in a report by the House of Lords European Union Committee:

> when the UK leaves the EU, it will in principle also leave the 35 pre-Lisbon police and criminal justice measures that two years ago were deemed "vital" by the then Home Secretary, now the Prime Minister, 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." When it leaves the EU, the UK will in principle also be poised to leave the police and criminal justice measures that it has chosen to opt into since the Lisbon Treaty entered into force in December

11 For examples, see: http://www.voteleavetakecontrol.org/why_vote_leave.html; https://www.strongerin.co.uk/#MAHCGDfSevF6fsxD.97

12 For example, see: http://www.voteleavetakecontrol.org/briefing_safety.html

13 See https://www.bbc.co.uk/news/politics/eu_referendum/results

14 For further discussion on this, see Section 2.

2009. These number around 30, and include measures such as the 2016 Passenger Name Record Directive, the Prüm Decisions, and the European Investigation Order.[15]

From these areas of cooperation, it is easy to see that there are an array of justice and security measures that may be affected when the UK leaves the EU. As evidenced by the above quotation, due to the UK's integration into EU tools spanning repatriation and transfer, policing and prosecutorial cooperation, and information and data sharing, the future effectiveness of UK criminal justice and security systems has been called into question. A further complication is added by Northern Ireland/Ireland.

Like Scotland, Northern Ireland voted to remain in the EU by a clear majority,[16] and as the serious concerns about the specific implications for NI have been raised by research completed by academics, government bodies, and civil society groups, the support for remain has risen further.[17] It is important to note that many of the concerns have arisen out of the geographical location of NI – the fact that it shares a 310-mile land border with the Republic of Ireland – as well as the potential threat to the peace process.[18] In relation to justice and security, the specific implications for Northern Ireland and Ireland are also under explored.

COMMISSIONED RESEARCH

In March 2018, the Joint Committee produced a policy statement on the UK's withdrawal from the EU. Section five of the policy statement highlights the necessity of ensuring that the evolving justice arrangements comply with the commitment made to non-diminution of rights.[19] It was based on this concern that the Joint Committee commissioned the current research project.

The researchers were asked to identify the potential human rights and equality gaps envisaged with any future cooperative justice arrangement between the UK and the EU and to make recommendations as to how these gaps might be addressed. We were requested to examine this within the context of the following broader issues:

- The European Arrest Warrant;
- Prisoner repatriation and transfer;
- Policing and prosecutorial cooperation;
- Information and data sharing for criminal justice purposes; and
- Cross-border justice arrangements.

METHODOLOGY

The research conducted for this report was informed by the ongoing work of many experts, academics, practitioners, and human rights organisations. An extensive review of the literature examining both current and possible future UK-EU justice cooperation has been conducted alongside some primary analysis of relevant UK and EU law, policy, and practices.

15 European Union Committee, 'Brexit: Future UK-EU Security and Police Cooperation' House of Lords (7th Report: Session 2016-2017, HL Paper 77) para 23-24.

16 55.8 percent of voters in NI voted to remain, see https://www.bbc.co.uk/news/uk-northern-ireland-36614443

17 See https://www.theguardian.com/uk-news/2018/may/21/support-for-brexit-falls-sharply-in-northern-ireland

18 BrexitLawNI Policy Report, 'Brexit and the Peace Process', 2018, available at https://brexitlawni.org

19 Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, 'Policy Statement on the United Kingdom Withdrawal from the European Union', March 2018, available at https://www.ihrec.ie/app/uploads/2018/03/Joint-Committee-IHREC-NIHRC-Brexit-Policy-Statement_March-2018.pdf

The authors also conducted interviews with experts working in the area of justice and security cooperation. Interviewees came from a wide variety of backgrounds including academics, practitioners, and human rights organisations. All of those interviewed for the project were based in the UK and Ireland. Overall, eight interviews were conducted with a total of 14 participants. They were asked questions on each of the five project themes, as well as general questions on the most and least desirable potential future justice arrangements between the UK and the EU. Due to the highly sensitive nature of the subject matter, the fact that negotiations and preparations are ongoing, and for confidentiality reasons, the interviewees are not individually identified in the research (with the exception of our interview with a representative from the global criminal justice watchdog, Fair Trials). Interviewees are all identified as 'Justice and Security Experts' with the corresponding date of interview.

In light of the sparse literature on the topic, and in order to better understand the consequences of the decision to leave the EU, this report will examine the potential impact of Brexit on five main areas: (1) extradition, repatriation and transfer; (2) policing and prosecutorial cooperation; (3) cross-border justice arrangements on the island of Ireland; (4) information and data sharing; and (5) judicial oversight. Within these areas, the importance of human rights protections and the potential human rights consequences has often been lost to the strategic objectives of justice operations. Thus, throughout each of these themes, we aim to highlight the human rights issues that arise and make recommendations for a future UK-EU relationship that also prioritises human rights protections.

Section Overview

Section 2: Developments of UK-EU Justice Arrangements

We have provided a general history of the development of justice arrangements between the UK and the EU. Section two includes an overview of the evolution of the main justice cooperation measures, as well as the privileged position of the UK in relation to the ability to opt-in. It also offers a detailed breakdown of the opt-outs and opt-ins of both the UK and Ireland to some of the key justice instruments, including Eurojust, Europol, Joint Investigations Teams, the European Arrest Warrant, and the European Protection Order. Further, it reflects on the changes related to justice cooperation since the referendum.

Section 3: Changing Competencies

When examining the interaction of the UK and EU in the realm of justice cooperation, an important area to consider, which is often forgotten, surrounds the overlapping competencies between the UK government and the devolved administrations in Northern Ireland and Scotland. Section three examines the general principles guiding the division of competencies in relation to justice and security and how these matters are devolved in Northern Ireland and Scotland. Two examples are provided that illustrate the way in which competencies overlap and interact. The first is in the Scottish context, examining the right to information for accused and suspected persons. The second is Northern Ireland-specific, looking at participation in the European Criminal Records Information System (ECRIS).

Section 4: Extradition, Repatriation and Transfer

Extradition, repatriation and transfer of individuals has long been an area of cooperation between the Member States of the EU. Section four details the past arrangements focussing primarily on the 1957 Convention on extradition, and current arrangements under the European Arrest Warrant. It also details the human rights issues that have arisen under both systems. It then outlines the main post-Brexit options available to the UK, highlighting the procedural and human rights problems that may be created.

Section 5: Policing and Prosecutorial Cooperation

The UK currently participates in a number of EU mechanisms that facilitate policing and prosecutorial cooperation. These mechanisms are designed to assist police services and law enforcement agencies to share intelligence, evidence and expertise with one another. Section five outlines some of the various forms of cooperation as well as the benefits they provide. It goes on to examine the various possible future scenarios and outlines a number of issues that would arise under each.

Section 6: Cross-Border Justice Arrangements on the Island of Ireland

The sharing of a 310-mile land border, and the complex history between Ireland and the UK, mean cross-border justice cooperation has long been a feature of the relationship between NI and the Republic of Ireland. The main challenges that Brexit provides to this relationship surround policing cooperation and extradition. Each of these issues are examined in detail in Section six. This is followed by a discussion of the potential future scenarios and the various challenges that would arise under each.

Section 7: Information and Data Sharing

Data sharing is an area of cooperation that cuts across justice and security cooperation between the UK and the EU. Section seven presents the way in which data sharing is used in policing and prosecution. It also outlines the key databases and identifies the level of both UK and Irish involvement in each. This section also explores the potential future outcomes, including the possibilities of third-country membership, as well as the 'fall back' options for the UK. This section concludes with a consideration of some of the key human rights issues.

Section 8: Judicial Oversight

Another cross-cutting area is that of judicial oversight. The key oversight mechanism for EU justice and security cooperation is the Court of Justice of the European Union. The Court works alongside Member States' own courts and tribunals to interpret and enforce EU law. The UK has stated its intention to remove the jurisdiction of the CJEU on EU exit day, and in relation to this, Section eight outlines the associated concerns both for human rights protections, as well as the ability of the UK to conclude a desirable justice and security treaty. Both of these issues are examined in turn. To illustrate the human rights concerns, the example of the impact of leaving the CJEU on extradition is explored in detail. Section eight concludes with a consideration of the possible future scenarios.

Section 9: Overarching Themes and Concerns

Section nine of the report draws out a number of overarching themes that emerged throughout the research process. These are discussed in detail within the broader context of the UK's withdrawal from the EU. The themes presented include the interconnectedness of EU measures; interconnectedness and human rights; delay and uncertainty; and public safety and community confidence.

Section 10: Recommendations

The final section summarises the recommendations. This covers both general recommendations as to the most desirable and least desirable post-Brexit justice and security arrangements between the UK and the EU. It also puts forth specific recommendations related to each area covered in the report, as well as human rights-based recommendations.

2. Development of Existing Justice Arrangements

This chapter outlines the development of the existing EU justice arrangements to contextualise the current involvement of both the UK and Ireland in these measures. Details are provided on the types of cooperation that currently exist at the EU level. Both the UK and Ireland are party to an opt-out on justice and home affairs cooperation by virtue of Protocol 21 to the Lisbon Treaty. This allows each state to opt back into measures on a case-by-case basis. Currently the UK participates in more EU cooperation measures than Ireland. The chapter proceeds to examine possible scenarios for continued UK access to measures post-Brexit by identifying current precedents for third-country participation. Overall, the chapter illustrates that the issue of continued participation in justice arrangements is not straightforward as the measures have developed over a considerable timeframe and in response to both practical challenges and human rights concerns.

Development of EU Justice and Security Policies

When the European Coal and Steel Community was formed with six members in 1952, cooperation in the areas of justice and security policies was not anticipated.[20] The building of relations through the 1950s and 1960s centred on the development of frictionless trade and economic prosperity. As integration in these areas expanded and the ideological divides of the Cold War lessened, improved security was to become a benefit that 'spilled over' from the success of economic cooperation.[21] These developments were not without controversy and political discussion as they engaged more acutely with issues of state sovereignty and judicial independence than other policy areas.[22] This section outlines the key developments leading to the current configuration of EU-level justice and security cooperation and the UK's involvement and relationship to these arrangements.

In a series of CJEU judgments in the 1960s and 1970s the Court ruled that human rights were general principles of EU law and must be considered in all policies pursued.[23] For many this was the first indication that the EU was anything more than an economic bloc.[24] The Maastricht Treaty legally enshrined in 1991 that the EU was an entity beyond economics. This granted the EU competence to develop formal cooperation and integration mechanisms for Justice and Home Affairs (JHA).[25] This cooperation was to be facilitated through intergovernmental cooperation. States, therefore, retained more explicit control of cooperation and the development of instruments than existed in relation to the internal market where the Commission had a more prominent role.

After the enlargement of the EU to 27 Member States in the 2000s, treaty reform was necessary to allow for improved decision-making, address issues of democratic legitimacy and re-align the integration agenda. This process was difficult and fraught with divisions. A 2005 treaty was defeated as its constitutional aspirations were beyond the commitments some Member States were willing to

20 Treaty of Paris 1951.

21 S Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press, 2011).

22 S Lavenex, 'Justice and Home Affairs: Institutional Change and Policy Continuity' in H. Wallace, M.A. Pollack and A.R. Young, *Policy-making in the European Union* (7th edn, Oxford University Press, 2015).

23 *Erich Stauder v City of Ulm, Sozialamt* Case 29/69 [1969] ECLI: EU: C: 1969: 57; Case 11/70 *Internationale Handelsgellschaft* [1970] ECR 1125.

24 P Alston & J H H Weiler, 'An ever closer Union in need of a human rights policy: The European Union and human rights' in P Alston (ed) *The European Union and Human Rights* (Oxford University Press, 1999); I Ward, *A Critical Introduction to European Law* (Cambridge University Press, 2009); De Búrca G, 'The road not taken: the European Union as a global human rights actor' (2011) 105 *American Journal of International Law* 649.

25 Title V of the Treaty on European Union, Articles 67-89.

give.[26] A revised treaty was eventually adopted at Lisbon in 2007 and the ratified in 2009.[27] The Irish electorate refused to ratify this treaty at its first referendum but did vote in favour at a second vote. The UK, not having a written constitution, was not required to put these changes to the electorate but did have reservations about the changes it would bring. Both Ireland and the UK negotiated an opt-out of future security and justice arrangements on a case-by-case basis. They also both retained opt-outs of the Schengen area of free movement and the UK remains outside of the single currency.

One key change at Lisbon was the merging of the pillar structure and an increased role for the Commission in JHA issues. The ability of the CJEU to give preliminary rulings was also normalised which had an effect for the UK-EU relationship. Previously the UK did not grant its judiciary the power to interact with the CJEU under the preliminary ruling procedure under the third pillar. The result post-Lisbon was that the UK Supreme Court had to "grapple with the question of the definition of judicial authority."[28] The most pronounced example of this was for the purposes of the Framework Decision on the European Arrest Warrant in two recent cases – *Assange* and *Bucnys*.[29] However, the UKSC did have regard for CJEU decisions and made its decisions largely by reference to what it assumed the CJEU would decide.[30]

The changes at Lisbon now form the foundational treaties of the European Union, the Treaty on European Union (TEU)[31] and the Treaty on the Functioning of the European Union (TFEU).[32] The Justice and Home Affairs Council, composed of the justice and home affairs ministers from all the EU Member States adopts legislation, in most cases with the European Parliament. Policy areas now include: free movement of person; asylum and immigration; judicial cooperation in civil matters; judicial cooperation in criminal matters; police and customs cooperation; EU citizenship; discrimination; the fight against terrorism; the fight against organised crime; trafficking in human beings; combatting drugs and other cross-cutting issues relating to enlargement policy, foreign and security policy and the maintenance of European statistics.[33]

Types of Cooperation

Following the Lisbon Treaty, the area of freedom, security and justice (AFSJ) was established, through Title V of Part Three of the TFEU. Police cooperation is covered in Articles 87 to 89 and judicial cooperation in criminal matters is covered in Articles 82 to 86.

POLICE COOPERATION

Police cooperation encompasses cooperation between the police, customs and other law enforcement services of the Member States. The rationale of such cooperation is to prevent, detect and investigate criminal offences across the EU. In practice, the cooperation mainly concerns serious crime, such as

26 The Treaty was ratified by 18 Member States but the ratification process broken down following failed referendums in France and the Netherlands in May and June 2005. For analysis: P Hainsworth, 'France Says No: The 29 May 2005 Referendum on the European Constitution' (2006) 59 *Parliamentary Affairs* 98; G Ivaldi, 'Beyond France's 2005 Referendum on the European Constitutional Treaty: Second-order model, anti-establishment attitudes and the alternative European utopia' (2006) 29 *West European Politics* 47; F Laursen (ed), *The Rise and Fall of the EU's Constitutional Treaty* (Martinus Nijhoff Publishers, 2008).

27 Treaty of Lisbon amending the Treaty on European Union and Treaty establishing the European Community, signed at Lisbon, 13 December 2007 OJ C 306.

28 V Mitsilegas, 'European criminal law after Brexit' (2017) 28 *Criminal Law Forum* 219.

29 [2012] UKSC 22; [2013] UKSC 71 as cited in V Mitsilegas, 'European criminal law after Brexit' (2017) 28 *Criminal Law Forum* 219.

30 V Mitsilegas, 'European criminal law after Brexit' (2017) 28 *Criminal Law Forum* 219.

31 Consolidated Version of the Treaty on European Union [2010] OJ C83/1.

32 Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/01.

