

# Evolving Justice

## Arrangements Post-Brexit

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**Coimisiún na hÉireann  
um Chearta an Duine  
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A large, light gray silhouette of a person, likely a justice figure, holding a scale of justice. The figure is positioned in the background, with the scale's beam and pans visible. The text is overlaid on this silhouette.

**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.**

## About the Authors

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1 [https://pure.qub.ac.uk/portal/en/persons/amanda-kramer\(6bf216e8-a01c-4633-95dc-745e52393dco\).html](https://pure.qub.ac.uk/portal/en/persons/amanda-kramer(6bf216e8-a01c-4633-95dc-745e52393dco).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=C8F1519F99593BF984626C9E17E3BF2E?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>

## Abbreviations

AFSJ	Area of Freedom, Security and Justice
AGS	An Garda Síochána
B/GFA	Belfast/Good Friday Agreement
CJEU	Court of Justice of the European Union
COE	Council of Europe
CSE	Child Sexual Exploitation
CTA	Common Travel Area
DPP	Director of Public Prosecutions
DOJ	Department of Justice
DRIPA	Data Retention and Investigatory Powers Act
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRIS	European Criminal Records Information System
EIO	European Investigation Order
EIS	Europol Information System
EJN	European Judicial Network
EPO	European Protection Order
EPPO	European Public Prosecution Office
ESO	European Supervision Order
EU	European Union
GDPR	General Data Protection Regulation
HMRC	Her Majesty's Revenue and Customs

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

## Executive Summary

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. On 23 June 2016, the United Kingdom voted to leave the European Union. Given the current level of cooperation between the UK and EU on justice and security matters, this stands to have potentially far reaching and severe consequences for the UK. Yet, research and public discussion on the potential impact of Brexit for justice and security has been largely absent. With much of the focus being on areas such as trade, borders, immigration and sovereignty, the Joint Committee of the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission commissioned this academic research report on the evolving justice arrangements post-Brexit, with a particular focus on the human rights implications.

Currently, the UK participates in a range of justice and security cooperation measures. These include extraditions measures, such as the European Arrest Warrant (EAW); policing and prosecutorial cooperation, such as Europol and Eurojust, Joint Investigation Teams and the European Investigation Order; as well as information and data sharing tools, such as the Schengen Information System (SIS II) and the European Criminal Records Information System (ECRIS). This cooperation has not only helped to advance the effectiveness of the justice and security systems in the UK, but it has also been important in the specific context of the East/West and North/South relationships of the UK and the Republic of Ireland and Northern Ireland (NI) and Ireland respectively. Given the necessity of maintaining a high level of policing cooperation due to the 310-mile land border and the specific post-conflict realities on the island, any disruption to police cooperation could have serious consequences.

If the UK leaves the EU without a deal, there will be immediate consequences for the ability of the UK to continue to participate in these EU measures. If the UK leaves with a deal, the transition period would enable the current arrangements to continue, but many of the same consequences would become apparent once this period ends. Given the information available, these consequences range from instant removal of access, to continued participation without any decision-making power. It is against this background that this report explores the evolving justice and security relationship between the UK and the EU. We examine the current areas of cooperation as well as the possible future scenarios and the human rights implications of each of these. We provide this analysis across five main areas: (i) extradition, repatriation and transfer; (ii) policing and prosecutorial cooperation; (iii) cross-border justice arrangements on the island of Ireland; (iv) information and data sharing; and (v) judicial oversight.

The analysis is informed by a literature review of existing research in this area, legal analysis conducted by the authors, as well as interviews with experts working in the area of justice and security. A total of 14 experts were interviewed, including academics, practitioners, and representatives from human rights organisations. They were asked specific questions relating to each of the five project themes, as well as general questions on the desirability of the various possible post-Brexit arrangements.

### EXTRADITION, REPATRIATION AND TRANSFER

The European Arrest Warrant (EAW) has led to higher numbers of successful extraditions, dropped average extradition times to 48 days, and decreased four-fold the cost of extradition since becoming operational in 2004. It has also led to increased human rights protections for individuals facing extradition, due mainly to the Court of Justice of the EU interventions on EU Charter of Fundamental Rights violations. The EAW replaced previous extradition arrangements that relied on the 1957 Council of Europe Convention on Extradition.



Should the UK leave the EU without any arrangements in place, it will have to rely on the 1957 Convention on extradition which would cause considerable disruption and delay to extradition arrangements. From both a practical enforcement and human rights standpoint, the most desirable arrangement for the UK is retained access to the EAW to ensure seamless continuation of law enforcement activities. However, no precedent exists for third country membership to the EAW system. Alternatively, the UK should seek to negotiate a new arrangement with the EU as a whole that builds in human rights protections and judicial oversight mechanisms. Failing that, the UK would have to resort to the negotiation of individual extradition arrangements with each Member State as a cumbersome and costly alternative.

#### POLICING AND PROSECUTORIAL COOPERATION

EU measures help police to engage in effective investigations and provide intelligence and evidence to colleagues in other Member States. They assist with prosecutions by providing information on previous criminal records attained in other Member States and transfer suspects so that they can be prosecuted in other jurisdictions. There are also more general benefits that include building trust between justice professionals within EU Member States, sharing best practice, and developing common standards. From a practitioner's perspective, maintaining as much of the existing cooperation as possible is essential to ensure:

- the continuing effectiveness of the UK justice system;
- high levels of trust with EU Member States; and
- the maintenance of security in the UK and preventing it from becoming a 'safe harbour' for those wishing to exploit the law.

In terms of drafting future justice and security agreements, there are a number of considerations that the UK should keep in mind. Firstly, negotiators must be cognisant of the potential gap in time between EU exit and a justice and security deal – in many cases, this may lead the UK to rely on past arrangements as a 'fall back' option. It must be recognised that these fall back options are likely to result in inefficiency and significant delay. This potential for delay raises a number of concerns, including human rights issues, such as negative impacts on victims and witnesses of crime. Secondly, it is clear that EU justice and security measures, such as the European Public Prosecution Office, will continue to be developed. The UK should take these future developments into consideration within the negotiation of future arrangements to ensure that it may participate in new initiatives as desired.

#### CROSS-BORDER JUSTICE ARRANGEMENTS ON THE ISLAND OF IRELAND

Policing cooperation can be dated back to the creation of two separate jurisdictions and police forces with partition in 1922. As long as a border has existed, the police have had to deal with various forms of cross-border crime. Historically, much of this cooperation existed informally, which brought a set of challenges ranging from inconsistencies to alleged collusion. Along with the more structured cooperation resulting from the peace process, the EU has been a helpful tool for encouraging formalised mechanisms for cooperation. Due to the persistence of a strong relationship between the two police services, it is likely that they will continue to find ways to cooperate without the EU structures, but concerns have been raised that this will return much of the cooperation to the informal realm.

Extradition on the island of Ireland is another key concern of justice officials. Historically, extradition between NI (and the rest of the UK) and the Republic of Ireland has been a politically difficult and sensitive issue. With the introduction of the EAW, many of the political challenges surrounding extradition were resolved. In this context, interviewees highlighted how the EAW has been an essential

tool for ensuring the safety of communities, and the effectiveness of the justice systems across the island of Ireland.

## INFORMATION AND DATA SHARING

Data sharing has become an essential tool for justice and security cooperation between the EU and UK. For policing and prosecution, the loss of access to EU databases will result in a slowing of operational effectiveness and diminished access to reliable data. This will have ramifications for the day-to-day work of justice institutions and the police. It will also potentially impact the procedural rights of individuals involved in the justice system if significant delays are introduced.

There are some possibilities of third-country membership in this area, as well as potential fall back options for the UK. From an operational standpoint, interviewees expressed that the continued EU membership appears as the only way of continuing access to all of the data sharing tools the UK currently values. An alternative arrangement could be a combination of negotiating access to some form of the databases and relying on previous data sharing arrangements for others. The EU has made it clear that if the UK does not retain an equivalent level of data protection in line with updated EU standards, UK access to data will likely not be possible. The loss of the European Charter of Fundamental Rights, in particular the rights in Article 8 on the protection of personal data, are raising concerns amongst justice and security experts, as it provides an improved level of protection in the digital sphere to the protections found in the European Convention on Human Rights in this area.

## JUDICIAL OVERSIGHT

The UK has stated its intention to remove the jurisdiction of the CJEU on EU exit day. This raises a number of concerns both for human rights protections, as well as the ability of the UK to conclude a desirable justice and security treaty. From a human rights perspective, it is established that removing access to the CJEU will result in a loss of rights. Furthermore, in relation to the future ability of the UK to conclude a comprehensive justice and security partnership with the EU, it is also recommended that CJEU jurisdiction is retained.

The EU is unlikely to allow the UK access to justice mechanisms without an effective judicial oversight mechanism. We suggest that, if the UK is unwilling to retain CJEU jurisdiction, this could take the form of constructing a new court to oversee the justice and security arrangement between the UK and EU. This option will likely be very costly and time consuming to set up. It would be difficult for a new court to be established in time to oversee the future arrangements. Due to these and other issues, our analysis demonstrates that none of the proposed alternatives are sufficient.

## **Main Themes**

In addition to the areas explored above, a number of cross-cutting themes emerged throughout the research and are explored in Section 9. These were informed by both the existing research and our own interviews. Each of the themes will be outlined briefly. The most important theme that must be stressed is the interconnectedness of EU measures.

## INTERCONNECTEDNESS OF EU MEASURES

The interconnectedness of EU measures was emphasised by the majority of experts we interviewed for the project. We offer the analogy of thinking about EU justice and security measures as a web. This metaphor helps to illustrate that areas of judicial cooperation, law enforcement, security measures, policing cooperation, and data sharing are all distinct, but intertwined. Removing access to one tool has implications for other cooperation measures, the extent of which has not been well publicised.

## 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.<sup>11</sup> With the exception of some limited discussion of terrorism,<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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

<sup>11</sup> For examples, see: [http://www.voteleavetakecontrol.org/why\\_vote\\_leave.html](http://www.voteleavetakecontrol.org/why_vote_leave.html); <https://www.strongerin.co.uk/#MAHCGDfSevF6fsxD.97>

<sup>12</sup> For example, see: [http://www.voteleavetakecontrol.org/briefing\\_safety.html](http://www.voteleavetakecontrol.org/briefing_safety.html)

<sup>13</sup> See [https://www.bbc.co.uk/news/politics/eu\\_referendum/results](https://www.bbc.co.uk/news/politics/eu_referendum/results)

<sup>14</sup> 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.<sup>15</sup>

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,<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.

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

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

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

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

<sup>19</sup> 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](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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> For many this was the first indication that the EU was anything more than an economic bloc.<sup>24</sup> 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).<sup>25</sup> 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

<sup>20</sup> Treaty of Paris 1951.

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

<sup>22</sup> 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).

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

<sup>24</sup> 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.

<sup>25</sup> Title V of the Treaty on European Union, Articles 67-89.

give.<sup>26</sup> A revised treaty was eventually adopted at Lisbon in 2007 and the ratified in 2009.<sup>27</sup> 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.”<sup>28</sup> 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*.<sup>29</sup> However, the UKSC did have regard for CJEU decisions and made its decisions largely by reference to what it assumed the CJEU would decide.<sup>30</sup>

The changes at Lisbon now form the foundational treaties of the European Union, the Treaty on European Union (TEU)<sup>31</sup> and the Treaty on the Functioning of the European Union (TFEU).<sup>32</sup> 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.<sup>33</sup>

## 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](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.<sup>34</sup> 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’.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

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](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](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’.<sup>38</sup>

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;<sup>39</sup>
- Judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty<sup>40</sup>, 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<sup>41</sup>, 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<sup>42</sup>, 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.<sup>43</sup> 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”.<sup>44</sup> 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.<sup>45</sup>

Currently, the UK participates in the European Arrest Warrant (EAW)<sup>46</sup> as well as both Europol<sup>47</sup> and Eurojust<sup>48</sup> agencies. In criminal investigations, the UK does participate in Joint Investigation Teams (JITs)<sup>49</sup> and executes European Investigation Orders (EIOs).<sup>50</sup> UK access to a range of criminal justice and law enforcement databases has also been opted-into, including the Schengen Information System (SIS II),<sup>51</sup> the European Criminal Records Information System (ECRIS),<sup>52</sup> and the Passenger Name Record (PNR).<sup>53</sup> The UK has also completed the necessary preparations to accede to measures of the Prüm Convention,<sup>54</sup> 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.<sup>55</sup>

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.<sup>56</sup> 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](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>

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

<b>Instrument</b>	<b>UK</b>	<b>Ireland</b>	<b>Third-country Participation</b>
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. <sup>57</sup>
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. <sup>58</sup>
European Judicial Network (Council Decision 2008/976/JHA)	IN	IN	Cooperation with third-countries is governed by international law. <sup>59</sup>
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. <sup>60</sup>
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 <sup>61</sup> ).  USA has an agreement with the EU, and bilateral arrangements with Member States but still subject to political approval. <sup>62</sup>
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). <sup>63</sup>  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](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 EJM partners, 43<sup>rd</sup> Plenary meeting of the EJM, 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](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<sup>64</sup> and the Directive on combatting money laundering,<sup>65</sup> 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.<sup>66</sup> The UK also signed the EU's General Data Protection Regulation (GDPR) into domestic law in 2018, a measure it was instrumental in developing.<sup>67</sup>

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.<sup>68</sup> For example, the UK initially opted-out of the Directive on Trafficking in Human Beings but opted-in at a later date.<sup>69</sup>

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 opt-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.<sup>70</sup> Others determined that the increased data sharing tools may be joined as their benefits have become more apparent, particularly SIS II.<sup>71</sup> 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.<sup>72</sup> Interestingly the Irish government did issue a political declaration that it would participate in judicial and police cooperation to the maximum extent possible.<sup>73</sup>

## 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 fraud 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](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.



### 3. Mapping Overlapping Competencies in the Areas of Justice and Security within the UK

The areas of justice and security, particularly criminal justice and police cooperation, are part of overlapping competencies between the UK government and the devolved administrations in Northern Ireland and Scotland. The redistribution of these competencies within the UK context through the Scotland Act 1998, the Belfast/Good Friday Agreement 1998 (B/GFA) and the Northern Ireland Act 1998 coincided with a rapidly developing EU legal framework.<sup>74</sup> This resulted in a multi-dimensional arrangement with overlapping competencies. The shape of any future arrangements must therefore fully appreciate and reflect these complexities.

In order to facilitate a better understanding, the following section will set out the general principles that determine competencies in the areas of justice and security in the UK context, reflect on the specific inter-Irish dimension and provide relevant examples for the operation of those overlapping competencies. Appreciation of these overlaps is crucial to ensure that policy makers at both levels of governance in the UK fully take into account the need for a human-rights based approach of any evolving justice arrangement. The overlaps require the UK government to cooperate with devolved administrations to ensure that Westminster, Holyrood and Stormont can be one within the UK to use their internal scope to ensure a human-rights based approach.

#### **General Principles and Relevant Devolved Areas**

As a general guideline, the competencies regarding the areas of justice and security can be described as follows:

- All internal operations in the areas of policing and justice in Northern Ireland and Scotland are the competence of the devolved<sup>75</sup> administrations.
- All external relations (any agreement with other states) is a reserved matter for the UK government.
- Any measures regarding terrorism, misuse of drugs, data protection and national security are non-devolved, reserved or excepted matters for the UK government.

Relevant devolved competencies in Northern Ireland/Scotland: Justice and policing. Also relevant in this context is the obligation to observe and implement obligations arising from international agreements, international human rights law such as the European Convention on Human Rights (ECHR), and EU law.<sup>76</sup>

UK Reserved or 'excepted' areas: Foreign affairs (including the conclusion of any international agreements that form the basis for cooperation between states in matters of security and justice cooperation), firearms and explosives, cross-border rail, defence, national security, misuse of drugs, and data protection.<sup>77</sup>

<sup>74</sup> Treaty on the Functioning of the European Union (TFEU), Chapter 4 and 5, Title V.

<sup>75</sup> 'Devolved' means in the Scottish context any function not reserved to the UK Government or Parliament under Schedule 5 to the Scotland Act or transferred to the Scottish Ministers under other legislation; in the Welsh context, any function exercisable by the Welsh Ministers, or any matter within the legislative competence of the National Assembly for Wales; and in the Northern Ireland context any matter which is not an excepted or reserved matter under Schedules 2 and 3 to the Northern Ireland Act. 'Non-devolved' means anything else.

<sup>76</sup> Scotland Act 1998, Sch 5, Pt 7 para 2(1). It is important to note that the current Scottish and Welsh devolution settlements do not specify which matters are devolved to the respective legislatures, rather they specify those matters that are reserved to the UK Parliament. These legislatures have primary legislative powers over all other policy areas. The Northern Ireland Assembly can in principle also legislate in respect of 'reserved' category matters subject to various consents but has not yet done so to any significant degree.

<sup>77</sup> Scotland Act 1998, Sch 5, Northern Ireland Act 1998, Sch 2 (for excepted) and 3 (for reserved matters).

## Some General Principles in the Context of Overlapping Competencies

The key political but non-binding instrument that seeks to regulate the cooperation between the different administrative levels in the UK context is the Memorandum of Understanding between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee from October 2013.<sup>78</sup> It sets out some of the key principles that aim to make the devolution settlements work:

- **Principle of Communication and Consultation:** Entails the obligation of good communication with each other, and especially where one administration's work may have some bearing upon the responsibilities of another administration. This entails, *inter alia*:
  - » the duty to give appropriate consideration to the views of the other administrations; and
  - » to establish, where appropriate, arrangements that allow for policies for which responsibility is shared to be drawn up and developed jointly between the administrations.
- **Principle of Cooperation:** To work together in areas of joint interests and ensure effective operations.
- **Conduct of International Relations**
  - » The devolved administrations are able to develop bilateral or multilateral arrangements with other members of the British-Irish Council, including the Republic of Ireland, and to participate in the British-Irish Council itself, as set out in the Belfast Agreement.
  - » The UK Government will involve the devolved administrations as fully as possible in discussions about the formulation of the UK's policy position on all EU and international issues which touch on devolved matters.

