STUDY
for the LIBE committee

European Parliament

The implications of the United Kingdom's withdrawal from the European Union for the Area of Freedom, Security and Justice

Committee on Civil Liberties, Justice and Home Affairs

Directorate General for Internal Policies of the Union

Policy Department for Citizens' Rights and Constitutional Affairs
PE 596.824 December 2017

EN

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT FOR CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

The implications of the United Kingdom's withdrawal from the European Union for the Area of Freedom, Security and Justice

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, appraises the implications of the United Kingdom's withdrawal from the European Union for the Area of Freedom, Security and Justice and protection of personal data for law enforcement purposes. It maps the various policy areas in which the UK is currently participating and analyses the requirements for the disentanglement of the UK from them, as well as the prerequisites for possible UK participation in AFSJ policies after withdrawal. Furthermore, it provides an assessment of the political and operational impact of Brexit for the EU in the Area of Freedom, Security and Justice.

PE 596.824 EN

ABOUT THE PUBLICATION

This research paper was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs and commissioned, supervised and published by the Policy Department for Citizens' Rights and Constitutional Affairs.

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LINGUISTIC VERSIONS

Original: EN

Manuscript completed in December 2017

This document is available on the internet at:
http://www.europarl.europa.eu/supporting-analyses

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LIST OF ABBREVIATIONS

AFSJ	Area of freedom, security and justice
BIIa	Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility
BIR	Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)
CEAS	Common European Asylum System
CIA	Central Intelligence Agency (US)
CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
EAW	European Arrest Warrant
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECRIS	European Criminal Record Information System
ECTC	European Counter-Terrorism Centre
EEC	European Economic Community
EIS	Europol Information System
EJN	European Judicial Network
EMPACT	European Multidisciplinary Platform Against Criminal Threats
ENU	Europol National Unit
EU-LISA	European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice
EUROSUR	European border surveillance system
FBI	Federal Bureau of Investigation (US)
FIU	Financial Intelligence Unit
FRONTEX	European Border and Coast Guard Agency
GCHQ	Government Communications Headquarters (UK)
GDPR	General Data Protection Regulation (2016)
ICO	Information Commissioner (UK)

ILP	Intelligence-led Policing
IPA	Investigative Powers Act (UK)
IPT	Investigative Powers Tribunal (UK)
JIT	Joint Investigation Teams (Eurojust)
NATO	North Atlantic Treaty Organisation
NCA	National Crime Agency (UK)
NSA	National Security Agency (US)
SIENA	Secure Information Exchange Network Application (Europol)
SIS II	Schengen Information System (second generation)
SOCTA	Europol Serious Organised Crime Assessment
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNODC	United Nations Office on Drugs and Crime

EXECUTIVE SUMMARY

Background

The Area of Freedom, Security and Justice (AFSJ) is a policy area whose importance has grown over the past two decades. The areas it covers – migration and asylum, freedom of movement in the EU, judicial cooperation in criminal and civil matters, police cooperation, and data protection in the security context – go to the heart of Europe's future. Brexit poses both challenges and opportunities for European developments in this area. But the timelines for negotiations under Article 50 are extremely tight to achieve orderly future arrangements before the UK leaves the EU, in principle in March 2019. In the time allowed, it may be very difficult to reach even transitional arrangements that ensure the necessary legal certainty and procedural checks and balances in this area, particularly in light of the UK's position (at the time of writing) towards the Court of Justice of the European Union (CJEU) and the domestication of the rights and principles of the Charter of Fundamental Rights and Freedoms (the EU Charter), in particular as they concern the protection of personal data.

Key findings

This study makes a number of findings in the different areas covered by the AFSJ.

Border Checks, asylum and immigration, including free movement of persons

If there is no EU-UK deal on citizens' rights after Brexit, British citizens and their third-country national family members will have to comply with the Schengen Border Code and the EU immigration acquis to enter and reside in the EU. EU Migration legislation (or, where applicable, national laws) will apply to them. EU26 nationals (leaving aside Irish nationals, who may benefit from a bilateral arrangement) seeking to enter and reside in the UK will need to fulfil British immigration rules, which include a quarterly cap on labour migration and financial requirements to bring in third country national spouses. The status of EU Member States' citizens and British citizens resident in either the UK or the EU after Brexit is far from being resolved despite the recent agreement between the two sides. At present it appears that immigration between the UK and the EU26 (not including Ireland if there is a bilateral agreement) will be, in any case, much more complex and expensive.

The UK does not participate in Phase 2 of the Common European Asylum System (CEAS) and will no longer be bound by Phase 1. It will no longer automatically participate in the Dublin system nor have access to the European Dactyloscopy (EURODAC) database.

Judicial cooperation

There has been limited discussion so far about the future of judicial cooperation between the UK and the EU27 but it seems clear that **judicial cooperation in both civil and criminal matters will take much longer and be more expensive if there is no deal between the EU and UK after Brexit.** Even with a deal on Brexit, it could take a long time to reach agreement to replicate the current arrangements and this is unlikely to be resolved by March 2019.

Judicial cooperation in criminal matters is a key element in combating serious and organised crime and terrorism, so there is a mutual interest in seeking agreement but the area is both politically sensitive and technical therefore it is difficult to find solutions

quickly. A failure to agree on transitional and future arrangements in the field of international family law risks leaving a serious gap in the legal framework for proceedings involving children, which could affect EU citizens with family connections to the UK. There is an **urgent need to start exploring the practical future options** at a technical level but the UK's current position on the CJEU and the rights contained in the EU Charter of Fundamental Rights, in particular data protection, is potentially a serious impediment to future agreements on judicial cooperation.

Police cooperation

Police cooperation within the EU is part of a wider global network of police and security cooperation that needs to be taken into account in Brexit negotiations. Future cooperation of some sort will be needed to ensure continued security and to combat cross-border crime. But negotiations should reflect the need to protect the integrity of the EU system while exploring practical options for cooperation with the UK post Brexit. The UK has been an important stakeholder in developing police cooperation in practice but UK political constraints have also put a break on closer cooperation in some areas. **The UK's departure offers an opportunity for a new drive towards strengthened EU cooperation in this area**.

Data protection

When the UK ceases to be a Member State of the EU, it will be treated as a third country, so **any EU-UK data transfer deal for law enforcement purposes must fulfil the requirements of EU data protection law for third-country data transfer**. This will need to be based on an **adequacy decision in relation to UK data protection standards** which is in the interests of both the UK and the EU. The UK Government has embraced the idea of the adequacy decision scheme for future EU-UK data transfer for law enforcement purposes, although whether it will secure that decision is questionable. Any future deal facilitating data exchange between the EU and UK in the context of law enforcement must maintain a high standard of data protection as reflected in the EU Charter and secondary legislation.

1. INTRODUCTION

The prospect of the UK's withdrawal from the EU following the June 2016 Brexit referendum marks a major political shift in the development of the EU and international frameworks more broadly. This is the first time that a Member State has sought to leave the EU, and the way in which the withdrawal is conducted could have significant consequences for the EU as well as the UK. The Brexit process must be viewed holistically, including:

- the details of the withdrawal agreement and any transitional arrangements.
- the possibility of future agreements.
- the wider impact on relations with states and organisations outside the EU; and
- the impact on the coherence and integrity of the EU itself.

The Area of Freedom, Security and Justice is a policy area whose importance has grown over the past two decades. The areas it covers – migration and asylum, freedom of movement in the EU, judicial cooperation in criminal and civil matters, police cooperation and data protection in the security context – go to the heart of Europe's future. They touch on sensitive areas including the right to family life and the rights of the child, security, privacy, and the rule of law. The outcomes of the Brexit negotiations could have far-reaching consequences for individual lives in the UK and the EU, whatever the nationality of the individuals concerned. The success of the AFSJ has meant that free movement of people around Europe has become commonplace, with people moving easily for work, study, or personal reasons in the Union without thinking about national borders. The impact of Brexit on individual lives is often characterised by politicians and the media as a binary issue between UK citizens in Europe and EU27 citizens in the UK. The reality is much more complex, widespread, and nuanced: many people live, study, work, and form families across multiple borders with complex identities based on national and EU citizenship. The AFSJ has allowed the EU to become a union of societies: breaking up this aspect of the EU may prove to be one of the most difficult aspects of Brexit, with acute and profound impacts on those affected.

Migration and freedom of movement in the EU generated intense debate in the run-up to the UK referendum. The sensitivity of these issues had already led to the UK staying outside the Schengen area. But as Brexit negotiations progress, the domestic debate in the UK is changing. In June 2017, it was reported that since the Brexit vote there had been a 96% drop in EU nurses registering in the UK.[1] In July 2017 the Home Secretary Amber Rudd commissioned research on EU worker contributions in the UK.[2] It is astonishing that this research was requested a year after the referendum, but this gives an indication of the political flux in the UK and the lack of accurate information behind the migration stories that fueled anti-EU sentiment in the UK. In August 2017, net migration to the UK dropped to its lowest figure in three years, largely driven by the Brexit effect.[3] Figures published by the Office of National Statistics also revealed that the ways in which immigration statistics in areas like student migration were reported and dealt with by the government[4] was

[1] The Health Foundation, *New nurse registrants from the EU,* 01.12.2017 at: http://www.health.org.uk/chart-96-drop-nurses-eu-last-july.
[2] Home Office, *Home Secretary commissions major study on EU workers* (press release), 27.07.2017 at: https://www.gov.uk/government/news/home-secretary-commissions-major-study-on-eu-workers.
[3] Office for National Statistics, *Migration Statistics Quarterly Report,* August 2017 at: https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/%20bulletins/migrationstatisticsquarterlyreport/august2017.
[4] See 'Theresa May under fire as student visa myth exposed', *The Guardian,* 24.09.2017 at: https://www.theguardian.com/education/2017/aug/24/pressure-grows-for-immigration-targets-to-exclude-foreign-students.

misleading.[5] Given the shifting sands of UK politics and the slow revelation of the effect of Brexit, along with more accurate reporting on the reality and benefits of freedom of movement, it is difficult to assess at this stage how the UK negotiating position may change in this area till March 2019.

Following several terrorist attacks with cross-border implications in recent years, security and cooperation in the fight against terrorism have become increasingly important concerns. The UK's pragmatic approach to the AFSJ has allowed it to drive forward important developments like the EAW while choosing which policy areas and legislative instruments it wishes to engage with – effectively cherry-picking the policies that suit its national agenda. The UK's record in this area and its value to Europe is mixed. On the one hand, the UK provides a useful bridge to other international and global networks for security and criminal justice cooperation, such as 'Five Eyes'.[6] On the other hand, the UK's concerns about sovereignty in the criminal justice arena have put a brake on deeper and more coordinated development of the EU criminal justice system. The UK has proved resistant to the supranational oversight provided by the CJEU. It has also resisted the development of a high level of protection of personal data in EU law, which forms the basis for enhanced cooperation and mutual trust in this field. As such, Brexit poses both a risk and an opportunity for the EU. Protecting the interests of the EU27 and EU institutions to ensure the security of people within the EU will require a complex assessment of the consequences of different approaches to Brexit, both for internal EU relations and for EU relations with the wider world. In the context of Brexit, there are profound questions raised by the AFSJ around fundamental rights, the rule of law, the role of supra-national courts, sovereignty and the separation of powers within and across borders. These issues are extremely difficult to unpick, but it is important that the fundamental ideals of the AFSJ should not be lost in the labyrinth of technicalities in the negotiations. This study will highlight some of the ways this risk might be addressed.

EU-UK negotiations for Brexit started in June 2017, but at the time of writing, and despite recent progress in discussions on the primary issues of citizens' rights, the exit bill, and the Irish border, there are no conclusions in the area of the AFSJ. While the EU has produced several position papers with technical details relevant to the AFSJ, they are overshadowed by the difficult political reality of the UK's intransigence on the fundamental issue of CJEU jurisdiction.[7] Given this political blockage, it is difficult to see how the technical negotiations needed for an orderly withdrawal from the AFSJ will be achieved within the Article 50 timescale. The UK Government issued a number of relevant position papers over the summer of 2017 on judicial cooperation in civil matters, data protection, and judicial oversight, but these were dismissed by EU interlocutors as unsatisfactory due to their lack of realism and detail.[8] The outcome of the recent British General Election and the difficulties encountered by the Conservative Party in forming a government make it harder than ever to predict how the UK's political approach to Brexit may change over the remaining negotiating period. But it is important to explore a number of possible options, including the challenges of allowing the UK to opt in to certain policies and the risks associated with

[5] See Office for National Statistics, *What's happening with international student migration?* , 24.08.2017 at: https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/whatshappeningwithinternationalstudentmigration/2017-08-24.

[6] The partner agencies of the US National Security Agency (NSA) in 'Five Eyes' are the UK Government Communications Headquarters (GCHQ), Canadian Communications Security Establishment, Australian Digital Signals Directorate, and New Zealand Government Communications Security Bureau.

[7] Publication is ongoing and current position papers can be found at: https://ec.europa.eu/commission/Brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en.

[8] UK position papers are available at: https://www.gov.uk/government/policies/Brexit. The EU response can be found at http://europa.eu/rapid/press-release_SPEECH-17-3043_en.htm.

the UK withdrawing, as well as the opportunities for the EU to develop closer cooperation and push forward new policy objectives in the AFSJ once the UK leaves the EU.

The timeline for the negotiations is very tight. With Article 50 triggered in March 2017, an agreement for withdrawal needs to be concluded by the end of March 2019 (unless the deadline is postponed through a unanimous decision of the European Council and the UK, as Article 50(3) allows). Within the time allowed, it will be very difficult to reach even transitional arrangements that ensure the necessary legal certainty and procedural checks and balances in this area. It will be up to the Member States and EU institutions to decide whether or not it is in their interest to extend the Article 50 deadline if the UK requests it. Prime Minister Theresa May has said recently that she would like to have a two year 'transitional period', but it is unclear whether this is, in practice, a request to extend the Article 50 deadline. With so many different political, economic, and legal interests at play in the Brexit negotiations, it is impossible at this stage to predict the eventual outcome or impact of Brexit on the AFSJ. Brexit negotiations are also ongoing alongside domestic political debates around the EU Withdrawal Bill in the UK.

This study, covering developments up until the end of September 2017, provides an overview of some of the implications for the AFSJ of Brexit. The broad scope of this study makes it impossible to provide an exhaustive analysis of all the issues or to cover the full breadth of legislation: each section or sub-section merits a separate in-depth analysis to accompany technical negotiations. The study therefore focuses on some of the most important policy areas and pieces of legislation that will be most acutely affected by Brexit. The authors seek to highlight key risks and opportunities for the EU and its citizens that should be taken into account in the Brexit process. The study is multi-disciplinary, and the different backgrounds and perspectives of the authors are reflected in the text. Where possible, we make some suggestions for action that can be taken to mitigate negative consequences. We recognise that the AFSJ is only one part of a much wider and more complex negotiation whose wide-ranging political and practical aspects render it a highly volatile and unpredictable process.

There are some fundamental issues underpinning the AFSJ that are beyond the scope of this study. These include the importance of the rights and principles set out in the EU Charter in the Article 50 process and as a basis for cooperation outside the EU; the status of EU citizenship and the way the EU protects the rights of its citizens, including British EU citizens wherever they live, in the Brexit process; the role and importance of the CJEU in the future of the EU; and the complexities of borders in Europe through dialogue on the Irish border, and eventually the border with Gibraltar. Although these issues are not explored in detail in this study, they should be kept at the forefront of Brexit negotiations because their implications go far beyond Brexit and will help shape the EU's future.

2. MAPPING BREXIT AND THE AFSJ

Over the past thirty years, the UK has taken, through a complex series of opt-outs and opt-ins, a pick-and-mix approach to its involvement with the development of AFSJ policies and legislation. This approach has been driven by a combination of domestic political pressures and pragmatic operational needs. Brexit may bring the conflict between those two factors on certain sensitive issues (in particular continued cooperation for mutual security) into sharp definition, in both the UK and the EU.

This chapter will map out the UK's involvement in specific issues within the AFSJ, as these are the areas that are likely to be most directly affected by Brexit. It should be noted that all of these policy areas have significant implications for the fundamental rights protected by the EU Charter as interpreted by the CJEU. Although the application of the EU Charter is technically limited to EU law and therefore, following withdrawal, will cease to apply in the UK, concerns will be raised about the adequacy of UK law if the EU Charter's rights and principles beyond those contained in the European Convention on Human Rights (ECHR) are not reflected in its domestic law, in particular with reference to the right to protection of personal data.[9] The draft of the EU Withdrawal Bill (at the time of writing) and its explanatory notes indicate that – unlike the main body of EU law implemented by the UK to date – the EU Charter will not be carried over into UK domestic legislation.[10] The UK Government's stance towards the EU Charter raises serious questions as to why the UK feels it appropriate to not domesticate the rights and principles protected by the EU Charter at the point of Brexit.

The CJEU has the jurisdiction to annul EU-third-country agreements that are incompatible with EU Treaties including fundamental rights.[11] It can also give an opinion on the legality of agreements with third countries before they enter into force.[12] Therefore, the CJEU will be able to rule, as a minimum, on the legality of future EU acts agreed with the UK in the AFSJ and on the Withdrawal Agreement itself. Discussion of the CJEU in the UK political arena does not seem to recognise this. Although not the focus of this study, the settlement of the application of rights contained in the EU Charter, in particular personal data protection, and the jurisdiction of the CJEU are likely to be fundamental issues in the negotiation of future agreements in this area because of the sensitivity of the issues at stake and the potential impact on fundamental rights. These two issues, therefore, set the parameters for any further discussions on the AFSJ. Without agreement there, any assessment of technical details is of limited practical value.

2.1. The UK's participation in legislation and policies on border checks, asylum and immigration, including free movement of persons

The UK has had the right to opt in or out of measures adopted in the AFSJ. It has chosen to opt out of almost all the ASFJ immigration measures. It has opted into only the whole of the first phase of the Common European Asylum System (CEAS), which makes this aspect

[9] EU Charter, Article 51.
[10] EU (Withdrawal) Bill, clause 5(4). The explanatory notes (Bill 5-EN), in paragraph 99, explain that this is because the EU Charter 'did not create new rights, but rather codified rights and principles which already existed in EU law and such rights and principles will be saved under the Bill (in clauses 2-4).
[11] TFEU, Article 263.
[12] TFEU, Article 218 (11).

of Brexit less complicated from the perspective of the UK legal order (although it will be highly relevant in terms of the future status of UK nationals in the EU). It should be noted that the UK Government has given indications that it will treat Irish nationals differently than other EU nationals, taking into account earlier agreements for a Common Travel Area and the specific needs for addressing the issue of the UK-Irish border.

From its inception in 1985, the UK opted out of the Schengen acquis on free movement of persons. It never participated in the inter-governmental development of the Schengen acquis; when this was transformed into EU law through the Amsterdam Treaty in 1999, the UK remained outside the system. The legal mechanism for this was a protocol to the Amsterdam Treaty that has since been carried through to subsequent treaties. The UK Government has expressed concerns that the British-Irish land border does not become a so-called hard border.[13] As Ireland also has an opt out of the Schengen acquis (though not of the right of free movement of persons), there is no reason why Ireland would have to apply the Schengen Borders Code to the Irish-British border (unless Ireland joins the Schengen system).