33 European Union, 'Justice, freedom and security' https://eur-lex.europa.eu/summary/chapter/justice_freedom_security.html?root_default=SUM_1_CODED%3D23

organised crime, drug trafficking, trafficking in human beings, cybercrime, and terrorism.[34] A range of cooperation measures exists which span the length of police work from intelligence sharing, investigation assistance, evidence-sharing and powers to apprehend and extradite wanted persons to other Member States. A further strand of cooperation concerns common approaches to police training, development of best practice and knowledge exchange through conferences and networking opportunities.

JUDICIAL COOPERATION

The rationale behind the EU competences in the field of judicial cooperation in criminal matters is to tackle the challenge of serious cross-border crime by promoting judicial cooperation. The principle of mutual recognition is fundamental to judicial cooperation in the EU. Previously, the principle of mutual legal assistance had been the foundation of judicial cooperation, which took the form of judiciaries voluntarily agreeing to assist one another. The principle of mutual recognition aims to promote further integration in this area and provide an alternative to harmonising laws. In practice this means that national measures such as judicial decisions were to be recognised in all other Member States, enabling cooperation with minimum procedure and formality. This move was formalised through the JHA multi-annual programmes, starting with the 1999 Tampere Conclusions where the European Council described mutual recognition as the 'cornerstone of judicial cooperation in criminal justice'.[35] The 2009 Stockholm Programme re-emphasised the EU's commitments in this area, stating that cooperation between judicial authorities and the mutual recognition of court decisions within the EU must be further developed, and to facilitate this Member States should continue to adopt common minimum rules to approximate criminal law standards, and strengthen mutual trust.[36] Judicial cooperation in criminal matters at EU level is facilitated by a number of arrangements, including Eurojust and the European Judicial Network (EJN), mutual legal assistance and mutual recognition policies.

Mutual legal assistance entails cooperation between Member States in collecting and exchanging information used in the investigation or prosecution of criminal offences, including evidence gathering and exchange. Authorities from one Member State may request evidence that is located in another Member State in order to assist in criminal investigations or provide evidence to proceedings in another. This cooperation is strengthened with specific measures, such as the European Investigation Order (EIO) and funding for Joint Investigation Teams (JITs). The EIO is based on the principle of mutual recognition and functions to establish strict deadlines for gathering requested evidence, limit reasons for refusal and reduce administrative burdens. A JIT carries out a criminal investigation in one or more of the involved Member States, they are able to directly gather and exchange information and evidence without the need to use traditional channels of mutual legal assistance. JITs can be set up with non-EU states through other legal frameworks such as the Second Additional Protocol to the European Convention on Mutual Legal Assistance.

Eurojust was established in 2002 and its objective, as outlined in Article 85 TFEU, 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 operations conduction and information supplied by the Member States' authorities and by Europol.[37]

34 Policy Department for Citizens' Rights and Constitutional Affairs, 'The EU-UK relationship beyond Brexit: options for police cooperation and judicial cooperation in criminal matters' (2018) https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604975/IPOL_STU(2018)604975_EN.pdf

35 Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999 http://www.europarl.europa.eu/summits/tam_en.htm

36 The Stockholm Programme: An open and secure Europe serving and protecting citizens [2010] OJ C 115/1.

37 Article 85 TFEU.

Article 3 of the 2002 Council Decision founding Eurojust states its objectives are: 'to support the competent authorities of the Member States to render their investigations and prosecutions more effective, and to improve cooperation between the competent authorities of the Member States'.[38]

The European Judicial Network (EJN) was established in 1998 as a network of national contact points for the facilitation of judicial cooperation in criminal matters. The network is composed of contact points in the Member States designated individually among the central authorities in charge of international judicial cooperation. The EJN establishes direct contacts between competent authorities by providing legal and practical information necessary to prepare an effective request for judicial cooperation.

Framework Decisions on the application of the principle of mutual recognition also exist, covering:

- Judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions;[39]
- Judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty[40], which ensures Member State recognise judgments in criminal matters imposing prison sentences in one another's national laws or decisions. Practically speaking, it sets up a system for the transfer of convicted prisoners back to the Member State of which they are nationals (or resident) or to another EU country with which they have close ties so they can serve their prison sentence there;
- Confiscation orders[41], which allow a judicial authority in one Member State to send an order to freeze or confiscate property directly to the judicial authority in another Member State where it will be recognised and carried out with no further formality;
- Financial penalties[42], which introduces specific measures allowing a judicial or administrative authority to transmit a financial penalty to an authority in another EU Member State and to have that financial penalty recognised and executed without any further formality.

UK and Irish Opt-Outs and Opt-Ins

During the negotiations of the Lisbon Treaty, the UK sought to extend the opt-out it held on migration law, i.e. the Schengen Convention, to criminal law measures.[43] Under Protocol 21 of the Lisbon Treaty, the UK has the right not to participate in EU law to the whole of Title V TFEU on the Area of Freedom, Security and Justice, including criminal law measures. This right extended to include legislation amending existing measures which are binding on the UK. Therefore, the UK is in a privileged position whereby "the government decides on its participation in post-Lisbon measures on a case-by-case basis".[44] The UK notified the Presidency of the EU that, pursuant to Art. 10(4) of Protocol 36, it did not accept the powers of the EU institutions; accordingly, third pillar law would cease to apply in the UK

38 Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ 2002, L-63/1.

39 Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, 16 December 2008 OJ L 337.

40 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, 5 December 2008, OJ L 327.

41 Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, 24 November 2006, OJ L 328.

42 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, 22 March 2005, OJ L 76.

43 V Mitsilegas, 'European criminal law after Brexit' (2017) 28 *Criminal Law Forum* 219; p 220.

44 ibid.

from 1 December 2014. However, the UK later indicated it would seek to opt back into 35 out of 130 of the most significant and well-used third pillar measures that had caused the previous aggravation.[45]

Currently, the UK participates in the European Arrest Warrant (EAW)[46] as well as both Europol[47] and Eurojust[48] agencies. In criminal investigations, the UK does participate in Joint Investigation Teams (JITs)[49] and executes European Investigation Orders (EIOs).[50] UK access to a range of criminal justice and law enforcement databases has also been opted-into, including the Schengen Information System (SIS II),[51] the European Criminal Records Information System (ECRIS),[52] and the Passenger Name Record (PNR).[53] The UK has also completed the necessary preparations to accede to measures of the Prüm Convention,[54] relating to the sharing of DNA and biometric data and this is awaiting Parliamentary approval. The purpose and functionality of these databases will be discussed further in Section 7. The UK is currently opted out of about 100 measures. The most significant of these relate to the Schengen acquis and the removal of internal border controls and checks, as well as measures relating to advancing procedural rights. One aspect of this which is interesting in terms of co-operation between NI and the ROI is that 'hot pursuits' are not facilitated so police forces cannot continue to pursue an assailant if they cross a border into the territory of another EU Member State.[55]

It is important to note that the UK is not the only EU Member State to have negotiated opt-outs from JHA measures. Denmark also participates selectively, but most notably so does Ireland. Indeed, Ireland currently does not participate in key cooperation measures that the UK has opted-in to, for example JITs, the EIO, European Protection Orders (EPO) and the Schengen Information System. Past analysis of the development of Justice and Home Affairs tends to speak of the UK and Irish opt-outs together, as they are facilitated by the same legal protocol. However, it is important to note that current cooperation between the criminal justice agencies in Ireland and the UK with the EU differs.[56] The implications these different landscapes could have on policing and justice cooperation between the UK, Ireland and the EU will be examined in Section 6.

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45 V Mitsilegas, 'European criminal law after Brexit' (2017) 28 *Criminal Law Forum* 219; p 225; T Durrant, L Lloyd and M Thimont Jack, 'Negotiating Brexit: policing and criminal justice' (2018) *Institute for Government* https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_policing_criminal_justice_web.pdf

46 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 18 July 2002, OJ L 190.

47 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol), 24 May 2016 OJ L 135.

48 Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust, 6 March 2002, OJ L 63/1.

49 Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams, 20 June 2002, OJ L 162/1.

50 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, 1 May 2014, OJ L 130/1.

51 Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), 28 December 2006, OJ L 381.

52 Council Framework Decision 2008/675 of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, 15 August 2008, OJ L 220.

53 Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name records for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, 4 May 2016 OJ L 119.

54 Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, 6 August 2008, OJ L 210/1.

55 S de Mars, C Murray, A O'Donoghue & B Warwick, *Discussion Paper on the Common Travel Area,* 2018: Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission.

56 S Peers, 'EU Lisbon Treaty Analysis no 4: British and Irish opt-outs from Justice and Home Affairs Law' *Statewatch* 3 November 2009 http://www.statewatch.org/news/2009/nov/statewatch-analysis-lisbon-opt-outs-nov-2009.pdf

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Table 1: UK and Ireland opt-in/outs of key instruments

Instrument	UK	Ireland	Third-country Participation
Convention on mutual legal assistance in criminal matters between the Member States (29 May 2000)	IN	IN	Japan has an MLA with the EU but no specified timeframes for responses to requests. Also questions raised about which countries' law takes precedence.[57]
EUROJUST (est. in 2002 and amended in 2003 and 2009)	IN	IN	Montenegro, Norway, Switzerland and the USA have co-operation agreements with Eurojust. They can attend and participate in operational and strategic meetings if invited. However, they cannot access to the Case Management System and do not sit on the board.[58]
European Judicial Network (Council Decision 2008/976/JHA)	IN	IN	Cooperation with third-countries is governed by international law.[59]
European Public Prosecutor's Office (Text adopted by Council 12/10/2017)	Not in favour	Not in favour	EPPO jurisdiction is within EU territory. Third states thus would not be participants although cooperation may be necessary depending on the case, most likely through Eurojust networks.[60]
Europol	IN	IN	Non- EU countries with operational/cooperation agreements with Europol/Eurojust can join JITs if invited but no power to initiate investigations. Council of Europe member states can initiate JITs but cannot receive Europol/Eurojust funding to participate unless they are EU Member States.
ECRIS (application of Framework Decision 2009/315/JHA)	IN	IN	No precedent for third-country access. Third-countries with MLA agreements can request criminal record information on a case-by-case basis.
European Arrest Warrant (Framework Decision 2002/584/JHA)	IN	IN	Norway and Iceland have partial extradition agreements (not yet in force, signed 2006[61]). USA has an agreement with the EU, and bilateral arrangements with Member States but still subject to political approval.[62]
Framework Decision 2009/829/JHA mutual recognition of supervision measures and an alternative to provisional detention (European Supervision Order)	IN	OUT	No non-EU countries have access to the ESO.
European Protection Order (Directive 2011/99/EU)	IN	OUT	No non-EU countries have access to the EPO.
European Investigation Order (Directive 2014/41/EU)	IN	OUT	No non-EU countries have access to the EIO.
Victim's Rights Directive (2012/29/EU)	IN	IN	No non-EU countries participate in the VRD.
Roadmap for strengthening procedural rights (and associated measures)	OUT	OUT	No non-EU countries are signatories.
SIS II (Law Enforcement)	IN	OUT	Iceland, Norway, Lichtenstein and Switzerland have full access to SISII (inc border control and vehicle registration parts as Schengen Associates).[63] No non-EU, non-Schengen country has any form of access.

57 T Durrant, L Lloyd and M Thimont Jack, 'Negotiating Brexit: policing and criminal justice' (2018) *Institute for Government* https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_policing_criminal_justice_web.pdf

58 ibid.

59 Resolution of Commission on Crime Prevention and Criminal Justice on Strengthening of regional networks for international cooperation in criminal matters, Nineteenth Session of the United Nations Commission on Crime Prevention and Criminal Justice, Vienna 2010; White Paper on the implementation of the Explanatory Memorandum and cooperation with other EJN partners, 43rd Plenary meeting of the EJN, Rome 2014.

60 EPPO Regulation 2017/1939, recital *n. 10* states '[...] this Regulation should establish a close relationship between them based on mutual cooperation'.

61 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 OJ L 292, 21 October 2006.

62 Agreement on extradition between the European Union and the United States of America OJ L 181, 19 July 2003; Article 5(1) 'Requests for extradition and supporting documents shall be transmitted through the diplomatic channel'.

63 T Durrant, L Lloyd and M Thimont Jack, 'Negotiating Brexit: policing and criminal justice' (2018) *Institute for Government* https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_policing_criminal_justice_web.pdf

Since the result of the EU referendum, the UK has continued to opt-out of EU criminal justice measures, such as the Directive on the fight against fraud to the Union's financial interests by means of criminal law[64] and the Directive on combatting money laundering,[65] which Ireland has also opted-out of. However, the UK did decide to participate in the Directive concerning measures for a high common level of security network and information systems across the Union of 6 July 2016.[66] The UK also signed the EU's General Data Protection Regulation (GDPR) into domestic law in 2018, a measure it was instrumental in developing.[67]

Opting-out of the final directive does not mean the UK has not had any influence over the development of cooperation. It merely indicates that the UK has chosen not to participate in particular measures at this time, the option to opt-in is available at any time as a Member State. It has also been raised that this opt-out approach may have been pursued by the UK government to alleviate concerns about the impact on domestic law and possible interference by the CJEU.[68] For example, the UK initially opted-out of the Directive on Trafficking in Human Beings but opted-in at a later date.[69]

Another possible scenario post-Brexit is that as the UK could lose access to the measures it is currently engaged with, Ireland could choose to join them. The Irish out-out protocol allows participation in measures to be initiated at any point. Some of the justice and security experts we interviewed indicated that Ireland may be moving towards joining the EIO, although probably not JITs.[70] Others determined that the increased data sharing tools may be joined as their benefits have become more apparent, particularly SIS II.[71] Any developments of this nature, could have implications for the cooperation that occurs between criminal justice agencies on the island of Ireland in the future. Ireland and the UK both currently engage with justice and policing cooperation on a case-by-case basis under Protocol 21 to the Lisbon Treaty as a recognition that their common law systems differ in fundamental ways to the criminal justice systems of continental European countries.[72] Interestingly the Irish government did issue a political declaration that it would participate in judicial and police cooperation to the maximum extent possible.[73]

Summary

In summary, currently the UK and Ireland both enjoy a flexible opt-out to EU justice and home affairs measures which allows the protection of their national interests but also the benefits of accessing information, policing and prosecutorial cooperation and, for the UK, the use of orders to facilitate justice. The differentiation between the measures the UK and Ireland participates in illustrates that the two states pursue different approaches to justice and security which must be considered in any bilateral arrangements and also in any future justice and security relationship with the EU. The third country

64 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraid to the Union's financial interests by means of criminal law, 28 July 2017, OJ L 198.

65 Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, 12 November 2018, OJ L 284.

66 Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, 19 July 2016, OJ L 194.

67 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 4 May 2016, OJ L 119.

68 V Mitsilegas, 'European criminal law after Brexit' (2017) 28 *Criminal Law Forum* 219; p. 222.

69 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2012 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, 15 April 2011, OJ L 101.

70 Interview with justice and security expert, 15 February 2019.

71 Interview with justice and security expert, 9 April 2019.

72 B Vaughan, 'Ireland's Engagement with EU Policy on Justice, Home Affairs and Foreign Relations' (no date) National Economic and Social Council available at: http://files.nesc.ie/nesc_background_papers/NESC_122i_bg_paper_7.pdf (accessed 14 May 2019).

73 Department of Foreign Affairs, The Lisbon Treaty: White Paper (Department of Foreign Affairs, Dublin, 2009).

precedents for participation in EU JHA measures shows that uniform and unfettered access is not granted and any access is carefully negotiated for each individual measure. This stresses the importance of time, the need for interim measures and for careful consideration of each measure both in terms of continued access but also operational effectiveness.

The next chapter examines how changes to UK competence in the area of justice and security occur on multiple levels, outlines the operational effects that could arise and argues that scrutiny must exist at all levels to monitor effects on human rights. The chapters which follow then analyse the specific areas of justice cooperation contextualised in this chapter.