### NORTH-SOUTH COOPERATION

Current areas of cooperation<sup>79</sup> through advisory groups within the remit of the devolved administrations:

- forensic science
- registered sex offenders
- probation and rehabilitation
- victim support
- youth justice matters, and
- criminal justice social diversity.

Multi-level competencies:

- Northern Ireland Related Terrorism threat

<sup>78</sup> Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/316157/MoU\\_between\\_the\\_UK\\_and\\_the\\_Devolved\\_Administrations.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf) (Hereafter: Memorandum)

<sup>79</sup> Intergovernmental Agreement on Co-operation on Criminal Justice Matters, April 2010, in detail see *Technical Explanatory Note: North-South Cooperation Mapping Exercise*, p 11-12, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/762820/Technical\\_note-\\_North-South\\_cooperation\\_mapping\\_exercise\\_\\_2\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/762820/Technical_note-_North-South_cooperation_mapping_exercise__2_.pdf)

- Multi-agency cooperation on organised crime and drugs

UK competency but operational at the devolved level:

- Mutual legal assistance in criminal matters
- Extradition/Surrender, including the European Arrest Warrant
- Access to shared law enforcement information systems
- Criminal asset seizure
- Transfer of prisoners
- Civil judicial cooperation
- Joint investigation teams
- Other aspects of criminal justice cooperation.

## **Examples of Overlapping Competencies in Practice**

### THE RIGHT TO INFORMATION FOR ACCUSED AND SUSPECTED PERSONS

The Scottish Parliament implemented the EU directive on the right to information in criminal proceedings through ‘The Right to Information (Suspects and Accused Persons) (Scotland) Regulations 2014’. These regulations apply to Police Scotland, but do not apply to those authorities carrying out reserved functions. Since revenue and customs are reserved matters, people arrested by HM Revenue and Customs (HMRC) in Scotland fall outside the scope of The Right to Information Regulations. In order to ensure effective application of EU law across the UK, the UK government issued a code of practice regarding (HMRC) criminal justice working practices for suspects in Scotland only, concerning the right to information in criminal proceedings.<sup>80</sup>

### PARTICIPATION IN THE EUROPEAN CRIMINAL RECORDS INFORMATION SYSTEM (ECRIS) - THE COMPUTERISED SYSTEM FOR THE EXCHANGE OF INFORMATION ON CRIMINAL CONVICTIONS

Currently, the Police Service of Northern Ireland and Police Scotland can directly access information in ECRIS for the purpose of criminal proceedings (ensuring a consistency in sentencing of EU and UK nationals and a fairer application of justice) and requests by employers for EU nationals applying to work in regulated activity with children (ensuring effective protection). Should ECRIS access cease and no alternative arrangement be in place, the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters would apply.<sup>81</sup> This would require that any incoming request for authorities in Northern Ireland would have to be facilitated by the Central Authority in London.<sup>82</sup> Any data request by police authorities in the UK would have to be issued by a court or a designated prosecuting authority and, where the domestic law of the requested state requires, be transmitted via the UK central authority.

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<sup>80</sup> L Mancano, M Fletcher, M O'Neill ‘Police and Judicial Cooperation in Criminal Justice’ in N Busby, R Zahn (eds) *Studying EU Law in Scotland during and after Brexit* (SULNE 2018) 75, p. 79.

<sup>81</sup> Article 13 of the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters.

<sup>82</sup> UK Home Office Requests for *Mutual Legal Assistance in Criminal Matters Guidelines for Authorities Outside of the United Kingdom – 2015* (12th ed.), p 11.

## Summary

These examples show how important it is that the UK government and the devolved administrations in Northern Ireland and Scotland will all be fully aware of their responsibilities in ensuring that any future justice arrangements have human rights protection at their heart. It requires close cooperation between the different levels of governance and debate over the future direction. So far, justice arrangements have been overshadowed by other questions within the Brexit debate such as economic and border arrangements. Given that any future justice arrangement will be operational at the devolved level, consultation and communication between the different policy makers to inform any future negotiations is pivotal.

### KEY RECOMMENDATION

Because of the overlapping competencies in the areas of justice and policing, consultation and communication between the UK Government and the devolved administrations is pivotal to ensure a human rights based approach to any evolving justice arrangements post-Brexit.

## 4. Extradition, Repatriation and Transfer

When a person has been accused or convicted of committing a crime in another jurisdiction, extradition arrangements may allow that person to be transferred to the other jurisdiction. This is typically conducted through cooperative arrangements negotiated between states. For EU Member States, this process has been streamlined through the introduction of the European Arrest Warrant (EAW) in 2002.

The proceeding section outlines the current extradition arrangements between the UK and the EU through the EAW before analysing the existing human rights concerns with that arrangement. A summary of the prisoner transfer arrangements between the UK and EU is then provided. Following on from this, the possible future scenarios are spelled out, with recommendations offered as to which would be the most desirable outcome for the UK. Human rights concerns associated with each of the possible future scenarios are also raised, with suggestions as to how these can be mitigated.

### Current UK-EU Relationship – the European Arrest Warrant

As an EU Member State, the UK fully participates in the Council Framework Decision of 13 June 2002 on the European Arrest Warrant. The EAW was designed to simplify and facilitate extradition procedures between EU Member States. It allows for individuals to either face prosecution or serve a prison sentence in another EU Member State. An EAW issued within the EU is valid throughout its entire territory. It was enacted in 2002 in the wake of the terrorist attacks of 11 September 2001 and has been operational since 1 January 2004.<sup>83</sup> In practice, a request would be made by a judicial authority from one EU Member State to another to arrest and surrender a person either for prosecution or to serve a prison sentence.

Like many other areas of EU justice cooperation, the Framework Decision of the EAW applies the principle of mutual recognition in criminal law. This principle is based on the trust that all EU Member States are fully human rights compliant. As outlined by researchers on the project 'UK in a Changing Europe', with the EAW 'an unprecedented level of mutual recognition was achieved, making it possible for judicial extradition decisions in one Member State to be easily enforced in another'.<sup>84</sup> In this context, mutual trust essentially requires EU Member States to accept an extradition request without inquiring into the facts or circumstances giving rise to it (subject to certain, limited grounds).<sup>85</sup>

Article 3 of the Framework Decision on the EAW outlines three mandatory grounds under which the judicial authority in the executing country must refuse to surrender the requested person:<sup>86</sup>

- Article 3(1): if the offence is under an amnesty in the executing country (under the circumstances where that country could also have prosecuted them), extradition must be refused.
- Article 3(2): under the principle of *ne bis in idem*, a country must refuse to surrender a person who has already been judged for the same offence by an EU Member State. This ground for refusal is based on Article 50 in the Charter of Fundamental Rights ('the Charter'), which states that 'no one shall be tried or punished again in criminal proceedings for an offence for which he or she

<sup>83</sup> [https://e-justice.europa.eu/content\\_european\\_arrest\\_warrant-90-en.do](https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do)

<sup>84</sup> UK in a Changing Europe 'Post-Brexit law enforcement cooperation: negotiations and future options', p 7, available at <https://ukandeu.ac.uk/wp-content/uploads/2017/11/Post-Brexit-law-enforcement-cooperation-negotiations-and-future-options.pdf>

<sup>85</sup> J Dawson, 'Brexit: Implications for policing and criminal justice cooperation' (Briefing Paper number 7650, 24 February 2017) House of Commons Library, p 11.

<sup>86</sup> Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

has already been finally acquitted or convicted within the Union in accordance with the law' (also referred to as the principle *ne bis in idem*).<sup>87</sup>

- Article 3(3): requests to extradite must also be refused if the person is below the age of criminal responsibility in the executing country.

There are also a number of optional grounds whereby a country may refuse to surrender someone for an EAW, contained in Article 4 of the EAW Framework Decision. Under Article 4(1) executing states can refuse to extradite persons for acts that are not considered criminal offences under the law in their jurisdiction. This only applies for offences that are not covered by Article 2(2) of the Framework Decision on EAW.<sup>88</sup> If a person has a prosecution pending in the executing Member State, extradition may be refused under Article 4(2). Article 4(3) permits judicial authorities to refuse to surrender a person if prosecution for the same offence has been precluded in the executing Member State – there may be overlap here with the *ne bis in idem* principle. If there is a statute-bar on prosecution or punishment for an offence, the judicial authorities may refuse to extradite based on Article 4(4). If the executing State becomes aware the requested person has been finally judged in a third country, they may refuse to surrender the person under Article 4(5). Under Article 4(6), if a Member State is requesting a person to be surrendered to serve a custodial sentence, judicial authorities in the executing state may come to a decision that it is best for the person to serve their custodial sentence in the executing state, rather than surrendering them to the issuing state. This may apply to a person who is staying in, is a national or is a resident of the executing Member State. As evident by the options for refusal outlined above, there are no specific provisions within the EAW to refuse to extradite a person on the basis of a breach of their human rights in the issuing Member State. This will be discussed further in the section below, 'Existing Human Rights Concerns'.

The EAW replaced the former extradition arrangements that existed under the 1957 Council of Europe Convention on Extradition (which the UK is also party to). There are a number of ways in which extradition arrangements have changed under the EAW.<sup>89</sup> These include:<sup>90</sup>

- **Strict Time Limits:** The arresting country has 60 days to take a final decision on whether or not to execute a EAW; if consent has been provided by the individual, a surrender decision must take place within 10 days; and the person must be surrendered within 10 days after the final execution decision.
- **Double Criminality Check:** Under prior extradition arrangements, both countries were required to check whether the act was a criminal act in both jurisdictions – with the EAW this obligation has been removed for 32 categories of offences. Instead, the requirement just states that the offence must be punishable 'by a maximum period of at least 3 years of imprisonment in the issuing country'.<sup>91</sup>

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87 Charter of Fundamental Rights of the European Union

88 Offences covered by Article 2(2) include: participation in a criminal organisation; terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotic drugs and psychotropic substances; illicit trafficking in weapons, munitions and explosives; corruption; fraud; laundering of the proceeds of crime; counterfeiting currency; computer-related crime; environmental crime; facilitation of unauthorised entry and residence; murder, grievous bodily injury; illicit trade in human organs and tissue; kidnapping, illegal restraint and hostage-taking; racism and xenophobia; organised and armed robbery; illicit trafficking in cultural goods; swindling; racketeering and extortion; counterfeiting and piracy of products; forgery of administrative documents and trafficking; forgery of means of payment; illicit trafficking in hormonal substances and other growth promoters; illicit trafficking in nuclear or radioactive materials; trafficking in stolen vehicles; rape; arson; crimes within the jurisdiction of the International Criminal Court; unlawful seizure of aircrafts/ships; and sabotage.

89 V Mitsilegas, 'The Uneasy Relationship between the UK and European Criminal Law: From opt-outs to Brexit?' (2016) 8 Criminal Law Review 528.

90 European Justice Portal 'European Arrest Warrant, available at [https://e-justice.europa.eu/content\\_european\\_arrest\\_warrant-90-en.do](https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do)

91 *ibid*.

- No political involvement: Extradition decisions are made exclusively by judicial authorities.
- Surrender of Nationals: the EAW removed the grounds for refusal that allowed an EU country to refuse to surrender its own nationals for extradition to another EU country.
- Guarantees: The executing country may require guarantees that (1) for people serving life sentences, provide the person with a right to ask for a review; and (2) the person subject to the EAW can serve their prison sentence in the EU country in which they are a national or habitual resident.
- Limited Grounds for Refusals: The EAW restricted the mandatory and optional grounds for refusals by the executing country.<sup>92</sup>

The EAW is implemented in the UK through the Extradition Act 2003. The UK is one of the most active users of the EAW. Between 2009 and 2016, the UK surrendered 7,436 individuals wanted by other EU member states and it issued 1,669 warrants.<sup>93</sup> As expanded upon in Section 6, the EAW has been identified by a number of politicians and justice and security experts as one of the most important EU justice measures to retain. This applies to both maintaining the justice relationship and security on the island of Ireland, and more broadly between the UK and EU. For example, the Crown Prosecution Service has stated that it regards the EAW as ‘absolutely vital’.<sup>94</sup> The National Crime Agency has also included the EAW in their list of top three priorities for the Brexit negotiations.<sup>95</sup> Furthermore, Helen Ball, the Metropolitan Police Service’s Senior National Coordinator for Counter-Terrorism Policing has stated that ‘on a scale of 1 to 10, she would currently rate the EAW ‘about an 8’ in terms of its importance to counter-terrorism policing: ‘it is an extremely valuable power to have’.<sup>96</sup>

These sentiments - relating to the value of the EAW for the UK - were also expressed by all of the justice and security experts interviewed for this project. For example, one stated:

Yes, I mean we would, along with other criminal justice partners, recognise the benefits that the EAW has brought in purely practical terms in that it streamlines arrangements and not just with a focus on Ireland but across the EU. The principal benefit of the EAW is that it is a streamlined arrangement, it is mutually recognisable across all of the EU states and an EAW issued in one Member State territory can be executed in any other Member State territory so there’s that reciprocal recognition attached to it which is obviously incredibly beneficial for the criminal justice system generally.<sup>97</sup>

### **Existing Human Rights Concerns**

Many of the project interviewees emphasised how the EAW improved human rights conditions of extradition when compared with previous Council of Europe extradition measures. Also stressed was the way in which the EAW has been improved since it was implemented in 2004. For example, when asked about both general problems and specific human rights issues of the EAW, one justice and security expert asserted:

There were a lot of calls for improvements to it [EAW], I know that. But I also know that law enforcement were finding most of those had been resolved, relatively recently, certainly over the course of the last 12 months ... I think most people were satisfied that all the safeguards

<sup>92</sup> *ibid.*

<sup>93</sup> UK in a Changing Europe ‘Post-Brexit law enforcement cooperation: negotiations and future options’, p 40.

<sup>94</sup> European Union Committee, ‘Brexit: Future UK-EU Security and Police Cooperation’ House of Lords (7th Report: Session 2016-2017, HL Paper 77) para 126.

<sup>95</sup> *ibid.*, para 126.

<sup>96</sup> *ibid.*

<sup>97</sup> Interview with Justice and Security Expert, 15 February 2019.



were built in. And as I say I think the practical issues have mostly been resolved ... So there were little sort of glitches I think in terms of how they were sharing information, how they were recording them, that sort of thing. And gaps, I think there were some gaps being identified but most of those were resolved and I'm pretty sure resolved practically. I don't think there was any call for any sort of legal change.<sup>98</sup>

That said, despite improvements, human rights related issues persist with the EAW. The UK participates in the EAW without participating in important tools designed to protect human rights. For example, the UK has chosen not to participate in the Directive on access to a lawyer. By failing to participate in these tools, the UK has left a human rights protection gap for people facing extradition.

There are a number of existing human rights issues with the EAW that remain to be resolved. One of the key human rights concerns that continues to persist is proportionality. Some EU Member States issue excessive numbers of EAW for relatively minor crimes. As highlighted in our interview with Fair Trials, 'So you see people being sought under EAWs for quite minor crimes and that really isn't what it was really designed for'.<sup>99</sup> For example, prosecutors in Poland do not have the discretion to decide whether or not to apply for an EAW. Furthermore, Poland has relatively harsh standards for setting custodial punishments, which means that there are high numbers of people who would meet the minimum four-month custodial sentence requirement. With both of these elements in operation in Poland, the end result is that 'a large number of warrants are issued for relatively minor offences'.<sup>100</sup>

There are also a number of examples of human rights abuses within the criminal justice systems of EU Member States (evidenced in part by CJEU cases). For example, British citizen, Andrew Symeou was transferred to Greece under an EAW in 2009. He was held in pre-trial detention in Greece for 11 months, and during this time period was subjected to poor treatment. Furthermore, he was held in detention on evidence that was obtained by the police through violence. Many of the human rights concerns that were raised by Symeou's case have been resolved through changes that have been introduced to the EAW. But one key issue remains: currently, under the operative provisions of the Framework Decision on the EAW, there is no ground to refuse extradition on the basis of human rights concerns. Activists and academics alike have called for the introduction of human rights bar to extradition.

Despite the lack of a human rights bar for extradition in the legislation, the CJEU has demonstrated its willingness to examine human rights in relation to EAW cases. The CJEU has done this by reading together Article 1(3), 12 and 13 of the Framework Decision on EAW, which dictate that 'fundamental rights and fundamental legal principles should be respected in the context of the EAW'.<sup>101</sup> In the Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, the CJEU confirmed that the execution of an EAW may be refused on human rights grounds. In doing so, it also demonstrated a willingness to contravene the mutual trust principle by creating a standard whereby, 'human rights compliance must be queried and ascertained on the ground, and on the basis of concrete evidence'.<sup>102</sup> The Court found that:

It follows from all the foregoing that the answer to the questions referred to in that article 1(3), Article 5 and Article 6(1) of the Framework Decision must be interpreted as meaning

<sup>98</sup> Interview with Justice and Security Expert, 14 February 2019.

<sup>99</sup> Interview with Fair Trials, 13 March 2019.

<sup>100</sup> House of Commons Justice Committee, *Implications of Brexit for the Justice System* (9th Report of Session 2016-2017, 15 March 2017) HC 750, p 6.

<sup>101</sup> European Commission 'Handbook on How to Issue and Execute a European Arrest Warrant (28 September 2017) C(2017) 6389, p 46.