The UK was among the original signatories of the 1990 Dublin Convention, which set out rules regarding Member State responsibility for asylum seekers and the determination of their claims.[14] Under the protocol negotiated to the Amsterdam Treaty, the UK is entitled to opt in or out of any measure in the field of asylum. The UK chose to opt in to the first phase of the CEAS in 2004 and 2005. The core measures (as recast) are the Dublin system (including the EURODAC fingerprint data base, originally designed to assist in the identification of asylum seekers and the state through which they entered),[15] the reception conditions directive,[16] the qualification directive,[17] and the procedures directive.[18] However, when these core measures were renewed in the Second Phase of the CEAS in 2011–2013, the UK opted out of all of them except EURODAC (finger print database)[19] and the Dublin III regulation.[20]

[13] See 'The Hardest border', *BBC, 2017* at: http://www.bbc.co.uk/news/resources/idt-sh/The_hardest_border.
[14] Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities – Dublin Convention, signed 15.05.1990, OJ C 254, 19.8.1997, pp. 1-12.
[15] Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining the criteria and mechanisms for determining the Member State responsible for examining an application for international protected lodged in one of the Member States by a third-country national or a stateless person (recast)*, OJ L 180-31, 29.6.2013; and Council of the European Union, *Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining the criteria and mechanisms for determining the Member State responsible for examining an application for international protected lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with EURODAC data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast)*, OJ L 180/31, 29.6.2013.
[16] Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protect (recast)*, OJ L 180/96, 28.6.2013.
[17] Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, OJ L 337/9, 20.12.2011.
[18] Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, OJ L 180/60, 29.6.2013.
[19] *Regulation 603/2013*, op. cit.
[20] Peers, S., Moreno-Lax, V., Garlick, M. and Guild, E., 'EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition', *Vol. 3: EU Asylum Law*. Leiden: Brill, 2015.

The UK joined the EU after the rules on free movement of persons had been determined. The 1957 EEC Treaty provided for free movement of persons, in particular workers, the self-employed, and service providers and recipients. The transitional period for achieving free movement of EU nationals ended in 1968, before the UK's entry into the EU, with all the secondary legislation necessary for the achievement of free movement of EU nationals having been adopted. Thus, when the UK joined the EU it opted in to a fully established system.

As regards secondary legislation, the rules on free movement of EU citizens remained unchanged until the early 1990s. At that point in time, the EU adopted three directives providing for free movement of pensioners, students, and the economically inactive. The UK participated in the negotiations of these directives. A major overhaul of the secondary legislation took place in 2004, resulting in the adoption of Directive 2004/38. This directive incorporated the right of free movement for pensioners, students and the economically inactive, created the status of permanent residence after a five-year qualifying stay in a host Member State, and enhanced protection against expulsion. Since then two secondary instruments have been adopted, one to provide further protection for workers and the other for remedies. The UK participated in the negotiations for all these measures.

In relation to family reunification, for British citizens already living in the EU25 with third-country national family members, the rules of Directive 2003/86 will apply. In Denmark and Ireland, national law can be applied to them. In EEA states and Switzerland, which are not bound by Directive 2003/86, family reunification for third-country national family members of British citizens will be a matter of national law after Brexit. The status of third-country national family members of EU citizens in the UK after Brexit is a topic for negotiation, with the latest documents indicating that there are still unresolved issues.[21]

2.2. UK participation in legislation and policies on judicial cooperation in civil and criminal matters

When considering the UK's role in judicial cooperation, it is worth noting that the complexity of the relationship between the UK and the EU in this area is exacerbated by the fact that the UK is made up of three separate jurisdictions (England and Wales, Scotland, and Northern Ireland) with quite different legal systems, particularly in relation to criminal and family law. Gibraltar also has a different legal system.[22]

The UK and its overseas territories have shared waters with the EU27 and three land borders (between Northern Ireland and Ireland; between Gibraltar and Spain; and between the British Sovereign Base Areas of Akrotiri and Dhekelia and the Republic of Cyprus). It is quite likely that people around those land borders with transient workforces and families that may straddle borders will be particularly affected by any reduction in the UK's ability to cooperate in cross-border civil and family disputes or in combating cross-border crime.

Like other areas of the AFSJ, the UK has had the possibility of opting in or opting out to a range of judicial cooperation measures. It has chosen to opt in to approximately 30 judicial cooperation measures on a wide variety of issues, some relating to harmonisation of standards and others relating to operational cross-border cooperation.

[21] See 'Comparison of EU/UK positions on citizens' rights', *Joint Technical Note*, 31.08.2017 at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/641334/2017-08-30_-_EU_UK_Comparison_Table_CR_AUGUST_day_2_FINAL_AGREED_VERSION_AGREED_with_Cion_V2.2.pdf .

[22] Other British Overseas Territories and Crown Dependencies are all separate jurisdictions, but they are not currently in the EU (while Gibraltar is).

In 2013 the UK Government notified the Council of Ministers that it was going to exercise a block opt-out from the pre-Lisbon police and criminal justice measures.[23] It indicated that it would seek to re-join thirty-five of those same measures, which it did (from 1 December 2014) to ensure their seamless application. The UK has had the opportunity to decide about opting in or out of post-Lisbon measures. While it has not chosen to opt in across the board, it has done so for certain significant instruments.[24] Most recently, on 20 July 2017, the UK Government announced that it would opt in to the new regulation on mutual recognition of freezing and confiscation orders.[25]

2.2.1. Criminal judicial cooperation

Reflecting the mutual trust between EU Member States, judicial cooperation in criminal matters has developed in the EU to meet the threats of terrorism and organised crime across borders and to allow for enhanced and fast-track cooperation in cross-border criminal matters. Judicial cooperation in criminal matters encompasses three main strands of legislation:

- Legislation and treaty provisions establishing judicial cooperation bodies: e.g., Eurojust.[26]
- Legislation establishing minimum standards in criminal legislation: e.g., the Terrorism Directive,[27] the Framework Decision on Racism and Xenophobia,[28] and the Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest.[29] and
- Legislation allowing for mutual recognition as the basis for enhanced cooperation: e.g., the European Arrest Warrant (EAW).[30]

While UK engagement in these policy areas has been patchy and inconsistent, in some areas the UK has made very important contributions to EU judicial cooperation in criminal matters.

Judicial cooperation bodies, in particular Eurojust and the European Judicial Network (EJN), allow judges and prosecutors from Member States to coordinate cross-border cooperation more effectively. Eurojust's mission, as the Treaty on the Functioning of the European Union (TFEU) Article 85 outlines, is 'to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime

[23] The Lisbon Treaty communitarised the field of criminal justice cooperation as of 1 December 2014. Article 10 of Protocol 36 to the Treaty gave the UK the possibility of a 'block op-out' from all pre-Lisbon measures.
[24] The UK opted in to the Directive on the European Investigation Order in criminal matters, which entered into force on 22.05.2017 at:
http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1450446176116&uri =CELEX:32014L0041.
[25] See Chapter 2.2.
[26] See Council of the European Union, *Council Decision 2009/426/JHA of 16 December 2008 on the strengthening and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime*, OJ L 138/14, 4.6.2009.
[27] See Council of the European Union, *Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*, OJ L 88/6, 31.3.2017.
[28] Council of the European Union, *Council Framework decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law*, OJ L 328/55, 6.12.2008.
[29] Council of the European Union, *Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*, OJ L 294/1, 6.11.2013.
[30] Council of the European Union, *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)*, OJ L 190/1, 18.7.2002.

affecting two or more Member States […]'. TFEU Article 86 states that 'in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust'. Eurojust also funds and facilitates the creation of Joint Investigation Teams (JITs), which play a crucial role in combating cross-border serious and organised crime. The UK has been an active participant in Eurojust and the EJN.[31] It has also been one of the main users of JITs.[32] Brexit will mean that the UK will no longer have a voice in the development of judicial cooperation institutions like Eurojust.

Legislation establishing minimum standards in criminal law across the EU serves various purposes. Many serious and organised types of crime (such as trafficking in human beings, terrorism and cybercrime) are committed across borders. A degree of relative harmonisation across national laws ensures that criminals cannot misuse those EU countries with the most lenient legal systems or establish 'safe havens' through legal loopholes. Common rules on procedural rights strengthen mutual trust between the judiciaries of Member States, facilitating cooperation and mutual recognition of judicial measures. EU criminal law helps to prevent and punish serious offences against EU law in certain policy areas (such as protecting the environment).[33] Brexit will have a minimal impact in criminal law, at least in the short term, since the UK has not opted in to all of the measures of this type and intends to transpose into domestic law any EU law that it has already implemented through Clauses 2 and 3 of the EU (Withdrawal) Bill. Since these measures relate to the harmonisation of laws rather than the legal basis for judicial cooperation as such, they should not be directly affected by the UK withdrawal from the EU in a practical sense.

Mutual recognition instruments have transformed the ability of Member States to cooperate across borders. Compared to the more traditional mutual legal assistance and extradition tools that were available in the past, EU mutual recognition instruments significantly reduce the costs and time involved in surrendering suspects, exchanging evidence and freezing assets across borders. These instruments are based on the assumption that all EU Member States share common standards, in particular when it comes to the respect for and protection of human rights, and that CJEU jurisdiction provides certainty in terms of how these instruments are interpreted across the EU. Brexit is likely to have the biggest impact on the operation of mutual recognition instruments in proceedings and investigations involving the UK.

Brexit will have implications on a technical level in a wide range of areas because UK participation in mutual recognition instruments is widespread. The EU Paper 'Essential Principles on Ongoing Police and Judicial Cooperation in Criminal Matters' identifies several mutual recognition instruments that will need transitional provisions in the Withdrawal Agreement to ensure that ongoing procedures are not disrupted by Brexit.[34] These include measures like the European Investigation Order (EIO),[35] the EAW,[36] the European

[31] See EJN, *Evaluation report on the sixth round of mutual evaluations. The practical implementation and operation of the Decision setting up Eurojust with a view to reinforcing the fight against serious crime and of the Decision on the EJN. Report on United Kingdom,* 12.5.2014 at: https://www.ejn-crimjust.europa.eu/ejn/%20libdocumentproperties.aspx?Id=1298.

[32] Eurojust , *Annual Report 2016* at: http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/ Annual%20Report%202016/AR2016_EN_web.pdf .

[33] See http://ec.europa.eu/justice/criminal/criminal-law-policy/index_en.htm.

[34] European Commission, *Essential Principles on Ongoing Police and Judicial cooperation in Criminal matters, TF-50 8/2 – Commission to UK,* 12.7.2017 at: https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-ongoing-police-judicial_en_0.pdf .

[35] Council of the European Union, *Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters*, OJ L 130/1, 01.5.2014.

Protection Order (EPO),[37] and also the recognition of financial penalties,[38] custodial sentences,[39] supervision measures,[40] and confiscation orders.[41] If there is a desire to continue cooperation with the UK in these areas following Brexit, separate arrangements with the UK as a third country will need to be agreed.

2.2.2. Civil judicial cooperation

Within the EU's system of civil judicial cooperation, the UK participates in a range of instruments covering civil and commercial as well as family law. Civil judicial cooperation instruments are designed to facilitate the application of non-criminal law across borders in the EU, supporting the freedom of movement of people, services and goods.

In the civil and commercial sphere, these include the Brussels I Recast Regulation on jurisdiction and recognition and enforcement of judgments between EU Member States (1215/2012), the Rome I Regulation on applicable law in contracts (593/2008), the Rome II Regulation on applicable law in non-contractual obligations (864/2007), and the Insolvency Regulation on jurisdictional rules and applicable law and recognition of insolvency proceedings in cross-border insolvencies (1346/2000, 2015/848). In addition, the small claims (861/2007, revised by 2015/2421), enforcement order (805/2004), and order for payment (1896/2006) Regulations facilitate means for obtaining decisions on claims that can be enforced throughout the EU.

In relation to family law, the most important instruments the UK participates in are the Brussels IIa Regulation (BIIa) on jurisdictional rules in matrimonial and parental responsibility matters and the recognition and enforcement of judgments (2201/2003), the Maintenance Regulation on rules for determining which court has jurisdiction for, and the recognition and enforcement of, maintenance decisions (4/2009), and the Regulation on protection measures in civil matters, including for victims of domestic violence (606/2013). In October 2016, the UK Government decided to opt in to the renegotiation of BIIa.

Other cross-cutting instruments include the EU Service Regulation on rules for serving documents in other EU countries (2007/1393), the Taking of Evidence Regulation on cross-border processing of requests to take evidence (2001/1206), the Legal Aid Directive (2002/8) on granting legal aid in cross-border disputes, and the Mediation Directive (2008/52) on access to alternative dispute resolution and settlement of disputes through the use of mediation in cross-border disputes.

The UK also participates in the EJN in Civil and Commercial Matters, which facilitates cross-border cooperation for judges and practitioners and access to justice for those involved in disputes.[42]

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[36] 2002/584/JHA, op. cit.
[37] Council of the European Union, *Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order*, OJ L 338/2, 21.12.2011.
[38] Council of the European Union, *Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties*, OJ L 76/16, 22.3.2005.
[39] Council of the European Union, *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*, OJ L 327/27, 5.12.2008.
[40] Council of the European Union, *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 on supervision measures as an alternative to provisional detention*, OJ L 294/20, 11.11.2009.
[41] Council of the European Union, *Council Framework Decision 2006/783 of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders*, OJ L 328/59, 24.11.2006.
[42] Council of the European Union, *Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (2001/470/EC)*, OJ L 174/25, 27.6.2001.

2.2.3. The UK's participation in legislation and policies on police cooperation

The UK is often seen as a leader and significant contributor to European police cooperation. It has opted in to around 20 police cooperation measures covering a wide range of issues, from Europol, security in relation to football matches, and information exchange in areas ranging from financial intelligence to criminal records and customs matters.

The impact of Brexit on police cooperation in the EU cannot be divorced from the broader picture of intelligence cooperation and global information exchange that ensure EU security in many contexts. This includes bilateral and transatlantic arenas as well as the wider international context. Although not directly within the scope of EU competence or Brexit negotiations, they are likely to be affected by Brexit and may influence the strategic negotiating positions of both the EU and the UK.

The UK participates in prominent EU measures on data exchange for law enforcement purposes, namely the Schengen Information System (SIS II),[43] the European Criminal Records Information Systems (ECRIS),[44] the EU Passenger Name Record (PNR),[45], and the Prüm Decisions.[46] Continued involvement in these systems after Brexit will need to be based on UK compliance with EU data protection standards.

2.2.4. The UK's participation in legislation and policies on the protection of personal data for the purposes of law enforcement

The UK's role in this area has been shaped by its 'pick-and-choose' approach. Protocol 21 stipulates that Article 16 of the TFEU, which enshrines the right to protection of personal data, is applicable to the UK only for the EU police and judicial co-operation measures in which it participates.[47]

The protection of personal data is recognised as a fundamental right by Article 8 of the EU Charter. Data protection standards in the context of law enforcement were initially governed by the 2008 Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.[48] This was replaced by the 2016 Directive on protecting personal data processed for the purpose

[43] Council of the European Union *Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)*, OJ L 205/63, 7.8.2007.
[44] Council of the European Union, *Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States*, OJ L 93/23, 7.4.2009; and *Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA*, OJ L 93/33, 7.4.2009.
[45] Council of the European Union, *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*, OJ L 119/132, 27.4.2016.
[46] Council of the European Union, *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*, OJ L 210/12, 6.8.2008; and *Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime*, OJ L 210/12, 06.8.2008.
[47] Article 6 (a) of Protocol No. 21 annexed to TFEU Treaty on the position of the United Kingdom and Ireland in respect to the Area of Freedom, Security and Justice.
[48] Council of the European Union, *Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters*, OJ L 350/60, 30.12.2008. Hereafter cited as 2008 Framework Decision.

of criminal law enforcement.[49] Following the UK's block opt out from pre-Lisbon criminal and policing measures in accordance with Protocol 36 of the TFEU,[50] the UK re-joined the 2008 Framework Decision in April 2014 and transposed it into UK law by the Criminal Justice and Data Protection (Protocol 36) Regulations 2014.[51] The 2008 Framework Decision regulated cross-border exchanges of personal data for law enforcement purposes. By contrast, the 2016 Directive covers not only data transfer between law enforcement authorities but also data processing activities performed by national law enforcement authorities for the prevention, investigation, detection or prosecution of criminal offences (Article 1). It does not cover data transfer between and by intelligence services, whose activities fall outside the scope of EU law.[52] The 2016 Directive must be transposed into the national laws of EU Member States by 6 May 2018; given its ability to opt out, the UK is under no obligation to transpose it into national law by that time. Nevertheless, the UK Government announced in August 2017 that the Data Protection Bill would include the implementation of the 2016 Directive.[53] Indeed, the first draft of the Bill incorporates data processing rules for law enforcement purposes and transposes the 2016 Directive into UK law.[54]

The UK Government's position in relation to data transfer for the purposes of law enforcement after Brexit is clear: it wishes to maintain that transfer. The UK Government confirmed that it will achieve this goal by seeking an adequacy decision.[55] While this may be the UK's desire, there is no guarantee that an adequacy decision will be granted.

[49] Council of the European Union, Directive *2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA*., OJ L 119, 04.5.2016. Hereafter cited as 2016 Directive.

[50] See House of Commons, European Scrutiny Committee, *The UK's 2014 Block Opt-Out Decision*, note 1 at: https://publications.parliament.uk/pa/cm201415/cmselect/cmeuleg/762/76203.htm#note1.

[51] Hereafter cited as 2014 Regulations. The UK also re-joined Council Framework Decision 2006/960/JHA, which was also transposed by the 2014 Regulations. See Council of the European Union (2006), *Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities*, OJ L 386/89, 13.12.2006.

[52] 2016 Directive, op. cit., article 2(3)(a).

[53] *A New Data Protection Bill: Our Planned Reforms* at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/635900/2017-08-07_DP_Bill_-_Statement_of_Intent.pdf.

[54] Data Protection Bill, part 3. For the first draft of the Data Protection Bill at: https://publications.parliament.uk/pa/bills/lbill/2017-2019/0066/lbill_2017-20190066_en_1.htm.

[55] The UK wants to explore a UK-EU model for exchanging and protecting personal data, *which could build on the existing adequacy model*' (emphasis added). See Department for Exiting the European *The exchange and protection of personal data: A future partnership paper,* 24.8.2017, note 4 at: https://www.gov.uk/government/publications/the-exchange-and-protection-of-personal-data-a-future-partnership-paper.

3. POLICIES ON BORDER CHECKS, ASYLUM AND IMMIGRATION, INCLUDING FREE MOVEMENT OF PERSONS

KEY FINDINGS

- Assuming no EU-UK deal on rights after Brexit, British citizens will have to comply with the Schengen Border Code and the EU immigration acquis to enter and reside in the EU.
- EU26 nationals (leaving aside Irish nationals who would benefit from a bilateral arrangement) seeking to enter and reside in the UK will need to fulfil British immigration rules (which include a quarterly cap on labour migrants); British nationals seeking to enter and reside in EU26 Member States will have to comply with EU migration legislation (or, where applicable, national laws).
- The UK does not participate in Phase 2 CEAS and will no longer be bound by Phase 1; it will no longer automatically participate in the Dublin system nor have access to the EURODAC database.
- The position of EU27 and British citizens resident in either the UK or EU 27 post-Brexit is far from being resolved, though both sides have clarified their starting positions.
- Immigration between the UK and the EU26 (presumably not including Ireland) following Brexit without a deal will be much more complex and expensive.