KEY RECOMMENDATIONS

Because of the interconnectedness of EU measures in the area of justice and security, it is strongly recommended that any future arrangement should aim to be as comprehensive as possible and cover judicial and police cooperation as well as any data sharing arrangements. Further, any future treaty between the UK and the EU must refer to both justice and security in its title to make clear one is not prioritised over the other. The UK should also build into any agreement the opportunity to opt-in to future EU justice and security mechanisms. This will ensure the UK keeps pace with EU legal developments – particularly in the field of human rights.

> what you call it. So if it is not going to be called for us EAW, that there is a mechanism between the UK and Ireland and then onwards for other Member States, but Ireland being our closest geographical neighbour in terms of Member States, that is very important to us that that would be available as a justice measure or a tool to bring individuals to justice.[263]

Possible Future Scenarios

One of the primary concerns that was expressed by several of the justice and security experts interviewed for this project was that leaving the EU, particularly in a 'no deal' scenario, will mean that much of the policing cooperation will continue to take place, but will return to being informal. As outlined above, there have been a number of efforts designed to formalise police cooperation on the island, thereby assisting with both transparency of and accountability for police practices. There was a high level of certainty expressed that cooperation will continue, but not using these official channels. As captured by one interviewee:

> … if we were to fall back on these less formal cross-border sharing arrangements, we could go very, very quickly into sharing through 'ach sure I'll just give him a call, I don't need to tell your man cause I don't trust your man in the next office, and sure if they ask us for something in return', you can see exactly how it would go but that already exists in Ireland and because that was the norm before there is going to be a very quick backslide into those very informal arrangements and there is still reluctance to share.[264]

> I think, that without these formal mechanisms there is going to be cross-border cooperation undoubtedly, they are going to talk to each other because they always have, but only when it suits and we will never know, solicitors representing people who are prosecuted on the basis of this information are never going to know the reliability of it. It is unlikely to be used in Court and therefore the prosecutions are therefore less likely to be successful. There's going to be complaints that fewer people are prosecuted so what does that tell us about, you know can see it all, the long line of it and all of this is going to come back to the simple mistake of leaving a formal mechanism which is shared, which is trusted and which is overseen so I'm not sure there is much more I can say about that, except it is a very practical and almost philosophical example of what is going to go wrong.[265]

Although this recourse to informal methods of cooperation is likely, one interviewee made a point of emphasising that:

> On an operational level there is a very strong, close working relationship between PSNI and AGS because they are physically our closest neighbour and we have to work collaboratively to solve problems … That said, the Chief Constable of the PSNI and the Commissioner of AGS cannot break the law for each other. There must be a statutory and legal underpinning for the work that we do. Whether that is information-sharing at the beginning of an investigation or the sharing of evidence later on as the investigation progresses and for the extradition of people wherever you might be. That's important to us.[266]

Another related concern that was expressed by our interviewees is that if these informal routes of cooperation are returned to, issues of trust may hamper future cooperation and data sharing.

263 ibid.

264 ibid.

265 Interview with justice and security expert, 14 February 2019.

266 ibid.

Summary

This section has demonstrated the importance of justice cooperation on the island of Ireland. It has explored how the EU has played a fundamental role in two particular areas in which North/South cooperation has been key for effectiveness: policing cooperation and extradition arrangements. Our interviews revealed that police cooperation has historical largely taken place through informal relationships between police officers in Northern Ireland and An Garda Síochána (AGS). While EU membership has not eliminated this type of cooperation, mechanisms have encouraged more formalised and transparent cooperation emerge. One of the key areas in which this has taken place relates to data sharing practices between the Police Service of Northern Ireland and AGS. Concern was expressed by some interviewees that the UK's exit from the EU will involve the return to informal relationships that lack transparency and the independent oversight of EU structures.

The second concern for cross border justice cooperation is the current extradition arrangements facilitated by the EAW. Prior to the introduction of the EAW, extradition between NI (and the rest of the UK) and the Republic of Ireland was extremely politically sensitive. The creation of the EAW, and the shift of extradition from the political to the judicial realm helped to desensitise and facilitate more efficient extradition. The EAW has been identified publicly by both the PSNI and AGS as an essential tool for cross-border justice cooperation. Similarly, interviewees for the project highlighted the potential loss of the EAW as one of the most serious challenges in this area.

KEY RECOMMENDATION

Any future agreement should maintain access to the European Arrest Warrant or an equivalent tool, because the EAW has proven to be an essential tool for cross-border justice cooperation on the island of Ireland.

7. Information and Data Sharing

The preceding sections have raised the importance of information and data sharing as a cross-cutting issue in criminal justice and security cooperation between the UK and the EU. Intelligence-led policing and the need to share evidence to prosecute crimes creates the need to retain access to information stored in other EU jurisdictions. Criminal activity, including terrorism, increasingly does not respect national borders and law enforcement agencies rely on information being passed on from their counterparts in other states. To facilitate this smoothly and efficiently, the EU has developed a range of databases that store information relating to criminal justice.

This section maps the current participation of the UK, Ireland and third-countries in EU measures for information and data sharing for criminal justice. The specific functions and capabilities of SIS II, ECRIS, PNR, Prüm and EIS are analysed to highlight issues that could impact on human rights if access was not retained post-Brexit. It is identified that loss of these measures would have detrimental impact on the operational capabilities of criminal justice practitioners but also on the rights of victims, witnesses and accused/investigated persons. The chapter continues to evaluate possible scenarios and highlight human rights concerns associated with each. Based on this analysis, it argues that data protection should not be considered a side issue but underpins rights-based approaches to policing and justice cooperation between states.

Current Participation in Information and Data Sharing Measures

The UK, and thus NI, currently participates in the following systems: SIS II, ECRIS, PNR and EIS. It has also undertaken the necessary preparatory work to become operational in sharing information under Prüm. It has been a priority for the UK government to retain access to information held in these databases as outlined in its plans for a special and deep security partnership after exit.

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Table 2: UK and Ireland participation in EU security and justice databases

Database	Functions	UK involvement	Ireland involvement	Third-country involvement
Schengen Information System (SIS II)	Security and border management	Only law enforcement cooperation (since 2015)	None	Iceland, Norway, Lichtenstein and Switzerland have full access to SISII (inc border control and vehicle registration parts as Schengen Associates).[267] No non-EU, non-Schengen country has any form of access.
European Criminal Record Information System (ECRIS)	Sharing of criminal record data (inc. translation of offences between Member States)	Fully operational (since 2012)	Fully operational (since 2012)	No non-EU country has access. Countries with MLA agreement can request information on a case-by-case basis.
Passenger Name Records (PNR)	Sharing of travel data for prevention, detection, investigation and prosecution of terrorist offences and serious crime	Fully operational (since May 2018)	Fully operational (since May 2018)	PNR Agreements have been concluded with Australia, Canada and the US. However, do not allow same level of cooperation as MS authorities enjoy with each other (less detailed, less immediate).
Europol Information System (EIS)	Central criminal information and intelligence data base (no access by local force, holds information on accused not just convicted)	Fully operational (since 2005, the UK Commission Presidency advanced the system)	Fully operational (since 2005)	Non-EU countries who station officers at Europol do not have direct access. Note: Denmark is an EU Member State but not a full member of Europol so its police do not have direct access to EIS, only the 3 officers stationed there who deal with all national requests.
Prüm	Sharing of DNA, biometric and vehicle data	All preparatory work undertaken to go operational (awaiting parliamentary approval)	None	Iceland and Norway have negotiated access. Lichtenstein and Switzerland have begun the negotiation process.

To assess the implications of possible future arrangements for human rights and criminal justice cooperation on the island of Ireland, it is important to understand the specific purpose and function of each system.

SCHENGEN INFORMATION SYSTEM (SIS II)

SIS II is a widely utilised information sharing system for security and border management in Europe.[268] The scope of SIS II is defined in three legal instruments:

- Regulation (EC) No 1987/2006 (Border control cooperation)
- Council Decision 2007/533/JHA (Law enforcement cooperation)
- Regulation (EC) No 1986/2006 (Cooperation on vehicle registration)

The UK only participates in the law enforcement cooperation framework, this aspect of SIS II became operational in the UK on 13 April 2015, after much preparatory work by EU agencies.[269]

267 T Durrant, L Lloyd and M Thimont Jack, 'Negotiating Brexit: policing and criminal justice' (2018) *Institute for Government* https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_policing_criminal_justice_web.pdf

268 European Commission, 'Schengen Information System' 2019 https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system_en

269 European Commission, 'The UK cooperates with European states on law enforcement' 13 April 2015, https://ec.europa.eu/home-affairs/what-is-new/news/news/2015/20150413_01_en

In terms of how it is currently used, SIS II alerts individuals and objects of interest to law enforcement agencies when they cross internal and external EU borders. Alerts can relate to whether someone is subject to an EAW, otherwise wanted or under surveillance by police in another Member State. SIS II also has the capacity to alert law enforcement to objects, such as stolen cars and passports, when they cross borders. SIS II was accessed 539 million times by the UK in 2017, the UK also inputs a significant amount of data into the system that can be accessed by other Member States.[270]

By being efficient and integrated, SIS II offers many advantages to police services in the UK. Alerts can be made early in investigations, before the power of arrest comes into play, so other police authorities 'in different Member States are able to, through their police craft, be speaking and engaging the person and glean some information that might be very helpful to the other Member State's police service'.[271] Further advantages are that EAWs are uploaded to SIS II and alerts automatically issued, again cutting down the bureaucracy of need to send correspondence to 27 Member States. Cooperation is not limited to high-level exchanges, officers on the ground are equipped with mobile devices that enable them to run checks on persons and vehicles while out on patrol, 'there in the officer's hand out on the ground and right up to the minute up-to-date'.[272]

The Home Affairs Select Committee has indicated its desire to see the Government retain access to SIS II:

> Without UK access to SIS II, individuals who pose a genuine threat will be able to enter the UK or the EU without important intelligence being flagged to border officials. Losing access to it would be a calamitous outcome for the UK, which would pose a severe threat to the Government's ability to prevent serious crime and secure the border effectively, but it is an increasingly likely prospect. Retaining access to SIS II should be a primary negotiating objective for the Government: it should publish a detailed assessment of losing access, and focus significant efforts on persuading the EU 27 to widen its negotiating mandate on data exchange. We are very concerned about the vast distance between the EU and UK's positions on this extremely significant issue, and the government's recent White Paper does nothing to close that gap.[273]

According to a justice and security expert we interviewed, SIS II is 'the one that the UK has most interest in maintaining access to and probably the least chances of'.[274]

There are a number of reasons why retaining access could be problematic for the UK. In 2016, the European Commission proposed significant changes to strengthen the SIS. These changes will be implemented in stages and are to be completed by 2021. This of course poses a difficulty for the UK in terms of potential future access and a loss of capabilities. Another problem is that in the past there have been concerns from the EU about the UK's handling of data from the SIS and even allegations that it has shared them with non-EU states.[275]

Key concerns about loss of access to the system include a slowing of operational effectiveness and a forced reliance on less favourable databases, which both raise questions of potential security

270 EU-Lisa, 'SIS II – 2017 statistics' February 2018 https://www.eulisa.europa.eu/Publications/Reports/2017%20SIS%20II%20Statistics.pdf, 7.

271 Interview with Justice and Security Expert, 9 April 2019.

272 ibid.

273 House of Commons Home Affairs Committee, UK-EU security cooperation after Brexit: Follow-up report' 17 July 2018 https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1632/163202.htm, para 4 recommendations and conclusions; .

274 Interview with Justice and Security Expert, 5 March 2019(b).

275 Nikolaj Nielsen, 'UK unlawfully copying data from EU police system' (28 May 2018, *EU Observer*) https://euobserver.com/justice/141919

implications.[276] Systems that require the manual input of data would unlikely be integrated which will add an administrative burden which could affect rights at an operational level where:

> It is hugely preferable that when engaging with a member of the public where an associated check on police databases is required that this is achieved in a timely manner rather than being delayed due to multiple or manual accessing arrangements which could result in delays or complaints.[277]

The current system is 24/7 and fall-back or sub-optimal arrangements do not guarantee that level of efficiency. An additional concern would be reduced confidence amongst police personnel in utilising the system, officers require reliable and up-to-date information because they are making a decision to arrest a person and deprive them of their liberty. While police officers undertake these duties daily, 'for that individual that is highly impactive' and must be carried out on the basis of accurate information.[278]

Speaking to NI specifically, Ireland does not currently operate SIS II. However, in a post-Brexit environment many experts raise the issue of international terrorism and its potential to exploit the Irish border as a route into the UK. It has been determined that very few terrorist attacks in Europe have been carried out by citizens of the Member State in which they occurred so SIS II alerts have been key in alerting police forces to persons of interest.[279]

THE EUROPEAN CRIMINAL RECORDS INFORMATION SYSTEM (ECRIS)

The European Criminal Records Information System (ECRIS) exists to connect national criminal databases and facilitate both centralised and decentralised information exchange.[280] ECRIS was established in 2012 and all 28 Member States, including the UK, are currently connected to the system. In terms of benefits, an advantage of ECRIS has over other methods of information sharing is that it maps the offence codes of each EU jurisdiction and so takes account for any variations in the meanings attached to offences across Member States.[281] Criminal offences are listed as codes and the associated outcomes listed so police will know if a person has been given a fine or term of imprisonment. This means it is very easy to translate the data and makes the system highly efficient. Costs are reduced in terms of translation costs but also in real terms as to how that data can be used. ECRIS also implements a swift turnaround time:

> So if someone is charged to court in this country, ECRIS would return a criminal record from a Member State for that person (if one existed) within ten days. Without this system an approximate timeline to receive this information is sixty days.[282]

The system also holds information on witnesses so authorities can check whether there has been any dishonesty in a person's background.

The European Commission published its first report on Member States' use of ECRIS on 29 June 2017. That report found that the UK was a leading user of the system. It was found that yearly notifications on new convictions, requests and replies to requests amounted to roughly 350,000 per category and

276 Interview with Justice and Security Expert, 5 March 2019(b).

277 Interview with Justice and Security Expert, 9 April 2019.

278 ibid.

279 Interview with Justice and Security Expert, 14 February 2019.

280 European Commission, European Criminal Records Information System (ECRIS), 2019 https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/tools-judicial-cooperation/european-criminal-records-information-system-ecris_en

281 Interview with Justice and Security Expert, 9 April 2019.

282 ibid.

the UK was the second most active user of these messages, accounting for 13.7%.[283] It was also found that in 2016 the UK sent considerably more requests for information than they received, sending the second highest number of requests to other Member States after Germany.[284]

It is clear that the UK is an active user of ECRIS and frequently requests criminal record information from other EU Member States. The UK government has made clear its intention to retain access. The Government response to a report from the Home Affairs Committee on 6 September 2018 emphasising the commitment it made to developing a close partnership with the EU on these matters in the White Paper on the future relationship on 12 July 2018.[285] The Government's position is that it is desirable to secure:

> [...] an ambitious and pragmatic future security partnership that protects mutually important capabilities after we leave the EU. We are proposing a future relationship that protects operational law enforcement and criminal justice capabilities, including mechanisms for rapid and secure data exchange; practical measures to support cross-border operational cooperation; and continued UK cooperation with EU law enforcement and criminal justice agencies.[286]

However, there is no existing precedent where a non-EU country has been granted such access. Even non-EU Schengen countries such as Norway and Switzerland do not have access to the system.