<sup>102</sup> V Mitsilegas, 'The Uneasy Relationship between the UK and European Criminal Law: From opt-outs to Brexit?' (2016) 8 *Criminal Law Review* 530.



that where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European Arrest Warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State.

To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.<sup>103</sup>

In accordance with this judgment, if the executing Member State obtains evidence that the conditions of detention in the issuing Member State would amount to inhuman and degrading treatment, they are obligated to follow the procedures outlined in paragraphs 89 to 104 of the *Aranyosi* and *Căldăraru* judgment.

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<sup>103</sup> Case C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, Judgment 5 April 2016, (ECLI:EU:C:2016:198), para 104.

These steps have been summarised by the European Commission as follows:<sup>104</sup>

### **1. Verification whether there is a real risk of inhuman and degrading treatment of the requested person because of general detention conditions**

- based on objective reliable, specific and properly updated information that may be obtained from, inter alia, judgments of international courts, such as judgments of the European Court of Human Rights, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.

### **2. If the existence of such a risk is identified based on the general detention conditions, verification whether there are substantial grounds to believe that such a real risk of inhuman and degrading treatment exists in the particular circumstances of the case for the requested person**

- **obligation to request** — on the basis of Article 15(2) of the Framework Decision on EAW — of the issuing judicial authority that there be provided, as a matter of urgency, all necessary supplementary information on the conditions in which it is envisaged that the requested person will be detained;
- **possibility to request information** relating to the existence of possible mechanisms for monitoring detention conditions;

### **3. If the existence of a real risk of inhuman or degrading treatment for the requested person is identified, based on information received from the issuing judicial authority and any other information that may be available to the executing judicial authority (and pending a final decision on the EAW):**

- **obligation to postpone the execution of the EAW in question.** Eurojust must be informed (in accordance with Article 17(7) of the Framework Decision on EAW);
- **possibility to hold the person concerned in custody**, but only if the procedure for execution of the EAW has been carried out in a sufficiently diligent manner and the duration of the detention is not excessive (in accordance with the judgment in Case C - 237/15 Lanigan, paragraphs 58, 59 and 60), giving due regard to the principle of the presumption of innocence guaranteed by Article 48 of the Charter and respecting the principle of proportionality laid down in Article 52(1) of the Charter;
- **possibility or even obligation to provisionally release the person concerned** accompanied by measures to prevent the person absconding.

### **4. Final Decision:**

- if the executing judicial authority, on the basis of the information received from the issuing judicial authority, can discount the existence of a real risk that the requested person will be subject to inhuman and degrading treatment, it must decide on the execution of the EAW;
- if the executing judicial authority finds out that the risk of inhuman and degrading treatment cannot be discounted within a reasonable time, it must decide whether the surrender procedure should be brought to an end.

<sup>104</sup> European Commission 'Handbook on How to Issue and Execute a European Arrest Warrant' (28 September 2017), C(2017) 6389, p. 46-48.

Further human rights developments have taken place with respect to CJEU judgements related to the EAW. As outlined by Steve Peers, in the case of *Bob-Dogi*, it was held ‘that Hungary could not simply issue EAWs as a stand-alone measure, with no underlying national arrest warrant, *inter alia* because the purpose of requiring the prior issue of a national arrest warrant was to ensure the protection of the suspect’s fundamental rights’.<sup>105</sup> In discussing the recent cases of *Aranyosi* and *Căldăraru* and *Bob-Dogi*, Peers argues that the inclusion of human rights considerations within these judgments will also fuel a push for other human rights considerations to postpone or invalidate future EAWs.<sup>106</sup>

In addition to the CJEU taking fundamental rights into consideration, the European Commission has provided guidance for Member States as to use of an EAW that respects fundamental rights. Thus, for issuing countries, it is advised that they first assess the ‘proportionality’ of whether the EAW is necessary and that there are no less harsh options available. This is in keeping with the principle of mutual trust, as the issuing Member State is taken to have made a proportionate decision. That said, from a human rights perspective, there has been criticism that executing countries are unable to refuse to extradite when they deem the EAW to be disproportionate.<sup>107</sup>

Although there is no bar for Member States to refuse to extradite on human rights grounds, the UK has taken a more progressive stance with its implementation of the EAW. Within the Extradition Act 2003, the UK has included a human rights ground for refusal to extradite under Part 1, Section 21:

1. *If the judge is required to proceed under this section (by virtue of section 11 or 20) he must decide whether the person’s extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.*
2. *If the judge decides the question in subsection (1) in the negative he must order the person’s discharge.*<sup>108</sup>

Despite these shifts by the CJEU towards considering fundamental rights protections in the context of the EAW, this is not sufficient protection for human rights. As will be expanded upon, we recommend that any future arrangement negotiated between the UK and EU must include this human rights ground for refusal.

Even with the human rights concerns highlighted above, many of the strongest critics of the EAW have not suggested that the EAW should be abandoned – even in the context of Brexit.<sup>109</sup> The conversations have instead centred around the need for reforming the EAW in order to improve protections for individuals subject to extradition. Organisations such as the General Council of the Bar of England and Wales and Fair Trials have argued that fully participating in newer EU measures, such as the EIO and ESO, would help to solve some of the current human rights concerns of the EAW – ensuring that the harshest mechanism is not the only measure in place.<sup>110</sup> This was well summarised in our interview with a representative from Fair Trials, who stated:

UK extradition practitioners have told us they’ve come across fewer cases in which people are surrendered under disproportionate EAWs after the reforms to the Extradition Act back in 2014. We know that countries continue to issue EAWs for minor crimes, but the reforms

105 S Peers, ‘Human Rights and the European Arrest Warrant: Has the turned from poacher to gamekeeper?’ (EU Law Analysis, 12 November 2016) available at <http://eulawanalysis.blogspot.nl/2016/11/human-rights-and-european-arrest.html>

106 *ibid.*

107 Fair Trials ‘Beyond Surrender: Putting Human Rights at the Heart of the European Arrest Warrant’ (2018), available at <https://www.fairtrials.org/publication/beyond-surrender>

108 Extradition Act 2003, Part 1, Section 21 [emphasis added].

109 The General Council of the Bar of England and Wales, *EU Referendum Bar Position Paper III: Reform or Withdrawal: Rights and Justice*, p 11.

110 *ibid.*, p 11-12.

may have helped to curb the problem – previously there were many people being sought under EAWs for very minor crimes, and it had a huge impact on their lives. The introduction of the EIO may have also had some effect on the use of EAWs, because it can be a better way of seeking information before actually seeking extradition. We think that we have seen a bit more of a positive trend in this regard.<sup>111</sup>

### **Current UK-EU Relationship – Prisoner Transfer**

Convicted prisoners can also be transferred back to their country of nationality or residence through Council Framework Decision 2008/909/JHA of 27 November 2008 (known as the EU Prisoner Transfer Framework Decision). Like the EAW, it is also based on ‘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’.<sup>112</sup>

It builds upon previous Conventions, including the Convention on the Transfer of Sentenced Persons of 21 March 1983, which allowed for the transfer of prisoners to serve the remainder of their sentence in their state of nationality and with their consent and that of the European states involved. The Additional Protocol to the Convention of 18 December 1997, added the provision that prisoners could be transferred without their consent under certain conditions. Under the current Framework Decision, deportation is only permissible if the prisoner has at least 6 months of their sentence left to serve and can take place without their consent.<sup>113</sup> The Framework Decision also applies to the enforcement of sentences in EAW cases.

The Framework Decision on Prisoner Transfer was one of the measures that the UK opted back in to in 2014.<sup>114</sup> The Government provided two reasons for this decision: (1) transferring prisoners back to their country of residence or nationality would free up prison places in the UK (therefore cutting costs); and (2) it is an essential component within the context of the EAW as it allows for UK citizens and residents to be returned to the UK to serve their sentences.<sup>115</sup> Prior to the UK opting back in, the Ministry of Justice also argued that serving a prison sentence within one’s home country can also promote better reintegration with society upon release.<sup>116</sup>

### **Possible Future Scenarios**

The EU has made it clear that upon exit, the UK will no longer be able to be a part of the EAW.<sup>117</sup> Further, the majority of legal experts also appear to share this view that, legally, the UK will not be able to be part of the EAW as there are no provisions for third country membership.<sup>118</sup> This means that the most likely scenario will involve negotiating an extradition agreement between the UK and the EU.

#### COUNCIL OF EUROPE CONVENTIONS

It is possible for the UK to rely on the 1957 Council of Europe Convention on Extradition. But a number of concerns have been raised about the problems that would arise through reliance on this Convention. One of the justice and security experts interviewed for this project referred to it as a ‘a suboptimal

111 Interview with Fair Trials, 13 March 2019.

112 Council Framework Decision 2008/909/JHA <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008F0909>

113 J Dawson, ‘Brexit: Implications for policing and criminal justice cooperation’ (Briefing Paper number 7650, 24 February 2017) House of Commons Library, p 11.

114 *ibid.*

115 *ibid.*

116 House of Commons Justice Committee, *Implications of Brexit for the Justice System* (9<sup>th</sup> Report of Session 2016-2017, 15 March 2017) HC 750, p 7.

117 BBC News ‘UK “can’t keep European Arrest Warrant after Brexit”’, 19 June 2018, <https://www.bbc.co.uk/news/uk-politics-44532500>

118 See, for example, UK in a Changing Europe ‘Post-Brexit law enforcement cooperation: negotiations and future options’, p 38.

substitute that could put people at risk across Europe'.<sup>119</sup> Many of these issues were highlighted by another interviewee:

I think it's been well documented that a reliance on the 1957 Convention is less than optimal, in comparison to how the EAW works and obviously the EAW having replaced the Convention did so on the basis that it was streamlined and it was much more easily understood, that there were fewer circumstances in which extradition could be refused and obviously as an agreement across the EU, it has essentially has simplified arrangements on extradition.<sup>120</sup>

As alluded to in the above excerpt, requests made under this framework are slower and more costly. In evidence provided to the House of Commons Justice Committee, Francis Fitzgibbons QC, the Chair of the Criminal Bar Association described relying on the Conventions as 'cumbersome, awkward and slow'.<sup>121</sup> A Home Office document leaked to *The Times* stated that extradition to non-EU countries cost an average of £62,000, while extradition under the EAW costs an average of £13,000.<sup>122</sup> The same leaked document also revealed that extradition is approximately three times faster under the EAW Framework than extradition involving non-EU countries. According to a UK in a Changing Europe Report, '[i]t took an average of 18 months to extradite an individual under the Convention, compared with 15 days for uncontested EAW cases and 48 days for contested ones – partly because it placed no time limits on each stage of the process'.<sup>123</sup> The Director of Public Prosecutions has also emphasised this point, describing the EAW as 'three times faster and four times less expensive than the alternatives'.<sup>124</sup> To illustrate the speed of the EAW, one of the justice and security experts interviewed for this project stated: 'an individual who is arrested today on the basis of an EAW in France can be back in this country within 7 days'.<sup>125</sup>

In line with the concerns expressed above, many of the issues highlighted by the experts interviewed for this project surrounded the speed and cost advantages of the EAW. But these were also linked in with the loss of the 'tactical advantages'<sup>126</sup> of the EAW:

[The EAW] is much easier. Understanding the process is much easier. The significant loss for the PSNI ... will be that at the minute they can arrest on the strength of an EAW, but this capability will be lost. [So arrests can be made] based on the strength of that [EAW] and obviously the reassurance and the knowledge and the understanding that comes with that.<sup>127</sup>

Expanding on this, another interviewee stated:

there are two parts to this ... The tactical advantages of EAW in that it is an efficient and easily understood system, every Member State in Europe has access to it, automatically when the police obtain an EAW they go onto the SIS for an alert so if that individual then moves throughout Europe and they are interacting with police services and the check is run there is opportunity to detect a person who is wanted in connection with a criminal offence. It is accepted that Member States have judicial oversight such that when an EAW is issued and

119 Interview with Justice and Security Expert, 4 March 2019

120 Interview with Justice and Security Expert, 15 February 2019

121 House of Commons Justice Committee, *Implications of Brexit for the Justice System* (9<sup>th</sup> Report of Session 2016-2017, 15 March 2017) HC 750, p 6.

122 The Times 'Leaked Document: the Home Office assessment of post-Brexit terror and crime risks', 23 August 2017, <https://www.the-times.co.uk/article/leaked-document-the-home-office-assessment-of-post-brexit-terror-and-crime-risks-gjc6zngmb>

123 UK in a Changing Europe 'Post-Brexit law enforcement cooperation: negotiations and future options', p 42-43.

124 European Union Committee, 'Brexit: Future UK-EU Security and Police Cooperation' House of Lords (7<sup>th</sup> Report: Session 2016-2017, HL Paper 77) para 136.

125 Interview with Justice and Security Experts, 9 April 2019.

126 *ibid.*

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

then actioned, the Member State making the arrest has assurance that due diligence has been given prior to the issuance of the EAW, therefore an arrest can place on good faith of the alert and papers received. By contrast there are some arrest alerts from other countries the circumstances of which means police cannot make an arrest based on the alert, but have to obtain details of the person stopped, let them go, and obtain a warrant from a UK court as soon as possible, before trying to apprehend the person again. That's the tactical advantage. The strategic advantage is, regardless of what you call the system, it happens to be called EAW but we see a great value in an extradition process, that means people who move, throughout Europe in particular, but closer to home throughout the UK and Ireland, those citizens who are able to move because of the CTA, to reside, educate and for employment purposes in those regions can do so freely in exercise of their CTA rights and it is right that also the state is able to follow, as it were, that person's trail if they have involvement in criminal offending.<sup>128</sup> And so for us, we see it as very important that in the event that Justice and Home Affairs measures are lost because of UK exit from the EU, that the ability to extradite citizens is replicated that there is a mechanism between the UK and Ireland and then onwards for other MS, 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.<sup>129</sup>

As Home Secretary, Theresa May was highly critical of relying on the Convention for extradition. In November 2014, she stated that 'one crucial aspect [of the Convention] would cause us problems, namely that the length of time extradition procedures would take could undermine public safety'.<sup>130</sup> In the House of Commons, she also highlighted the 'problem' that, under the Convention, the majority of EU Member States (22) can refuse to extradite their own nationals to the UK.<sup>131</sup> This lack of swiftness has also been identified as potentially creating a scenario whereby 'a terrorist can think, okay there is a safe haven where it is going to take a very long time for me to be extradited and come to justice'.<sup>132</sup>

As outlined above, the EAW has been praised for its progressive contributions to the extradition process. Another concern about falling back on the 1957 Convention is that it reintroduces a political dimension to the extradition process. By placing extradition in the hands of judicial authorities, the EAW largely removed the political dimension from extradition amongst EU Member States. In past extradition arrangements, those responsible for making extradition decisions were the political authorities: applications made under the 1957 Convention were made through diplomatic channels, including a direct role for the Secretary of State.<sup>133</sup> The Permanent Secretary for the Department of Justice in Northern Ireland submitted a document to the former head of the Northern Ireland Civil Service that stated 'The EAW has removed the political dimension from extradition. The extradition process could become toxic once again'.<sup>134</sup> Thus, there is concern that by removing extradition from the hands of judicial authorities and putting it in the hands of political ones, relying on the 1957 Convention could remove much of the transparency that was built into the EAW and reintroduce political subjectivity into the decision making process.

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128 Note from interviewee: 'any actions by the "state" to "follow" persons is done so within full cognisance of the law and in compliance with Human Rights Act.' Interview with Justice and Security Expert, 9 April 2019.

129 *ibid.*

130 European Union Committee, 'Brexit: Future UK-EU Security and Police Cooperation' House of Lords (7<sup>th</sup> Report: Session 2016-2017, HL Paper 77), para 125.

131 *ibid.*

132 *ibid.*, para 127.

133 European Union Committee, 'Brexit: Future UK-EU Security and Police Cooperation' House of Lords (7<sup>th</sup> Report: Session 2016-2017, HL Paper 77) Paragraph 134.

134 C Campbell 'Government fears "essential" extradition powers to combat crime will be lost after Brexit', *The Detail*, 23 November 2017 <http://www.thedetail.tv/articles/extradition-issue-to-become-toxic-post-brexit>



A further problem with relying on the 1957 Convention is that a number of countries have nationality bars on extradition that prevent them from extraditing their citizens. The EAW solved this problem as it required EU Member States to amend their domestic legislation that contained nationality bars. For example, the German constitution had to be amended with the introduction of the EAW.<sup>135</sup> However, as highlighted by one of the justice and security experts interviewed for this project, ‘there are nationality bars that Germany and France have made clear that they have, I think there are nine countries that have them, Slovenia, Slovakia, and others. And obviously at some point that may bite or there may be an impact there’.<sup>136</sup>

It is also important to note that some countries, including the Republic of Ireland, have repealed the law that implemented the Convention. Helen Malcom QC of the National Crime Agency has stated that ‘many countries that were part of the EAW had repealed legislation that allowed them to have an extradition arrangement with other Member States’.<sup>137</sup> Furthermore, the Law Society of Scotland has pointed out that the Republic of Ireland has ‘repealed all pre-existing extradition arrangements with the UK prior to the adoption of the EAW’, and as a result would have to amend its domestic law to give effect to any new arrangement.<sup>138</sup> That said, it is with this in mind, that the Republic of Ireland included Part 14 - ‘Amendments to the Extradition Act 1965 to apply the provisions of the 1957 Council of Europe Convention on Extradition’ of the Omnibus Bill to amend the Extradition Act 1965, which governs Irish extradition arrangements.<sup>139</sup> This part of the Bill would provide for an amendment to the Extradition Act to allow extradition of Irish citizens with the UK on a reciprocal basis to continue under the 1957 Convention (replacing current EAW arrangements). This reflects the importance that the Irish government has placed on maintaining extradition with the UK post-Brexit:

The departure of the UK [from the EU] is particularly significant for Ireland on a wide range of issues. However, in the context of combating crime and terrorism, the necessity to maintain a functioning system of extradition between the two states has been identified as a key priority. As all Annual Reports on the EAW to date have shown, the UK remains the state with which Ireland has the greatest interaction.<sup>140</sup>

Were the UK to rely on the 1957 Convention, human rights concerns have also been raised. For example, the Crown Office and Procurator Fiscal Service provided evidence to the House of Lords EU Committee that the speedier extradition process of the EAW ‘is an important element in delivering justice and upholding the rights of both victims of crime and accused persons. They warned that leaving the EAW and falling back on pre-existing arrangements “would be both retrograde and uncertain”.’<sup>141</sup> One of the experts interviewed for the project expressed similar sentiments about the potential ramifications for human rights:

efficiency problems I suppose bites two ways. It bites on the criminal justice system in particular, but it also bites on victims and witnesses, and it bites on requested persons

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<sup>135</sup> House of Lords European Union Committee, ‘Brexit: Judicial Oversight of the European Arrest Warrant’ (27 July 2018, 6<sup>th</sup> Report of session 2017-19) HL Paper 16, p 24.