One of the most sensitive and complex issues which must be dealt with in the Brexit negotiations is the situation of EU27 nationals in the UK and British citizens in the EU27, including border checks. The UK has opted out of much of the AFSJ, including almost all the ASFJ immigration measures.[56] It has opted into only the whole of the first phase of the CEAS, which makes this aspect of Brexit less complicated from the perspective of the UK and EU legal order. But as AFSJ immigration measures will apply to British citizens seeking to go to the EU27 after Brexit (unless some arrangement is made), they are relevant from that perspective. What is key to Brexit and the situation of EU27 citizens and British citizens after March 2019 is that EU27 citizens will be third-country nationals in the UK and British citizens in the EU27 will also be third-country nationals. This means that EU27 citizens will be subject to British border and immigration law on entering and residing in the UK and that British citizens entering and seeking to reside in the EU27 will be subject to EU rules on third-country nationals supplemented (in so far as the system is not yet complete) by the national laws of the relevant country. This section takes into account the joint EU-UK note published in August 2017 and notes the UK's request to its Migration Advisory Committee to prepare a detailed assessment of the role of EU citizens in the UK economy and society.[57]

[56] See above Chapter 2 of this report.
[57] The joint EU-UK note can be found at: https://www.gov.uk/government/publications/joint-technical-note-on-the-comparison-of-eu-uk-positions-on-citizens-rights; the UK request to the Migration Advisory Committee can be found at: https://www.gov.uk/government/news/migration-advisory-committee-mac-commissioned-by-government.

3.1. The role of the UK in policy development

3.1.1. Borders and border checks on persons

The UK did not participate in the inter-governmental development of the Schengen acquis on free movement of persons and chose to not join it at its inception in 1985. When the Schengen acquis was transformed into EU law in 1999 through the Amsterdam Treaty, the UK remained outside the system. This was done through a protocol to the Amsterdam Treaty which has since been carried through to subsequent treaties. Thus, the role of the UK in the development of policies in this area has been one of absence or, indeed, even an obstacle to be overcome. Even if the UK was not the only Member State concerned about the implications for state sovereignty, it is not clear that the development of the Schengen area within EU law would have taken place without UK opposition. The 1987 Single European Act's new definition of the internal market as an area without controls on the free movement of goods, persons, services and capital could have provided the legal basis, for the purpose of achieving a border-control-free EU, to replace the 1985 Schengen Agreement. The development of the Schengen system outside EU law between 1985 and 1999 was thus partly the result of the UK's determination to retain border controls on persons coming from EU Member States to the UK.

What the UK safeguarded has been the right to carry out border controls on the movement of persons from the EU27 (though, in reality, this is the EU26, as the Common Travel Area with Ireland means that there is no border control on persons between the UK and Ireland, an issue dealt with below).[58] At the present time, the continuation of UK border checks on EU citizens is subject to the right of all EU citizens to enter and remain in the UK for three months without conditions (Directive 2004/38, Article 6).[59] According to a BBC report, however, a Government spokesperson stated that 6,500 EU nationals had been refused entry at UK borders between 2010 and 2016.[60] Since the Conservative Party came to power in 2010, the *Independent* noted (using government data) that there has been a fivefold increase in the detention of EU nationals in the UK; by January 2017, EU nationals accounted for 11.4% (3,699) of all immigration detainees.[61] These figures indicate the extent to which UK authorities consider that EU nationals are not entitled to exercise their right to enter and stay in the UK for three months under Article 6 Directive 2004/38: the only grounds for exception involve individuals who are a future and serious threat to a fundamental interest of society on the grounds of public policy, public security or public health (this threshold also applies where authorities justify their decision on the ground that there is a re-entry ban which is compliant with the [high] threshold).[62]

[58] B. Ryan, 'The common travel area between Britain and Ireland', *The Modern Law Review* 64.6, 2001, pp. 831-854.
[59] Council of the European Union , *Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citiznes of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC*, OJ L 229/35, 29.6.2004. See also Guild,E., Peers,S. and Tomkin,J., *The EU citizenship directive: a commentary*, Oxford: Oxford University Press, 2014.
[60] 'Reality Check: How many EU nationals have been refused entry to the UK?', *BBC*, 22.04.2016 at: *http://www.bbc.com/news/uk-politics-eu-referendum-36101449*.
[61] *See* Home Office, *National Statistics Detention, 01.12.2016* at: https://www.gov.uk/government/publications/immigration-statistics-july-to-september-2016/detention and analysis at: http://www.independent. co.uk/news/uk/politics/eu-citizens-detention-centres-immigration-detained-five-times-theresa-may-Brexit-hostile-environment-a7534231.html.
[62] Guild, Peers and Tomkin, *EU Citizenship Directive*, 2014 op. cit.

Assuming that there is no specific arrangement made covering these areas after Brexit, the situation following the UK's departure from the EU will be as follows:

- EU26 nationals seeking to enter the UK will need to fulfil the conditions of the immigration rules; they will no longer enjoy a right to enter against which the UK authorities are required to justify refusal; instead they will be required to justify the purpose of their entry, e.g., visit less than six months, work with a prior authorisation to work under British law, family reunification with a prior authorisation under British law. etc;[63]

- British nationals seeking to enter the EU26 will need to fulfil the Schengen Border Code requirements (entry for three months out of every six), for longer stays the EU immigration acquis will apply, e.g., the Blue Card Directive, the Student and Researcher Directive, the Family Reunification Directive, etc. (see Section 2).

What will this mean in reality? The first practice which will disappear is the entitlement of EU26 nationals to enter the UK with an identity document other than a passport. British immigration law only allows for the use of national ID documents for EEA and Swiss nationals based on its current membership of the EU and EEA[64] so this is unlikely to continue in the absence of a specific agreement on this. Following Brexit, the UK authorities have stated that entry to the UK will only be permitted on presentation of a valid passport. EU citizens will no longer be able to travel to the UK using their ID cards.[65] Secondly, EU26 nationals will no longer be able to use the queue at UK ports of entry currently reserved for British and all other EEA (including Swiss) nationals, meaning longer waits.[66] Thirdly, EU26 nationals will have to justify their request to enter the UK and will be subject to a decision of an immigration officer as to whether they fulfil the conditions. The general provision of British immigration law that an immigration officer can refuse entry to a foreigner on general interest grounds will apply to EU26 nationals.[67] Any EU26 nationals travelling with third-country national family members will have to ensure that, should the nationality of their family members be subject to a British mandatory visa requirement, these family members fulfil this requirement. The list of countries subject to a mandatory visa requirement is not the same for the UK as the Schengen states. Most importantly, nationals of non-EU Western Balkan states, who are subject to a visa-free regime within the Schengen area, are required to obtain British visas before travel to the UK.

Visa reciprocity is an important EU priority. This means that, in principle, states which require visas of EU citizens should be treated the same way by the EU, so their citizens should be subject to mandatory Schengen visa requirements. Visa reciprocity has strained EU-US relations because of the US's refusal to lift mandatory visa requirements for nationals of some EU Member States.[68] It cannot be taken for granted that visa reciprocity

[63] Clayton, G., *Textbook on immigration and asylum law*. Oxford: Oxford University Press, 2016.
[64] See Home Office Rules at: https://www.gov.uk/uk-border-control/before-you-leave-for-the-uk.
[65] 'Post-Brexit immigration: 10 key points from the Home Office document', *The Guardian*, 05.09.2017 at: https://www.theguardian.com/uk-news/ng-interactive/2017/sep/05/post-brexit-immigration-10-key-points-from-the-home-office-document
[66] 'Will Brexit mean longer queues at passport control?, *The Telegraph*, 20.02.2017 at: http://www.telegraph.co.uk/travel/news/Brexit-and-budget-cuts-could-mean-longer-passport-queues-airports-warn/.
[67] See immigration rules on leave to enter or stay in the UK at: https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-1-leave-to-enter-or-stay-in-the-uk#pt1stay and general grounds for refusal at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/607625/GGFR-Section-3-v28.pdf.
[68] Stefan, M., CEPS, *The Transatlantic Dispute over Visas: The need for EU action in the face of US non-reciprocity, moving targets and the harvesting of EU citizens' data, Brussels* 2017 at:

can be guaranteed following Brexit. The UK's approach to visas for Western Balkan nationals, for instance, could be extended to EU Western Balkan states in order to diminish irregular migration from those states to the UK.

For British citizens seeking to enter EU or EEA (including Switzerland) states, the situation will vary across states. It will be a matter of negotiation whether Ireland will give privileged access to British citizens seeking to enter and reside in the country. All the EU and EEA states (including Switzerland) participating in the Schengen acquis (which means all of them except Bulgaria, Croatia, Cyprus and Romania) comply with the Schengen Borders Code.69 (While Bulgaria, Croatia, Cyprus and Romania are not formally part of the Schengen areas of border-control-free travel for persons yet, they voluntarily apply the Schengen acquis on border control regarding third-country nationals.) Assuming that Britain is not added to the Schengen visa black list, British citizens will not be required to obtain a visa before entry. If an EU electronic pre-entry requirement like the one proposed in ETIAS (currently under consideration by the legislator) is put into place, British citizens, like other third-country nationals, would be subject to it. British citizens will have to justify the reason for their entry into an EU Schengen state and then will have a total of 90 out of every 180 days to travel within the area. If they do not leave at the end of their permitted stay, they will become overstayers subject to the Return Directive (and expulsion).

The British Government has expressed concerns that the British-Irish land border not become a so-called hard border.[70] As Ireland also has an opt-out of the Schengen acquis (though not over the right of free movement of persons), there is no reason why Ireland (unless it joins the Schengen system) would have to apply the Schengen Borders Code to the border with the UK. Should Ireland join the Schengen system in full (including border controls), then it would have to introduce Schengen-compliant border checks with the UK. This would do no more than put Ireland in the same position as the EU 26 vis-à-vis border checks on people entering from the UK.

3.1.2. Asylum

The UK's geographic position and the nature of asylum flows have meant that other Member States have had relatively greater responsibility for asylum seekers. In theory, the UK should be able to send asylum seekers who have entered the EU through other Member States to those states. The UK is entitled to opt in or out of any measure in the field of asylum. The UK chose to opt in to the first phase of the CEAS in 2004 and 2005. The core measures (as recast) are the Dublin system (including the EURODAC fingerprint data base, designed originally to assist in identifying asylum seekers and the state through which they entered), the reception conditions directive, the qualification directive, and the procedures directive.[71] The UK was thus an important actor in the development of the first phase of the CEAS.

However, when these core measures were renewed in the Second Phase of the CEAS in 2011–2013, the UK opted out of all of them except the EURODAC and the Dublin III regulations.[72] The UK's involvement in EU asylum policies has thus become more marginal. Brexit without an agreement will mean the end of Dublin returns to the EU27, but these

https://www.ceps.eu/publications/transatlantic-dispute-over-visas-need-eu-action-face-us-non-reciprocity-moving-targets.

[69] Council of the European Union, *Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification)*, OJ L 77/1, 23.3.2016.

[70] See 'The Hardest Border', *BBC*, op. cit.

[71] See 2.1. of this report.

[72] Peers, Moreno-Lax, Garlick and Guild, *EU Immigration and Asylum Law*, 2015, op. cit.

amount to a drop in the (European) asylum bucket (the UK sent requests to take back under Dublin in respect to 1,513 asylum seekers). The UK received 38,785 first asylum applications in 2016 and 40,160 in 2015; its neighbour of a similar population size, France, received double those amounts (84,270 applications in 2016 and 76,165 in 2015).[73]

Similarly, the UK will no longer participate in the European Asylum Support Office (EASO). While the UK is not formally part of Frontex (nor of the European Border and Coast Guard Agency), it is currently invited to Management Board meetings. As the European Border Surveillance System (Eurosur) is a continuation of Frontex, the UK does not participate in it.

At the moment, the UK remains bound by its opt in to the First Phase of CEAS. This provides a floor of rights and procedures in the asylum system regarding reception conditions and qualification as a beneficiary of international protection (including as a refugee) and procedures (the right to an individual interview and appeal procedures, etc.). After Brexit is formally completed, British national implementing legislation for the First Phase of CEAS can be changed. The floor of rights which exists as a result of EU legislation will no longer apply.[74] For asylum seekers in the UK, this will mean that national law can be changed so that standards of reception are diminished (greater detention powers may be possible) and more onerous procedural rules are put in place. This could have an impact on the EU determination of whether the UK is a safe third country for the return of asylum seekers. But it will probably not result in a substantial change to the rules for recognition as a refugee or person in need of international protection, as EU rules mirror the 1951 UN Refugee Convention and the ECHR, to which the UK is a party outside of its EU membership.[75]

The EURODAC database is tied to the Dublin system of determining the state responsible for applicants for international protection. Since 2013 it has been amended for use by law enforcement officials in the Member States.[76] After Brexit EURODAC will not be available for British law enforcement purposes. Because the primary purpose of the database is to determine which Member State is responsible under the Dublin rules for the care and determination of asylum applications, it is unlikely that the UK would be able to have access to the database if it is outside the Dublin system.

At the moment, the EU Charter has been very important in the CJEU's interpretation of the CEAS.[77] The UK will no longer be bound by the EU Charter after Brexit. Assuming that there is no agreement on the applicability of CJEU judgments in the UK after Brexit, the matter will have to be resolved by the British constitution. Refugee rights and asylum are likely to be less well protected from a fundamental rights perspective after Brexit because of the loss of protection of the EU Charter and the lack of domestication of the rights and principles it contains.

[73] See the 2016 EASO Annual Report at: https://www.easo.europa.eu/sites/default/files/Annual-Report-2016.pdf.
[74] Clayton, *Textbook on immigration and asylum law*, 2016, op. cit.
[75] UN General Assembly, *Convention Relating to the Status of Refugees*, 28.7.1951, United Nations, Treaty Series, vol. 189, p. 137 at: http://www.refworld.org/docid/3be01b964.html; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4.11.1950, ETS 5 at: http://www.refworld.org/docid/3ae6b3b04.html.
[76] Regulation (EU*) 603/2013*, op. cit.
[77] Peers, S. et al., eds., *The EU Charter of fundamental rights: a commentary*, London: Bloomsbury Publishing, 2014 and Ippolito, F., 'Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?', *European Journal of Migration and Law* 17.1.2015, pp. 1-38.

3.1.3. Free movement of persons and immigration

When the UK joined the EU it opted in to a fully established system of free movement of workers, self-employed and service providers and recipients (see below). The UK opted out of policy and legislation in immigration matters, particularly in relation to third country nationals and therefore this study will not look into this area as it is not affected significantly by Brexit. The only additional area would be free movement of persons though the Single European Act, accomplished by the abolition of border controls within the EU (which the UK rejected). The main changes to the system include:

- The abolition of border controls in Member States on the free movement of persons (which the UK opposed) in the 1987 Single European Act.
- The introduction of EU citizenship in the 1993 Maastricht Treaty, which the UK participated in.
- The incorporation of the Schengen acquis into EU treaties by the 1999 Amsterdam Treaty, for which the UK obtained and exercised an opt out.
- The provision of the legal effect of the EU Charter by the 2009 Lisbon Treaty, from which the UK obtained an opt out.

As regards secondary legislation, the rules on free movement of EU citizens remained unchanged until the early 1990s. The UK participated in the negotiations of three directives providing for free movement of pensioners, students, and the economically inactive at that time. A major overhaul of the secondary legislation took place in 2004, resulting in the adoption of Directive 2004/38. This directive incorporated the right of free movement for pensioners, students and the economically inactive, created the status of permanent residence after a five-year qualifying stay in a host Member State, and enhanced protection against expulsion. Since then two secondary instruments have been adopted, one to provide further protection for workers and the other for remedies. The UK participated in the negotiations for all these measures.

The status of EU27 nationals in the UK and British nationals in the EU27 remains a substantial issue in the negotiations. Both sides have given it a substantial priority (together with obtaining agreement on the British payment to the EU upon departure). At the present time, there is very substantial distance between the two negotiation positions. The Commission's approach is to safeguard the rights of EU27 nationals in accordance with the citizens' directive (2004/38) and the principle of equal treatment with British citizens. This would be reciprocal for British citizens in the EU 27. The reason for including the two approaches is that EU27 nationals in the UK enjoy more extensive rights in some fields than their British counterparts. This is particularly apparent in the area of family reunification, where EU27 nationals working in the UK have a right to family reunification whereas British nationals must meet a wide range of requirements, which include high income thresholds, the successful passing of language and integration tests (the first abroad, before arrival) by most third-country-national family members, and other restrictive requirements. This means that British citizens who have always lived in the UK and wish to exercise family reunification with their third-country-national family members face greater hurdles than EU27 citizens residing in the UK. This is the consequence of the application of EU law: more restrictive national rules cannot be applied to EU27 nationals, who must only comply with the conditions set out in the citizens' directive (2004/38).

For British citizens living in EU Member States except Denmark and Ireland, the situation is clearer: Directive 2003/86 on family reunification of third-country nationals will apply to them. This directive sets out the rules and obligations of third-country nationals resident in

an EU state regarding family reunification, including the class of family members for whom family reunification is permitted, the conditions which can be attached, and the rights these family members have after entry. If a British national marries or otherwise becomes a family member of an EU27 national, either EU rules will apply if the EU27 national resides in another EU Member State or national rules will apply if the EU27 national lives in his or her home state. Directive 2003/86 does not apply (as a result of opt outs obtained in 1999) to Denmark and Ireland, where British citizens must comply with national family reunification rules.

The rules of Directive 2003/86 will apply for British citizens already living in an EU25 state with their third-country-national family members. In Denmark and Ireland, however, national law can be applied to them. As regards EEA states and Switzerland, which are not bound by Directive 2003/86, after Brexit national law will apply for family reunification for third-country-national family members of British citizens.

To safeguard the rights of EU27 nationals after Brexit, the Commission has proposed the continuing jurisdiction of the CJEU in respect to EU27 nationals with rights under EU law. This complex issue is highly contested in the UK. The problem is substantial. A recent example of the difficulties in the protection of EU citizens' rights is exemplified in *Molina, R (On the Application Of) v The Secretary of State for the Home Department [2017] EWHC 1730 (Admin)*. In this case, the British High Court held that even though an Italian national working in the UK was in a genuine relationship with a third-country national (the couple was even trying to get married), theirs was a relationship (and marriage) of convenience not protected by EU law (Directive 2004/38). As a result, the third-country-national partner could be expelled from the UK. The idea that a relationship can be genuine but still a marriage of convenience, and thus outside the scope of EU law, is a novel approach inconsistent with CJEU jurisprudence, which was extensively cited to the British court.

The UK Government has made its own proposal on the future of EU citizens to the Commission. Irish nationals will be provided with free movement rights, in accordance with a pre-EU treaty between the two countries. The UK proposes that EU26 nationals be gradually incorporated under British Immigration Rules (which apply to all third-country nationals and which are quite restrictive). The key to the British offer is that EU citizens must apply for residence documents (not a requirement of EU law).[78] Most (but perhaps not all) of the EU26 nationals who have acquired an EU right to permanent residence as a result of a period of five years of qualifying residence in the UK will be transferred to the British national long-term residence status, which grants indefinite leave to remain. EU26 nationals already in the UK and acquiring rights towards the EU status of permanent residence may be entitled to continue acquiring those rights and apply for indefinite leave to remain. There will be a grace period of two years after Brexit so that EU nationals can file their applications. If they fail to do so, they will be subject to British immigration law, which means that they will probably be classified as overstayers, irregularly present in the UK, and thus liable to expulsion.