The Member States could, however, be convinced that there would be a wider benefit to maintaining these channels of information exchange with the UK.[287] Prior to her Chequers Plan, Prime Minister Theresa May spoke of the importance of retaining access and warned that lives will be put at risk if the EU does not soften its stance, stating:

> We will no longer be able to share real-time alerts for wanted persons, including criminals. We would be able to respond less swiftly to alerts for missing people, either side of the Channel, and reunite them with their loved ones. And our collective ability to map terrorist networks across Europe and bring those responsible to justice would be reduced. That is not what I want, and I do not believe that is what you want either.[288]

Despite the political difficulties faced securing agreement of a withdrawal text since, the government remains optimistic about securing access to crucial data. Home Secretary Savijd Javid reiterated the Prime Minister's sentiments in Madrid in September 2018 emphasising the government's desire that Brexit occurs 'without undermining the day-to-day operational cooperation which plays such an important role in keeping European citizens safe'.[289]

To date, Brussels has been less encouraging about an enhanced position for the UK as a third country. The EU has not, to date, published a specific legal analysis of the form and content of a future security

283 European Commission, 'Report concerning the exchange through the European Criminal Records Information System (ECRIS) of information extracted from criminal records between the Member States' 29 June 2017 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0341&from=EN

284 ibid.

285 HM Government, 'The Future Relationship Between the United Kingdom and the European Union' 12 July 2018 https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union

286 Parliament 'Appendix: Government Response' 6 September 2018 https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1566/156602.htm

287 C Mortera-Martinez, 'Hard Brexit, soft data: How to keep Britain plugged into EU databases' *Centre for European Reform*, 23 June 2017 https://www.cer.eu/sites/default/files/insight_CMM_23.6.17.pdf

288 Daniel Boffey and Heather Stewart, 'Theresa May tells EU leaders: you are putting lives at risk over Brexit' (28 June 2018, *The Guardian*) https://www.theguardian.com/politics/2018/jun/28/uks-cabinet-split-is-bad-for-brexit-negotiations-says-juncker

289 Home Secretary Saijd Javid, 'Future Security in Europe' Speech, 25 September 2018, Madrid, https://www.gov.uk/government/speeches/future-security-in-europe

interoperability between other criminal justice instruments or a timeframe for implementation.[321] Liechtenstein and Switzerland have commenced negotiations for access in June 2016 with the parties signing the agreement in May 2018 so the provisions should enter into force soon.[322] A key concern for the UK in retaining access to these provisions would be the proportionality with which the data held would be used by other states. Unlike other databases, where the EU side has concerns about the UK's adherence to data protection standards, as regards Prüm, the UK Government concern is that DNA profiles, dactyloscopic and biometric data could be used in minor cases in a disproportional manner.

EUROPOL INFORMATION SYSTEM (EIS)

In addition to these databases, the Europol Information System provides unique services to enhance traditional law enforcement measures. EIS is Europol's central criminal information and intelligence database and covers all of Europol's mandated crime areas. It holds information on serious international crimes, suspected and convicted persons (more than ECRIS, which is only those convicted), criminal structures, and offences and the means used to commit them. EIS operates on a reference system so national police can check whether information is available on a subject of interest (person or object).[323] Thus, the PSNI does not have direct access to the system but instead makes applications for records through national Europol offices in Manchester or Dublin.[324]

Retaining access to this information has also been acknowledged as a priority for the UK. In particular, it is seen as important for intelligence-led operations and strategy. Participation as a third country is possible through a strategic and operational agreement. However, some reduced capacity may be experienced.[325] For example, Norway cannot search the Europol database directly and all information must go through Europol's operational centre to ensure compliance with Europol rules.[326] Further, the preamble to Norway's Europol agreement acknowledged the close association of Norway to EU criminal justice cooperation through its participation in Schengen co-operation mechanism and the EEA; the UK does not participate in these measures. The USA also has a strategic and technical agreement with Europol without being a Schengen or EEA member, which perhaps indicates UK participation is possible.[327] However, it is unable to initiate operations or have direct access to information held in the EIS which would be a reduction in competence for the UK.[328] Even if full, direct access was granted EIS contains substantially less data and is utilised less frequently than SIS II which is more user-friendly, updated in real time and allows officers to set up alerts.[329] It would, therefore, be less than ideal if the UK was to retain access to EIS but not SIS II.

321 C Mortera-Martinez, 'Hard Brexit, soft data: How to keep Britain plugged into EU databases' *Centre for European Reform*, 23 June 2017 https://www.cer.eu/sites/default/files/insight_CMM_23.6.17.pdf

322 European Commission, Proposal for a Council Decision on the signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the European Union and the Swiss Confederation on the application of certain provisions of Council Decision 2008/615/JHA, 31 January 2019.

323 Policy Department for Citizens' Rights and Constitutional Affairs, 'The EU-UK relationship beyond Brexit: options for police cooperation and judicial cooperation in criminal matters' (2018) https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604975/IPOL_STU(2018)604975_EN.pdf

324 Interview with Justice and Security Expert, 9 April 2019.

325 S Hufnagel, ''Third Party' Status in EU Policing and Security – Comparing the Position of Norway with the UK before and after 'Brexit' 2016 3 *Nordisk Politiforskning* 165.

326 ibid.

327 ibid.

328 T Durrant, L Lloyd and M Thimont Jack, 'Negotiating Brexit: policing and criminal justice' (2018) *Institute for Government* https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_policing_criminal_justice_web.pdf

329 ibid.

> adequacy process because that's our baseline. I don't think it will be smooth sailing, I don't think it will be quick but that's a good starting point I think.[337]

However, prior to the GDPR, the CJEU did rule parts of UK data law under the Data Retention and Investigatory Powers Act (DRIPA) illegal and expressed suspicion of the UK's relationship with US intelligence services.[338] Therefore, implementation of the GDPR alone may not suffice:

> even in the context of GDPR applying across the board it doesn't mean that everyone is operating at the same levels so it can mean that data is being processed and stored to different degrees of satisfaction but all being inputted into these databases. And then, so this isn't specific to the data context at all really but I'm sure you have been spoken to previously about the fact that the UK did not opt-in to the EU's roadmap for strengthened procedural rights and I think that's something that sort of backlights all of this, I suppose moving forward and also obviously the position with respect of the Charter is another thing to be taken into account.[339]

Thus, the EU may require strong assurances about the UK's compatibility with EU standards and its handling and use of data, and potential acceptance of additional measures. The granting of an adequacy decision would also not end the UK's duties to the EU as the decision would be subject to periodic review and could be revoked if compatibly was not deemed sufficient.[340]

If an adequacy decision was taken and granted, a justice and security expert we interviewed outlined the possible improvement this could bring to privacy rights in the UK. They were, however, unsure how that would take place in practice:

> whether we go down the path of an adequacy decision or a separate treaty, I think that may be a route through which certainly the standards as they apply in the UK may be improved. To be honest, I don't really have a quick answer on how to improve the kind of EU level standards, I'm not sure whether that would kind of come out of a future security treaty with the UK.[341]

They outlined, for instance, that, depending on how the EU approaches the adequacy decision, there could be opportunity for some sort of remedy to human rights concerns with regards how UK data is currently used:

> [...] in particular the expansive surveillance regime that the UK currently operates is to a large measure possible as it falls into the national security exception and so is not subject to the same standards as other areas of data processing, storage and retention.[342]

Across the criminal justice sector, support for an adequacy decision was widespread. Our interviewees saw this as an important first step in maintaining access and protecting individual rights stating, for example:

> we are supportive of the fact that the UK has to get an adequacy decision. I think it is becoming more and more crucial, especially as the world becomes more digitised and criminal justice becomes more digitised as well. And sometimes it feels like the human rights law is trying to catch up with all of these new data sharing laws that are coming in.[343]

337 Interview with Justice and Security Expert, 15 February 2019.

338 C Mortera-Martinez, 'Hard Brexit, soft data: How to keep Britain plugged into EU databases' *Centre for European Reform*, 23 June 2017 https://www.cer.eu/sites/default/files/insight_CMM_23.6.17.pdf

339 Interview with Justice and Security Expert, 5 March 2019b.

340 A D Murray, 'Data transfers between the EU and UK post Brexit?' (2017) 7 *International Data Privacy Law* 149.

341 Interview with Justice and Security Expert, 5 March 2019(b).

342 Interview with Justice and Security Expert, 5 March 2019(b).

343 Interview with Justice and Security Expert, 13 March 2019.

However, it is possible to identify more cross-cutting human rights concerns that should be emphasised as new measures are negotiated.

Human Rights Concerns Relating to Information and Data Sharing

As mentioned, the ability of the UK to continue to participate in EU security and justice cooperation after exit remains unclear. EU Chief Negotiator, Michel Barnier has remained firm that the UK's future status as a third country will result in it no longer being able to participate in the measurements as it currently does, 'If you leave this "ecosystem", you lose the benefits of this cooperation. You are a third country because you have decided to be so. And you need to build a new relationship'.[344]

Human rights have been emphasised as a foundation to whatever the new arrangements for security and justice cooperation will be. EU negotiators have suggested:

> a number of safeguards pertaining to fundamental rights, data protection and dispute settlements. Both the fundamental rights safeguards, which denote that the UK must remain party to the ECHR, and the data protection safeguards, which require an Adequacy decision on UK data protection standards, should include provision for a so-called 'guillotine clause'. [...] this clause would be invoked should the UK have the adequacy decision declared invalid by the CJEU or should the UK leave the ECHR.[345]

From the European Commission's perspective, the range of potential factors that will determine the degree of cooperation available after exit are as follows:

- EU27 security interest;
- Shared threats and geographic proximity;
- Existence of common framework of obligations with third countries;
- Risk of upsetting relations with other countries;
- Respect for fundamental rights, essentially equivalent data protection standards; and
- Strength of enforcement and dispute settlement mechanisms.[346]

Even if the UK is successful in retaining the ability to share data with Member States, there is no guarantee that they would be willing to do so. Individual Member States retain the right to implement protections above and beyond the EU standards. Some states have recognised data protection as a constitutional right, for example, Ireland. This could result in reluctance from Irish authorities to enter into permanent arrangements giving the UK access to data.[347]

On a practical level, one area that has been identified as posing serious concern is the ability to conduct vetting of individuals working with children and vulnerable adults. A new arrangement to provide this information is not guaranteed. For such intrusive and special category data, providing authorities would want very high levels of assurance that the data would be handled appropriately.[348] Another

344 Michel Barnier, Speech on 18 June 2018 http://europa.eu/rapid/press-release_SPEECH-18-4213_en.htm

345 Policy Department for Citizens' Rights and Constitutional Affairs, 'The EU-UK relationship beyond Brexit: options for police cooperation and judicial cooperation in criminal matters' (2018) https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604975/IPOL_STU(2018)604975_EN.pdf Interview with Justice and Security Expert, 9 April 2019.

346 Policy Department for Citizens' Rights and Constitutional Affairs, 'The EU-UK relationship beyond Brexit: options for police cooperation and judicial cooperation in criminal matters' (2018) https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604975/IPOL_STU(2018)604975_EN.pdf

347 Interview with Justice and Security Expert, 9 April 2019.

348 ibid.

issue raised by this example, is the different level of protection provided by the ECHR and the Charter. Article 8 ECHR provides a right to respect for private and family life that has been developed in detail through ECtHR case law. Whereas Article 8 of the Charter contains much more specific provisions on the rectification of data, and prioritises data protection rights above a right to privacy. So if an EU Member State:

> shares data with us [the UK] that a person was convicted of a child sexual offence 20 years ago. That information would be automatically disclosable in the UK, but may not be in other EU countries [...] At the moment we get that data and can apply it in accordance with UK law but Article 8 does not allow that information to be shared with third countries.[349]

The difference in the specificity of protections under the ECHR 'becomes even more important moving forward in the absence of the Charter and the oversight of the EU', according to one security and justice expert we interviewed.[350] While receiving data adequate status from the EU would allow the EU27 to continue to share data with the UK, there is no guarantee states will choose to share their data. It will remain to be see whether the need to access UK data will provide the incentive to do so.

Summary

This chapter has detailed the significance of information and data sharing measures for justice and security cooperation between EU Member States. The importance of the UK retaining access to these measures has been illustrated by examining the specific functions of each database and analysing the operational implications for criminal justice practitioners and the victims, witnesses and accused/investigated persons in criminal cases. The potential disruption data protection standards could have for UK retained access were also considered and it was recommended that the UK continue to apply EU data protection standards in compliance with Article 8 of the Charter rather than relying on the lesser provisions of Article 8 ECHR.

The key concerns raised by our interviewees and analysis were an erosion of trust in terms of handling data and a reduced willingness to share information, time delays in terms of accessing data that is currently available instantaneously and the information that would prevent putting persons at risk being unavailable. Individually and combined, these issues could have implications for public safety and the protection of rights.

KEY RECOMMENDATIONS

As data sharing tools increasingly underpin cooperation in the areas of justice and security, it is strongly recommended that any future arrangement should aim to be as comprehensive as possible to avoid any reduction in capabilities and uphold public safety. That said, personal and sensitive data must be held and processed according to the highest standards so we recommend the UK retains the higher scope of protection provided for under Article 8 of the Charter and not rely solely on the most limited interpretation of data protection under Article 8 ECHR.

Further, this is an area of cooperation that involves the development of technology and has seen recent and has experienced advancement in terms of its capabilities in recent times. Thus, the UK should advocate for a position whereby it can keep pace with these advancements, particularly where human rights issues are being addressed and scrutinise any measures that do not prioritise human rights.

349 ibid.

350 Interview with Justice and Security Expert, 5 March 2019b.

8. Judicial Oversight

For many areas of justice and security cooperation within the EU, the Court of Justice of the European Union (CJEU or 'the Court') has provided the essential role of judicial oversight. This judicial oversight has been vital for protecting against EU law and fundamental rights infringements. This section provides an overview of the role of the CJEU, with a particular emphasis on the part it plays on justice and security matters. It then proceeds to provide reflections on the role of the Court in protecting human rights, with a focus on the context of the European Arrest Warrant. Finally, a discussion of the possible future scenarios is presented that includes recommendations regarding future judicial oversight for the post-Brexit justice and security arrangements.

The Court of Justice of the European Union

The Court of Justice of the European Union is the 'ultimate arbiter on matters of EU law, and alongside Member States' own courts and tribunals is charged with providing consistent interpretation and enforcement of EU law across Member States. The CJEU is tasked with ensuring that in the interpretation and application of the Treaties, the law is observed'.[351] Under the current arrangements, EU Member States (including the UK) are able to refer questions about the interpretation of EU law to the CJEU (preliminary references). The Court also has jurisdiction to hear disputes related to points of EU law. For example, this can take the form of infringement proceedings against a Member State for failing to comply with EU law. Further it has the ability to annul EU acts that are deemed to violate EU treaties or fundamental rights. The Court can also sanction EU institutions, requiring them to pay damages to individuals or companies.[352] It is important to highlight that in the realm of justice cooperation, the CJEU currently has jurisdiction over all '35 JHA measures which the UK chose to opt into in 2014, including Europol and the European Arrest Warrant'.[353]

Within the realm of policing and justice cooperation, oversight of the CJEU has been of primary importance. As discussed throughout this report, these mechanisms of cooperation are based on mutual recognition; a principle which is based on mutual trust. A key part of establishing this kind of trust (and thereby also enabling mutual recognition) is having an oversight body which acts to ensure that Member States are adhering to common legal principles and standards, including fundamental rights protections.[354] It is easy to imagine that without the checks and balances provided by the Court's oversight, establishing and maintaining this environment of mutual trust would be extremely difficult. The argument can thus be made that the CJEU is a key part of the mutual recognition principle underlying policing and justice cooperation in the EU.