<sup>136</sup> Interview with Justice and Security Experts, 9 April 2019.

<sup>137</sup> European Union Committee, ‘Brexit: Future UK-EU Security and Police Cooperation’ House of Lords (7<sup>th</sup> Report: Session 2016-2017, HL Paper 77), para 137.

<sup>138</sup> *ibid.*

<sup>139</sup> General Scheme of the Miscellaneous Provisions (Withdrawal of the United Kingdom from the European Union on 29 March 2019) Bill 2019 (‘Omnibus Bill’) <https://www.dfa.ie/media/dfa/eu/brexit/brexitnegotiations/General-Scheme-of-Miscellaneous-Provisions.pdf>

<sup>140</sup> Department of Justice and Equality (2017) ‘Report on the operation of the European Arrest Warrant Act 2003 (as amended) for the year 2017’ House of Oireachtas.

<sup>141</sup> European Union Committee, ‘Brexit: Future UK-EU Security and Police Cooperation’ House of Lords (7<sup>th</sup> Report: Session 2016-2017, HL Paper 77), para 128.

themselves. So from a human rights perspective, any delay in proceedings could have an impact on the requested person and on victims and witnesses.<sup>142</sup>

## EXTRADITION AGREEMENT

The UK may also attempt to conclude an extradition arrangement modelled after the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway.<sup>143</sup> The Norway/Iceland deal largely replicates the Framework Decision on EAW. According to Helen Malcom QC, of the Bar Council, there are two differences relating to exemptions from extradition, but ‘other than that, word for word, it is the same as the EAW and the form at the end of it is worded identically to the EAW form’.<sup>144</sup> Sir Francis Jacobs has argued that although the UK hopes to remain part of the EAW, ‘the best that could be hoped for would be an arrangement on the same lines as Norway and Iceland have’ which would be less than satisfactory’ and ‘may be difficult to attain’.<sup>145</sup>

The practical issue, identified above, regarding the need for constitutional change in some Member State jurisdictions also exists under this proposal. Thus, if the UK wishes to have arrangements similar to the EAW framework, whereby members must extradite their own nationals, the UK will have to persuade EU Member States that it is worth ‘the political risk for them to seek to negotiate to amend their constitution internally’.<sup>146</sup>

Although there are essentially only two differences between the EAW and the Iceland/Norway extradition agreement, they are important. The first is an option for countries party to the agreement to refuse to extradite their own nationals, and the second is an exemption based on political offences. In the context of a UK-EU arrangement, both of these grounds for refusal could prove to be problematic. This could provide a possibility for defence lawyers to argue that the extradition of suspected terrorists from Ireland to the UK to face prosecution ought to be exempted as political offence.<sup>147</sup>

The willingness of the EU to negotiate these kinds of arrangements does indicate an option of creating similar arrangements with the UK. That said, some key problems will inevitably arise due to the stance of the UK government. One of these relates to the fact that Iceland and Norway are both Schengen members, while the UK is not. In May 2016, ‘the Government suggested that “Norway and Iceland’s Schengen membership was key to securing even this level of agreement”, and that “there is no guarantee that the UK could secure a similar agreement outside the EU given that we are not a member of the Schengen border-free area”’.<sup>148</sup> Another issue arises due to the position taken by the UK in ending the jurisdiction and oversight of the CJEU. On this issue, the Crown Office and Procurator Fiscal Service noted that:

while non-EU states had negotiated arrangements very similar to the EAW with the EU, “we see formidable obstacles to a similar arrangement being in place for the UK by 2019/2020”. They also warned that on their understanding, “a necessary condition of these arrangements is that the non-EU states submit to the jurisdiction of the CJEU to adjudicate their operation”.<sup>149</sup>

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

143 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22006A1021%2801%29>

144 European Union Committee, ‘Brexit: Future UK-EU Security and Police Cooperation’ House of Lords (7<sup>th</sup> Report: Session 2016-2017, HL Paper 77), para 129.

145 House of Lords European Union Committee, ‘Brexit: Judicial Oversight of the European Arrest Warrant’ (27 July 2018, 6<sup>th</sup> Report of session 2017-19) HL Paper 16, p 19.

146 *ibid*, p 24.

147 UK in a Changing Europe ‘Post-Brexit law enforcement cooperation: negotiations and future options’, p 40-41.

148 European Union Committee, ‘Brexit: Future UK-EU Security and Police Cooperation’ House of Lords (7<sup>th</sup> Report: Session 2016-2017, HL Paper 77), para 130.

149 *ibid*, para 133.



Furthermore, as the UK has been very vocal that it intends to end the jurisdiction of the CJEU, but it is important to note that, in relation to extradition arrangements, the EU will likely require some kind of oversight body or a continuation of limited oversight of the CJEU.<sup>150</sup>

A further issue relates to data sharing. The issuing of EAW, involves the exchange of information about the person(s) involved. When this takes place, Member States are to ensure that they are observing the associated data protection requirements. As of leave day, the UK will be up to date with EU data protection laws, but if the UK diverges from EU standards, EU Member States may no longer be willing to share necessary data that would facilitate extradition.<sup>151</sup>

As highlighted by the experience of Norway and Iceland, negotiating and implementing an extradition arrangement with the EU can also be a very lengthy process. Despite being signed over a decade ago, the Iceland/Norway agreement is still not in force. Concerns have been raised that a similar situation could arise for the UK. In relation to this, concerns have been raised about the potential security risks related to any kind of operational gap that may appear between the removal of the EAW and implementation of a UK-EU agreement.<sup>152</sup> This concern can be mitigated by the fact that the UK can fall back on the 1957 Convention in the interim period until an agreement is concluded with the EU, but this does bring with it the concerns highlighted in the section above.

## Summary

To summarise, while existing human rights issues remain with the operation of the European Arrest Warrant, the above analysis has demonstrated that it is the most efficient and human rights compliant extradition arrangement that has existed to date. Maintaining the current UK position within the EAW framework would be ideal as it would both allow extradition to continue as it currently does, as well as present an opportunity for the UK to push for reform. Failing this, the UK has two options: relying on the 1957 Convention on Extradition or negotiating a new extradition treaty.

Justice and security experts interviewed for the project emphasised that the UK should pursue an extradition agreement similar to that negotiated between the EU and Iceland and Norway. Two issues that the negotiators must be mindful of are the two exemptions contained with the Iceland/Norway agreement whereby states may refuse to extradite their own nationals or refuse to extradite people for the commission of political offences. Negotiators must seek to minimise the issues this would create for the UK, particularly in the context of extradition between the UK and Ireland. Within the future agreement, it also is imperative that the UK seek to insert a human rights bar to extradition as well as retain domestic legislation that gives British Courts the power to refuse extradition if it would be incompatible with Convention Rights contained within the Human Rights Act 1998.

The UK must also consider two final points relating to oversight and data sharing, as these will be key issues for the successful negotiation of either retaining access to the EAW or the conclusion of a new extradition arrangement. First, contemplation must be given to judicial oversight currently provided by the CJEU. We assert that the UK should retain the jurisdiction of the CJEU for future extradition arrangements with the EU. This would help to ensure that protections remain for those subject to transfer and increase the likelihood of the EU agreeing to extradition arrangements similar to those with Iceland and Norway. Second, the UK must keep up to date with EU data protection laws,

<sup>150</sup> UK in a Changing Europe 'Post-Brexit law enforcement cooperation: negotiations and future options', p 41.

<sup>151</sup> House of Lords European Union Committee, 'Brexit: Judicial Oversight of the European Arrest Warrant' (27 July 2018, 6<sup>th</sup> Report of session 2017-19, HL Paper 16), p 24.

<sup>152</sup> European Union Committee, 'Brexit: Future UK-EU Security and Police Cooperation' House of Lords (7<sup>th</sup> Report: Session 2016-2017, HL Paper 77) para 141.

as Member States may no longer be willing to share data that would facilitate extradition without assurance that this data will be protected.

#### KEY RECOMMENDATIONS

Maintaining the current UK position within the EAW framework would be ideal as it would both allow extradition to continue as it currently does, as well as present an opportunity for the UK to push for reform. Failing this, the UK has two options: relying on the 1957 Convention on Extradition or negotiating a new extradition treaty. For any future negotiations: A human rights ground for refusal must be built into the future UK-EU extradition arrangement.

## 5. Policing and Prosecutorial Cooperation

This section examines other forms of policing and prosecutorial cooperation that currently occurs between the UK and EU. It begins by outlining the practical nature of the mechanisms the UK currently participates in. It then develops to assess the impact the various possible Brexit scenarios could have on the UK's continued participation in these measures. The specific impact of the scenarios on the operational capabilities and efficiency of cooperation in Northern Ireland is then examined. Following this, the section assesses the anticipated impact of loss of access to measures. Key concerns raised are the creation of lengthier processes than what currently exist and negative impacts for victims and witnesses. A range of possible future outcomes are also presented that were raised in the interviews conducted as part of the research.

### Current UK Cooperation

As an EU Member State, the UK currently participates in a number of mechanisms that facilitate policing and prosecutorial cooperation between jurisdictions. The benefit of these systems is that they allow police services and law enforcement agencies to assist each other in their inquiries and access intelligence and evidence. Such measures are deemed useful in tackling cross-border organised crime, international terrorism and taking into consideration the previous criminal activity of citizens who have utilised their free movement rights. Once a case progresses from the investigation stage to the prosecution stage, EU cooperation measures allow a national court to take into consideration convictions gained in other EU Member States when passing a sentence. National Courts often take into consideration past sentences an offender has received in another national jurisdiction so this information sharing has the purpose of helping ensure offenders do not escape conviction or receive lighter sentences by moving country. Northern Ireland fully participates in such activities and thus changes caused by Brexit will affect such cooperation in the future.

Such cooperation occurs in NI, through police to police enquiries at pre-evidential and evidential stages. Informal, collegial working relationships and requests for assistance are underpinned by formal frameworks such as International Letters of Request (ILOR), European Information Orders (EIO), Joint Investigation Teams (JITs) and access to information held in a number of electronic data and information sharing systems. On the prosecutorial level, personnel attend meetings at the Eurojust headquarters, form part of JITs, participate in the execution of the EAW and the EIO and engage with the European Judicial Network.<sup>153</sup> Therefore, cooperation exists on an operational, day-to-day level alongside practice-sharing, mutual learning and the development of common standards.

Specifically, prosecuting authorities employ letters of request and EIOs to obtain evidence on behalf of an investigating body, which may or may not result in a criminal trial.<sup>154</sup> The majority of mutual legal assistance requests received in NI are from the ROI, who do not participate in the EIO. Thus, cooperation takes place via the more traditional route of ILOR, which would not be affected by Brexit. The issue of cross-border arrangements will be considered in more detail in Section 6. Generally, policing and prosecutorial cooperation has been expanding during the course of the Brexit negotiations and the UK, during this time, has made EIOs operational (February 2018), made the necessary alignments for Prüm to become operational (awaiting Parliamentary approval) and implemented the Passenger Name Record (PNR) system (May 2018).

This section outlines the possible post-Brexit arrangements in this area and examines the potential implications these arrangements could have on criminal justice proceedings, both the investigation and prosecution of crime, in Northern Ireland.

<sup>153</sup> Interview with Justice and Security Expert, 5 March 2019.

<sup>154</sup> *ibid.*

## Possible Post-Brexit Scenarios

Policing and prosecutorial cooperation has not been at the forefront of the withdrawal negotiations; instead the focus has been more concretely on issues of trade and the Irish border. The first Position Paper on Northern Ireland<sup>155</sup> outlined four areas considered important to maintain the peace process:

- Upholding the Belfast ('Good Friday') Agreement in all its parts;
- Maintaining the Common Travel Area and associated rights;
- Avoiding a hard border for the movement of goods; and
- Aiming to preserve North-South and East-West cooperation, including on energy.<sup>156</sup>

Though central to the first priority area, policing and prosecutorial cooperation are not explicitly mentioned. Yet research has found public concern over security issues to be high.<sup>157</sup>

The UK government position has been to communicate the mutual benefit of remaining a part of the EU frameworks for policing and prosecutorial cooperation. The Future Partnership Paper of 18 September 2017 emphasises that the UK and Europe face shared security threats to 'their citizens and way of life'.<sup>158</sup> Also outlined, is that effectively combatting these threats and achieving the UK and EU's common objectives requires maintained and strengthened close collaboration after the UK's exit.<sup>159</sup> Northern Ireland is identified as an example of how the UK has 'developed increasingly sophisticated ways of working with its international partners'.<sup>160</sup> EU instruments are credited as underpinning the 'strong cooperation between the Police Service of Northern Ireland (PSNI) and An Garda Síochána (AGS), and Her Majesty's Revenue and Customs (HMRC) and Ireland's Revenue Commissioners in their efforts to combat terrorism and serious organised crime'.<sup>161</sup> Experts we interviewed shared optimism that good relations would continue across the border, and more generally, with Europe. We think it important to highlight the specific circumstances of the security situation in NI and account for the possible implications different policy options could entail for Northern Ireland.

The further detail of the Future Partnership Paper outlines that future arrangements should maintain commitment to:

- Build on, and where possible enhance, the strong foundation of existing cooperation and work collaboratively against shared threats;
- Cooperate across a range of measures, agencies and other fora and continue the facilitation of operational business across borders, avoiding operational gaps for law enforcement agencies and judicial authorities in the UK and the EU;
- Continue to develop a dynamic relationship over time as threats change and opportunities for joint working develop; and

155 HM Government, 'Northern Ireland and Ireland' Position Paper, 16 August 2017 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/638135/6.3703\\_DEXEU\\_Northern\\_Ireland\\_and\\_Ireland\\_INTERACTIVE.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf)

156 *ibid.*

157 BrexitLawNI, *BrexitLawNI Policy Report: Brexit and The Peace Process* (14 September 2018) <https://brexitlawni.org/assets/uploads/Brexit-and-the-Peace-Process.pdf>

158 HM Government, *Security, law enforcement and criminal justice: A future partnership paper* (18 September 2017) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/645416/Security\\_\\_law\\_enforcement\\_and\\_criminal\\_justice\\_-\\_a\\_future\\_partnership\\_paper.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645416/Security__law_enforcement_and_criminal_justice_-_a_future_partnership_paper.PDF), 1.

159 *ibid.*, p 2.

160 *ibid.*, p 4.

161 *ibid.*

- Assist one another when needed, if for example the UK or a Member State is subject to a terrorist attack.<sup>162</sup>

The White Paper on the Future Relationship develops these priorities and while explicitly stating the UK understands the security relationship cannot continue on the same basis as when it was a Member State, proposes ‘an ambitious security partnership with the EU that goes beyond existing precedents in this area’.<sup>163</sup> Consideration was given that any future arrangement between the UK and the EU must respect the ‘separate and distinct’ legal systems of Scotland and NI.<sup>164</sup>

It is important to consider, however, that both the Future Partnership Paper and the White Paper on the Future Relationship only presents the UK’s view. The Political Declaration between the UK and the EU on 25 November 2018 sketches a more realistic picture of the EU’s priorities. Prior to this, the EU’s position had been most explicitly articulated in the European Council’s guidelines of March 2018 where the EU27 stressed that any future relationship would need to take into account the fact that the UK after Brexit will be a third country outside of Schengen.<sup>165</sup> Although the UK is currently outside of Schengen, it still participates in legislative decision-making and influences the development of policy, something it could no longer do as a third country. Instead, it would have to accept the decisions taken by the remaining Member States.

Other options that have been mooted, such as a Norway-like arrangement, would not facilitate the same level of effectiveness. For example, bilateral agreements between the UK and individual Member States would not guarantee that UK requests for cooperation will be treated by EU partners with an equal priority compared to those of remaining Member States.<sup>166</sup> The Council of Europe (CoE) agreements have been superseded by EU cooperation in terms of innovation and intra-EU applicability, and only cover limited aspects of EU cooperation.

As a result of this assessment, Mitsilegas notes a triple paradox characterises the envisaged post-Brexit relationship between the EU and the UK. First, the UK’s current position in the EU is marked by tension about maintaining national sovereignty in matters of criminal law but simultaneously seeking cooperation in the field of security. Second, however, the UK’s willingness to continue to receive the benefits of cooperation on these matters will only be possible if the UK fully complies with the EU *acquis*, including fundamental rights provisions. This is more than it currently adopts as an EU Member State because of the opt-outs it negotiated; these would no longer be available as a third-country. Third, post-Brexit the EU will continue to develop criminal law but the UK’s influence will be less marked which could impact on the direction it takes and certainly will have a negative impact of the UK’s ability to conduct quality control and scrutiny of EU criminal law pre-adoption.<sup>167</sup>

The draft political declaration which accompanies the draft withdrawal agreement, does contain commitments in the spirit of these aspirations. The language of an ‘ambitious, broad, deep and flexible partnership’ indicates the possibilities are open.<sup>168</sup> In providing further detail, the declaration outlines that the future relationship will ‘provide for comprehensive, close, balanced and reciprocal law

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162 *ibid*, p 7.