The position of Irish nationals calls for some attention. According to the British offer, they will continue to be entitled to free movement and will be allowed to work (including self-employment) and study in the UK under the same conditions as British citizens. This offer is justified as the application of the Ireland Acts of 1948 and 1949, adopted by Ireland and the UK, respectively. The Ireland Acts provide reciprocal rights to nationals of the two

[78] EU citizens are not required to register in a host state, although a host state can require them to do so. Most Member States do not require registration. The acquisition of permanent residence occurs automatically.

countries regarding movement and residence. The application of the Ireland Acts in the Brexit context means that the official number of putative EU27 nationals living in the UK may be diminished as Irish nationals are a large group. But official statistics regarding EU27 nationals residing in the UK are rather murky. The prevalence of dual nationality among Irish-British nationals and many others, particularly for the generations born in the UK, makes it rather complex to arrive at accurate figures. Further, there is anecdotal evidence that since the Brexit referendum many British citizens have been checking their ancestry and following up on entitlements to citizenship or passports of other Member States arising therefrom.[79] It would be worthwhile to check with EU27 authorities whether there are substantial numbers of British citizens seeking citizenship or confirmation thereof and whether their nationals are dual citizens with the UK. Access to dual citizenship will mean that British citizens of European heritage are more likely to be able to retain their EU citizenship than those from other backgrounds.

With regards to ancillary issues such as social security rights (including pension contributions and benefits), recognition of diplomas, workers' rights, taxation, etc., the key issue will be what legislation applies. If EU law continues to apply (a matter which is a subject of negotiation), then the situation is clear. But if EU nationals become subject exclusively to British law, then their situation changes dramatically. For example, the UK has a policy of freezing pensions (i.e., not applying annual upgrade assessments) for pensioners who live in a substantial number of foreign countries (although not in the EU27): the UK All-Party Parliamentary Group on Frozen British Pensions states that this policy of freezing pensions covers 95% of British pensioners living in Commonwealth countries.[80]

For British citizens who become third-country nationals in the EU27, the rules of social security rights are a little clearer. The main EU Regulation 883/2004 and its implementing legislation has been extended to lawfully resident third-country nationals. Although the scope of the regulation is limited to the EU, there have been indications that social security contributions made in a state before its accession to the EU also count for the purposes of aggregation and export. Whether the same would be true regarding a state which ceased to be a Member State is uncertain.

Negotiations have not been helped by UK's position on the necessity of (private) comprehensive sickness insurance for EU27 nationals living in the UK but not working or self-employed (which also applies to periods between work or self-employment): the UK Home Office claims that these periods of residence are not in accordance with EU law and thus do not count towards permanent residence and could be considered to be a break to continuity of residence.[81] The problem, simply put, is that when an EU citizen (like a student) has recourse to the UK's National Health Service, UK authorities may consider the individual to no longer be lawfully resident because the person should have comprehensive sickness insurance (and not rely on the universal system available to UK residents). The Commission has been examining the extent to which the same approach is taken by other Member States, but informal indications are that this is not the case.[82]

[79] See *How UK citizens can stay in Europe after Brexit* at: https://qz.com/716113/Brexit-how-to-stay-in-europe/.
[80] See http://frozenbritishpensions.org and https://www.connexionfrance.com/index.php/French-news/ Brexit/MPs-to-debate-end-to-freezing-of-state-pensions-of-British-pensioners-abroad.
[81] Valcke, A., EU Rights Clinic, A., *Case studies – access to social and health services for mobile EU citizens*, 2015 at:https://www.academia.edu/15008125/Case_studies_Access_to_Social_and_Health_Services_for_Mobile_EU_Citizens/ and Vargas-Silva, C., 'EU Migration to and from the UK After Brexit', *Intereconomics* 51.5, 2016, pp. 251-255.
[82] Meduna, M. Commission Office DG Justice, London, UK Immigration Law Practitioners Association Conference, 04.10.2017.

3.2. Important areas and challenges for future cooperation

For the moment, there is no clarity on how the negotiations will proceed. One of the central unresolved questions is the so-called 'cut-off date': that is, when do EU27 nationals cease to be eligible to rely on their EU rights while in the UK? According to the Commission's offer, this should be the date of the UK's effective departure. The British offer does not clarify what date should apply, leaving that open for negotiation. This is particularly important for British and EU26 nationals (excluding Ireland, see above) who have moved or are moving to the EU26 or the UK since the British referendum. At the moment, the earliest date which seems to be under discussion is when the UK triggered Article 50 (29 March 2017). The chosen date will have consequences regarding the retroactive effect of the law, but how this will be dealt with remains to be negotiated. The Treaty on the European Union (TEU) does not specify further than Article 50 what happens in the event of a Member State departing. The principles of law which may apply remain to be clarified. This may be the job eventually of the CJEU.

After Brexit, movement between the UK and the EU26 (assuming the situation with Ireland remains on the footing of the Ireland Acts) will become much more complicated. If there is no agreement to the contrary, British nationals will become third-country nationals for the purposes of EU law. This means that EU measures on migration will apply to them. These measures will apply to students and researchers, family reunification with third-country family members already in the EU26, long-term residence status after five years of residence in the host EU Member State fulfilling the conditions of the directive; highly skilled employment under the Blue Card Directive and Intra-Company Transfers under that directive, and seasonal workers under the directive of that name. The Return Directive will apply to British citizens in the EU26 who no longer comply with the conditions of their admission and residence. The EU26 are obliged to apply EU law in this field. Once the EU exercises competence in an area it acquires exclusive competence over the matter – so Member States are not entitled to adopt national laws or practices inconsistent with EU provisions. Unless one of the third-country-national directives permits a derogation under national law (such as the maintenance of national highly skilled migrant schemes in the Blue Card Directive), no exception can be made for British nationals.

The situation will be equally clear for EU26 nationals in the UK. If they have not started to acquire rights before the cut-off date, then they will have to comply with British Immigration Rules, which are substantially more restrictive than EU immigration measures. Family reunification is harder, labour migration is difficult and subject to a cap, intra-company transfers require businesses to be registered and must fulfil high income thresholds, and students need to obtain a specific residence status and need to evidence substantial funds to support themselves through their studies. There is no guarantee that the dramatically lower 'home-student' fees (GBP 9,250 maximum for English universities) will continue to apply to EU26 students, in which case the higher 'overseas' student fees will apply (ranging from GBP 10,000 to GBP 35,000 depending on the course). UK universities have stated that EU27 students who have commenced their studies before Brexit will benefit from home student fees.

Differential treatment of Irish nationals and EU26 nationals may be problematic from the EU side, as the principle of equality of EU citizens will be questioned. As exemplified in the EU visa reciprocity debate, one high priority for the EU is the equal treatment of EU citizens by third-country authorities. When this concerns actions within the EU's scope, this is even

an obligation in EU law. Historical relationships between some Member States and third countries were negotiated at the time of the EEC Treaties or on accession to preserve some benefits. If a similar situation is to continue after Brexit for Irish nationals, this would need to be part of the deal.

The hardening of EU-UK border controls is likely to be an inevitable consequence of Brexit. The legal framework for border controls both in the UK and the EU requires full border checks on third-country nationals, giving substantial powers to border guards to refuse entry since third-country nationals have no inherent right to enter the EU or the UK. In both cases, the burden of substantiating the reason for entry rests on the individual.

The departure of the UK from the CEAS is unlikely to have significant consequences for the EU27, but it may result in changes to the UK's asylum system that do not benefit refugees. But as the UK has only participated in a very limited number of the AFSJ's immigration measures, its departure will not make a substantial difference.[83]

The Brexit negotiations have started discussing the status of EU/UK citizens. The issue is a top priority for both sides. However, the starting point for the two sides is extremely far apart. The UK offer seeks to interiorise EU26 nationals in the UK, applying to them current UK immigration rules with no promises about any protection from subsequent changes to those rules. The EU Commission seeks to extend indefinitely the current EU rules on free movement of persons to EU27 nationals living in the UK as long as they have started to acquire rights by Brexit day. For British citizens, the Commission appears to be content to seek a protection of their residence status in the current host Member State without further EU27 mobility rights.

Perhaps the most noteworthy aspect of the current debate (autumn 2017) is the sense on both sides that it is unclear whether a deal will be struck. The issue of the treatment of EU/UK citizens seems to be creating great intransigence.

3.3. Conclusions and recommendations

Many problems will likely arise if no deal on the status of EU and British citizens after Brexit is struck. First, for EU27 citizens in the UK, Irish nationals are likely to get a very different deal from the EU26, creating discrimination in treatment by a third country (as the UK will then be). This will raise the issue of reciprocity. EU26 nationals are likely to be absorbed over a two-year period in the UK's existing immigration rules. British citizens living in or seeking to go to the EU27 countries will become third-country nationals and will have to fulfil the requirements of EU measures for third-country nationals. In areas which have not yet been fully harmonised, British citizens will be subject to the national law of Member States.

[83] These include Council of the European Union, *Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals*, OJ L 157, 15.6.2002; Council of the European Union, *Council Decision of 5 October 2006 on the establishment of a mutual information mechanism concerning Member States' measures in the areas of asylum and immigration*, OJ L 283, 14.10.2006; Council of the European Union , *Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas*, OJ L 164, 14.7.1995; and Council of the European Union , *Council Regulation (EC) No 333/2002 of 18 February 2002 on a uniform format for forms for affixing the visa issued by Member States to persons holding travel documents not recognised by the Member State drawing up the form*, OJ L 53/4, 23.2.2002.

4. JUDICIAL COOPERATION

KEY FINDINGS

- Judicial cooperation in both civil and criminal matters will take much longer and be more expensive if there is no deal between after Brexit.
- Judicial cooperation in criminal matters is a key element in combating serious and organised crime and terrorism, so there is a mutual interest in seeking agreement.
- The UK's position on the CJEU and the rights contained in the EU Charter is a serious impediment to future agreements on judicial cooperation.
- A failure to agree on transitional and future arrangements in the field of international family law risks leaving a serious gap in the legal framework for proceedings involving children, which could affect EU citizens with connections to the UK.

This chapter will highlight some of the issues the EU27 will face when it comes to continued judicial cooperation with the UK after Brexit. The scale of the challenges means that a detailed assessment across all areas is not possible within the scope of this study and particular pieces of legislation have been highlighted because of the scale of their impact. Brexit brings up two fundamental questions in relation to judicial cooperation for the EU. Firstly, what is the practical impact of losing enhanced cooperation with the UK? Secondly, what future vision does the EU have for judicial cooperation and how can future arrangements with the UK support it?

4.1. Role of the UK in the development of judicial cooperation in criminal matters

The UK has had a chequered relationship with EU law when it comes to developing judicial cooperation in criminal matters. While cooperation with the EU in the field of criminal law is often politically controversial, the UK has given significant political and practical support to the development of EU judicial cooperation in criminal matters.[84] Indeed, the 1998 Cardiff European Council, held under the UK Presidency, gave rise to the principle of 'mutual recognition' as a cornerstone of EU judicial cooperation (as opposed to harmonisation of criminal law).[85] This principle allowed the UK to protect the space of the common law within the rapidly developing field of EU criminal law; it has also provided the basis for greatly enhanced cooperation as compared to previous models for mutual legal assistance.

[84] British officials have had significant roles in building the AFSJ from the establishment of the Task Force for Justice and Home Affairs (headed by Adrian Fortescue and Jonathan Faull as Director General of the then DG JHA) to UK leadership in Eurojust by Mike Kennedy from its inception and, more recently, with Rob Wainwright as Director of Europol.

[85] See Council of the European Union, *Presidency Conclusions*, Cardiff European Council, 15-16.6.1998, Conclusion 39, and Jimeno-Bulnes,M., 'Brexit and the Future of European Criminal Law – A Spanish Perspective', *Criminal Law Forum,* 28.05.2017, pp. 325-347, at p. 335.

Along with Denmark and Ireland, the UK has the option to opt in or out of Lisbon Treaty Title V measures (Protocol 36). In 2013 the UK Government notified the Council of Ministers that it was going to exercise the block opt-out from the pre-Lisbon police and criminal justice measures. It indicated that it would seek to re-join thirty-five of those same measures, which it did (from 1 December 2014) to ensure their seamless application. By opting in to those measures, the UK accepted that the enforcement powers of the European Commission and full CJEU jurisdiction would apply to those measures from that date. The then Home Secretary Theresa May, now Prime Minister, said in November 2014 that the measures the UK opted into were 'vital' 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'.[86] May later added that failing to re-join those 35 measures 'would risk harmful individuals walking free and escaping justice, and would seriously harm the capability of our law enforcement agencies to keep the public safe'.[87]

The UK has had the opportunity to decide about opting in or out of post-Lisbon measures. While it has not chosen to opt in across the board, it has done so for certain significant instruments.[88] Most recently, on 20 July 2017, the UK Government announced that it would opt in to the new regulation on mutual recognition of freezing and confiscation orders.[89] Although the previous UK Government decided to opt out of the 2014 Directive on this issue, the UK had opted in to earlier pre-Lisbon Framework Decisions on asset freezing in December 2014.[90] Despite the relatively recent transposition of these instruments in the UK, the Director of Public Prosecutions (DPP) gave evidence about the scale of cooperation the UK is engaged in on asset freezing:

> *[C]urrently we have 69 requests for restraint and we have £170 million frozen in the UK. They are assets that we have been asked to freeze by other European countries. It also means that we can ask other European countries to do that, and we have … It is cheaper, quicker and more effective. The other slight advantage to it is that in cases where we are recovering more than £10,000 it is mandated that you split the proceeds that are recovered 50/50—so there is a slight financial incentive as well.*[91]

The contradictory approach the UK has taken since 2014 to its decisions to opt in and transpose the different instruments on freezing and confiscation orders seems to indicate that there is no clear political line in the UK on more recent mutual recognition instruments. The UK Government's recent decision to opt in to the new regulation over a year after the Brexit referendum could be interpreted as a sign that the UK would like to continue to cooperate with the EU in this area. But it is also an indication of the lack of coherence in UK policy on Brexit in general and on the AFSJ in particular. The scale of cooperation that has built up over the last three years in this area would suggest there is a clear operational interest for the EU27 in continued enhanced cooperation with the UK. It remains to be seen

[86] Theresa May, 'Fight Europe by all means, but not over this Arrest Warrant', *The Daily Telegraph*, 09.11.2014 at: http://www.telegraph.co.uk/news/politics/conservative/11216589/Theresa-May-Fight-Europe-by-all-means-but-not-over-this-Arrest-Warrant.html.
[87] House of Commons, *Hansard Debates*, 10.11.2014, columns 1224, 1228, 1229 at: https://publications.parliament.uk/pa/cm201415/cmhansrd/cm141110/debtext/141110-0002.htm.
[88] The UK opted in to the European Investigation Order in criminal matters, which came into force on 22 May 2017. See Directive *2014/41/EU,* op. cit.
[89] See Chapter 2.2 above.
[90] See Council of the European Union, *Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence*, OJ L 196, 2.8.2003; and Council of the European Union, *Council Framework Decision 2006/783*, op. cit.
[91] House of Lords, *Corrected oral evidence: Brexit: future EU-UK security and police co-operation,* 02.11.2016, Q58 at: https://www.parliament.uk/documents/lords-committees/eu-home-affairs-subcommittee/Evidence-Brexit-Policing.pdf.

if this is a practical possibility given the UK Government's current position to reject the jurisdiction of the CJEU and the application of the EU Charter's rights and principles.[92]

If one takes the example of the EAW, the UK receives a large number of requests from the EU27 every year. The UK surrenders around 1,000 people on EAWs every year and receives around 10% of that number in surrenders from other EU Member States. Some EU27 countries, like Poland (half of whose EAW requests are executed in the UK), will be particularly affected by a British withdrawal from the EAW system.[93] Failing to reach a similar arrangement with the UK after Brexit will result in a significant cost increase to EU27 Member States in extradition requests to and from the UK, with potentially significant delays in bringing suspects to justice.[94]

Table 1. EAW Requests to and from the UK.

Wanted from the UK[95]

Part 1 EAWs - Calendar Year	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**Total**
Requests	4,369	6,512	6,290	5,522	13,460	12,613	**48,766**
Arrests	1,307	1,332	1,331	1,775	1,519	2,041	**9,305**
Surrenders	1,038	1,079	1,025	1,126	1,097	1,149	**6,514**

Wanted by the UK[96]

Part 3 EAWs - Calendar Year	2010	2011	2012	2013	2014	2015	**Total**
Requests	252	226	271	219	228	228	1,424
Arrests	141	151	148	170	156	150	916
Surrenders	133	136	136	127	145	123	800

The UK has been an active member of Eurojust from the start, with the Presidents of the College being British from its inception until 2012. The UK's practical role within Eurojust has not diminished since then. According to the 2016 annual report, the UK received 262 requests for assistance through Eurojust, the second highest number of any Member State, while it made 111 requests.[97] The UK has also been a very active participant in Joint Investigation Teams (JITs). From 2009 to 2013, Eurojust provided over €1.8 million in funding for JITs involving British participation (this figure is now estimated to be around

[92] The UK Government rejects the protection of rights and principles that go beyond the European Convention on Human Rights, such as the right to protection of personal data. Rights enshrined in the ECHR will remain applicable.
[93] Swiatlowski, A. and Nita-Swiatlowska, B., 'Brexit and the Future of European Criminal Law – A Polish Perspective', *Criminal Law Forum* 28:2, 2017, pp. 319-324.
[94] It is impossible to compare figures with pre-2003 Extradition Act extraditions to and from the UK to the EU27, in particular because many of the most affected Member States, such as Poland, were not yet members of the EU.
[95] National Crime Agency, *Wanted from the UK: European Arrest Warrant Statistics 2008 – May 2016 (Calendar Year*, 9.5.2016 at: http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-from-the-uk-european-arrest-warrant-statistics/691-wanted-from-the-uk-european-arrest-warrant-statistics-2009-may-2016-calendar-year.
[96] National Crime Agency, *Wanted by the UK: European Arrest Warrant statistics 2009 – May 2016 (Calendar Year)* at:http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-by-the-uk-european-arrest-warrant-statistics.
[97] See graphs in Eurojust Annual Report (2016), op. cit., p. 11.

€2.5 million).[98] The UK was the largest recipient of funding in 2016 for the establishment of JITs.[99] It is also an active participant in the European Judicial Network.[100]

The scale of judicial cooperation in criminal matters between the UK and the EU27 means that some EU27 countries may experience significant impacts on both resources and security if suitable arrangements are not made going forward. There will also be ongoing operations involving the UK on Brexit day, so transitional arrangements will need to be built into the Withdrawal Agreement to ensure that those proceedings are not compromised while ensuring both the protection of the fundamental rights of those concerned and the integrity of judicial proceedings concerning serious and organised crime.

4.2. Important areas and challenges for future cooperation in criminal matters

There are many challenges for future judicial cooperation in criminal matters, but there is a clear mutual interest in continuing to cooperate with the UK in order to combat serious and organised crime and terrorism and to ensure that Brexit does not compromise European security.