The UK government has been clear in its intention to remove the jurisdiction of the CJEU in the UK.[355] This commitment has been part of the broader Brexit narrative regarding the UK 'taking back control'. When the CJEU jurisdiction would end depends on the outcome of the Brexit negotiations. If the UK exits the EU on the terms of the current draft Withdrawal Act, the UK would continue to remain

351 House of Lords European Union Committee, 'Brexit: Judicial Oversight of the European Arrest Warrant' (27 July 2018, 6th Report of session 2017-19, HL Paper 16), p 10.

352 https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en

353 UK in a Changing Europe 'Post-Brexit law enforcement cooperation: negotiations and future options' p 26, http://ukandeu.ac.uk/wp-content/uploads/2017/11/Post-Brexit-law-enforcement-cooperation-negotiations-and-future-options.pdf

354 A Erbežnik, 'Chapter 13: Mutual Recognition in EU Criminal Law and Fundamental Rights – The Necessity for a Sensitive Approach' in C Brière and A Weyembergh (eds) *The Needed Balances in EU Criminal Law* (London, Hart Publishing, 2017) p 211.

355 House of Lords European Union Committee, 'Brexit: Judicial Oversight of the European Arrest Warrant' (27 July 2018, 6th Report of session 2017-19, HL Paper 16) p 11.

under the jurisdiction of the Court for the duration of the transition period.[356] After this period, the jurisdiction of the Court will end. However, in the event of a 'no deal' Brexit, the jurisdiction of the Court would end immediately, as the legal foundation for its jurisdiction ceases to apply to the UK. In both of these scenarios, this means that:

> The supremacy of EU law ends at exit day as does any referral of any matters for decisions to the CJEU. After exit day, any court or tribunal including those in Scotland will not therefore be bound by or to any principles laid down or any decisions made on or after exit date with regards to EU law.[357]

A more nuanced position on supremacy is presented in the EU (Withdrawal) Act 2018 and the Draft Withdrawal Agreement. These interpretations can be found in sections 5, 7, and 8. By way of illustration, section 5 states:

> (1) the principle of supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day. (2) Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.[358]

Similarly, the Draft Withdrawal Agreement provides for the supremacy of the Draft Withdrawal Agreement and any EU law made applicable under its provisions in Article 4:

1. The provisions of this Agreement and the provisions of the Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.

2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions through domestic primary legislation.

3. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union Law.

4. The provision of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.

5. In the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period.[359]

There is broad consensus that the UK's current position on the removal of (future) oversight

356 Draft 'Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' as endorsed by leaders at a special meeting of the European Council on 25 November 2018 (hereafter: Draft Withdrawal Agreement), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

357 The Law Society of Scotland, Written Evidence 'Brexit: The Proposed UK-EU Security Treaty' (May 2018) p 8, available at https://www.lawscot.org.uk/media/360394/brexit-the-proposed-eu-uk-security-treaty-call-for-evidence.pdf.

358 European Union (Withdrawal) Act 2018, s 5(1)-(2).

359 Draft Withdrawal Agreement, art 4.

and adjudication by the CJEU will likely be a sticking point for the UK-EU security and justice arrangements.[360] A number of actors have warned the UK government of this. For example, the House of Lords European Union Committee published a report in 2017 that warned:

> We anticipate that even with the utmost goodwill on both sides, and a recognition of the mutual interests at stake, there may be practical constraints on how closely the UK and the EU 27 can work together in future if they are no longer bound by the same rules, enforced by the same supranational institutions. From the perspective of the EU-27, institutions such as the CJEU and the European Parliament – from which the UK would be seeking to remove itself – provide oversight and the checks and balances around many of the measures underpinning police and security cooperation.[361]

Protection of Human Rights

As discussed above, the CJEU has proven to be an important oversight mechanism for ensuring that EU measures developed since the Lisbon Treaty on areas of policing and justice cooperation are compliant with fundamental rights. As summarised by Anže Erbežnik, '[m]utual recognition is built on common trust. Such trust is the consequence of adherence to common legal principles and standards, especially as regards the rule of law and fundamental rights'.[362] Thus, in order to have functioning justice cooperation across the EU, ensuring common adherence to human rights standards is essential. As an oversight body, the CJEU has played a key role in this process by both assisting Member States with interpretation and also holding them to account when human rights standards are not being upheld. As an illustration of this, this section will explore in more depth the role of the CJEU in upholding fundamental rights in relation to the EAW.

EUROPEAN ARREST WARRANT

Over time, the Court has proven to be integral for ensuring that EAWs are proportionate and respectful of citizens' human rights. Since entering into operation in 2004, 'the practice of EAWs ... has resulted in serious concerns with regard to fundamental rights' protections'.[363] Much of the criticism regarded the way in which EAWs favoured 'enforcement demands at the expense of individual rights'.[364] The CJEU has ruled on a number of human rights concerns covering various aspects of the EAW. Some of these cases are highlighted in Section 4, but generally, the rulings have surrounded the violations of Article 4, 6 and 49 rights of individuals subjected to EAWs. According to a report prepared by the House of Lords European Union Committee, this occurred through the following procedure: '[i]n 2009, given the expansion of the CJEU's jurisdiction into Justice and Home Affairs matters including the EAW, the preliminary ruling procedure was reformed to include an expedited process for cases involving persons in custody'.[365]

It has been argued that the history of CJEU rulings in relation to the operation of the EAW can be split

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360 European Union Committee, 'Brexit: Future UK-EU Security and Police Cooperation' House of Lords (7th Report: Session 2016-2017, HL Paper 77) p 2-3.

361 ibid, para 31.

362 A Erbežnik, 'Chapter 13: Mutual Recognition in EU Criminal Law and Fundamental Rights – The Necessity for a Sensitive Approach' in C Brière and A Weyembergh (eds) *The Needed Balances in EU Criminal Law* (London, Hart Publishing, 2017) p 211.

363 L Mancano, 'A New Hope? The Court of Justice Restores the Balance between Fundamental Rights Protections and Enforcement Demands in the European Arrest Warrant System' in C Brière and A Weyembergh (eds) *The Needed Balances in EU Criminal Law* (London, Hart Publishing, 2017) p 286.

364 ibid.

365 House of Lords European Union Committee, 'Brexit: Judicial Oversight of the European Arrest Warrant' (27 July 2018, 6th Report of session 2017-19) HL Paper 16. Page: 10.

into two periods.[366] The earlier period was characterised by the Court's prioritisation of enforcement over fundamental rights protections; with the latter period regarded as 'progressive refinement', providing better balance between enforcement demands and individual rights.[367] According to Leandro Mancano, in the second phase:

> the CJEU was confronted with crucial aspects of the EAW mechanism: time-limits for the execution and right to be released (*Jeremy* and *Lanigan*); detention conditions and possibility to refuse the EAW execution (*Aranyosi* and *Căldăraru*); the concept of deprivation of liberty (*JZ*); summons and trial in absentia (*Dworzecki*); the relationship between national arrest warrant and EAW (*Bob-Dogi*); the issue of EAW's and non-judicial authority (*Poltorak*, *Kovalkovas*, *Özçelik*).

It was in these cases listed above that the 'progressive refinement' is evident. We can highlight two examples here of the evolving progressive nature of the CJEU's rulings in these EAW cases. First, in *Lanigan*, it was held that the EAW must be interpreted in light of the Charter. Second, in *Căldăraru*, the Court took human rights protections further by stating that EAWs could be postponed or abandoned if a risk of fundamental rights violations was established. In subsequent cases, the Court has continued to apply these interpretations. While still in the early stages, there now seems to be a tendency that fundamental rights are being increasingly prioritised in EAW cases.

Possible Future Scenarios

As the UK has made it clear that it does not plan to remain subject to the jurisdiction of the CJEU, one of the key issues to be resolved in the Brexit negotiations, both more generally but also specifically in relation to justice issues, is how disputes are going to be resolved. If, through a policing and security agreement, the UK secures access to EU mechanisms, some kind of oversight mechanism will be required. According to Joanne Dawson, '[i]t 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'.[368] But concerns have been raised about relying on arbitration rather than judicial dispute resolution. Arbitration 'procedure is not transparent, there may be difficulties with enforcement, and arbitration does not give rise to a body of case law'.[369] While arbitration might be a suitable mechanism in the resolution of disputes between two equal parties in a contractual relationship, such mechanisms are incompatible with individual rights protection. To ensure rights protection and equality in the areas of justice and security a consistent development and application of the law is pivotal. Equality before the law can only be ensured if an independent and impartial body is tasked with the oversight of the application of the law.

Specifically, in the context of EU tools that the UK is likely going to be seeking access to, such as enforcing criminal judgments, a court is ultimately the only suitable type of oversight available.[370] It is likely that the EU will require the Court's jurisdiction to continue UK participation. This was confirmed by one of the justice and security experts interviewed for the project:

366 L Mancano, 'A New Hope? The Court of Justice Restores the Balance between Fundamental Rights Protections and Enforcement Demands in the European Arrest Warrant System' in C Brière and A Weyembergh (eds) *The Needed Balances in EU Criminal Law* (London, Hart Publishing, 2017) p 286.

367 ibid.

368 J Dawson, 'Brexit: Implications for policing and criminal justice cooperation' (Briefing Paper number 7650, 24 February 2017) House of Commons Library, p 17.

369 House of Lords European Union Committee, 'Brexit: Judicial Oversight of the European Arrest Warrant' (27 July 2018, 6th Report of session 2017-19, HL Paper 16) p 14-15.

370 ibid, p 15.

> … [the UK] are not going to be subjecting themselves to the CJEU's oversight in relation to privacy and all of that, I mean that's the place doing all the work on it so if they won't make themselves accountable why on earth are anyone going to let them participate in any of these mechanisms? … So there isn't an answer, there won't be oversight and accountability and why should anyone give us access to stuff without it.[371]

As the Court has proven to be essential for ensuring the protection of fundamental rights, we strongly advocate that its jurisdiction is retained for any future justice and security arrangement between the UK and EU. This is the best avenue to ensure consistency of the law as a key feature to safeguard equality. The CJEU is and will remain the ultimate oversight mechanism within the EU, any measures that the UK is seeking access to will hence need to be applied in light of the CJEU's case law.

If full CJEU oversight is not required, then it is likely that the EU will impose an obligation to create some kind of mechanism for ensuring that the UK is bound by relevant CJEU case law. Therefore, if the future justice arrangement between the UK and EU is aimed at continuing participation in EU measures, 'the relevant judgements 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'.[372] We can look to Article 37 of the Norway/Iceland Agreement on Surrender Procedures for an example of this:

> The Contracting Parties, in order to achieve the objective of arriving at as uniform an application and interpretation as possible of the provisions of this Agreement, shall keep under constant review the development of the case law of the Court of Justice of the European Communities, as well as the development of the case law of the competent courts of Iceland and Norway relating to these provisions and to those of similar surrender instruments. To this end a mechanism shall be set up to ensure mutual transmission of such case law.[373]

However, the EU legal system is autonomous and stringently protected by the CJEU. The principle of autonomy has in the past prevented the establishment of common institutions with third-countries in order to protect the EU's decision-making ability.[374] Examples include the plans for an 'EEA Court'[375] and the accession of the EU to the ECHR and the ECtHR.[376] Thus, regardless of the preferences of factions of the UK Parliament any additional mechanism will rely on the approval from the CJEU that the autonomy of the EU legal system will not be detrimentally affected. This issue will be imperative in negotiations on the future relationship and may not be resolved speedily.

Finally, it is very likely that the UK will continue to be subject to the CJEU in its cooperation with EU partners. This is because EU Member States and EU agencies are bound by EU law in all of their external behaviour, including that with non-EU members. Thus, even where the UK is cooperating with EU Member States on a bilateral basis or is a third country member to its institutions, the CJEU will have jurisdiction to enforce, for example, the provisions found in the Charter of Fundamental

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371 Interview with Justice and Security Expert, 14 February 2019.

372 J Dawson, 'Brexit: Implications for policing and criminal justice cooperation' (Briefing Paper number 7650, 24 February 2017) House of Commons Library, p 17.

373 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 2006, OJ L 292, 21/10/2006, p. 0002 - 0019.

374 J Larik, 'EU external relations law and Brexit: 'When pluto was a planet'' (Forthcoming) *Europe and the World*.

375 Opinions 1/91 (EEA) [1991], ECLI:EU:C:1991:490. The amended EEA Agreement with an EFTA Court, which would not have jurisdiction over the EU or its Member States was deemed compatible with EU law by the CJU, Opinion 1/92 (EEA II) [1992] ECLI:EU:C:1992:189.

376 Opinions 2/94 (ECHR) [1996] ECLI:EU:C:1996:140 and Opinion 2/13 (ECHR II) [2014] ECLI:EU:C:2014:2454. See further Tobias Lock, 'The Future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?' (2015) 11 *European Constitutional Law Review* 239.

Rights.[377] The House of Lords EU Select Committee has also emphasised this, '[w]e also observe that any international treaty underpinning future cooperation between the UK and EU in this area would in principle remain open to interpretation by the CJEU, as the CJEU has jurisdiction to interpret the treaties that the EU signs with third countries'.[378] All this begs the question why the UK would aim to establish a separate judicial oversight body that would need to align its findings with the jurisprudence of the CJEU, if it could pragmatically resolve the problem by retaining the jurisdiction of the CJEU.

Summary

As the ultimate arbiter on matters of EU law, the Court of Justice of the European Union has proven to play a key role in providing oversight to justice and security cooperation measures. The checks and balances provided by the Court reinforce the environment of mutual trust among Member States, thereby helping to improve cooperation. The CJEU has also demonstrated to be integral to the protection of human rights in the area of justice and security. The EAW provides an illustration as to how the Court has increasingly attempted to ensure that extradition is both proportionate and respectful of citizen's human rights. As discussed in Section 4, without an explicit human rights bar to extradition, the Court has been integral for introducing human rights concerns into the execution of EAWs.

The UK government has taken a strong (but nuanced) stance in relation to removing the Court's jurisdiction once it leaves the EU. We have problematised this position, for a number of reasons. Without some kind of judicial oversight body, it is unlikely the EU will be agreeable to the conclusion of justice and security arrangements. Suggestions have been made that an independent arbitration body could suffice, but we strongly contend that this would provide inadequate protection for individual citizens and human rights. The only suitable form of oversight is an independent judicial oversight body, such as the CJEU or the creation of a comparable court.[379]

KEY RECOMMENDATIONS

The UK should retain access to the Court of Justice of the European Union (CJEU). If the government does not remain under the jurisdiction of the CJEU, new independent judicial oversight with adjudicative powers should be created to ensure effective protection and enforceability of human rights. Because of the interconnectedness of EU measures in the area of justice and security, it is strongly recommended that any future arrangement should aim to be as comprehensive as possible and cover judicial and police cooperation as well as any data sharing arrangements. An essential part of this is providing independent judicial oversight for this web of arrangements.

377 V Mitsilegas, 'The Uneasy Relationship between the UK and European Criminal Law: From opt-outs to Brexit?' (2016) 8 *Criminal Law Review* 536-537.

378 European Union Committee, 'Brexit: Future UK-EU Security and Police Cooperation' House of Lords (7th Report: Session 2016-2017, HL Paper 77) para 32.