163 *ibid*, p 51 & 55.

164 *ibid*, p 56.

165 European Council, Conclusions, 23 March 2018, <https://www.consilium.europa.eu/media/33457/22-euco-final-conclusions-en.pdf>

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

167 *ibid*.

168 Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, 25 November 2018 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/759021/25\\_November\\_Political\\_Declaration\\_setting\\_out\\_the\\_framework\\_for\\_the\\_future\\_relationship\\_between\\_the\\_European\\_Union\\_and\\_the\\_United\\_Kingdom\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom_.pdf), para 3.

enforcement and judicial cooperation in criminal matters' and emphasises the need to maintain strong operational capabilities.<sup>169</sup> However, it does not provide detail on the specific provisions that the UK may be able to remain a part of. The specific access and capabilities the UK will retain still need to be negotiated which does provide opportunity for practitioners and experts to influence the priorities.<sup>170</sup> On the other hand, given the current political impasse faced by the UK government, the impact of exiting in a no-deal scenario is completely uncertain. Therefore, it appears imperative to consider how any delay to continued access to cooperation frameworks in the transition period, at best, or no continued access in the case of no-deal, at worst, could impact the operational capability and efficiency of policing and criminal justice in NI.

### **Operational Capability and Efficiency in Northern Ireland**

In terms of the Northern Ireland position on these issues, the OFMDFM letter to the Prime Minister following the referendum result in 2016 is the only formal political communication that exists. However, the objective expressed there, to maintain cooperation, continues to be the priority for experts in the area.<sup>171</sup> This political steer has been underscored by the statements of the PSNI Chief Constable, George Hamilton, who has repeatedly emphasised the threat Brexit poses for a return to violence in NI.<sup>172</sup> Similar concerns were expressed by the Garda Commissioner, Drew Harris.<sup>173</sup> However, police services on both sides of the border have expressed an explicit commitment to maintaining to good relations they have developed.

While these positive sentiments will no doubt underscore efforts to navigate the post-Brexit environment, legal restrictions could have an impact on the operational capability and efficiency of investigations and prosecutions. Our interviews indicated a desire to continue working and cooperating as currently happens.<sup>174</sup> However, despite this good will, it was agreed by experts we interviewed that anything other than the EU measures would be sub-optimal.<sup>175</sup> While mutual trust has been developed and is hoped to continue, the day-to-day capabilities could be affected greatly.

### **Anticipated Impact**

As Brexit day draws closer and the lack of clarity on the exit conditions remain, experts in the area are involved in planning for multiple possibilities. Contingency plans for no-deal are being made across all sectors, including criminal justice. It is reported that up to a thousand police officers from England and Wales are being trained for deployment to NI to assist with any disorder that may result from a no-deal Brexit.<sup>176</sup> Additional funds have also been allocated for the PSNI to recruit over 300 new officers by 2020.<sup>177</sup> It has also been expressed that allocating time to contingency planning and preparing for all

169 *ibid*, para 82.

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

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

172 BBC News, 'PSNI chief warning over post-Brexit threat' 9 September 2018: <https://www.bbc.co.uk/news/uk-northern-ireland-45461120>; Henry McDonald, 'Police chief says 'hard Brexit' Irish border would be paramilitary target' (7 February 2018, *The Guardian*) <https://www.theguardian.com/uk-news/2018/feb/07/n-ireland-police-chief-says-hard-brexit-border-posts-would-be-paramilitary-target>; C Page, 'PSNI are 'not overplaying Brexit border threat' (16 November 2018, *BBC News*) <https://www.bbc.co.uk/news/uk-northern-ireland-46180190>

173 Conor Lally, 'Dissident republicans will 'undoubtedly' try to exploit hard border, says Harris' (7 November 2018, *The Irish News*) <https://www.irishtimes.com/news/crime-and-law/dissident-republicans-will-undoubtedly-try-to-exploit-hard-border-says-harris-1.3689641>

174 Interview with Justice and Security Expert, 7 March 2019; Interview with Justice and Security Expert, 5 March 2019.

175 Interview with Justice and Security Expert, 15 February 2019; and Interview with Justice and Security Expert, 14 February 2019.

176 V Dodd, J Rankin and R Syal, 'Police reinforcements for Northern Ireland in case of no-deal Brexit' (4 January 2019, *The Guardian*) <https://www.theguardian.com/uk-news/2019/jan/03/police-reinforcements-for-northern-ireland-in-case-of-no-deal-brexit-1000-officers-training-trouble-hard-border>

177 BBC News, 'Brexit: PSNI to recruit an extra 308 officers after funding boost' (19 December 2018, *BBC News*) <https://www.bbc.co.uk/news/uk-northern-ireland-46623152>; Michael McHugh, 'PSNI to get 300 new police officers and staff by 2020 for Brexit preparations' (19 December 2018, *The Irish News*) <https://www.irishtimes.com/news/brexit/2018/12/19/news/psni-to-get-300-new-police-officers-and-staff-by-2020-for-brexit-preparations-1512503/>

eventualities can detract resources from duties.<sup>178</sup> Security and justice experts we interviewed indicated that the evolution of justice arrangements are only beginning and impact could be felt well into the long-term:

The loss of the measures is probably not the day one priority then but at some point in that first six months after we leave, we might start to feel the impact of that concurrent with other issues that we are facing. So they're our short and medium term priorities, and then in our head there is a more strategic long-term set of issues around competence, and how citizens feel about the state and what that does to community policing in NI so that's the way we see that moving over time.<sup>179</sup>

Access to policing and criminal justice databases and their continued use operationally will be examined in more detail in Section 7.

### LENGTHIER PROCESSES

A commonly raised concern has been that the impact of Brexit will lead to delay in criminal justice proceedings. Assistant Chief Commissioner of the PSNI Tim Mairs is on record as stating that a no-deal Brexit would make policing slower and more bureaucratic<sup>180</sup> His concern was also raised in our interviews with security and justice experts.<sup>181</sup> 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.<sup>182</sup> As one of our interviewees indicated:

... our analysis of the issues for the criminal justice system wherever you are, is things will take longer, that will lead to delay, worried about the long-term competence issues, how do victims and witnesses feel about that? Additional judicial reviews are probably inevitable.<sup>183</sup>

As mentioned above, the traditional form of police cooperation is the issuing of International Letters of Request (ILORs) between jurisdictions. The Public Prosecution Service (PPS) can be involved in assisting with the drafting of these letters. The EIO was developed to make this process more streamlined between EU Member States, and introduces mutual recognition of judicial decisions taken by other Member States, a standardised request system and specified timeframes for responding to requests.<sup>184</sup> EIOs only became live in the UK in February 2018 but already there has been recognition of the benefits it brings to investigating officers by providing structure and focus to proceedings and removing elements of choice associated with ILORs.<sup>185</sup>

The loss of these capabilities would not be ideal, however it should be stressed that ILORs remain as a fall-back that have been the only method of operating until recently, and continue to be for cooperation with jurisdictions outside the EU.<sup>186</sup> Some practical issues would need to be worked out, however, such

178 Belfast Telegraph, 'Brexit a 'distraction' to policing in Northern Ireland, says chief constable' (7 February 2019, *Belfast Telegraph*) <https://www.belfasttelegraph.co.uk/news/northern-ireland/brexit-a-distraction-to-policing-in-northern-ireland-says-chief-constable-37793073.html>

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

180 Jonathan Bell, 'No-deal Brexit policing slower and more bureaucratic – PSNI' (11 February 2019, *Belfast Telegraph*) <https://www.belfasttelegraph.co.uk/news/northern-ireland/nodeal-brexit-policing-slower-and-more-bureaucratic-psni-37806651.html>

181 Interview with Justice and Security Expert, 14 February 2019; Interview with Justice and Security Expert, 7 March 2019; Interview with Justice and Security Expert, 5 March 2019; and Interview with Justice and Security Expert, 15 February 2019.

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

183 *ibid.*

184 UK Home Office, Guidance: European Investigation Orders requests, 26 February 2018: <https://www.gov.uk/guidance/european-investigation-orders-requests>

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

186 *ibid.*



as the potential for EU countries to prioritise EIOs above ILORs. The extent to which this could be an issue would differ case to case depending on the length and nature of the request.

Another key measure that the UK has opted-in to is the European Protection Order (EPO). The aim is to ensure victims of crime who are granted protection from their aggressor in one Member State are able to enjoy similar protection if they are in another Member State.<sup>187</sup> These orders enable a judge to impose ‘protection measures’ for persons who are subject to a criminal threat that could endanger life, physical or psychological integrity, dignity, personal liberty or sexual integrity. Protection measures may be prohibitions or restrictions on a person, such as an order not to enter property, not to contact the person, or to remain a specified distance away from them. It is understood that the EPO mechanisms would quite easily remain as part of UK law as that measure has been transposed into domestic law under the Protection and Harassment Order (NI) 1997.<sup>188</sup> This means the UK could issue recognise and uphold EPOs issued by other Member States but would not be able to ensure reciprocal recognition of its domestic orders by EU Member States. While this would provide protection for persons when in the UK, there would be no guarantee of protections remaining enforceable in other EU countries. The UK would either have to negotiate an agreement with the EU that retains this mutual recognition or negotiate bilateral arrangements with individual Member States. A key benefit of the EPO is the power of arrest that would allow police services in other countries to apprehend an individual in breach of an EPO.<sup>189</sup> This would also require renegotiation and would probably require reciprocal arrangements for UK police services.

A further EU mechanism is the European Supervision Order (ESO), a pre-Lisbon policing and criminal justice mechanism that the UK opted back in to in December 2014. The ESO covers issues relating to pre-trial detention and allows a person accused in another Member State to remain in their home state and be supervised there to await trial.<sup>190</sup> Continued use of ESO is deemed important as it mitigates some of the problems with EAW (mentioned in Section 4) and ensures fairer and proportionate criminal proceedings.<sup>191</sup> It is also important to note that there are no Council of Europe fall-back measures that could offer the same level of cooperation, the UK would have to negotiate any such system from scratch.<sup>192</sup>

What is clear from assessment of these measures is that they do not form the sole basis of policing and prosecutorial cooperation between NI and the ROI. Section 6 on cross-border justice arrangements indicates in more detail the nature of this cooperation and how it will be affected post-Brexit, emphasising that just because EU measures are not the sole basis of cooperation, does not mean there is no reason for concern. Criminal justice agencies in NI also engage in policing and prosecutorial cooperation with their counterparts in other Member States so the measures outlined would be a loss in terms of cooperation there.

While some fall-back mechanisms exist, these do not extend to all areas currently covered and there is concern regarding the removal of tools that have proven very useful, even in the short-term.<sup>193</sup> It was

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187 Joanne Dawson, ‘Brexit: Implications for policing and criminal justice cooperation’ (Briefing Paper number 7650, 24 February 2017) House of Commons Library.

188 Protection and Harassment Order (NI) 1997.

189 Interview with Justice and Security Expert, 10 April 2019.

190 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions of supervision measures as an alternative to provisional detention, 11 November 2009, OJ L 294.

191 European Union Committee, ‘Brexit: Future UK-EU Security and Police Cooperation’ House of Lords (7<sup>th</sup> Report: Session 2016-2017, HL Paper 77)

192 *ibid.*

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



also expressed that any added delays to the criminal justice process would also affect the victims and witnesses of crimes. Experts noted that it is not desirable to build in any further delay to already time-consuming procedures, especially if there was previously access to tools that created a more efficient way of proceeding.<sup>194</sup>

## IMPACT ON VICTIMS AND WITNESSES

Providing justice for victims is a key aspect of policing and prosecutorial work. As we have emphasised throughout this report, solely relying on statistics to assess the effectiveness and efficacy of measures and cooperation belies their full reach. Interviewees emphasised that criminal justice proceedings are ‘all individual stories for people, you know because for every one of those there is a set of victims, there is families of victims, there is local communities’.<sup>195</sup>

A practical impact of Brexit is that variances in procedure and practices could occur that ‘results in a slowdown in the processes, an added complication to the process, an administrative burden around the process, or lack of operational engagement of those processes’ which will ‘undoubtedly create situations where victims are not getting the best service that they should be and that’s not for want, that’s for the fact that we have processes that we need to follow around that’.<sup>196</sup>

Delay is not the only aspect of post-Brexit arrangements that could have a negative impact on victims and witnesses of crime. The EU measures relating to victims, the European Protection Order<sup>197</sup> and Victim’s Rights Directive<sup>198</sup> have been instrumental in creating a consistent approach to how victims and witnesses of crime are treated. As one security and justice expert interviewed put it:

[...] we didn’t really have anything like it, we didn’t treat victims properly, what we tended to do was ignore them and treat them very badly or suddenly put them to the forefront of every prosecution and give them rights that frankly they weren’t entitled to and give them expectations that could not be fulfilled. So they were used completely as a political football, and not only in the Northern Ireland context where that is probably obvious but just generally victims of crime across the UK.<sup>199</sup>

As the criminal justice system adjusts to legal changes post-Brexit, an increase in the number of judicial review applications is also foreseen. Experts we interviewed indicated that judicial reviews would be likely even in areas that should not really be novel because the measures will not have been used in that context. For example, if the UK is no longer part of the EAW and is operating extradition procedures under the 1957 Convention against nationals of EU Member States.<sup>200</sup> Existing judicial review cases would indicate that the loss of oversight of the CJEU could result in a diminution of rights in this context, as cases already exist which show a lack of regard for the Charter in governmental decision-making.<sup>201</sup> Monitoring and observation of the continued implementation of rights during any transition or new partnership arrangement would be imperative, particularly as the public knowledge of what continues to apply or disapply may be unclear.

194 Interview with Justice and Security Expert, 5 March 2019.

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

196 *ibid.*

197 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, 21 December 2011, OJ L 338.

198 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, 14 November 2012, OJ L 315.

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

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

201 Interview with Justice and Security Expert, 14 February 2019; Northern Ireland has seen issues of this type arise and be decided on by the Courts - *MM* [2012] ECHR 24029/12; *Gallagher’s Application* [2015] NIOB 63.

It should also be emphasised that for policing ‘the ethos is that it is victims no matter where they are because I think that it is that information flows both ways, so we may not do our best for victims in another jurisdiction’.<sup>202</sup> Thus, victims of crimes in other EU jurisdictions could also be affected detrimentally by changes to these measures.

### **Possible Future Outcomes**

Our interviews and analysis has shown a strong commitment to positive working relationships and continued trust amongst policing and criminal justice practitioners. There was an explicit understanding expressed that ‘police-officers are problem-solvers in their DNA’ and will work to minimise disruption to their duties.<sup>203</sup> A keen desire to maintain current service levels was also expressed by security and justice experts, ‘we’re thinking our immediate priority is to keep as much going as we can on every sector’.<sup>204</sup>

Concern was also expressed about a loss of capabilities and how EU measures have been more successful than other attempts at cooperation:

I think the arrangements they had through Safe Harbour outside the EU, it just wasn’t as successful and the Courts have been critical about some of these arrangements and having got this far and now having arrangements in place that work and are trusted and the Courts appear to be accepting, with potential future challenge. To not have that, not only risks losing the benefits but erodes trust completely and why should somebody share their own citizens’ information if it is not going to be used properly.<sup>205</sup>

However, there is the possibility that EU standards will develop after the UK exits and, depending on the future partnership, the UK may not be able to influence new standards and may be required to participate as a condition of the future partnership. For example, an area where EU cooperation is deepening while Brexit is being negotiated is prosecutorial cooperation. The European Public Prosecution Office (EPPO) will be operational by end 2020/early 2021 and 22 EU Member States will participate. The EPPO will be the first EU body competent to adopt decisions vis-à-vis individuals in the field of criminal law and will be able to investigate and prosecute crimes affecting the financial interests of the EU.<sup>206</sup> The UK has expressed longstanding antipathy towards the creation of the EPPO and not opted in to the Regulation, which does not affect its participation in other mechanisms. However, as a third country the EU may require the UK to participate.

### **Summary**

In summary, a wide range of cooperation tools exists in the area of policing and prosecutorial cooperation. These tools extend from investigations right through to the prosecution of crime and the protection of victims. The tools operate to varying levels of severity and introduce greater nuance into the system, taking into account the nature of the crime, past convictions, and other circumstances. Tools such as the EIO and ESO mean Member States do not have to immediately resort to use of the EAW which introduces proportionality into the system and takes better account of procedural and due process rights. A high degree of interconnectedness can be seen, whereby measures have been developed to address criticisms and fill gaps in cooperation. The continued development of the system

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

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

204 Justice and Security Expert, 15 February 2019.

205 Justice and Security Expert, 14 February 2019.

206 S Carrera, V Mitsilegas, M Stefan and F Giuffrida, ‘Criminal Justice and Police Cooperation between the EU and the UK after Brexit: Towards a principled and trust-based partnership’ 2018 Report of a CEPS and QMUL Task Force, [https://www.ceps.eu/system/files/TFR\\_EU-UK\\_Cooperation\\_Brexit\\_o.pdf](https://www.ceps.eu/system/files/TFR_EU-UK_Cooperation_Brexit_o.pdf)

is something the UK should consider as it negotiates a future arrangement to ensure it has the option of participating in new initiatives that may address current pitfalls in the system, particularly regarding human rights issues.