It will not be possible to draw a clean line over cross-border cooperation on Brexit day. There will be pending EAWs and other requests as well as ongoing JITs. If these transitional issues are to be handled effectively, a legal basis for transitional cooperation will be needed; such a legal basis should be included in the Withdrawal Agreement to ensure that pending and ongoing actions are not immediately compromised. In the July 2017 position paper 'Essential Principles on Ongoing Police and Judicial Cooperation in Criminal Matters', the European Commission stated that the Withdrawal Agreement should allow for the orderly completion of ongoing procedures in a number of instruments in the area of police and judicial cooperation in criminal matters.[101] The Withdrawal Agreement would need to establish the procedural stage that has been reached in order for the procedure to continue in accordance with the relevant provisions of EU law applicable on withdrawal date; the EU position paper states that all applicable procedural rights enshrined in EU law should continue to apply.[102] This will require a detailed analysis of the implications, including the potential impact to individuals subject to judicial proceedings and their rights, for cutting off cooperation at a particular stage. The UK Government has not yet indicated how it envisages this transition will work in practice. It has issued a position paper on ongoing judicial and administrative procedures involving the UK, but this is only relevant for cases pending before the CJEU (and the UK's restrictive approach on CJEU jurisdiction is likely to make it difficult to agree effective transitional arrangements that do not seek to dilute the role of the CJEU). The Withdrawal Agreement itself may be challenged before the CJEU, so it is crucial that any agreement includes adequate checks and balances to ensure that the protection of individual rights enshrined in the EU Charter is real and effective throughout the withdrawal process.

[98] The Anti Trafficking Monitoring Group, *Brexit and the UK's fight against modern slavery,* July 2017 at: https://www.antislavery.org/wp-content/uploads/2017/07/ATMG-Brexit-paper.pdf.
[99] See Eurojust, *Annual Report*, 2016, op. cit.
[100] See EJN, *Evaluation report on the sixth round of mutual evaluations,* 2014 op. cit.
[101] European Commission, *Position paper on ongoing police and judicial cooperation in criminal matters,* 13.7.2017 at: https://ec.europa.eu/commission/publications/position-paper-ongoing-police-and-judicial-%20cooperation-criminal-matters_en.
[102] Ibid.

There have been some suggestions that the EU should seek a treaty-based mutual assistance system based on existing EU mutual recognition instruments. But given the length of time that may be required to put new agreements in place, there may also be a need for other transitional arrangements to avoid the risk of being unable to engage with the UK effectively on serious and organised crime and terrorism in the period immediately after Brexit day.[103] While the duration and scope of such transitional arrangements will be a matter for negotiation, they could, for example, include an extended application of relevant judicial cooperation measures with the UK for a specified amount of time. This, however, would likely depend on the UK agreeing to be bound by CJEU jurisdiction and the application of the EU Charter with respect to the implementation of those instruments for the duration of the transitional arrangements. As an interim measure, EU27 Member States who most actively engage with the UK in this sphere may well want to assess their domestic legislation in order to set up bilateral arrangements with the UK to ensure that cooperation can be continued even in the absence of EU-level agreements on Brexit day.

4.2.1. Mutual recognition

In many areas, cooperation with the UK could fall back onto Council of Europe treaties in the field of criminal justice cooperation, including the 1957 European Convention on Extradition (ECE) and the 1959 European Convention on Mutual Assistance in Criminal Matters. But these treaties, dating back over sixty years, do not have the same level of detail or effectiveness as EU arrangements which have revolutionised the field over the past twenty years. In some cases, EU Member States, including the UK, have not signed or ratified the relevant conventions.[104] In any event, it is likely that domestic laws will have moved on significantly. Stepping back to international legal arrangements, whether bilateral or multilateral, is likely to require a significant amount of domestic legislative amendment to ensure that the EU27, whether individually or collectively, are able to continue cooperating with the UK on a clear legal basis.

Using the example of the EAW which has no provision for third countries, the EU could come to a similar separate agreement with the UK as a third country. This is not necessarily an easy or quick option. The EU concluded an agreement for surrender of persons similar to the EAW with Norway and Iceland: the agreement took thirteen years to negotiate and, more than three years after its conclusion, it has still not yet entered into force.[105] Moreover, this agreement is not as comprehensive as the EAW, as it does not allow for the surrender of own nationals. Many EU Member States are unable to extradite their own nationals outside the EU. This is not a problem for extradition from the UK, which does not have such a bar, but it may mean that some Member States will be unable to surrender criminals who are own nationals for prosecution in the UK in the future.[106] This may have cost and security implications for these Member States if they are obliged to

[103] Bock, S., 'Brexit and the Future of European Criminal Law – the German Perspective', *Criminal Law Forum,* 28:2, 2017, pp. 311-318, at p. 313.
[104] The Council of Europe Convention on the Validity of Criminal Judgments has not been ratified by more than half of EU Member States, including the UK.
[105] In 2001, the Council authorised the Presidency to open negotiations with Iceland and Norway with a view to extending to those countries the parts of the EU Extradition Convention of 27 September 1996 which were not related to the Schengen Agreement. This authority was expanded in 2002, following the adoption by the EU Member States of the Framework Decision of 13 June 2002 on the European Arrest Warrant. The signing of the Agreement was authorised by the Council Decision 2006/697/EC on 27 June 2006, but the Agreement was not concluded by the entry into force of the Lisbon Treaty. It was finally agreed in 2014 2014/835/EU: Council Decision of 27 November 2014 on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway. As at July 2017 the agreement had not entered into force in the relevant third countries at: https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/16/1606.htm#_idTextAnchor023
[106] Around 22 EU Member States will be affected by this rule, including Germany; see Bock, *Brexit and the Future of European Criminal Law – the German Perspective,* 2017, op. cit.

either prosecute themselves (where possible) or release individuals suspected of serious crimes.

In her evidence to the House of Lords Inquiry, the UK's Director of Public Prosecution highlighted the value of the EAW:

> The EAW came in because we were concerned about delays … when we looked at casework, either outside the EU or prior to the EAW, we were talking months and years rather than the days and weeks we currently have. It is much quicker and more effective. When we compare our data, it is three times faster to use an EAW and four times less expensive ….[107]

The impact on the speed and cost effectiveness of cross-border surrenders following Brexit will be felt not only by the UK but any country wishing to extradite to or from the UK.[108] Existing domestic legislation in Member States and the UK may also require amendment to rely on the ECE or bilateral treaties with the UK.[109] It may be in the interests of the EU27 to seek an agreement similar to the one put in place with Norway and Iceland. Given the time pressures, steps should be taken quickly to explore this option in tandem with Brexit negotiations. While there is no precedent for drafting an agreement with a country that will become a third country upon withdrawal from the EU, there is no legal barrier[110] in principle to this approach if both the EU and the UK have the political will to continue cooperating in this way after Brexit.

While the EAW was a flagship mutual recognition instrument, there have been many more such instruments since it began, some of which the UK has opted into. A fundamental question for the EU27 around future agreements with the UK will be whether it is in the EU's interests to continue with the status quo situation where the UK can pick and choose which elements of the criminal justice acquis it opts into or if the EU should push for 'all or nothing'. While it may be politically difficult for the UK to sign up to the full criminal justice acquis precisely at a time when it is leaving the EU to 'take back control', the way the EU deals with the UK as a third country in this field may have implications for its dealings with other third countries in the future. From the perspective of the EU, as opposed to the perspective of individual Member States, decisions on the future of the UK's relationship with the EU criminal justice acquis need to take into account broader considerations than immediate practical and political expediency.

4.2.2. Judicial cooperation bodies

While the EJN does not include the possibility of non-EU members, it does engage with other international networks.[111] It is also housed within Eurojust: from a practical perspective, therefore, UK involvement with Eurojust will be a priority.[112] The UK will

[107] House of Lords, *Corrected oral evidence: Brexit: future EU-UK security and police co-operation*, 2.11.2016, op. cit., Q65.
[108] Around 1000 requests a year to the UK from EU Member States (ibid, Q68).
[109] If the EU27 no longer have the domestic legislation needed to rely on the 1957 European Convention on Extradition, they will need to either make amendments to reinstate the ECE in their domestic law or reach bilateral agreements with the UK, either on an ad hoc or formal basis in order to be able to extradite to or from the UK in the absence of an EU-wide agreement. There does not appear to have been work done to assess the scale of this issue or to address the problem domestically in the EU27 Member States.
[110] The Treaties did not envisage this situation and therefore, while TFEU Article 218 provides for agreements negotiated with third countries and international organisations, there is no provision for existing EU Member States in the process of becoming third countries, but neither is there a prohibition on such negotiations with an agreement presumably being concluded at the point they become a third country.
[111] Eurojust, *Cooperation with third countries and judicial networks* at: https://www.ejnforum.eu/cp/network-atlas.
[112] Council of the European Union, *Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network*, OJ L 348/130, 24.12.2008.

effectively become a third country under the Eurojust Decision after Brexit.[113] Article 26a allows Eurojust to enter into 'cooperative relations' with third countries and organisations which include the sharing of personal data and the secondment of liaison officers and liaison magistrates to Eurojust.[114] Yet the sharing of personal data with a third country requires either it being subject to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (28 January 1981) or an assessment confirming that the country ensures an adequate level of data protection. As the UK is subject to that Convention,[115] there should be no obvious impediment to a cooperation agreement being made with the UK.[116]

For Eurojust to conclude a third-country cooperation agreement, it must first consult with the Joint Supervisory Body regarding the issue of data protection and then get a qualified majority approval from the Council.[117] A certain degree of cooperation (receiving information from a third country, including personal data, and sharing information with the third country, excluding personal data) is possible even prior to an agreement if it is necessary for the legitimate performance of Eurojust's tasks.[118] Eurojust is required to inform the Council of any plans for entering into such negotiations, and the Council may draw any conclusions it deems appropriate.[119] Given the high level of bilateral and multilateral cooperation through Eurojust and JITs between the UK and the EU27, such an agreement with the UK after Brexit would seem desirable for all concerned.[120] At the time of writing, Eurojust has not publicly notified the Council of any plans to enter into negotiations with the UK regarding its post-Brexit relationship. Previous agreements with third countries have taken between five to seven years to complete.[121] That is not necessarily an indication of how long it would take to reach an agreement with the UK, a former member of Eurojust. Such an agreement after Brexit could be agreed more quickly or it may take longer, depending on the politics that develop around the Brexit negotiations. As serious issues of security and the fight against terrorism and organised crime are at stake, it would seem prudent that Eurojust explore the possibility and scope of such negotiations as a matter of urgency.

4.3. Role of the UK in the development of judicial cooperation in civil matters

Judicial cooperation in civil matters predates the UK's accession to the EEC, most notably with the agreement of the 1968 Brussels Convention. Since it joined the EU, the UK has been actively involved in the development of legislation in this area. In March 2017 the House of Lords EU Justice Sub-Committee's report 'Brexit: justice for families, individuals

[113] Council of the European Union , *Council Decision 2009/426/JHA of 16 December 2008 on the Strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime*, OJ L 138/14, 4.6.2009.
[114]Article 26a can be found at: http://www.eurojust.europa.eu/about/Partners/Documents/article-26a-EJD-EN.pdf.
[115]See: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures?p_auth=xm3iO3cj. The territorial application of the Convention is extended to the Isle of Man, Jersey and Guernsey, but not to British Overseas Territories, which include Gibraltar.
[116] Currently Eurojust has cooperation agreements with 9 third countries and hosts liaison magistrates from the United States, Norway and Switzerland; see: http://www.eurojust.europa.eu/about/Partners/Pages/third-states.aspx.
[117] Eurojust Decision, Article 26a (2).
[118] Ibid. Article 26a (5), 26a (6).
[119] Ibid. Article 26a (2).
[120] See Bock, *Brexit and the Future of European Criminal Law – the German Perspective,* 2017, op. cit.
[121] On the reasons for delay in reaching an agreement with Switzerland, see Alison Saunders's testimony in House of Lords, *Corrected oral evidence: Brexit: future EU-UK security and police co-operation*, 02.11.2016, op. cit., Q 61-62.

and businesses?' acknowledged and welcomed 'the UK's influence over the content of these three EU Regulations which are crucial to judicial cooperation in civil matters and reflect the UK's influence and British legal culture', urging 'the Government to keep as close to these rules as possible when negotiating their post-Brexit application'.[122]

Judicial cooperation in civil matters has significant implications for the right to family life[123] and the rights of the child[124] as well as access to justice[125] and effective remedies.[126] Judicial cooperation in civil matters has a long history in the EU. The then-six Member States engaged themselves in the original 1957 Treaty of Rome to 'enter into negotiations with each other with a view to securing for the benefit of their nationals … the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards'.[127]

This chapter will focus on three principal regulations covering judicial cooperation in civil matters in the AFSJ that will be acutely affected by Brexit because of the significant impact the loss of these instruments will have on individuals and their cross-border arrangements post-Brexit:

- Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) – known as the Brussels I Regulation recast (BIR).
- Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility – known as the Brussels IIa Regulation[128] (BIIa)
- Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance – known as the Maintenance Regulation (MR).

These regulations are the result of negotiations and legal developments over time, reflecting the need for certainty in cross-border legal disputes in order to support the free movement of goods, services and people. BIIa is currently the subject of renegotiation.[129]

Transborder family issues are not limited to multi-national families. In a Europe with a mobile work-force, even a family with parents from the same country can face international family law issues when, for example, one parent takes up work in another country, starts a

[122] House of Lords, 'Brexit: justice for families, individuals, and businesses?', *HL Paper 134,* 20.3.2017, para. 23 at: https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/134.pdf
[123] ECHR, Article 8; CFR, Article 7.
[124] Article 24 of the EU CFR provides detailed provisions on the rights of the child:
> 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity;
> 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration;
> 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

[125] ECHR, Article 6 ; CFR, Article 47.
[126] ECHR, Article 15 ; CFR, Article 47.
[127] Treaty of Rome (1957), Article 220.
[128] Also known as Brussels II bis.
[129] According to the Commission Factsheet (30.6.2016) at: http://europa.eu/rapid/press-release_MEMO-16-2359_en.htm) on the proposal: *The main objectives of the changes are to further develop cross-border justice proceedings which requires mutual trust between EU countries' judicial systems. It will be possible by removing the remaining obstacles to the free movement of judicial decisions with more mutual recognition and to better protect the best interests of the child by simplifying the procedures and enhancing their efficiency. The new rules will bring legal certainty, reduce costs and, most importantly, limit the length of proceedings in parental child abduction cases, for the benefit of both children and their parents.*

new family in a different country, or if the family is based outside their home country but one parent wants to go home following a family breakup. For the best interests of the child, it is necessary that challenges like international parental child abduction or non-payment of child maintenance across borders are effectively addressed. Lengthy and complex court proceedings in multiple jurisdictions are not accessible for many families with limited resources. BIIa and MR offer a simplified framework for addressing these issues quickly and effectively, making a huge difference to the lives of children and their parents across the EU. Because of the very significant impact that Brexit could have on the lives and fundamental rights of people across the EU with family ties to the UK, including some of the most vulnerable children, the family law aspect of judicial cooperation in civil matters will be the main focus of this section. While fundamental rights concerns may be the engine driving closer cooperation, the UK's current position towards the CJEU and the rights and principles contained in the EU Charter may be a significant obstacle to future agreement post-Brexit.[130]

4.3.1. Civil and commercial law

The international legal services industry is very important for the UK, in particular London.[131] The House of Lords noted in its March 2017 report: '*The evidence suggests that jurisdictions in other EU Member States, and arbitrators in the UK, stand to gain from the current uncertainty over the post-Brexit application of the BIR, as may other areas of dispute resolution'*.[132]

While this may be viewed as an opportunity for EU legal services,[133] barrister Oliver Jones noted in the House of Lords Inquiry that while '*we think very much of big corporates, large commercial claims*', the BIR '*applies equally to very small claims, individual claims and small company claims … which could be for a very small amount of money'*. Anything that undermined the BIR's uniformity, Jones added, would '*impact on those people the most'*.[134] Those people and businesses will be both from the UK and the EU27.[135]

4.3.2. Family law

The UK has opted in to the BIIa and MR (except with respect to the provisions on applicable law for maintenance obligations).[136] As a sign of the fundamental UK interest in the area of international cooperation on family matters, the UK Government decided in October 2016 (after the Brexit referendum) to opt in to the renegotiation of BIIa. In his evidence to the House of Lords Inquiry, Sir Oliver Heald, Minister of State for Courts and Justice, recounted that:

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[130] See Chapter 2 above.

[131] See the report by The Law Society of England and Wales, *The economic value of the legal services sector*, March 2016, London: Law Society of England and Wales at: http://www.lawsociety.org.uk/support-services/research-trends/a-25-billion-legal-sector-supports-a-healthy-economy/. The report found that legal services contributed £25.7 billion to the UK's economy. Prof Gilles Cuniberti found that between 2007 and 2012, 11% of all international commercial contracts chose English contract law as the applicable law for the settlement of disputes; see Cuniberti, G., 'The International Market for Contracts: The Most Attractive Contract Laws', *Northwest Journal of International Law and Business* 34:3 ,2014, pp. 455-517.

[132] House of Lords, *Brexit: justice for families,* op. cit., 2017, para. 69.

[133] In his evidence to the House of Lords report 'Brexit: justice for families, individuals, and businesses?', Prof. Steve Peers said: 'There is a risk … that people in the European Union will think this is an opportunity to divert or prevent business'. See House of Lords, *Brexit: justice for families*, 2017, op. cit., para. 41.

[134] House of Lords, *Brexit: justice for families,* 2017, para. 29.

[135] See also Dutta, A., 'Brexit and international family law from a continental perspective', *Child and Family Law Quarterly* 29:3, 2017, pp. 199-211.

[136] See MR Articles 23 and 24 regarding decisions for countries not bound by the 2007 Hague Protocol. This means that English decisions will not be automatically recognised in another State if they are manifestly contrary to public policy in that State, or where a decision was given in default of appearance, or the decision is irreconcilable with an earlier decision given in another jurisdiction.

> *'When I became a Minister in this department we had to decide whether we wanted to remain part of the discussions about the revision of Brussels IIa, which is going on at the moment. I thought that we should stay in, so that when the law is transferred into UK law it is the very latest law and we are part of the Brussels I recast and Brussels IIa as well as the current arrangements, because it is a good system that helps with the arrangements for children and with matrimonial matters.*[137]

While recognising the importance of these Regulations during the House of Lords Inquiry, the Minister held back from revealing the Government's goals in negotiations with the EU. The UK Government issued a 'future partnership paper' in late August 2017, 'Providing a cross-border civil judicial cooperation framework'.[138] That paper acknowledges the importance of continued civil judicial cooperation for businesses and individuals and the need for legal certainty, but it does not offer a clear path as to how that can be ensured in the relevant timeframes.

4.4. Important areas of cooperation and challenges for future cooperation in civil matters

At the time of writing it remains unclear how the level of cooperation in civil justice between the UK and the EU could be maintained or what, exactly, will replace it. This creates a huge amount of uncertainty for individuals and businesses that may be affected, in both the short and long term. The affected parties include any individual or business with commercial or personal ties in the UK and any other EU Member State or anyone from the EU who may visit the UK who may later need to take legal proceedings involving the UK.