379 For more on this discussion, see Section 10.

9. Overarching Themes and Concerns

A number of overarching themes emerged throughout our research. These have been examined within previous chapters and are important to consider in the broader context of the UK's withdrawal from the EU. The interconnectedness of EU measures and the importance of effective human rights protection in this context are two of the key themes we wish to emphasise. While the debate surrounding post-Brexit justice and security tools is often reduced to the importance of the European Arrest Warrant, it is the sum of the different EU measures that makes the system as effective as it is. At the same time, the web of measures in place requires a robust system of human rights protection across all countries involved. Additionally, interviewees expressed concerns about the impact of any delay to and uncertainty about future arrangements. While the impact of uncertainty on the business community has been widely discussed, the impact on public safety and community confidence has attracted very little consideration. For those reasons, these overarching issues are explored in more detail in this chapter.

Interconnectedness of EU Measures

One of the main themes that emerged throughout our research is how interconnected the EU justice and security measures are. It is helpful to think of EU justice and security measures as a web. It showcases that the areas of judicial cooperation, law enforcement, police cooperation and security measures are distinct and yet intertwined. Justice and law enforcement serve the rule of law and are (ideally) designed to contribute to the security of the people affected. Equally, police cooperation is important as a security measure but also important for the investigation of crime. Yet cooperation also feeds into a justice process that is a key value in itself and operates beyond the security aspect of crime prevention. This web of measures has been developed in response to the free movement of people and goods as key features of the European Union. Yet, their importance remains even when the freedom of movement for peoples and goods might end. Trade, and with it the flow of goods, will continue; and people will continue to travel across borders. Information and communications technologies are now central to the way we interact, both socially and commercially. The new dimension of cyberspace widens the scope of security threats and potential for crime regardless of Brexit. It emphasises the urgency for harmonisation and cooperation, legally as well as operationally, between states and the demand for regional capacity-building to tackle such threats.[380]

Many of the EU measures in the area of justice and security cooperation that have been discussed above are interconnected and interact with each other in ways that have not been appreciated or fleshed out in many of the mainstream Brexit conversations. In what follows, the interconnectedness of measures across all five areas contained in the report will be teased out. Information and data sharing arrangements have been identified as featuring prominently throughout judicial and policing cooperation and should not be underestimated in the negotiation of future justice arrangements.

JUDICIAL COOPERATION

Judicial cooperation is designed to ensure that administrative and legal issues are resolved quickly. These measures are not only limited to criminal law but extend to civil justice matters, where relevant. As outlined above, mutual recognition is the principle that underpins the entire system of judicial

380 J Clough, 'A World of Difference: The Budapest Convention on Cybercrime and the Challenges of Harmonisation', (2014) 40 *Monash University Law Review* 698, 699. The most important legal framework that addresses cybercrime is the Council of Europe Convention on Cybercrime, which, it should be noted, is not an EU instrument but an international convention.

cooperation.[381] It expresses mutual trust in the judicial systems of other EU countries. Based on this principle, types of judicial cooperation include measures such as sending documents from one country to another, mutual legal assistance and extradition most prominently through the EAW, the taking of evidence in another EU country for example through the EIO, detention and transfer of prisoners, confiscation and freezing of assets, and the payment of fines. These types of cooperation are supported through the networks and bodies supporting judicial cooperation such as Eurojust and the European Judicial Network. The tools of judicial cooperation are the European e-Justice Portal and the European Criminal Records Information System (ECRIS).[382] This list of measures shows that the EU system has an unprecedented dimension of cooperation. It leaves traditional avenues of mutual legal assistance behind through the EAW and EIO, which are effective in multiple jurisdictions simultaneously. When combined with the direct networks and bodies for cooperation, this provides a special quality to judicial cooperation in the EU. In interviews, this special quality is, for example, reflected in concerns about delays in the justice process after Brexit and a return to more bureaucratic policing structures.[383]

This quality, however, is provided through the sum rather than one stand-alone measure. In the Brexit discourse, the perception has often been narrowed down to the European Arrest Warrant. The importance of the interplay of different measures is well summed up by Helen Malcolm QC who addressed this issue when she provided evidence on behalf of Bar Council to the House of Lords EU Home Affairs Sub-Committee. When asked for her views on what should make up the UK's Brexit priorities in the area of justice, she highlighted the interconnectedness of the measures, asserting that they can therefore not be considered individually:

> 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.[384]

A system based on mutual recognition required in its development minimum procedural standards[385] to ensure that standards of rights protection and procedure would not be undermined. This resulted in the 2009 Stockholm programme and roadmap.[386] Trust, however, requires common minimum rules to approximate criminal law standards and allow reliance on each other's rules-based systems. Particularly within the last decade, a set of rules have therefore evolved to ensure some minimum standards for the protection of individual rights for suspects and accused but also for victims of crimes. Not least because

381 Council of the European Union, *Presidency Conclusions, Tampere European Council*, 16 October 1999, http://www.europarl.europa.eu/summits/tam_en.htm

382 For the overview and further links see https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation_en

383 See Section 5.

384 J Dawson, 'Brexit: Implications for policing and criminal justice cooperation' (Briefing Paper number 7650, 24 February 2017) House of Commons Library, p 22.

385 Communication from the Commission to the Council and the European Parliament of 10 May 2005, 'The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice' [COM (2005) 184 final] OJ C 236 of 24.9.2005.

386 The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115 of 4.5.2010.

of the pressure of civil society groups, directives on issues such as translation and interpretation,[387] the right to information in the legal process,[388] access to a lawyer and legal aid,[389] and the presumption of innocence and the right to silence[390] have been issued.

As previously noted, together with Denmark, the UK and Ireland currently have special status in having negotiated opt-in/out possibilities into measures on justice and security. For that reason, to date, not all measures apply equally to all states. The European Protection Order, currently effective in Northern Ireland but not in the Republic of Ireland, is a good example that demonstrates the impact of a fragmented regime and the loss of protection in the day-to-day life of Europe's citizens.[391] The willingness of EU states to accommodate such opt-in/out arrangements evidence the privileged position currently held by the UK and the level of trust that other member states were willing to invest in the UK system.

POLICE COOPERATION

The main instrument for police cooperation is the European Police Office (Europol), which is described as 'a central plank of the broader European internal security architecture';[392] or, to use the more dynamic metaphor employed in this report, is a key point in the web of measures. It hosts experts from the different Member States and has a coordinating and service function to support Member States in Union-wide crime prevention, analyses and investigations.[393] It formalises police cooperation and provides an additional, important layer to the previously informal police arrangements on the island of Ireland. Europol also hosts specific expert teams such as the Joint Cybercrime Action Taskforce (J-CAT), which was launched to strengthen the fight against cybercrime in the European Union and beyond; it is located within the European Cybercrime Centre at Europol. The J-CAT coordinates international investigations into issues such as underground forums and malware, including banking Trojans. Beyond those specialised functions, Europol serves as an information hub for the Member States, including criminal intelligence. It can alert States to information relevant to them and can, among other tasks, organise, implement and participate in joint investigation teams. These Joint Investigation Teams (JITs), comprising investigators from different Member States, are set up for a fixed period to investigate specific cases.[394] Although the JIT's and Europol are distinct in functions and legal basis, they are strongly interconnected. Often Europol's information will provide the big picture that enables JIT's to effectively investigate serious cross-border criminal cases.

POLICING COOPERATION AND JUDICIAL COOPERATION

Another strand of interconnectivity is that between police cooperation and judicial cooperation. Many investigative measures require judicial decisions – although this may vary at the domestic level – such as issuing a search warrant. For cross-border investigation to work effectively, the measures outlined above as part of judicial cooperation (such as the European Investigation Order) or the exchange on

387 Directive (EU) 2010/64 on the right to interpretation and translation in criminal proceedings.

388 Directive (EU) 2012/13 on the right to information in criminal proceedings (the so-called 'letter of rights').

389 Directive (EU) 2013/48 on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest; Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings, and for requested persons in European arrest warrant proceedings.

390 Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

391 See Section 5 for the details.

392 See http://www.europarl.europa.eu/factsheets/en/sheet/156/police-cooperation

393 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, L135/53 OJ, 24 May 2016, para 4.

394 Council Framework Decision 2002/465/JHA on joint investigation teams

data of previous convictions for background checks (ECRIS) are inevitable. Therefore, Europol and Eurojust (Europol coordinating police activity, Eurojust providing a network and coordination of judicial activities) are required to liaise and cooperate with one another to connect and enable the different activities.[395]

The mechanisms operational in the database on DNA and fingerprints (Prüm) also illustrates how interconnected police and judicial cooperation are because it integrates mutual legal assistance. The Prüm system provides automated access for investigators to finger print and DNA data from across the Member States. It is divided in two steps: Step 1 involves the provisions as stipulated in the Prüm Decision pertaining to the automatic exchange of information relating to DNA, fingerprints and VRD, and is followed-up by mutual assistance procedures (MAP) or Mutual Legal Assistance (MLA) requests:

> In the case of data from national DNA analysis files and automated dactyloscopic identification systems, a hit/no hit system should enable the searching Member State, in a second step, to request specific related personal data from the Member State administering the file and, where necessary, to request further information through mutual assistance procedures, including those adopted pursuant to Framework Decision 2006/960/JHA.[396]

The House of Lords EU Committee have highlighted yet another example of the interconnectedness between different measures and instruments from across the areas of policing and judicial cooperation:

> Both the NCA and the NPCC [National Police Chief's Council] also drew our attention to the link between SIS II and the EAW. SIS II was said to have increased exponentially the number of EAWs for subjects wanted in the UK, leading to a 25% increase in the number of EAWs executed and people arrested in the year since it became available.[397]

The process as to how this increase occurred was explained by Alison Saunders, then Director of Public Prosecutions. In cases where the Crown Prosecution Service 'did not really know exactly which country an individual was in, SIS II enabled them to put out an EAW, find somebody and bring them back very quickly'.[398] The SIS II database can provide information that police intelligence may not otherwise have had access to, that can, for example, help to track down a suspect.

A statement by Baroness Williams of Trafford, the Minister of State (Home Office), outlines how the effectivity of different measures is enhanced through the connection between them. This is specifically true for databases. She explained to the House of Commons in June 2018, at a time when the Brexit process was in full swing, the Government's decision to opt-in to a framework for the interoperability between different EU information systems:

> The Proposal will allow law enforcement and border guards to search all the relevant databases with a single query and will link together matching biometric information. It will also create links between related records and will alert officials when potential multiple identities have been found. It covers three existing databases (Schengen Information System II, Visa Information System, EURODAC) and 3 planned databases (European Travel Information and Authorisation System, Entry Exit System, European Criminal Records Information System-

395 Art 4 (1)(c)((ii) of Regulation (EU) 2016/794.

396 Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, L 210/1 OJ of the European Union, 6 August 2008, para 10.

397 European Union Committee, 'Brexit: Future UK-EU Security and Police Cooperation' House of Lords (7th Report: Session 2016-2017, HL Paper 77) para 32.

398 European Union Committee, 'Brexit: Future UK-EU Security and Police Cooperation' House of Lords (7th Report: Session 2016-2017, HL Paper 77) para 91.

> Third Country Nationals). The UK participates in SIS II, EURODAC and ECRIS-TCN. The intended aim of the work is to prevent incorrect or fragmented data amongst JHA databases and improve their efficiency and usage by law enforcement. This should prevent identity fraud and reduce inconveniences to honest travellers due to errors or similarities in biographical information. This will have benefits for UK policing being able to identity third country nationals who are victims, witnesses or suspects to crimes and terrorist incidents. It will also improve the quality and scope of data available to asylum officials. The Government supports the aims of this work and has made this decision to maximise the benefits to the UK from access to these databases.[399]

The interconnectedness is of key importance to ensure the full effectiveness of the different measures. The overarching purpose is the creation of an internal area of freedom, security and justice. The legal foundation for this is article 3(2) of the TEU:

> The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.[400]

CONSEQUENCES FOR ANY FUTURE ARRANGEMENTS

The current arrangement for the UK of opting in to a range of judicial cooperation measures indicates its interest in the participation of EU measures and close cooperation in the areas of justice and security. As previously noted, after the UK Government had notified the Council of Ministers in 2013 that it was going to exercise a block opt-out from the pre-Lisbon police and criminal justice measures, the UK later re-joined thirty-five of those same measures from 1 December 2014 to ensure their seamless application.[401] Even after the Brexit vote, the UK Government continued to opt in to new regulations.[402] It is therefore crucial that any future arrangement should aim to be as all-inclusive as possible and cover judicial and police cooperation as well as any data sharing arrangements. Having said that, an all-inclusive approach must encompass a strong commitment to the protection of individual rights. The foundation of mutual trust in the legal process is only justified if the legal processes encompass a commitment to the rule of law, the protection of human rights and, as part of this, a commitment to data protection.

Nevertheless, it must be made clear that even if a future arrangement can be achieved, the UK will lose out. The Area of Freedom, Security and Justice is dynamic and still evolving in EU legislation. As a key point, the UK will not be represented in the European Parliament. Through the Treaty of Lisbon, the European Parliament gained key competencies regarding the monitoring and the evaluation of criminal law cooperation measures.[403] Democratic oversight will be lost from a UK perspective.

Interconnectedness and Human Rights

One of the justice and security experts interviewed for this project argued that the 'web' of justice and

399 Baroness Williams of Trafford, Statement to the House of Commons, HLWS711, 5 June 2018, https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2018-06-05/HLWS711/

400 Article 3(2) of the TEU.

401 The Lisbon Treaty communitarised the field of criminal justice cooperation as of 1 December 2014. Article 10 of Protocol 36 to the Treaty gave the UK the possibility of a 'block op-out' from all pre-Lisbon measures.

402 E.g. 2017 on mutual recognition of freezing and confiscation orders.

403 Articles 70 and 85 TFEU.

security measures was designed with human rights in mind.[404] This person stated that, because all European measures have to be compatible with European human rights standards (both the ECHR and the Charter), whenever gaps in human rights protections are discovered, efforts must be (and have been) made to address them. Thus, like the metaphor of a web of justice and security measures, one can also think about an underlying web of protection existing through European human rights law and enforcement bodies.[405] This person argued, that not only does this assist with ensuring human rights protections exist, but it is also important because everyone working in this field is aware of what the standards are 'with these [EU] mechanisms, those legal standards which are agreed across Europe and have human rights arrangements running through them, you know we all know what the rules are now'.[406]

Looking forward, human rights must be a central element of future arrangements with the EU. The EU will likely require UK compliance with human rights standards in order to access many of the mechanisms discussed throughout.[407] For example, Member States are unlikely to extradite their nationals to a country in which their human rights protections are not on par with those provided throughout the EU. As one justice and security expert commented, 'human rights being something which is the basis on which both the UK and the EU should approach the negotiations and that cuts right across everything'.[408]

Furthermore, it should be emphasised that the UK will be reliant on the relationships it has built with Member States in order to successfully negotiate post-Brexit access to EU justice and security measures. The balance of power within the negotiations is not in the UK's favour. Due to the prominence of human rights protections in the EU system, this is likely to become a sticking point. As argued by one interviewee, '[g]oodwill will be eroded if we do not show commitment to human rights and why on earth shouldn't it be, you know, it should be eroded'.[409]

In line with this, we are concerned about the diminishing protections of human rights due to the removal of the Charter within the UK. We recommend that the UK government retain the Charter. One of the strongest arguments for retention relates to diminishing privacy protections for UK citizens. As discussed in Section 7, Article 8 of the ECHR does not provide the same level of protection of privacy as Article 8 of the Charter.

Additionally, human rights protection through the ECHR is under pressure. It has become public knowledge that, after Brexit, Theresa May proposes removing the Human Rights Act 1998, replacing it with a British Bill of Rights.[410] Additionally, the threat of withdrawing from the ECHR altogether – which is currently implemented into UK Law through the Human Rights Act 1998 – is lingering in the background. Remarkably, the Conservatives only committed to remaining signatories to the ECHR for the duration of the next parliament.[411] Accordingly, the Lords 'Rights after Brexit' inquiry raised concerns about the diluting of the human rights protections in the Political Declaration from 'reaffirmation of the UK's commitment to the European Convention on Human Rights,' to

404 Interview with Justice and Security Expert, 14 February 2019.

405 ibid.