#### KEY RECOMMENDATIONS

Any future agreement between the UK and the EU 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. To ensure this occurs and demonstrate its commitment, the UK should appoint an independent panel of human rights experts to assess future negotiated agreements. In addition, UK retention of the Charter of Fundamental Rights of the European Union would strongly signal its commitment to human rights. Failing this, the UK must update domestic human rights protections to reflect those provided under the Charter. The UK should demonstrate its commitment to the Victim's Rights Directive and Council of Europe instruments regarding cooperation in matters of criminal law and efficiency in justice.

## 6. Cross-Border Justice Arrangements on the Island of Ireland

Justice and security cooperation on the island of Ireland has been ongoing since partition in 1922. Given the political history and geographic reality of the island, cooperation has proven necessary to tackle ‘ordinary’ cross-border crime, address both the issues during the Troubles and the legacy of the conflict and respond to the changing realities of globalised crime. The decision of the UK to leave the EU will likely change the context in which this cooperation takes place – creating both challenges and opportunities that will need to be addressed.

The following section outlines the historical and contemporary relationships between Ireland and Northern Ireland, with a particular focus on policing cooperation and extradition arrangements. The role of EU mechanisms within both of these areas of cooperation are examined within these discussions. This section concludes with a discussion of the possible future scenarios, emphasising the issues that may arise.

### Current Relationship

Cross-border justice cooperation on the island of Ireland is a key Brexit issue. Ireland and Northern Ireland share a 310-mile land border as well as a complex history, including the Troubles in Northern Ireland. Cross-border justice cooperation has been built over the last number of decades, particularly during and since the peace negotiations. The NI Department of Justice (DOJ) has emphasised this in briefing papers prepared since the Brexit referendum. For example, their second briefing paper prepared in 2017 stated:

The UK’s departure from the EU raises various practical policing and justice issues specific to this jurisdiction because of the land border. These include maintaining the current high levels of operational cooperation between the PSNI and the Garda, sustaining effective criminal justice cooperation. For practical law enforcement, the maintenance of the European Arrest Warrant is essential.<sup>207</sup>

### Policing Cooperation

Since partition in 1922, the island of Ireland was divided into two separate jurisdictions. Along with this, two separate police forces were established: the Royal Ulster Constabulary (RUC) in Northern Ireland and An Garda Síochána (AGS) in the Republic of Ireland. The policing context in the two jurisdictions has also been markedly different. As outlined by Dermot Walsh:

[t]he RUC was an armed force with a primary role in protecting the established political order within a deeply divided state. For the most part, it was composed of and reflected the political, cultural, and social values of one side (the majority unionist community) within that division. The Garda Síochána, by comparison, was generally unarmed and enjoyed the relative luxury of being able to focus primarily (although not exclusively) on a civil policing role in a less divided society.<sup>208</sup>

In 1998, as part of the Belfast/Good Friday Agreement (B/GFA), the Independent Commission on Policing for Northern Ireland was established. In 1999, the Commission released a report entitled ‘A

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<sup>207</sup> NI Department of Justice Briefing paper, cited in Cormac Campbell ‘Government fears “essential” extradition powers to combat crime will be lost after Brexit’ 23 November 2017, *The Detail*, <http://www.thedetail.tv/articles/extradition-issue-to-become-toxic-post-brexit>

<sup>208</sup> DPJ Walsh ‘Police Cooperation across the Irish Border: Familiarity Breeding Contempt for Transparency and Accountability’ in (2011) 38 *The Journal of Law and Society* 304.

New Beginning: Policing in Northern Ireland', which became known as the Patten Report.<sup>209</sup> In line with the recommendations made in this report, the RUC became the Police Service of Northern Ireland in 2001.

Looking back through policing history on the island, it is clear that due to its shared history, as well as the creation of a land border in 1922, police cooperation has long been a necessary tool. As long as a border has existed, there has also been some form of cross-border crime.<sup>210</sup>

We can identify three 'types' of crimes with cross-border elements. The first includes 'routine' cross-border crime, such as drug trafficking, human trafficking, smuggling (such as tobacco and fuel), money-laundering, fraud, and vehicle theft, and organised crime. Second, the existence of an international border also means that crimes take place whereby the perpetrator intentionally takes advantage of the border and the jurisdictional limitations, by fleeing to the other jurisdiction after committing a crime. This includes those who committed acts of terrorism and fled across the border in an attempt to evade justice. Third, in a more contemporary sense, due to the integrated nature of everyday life in the post-B/GFA environment, many 'ordinary' crimes develop cross-border elements to them. For example, a person may cross the border to go to a local pub that is a short walk from their house. While they are there, they may get into a physical confrontation with someone or vandalise property before returning home. This 'ordinary' crime then develops a cross-border dimension as the crime took place in one jurisdiction, and the perpetrator and victim are located in separate jurisdictions. In order to resolve these various forms of cross-border crime, strong cooperation between the police services north and south was required.

Both academic work in this area and interviewees consulted for the project confirmed that much of the historical police cooperation (between AGS and the RUC) took place informally.<sup>211</sup> According to Walsh, 'the political and violent conflicts associated with its division in 1922 ensured that no formal approaches to police and criminal justice cooperation across the border were attempted for more than fifty years'.<sup>212</sup> Formal cooperation in the form of extradition and cross-border investigations was carried out through broader norms existing in international relations at the time between two sovereign states. Despite this complex context though, both formal and informal policing cooperation did evolve.

One of the justice and security experts interviewed for the project expressed similar sentiments. This person emphasised that, historically, the cooperation between the RUC and AGS was 'very informal':

... because of the history, between the RUC and AGS over the years, the political issues but also maintenance of the border, cross-border crime, terrorism, the informal arrangements were very informal and very dependent on personalities and personal relationships and arguably other factors relevant to why they were sharing information, so it couldn't really be relied on necessarily. I'm not saying it was dishonest, I don't mean that, but it was often partisan, there was suspicion, you know yourself from some of these inquiries about alleged collusion, all sorts of things, including people travelling down to Dublin. All that played a part in the cross-border cooperation on the combatting of crime, not just terrorism. So informal arrangements were very informal, they couldn't be trusted at all.<sup>213</sup>

209 *A New Beginning: Policing in Northern Ireland – The Report of the Independent Commission on Policing for Northern Ireland* (1999) (the Patten Report).

210 <https://www.thejournal.ie/cross-border-customs-ireland-2-3197617-Jan2017/>

211 DPJ Walsh 'Police Cooperation across the Irish Border: Familiarity Breeding Contempt for Transparency and Accountability' (2011) 38 *The Journal of Law and Society*, 304; Interview with Justice and Security Expert, 14 February 2019.

212 Walsh, *ibid.*

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

However, as emphasised by Walsh, since the 1960s - and particularly considering the introduction of EU mechanisms for justice cooperation - formal cooperation between the two police forces has developed significantly.<sup>214</sup> These EU developments have helped to traverse the political and legal separation between the UK and the Republic of Ireland, enabling formal mechanisms to develop. These sentiments were also reflected by the justice and security expert referenced above. This person argued that as the formal mechanisms developed – both bilaterally between the UK and Republic of Ireland, as well as formal tools developed by the EU – police cooperation swiftly moved into the formal realm:

... it is a mind-set of police officers - and they are very good at problem-solving - but if there is something there that can be used to their advantage they are terrified not to use it so soon as there is a formal mechanism in place and other states have signed up to it, they will use it whether they want to or not. It also means that when they are using it, the information recorded that they are sharing with each other is much more reliable, there is a record of it, they can go back and access it. So the formal arrangements really helped in relation to that.<sup>215</sup>

However, despite the development of these formal mechanisms, Dermot Walsh emphasised that police cooperation throughout this time has also continued to advance on an informal level:

it seems that there has always been a degree of close informal cooperation between officers on either side of the border ... In the context of extradition for example, officers in the two forces operated an informal arrangement whereby they would arrest each other's wanted persons and deliver them discreetly across the border. It was an incident of excessive enthusiasm by Gardaí operating this arrangement for the benefit of British police officers that resulted in the introduction of a formalised judicial element to the procedure in 1965 ... Nevertheless, the informal cooperation survived and even began to expand and deepen as officers on either side of the border became more familiar with each other through direct personal contacts, and began to see each other as part of the same team faced by common opposition.<sup>216</sup>

Thus, police have continued to engage in various forms of informal mechanisms for cooperation. For example, in situations where police officers were reacting to a crime in progress, it became common practice to alert the police on the other side of the border of their activities. Therefore, if the suspect crossed the border, the police would have the prior knowledge that this was taking place, potentially assisting with the apprehension of the suspect.<sup>217</sup> This theme was also stressed by the justice and security expert who stated:

There is still that personal network, which I think can operate to great effect, but sometimes still bypasses the formal arrangements and it is a little bit too easy. And I think we are a bit guilty of this in Ireland, 'ach sure I'll just pick up the phone' and there is still that attitude. So, it means they are not always getting the best out of these arrangements and they are not always playing by the rules of them, so that's still a concern.<sup>218</sup>

## Contemporary Police Cooperation

Our research has revealed that within more contemporary policing cooperation, many of these

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214 DPJ Walsh 'Police Cooperation across the Irish Border: Familiarity Breeding Contempt for Transparency and Accountability' (2011) 38 *The Journal of Law and Society*, 304.

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

216 DPJ Walsh 'Police Cooperation across the Irish Border: Familiarity Breeding Contempt for Transparency and Accountability' (2011) 38 *The Journal of Law and Society*, 304, 309.

217 *ibid*, 311-312.

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

patterns continued.<sup>219</sup> The development of both formal and informal modes of cooperation is evident. Furthermore, as EU law and structured mechanisms related to justice and security cooperation developed, more formal methods of cooperation also followed suit. Both of these trends will be examined below.

Much of the discussion above was reflected in the findings and recommendations of the Patten Report.<sup>220</sup> In relation to cooperation between the RUC and AGS, the report states:

We accept that the present relationship between the Garda and the RUC is, as both services described it to us, a good one. There are frequent meetings, both regular and ad hoc, at various levels from the operational level to the top ranks. There has long been a good exchange of information and good operational cooperation, particularly against terrorism.<sup>221</sup>

But, the relationship between the RUC and AGS was also described as being ‘ad hoc and dependent on personal relationships’<sup>222</sup> and recommendations were made within the Patten Report to create more formalised structured channels for cooperation. Some of these recommendations referenced the European Union and Member Status. The key recommendations for our purposes included:

- Developing written protocols covering key aspects of cooperation for both police services
- Enhancing present pattern of meetings of the two police services with an annual conference
- Annual conference and working groups should be designed to drive forward cooperation in areas of common concern, such as: drugs, smuggling, financial crime, paedophile rings, or any other subject of concern
- Creating a programme of long-term personnel exchanges in specialist fields where cooperation between the two services is most needed
- Posting a liaison officer from each service to the central or border area headquarters of the other
- Structured training cooperation between the two services
- Joint disaster planning that is regularly tested by regular joint exercises
- Ensure fast, effective and reliable communication through improved radio links and compatible IT systems
- Development of joint database covering all main areas of cross-border criminality.<sup>223</sup>

In 2002, there was another significant development in the area of police cooperation, largely based on the recommendations of the Patten Report. The two governments published the Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland on Police Cooperation.<sup>224</sup> Underlying EU membership is built into that Agreement. For example, Article 9 covering joint investigations, directly cites European Member State status within the provision. That said, one of the justice and security experts interviewed for this project stated that this

219 For example, Interview with Justice and Security Expert, 14 February 2019.

220 *A New Beginning: Policing in Northern Ireland – The Report of the Independent Commission on Policing for Northern Ireland (1999)* (the Patten Report), paras 18.5-18.6.

221 *ibid.*

222 *ibid.*

223 *A New Beginning: Policing in Northern Ireland – The Report of the Independent Commission on Policing for Northern Ireland (1999)* (the Patten Report) Paragraph 18.7-18.15.

224 Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland on Police Co-operation (adopted on 29 April 2002, entered into force on 20 December 2002), Treaty Series 2, No 2.



provision has never been used to initiate a joint investigation between the PSNI and AGS.<sup>225</sup> However, the Agreement has been relied upon for the secondment of officers between the PSNI and AGS, and the exchange of equipment (such as water cannons or vehicles).<sup>226</sup>

Generally, many of the contemporary cooperation measures used by the PSNI and AGS cite EU law as their basis. According to one justice and security expert:

... there are a lot of bilateral measures but they all cite EU law as a basis. So one of the structures, one of the founding foundations of each one will be the relevant EU legal basis and also the membership, the broader membership context is very important. So there are lots of different areas.<sup>227</sup>

Following on from this, the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland on Cooperation on Criminal Justice Matters was signed in 2005,<sup>228</sup> and another Agreement was signed in 2010.<sup>229</sup> In the Preamble of the Agreement, both the 2005 and 2010 versions, state that cooperation takes ‘into account also developments within the European Union in respect of cooperation on criminal justice matters’. Following devolution of policing and justice to Northern Ireland in 2010, the significant change from 2005 to 2010 was replacing the role for the UK government in cooperation with the Republic of Ireland, to a role for Northern Ireland. Article 1 of the 2010 Agreement creates an obligation for annual meetings between the Ministers in each jurisdiction to facilitate more ‘effective cooperation and coordination on criminal justice matters, including in combating criminal behaviour, working together in the prevention of crime and on community safety issues, and dealing with offenders after conviction’.

In order to enhance avenues of official police cooperation, the next significant step was the development of the Cross Border Policing Strategy in 2010.<sup>230</sup> An updated version of this strategy was released in 2016 to ‘continue the positive momentum created by the first strategy’.<sup>231</sup> While neither of these strategies is based wholly on EU arrangements, according to one justice and security expert interviewed for the project, ‘there are component parts of that that do refer to things that may be impacted on and have an EU basis’ and upon the UK’s exit from the EU, ‘there will be amendments required’.<sup>232</sup>

Within both the 2010 and 2016 strategies, there is a clear, strong desire for the continued development of cooperation. For example, the foreword of the 2016 Strategy written by George Hamilton, PSNI Chief Constable, details the level of cooperation between the PSNI and AGS – stating that policing cooperation takes place on a daily basis by ‘conversations, contacts, practical assistance and information sharing. These engagements take place at every level in our respective Services across a range of disciplines and service delivery’.<sup>233</sup> George Hamilton then goes on to highlight the demonstrable successes of cross-border policing cooperation, which is evidenced by arrests for serious crimes like armed robberies and burglaries, the seizure of drugs and interruption of drug trafficking, as well as foiled terrorist attacks.<sup>234</sup> In her opening foreword, the former Irish Minister for Justice and Equality,

225 Interview with Justice and Security Experts, 9 April 2019.

226 *ibid.*

227 *ibid.*

228 Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/238631/7584.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/238631/7584.pdf)

229 Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/238385/7916.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/238385/7916.pdf)

230 Cross Border Policing Strategy 2016, <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/cross-border-policing-strategy-2016.pdf>

231 *ibid.*, p 1.

232 Interview with justice and security experts (9 April 2019).

233 Cross Border Policing Strategy 2016, p 1.

234 *ibid.*



Frances Fitzgerald, T.D. emphasised that the nature of policing on the island of Ireland is one of ‘many shared challenges’ and that the revised Cross Border Policing Strategy demonstrates the commitment AGS and PSNI have undertaken to work together to face those challenges.