One of the challenges for future EU engagement is the fact that the UK is made up of fundamentally different legal systems: the jurisdictions of Scotland, Northern Ireland, and England and Wales, as well as different jurisdictions in Overseas Territories including Gibraltar and the Crown Dependencies. This is of particular importance for family law, as different UK jurisdictions operate very different laws in relation to the relocation of children following a family breakup and the division of family assets.[139]

There are indications from the UK Government that this area of law would come under the category of 'retained EU law' for the purposes of the EU (Withdrawal) Bill.[140] Yet neither family law nor civil and commercial law are the subject of substantive notes the UK Government published alongside the Withdrawal Bill. The recent 'future partnerships paper' states that the UK Government intends to incorporate the Rome I and II instruments on choice of law and applicable law in contractual and non-contractual matters into domestic

[137] House of Lords, *Corrected oral evidence : Brexit : civil justice co-operation and the CJEU, 31.12. 2017*. Select Committee on the European Union, Justice Sub-Committee, 31.1.2017, Q41 at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/Brexit-civil-justice-cooperation/oral/46539.html.

[138] Department for Exiting the European Union, *Providing a cross-border civil judicial cooperation framework – a future partnership paper,* 22.8.2017 at: https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper.

[139] For a summary of the fundamental differences in family law between Scotland and England and Wales, see: https://www.turcanconnell.com/media/blog/2015/09/scotsenglish-family-law-differences-affect-both-children-and-money/. For a detailed analysis of Scottish family law, see Carruthers, J.M. and Crawford , E.B., 'Divorcing Europe: reflections from a Scottish perspective on the implications of Brexit for cross-border divorce proceedings', *Child and Family Law Quarterly* 29:3, 2017, pp. 233-252; on Northern Ireland see: http://ec.europa.eu/civiljustice/publications/docs/family_rights/united_kingdom_northern_ireland_en.pdf; and for Gibraltar, see Simpson, C*., Family law in Gibraltar: overview* at: https://uk.practicallaw.thomsonreuters.com/1-5702325?transitionType=Default&contextData=(sc.Default)& firstPage =true&bhcp=1

[140] See: https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill_2017-20190005_en_1.htm.

law, but there is no explicit commitment on BIR, BIIa or MR.[141] Inclusion as retained EU law would mean that BIR, BIIa and MR would be reflected in UK law on exit day. This would not be enough, though, to fulfil the requirement of reciprocity needed for the regulations to function effectively across borders since the Withdrawal Bill is only domestic legislation and does not amount to an agreement with other countries.[142]

The Withdrawal Bill is also problematic in terms of continued cooperation because it explicitly repeals the application of the rights and principles contained in the EU Charter and repeals the jurisdiction of the CJEU, both of which provide guarantees of a level playing field[143] for the operation of international agreements and increase mutual trust in the EU.[144] A further problem with the Withdrawal Bill is the wide-ranging powers it gives to the executive to change retained EU law following exit day. This is controversial in terms of domestic rule of law.[145] As the Withdrawal Bill provides no guarantee of continuity in UK law, it would be difficult for the EU or its Member States to rely on any apparent commitments in the Bill. Given the fundamental difference in approach between the common law system in England and Wales and the continental legal systems, it has been noted that continental lawyers should not lightly give up the level of control provided by the CJEU.[146]

Reciprocity should not, however, be taken as the only basis for EU thinking on future judicial cooperation in civil matters with the UK. As one commentator has put it:

> *Private international law primarily deals with relations between individuals in cross-border situations. The nonrecognition of a UK divorce decision on the continent might harm not only spouses with strong connections to the UK but also spouses with a nationality of, or a habitual residence in, one of the remaining Member States… in private international law, in general, and in international family law, in particular, a 'prosecco' versus 'fish & chips' approach to the future cooperation between the EU and the UK would be flawed. However, one should not close one's eyes to the fact that reciprocal thinking will play a role in the political debate on the future cooperation in judicial matters. And from a strictly reciprocal perspective, the UK has more to lose than the remaining EU.*[147]

In this political climate, it will be important to ensure that individual rights are kept at the forefront of EU27 thinking.

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[141] Department for Exiting the European Union, *Providing a cross-border civil judicial cooperation framework,* 2017, op. cit., para. 19.

[142] Prof. Steve Peers posed a practical question in his evidence to the House of Lords Inquiry: 'What about every case that is pending on Brexit day? Do they continue under the rules of the EU regime? The same would apply to anything pending on the continent with British involvement or potential relevance for enforcement'. See House of Lords, Brexit*: justice for families,* 2017, op. cit., para. 41.

[143] In terms of the regulatory framework around areas like workers' rights and data protection as well as a common approach to judicial oversight.

[144] See EU (Withdrawal) Bill, Section 5(4), Section 6.

[145] See selection of public law analyses at: https://publiclawforeveryone.com/2017/07/18/resources-the-eu-withdrawal-bill/, including Angela Patrick's blog (http://Brexit.doughtystreet.co.uk/post/102ebeo/eu-withdrawal-bill-you-say-tomato-i-say-unprecedented-executive-power).

[146] 'The European instruments are – as we know since Lord Goff's famous dictum in Airbus Industries – rather continentally influenced, and so rather different from what a common law approach to private international law issues would entail. From a continental perspective, judicial control is, therefore, much more necessary to ensure a uniform approach is taken to the interpretation of obligations involving the UK compared, for example, to the current cooperation between the EU and Iceland, Norway and Switzerland under the Lugano system, where the decisions of the European Court of Justice do not formally bind the third state courts but to which only 'due account' must be paid. The past has impressively shown – one has only to mention Turner, Owusu and West Tankers – that considerable pressure was needed from the European Court of Justice to bring the English courts in line with the European instruments. As a continental lawyer, one should not give up that control lightly'. Dutta 'Brexit and international family law', 2017, op. cit., p. 210.

[147] Dutta, *Brexit and international family law,* 2017, op. cit., pp. 208-9.

Ultimately, for there to be continuity in relation to private international law (and potentially any redraft of BIIa), there will need to be a new legal agreement or agreements between the UK and the EU. The House of Lords Inquiry, which studied the options in relation to the BIR, BIIa, and MR, was concerned that there were no clear ways forward to secure the undoubted benefits of the regulations post-Brexit. While there has been much talk about 'transitional arrangements' in various areas, the time pressures of Article 50 and the complexity of the issues involved make it unclear whether it would be quicker to reach transitional arrangements or to establish new agreements altogether.

4.4.1. Options for the BIR

Retaining the BIR may be of greater immediate concern to the UK than to the EU27 because it will have a particularly acute impact on UK businesses and legal services. The House of Lords Inquiry affirmed, 'We are in no doubt that legal uncertainty, with its inherent costs to litigants, will follow Brexit unless there are provisions in a withdrawal or transitional agreement specifically addressing the BIR'.[148]

If the BIR ceases to apply in the UK, this will undoubtedly impede access to justice and effective remedies in cross-border legal disputes involving the UK. This will have the most acute impact on individuals and small and medium enterprises who do not have the resources to launch into complex international litigation with heightened costs or who may find themselves signing up to arbitration agreements which risk undermining open justice.[149] While there is no precedent for non-EU countries being party to the BIR, this does not mean that such a thing is impossible.

The UK 'future partnership paper' suggests that the UK will seek to continue to participate in the 2007 Lugano Convention (which forms the basis for EU cooperation with Norway, Iceland and Switzerland).[150] However, the UK is not currently a state party to the Lugano Convention, which was signed by the EU.[151] Therefore, for the post-Brexit UK to participate in the Lugano Convention, it will need to seek the prior authorisation of the EU and the other participating States; any one of the convention parties could veto the request.[152] Given the time pressures and the potential implications for citizens' rights and the need for legal certainty for businesses, discussions around potential accession of the UK to the Lugano Convention should be started as soon as possible.

This issue, which has already started to affect businesses concerned about future uncertainty, should be addressed as a matter of urgency as part of the negotiations on the Withdrawal Agreement and as part of the agreement for future relations between the EU and the UK. However, the UK's red line on CJEU jurisdiction and its stance on the rights and principles in the EU Charter may make it difficult to negotiate agreements that would stand up to CJEU scrutiny.

[148] House of Lords, *Brexit: justice for families,* 2017, op. cit., para. 61.
[149] Ibid.
[150] Department for Exiting the European Union, *Providing a cross-border civil judicial cooperation framework,* 2017, op. cit., para. 22.
[151] Cf. Council of the European Union, *Council Decision of 27 November 2008 concerning the conclusion of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.* OJ L 147/1, 10.6.2009.
[152] Cf. Lugano Convention, Articles 70(1) (c), 73(3).

4.4.2. Options for BIIa and MR

The BIIa and the MR have added to and replaced existing frameworks for international family law, such as the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children and the 1980 Hague Convention on the Civil Aspects of International Child Abduction. As The Hague Conventions still operate for non-EU countries, they could provide some degree of a fallback position.[153] Some commentators have indicated that a return to The Hague Conventions would not be a significant problem for the EU27.[154] But these conventions do not cover all aspects of law covered by the BIIa and the MR, like matrimonial law: both the BIIa and MR have been developed to facilitate judicial cooperation in this sensitive area, thus greatly improving on the Hague frameworks.

The European Union asserts that it has exclusive external competence in the field of international family law.[155] This means that a Member State cannot engage with a third country bilaterally or through The Hague Conventions in this field unless it has secured unanimous agreement and a Council Decision to that effect.[156] Clarification is needed as to how this will affect the ability of Member States to engage through the Hague Conventions with the UK as a third country.[157] In relation to the 2007 The Hague Maintenance Convention, the UK will have to exercise its external competence while still bound by the Convention as a Member State even though, under EU law, the EU still has exclusive external competence.[158] To ensure that it remains in force for the UK without any break would be best done with an agreement of the EU recognising the unique situation around Brexit.

It appears that both regulations will be included under the category of retained EU law in the Withdrawal Bill. But this does not resolve the fundamental issue of reciprocity in cross-border disputes or the problem of legal certainty in the future (given the broad powers in the Bill for the UK Government to change retained law with minimal scrutiny after Brexit). The situation is even more legally complicated by the fact that the BIIa is currently being renegotiated, with the UK involved in the negotiations but without having committed itself to the final results of the negotiations. The BIIa regime's interaction with The Hague Conventions is an area that will require further in-depth legal analysis in the negotiations on withdrawal and future arrangements with the UK.

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[153] Denmark has also not signed up to the BIIa.

[154] '*This "downgrading" of UK decisions in child matters from the Brussels II bis to The Hague Convention system will have no particularly far-reaching consequences. The Brussels II bis Regulation – including its provisions on recognition and enforcement – mainly followed the solutions of the 1996 Hague Convention. However, the instruments do differ in detail. In particular, under Article 26 of The Hague Convention, certain access and return orders from the UK will no longer be enforced on the continent without exequatur, that is, without a declaration of enforceability by the local authorities, unlike under Article 40 and ff. Brussels II bis'*. Dutta (2017), Brexit and international family law, op. cit., 202.

[155] See Court of Justice of the European Union *Opinion 1/13 of the Court (Grand Chamber) 14.1.2014 (Opinion pursuant to Article 213(11) TFEU – Convention on the civil aspects of international child abduction – Accession of third states – Regulation (EC) No 2201/2003 – Exclusive external competence of the European Union – Risk of undermining the uniform and consistent application of EU rules and the proper functioning of the system which they establish)*, ECLI: EU:C, pp. 2014:2303.

[156] Dutta, *Brexit and international family law,* op. cit., p. 208.

[157] 'As this Opinion concerned the issue of competence to conclude an international agreement, the Court consistently first refers to Article 216(1) TFEU as well as to the relevant provision of the internal policy concerned (here: Article 81(3) TFEU regarding the area of family law with cross-border implications) to establish that the Union has competence in the area that forms the subject matter of the 1980 Hague Convention, before entering, in a second step, into the analysis as to whether or not that competence of the Union is exclusive, referring for that purpose to Article 3(2) TFEU and earlier case law'. Elbacher, F., 'Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty', *CLEER Papers*, 02.2017. The Hague: Centre for the Law of EU External Relations, 2017, p.10 at: http://www.asser.nl/media/3485/cleer17-2_web.pdf.

[158] See Beaumont, P., 'Private international law concerning children in the UK after Brexit: comparing Hague Treaty law with EU Regulations', *Child and Family Law Quarterly* 29:3 , 2017, p.p 213-232 at p. 214.

In the interests of legal certainty, the EU27 will need to be clear on how they will deal with UK decisions issued before Brexit date. This is particularly important for divorce decisions, which continue to have legal effect for many years after they are issued. One way of addressing this is to continue to apply BIIa for those decisions. But unless a provision to that effect is included in the Withdrawal Agreement, this is likely to be a matter for national law, which may lead to patchy application across the EU.[159] Including provisions on the future recognition of pre-Brexit UK decisions in family law in the Withdrawal Agreement would help to ensure a smoother transition in this area by providing a unified legal basis in EU law.

If the BIIa and the MR cease to apply to the UK and there is no replacement, the implications for the fundamental rights of children but also vulnerable people in family breakdown situations will be very significant. The problem will be exacerbated when there is an economic power imbalance between partners or when economic coercion is used as a tool for domestic abuse. This will affect people in the EU and the UK. There is, therefore, clearly a strong interest for the EU to retain in the future some form of enhanced cooperation with the UK in relation to the matters covered by BIIa and MR; it appears that this is a mutual interest for the UK, as it has decided to opt in to the renegotiation of BIIa.
It is impossible to estimate the number of people in the EU or EU nationals in the UK who will be affected, immediately or in the future, by the disapplication of BIIa and MR in the UK in the absence of an alternative agreement on Brexit. It is clear that vulnerable people, including children, will be most acutely affected by the changes. The impact on them could be life-changing. The EU has a strong interest in trying to reach an agreement as early as possible in the negotiations on withdrawal from the EU in order to ensure clarity and certainty in cross-border family law disputes. This part of the negotiations should focus on individual rights rather than the broader political considerations around reciprocity.

As with the BIR, it is not clear whether separate transitional arrangements would be any easier to negotiate than a new agreement, but provisions relating to international family law should be included in the Withdrawal Agreement and in any agreement on future relations negotiated with the UK. These provisions do not appear to have been discussed at all in the negotiations so far and do not feature in either the EU or UK negotiating positions on citizens' rights.[160] As with other areas of cooperation, the UK's red line on CJEU jurisdiction may make it difficult to reach an agreement that will survive CJEU scrutiny and thus guarantee legal certainty in the future. How this will be managed will depend on what alternatives can be found around the broader question of the role of the CJEU or other models of judicial oversight after Brexit.[161]

The House of Lords Inquiry found that, for the UK, '[t]o walk away from these Regulations without putting alternatives in place would seriously undermine the family law rights of UK citizens and would, ultimately, be an act of self-harm'.[162] The same could be said for the EU, as EU citizens and residents with links to the UK would be equally affected. There is, therefore, a reciprocal interest in prioritising the issue of international cooperation in family law so as to ensure continuity and to make sure that the EU, at least, puts individual rights ahead of political strategy. How that is done, however, is debatable. It has been suggested that future cooperation with the UK should be on the basis that the UK abandons 'cherry

[159] See Dutta, *Brexit and international family law, 2017*, op. cit., p. 204. See also the 12 July 2017 European Commission Position Paper on Judicial Cooperation in Civil and Commercial Matters at: https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-civil-commercial-matters_en_0.pdf.
[160] See Joint Technical Note, *Comparison of EU/UK positions on citizens' rights*, 2017, op. cit.
[161] This issue requires separate detailed consideration which goes beyond the remit of this study.

picking' and takes on board the entire international family law acquis.[163] But the political uncertainty in the UK around Brexit makes it uncertain that such a negotiating position would have a realistic chance of success. What is clear, however, is that on issues like this which will have a serious impact on individuals, the EU should be drawing up clear proposals as a matter of urgency, regardless of the level of reciprocity in the negotiations with the UK.

4.5. Conclusions and recommendations

EU judicial cooperation instruments in both the criminal and civil spheres reflect the high level of mutual trust across the EU. The role of the CJEU is crucial in ensuring that comparable and enforceable standards are in place across the Union, so a pre-requisite to the establishment of any future relationships between the UK and the EU in this area is an agreement between the UK and the EU on CJEU jurisdiction. The UK's current stance on both the CJEU and the rights and principles contained in the EU Charter may make it difficult to continue the current high level of cooperation after withdrawal. To ensure legal certainty and the protection of fundamental rights around the withdrawal itself, the Withdrawal Agreement should clearly set out transitional arrangements relating to proceedings that have already started or events that have occurred prior to withdrawal.

The importance of continued judicial cooperation in criminal matters for security and bringing suspects to justice and in civil matters for families, including vulnerable children, as well as travelers, consumers and businesses, should not be underestimated. Some regional and international law mechanisms, like the ECE and The Hague Conventions on International Family Law, cover these areas, but so that they can be applied seamlessly, legislation implementing these international arrangements may need to be amended in EU Member States to reflect the new relationship with the UK.

There are some existing agreements with third countries that may serve as a model, such as the agreements on surrender to Norway and Iceland, third-country agreements with Eurojust, and the Lugano Convention, but negotiations with third countries in these areas have been time-consuming. The current time frame, with limited progress on Article 50 negotiations and less than 18 months remaining before the UK leaves the EU, makes it unrealistic to believe that such agreements could be concluded and put into force in time to ensure a smooth transition. Without an agreement over continued jurisdiction of the CJEU over any transitional period, transitional arrangements beyond those addressing ongoing proceedings are unlikely to be any simpler to conclude.

Given the importance of these issues, the potential impact on individual rights, and the extreme time pressures in areas where it is clear that there would be a mutual benefit in continued cooperation, the relevant EU institutions should start to engage the UK to discuss future agreements (to the extent possible given the current progress of negotiations).

[162] House of Lords, *Brexit: justice for families,* 2017, op. cit., para. 93.
[163] Dutta, *Brexit and international family law,* 2017, op. cit., p. 210.

5. POLICE COOPERATION

KEY FINDINGS

- Police cooperation in the EU is part of a wider global system that needs to be taken into account in Brexit negotiations.
- Future cooperation of some sort is needed to ensure continued security and combating cross-border crime, but negotiations should reflect the need to protect the integrity of the EU system.
- Police cooperation raises fundamental questions over the relationship between sovereignty and security.
- The UK's departure from the EU offers an opportunity for a new drive towards strengthened EU cooperation in this area.

A major challenge of Brexit for police and security cooperation is the multiplicity of jurisdictions and authorities involved. In the UK, policing is regulated differently in England and Wales, Scotland, and Northern Ireland. UK policing also involves central services such as the National Crime Agency (established in 2013), specialist bodies with policing competencies including state security services (MI5, MI6) and sectoral services (e.g. British Transport Police), as well as a variety of regulatory and municipal authorities and bodies.[164] This situation is mirrored both at the EU level and among EU Member States.[165] Multiple and sometimes conflicting strategic and political interests are in play, making it very difficult to assess precisely the benefits of particular negotiating positions to one party or the other. Further complexity is added by the current uncertain state of UK politics, particularly bearing in mind the constitutional issues around the devolved nations with their own security, criminal justice and political agendas, as well as the thorny question of the Irish border, all of which makes it very difficult to predict the outcome of negotiations in this area.