406 ibid.

407 Interview with Justice and Security Expert, 4 March 2019.

408 ibid.

409 ibid.

410 R Merrick 'Theresa May to consider axeing Human Rights Act after Brexit, Minister reveals' *The Independent*, 18 February 2019, https://www.independent.co.uk/news/uk/politics/theresa-may-human-rights-act-repeal-brexit-echr-commons-parliament-conservatives-a8734886.html

411 The Conservative and Unionist Party Manifesto 2017, p 37, available at https://www.conservatives.com/manifesto

a more diluted 'respect the framework of the ECHR'.[412] In January 2019, the Secretary of State for Justice David Gaulke responded to a question from the Lords EU Justice Committee stating that it is the government's intention to revisit the Human Rights Act once the process of exiting the EU is complete.[413] The Lords European Union Committee has acknowledged that the proposals by the Secretary of State are much less ambitious than those contained in the Conservative party manifesto.[414] These announcements make clear that the protection afforded through the ECHR cannot be taken for granted. Revoking the Human Rights Act would be a first step to make ECHR protection less effective and the threat of complete withdrawal remains.

In the context of continued access to EU justice and security tools, it is unlikely that this would be well-received by Member States. Many of these points were summed up by one of the justice and security experts interviewed for the project, who stated:

> Any change to our membership of the ECHR or to the HRA is something we have campaigned against for a really long time. We are strongly of the view that there can be no question of any tinkering with the HRA in the current political climate. We are in favour of more progressive rights protection than that in the HRA but at this moment the risk that amending the Act would result in rights regression is too great. I am of the view that recent Government comments about the ECHR are more indicative of a reversion to the status quo rather than constituting a new threat however looking forward it does raise fresh concerns due to the loss of the Charter. For example, while Article 8 ECHR does not offer the same level of specificity with regards to data protection as Article 8 CFR, the protection it can offer is nevertheless all the more important in a landscape without the Charter and the oversight of the CJEU.[415]

We are also concerned about the enforceability of human rights with the removal of the jurisdiction of the CJEU. One of most pertinent concerns here relates to the protection of rights in relation to extradition arrangements. The CJEU[416] has been responsible for ensuring that human rights are increasingly being taken into consideration within the processes of the EAW. Without external judicial oversight, the EU is unlikely to conclude any extradition arrangement similar to the EAW arrangements.

Delay and Uncertainty

An additional theme illustrated across the report is concern about the impact of delay. This manifests in a number of ways. First, the impact delay could have on requested persons as well as on victims and witnesses of crime. Second, the impact of delay on the operational capabilities of criminal justice agencies conducting their duties. Third, the impact delay could have on the efficiency of the criminal justice systems.

In terms of the impact on requested persons, victims and witnesses, interviewees were keen to emphasise that a whole range of individuals encounter the criminal justice system. As one interviewee stated:

> people who encounter the criminal justice system come in all sorts of shapes and sizes and we

412 See https://www.parliament.uk/business/lords/media-centre/house-of-lords-media-notices/2019/march-2019/leading-human-rights-experts-to-give-evidence-on-rights-after-brexit-/

413 House of Lords, 'The Human Rights Act is not safe after Brexit', 18 January 2019, https://www.parliament.uk/business/lords/media-centre/house-of-lords-media-notices/2019/january-2019/human-rights-act-is-not-safe-after-brexit/

414 See https://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/CWM/LBtoDG-ECHR-PoliticalDeclaration191218.pdf/

415 Interview with Justice and Security Expert, 5 March 2019(a).

416 C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, Judgment of 5 April 2016; C-220/18 PPU *ML*, Judgment of 25 July 2018; C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, Judgment of 25 July 2018.

> know for sure that many people who encounter the criminal justice system are innocent and they are entitled to a presumption of innocence. It is important that there are protections for data, it is a question of the proportionality of those protections in terms of what we are trying to achieve.[417]

This corresponded with statements from other participants who emphasised the broad spectrum of activities that the criminal justice system engages with - not limited to the detection and prosecution of crime:

> A significant element of our work increasingly relates to protection from and prevention of harm rather than solely traditional provisions re detection and prosecution. Concerns for individual's safety, missing persons, mental health related vulnerability are ever increasingly significant issues for policing.[418]

Thus, the impact of additional delays and uncertainty could provide stressors that result in criminal activity and/or other encounters with the criminal justice system. As an interviewee stated, 'from a human rights perspective, any delay in proceedings could have an impact on the requested person and on victims and witnesses'.[419]

From the more clinical perspective of operational capability and efficiency, criminal justice processes are already time-consuming procedures. EU mechanisms improve access to data and facilitate efficiency through measures such as request response timeframes and 'it is not desirable to build any further delay into a system that you had tools that were a more efficient way of doing things'.[420] Loss of capabilities, temporarily or long-term, would provide challenges for criminal justice agencies, a fact recognised by our interviewees:

> There are assumptions associated that any change process will have positives and negatives and it is up to us to ensure that if we have protocols and processes identified, to use those tools so that officers and staff operate to the best of their ability so there are training programmes, there is information, there are communications. All of the typical processes you would expect. but also associated with that we do know that some of the options that are being considered have potential costs, additional costs, additional timelines, additional bureaucracy, additional administration but that is up to us to do. The big focus for us is that energy to make this work because that seamless aspect of it is critical for us because, as I say, that is our day-to-day business compared to colleagues that are maybe in other parts of GB.[421]

However, a real-time impact also exists which should be considered:

> Something that also plays into that is trial readiness and people spending huge amounts of time in pre-trial detention abroad, that's a really big human rights concern and to hold people in a foreign country, in a prison, when they have actually not been convicted of a crime is big worry for us.[422]

Additionally, the impact of political delay cannot be ignored. The majority of justice and security experts we interviewed expressed wariness about the preparedness of the withdrawal process and the subsequent effect this could have on human rights. For example, one interviewee impressed that, 'I

417 Interview with Justice and Security Expert, 4 March 2019.

418 Interview with Justice and Security Expert, 9 April 2019.

419 Interview with justice and Security Expert, 15 February 2019.

420 Interview with Justice and Security Expert, 5 March 2019(b).

421 Interview with Justice and Security Expert, 9 April 2019.

422 Interview with Justice and Security Expert, 13 March 2019.

can't give you an off the shelf answer that there is going to be complete coverage for everything because at the moment that's just not clear for no deal'.[423] Another highlighted the potential of tight turnaround times to detract focus from human rights provisions and safeguards:

> I guess another concern is actually the timeline and whether it is deal or no-deal. The message we have received is that these negotiations [future relationship] are already kicking off and they will be happening regardless of whether we get deal or no-deal. It just means that if we get a withdrawal deal, it will be the two-year transition period and it will be a much longer time to negotiate these things and that will also mean civil society will have more time to negotiate these things and more of an ability to contribute to it. If there is no-deal, what we understand is that actually we may revert back to the 1957 Convention but that will be temporary until another deal is negotiated and I think that will be a priority and we are concerned about what that timeline would be and whether there will be any input from civil society at all, or academics. So I think that's another concern we have is that it is just going to be this fast-track process and we are a bit worried that if that happens we are not going to get adequate time to contribute.[424]

With public opinion already expressing fatigue and dissatisfaction with the process, another key concern identified was a reduction in public confidence as a consequence of added delay and uncertainty.

Public Safety and Community Confidence

We have also highlighted that delay and confusion in the criminal justice system can result in a reduction in public confidence that could have serious ramifications if persons feel compelled to demonstrate that dissatisfaction through engagement in criminal activity. What comes across is that while potential threats to public safety have been raised, both through potential diminished public confidence but also due to a possible loss of capabilities by justice partners, a longer-term, subtler legitimacy issue also arises. It has been identified that:

> The impact is not just on tackling individual lines of criminality but you can really link that to community confidence and that's really a B/GFA benefit. So community confidence, policing for the community, using these tools to tackle criminality, the numbers don't really matter would be my open shot on that.[425]

This was further emphasised as part of the wider role that the criminal justice system performs in society:

> Operational officers will tell you that actually a significant part of their job is not what may be deemed "traditional policing" encompassing law and order. Much of their work is around mental health, missing people, that is concerns for safety, that is people who have got mental health issues that need help. With the austerity that we have got, with the various different other departments, certainly from a policing perspective, it is documented, about taking people to hospital that should be going in ambulances that just aren't there, about signposting through mental health provisions.[426]

Similarly:

423 Interview with Justice and Security Expert, 15 February 2019.
424 Interview with Justice and Security Expert, 13 March 2019.
425 Interview with Justice and Security Expert, 15 February 2019.
426 Interview with Justice and Security Expert, 9 April 2019.

> if overall it [Brexit] contributes to a change in their confidence level in society or their quality of life, you know we see those differences and that adjustment playing out in their lives. Sometimes through criminality, sometimes just through that changing in individual or community sentiment, certainly for mental health so that overall indicator of how the person's enjoyment of a decent quality of life is affected. [...] Not all of those are within the sphere and control of policing but generally at some point the police would turn up to deal with the out-workings and the consequences of it.[427]

Therefore, concern exists across the justice and security sector that Brexit could impact on people's perception of living in a human-rights based society and feeling that their rights are being respected. Interviewees expressed an overarching aim of keeping people safe and ensuring they can go about their daily business without fear of harm. While obvious challenges exist with regard to any changing status of the border, there is concern at a deeper level that Brexit should not undo any of the work undertaken in the past 21 years since the B/GFA to establish community confidence in the system and engage communities that previously were deemed unreachable. Thus, the protection of these rights in any future arrangement is imperative:

> ...but if we don't have a structure which allows people to go about their business without fear and without the threat of criminal activity then some of the other rights and obligations that people might have are difficult to operate so I'm sure government is very conscious about having adequate security and criminal justice arrangements in place then that is a baseline on which the rest of the relationships can be built. [428]

Conclusion

Because of the interconnectedness of the EU measures in the area of justice and security, it is pivotal that any future arrangement should be as holistic as possible. It should encompass judicial and police cooperation as well as any data sharing arrangements. Such an approach must include a strong commitment to the protection of individual rights, because the foundation of mutual trust in the legal process is only justified if the legal processes encompass a commitment to the rule of law, the protection of human rights and, as part of this, a commitment to data protection.

Furthermore, any negotiations about future justice and policing cooperation need to come to swift agreements that avert the risk of further uncertainty and any delay and disruption in existing policing and justice arrangements. Such uncertainties can undermine public safety, severely damage the community confidence in the system and the engagement with communities that previously were deemed unreachable in the context of NI.

KEY RECOMMENDATIONS

Because of the interconnectedness of EU measures in the area of justice and security, it is strongly recommended that any future arrangement should aim to be as comprehensive as possible and cover judicial and police cooperation as well as any data sharing arrangements. The approach must encompass a strong commitment to the protection of human rights, because the foundation of mutual trust in the legal process is only justified if the legal processes encompass a commitment to the rule of law, the protection of human rights and, as part of this, a commitment to data protection.

In negotiating any new justice and security relationships, the UK will have to demonstrate commitment to human rights to bolster an environment of mutual trust. With this in mind, we recommend the UK reaffirm its commitment to the ECHR and its continued full implementation in UK law.

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427 ibid.

428 Justice and Security Expert, 4 March 2019.

10. Future UK-EU Justice Arrangement Recommendations & Conclusions

This section outlines the various possible scenarios available for the UK's future relationship with the EU. Reflecting the concerns and recommendations provided by the interviewees, we put forward the ideal and second best options. We then provide fall back priorities for the UK in the case of a no deal scenario that ensures continued adherence to human rights protections. Following this, specific human rights recommendations are presented that should be given precedence by UK negotiators.

Possible Future Scenarios

Throughout the literature and in our conversations with justice and security experts, it has been widely recognised that none of the options available to the UK, if it leaves the EU, will provide an equivalent level of cooperation on justice as being a member of the EU. In the context of the current globalised world, this has implications not only for the ability of the UK justice system to hold people criminally accountable for their actions, but also for victims to feel that justice is being done.

Furthermore, as emphasised by many of the interviewees, this has potential serious implications not only for the realm of justice, but also for the security of people living in the EU. Whether temporary access to data, information, and policing cooperation is lost while the UK negotiates an agreement with the EU, or the UK loses access permanently because they fail to comply with data protection or human rights requirements, this gap leaves the UK more vulnerable to security threats and organised crime. As articulated by one of our interviewees:

> clearly to advance the rule of law and the protection of citizens having adequate criminal justice arrangements in place would be of fundamental importance but there are also many other calls of fundamental importance as well but if we don't have a structure which allows people to go about their business without fear and without the threat of criminal activity then some of the other rights and obligations that people might have are difficult to operate.[429]

It must also be emphasised that no longer being a member of the EU means that the UK will cease to be in a position to influence the development of internal EU law and future direction of policy and practice. If the UK chooses to take part in the justice measures that the EU allows, it will be doing so on the understanding that it will no longer have any influence in shaping the measure; instead acting as a more passive recipient.

IDEAL SCENARIO: RETAINED EU MEMBERSHIP

Whilst cognisant of the political issues surrounding this scenario, the analysis presented throughout this report demonstrates that the UK participation in EU mechanisms has helped to strengthen the justice and security systems in the UK and EU. Further, retained access to the existing EU mechanisms is only possible if the UK retains its status as a full Member State. Thus, the ideal future scenario is retained access to EU justice mechanisms as a full Member State. Being in the privileged position of having the power to choose which justice measures to opt-in to and opt-out of, has meant that the UK has had the opportunity to carefully select its level of cooperation based on what best suited its interests. In line with this, amongst many of the justice and security experts we interviewed, there was consensus that leaving the EU will result in diminished cooperation and effective responses to security threats and crime. Staying within the EU is currently the only option that guarantees the UK can continue to have the exact same access to justice and security measures that it currently enjoys and therefore avoid the

429 Interview with Justice and Security Expert, 4 March 2019.

future problems that will arise. Furthermore, as a Member State with decision-making powers, the UK would continue to influence the direction and development of EU law and policy in the area of security and justice policy. Thus, in this scenario, the UK could also push for better human rights protections and scrutinise further technological advances from its position as a Member State.

Amongst all of the interviewees however, there was agreement that if the UK does leave, it should seek to retain a relationship that is as close as possible to what exists at the moment. One justice and security expert stated: 'I think what we can agree is that criminal justice practitioners UK-wide would wish to avail of the criminal justice measures that we have in place at this moment of time, going forward. And anything that is as close to it is what we would think is desirable'.[430]

SECOND BEST SCENARIO: NEGOTIATED AGREEMENT

The second best option available to the UK is to try to negotiate a separate justice and security treaty or a comprehensive set of arrangements with the EU. This was the option identified by most of the justice and security experts we interviewed as being the most likely future arrangement. As identified above, all of our interviewees argued that the UK should push for an arrangement that keeps justice and security cooperation as close to what the UK currently has as is possible. The reasoning for this varied from ensuring consistency and the continued ability of UK criminal justice officials to do their jobs, to maintaining public confidence in the criminal justice system and upholding human rights protections. Another aspect of this argument is the interconnectedness theme: as one interviewee stated, keeping everything as it currently stands 'is critical because it all ties together'.[431] Others contended that impact of leaving certain measures will only become apparent over time as gaps in protection or tools begin to appear, but by this time, it might be too late for the UK to negotiate access.