Like the 2010 Strategy, the updated 2016 Strategy places a renewed focus on organised crime and paramilitarism, but it also prioritises the actions arising from the Fresh Start Agreement 2015, including the Joint Agency Task Force (as outlined in Section 2.3 of the Strategy). It is clear from the Strategy, that the intention to improve cooperation and coordination between the PSNI and AGS is widespread, including:<sup>235</sup>

- Creating Memorandums of Understanding designed to allow for police to share equipment across the two police forces;
- Working together to construct proposals for legislation or legislative amendments that would be aimed at enhancing the ability of the PSNI and AGS to police cross-border crime more effectively;
- Promoting the information sharing agreement covering sex offenders that has been established by the PSNI and AGS;
- Finalise and resolve legal issues related to the Memorandum of Understanding on the sharing of information related to Fingerprints, DNA and other biometrics;
- Pursuing ‘partnerships between AGS/PSNI and other EU police services, academic institutions, and SME’s relating to applications for EU Commission funding for projects related to the prevention and detection of serious crime and terrorism’; and
- Developing specific joint PSNI/AGS training and best practice on: crime, leadership and management development; personnel exchanges, international operations, and sex offenders.<sup>236</sup>

Evidently, much of the desired cooperation included in the cross-border policing strategies has become a reality. The high level of day-to-day policing cooperation now taking place was one of the main themes that emerged from the interviews undertaken for the current project. As described by one interviewee:

That is a very high level of cooperation, so for PSNI officers, on their routine patrol and in receipt of a report from the member of the public of a stolen vehicle or a burglary or a robbery, they will be sharing that information with their colleagues in AGS either by the secure radio network, that allows the officers out on the ground to be communicating with each other directly. There is also a secure email system to be able to share information securely between the PSNI and AGS. By picking up the phone and speaking to each other, it is as routine as they would do with their own colleagues in NI and the same in Ireland. Where PSNI patrols are out and about as part of their normal patrolling pattern, particularly if they are operating in areas with elevated threat level, they will be in touch with their counterparts on the other side for that patrolling support, even if it is not part of a specific joint operation, but there is daily communication between each other about where they are patrolling, what they are doing and specifically around tackling incidents of crime that are happening even live-time, especially live-time in fact. That’s just on the sort of initial part of the investigation or a patrol. Then if they are in the actual investigation, you know it is the ability to be able to share that information rapidly and that is done then formally through the PSNI international and

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<sup>235</sup> *ibid.*

<sup>236</sup> *ibid.*

extradition unit, but typically officers will be speaking to each other to say, I'm going to need..., Here's the vehicle data that I'm interested in..., or What can you get me on this... because they are live-time police officers just trying to investigate a crime and ultimately, keep people safe ... They have a common purpose and they are in touch with each other all the time and the chances are that a PSNI officer will be on first name terms with their Garda colleague across the line more so and better than they would be with the next police station 20 miles along in their own jurisdiction because they need each other for that support, for their own safety and security and for investigating crime.<sup>237</sup>

Another area of policing cooperation surrounds the establishment of the Joint Agency Task Force (JATF) under the Fresh Start Agreement 2015. According to the PSNI Annual Report and Accounts for the year ended 31 March 2018, the work of the JATF is guided by the 'Cross Border Policing Strategy'.<sup>238</sup>

Under the 'Tackling Paramilitarism, Criminality and Organised Crime', Section A 3.2 of the *Fresh Start Agreement* 2015 states:

In a concerted and enhanced effort to tackle cross-jurisdictional organised crime and bring to justice those involved in it, a Joint Agency Task Force will be established under this Agreement. The Task Force will be led by senior officers from the PSNI, An Garda Síochána, the Revenue Commissioners and HM Revenue and Customs ... The Task Force will include:

- A Strategic Oversight Group (comprised of representatives from the relevant law enforcement agencies at senior management level) that will identify strategic priorities for combating cross-jurisdictional organised crime. The Oversight Group will provide a report on the work of the Task Force to the six-monthly Ministerial meetings under the Intergovernmental Agreement on cooperation on criminal justice matters; and
- An Operations Co-ordination Group (comprised of senior operational management personnel from the relevant law enforcement agencies) that will coordinate joint operations and direct relevant resources in that context.<sup>239</sup>

The Strategic Assessment, which was prepared for the JATF, highlights the specific policing challenges created by the land border on the island of Ireland. It specifically identified six areas of criminality that should be priority for the JATF: 'Drugs, Excise Fraud, Human Trafficking, Child Sexual Exploitation, Rural/Agricultural Crime and Criminal Finances/Money Laundering, although CSE was removed at a later date and replaced with Immigration Crime'.<sup>240</sup>

The PSNI have praised the JATF for having greatly improved working relationships and cooperation between the four agencies involved, but particularly between the PSNI and AGS.<sup>241</sup> The PSNI have stated that '[t]he increased ability of the PSNI and AGS to actively target the financial gains of organised crime groups has been the most viable benefit of the JATF'.<sup>242</sup> It is clear that both police forces are utilising the JATFs: during the year 2016-2017, PSNI and AGS participated in 29 targeted cross border

237 Interview with justice and security experts (9 April 2019).

238 The Report is available at <https://www.psnipolice.uk/globalassets/inside-the-psni/our-departments/finance-and-support-services/documents/2018-psni-main-report.pdf>

239 *A Fresh Start – The Stormont Agreement and Implementation Plan*, 17 November 2015, p15-16, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/479116/A\\_Fresh\\_Start\\_-\\_The\\_Stormont\\_Agreement\\_and\\_Implementation\\_Plan\\_-\\_Final\\_Version\\_20\\_Nov\\_2015\\_for\\_PDF.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/479116/A_Fresh_Start_-_The_Stormont_Agreement_and_Implementation_Plan_-_Final_Version_20_Nov_2015_for_PDF.pdf)

240 Police Service of Northern Ireland Annual Report and Accounts for the year ended 31 March 2017, p 35, <https://www.psnipolice.uk/globalassets/inside-the-psni/our-departments/finance-and-support-services/documents/main-report.pdf>

241 *ibid.*, p 29.

242 *ibid.*, p 35.

operations. The PSNI have specifically stated that these JATF operations have been particularly valuable for disrupting the importation and supply of illegal drugs and thereby targeting the financial gains for organised crime groups.

Our interviews with justice and security experts have revealed that initial assessments do not anticipate any negative impacts of Brexit on the continued functioning of the JATF.<sup>243</sup> Commensurate with other aspects of policing cooperation, the long-term impact of Brexit will remain to be seen.

Organised crime is a serious challenge for cross-border policing, as evident in the Cross Border Policing Strategy and the focus of the JATF. Further, the 2016-2017 PSNI Policing Plan states:

Some of the daily challenges faced include the cost of policing interface areas, public order situations and fulfilling our responsibilities around legacy issues. In addition, we face an increased threat from cyber-related crime, evolving organised crime groups and the need to professionally deal with vulnerable victims.<sup>244</sup>

Organised crime is not constrained by borders, and in fact very often profits from exploiting international borders. The DOJ has assessed there to be approximately 140 organised crime groups operating in Northern Ireland alone.<sup>245</sup> The importance of EU operations and tools in fighting organised crime was emphasised to us by justice and security experts interviewed for the project. They stated that it is essential that the PSNI will be able to participate in wider EU operations 'in serious and organised crime'.<sup>246</sup>

Throughout all of the cooperation outlined above, one theme that consistently came through in the interviews, was the importance of data sharing for effective cooperation between the PSNI and AGS. This is particularly important in the context of PSNI and AGS being able to effectively tackle cross-border crime. One expert interviewed for the project stated that due to Ireland's privacy protections, 'what allows [the Republic of Ireland] to share information with the UK is this EU framework ... so [w]hen that goes, they will be much more reluctant to give us information'.<sup>247</sup> Thus, it is often through EU frameworks and databases, such as the Europol Information System, that the police forces can share information that helps to tackle crime with a cross-border dimension. One of the justice and security experts consulted for the project stated that the:

big piece is data-sharing ranging ... all the way through to intelligence and information around criminal activity to even criminal convictions and those sort of records that are key to the justice process. So there is a long list, and some of them, probably you will find that the police use daily.<sup>248</sup>

Within this discussion, a practical example was provided in relation to the recent trend on the island of ATM robberies, and the close cooperation between the PSNI and AGS on this type of crime. It was stated that EU tools have been central in the police cooperation on this matter.<sup>249</sup> The concern then moving forward is that if the UK leaves the EU, it will also lose access to a lot of these tools and databases that facilitate sharing and cooperation between AGS and PSNI.

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<sup>243</sup> Interview with Justice and Security Experts, 9 April 2019.

<sup>244</sup> Northern Ireland Policing Board, *2016-2017 Policing Plan*, available at [https://www.psnipolice.uk/globalassets/inside-the-psni/our-strategy-and-vision/documents/final\\_pdf\\_-\\_policing\\_plan\\_2016-17.pdf](https://www.psnipolice.uk/globalassets/inside-the-psni/our-strategy-and-vision/documents/final_pdf_-_policing_plan_2016-17.pdf)

<sup>245</sup> Department of Justice 'Organised Crime', information available at <https://www.justice-ni.gov.uk/topics/policing-and-community-safety/organised-crime>

<sup>246</sup> Interview with Justice and Security Expert, 15 February 2019.

<sup>247</sup> Interview with Justice and Security Experts, 9 April 2019.

<sup>248</sup> *ibid.*

<sup>249</sup> *ibid.*

Ireland may be hesitant to enter into an arrangement to share data, without the guarantee of overarching EU law and oversight mechanisms. Thus, the same justice and security expert stated, '[s]o if we are not part of those systems, which we can't be if we are not in the EU ... EU Member States will be very, very reluctant to enter into permanent arrangements which will give us access to their data'.<sup>250</sup> Along the same vein, another interviewee stated:

clearly data sharing between EU police forces and security services just now is extremely important because transnational crime, organised crime, terrorism has an organisational structure which does not respect national boundaries or supranational boundaries for that matter, so in order to be well prepared and in a position to protect citizens across Europe there ought to be ways in which we can continue to share information.<sup>251</sup>

Thus, with the UK's exit from the EU, the PSNI will be losing access to tools that will likely have growing importance given the globalised nature of organised crime.

Lastly, one of the current difficulties of cross-border policing in Ireland relates to the inability of police to cross the border in 'hot-pursuit'. Unlike arrangements in the Schengen zone, a current deal between Northern Ireland and the Republic of Ireland does not exist to allow police engaged in an active chase of a suspect to cross the border. Between 2011 and 2015, this led to more than 47 police chases ending at the border.<sup>252</sup>

### **Extradition on the Island of Ireland**

Due mainly to the shared land border and legacy of the conflict in Northern Ireland, extradition is a key concern for justice officials on the island. This has been communicated by both the PSNI and the DOJ.<sup>253</sup> As outlined above, the DOJ maintained that for 'practical law enforcement, the maintenance of the European Arrest Warrant is essential'.<sup>254</sup> Furthermore, PSNI Chief Constable George Hamilton has said:

I have previously stated how important the EAW is to ensuring the safety of communities both in Northern Ireland and across Europe by providing for a quicker, efficient and dynamic response to crime and criminality. For the PSNI, the EAW is particularly critical in our continued collaboration with An Garda Síochána and ensuring that the border cannot be used by criminals to evade prosecution.<sup>255</sup>

Data obtained by The Detail, an investigative journalism site, through a Freedom of Information Act request to the Department of Justice revealed that the overwhelming majority of extradition requests made by the PSNI were to AGS requesting extradition of suspects back to Northern Ireland.<sup>256</sup> Thus, between January 2007 and May 2017, the PSNI sought 154 persons from the Republic of Ireland using the EAW. Of these cases, a total of 71 EAWs were granted and 47 persons were transferred to

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250 *ibid.*

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

252 C Campbell 'PSNI and Garda in Border slow lane on 'hot pursuit' chases' *The Irish Times*, (15 August 2016).

253 C Campbell 'Government fears "essential" extradition powers to combat crime will be lost after Brexit' *The Detail* (23 November 2017), <http://www.thedetail.tv/articles/extradition-issue-to-become-toxic-post-brexit>

254 *ibid.*

255 M Bain 'Brexit: Northern Ireland security at risk if UK kicked out of EU extradition system, warns police chief' *Belfast Telegraph Digital* (20 June 2018),

<https://www.belfasttelegraph.co.uk/news/northern-ireland/brexit-northern-ireland-security-at-risk-if-uk-kicked-out-of-eu-extradition-system-warns-police-chief-37029094.html>

256 C Campbell 'Government fears "essential" extradition powers to combat crime will be lost after Brexit' *The Detail* (23 November 2017).

NI.<sup>257</sup> The breakdown of crimes committed by the people surrendered to NI, include: 13 cases of Breach of Licence, ten cases of rape, seven cases of murder, two cases of human trafficking, and two cases of terrorism.<sup>258</sup> After the Republic of Ireland, the second highest number of EAWs issued by NI were eight for Lithuania. Further, The Detail revealed that 31% of the EAW requests made by the PSNI resulted in the successful extradition of a person, while only 14% of non-EU extradition requests were successful.<sup>259</sup>

These numbers might sound small but a number of justice and security experts interviewed for the project made a point of emphasising the significance of the EAW as a tool for maintaining effective cross-border cooperation, despite the seemingly small numbers. For example:

The one thing that we potentially would have here would be the numbers would be smaller in terms of the number of EAWs issued and executed in NI, the numbers, they belie the importance of some of the cases because a number of cases would be in the NI-related terrorism sphere and so on. So potentially so very, very significant cases would have EAWs issued ... if I was to focus particularly on the NI-ROI dynamic between 2004-2017 there was a total of 119 EAWs and that was warrants the ROI to NI and in the same period NI – ROI there was 120 so that doesn't sound like a huge amount of traffic in terms of EAW, but when you drill down into the types of case, they are for significant offences. They can be for significant offences. So comparably across the UK we would have fewer than the rest of the UK but the numbers, I wouldn't underestimate the effectiveness or the importance of that measure simply on the numbers alone. The Chief Constable is on record as saying that the EAW is possibly the primary and priority measure for PSNI and certainly in terms of continued engagement and cooperation between PSNI and AGS the Chief Constable has consistently been on record to say that that effective extradition arrangements and the use of the EAW is of principal importance in our context.<sup>260</sup>

A similar point was made by another interviewee, who stated that 'we don't get into the numbers game because it is about keeping people safe. The reality of it is one individual could pose huge danger to our community as compared to 100 others that have a different risk/harm profile associated with them'.<sup>261</sup> In other words, the numbers do not tell the whole story and that 'sometimes gets lost in translation because these are all individual stories for people, you know because for every one of those there is a set of victims, there is families of victims, there is local communities'<sup>262</sup> which are not captured by the numbers.

Another interviewee highlighted the land border and the interconnectedness of life in Ireland in a discussion on the importance of retaining the EAW. This person maintained that people must not be beyond the reach of the law simply by traveling across the border. They stated:

It should be the case and it is important that wherever you go on this island you are not beyond the reach of the law, for the purpose of criminal investigation and at the end process being brought to court to face justice for the matter which is alleged against you. [The EAW] provides a legal framework ensuring extradition regardless of the offence. That helps support a culture of lawfulness on this island, that you cannot exploit the border to evade justice. We see it as very important that in the event that Justice and Home Affairs measures are lost because of the UK's exit from the EU, that the ability to extradite citizens is replicated regardless of

257 C Campbell 'Extradition 'could become toxic' post-Brexit – Stormont officials' *The Irish Times* (23 November 2017), <https://www.irishtimes.com/news/crime-and-law/extradition-could-become-toxic-post-brexit-stormont-officials-1.3301064>

258 C Campbell 'Government fears "essential" extradition powers to combat crime will be lost after Brexit' *The Detail* (23 November 2017).

259 *ibid.*

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

261 Interview with justice and security experts, 9 April 2019.

262 *ibid.*

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.<sup>263</sup>

### **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.<sup>264</sup>

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.<sup>265</sup>

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.<sup>266</sup>

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.

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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 historically 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.

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). <sup>267</sup>  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.<sup>268</sup> 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.<sup>269</sup>

<sup>267</sup> 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](https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_policing_criminal_justice_web.pdf)

<sup>268</sup> European Commission, 'Schengen Information System' 2019 [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system_en)

<sup>269</sup> 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](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.<sup>270</sup>

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’.<sup>271</sup> 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’.<sup>272</sup>

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.<sup>273</sup>

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’.<sup>274</sup>

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.<sup>275</sup>

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.<sup>276</sup> 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.<sup>277</sup>

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 impactful’ and must be carried out on the basis of accurate information.<sup>278</sup>

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.<sup>279</sup>

#### 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.<sup>280</sup> 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.<sup>281</sup> 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.<sup>282</sup>

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

<sup>276</sup> Interview with Justice and Security Expert, 5 March 2019(b).

<sup>277</sup> Interview with Justice and Security Expert, 9 April 2019.

<sup>278</sup> *ibid.*

<sup>279</sup> Interview with Justice and Security Expert, 14 February 2019.

<sup>280</sup> 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](https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/tools-judicial-cooperation/european-criminal-records-information-system-ecris_en)

<sup>281</sup> Interview with Justice and Security Expert, 9 April 2019.

<sup>282</sup> *ibid.*

the UK was the second most active user of these messages, accounting for 13.7%.<sup>283</sup> 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.<sup>284</sup>

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.<sup>285</sup> 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.<sup>286</sup>

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.<sup>287</sup> 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.<sup>288</sup>

Despite the political difficulties faced securing agreement of a withdrawal text since, the government remains optimistic about securing access to crucial data. Home Secretary Sajid 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'.<sup>289</sup>

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

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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/cm-haff/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](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 Sajid Javid, 'Future Security in Europe' Speech, 25 September 2018, Madrid, <https://www.gov.uk/government/speeches/future-security-in-europe>

partnership. However, the ‘Task Force for the Preparation and Conduct of Negotiations with the UK under Article 50 TEU’ have published their guidance on the framework for the future relationship.<sup>290</sup> On 14 March 2018, the European Parliament adopted the Resolution on the framework of the future EU-UK relationship.<sup>291</sup> The resolution states that ‘it is in the mutual interest of the EU and the UK to establish a partnership that ensures continued security cooperation to face shared threats, especially terrorism and organised crime, and avoids the disruption of information flows in this field’.<sup>292</sup> Yet the Resolution also indicates the EU’s red-lines in terms of facilitating this, emphasising that ‘third countries (outside the Schengen area) do not benefit from any privileged access to EU instruments, including databases, in this field, nor can they take part in setting priorities and the development of the multi-annual strategic goals or lead operational action plans in the context of the EU policy cycle’.<sup>293</sup> Thus, as it stands, the UK will no longer be able to shape or influence the direction of these policies once it exits the EU. Nor will it receive any special accommodations for future actions based on its prior membership of the Union.

Access is not however fully closed off. Non-EU countries cannot have direct access to ECRIS, but those who have Mutual Legal Assistance agreements with the EU can request information on a case-by-case basis. Mutual Legal Assistance agreements are provided for under the 1959 European Convention on Mutual Assistance in Criminal Matters<sup>294</sup> but the process is not as straightforward or as instantaneous as ECRIS. Members of the Convention are only required to transmit criminal records data once per year.<sup>295</sup> Thus, the process is lengthier and the data desired may not be available or up-to-date. The possibility of delay and lengthier processes for accessing data has already been identified as a key concern for justice and security experts and should not be underestimated in preparations for the post-Brexit environment.