From the perspective of law-enforcement practitioners, fast and effective cross-border cooperation is critical to policing performance. EU measures in this area have made police cooperation and access to information less slow and cumbersome than the old-fashioned types of cooperation that UK politicians often laud. Arguments over police operational effectiveness will be crucial in shaping the future relationship between the EU and the UK. The caricature of the EU as an inefficient bureaucracy or a shadowy federal power, as portrayed in some circles, should be avoided.

Police cooperation needs to be understood in its broader context, incorporating activities carried out by both intelligence agencies and specialised police units with intelligence functions: this creates a level of interdependence between intelligence agencies and police

[164] See e.g. Crawford, A, 'Plural policing in the UK: policing beyond the police', Handbook *of Policing*, edited by T. Newburn, 147-181. London: Routledge (Second Edition), 2008.
[165] For recent comparative work, see inter alia: Devroe, E., Tepstra, J., 'Plural Policing in Western Europe: a comparison', *European Journal on Policing Studies* 3.2, April 2015, pp. 235-245; O'Neill, M., Fyfe, N.R., 'Plural Policing in Europe: relationships and governance in contemporary security systems', *Policing and Society* 27.1, 2017, pp. 1-5 (introduction to special issue on theme).

forces that goes beyond strict EU competence. The UK has been one of the drivers of a model of policing that makes exceptional measures routine (particularly in the context of counter-terrorism) while resisting judicial oversight, which is seen as an impediment to effective policing and national security.[166] Proponents of the UK model have tended to criticise EU-rules-based policing models when they have been unsuccessful in influencing the evolution of EU police cooperation. Many law enforcement officials in the EU27 who support this vision of a pragmatic, results-based policing are likely to support a continued strong relationship with the UK despite Brexit. Other practitioners will be pleased to be rid of the UK's political reluctance to support any kind of integrated European approach to policing which could lead to a form of supranational decision-making power in the field. For many in the EU27 who want to develop more effective and integrated EU policing initiatives, the blockage the UK has thrown up to such initiatives is a major problem that Brexit can solve.

In this area, therefore, Brexit is double-edged, and the EU will need to decide whether continued close cooperation with the UK at any cost, even at the risk of further watering down the coherence of the AFSJ, is key to the security of EU citizens or whether the departure of the UK will pave the way for projects that may construct a coherent, centralised, efficient system of policing that can act as a platform of integration of information for the different EU-Schengen national member states.

5.1. UK involvement in police cooperation

From the EU perspective, accepting the UK's cherry-picking position on EU policies and legal standards may create significant problems in reaching further agreements on police cooperation that meet the EU's imperatives in terms of free movement of persons, data protection, and control over ex-third pillar measures. The UK's refusal to domesticate the rights and principles in the EU Charter or to submit to the CJEU may lead to others asking for similar concessions, which would create a threat to legal certainty and order in European law. The EU, therefore, needs to make sure that future police cooperation supports operational continuity in police responses to transnational threats while remaining coordinated and compatible with EU data-protection laws and under CJEU oversight. This is likely to be a significant stumbling block in negotiations, with the sovereignty question overshadowing the question of police cooperation in practice.

From the UK perspective, police cooperation with the EU is not its only focus. The UK is already negotiating actively in other arenas (the transatlantic context, Five Eyes and Interpol). There is no indication that the EU is doing the same at this stage and thus it is failing to recognise the wider international web of policing at stake. At the moment, UK membership in EU security arrangements is a gateway for Five Eyes counterparts. It is uncertain how this will develop after Brexit, with some analysts considering that the UK's strength lies in its intermediary role rather than its own capabilities.

Once the central goal of negotiations is identified, the second step is to understand in detail the scope of the negotiations as well as the external factors in play (which may well prove to be more crucial than the negotiations themselves). Some networks are not EU mechanisms as such, even if the EU or its most powerful Member States may be key

[166] The debate around investigatory powers and bulk surveillance in the UK has been followed across Europe. The UK Investigatory Powers Act 2016 is particularly contentious because of the bulk surveillance powers it introduces. See e.g. Anderson, D, Q.C *Report of the Bulk Powers Review – Independent Reviewer of Terrorism Legislation*. London: The Stationery Office, 2016, Cm 9326, at: https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2016/08/Bulk-Powers-Review-final-report.pdf (accessed November 2017).

participants. It is crucial to understand that the negotiation process goes beyond EU institutions and the UK by affecting relations with many other actors, including US intelligence agencies (NSA, CIA, FBI) and international institutions (United Nations Office on Drugs and Crime [UNODC], Interpol).

5.1.1. Information exchange

At least six types of information exchange in police matters (intelligence and border) can be distinguished. Depending on how each fits within EU frameworks, there are different implications after Brexit. The first type of exchange concerns strictly informal collaboration through direct communication, meetings and the presence of bilateral liaison officers not integrated within the EU Liaison Officers' networks.[167] This type of exchange will continue regardless of formal agreements, and a 'hard Brexit' may revive these old practices. The second type of information exchange involves international electronic surveillance and geostrategic concerns.[168] This is based on networks and instruments beyond the EU, known as Five Eyes+, and will not be directly dealt with in EU-UK negotiations. The third type, which is not strictly within EU competence, involves the external secret services of Member States exchanging information on targeted intelligence around specific groups.[169] The fourth type is a network of information exchange about individual terrorism suspects and potential links between them. This operates through different national coordination centres on terrorism, some of whom collaborate regularly with Europol.[170] Different agencies, including Europol, Eurojust and Frontex, are involved; the information exchange happens not only through police agencies but also other agencies working at borders (border guards, customs and military police). Following the UK departure, including the departure of UK officials, the remaining Member States may try to reinforce the integration of a level of decision making between EU agencies and possibly with some influential third parties. The fifth type of cooperation in terms of data exchange deals with specialised agencies working closely with banks and other private companies to trace illicit financial flows.[171]

While the UK has been a leader in this field in many ways, it has been generally resistant to the involvement of prosecutors and magistrates and particularly opposed to the creation of a European prosecutor. This reflects a fundamental difference between common law and civil law approaches to criminal procedures and evidence gathering. The sixth type of cooperation involves the links between the intelligence capabilities of border guards and policing matters.

5.1.2. Counterterrorism and security

In terms of public statements, future cooperation on counter-terrorism seems to be relatively safe in the negotiations since both sides recognise its fundamental importance. Continued collective efforts to tackle terrorism feature as a goal in the UK Government's exit strategy.[172] But since counter-terrorism cooperation raises questions in highly disputed areas like global strategy (linked to foreign affairs and defence) as well as privacy, the

[167] Aldrich, R.J, 'International intelligence cooperation in practice', in *International intelligence cooperation and accountability*, eds. Born, H. Leigh,I. and Wills,A. New York: Routledge, 2010, pp. 18-41.
[168] See United Nations Office on Drugs and Crime, *Current practices in electronic surveillance in the investigation of serious and organized crime*. New York: United Nations Publications, 2009.
[169] Anonymous interviews; see also Den Boer, M., Hillebrand, C. and Nölke, A. 'Legitimacy under Pressure: The European Web of Counter-Terrorism networks', *Journal of Common Market Studies* 46:1, 2008, pp. 101-124.
[170] For instance, see: www.mi5.gov.uk/joint-terrorism-analysis-centre and www.europol.europa.eu/about-europol/european-counter-terrorism-centre-ectc#fndtn-tabs-0-bottom-1.
[171] On Financial Intelligence Units, see: www.europol.europa.eu/about-europol/financial-intelligence-units-fiu-net and https://egmontgroup.org/en/content/financial-intelligence-units-fius.
[172] Department for Exiting the European Union, *The United Kingdom's exit from and new partnership with the European Union White Paper*, 02.2.2017 at: https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper.

details may be thorny to iron out. The UK and US have often taken different approaches on these issues than other major EU Member States. The agencies involved take very different approaches in terms of information exchange and the channels used, with many avoiding Europeanisation because of the legal constraints of formal mutual legal assistance.[173]

The so-called Five Eyes+ network is critically important for signal and internet intelligence.[174] The US will play a pivotal role when it decides how important the 'special relationship' with the UK and, in particular, GCHQ, is to its security once the UK ceases to give the US access to EU networks. In this 'market of circulation of sensitive information', some EU governments could look upon Brexit as an opportunity to replace the UK from the traditional role of 'broker' that it has monopolized. The USA will need to decide whether it shifts allegiances to EU institutions or one or two key member states (e.g., Germany, France or Sweden). Despite the continuous efforts of the Counter-Terrorism Coordinator, Gilles de Kerchove, and the recent creation of a European Centre on Counter-Terrorism (ECTC) inside Europol, this type of exchange at the strategic level is not within the scope of EU policy.[175] Galileo and a reinforcement of strategic military capacities at EU level may change the state of play.[176] As of now, the primary role EU institutions have played in this area has been through challenges to the CJEU and checks imposed by the European Parliament because of the risks to privacy posed by large-scale surveillance.[177]

In relation to targeted surveillance, the EU institutions have some influence due to the need to respect democratic principles and the rule of law, but TEU provisions clearly state that national security activities are the sole responsibility of member states.[178] Information exchange between military intelligence services is not directly within EU competence, and many of the key actors are external. For good reason, and despite active encouragement from the US, NATO, and, paradoxically, some UK officials, the EU has never tried to engage in a US-style reorganisation of Homeland Security. But after each terrorist attack, the suggestion that it could have been prevented with a more fused approach returns, an argument often accompanied by the idea that judicial control ties the hands of counter-terrorism agencies.

While the Situation Centre (Sitcen), and later on the Intelligence and Situation Centre (Intcen) have certainly permitted small EU27 Member States to have a say in some circumstances, most EU Member States with strong intelligence capabilities, such as France, Germany, Sweden, and the UK, have tried to keep their relations outside an EU legal framework that could be a serious constraint or lead to the condemnation of state

[173] This has particularly been the case for exchanges of information in police and intelligence matters. See inter alia: Brown, I., 'The feasibility of transatlantic privacy-protective standards for surveillance', *International Journal of Law and Information Technology* 23.1, March 2015, pp. 23-40; Cole, D.D., Fabbrini, F., Schulhofer, S. eds. *Surveillance, privacy and transatlantic relations*. Oxford: Hart Publishing, 2017.

[174] 'The long-standing Five Eyes partner agencies of the US NSA are the UK GCHQ, Canadian Communications Security Establishment, Australian Digital Signals Directorate and New Zealand Government Communications Security Bureau. In addition, Snowden has revealed networks of bilateral and multilateral digital intelligence relationships with countries such as the "SIGINT Seniors": the Five Eyes plus France, Germany, Sweden, Italy, Spain, Belgium, the Netherlands, Norway and Denmark, and others in Africa, South America and Asia, involving shared access to global communications and exchanges of technical information and techniques'. Omand, D. 'Understanding Digital Intelligence and the Norms that Might Govern *It', Global Commission on Internet Governance Paper Series*, no. 8. Waterloo, Canada and London: CIGI and Chatham House. At p. 5, note. 24, 2015.

[175] See Europol, *European Counter Terrorism Centre – ECTC* at: https://www.europol.europa.eu/about-europol/european-counter-terrorism-centre-ectc.

[176] See European Space Agency, *What is Galileo?* at: http://www.esa.int/Our_Activities/Navigation/Galileo/What_is_Galileo.

[177] For further detail, see Chapter 6 of this study on data protection.

[178] TEU, Article 4(2).

activity.[179] Framing security as a transversal subject far beyond policing has been a key initiative. The questions around the legality of these agreements, not formally EU instruments but including major EU Member States, along with the possibility of oversight by organs of Member States or courts, including European courts, will certainly come back as a central issue in the post-Brexit world. This is especially true if the UK stands alone (or alongside the US) in refusing supervisory mechanisms from EU institutions regarding the necessity and proportionality of the measures taken in these information exchanges. Even when national security is at stake, EU institutions have played a key role in this area whenever privacy and human rights have been concerned by insisting on the application of the rule of law.[180]

5.1.3. Operational and institutional cooperation

The real transformation of information exchange in police matters has been the development of agencies like Europol, Eurojust, EU-Lisa, and Frontex, as well as a change of attitude concerning information exchange about individuals suspected of terrorism, serious or organised crime or even immigration irregularities. The different EU agencies and their mutual relations have created a specific web of information exchange. After much debate, the importance of the principle of privacy has been recognised, if not put completely into practice. Despite national differences of opinion in this area, EU agencies have developed different characteristics to national policing. Care needs to be taken that the Brexit negotiations do not start a period of deconstruction in this field of EU internal security.

Over a period of more than thirty years, the EU has built an interconnected network on policing matters concerning suspects of terrorism (often identified), suspects of financing of terrorism and organised crime, suspects of radicalization, suspects of organised crime, and suspects of illegal crossing and overstay. There has been no 'fusion' as such. But EU-Lisa, by monopolising the question of technical interoperability, and Europol have become the key nodes of this EU network.

The creation of Europol in the 1990s changed this part of the 'game' profoundly. Europol has strengthened the autonomy of the EU beyond the role of some EU Member States and has become a central place for contacts used by other police forces in the world. The different intelligence and police services of the US have changed their position of indifference towards Europol to one of attempting to acquire 'influence'. Most of the strong third parties now insist on being partners of Europol, be it on cross-border crime, organised crime (via meetings around SOCTA) or terrorism. Frontex has also succeeded in becoming a node for border control and, in relation with EU-LISA, surveillance of travellers and future PNRs.

It is beyond the scope of this study to explain Europol's major successes, such as integrating previous police officials who were in the TREVI and Pompidou clubs, opening police analysis to non-police officials, formalising more explicitly the channels of communication, providing (as 'agencification' was reinforced) specific personnel of analysts (more than one hundred in 2016, in addition to Europol Liaison Officers), pushing the

[179] IntCen (until 2012 the term used was 'SitCen') is the intelligence capability of the EU that provides intelligence analysis on security threats to EU decision-makers on the basis of material provided by internal and external intelligence services of EU Member States. For more details, see *Factsheet on EU Intelligence Analyses Center (INTCEN)* at: http://eu-un.europa.eu/factsheet-on-eu-intelligence-analyses-center-intcen/.

[180] See, in particular, reports on CIA activities and the complicity of some EU services in extraordinary renditions and CJEU judgments on data protection.

agencies of Member States to use harmonised incident data collection practices, sharing the same approach for threat evaluation, multiplying research groups developing strategic analysis, supporting law enforcement operations, and building centres on counter-terrorism and cyber-crime within the agency. But it is very clear that the EU and it Member States have an absolutely major asset in Europol, which now coordinates actions in more than 40,000 investigations per year and is building the Europol Information System (EIS), which gathers information on terrorism and serious and organised crime and correlates data in a better way than national services themselves.

Europol has also been a major player (in liaison with Eurojust) in organising a strong framework regarding EU criminal law. It is trying to integrate the network of specialised finance organizations working on the financing of organised crime and terrorism. Europol provides an additional conduit of cooperation for police forces across Europe. Because of its excellence, Europol is the EU's preferred agency for law enforcement cooperation. It operates under a solid legislative framework which has been renewed over the years, thereby making Europol one of the most integrated security tools the EU has ever achieved.[181] The success of the Europeanisation in this type of policing is at the heart of the Brexit negotiations, illustrating the disjuncture between police collaboration and arguments of 'national' sovereignty in policing. UK practitioners have been proud to participate in Europol; after each general opt-out, they have fought for specific re-opt-ins along their main interests.

Following the block opt out from pre-Lisbon criminal and policing measures, in December 2014 the British government re-joined Council Decision 2009/371/JHA (6 April 2009) which reformed Europol as an EU agency. In December 2016, the UK opted back in to the Europol Regulation.[182] The UK will thus remain a full member of Europol until the UK leaves the EU. The Europol Regulation replaces and repeals several relating Council Decisions.[183] The UK has the largest liaison bureau for a Member State at Europol; its bureau is a multi-agency structure of seventeen personnel representing a range of different disciplines (ranging from serious organised crime to customs, immigration and counter-terrorism).[184] At home, Britain's Europol National Unit (ENU) is the designated point of contact for information exchange between Europol and the forty-three national police forces. The British liaison bureau at Europol and the ENU are electronically connected through SIENA (Secure Information Exchange Network Application). SIENA is a platform of communication exchange between liaison bureaus, ENUs, Europol's analysts and experts, and third parties with whom Europol has cooperation agreements.[185] The UK is also the second largest

[181] Following Council Decision 2009/371/JHA, Europol became an EU agency. The decision replaces the Europol Convention of 1995 (including the three amending protocols) on which the agency was originally established. On 1 May 2017, this decision was replaced by the Europol Regulation 2016/794. This regulation steps up the role of Europol as a hub for information exchange between law enforcement authorities.

[182] European Commission , *Commission Decision 2017/388 of 6 March 2017 confirming the participation of the United Kingdom of Great Britain and Northern Ireland in Regulation (EU) 2016/794 of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation*, OJ L 59/39, 7.3.2017.

[183] Council of the European Union, *Council Decision of 6 April 2009 establishing the European Police Office (Europol)*, OJ L 121/37, 15.5.2009; Council of the European Union, *Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information*, OJ L 325/6, 11.12.2009; Council of the European Union, *Council Decision 2009/935/JHA of 30 November 2009 determining the list of third States and organisations with which Europol shall conclude agreements*, OJ L 325/12, 11.12.2009; Council of the European Union, *Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files*, OJ L 325.14, 11.12.2009; and Council of the European Union, *Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information*, OJ L 332/17, 17.12.2009.

[184] House of Lords, 'Brexit: future UK-EU security and police cooperation', *HL Paper 77*, 16.12.2016, pp. 15-21 at: https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/77.pdf.

[185]Europol, *Secure information exchange network application (SIENA),* at: https://www.europol.europa.eu/activities-services/services-support/information-exchange/secure-information-exchange-network-application-siena.

contributor to EIS, Europol's central criminal information and intelligence database.[186] The UK currently participates in all of Europol's EMPACT projects (13 in total), leading or co-leading almost half of them.[187] Through its National Crime Agency (NCA), the UK has exported its intelligence-led policing (ILP) model, with Europol's Serious Organised Crime Threat Assessment (SOCTA) reflecting many of ILP's principles. In parallel, the UK took a lead role in setting up the EU Policy Cycle on International Serious and Organised Crime, which is also based on the ILP model.[188] Lastly, Britain is ranked fourth in terms of human input to Europol's workforce, with sixty-seven staff in total (seventeen liaison officers and fifty staff members on EU contracts).[189] Despite Europol being subject to political criticisms in the UK for many years, the UK clearly understands the value of Europol in practice.

5.2. Challenges for future engagement

From the perspective of British law enforcement officials, the UK has a clear interest in maintaining cooperation with the EU on policing matters. Europol membership is listed as a top priority by the NCA, a position that has remained unchanged since 2012 when Europol was part of the JHA measures targeted by the British opt-out. At that time, Europol was categorised a 'vital' measure to UK policing.[190] But, as in other areas, the UK position is contradictory. On the one hand, it wants a lead role at Europol ('Britain will demand a leading role in Europol after Brexit', *The Telegraph* headlines); on the other hand, Home Secretary Amber Rudd has already warned that the UK might take away its information if no agreement with Europol is reached.[191] On the day the UK leaves the EU, it will become a third country in regard to Europol. UK withdrawal means that the UK might lose its rights at Europol, i.e., access to EIS, a seat on Europol's strategic body (Management Board), and posting of liaison officers. This could have a detrimental effect on the ability to cooperate effectively by other member states and, by extension, Europol.