It may be possible for the UK to negotiate a treaty or arrangement that provides comprehensive access to the EU justice and security tools. Both the UK and the EU have expressed a desire for a comprehensive future cooperative arrangement; however, there are barriers that need to be examined. Some have highlighted the arrangements between Norway or Switzerland and the EU, as evidence that the UK will be able to engage in similar kinds of partnerships. But, it is important to recognise that it 'has also been suggested that the UK may be in a different position in negotiations to that of Norway or Switzerland, on account of the fact that it is not a member of the Schengen system'.[432] This is not the only problem the UK will have to resolve, as summarised by Joanne Dawson:

> 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. 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.[433]

Concerns have also been raised regarding the current red lines that have been taken by the UK government – specifically in relation to the CJEU. As cautioned by the House of Lords European Union Committee:

430 Interview with Justice and Security Expert, 5 March 2019b.

431 Interview with Justice and Security Expert, 14 February 2019.

432 J Dawson, 'Brexit: Implications for policing and criminal justice cooperation' (Briefing Paper number 7650, 24 February 2017) House of Commons Library, p 17.

433 ibid, p 3.

> The UK and the EU-27 share a strong mutual interest in ensuring that there is no diminution in the level of safety and security afforded to their citizens after the UK leaves the EU. We caution, however, against assuming that because there is a shared interest in a positive outcome, negotiations will unfold smoothly. Even with the utmost goodwill on both sides, it seems inevitable that there will be practical limits to how closely the UK and EU-27 can work together on police and security matters if they are no longer accountable to, and subject to the oversight and adjudication by, the same supranational institutions, notably the Court of Justice of the European Union.[434]

In order to successfully negotiate this kind of deal, we strongly recommend, as we have explained above, that the UK retain access to the CJEU and keep the Charter. Removing these 'red lines' that the UK Government has put in place will be beneficial for convincing the EU that the future treaty will be based on the rule of law and that cooperation will be subjected to satisfactory human rights protections and independent oversight. It will also likely provide assurance to the general public that, while the UK may be entering a new partnership, this will not diminish their human rights and therefore maintain confidence in the system. It will also likely be helpful for maintaining a level of good faith in the negotiation process. As several of our interviewees pointed out, the Article 50 negotiations have damaged the relationship between the UK and EU; but, by making a commitment to human rights through retaining the Charter and the CJEU, it may help to instil more trust and confidence on the part of the EU and assist with completing a more comprehensive agreement.

FALL BACK PRIORITIES

In a scenario where neither of the above eventualities were realised, we feel the following aspects of the relationship between the UK and the EU should be prioritised to ensure continued adherence to human rights.

The Charter

While we strongly recommend that the UK retains the Charter, if this is not possible, the UK must make an effort to update domestic protections. We advise the UK government to undertake a comprehensive scoping exercise that identifies all of the areas in which human rights protections will diminish. An independent panel of experts could be appointed to conduct this review. This process must involve an in-depth analysis comparing the level of protections afforded by the Charter with those contained in the ECHR and Human Rights Act 1998. Based on this exercise, specific recommendations should be put forth outlining how to fill these protection gaps with changes to domestic UK human rights legislation. The obvious example where the Charter provides superior protection to the ECHR is with the Article 8 right to protection of personal data. The UK must ensure that upon EU exit, it devises a way to continue the same level of Article 8 protection currently afforded by the Charter.

The CJEU

We strongly advocate for the UK to remain under the jurisdiction of the CJEU for all justice and security matters. That said, if the UK government chooses not to retain access to the CJEU, we recommend that a new independent judicial oversight mechanism with equivalent powers to the CJEU be created to ensure the effective protection and enforceability of human rights. We must be very clear here that implementing anything less than an independent judicial oversight structure will be insufficient for protecting human rights. It is not sufficient to create an independent ombudsperson to oversee the operation of the future justice and security arrangement, or any of the elements within it.

434 European Union Committee, 'Brexit: Future UK-EU Security and Police Cooperation' House of Lords (7th Report: Session 2016-2017, HL Paper 77) para 91.

The UK and EU must work together to build a proper court with specialists who have already worked in the area of EU justice and security. It is essential that the creation of this court is built into the final treaty between the UK and the EU.

For example, a specialist Chamber could be created with locations in London and Luxembourg that oversees the work of the future Treaty. At a minimum, this Court must:

- Take into account CJEU jurisprudence;
- Offer effective remedies (modelled on what currently exists for the CJEU); and
- Include judges and justice professionals from both the UK and the EU.

Human Rights Recommendations

There has been a desire expressed both by the EU and UK to negotiate a comprehensive security agreement. Given the conversations that have been taking place, it is relatively likely that this agreement will aim to be 'streamlined' and fast-tracked – similar to how the EAW has been developed. It is also likely that, given the longstanding relationship between the UK and EU, it will be based largely on mutual trust (which will allow for fast-tracked arrangements). Given our knowledge of the development of the EU justice cooperation measures, we are concerned that this will give rise to human rights issues. Thus, in order to ensure that this future relationship can function, we make a number of recommendations as to the human rights considerations that need to be built into it.

MINIMUM STANDARDS

Security cooperation based on mutual trust must be underpinned by minimum human rights standards. At a base level this must include the ECHR. Ensuring that the UK's future commitment to the ECHR is built into any or all security agreement(s) will not only be important for demonstrating that the environment of mutual trust with the EU can be continued, but also to safeguard the future human rights protections for both UK and EU citizens. As previously highlighted, the protection afforded by the ECHR and the Human Rights Act 1998 is under political pressure in the UK. We want to be clear here that weakening the human rights protection afforded by the ECHR would very likely negatively influence the EU's willingness to engage in a comprehensive justice and security partnership.

Second, we argue that this baseline of building in the ECHR is not sufficient. Fair Trials has argued that:

> the UK's failure to adopt standards equivalent to those protected by EU law could result in lower human rights standards in the UK and affect its ability to participate in any security agreement with the EU. Without alignment of human rights standards, divergence between the EU and UK law could lead to challenges in national and EU courts on the legality of the UK's participation in security cooperation and undermine the effectiveness of security cooperation between two parties.[435]

This is an accurate analysis. Because of the danger connected with diverging standards of human rights protection, the UK should retain the Charter. This would ensure both no reduction of rights protections in the UK, as well as demonstrating its commitment to continuing an environment of mutual trust.

RETENTION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

As argued previously, is essential that the UK retains the Charter after Brexit. Generally, the Charter has proven to be part of a comprehensive web of protection for human rights and on that basis alone, it

435 Fair Trials, 'Human rights in the post-Brexit EU-UK security agreement' (2019).

should be retained. While the UK is still committed to the ECHR, this instrument alone does not afford the same effective level of individual rights protection as a combination of both, the ECHR and the Charter. These three key arguments for keeping the Charter are critical:

1. Data Protection: Retaining the superior data protection provisions contained in the Charter is essential for maintaining current standards of human rights and, in particular, privacy protection. Data driven policing has become very important due to increase in cyber-crime and use of mobile communications. Counterbalancing these powers with data protection rights for the individual is therefore of key importance and to date only afforded in the Charter.

2. Continued access to EU mechanisms: Future access to EU justice and security mechanisms will ultimately require a continued commitment to the rule of law. To ensure that both EU and UK citizens always have equal protections available to them, both sides should choose the same foundations with the Charter and the ECHR. It is also very likely that the EU will require this same level of protection for a future arrangement with the UK.

3. Extradition not covered in the ECHR: Currently, protections related to extradition is only protected under the Charter. It is excluded from the ECHR, hence, a very significant gap in human rights protections occurs if the Charter is not retained and extradition with the EU continues.

We recommend that the UK fully and unequivocally commit to the ECHR and its full implementation in UK Law. We further recommend that the UK retains the Charter of Fundamental Rights of the European Union. Both are important cornerstones to ensure both no diminution of rights protections in the UK, as well as demonstrating its commitment to continuing an environment of mutual trust.

HUMAN RIGHTS MONITORING

In order to human rights 'proof' future justice arrangements with the EU, we also advocate for specific human rights checks, that must be completed ***before*** agreements are implemented rather than waiting for human rights issues to arise and then acting to correct the gaps in protection. Such *ex ante* human rights impact assessments should be carried out by a team of human rights experts assembled from both the UK and EU.

In creating this group, it is essential that equal representation is drawn from each of the jurisdictions making up the UK to ensure that regional differences are taken into account. It may also be advisable that representatives from each EU Member State are also included. For efficiency, it is also recommended that they be composed of, for example, representatives from existing human rights bodies, such as National Human Rights Institutions. This group of experts should be tasked with completing a legal analysis of the draft agreement and identifying any potential areas in which gaps in human rights protections may arise. The issues identified by the group must be corrected before the agreement can move ahead between the UK and EU.

DOMESTIC HUMAN RIGHTS PROTECTIONS FOR EXTRADITION

Due to the numerous cases of injustice related to extradition, the UK introduced domestic reforms in 2014, which gave British Courts the power to refuse extradition where a person's extradition would be incompatible with Convention Rights contained within the Human Rights Act 1998. We maintain that, regardless of the type of extradition arrangements put in place with the EU, the UK must retain these domestic grounds for refusal.[436] It is in the best interests of UK citizens to provide continuity in terms of human rights related protections for extradition.

436 ibid.

A human rights ground for refusal should also be built into the future UK-EU extradition arrangement. It will be in the best interests of all citizens for a human rights bar to extradition to be in operation as soon as possible.[437] As it is unlikely that the EAW framework will be amended to include this, Brexit perhaps presents an opportunity to enhance human rights protections in this area for both EU and UK citizens.

RANGE OF COOPERATION MEASURES

As highlighted throughout, EU justice and cooperation measures have developed as a web. This has meant that, from a human right's perspective, many of the 'harshest' measures have been supplemented by other measures and tools that are not as harsh. Resorting to extradition, for example, is a very harsh measure, and due to the lack of availability of alternative tools in the past, such as the EIO and ESO, disproportionate reliance on the EAW has led to human rights violations. As summarised by Fair Trials:

> if the UK and EU Member States only have access to the harshest security measures (such as extradition) this will inevitably impact the rights of people accused of crime and would diverge from the overall trend across the EU towards more proportionate cooperation that respects human rights.[438]

The case of British citizen Andrew Symeou[439] evidences that the UK should strive to retain as much of the current cooperation as possible and ensure that the future treaty is comprehensive and contains the full spectrum of measures – not only the harshest ones.

EU PROGRESSIVENESS

We also recommend that the UK keep up with EU developments, both in terms of increasing human rights protections as well as the creation of new EU justice and security tools. This recommendation supplements those made previously. The EU and the UK have in the past mutually influenced each other to improve human rights protection. We are concerned that, upon exit, there will no longer be an outside impetus driving human rights forward. Therefore, particularly in the realm of justice and security, we recommend that the UK continue to implement any progressive changes to human rights law that comes out of the EU. Further, we advise that the future UK-EU justice and security arrangement be forward looking (i.e. keeping pace with EU legislative developments) – thereby providing opportunities for the UK to implement EU justice and security mechanisms developed in the future and continue to enhance cooperation with Member States.

TITLE OF THE TREATY

Beyond those specific recommendations, we lastly want to draw attention to the question of the title of any agreement reached on future arrangements in the areas of justice and security. Theresa May suggested that a future 'security treaty' between the EU and the UK should entail issues of internal security which would include measures on police and justice cooperation. While it may seem a small matter, labels matter. It is strongly recommended that any treaty in this area specifically refers to justice and security. Justice is an important value in its own right, it expresses the commitment to the rule of law. Simply subsuming justice and police cooperation under the heading of security turns ordinary people into security threats and excludes procedural safeguards for human rights protection from the conversation.

The measures and instruments of police and justice cooperation discussed above are founded on

437 See similarly the recommendations by Fair Trials, ibid.

438 Fair Trials, 'Human rights in the post-Brexit EU-UK security agreement' (2019)

439 See for the details section 4.

the conception of the European Union as an area of freedom, security and justice with respect for fundamental rights. This context must not be lost in the future debate.

Summary of Key Recommendations:

1. Because of the interconnectedness of EU measures in the area of justice and security, it is strongly recommended that any future arrangement should aim to be as comprehensive as possible and cover judicial and police cooperation as well as any data sharing arrangements. All experts interviewed for this project highlighted that maintaining access to all of the current EU justice and security arrangements would be ideal. In order to secure the effectiveness of law enforcement systems, it is imperative to retain as many of the existing tools as possible through a future partnership agreement.

2. The UK and the EU should secure continued policing and prosecutorial cooperation. In particular, it is recommended the UK retains access to Europol and Eurojust cooperation frameworks to ensure that operational capabilities and collaboration in the area of policing and criminal justice continue. However, it is noted that third-country access options may be limited and in this case, the UK should work to minimise disruption.

3. The UK and the EU should secure the continuation of data sharing arrangements. Access to tools such as SIS II and ECRIS facilitate speedy information sharing and retrieval, whereas a loss of these measures would result in delays in proceedings. To that end, joint data protection standards are pivotal to facilitate mutual trust with EU Member States and ensure protection for citizens.

4. The approach must encompass a strong commitment to the protection of human rights. The foundation of mutual trust in the legal process is only justified if the legal processes encompass a commitment to the rule of law, the protection of human rights and, as part of this, a commitment to data protection.

5. Any evolving justice and police cooperation system requires an independent judicial oversight mechanism with adjudicative powers to ensure effective protection and enforceability of human rights. This could be secured through a new court system, or – simpler, more cost effective, and avoiding any danger of disadvantages to UK citizens – the UK should retain access to the Court of Justice of the European Union (CJEU).

6. The UK's commitment to the European Convention on Human Rights should be built into any future justice and security agreement. This will help to ensure that there is no loss of human rights protections and safeguard trust with EU Member States. The UK should also reaffirm its commitment to Council of Europe legal instruments on cooperation in criminal law matters and efficiency of justice.

7. The UK should retain the Charter of Fundamental Rights of the European Union. If the UK does not retain the Charter, it must make an effort to update domestic protections to provide equivalent protections and make them accessible to the public. Additionally, the UK should retain commitments to human rights contained in secondary EU law, such as the Victim's Rights Directive, European Supervision Orders, and European Protection orders to indicate its commitment to rights protection.

8. An independently appointed panel of human rights experts should be tasked with completing *ex ante* human rights impact assessments. These panels must be comprised of equal representation from each of the jurisdictions making up the UK. It is suggested that they be composed, for example, of representatives from existing human rights bodies, such as National Human Rights Institutions.

Further, due to the interconnectedness of justice and security measures, these assessments must be undertaken for each element of future arrangements. In the event that human rights issues are discovered, the agreements should be returned to negotiators to be addressed.

9. A human rights ground for refusal must be built into the future UK-EU extradition arrangement. The negotiation of a future extradition arrangement presents an opportunity for the UK and EU to better protect the human rights of individuals facing extradition. Building in a human rights bar would require the UK and the EU Member States to refuse extradition if it would be incompatible with an individual's Convention Rights (something which exists domestically in the UK, but is not part of the EAW).

10. The UK should commit to implement any progressive changes to human rights law that come out of the EU in the future. This will help to ensure continued cooperation and bolster the environment of mutual trust.

11. The future UK-EU justice and security arrangement should be forward looking. This means that the UK should keep pace with legal developments in the EU and build into the agreement the opportunity to opt-in to future justice and security mechanisms.

12. Any treaty on future cooperation in this area must refer to both justice and security in its title. This will avoid one element being subsumed by another.

13. It is essential that any future negotiations involving human rights issues are conducted in close cooperation between the UK Government and the devolved administrations in the UK. This will help to ensure respect for overlapping competencies that exist in the complex constitutional arrangements within the UK.