Further development of these systems by the EU after Brexit is another issue which could affect the UK’s access to the systems as a third country. A potentially positive development is that the European Commission is currently seeking to expand ECRIS to facilitate the exchange of criminal record information of non-EU citizens.<sup>296</sup> This could mean the EU becomes more open to the idea of allowing third country access, in the spirit of reciprocity to encourage third countries to supply information and engage with the system, as they may need to offer an incentive. However, such a move is not without its challenges which would need to be ironed out between the Member States. The EU needs to conduct a comprehensive review into the operation of the system and ascertain its compliance with Article 8 ECHR,<sup>297</sup> which entails a data protection dimension as part of the protection of privacy.<sup>298</sup> Compliance with Article 8 ECHR is important for providing assurances to third-countries that their citizens data will be handled according to human rights standards. ECRIS has previously been criticised for failing to consider proportionality in how information is held and shared, these concerns could be further exacerbated if the information of third country nationals was held in or if authorities in third countries were permitted to hold information on EU nationals.<sup>299</sup>

290 European Parliament, resolution of 14 March 2018 on the framework of the future EU/UK relationship, 2018.

291 *ibid.*

292 *ibid.*

293 *ibid.*

294 European Convention on Mutual Assistance in Criminal Matters, European Treaty Series – No. 30, 1959.

295 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](https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_policing_criminal_justice_web.pdf)

296 A M Jackson and G L Davies ‘Making the case for ECRIS: Post-Brexit sharing of criminal records between the EU and UK’ 2017 21 *The International Journal of Evidence and Proof* 330.

297 *ibid.*

298 European Court of Human Rights *Guide on Article 8 of the European Convention on Human Rights* (2018) paras 146-158 with an overview over the case law, available at [https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf)

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



## PASSENGER NAME RECORD (PNR)

The Passenger Name Record Directive was signed on 27 April 2016 and facilitates the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.<sup>300</sup> The types of data held under PNR are dates of travel, travel itineraries, ticket information, contact details, means of payment, baggage details and seat numbers.<sup>301</sup> The UK made a number of changes to incorporate the PNR Directive into domestic law, making changes to the Immigration Act 1971, the Immigration and Asylum Act 1999, the Immigration, Asylum and Nationality Act 2006 and the Data Protection Act 2018.<sup>302</sup> As a result, the UK has the necessary technical requirements in place to facilitate continued participation in, and access to the information held by PNR.<sup>303</sup>

As a relatively new mechanism, it is difficult to quantify the benefits of being part of PNR. However, access to such information is foreseen to greatly improve the ability of Member States to identify suspicious travel patterns and track the movements of persons who pose a potential threat to security.<sup>304</sup> The UK government has stressed the benefit to other EU Member States of retaining the UK's participation, Heathrow is after all the largest airport in Europe.<sup>305</sup> However some analysts argue it would be better to seek associate status rather seek to negotiate a new agreement.<sup>306</sup> Prior to the UK withdrawal process, the CJEU did strike down an earlier agreement with a third country. The Court ruled that a PNR agreement with Canada could not be concluded in its current form due to failure to meet EU fundamental rights requirements.<sup>307</sup> This decision will have consequences for PNR agreements already in place with other third countries such as the US and Australia and the conclusion of forthcoming PNR agreements currently being negotiated with Mexico, Argentina and Japan.<sup>308</sup> A consequence for the UK, if it wishes to negotiate a separate agreement, is that it will need to provide assurances of continued alignment with EU fundamental rights. The UK government has been firm that the Charter will not be retained in UK law once it exits the EU, which could amount to an insurmountable hurdle in securing a future agreement.

The UK government has given some indication of how it hopes the future relationship, in terms of PNR, will unfold. Article 59(g) of the Withdrawal Agreement states that the PNR Directive will continue to apply to requests received before the end of the transition period.<sup>309</sup> Carrera and Mitsilegas interpret that after Brexit the UK will no longer be bound by the PNR Directive, but the

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

301 European Commission, Passenger Name Record (PNR) 2019 [https://ec.europa.eu/home-affairs/what-we-do/policies/police-cooperation/information-exchange/pnr\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/police-cooperation/information-exchange/pnr_en)

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

303 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](https://www.cer.eu/sites/default/files/insight_CMM_23.6.17.pdf)

304 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/lfg\\_Brexit\\_policing\\_criminal\\_justice\\_web.pdf](https://www.instituteforgovernment.org.uk/sites/default/files/publications/lfg_Brexit_policing_criminal_justice_web.pdf)

305 *ibid.*

306 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](https://www.cer.eu/sites/default/files/insight_CMM_23.6.17.pdf)

307 Court of Justice of the European Union, Press Release No 84/17 on Opinion 1/15, 26 July 2017: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-07/cp170084en.pdf>

308 A Vidaschi and C Graziani, 'PNR Agreements between fundamental rights and national security: Opinion 1/15' *European Law Blog*, 23 January 2018 <http://europeanlawblog.eu/2018/01/23/pnr-agreements-between-fundamental-rights-and-national-security-opinion-115/>

309 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, [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](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)



UK government maintains a commitment to negotiating a new security treaty that should permit UK authorities to exchange PNR data with EU partners in the same way they current do as a Member State. They warn that any of the existing alternatives are ‘sub-optimal, resulting in a capability loss’.<sup>310</sup> The issue of capability loss was raised in our interviews as something criminal justice practitioners and partners are concerned about avoiding, as this could have implications for public safety and security.<sup>311</sup> It was acknowledged that a loss of capability where measures and access existed previously would be frustrating for personnel and make carrying out their duties more difficult.<sup>312</sup>

## PRÜM

The powers of information sharing encompassed by Prüm refers to the Council Decision 2008/615/JHA to enhance cross-border cooperation, particularly with regard to combating terrorism and cross-border crime. It contains provisions for operational police cooperation and data exchange.<sup>313</sup> Information sharing under Prüm contains provisions for how the Member States grant each other access to DNA profiles, fingerprint data and vehicle registration data. The European Commission states that ‘DNA and fingerprint exchanges take place on a ‘hit/no-hit’ approach, which means that DNA profiles or fingerprints found at a crime scene in one Member State can be compared automatically with profiles held in the databases of other EU States’.<sup>314</sup>

The UK did decide to opt-out of Prüm in 2014, however this decision was based on concern it would not be able to implement the necessary domestic changes to computer systems in the required timeframe, rather than any lack of belief in its utility.<sup>315</sup> Therefore the UK opted back in in 2015 following the success of a pilot scheme.<sup>316</sup> As it stands, the UK will become fully connected to the system by 2020 but the government does have reservations about exchanging the DNA profiles of persons who have been arrested but not convicted.<sup>317</sup> Amongst the experts we interviewed, DNA and biometric data were identified as fundamental investigation tools UK police services participate in and use on a daily basis.<sup>318</sup> Therefore, it is anticipated that Prüm is a very practical policing tool that inability to access could leave the police unable to carry out their duties effectively.<sup>319</sup>

The UK has argued that its future participation in Prüm would be of mutual interest to the other EU Member States as it holds roughly the same number of profiles as all the other participants put together.<sup>320</sup> Precedent does exist for non-EU states to participate in Prüm arrangements. Norway and Iceland were granted access in 2009, but this only relates to certain provisions and does not cover

310 S Carrera, V Mitsilegas, M Stefan and F Giuffrida, ‘Criminal Justice and Police Cooperation between the EU and the UK after Brexit: Towards a principled and trust-based partnership’ 2018 Report of a CEPS and QMUL Task Force, [https://www.ceps.eu/system/files/TFPR\\_EU-UK\\_Cooperation\\_Brexit\\_o.pdf](https://www.ceps.eu/system/files/TFPR_EU-UK_Cooperation_Brexit_o.pdf)

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

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

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

314 *ibid.*

315 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](https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_policing_criminal_justice_web.pdf)

316 Mayor of London, ‘Exchange of Biometric Data across Europe – the Prüm Arrangements’ 5 March 2018 <https://www.london.gov.uk/what-we-do/mayors-office-policing-and-crime-mopac/governance-and-decision-making/mopac-decisions-o/exchange-biometric-data-across-europe-prum-arrangements>

317 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](https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_policing_criminal_justice_web.pdf)

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

319 *ibid.*

320 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](https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_policing_criminal_justice_web.pdf)

interoperability between other criminal justice instruments or a timeframe for implementation.<sup>321</sup> 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.<sup>322</sup> 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).<sup>323</sup> 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.<sup>324</sup>

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.<sup>325</sup> 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.<sup>326</sup> 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.<sup>327</sup> 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.<sup>328</sup> 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.<sup>329</sup> 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](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](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](https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_policing_criminal_justice_web.pdf)

329 *ibid.*

## Possible Scenarios

Although doubtful as to whether it will provide a basis for exit, the current draft Withdrawal Agreement (Theresa May's deal) does not include specific provisions on police and judicial cooperation in criminal matters after Brexit. The detail that does exist on this from the UK perspective is found in the White Paper. However, the EU Withdrawal Act 2018 does include important provisions about the legal landscape after Brexit that will have implications for the type of relationship and security partnership available to the UK. First, the Withdrawal Act states the Charter will not be transferred into UK national law.<sup>330</sup> The government rejected amendments introduced in Parliament that would have retained the Charter in UK law after exit.<sup>331</sup> However, the Withdrawal Act does transfer general principles of EU law into domestic law, by transposing directly already existing EU law into UK national law so as to allow for legal challenges to be made in the three years following the UK's exit from the EU if UK law fails to comply with the general principles of EU law.<sup>332</sup> Human rights have been considered general principles of EU law since the 1960s and thus, challenges to UK acts could be feasible under this provision. However, after the 3-year period such general principles are retained for interpretive purposes only and specific challenges will no longer be possible.

In a 'no-deal' scenario, where the Withdrawal Agreement is not the basis for exit and the negotiation of the future arrangement, there would be no provisions for making legal challenges as the UK would immediately be out of the jurisdiction of the CJEU and no arrangements for the transition period would apply. The extent to which domestic courts in the UK would continue to follow CJEU jurisprudence when judging relevant cases would remain to be seen. The current position on this is that the UK courts may 'have regard'<sup>333</sup> to CJEU rulings which does not create any duty and leaves an open margin of interpretation that could differ on a case-by-case basis until new case law is established.<sup>334</sup>

Beyond the initial exit period, the detail of the possible future security partnership has yet to be revealed. The protracted focus on the terms of withdrawal and the 'Northern Ireland backstop' have reduced capacity to plan these issues. A concern would be the lack of clarity on access to measures, particularly in a no-deal scenario. If this were the case, no transition period of retained access would occur.

The UK government has taken some steps to minimise the potential for operational disruption, having applied for a data protection adequacy decision. In order for this to be gained quickly, the UK will need to ensure its data protection standards remain close to those under the GDPR.<sup>335</sup> The Information Commissioner's Office has emphasised this need and underlined that the UK has long been an advocate for data protection.<sup>336</sup> A sentiment that was echoed in our interviews:

I think the UK having implemented GDPR and the Law Enforcement Directive is an indication that the UK government takes data protection and individual rights very seriously and that it has done that in a way that hopefully the EU will find it comforting to enter into a data

330 EU (Withdrawal) Act 2018 s5(4).

331 Charter of Fundamental Rights Amendment 5, Lord Pannick, cross-bench peer.

332 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](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.

333 European Union (Withdrawal) Act 2018 s5(2).

334 European Union (Withdrawal) Act 2018 s6; G Cowie, 'The Status of "retained EU law" *House of Commons Library Briefing Paper* (No 08375, 30 July 2018).

335 L Moerel & R Tigner, 'Data Protection Implications of Brexit' (2016) *European Data Protection Law Review* 381.

336 Information Commissioner's Office, 'Data protection if there is no Brexit deal' 2019 <https://ico.org.uk/for-organisations/data-protection-and-brexit/data-protection-if-there-s-no-brexit-deal/the-gdpr/international-data-transfers/>

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.<sup>337</sup>

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.<sup>338</sup> 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.<sup>339</sup>

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 compatibility was not deemed sufficient.<sup>340</sup>

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.<sup>341</sup>

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.<sup>342</sup>

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.<sup>343</sup>

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](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'.<sup>344</sup>

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.<sup>345</sup>

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.<sup>346</sup>

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.<sup>347</sup>

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.<sup>348</sup> Another

344 Michel Barnier, Speech on 18 June 2018 [http://europa.eu/rapid/press-release\\_SPEECH-18-4213\\_en.htm](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](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](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.<sup>349</sup>

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.<sup>350</sup> While receiving data adequate status from the EU would allow the EU<sup>27</sup> to continue to share data with the UK, there is no guarantee states will choose to share their data. It will remain to be seen 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.

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<sup>349</sup> *ibid.*

<sup>350</sup> 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’.<sup>351</sup> 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.<sup>352</sup> 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’.<sup>353</sup>

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.<sup>354</sup> 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.<sup>355</sup> 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, 6<sup>th</sup> Report of session 2017-19, HL Paper 16), p 10.

352 [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](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, 6<sup>th</sup> Report of session 2017-19, HL Paper 16) p 11.



under the jurisdiction of the Court for the duration of the transition period.<sup>356</sup> 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.<sup>357</sup>

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.<sup>358</sup>

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.<sup>359</sup>

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

<sup>356</sup> 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](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)

<sup>357</sup> 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-uk-uk-security-treaty-call-for-evidence.pdf>.

<sup>358</sup> European Union (Withdrawal) Act 2018, s 5(1)-(2).

<sup>359</sup> Draft Withdrawal Agreement, art 4.

and adjudication by the CJEU will likely be a sticking point for the UK-EU security and justice arrangements.<sup>360</sup> 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.<sup>361</sup>

### 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'.<sup>362</sup> 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'.<sup>363</sup> Much of the criticism regarded the way in which EAWs favoured 'enforcement demands at the expense of individual rights'.<sup>364</sup> 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'.<sup>365</sup>

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

360 European Union Committee, 'Brexit: Future UK-EU Security and Police Cooperation' House of Lords (7<sup>th</sup> 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, 6<sup>th</sup> Report of session 2017-19) HL Paper 16, Page: 10.

into two periods.<sup>366</sup> 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.<sup>367</sup> 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'.<sup>368</sup> 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'.<sup>369</sup> 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.<sup>370</sup> 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:

<sup>366</sup> 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.

<sup>367</sup> *ibid.*

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

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

<sup>370</sup> *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.<sup>371</sup>

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'.<sup>372</sup> 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.<sup>373</sup>

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.<sup>374</sup> Examples include the plans for an 'EEA Court'<sup>375</sup> and the accession of the EU to the ECHR and the ECtHR.<sup>376</sup> 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

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.<sup>377</sup> 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'.<sup>378</sup> 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.<sup>379</sup>

## 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.

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

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

<sup>379</sup> 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.<sup>380</sup>

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

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<sup>380</sup> 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.<sup>381</sup> 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)**.<sup>382</sup> 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.<sup>383</sup>

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.<sup>384</sup>

A system based on mutual recognition required in its development minimum procedural standards<sup>385</sup> to ensure that standards of rights protection and procedure would not be undermined. This resulted in the 2009 Stockholm programme and roadmap.<sup>386</sup> 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

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381 Council of the European Union, *Presidency Conclusions, Tampere European Council*, 16 October 1999, [http://www.europarl.europa.eu/summits/tam\\_en.htm](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](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,<sup>387</sup> the right to information in the legal process,<sup>388</sup> access to a lawyer and legal aid,<sup>389</sup> and the presumption of innocence and the right to silence<sup>390</sup> 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.<sup>391</sup> 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';<sup>392</sup> 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.<sup>393</sup> 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.<sup>394</sup> 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.<sup>395</sup>

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.<sup>396</sup>

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.<sup>397</sup>

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'.<sup>398</sup> 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-

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

<sup>396</sup> 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.

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

<sup>398</sup> European Union Committee, 'Brexit: Future UK-EU Security and Police Cooperation' House of Lords (7<sup>th</sup> 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 identify 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.<sup>399</sup>

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.<sup>400</sup>

#### 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.<sup>401</sup> Even after the Brexit vote, the UK Government continued to opt in to new regulations.<sup>402</sup> 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.<sup>403</sup> 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

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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 opt-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.<sup>404</sup> 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.<sup>405</sup> 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’.<sup>406</sup>

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.<sup>407</sup> 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’.<sup>408</sup>

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’.<sup>409</sup>

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.<sup>410</sup> 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.<sup>411</sup> 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

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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 axing 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’.<sup>412</sup> In January 2019, the Secretary of State for Justice David Gauke 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.<sup>413</sup> 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.<sup>414</sup> 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.<sup>415</sup>

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<sup>416</sup> 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-notice/2019/march-2019/leading-human-rights-experts-to-give-evidence-on-rights-after-brexite/>

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-notice/2019/january-2019/human-rights-act-is-not-safe-after-brexite/>

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.<sup>417</sup>

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.<sup>418</sup>

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'.<sup>419</sup>

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'.<sup>420</sup> 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.<sup>421</sup>

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.<sup>422</sup>

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

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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'.<sup>423</sup> 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.<sup>424</sup>

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.<sup>425</sup>

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.<sup>426</sup>

Similarly:

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<sup>423</sup> Interview with Justice and Security Expert, 15 February 2019.

<sup>424</sup> Interview with Justice and Security Expert, 13 March 2019.

<sup>425</sup> Interview with Justice and Security Expert, 15 February 2019.

<sup>426</sup> 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.<sup>427</sup>

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.<sup>428</sup>

## 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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<sup>427</sup> *ibid.*

<sup>428</sup> 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.<sup>429</sup>

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

<sup>429</sup> 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’.<sup>430</sup>

## 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’.<sup>431</sup> 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’.<sup>432</sup> 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.<sup>433</sup>

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:

<sup>430</sup> Interview with Justice and Security Expert, 5 March 2019b.

<sup>431</sup> Interview with Justice and Security Expert, 14 February 2019.

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

<sup>433</sup> *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.<sup>434</sup>

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.

<sup>434</sup> European Union Committee, ‘Brexit: Future UK-EU Security and Police Cooperation’ House of Lords (7<sup>th</sup> 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.<sup>435</sup>

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

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<sup>435</sup> 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.<sup>436</sup> It is in the best interests of UK citizens to provide continuity in terms of human rights related protections for extradition.

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<sup>436</sup> *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.<sup>437</sup> 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.<sup>438</sup>

The case of British citizen Andrew Symeou<sup>439</sup> 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.