Rationally, in view of the mandate of protecting EU citizens and delivering security, retaining access to information and sustaining information exchange are the immediate objectives of EU police cooperation. Helping the UK to continue participating at a high level seems also to increase the EU's security.

The feasibility of achieving this objective on the day the UK leaves the EU nevertheless depends on whether a future agreement will provide continuity to information exchange or will be based on ad-hoc and asymmetric exchanges giving the UK the power to decide case by case while asking more and more from the EU in terms of relaxing judicial controls in the name of operational effectiveness. A post-Brexit agreement can be achieved if both parties (UK and EU) agree on provisions that offer the same level of coherence and legal certainty as existing arrangements.[192] In addition, this depends upon the UK granting data protection arrangements meeting EU standards.

[186] House of Lords, *Brexit: future UK-EU security and police cooperation*, 2016, op. cit., Q11-18.
[187] Department for Exiting the European Union, *The United Kingdom's exit from and new partnership with the European Union White Paper,* 2017, op. cit., p. 61. An EMPACT (European multidisciplinary platform against criminal threats) provides a multi-annual strategic plan to tackle a priority crime area.
[188] House of Lords, *Brexit: future UK-EU security and police cooperation,* 2016, op. cit., Q11-18.
[189] Ibid.
[190] *House of Lords, EU police and criminal justice measures: the UK's 2014 opt-out decision, HL Paper 159,* 23.4.2013, p. 10 at: http://www.parliament.uk/documents/the-uks-2014-opt-out-decision1.pdf.
[191] 'Britain will demand a leading role in Europol after Brexit', *The Telegraph*, 29.12.2016 and 'UK "likely" to stop sharing intelligence with EU through Europol, says Amber Rudd', *The Independent*, 29.03.2017.
[192] Legal certainty is a set goal in the European Commission's draft negotiating directives. See 'Recommendation for a Council decision authorizing the Commission to open negotiations on an agreement with the United Kingdom

5.2.1. The UK's vision of its future in police cooperation

The following statement by Brandon Lewis, Minister of State for Policing and the Fire Service, to the House of Lords gives a sense of the UK's vision of its future as a 'global actor' which strategically positions itself to maintain ties with the EU while continuing to work with international partners:

> *'We are also looking at that more widely because we want to be a good partner to our colleagues across Europe. In the same way, we want to be a good partner with other countries—we have security and law enforcement issues that we share with countries around the world. We want to ensure that we have strong relationships with them in the same way as we want to continue having strong relations with our European colleagues. … we are leaving the European Union but we are not leaving our position as a partner to countries across Europe'.*[193]

The UK Government starts from the assumption that since the UK has been an EU Member State, it stands in a position different from other countries which have not been EU members. On this basis it advocates a special status reflecting its EU trajectory, its contribution to the EU in terms of expertise and knowledge, and its international links. The UK's exit strategy reflects this perspective: 'Our pre-existing security relationship with the EU and its Member States means that we are uniquely placed to develop and sustain a mutually beneficial model of cooperation in this area from outside the Union'.[194] Whether it is the British Government or UK law enforcement (through the NCA), it is clear that the UK insists on its 'unique position' as well as a 'new relationship' with the EU, which suggests that the UK seeks to continue dealing with the EU on the basis of a new and unique settlement.[195] The NCA suggested that the UK 'should not look at precedent' and 'should be aiming for access and a partnership that is different from and closer than currently exists for any other non-member state'.[196] The NCA continues: 'One of the issues of concern for our "Five Eyes" partners, for instance, is that the lack of the UK at Europol will impact on their relationships too, because sometimes they can use us as a proxy for getting work done if we are doing joint work together'.[197] The weight of transatlantic relations and the value they hold in the eyes of the UK may, however, lead to a strengthening of transatlantic security schemes at the expense of EU27 cooperation. But it is difficult to assess how far the UK's assessment of its own value within Europol in terms of brokering international relationships will hold true after Brexit.

5.2.2. Challenges for the integrity of internal EU police cooperation

One possibility for continued cooperation through Europol is a bilateral EU-UK agreement.[198] Europol is able to sign agreements with third countries, and a number of such agreements have been concluded. This has the potential of keeping the UK in the EU

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of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union', COM(2017) 218 final, 3.5.2017.

[193] House of Lords, Brexit*: future UK-EU security and police cooperation,* 2016, op. cit., Q26-37.

[194] Department for Exiting the European Union, *The United Kingdom's exit from and new partnership with the European Union White Paper,* 2017 op. cit., p. 69.

[195] House of Lords, *Brexit: future UK-EU security and police cooperation,* 2017, op. cit., Q26-37.

[196] Ibid. Q11-18.

[197] Ibid.

[198] Chapter V of the Europol Regulation (2016/794) provides that Europol can establish cooperative relations with the authorities of a third country. Arrangements vary depending on whether they imply the exchange of non-personal data or personal data. As far as non-personal data is concerned, Europol 'may directly exchange all information' with authorities of third countries [Article 23 (2)]. The exchange of personal data operates on the basis of either a decision of the Commission adopted in accordance with Article 36 of Directive (EU) 2016/680, finding that the third country ensures an adequate level of protection, or an international agreement concluded between the European Union and a third country pursuant to TFEU Article 218 adducing adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals (article 25 (1)).

arena and ensuring, to some extent, legal coherence among the different players.[199] There are two types of cooperation agreements Europol can enter into with third countries: strategic agreements and operational agreements. In either case, while third countries can deploy liaison officers, they do not have access to the EIS database or a seat on the Management Board.[200] The major difference between the two types of agreements is that a strategic agreement does not allow for the exchange of personal data. Both types of agreements, though, need to comply with the EU Charter and may be challenged in the CJEU.[201]

For the UK, opting for an operational agreement depends upon the receipt of an EU adequacy decision stipulating that the UK data protection framework is as protective as (or roughly equivalent to) EU standards. It will be extremely difficult, if not impractical, to secure future cooperation between the UK and Europol *on the basis* of the above-mentioned types of agreements because of the divergent positions of the UK and the EU in relation to the rights and principles of the EU Charter and the role of the CJEU. While high levels of data protection are laid down in the EU Charter and the CJEU has jurisdiction over Europol and any ex-third pillar measures, both the EU Charter and the CJEU are no-go areas for the UK.[202]

The major issues associated with future EU-UK cooperation turn on reciprocity. Depending on the level of access the UK has in the future to Europol, EU Member States and Europol itself may have more limited access to UK information. There are no provisions in the Europol Regulation to give access to its database to non-EU countries (or to EU Member States with whom Europol has specific working arrangements, like Denmark).

The prospective terms of any future Europol-UK relationship may lead to the risk of the remaining Member States and third countries demanding to re-negotiate their terms of Europol participation to reflect the change in the British input to Europol and the conditions under which this prospectively takes place (for instance, a substantial reduction of the UK's contribution to Europol in terms of information or the UK being offered more operationally advantageous terms than those granted to Denmark and other third countries). Providing the UK with a status equivalent to full membership would be a gamble for the EU: it could destabilise the status quo further and raise the issue of equal treatment of participating countries in Europol, whether EU Member States or third countries.

Specifically, UK engagement within Europol under different conditions poses a double challenge when it comes to the storage of UK/EU information in EIS and the use of UK/EU-owned data by the UK, other EU Member States, or Europol. The storage and use of data are closely related to respecting the principle of ownership of data enshrined in the Europol regulation. According to Rob Wainwright, some British imprint can be found in 40% of Europol cases.[203]

Any future UK-Europol relationship thus raises the issue of providing for the retroactivity of the storage and use of data (either by the UK or Europol) transferred before the UK leaves the EU. The Denmark-Europol agreement stipulates that

[199] V. Mitsilegas, 'European Criminal Law after Brexit', *Criminal Law Forum* 28:2, 2017, pp. 219-250.
[200] There are no provisions in the Europol regulation to give access to its database to non-EU countries.
[201] Europol, *Partners and Agreements* at: www.europol.europa.eu/partners-agreements.
[202] House of Lords, *Brexit: future UK-EU security and police cooperation,* 2016, op. cit., p. 19.
[203] 'Brexit puts security cooperation at risk', *Politico,* 27.04.2017 at: http://www.politico.eu/article/Brexit-security-cooperation-at-risk-brussels-calls-uk-bluff/.

> *[i]n case of termination, the contracting parties shall reach an agreement on the continued use and storage of the information that has already been communicated between them. If no agreement is reached, either of the two contracting parties is entitled to require that the information which it has communicated be destroyed or returned to the transmitting Party.*[204]

This has important implications for the significant amount of personal data exchanged between stakeholders and, secondly, the UK's future position on EU standards of data protection. The question of what will happen to such information in the event that no agreement is reached before Brexit day should be clearly addressed in the Withdrawal Agreement in similar terms. This may help focus the negotiators in terms of reaching an agreement respecting the value of the information concerned to either party and the need to protect the integrity of EU data protection standards.

Denmark gives an example of a solution nestled between third-country status and full Europol membership. Following Denmark's opt-out from Justice and Home Affairs in 2015, Denmark re-joined Europol by signing an operational and strategic agreement in April 2017. According to the agreement, Denmark can 'cooperate with Europol to a level at least equivalent to that of third countries with which such agreements have been concluded'.[205] Denmark-Europol arrangements are tailored-made, providing specific provisions to Denmark that other third countries with which Europol has operational agreements do not enjoy. For instance, Europol appoints 'Danish-speaking Europol staff or seconded national experts for treating Danish requests to input, receive, retrieve and cross-check data'.[206] Denmark may also attend, under observer status, meetings of the Management Board. The European Commission considers that this agreement allows for a 'sufficient level of cooperation' without amounting to full Danish membership.[207] It also makes available to Denmark rights given to Member States (access to EIS, unreserved participation in Europol's database, decision-making rights in the governing body of Europol, i.e., the Standing Committee on Operational Cooperation on Internal Security [COSI]).[208] This 'unique status' is based, however, on specific conditions which will not apply to the UK post-Brexit.[209] These include continued membership of the EU and the Schengen area, agreement to apply CJEU jurisdiction (particularly in relation to the interpretation of and compliance with the agreement), and, finally, the requirement for Denmark to transpose Directive 2016/680/EU on data protection in police matters into domestic law by May 2017 (which it did).[210] The agreement provides for the termination of cooperation if Denmark ceases to be bound by the Schengen acquis. The UK could request a bespoke deal with Europol that reflects a higher level of cooperation than other third countries, but it is unlikely that any agreement with watered-down judicial oversight or personal data protection would survive a challenge in the CJEU.

Other cooperation schemes raise similar issues in terms of compliance with EU standards. The Switzerland model, which allows it to participate in EU databases like SIS, is conditioned upon Switzerland's involvement in the Schengen area, a situation that does not fit well with the UK's preoccupation with border control, one of the main issues in the Brexit

[204] Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and the European Police Office at: https://www.europol.europa.eu/publications-documents/agreement-operational-and-strategic-cooperation-between-kingdom-of-denmark-and-europol.
[205] Ibid.
[206] Ibid.
[207] European Commission, *Commission welcomes Europol's new mandate and cooperation agreement with Denmark* (press release), 29.4.2017, at: http://europa.eu/rapid/press-release_STATEMENT-17-1169_en.htm.
[208] European Commission, *Declaration by the President of the European Commission, Jean-Claude Juncker, the President of the European Council, Donald Tusk and the Prime Minister of Denmark, Lars Løkke Rasmussen'* (press release), 15.12.2016 at: http://europa.eu/rapid/press-release_IP-16-4398_en.htm.
[209] European Commission, Commission *welcomes Europol's new mandate,* 2017, op. cit.
[210] Ibid.

referendum.[211] Principles of free movement among contracting parties are also incorporated into an EEA-style agreement, so that would unlikely receive approval in the current UK political climate.[212]

From an operational point of view, the option of bilateral agreements between individual EU Member States and the UK is not more appealing.[213] For both British and EU practitioners, this would be the worst-case scenario in terms of productivity. Whereas current EU measures offer a coherent, speedy and EU-wide response to transnational crime, bilateral mechanisms (in the form of agreements on a case-by-case basis between the UK and a large number of the EU27) will likely slow down cooperation (exchanging information will take longer) and lead to fragmented responses.

There is an urgent need to consider transitional arrangements for Europol-UK relations, as it is likely to take longer to reach an agreement than the remaining time for Article 50 negotiations. The House of Lords reports that it takes an average of seven years to conclude a cooperation agreement with Europol.[214] But if the UK Government maintains its stance on the rights and principles of the EU Charter and CJEU jurisdiction, transitional arrangements could face the same hurdles as a final agreement.

5.3. Conclusions and recommendations

The main challenge of Brexit in the field of police cooperation is to safeguard the uninterrupted exchange of information between police forces and agencies in Europe. The high degree of interdependence between EU measures means that proposals will need to ensure continuity and coherence. Brexit could pose the risk of unravelling existing arrangements that enable effective, collective efforts. This will affect the relationship between the UK and the EU but also of the UK and the EU to global security networks. The negotiations will need to take into account the wider global security context as well as internal UK dynamics, notably between Westminster and the devolved governments, particularly in Scotland and Northern Ireland. The complexity of the situation requires a comprehensive view of the issues and actors in play.

The UK likes to see itself as a global actor in this area. In the context of Brexit, some in the UK think that Britain can rely on other forms of cooperation to achieve a global level of acquisition of data. In particular, they believe that the UK can rely on Five Eyes, where the UK is positioned as a key intermediary between the US and the EU27, for strategic intelligence.[215] For policing, they hope that old spheres of influence inside Interpol can be

[211] Mitsilegas, *European Criminal Law after Brexit,* 2017, op. cit.
[212] Carrera,S., Guild, E., and Luk Chun, N., 'What does Brexit mean for the EU's Area of Freedom, Security and Justice?', *CEPS Commentary*, 11.07.2016 at: https://www.ceps.eu/publications/what-does-brexit-mean-eu's-area-freedom-security-and-justice.
[213] Mitsilegas, European *Criminal Law after Brexit,* 2017, op. cit.
[214] House of Lords, *Brexit: future UK-EU security and police cooperation,* 2016, op. cit., p. 18.
[215] Parties in the Five Eyes network are bound by the UK-US agreement. This agreement, which deals for the most part with sigint (signal intelligence) collection, operates on the basis that each party has responsibility for gathering sigint in specific geographical zone(s). In this arrangement, both the US and the UK have a primary position. Apart from sigint, parties cooperate on human intelligence collection and covert action, inter alia. For a detailed and historical account of the Five Eyes, see Richelson, J., and Ball, D., *The Ties that Bind: Intelligence cooperation between the UKUSA countries – United Kingdom, the United States of America, Canada, Australia and New Zealand*. London: Allen & Urwin, 1985. It should be noted that the work of the Five Eyes in terms of intelligence collection and use is not regulated by domestic or by EU law and falls, as such, outside the purview of data and privacy protection. The Five Eyes are also known for having been involved in mass surveillance of European citizens through the PRISM programme, as revealed by the Snowden leaks (see European Parliament [2014], *Report on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs*, PE526.085v03-00). In addition, ministers and high level civil servants responsible for immigration in the initial five

revived by reinforcing Interpol against, or at least apart from, the EU. But this nostalgic vision of past ties is dismissed as unrealistic by most UK practitioners who have been involved directly in day-to-day EU police cooperation matters and by most EU Member State practitioners. While the important role the UK has played is acknowledged, EU Member State practitioners also believe that the old-style UK pragmatic approach to police cooperation has put a brake on deeper and more effective EU collaboration in this sphere. This poses a conundrum for the EU. Should negotiations with the UK have as their goal ensuring continued high-level cooperation to mitigate the security risks of reduced access to global information? Or is it better to have a clean break from the UK to allow for stronger cooperation within the EU, albeit while maintaining some form of cooperation and information exchange with the UK as it pursues its own path outside the EU.

The strong divergence on both sides in the area of police information exchange over such issues as sovereignty, security, and governmental privilege regarding rule of law and control means that the boundaries of the emergency measures taken in the name of antiterrorism are not the same. In some way, these attitudes over different understandings of sovereignty are at the very root of what has led to a so-called divorce between the UK and the EU.

The official line from both sides is that a high level of continued cooperation is the desired outcome. But, unofficially, some UK officials consider their own capabilities, rightly or wrongly, to be much stronger than the EU27. Some officials from the EU27 see Brexit as an opportunity to settle the sovereignty question in an area that has been dogged by 30 years of multiple demands for opt-outs by UK politicians who seem to confuse the ideas of territorial control and supremacy of national decisions with the concept of sovereignty.[216] For some in the EU, the UK political narrative of sovereignty fails to grasp the ideal of the EU's founders that shared sovereignty between Member States is a way to gain more power and have more effective decision making on the global stage. The negotiations will have very different outcomes and very different styles depending on the real motivations and levels of self-interest around the table.

Once negotiations on the post-Brexit agreement in police matters have seriously advanced, it is necessary to see how any agreement will affect the normative power and relations between EU institutions and other international agreements where EU Member States are also members: their positions in global and transatlantic intelligence networks, as well as on global policing institutions, will depend on the success of the settlement with the UK. The converse is even truer for the UK if it ends up isolated. Further research on this area of the different types of intelligence, policing and migration, travel: networks of identification and surveillance in a post-Brexit context has to be done to see how 'porous', 'interdependent' or 'autonomous' they are and what the outcome in terms of security for people living in the EU will be.

Whatever the result of the negotiation, the question of interoperability between data bases and operational systems will be crucial. Further research on the compatibility of the UK projects for their own post-Brexit technical system, which the High-level expert group on

eyes (except Canada) have met to coordinate their actions with a clear move to have their own approach different from law enforcement on the topic of surveillance of travellers and illegal migration.

[216] This position has been exacerbated after the Brexit referendum, but it existed before in both Labour and Conservative governments. Anthony Giddens presented an illuminating discussion on sovereignt(ies), pointing out the key differences between Scotland and the EU on one side and the British/English understanding of sovereignty on the other, at the Edinburgh Festival of Literature. See also Gifford, C., 'The UK and the European Union: dimensions of sovereignty and the problem of Eurosceptic Britishness', *Parliamentary Affairs* 63:2, 2010, pp. 321-338.

information systems and interoperability proposed in May 2017, is needed. Such research cannot be reduced to mere technicalities or the political economy of the security industry but also has to analyse the legal and political outcomes of every divergence for the future of relations at the transatlantic scale.

6. POLICIES CONCERNING THE PROTECTION OF PERSONAL DATA FOR PURPOSES OF LAW ENFORCEMENT

KEY FINDINGS

- When the UK ceases to be a member of the EU, it will be treated as a third country, so any EU-UK data transfer deal for law enforcement purposes must fulfil the requirements of EU data protection law for third-country data transfer.
- The best option for both sides is to have an adequacy decision in relation to UK data protection standards.
- The UK Government embraced the adequacy decision scheme for future EU-UK data transfer for law enforcement purposes, although whether it will secure that decision is questionable.
- Any future deal in facilitating data exchange between the EU and UK in the context of law enforcement must maintain a high standard of data protection as enshrined in the EU Charter.
- The UK's departure offers an opportunity for a new drive towards strengthened EU cooperation in this area. The UK has been active participant in shaping measures such as the former Data Retention Directive, which were criticised over their incompliance of the protection of privacy and personal data protection. Therefore, the EU27 can seize the opportunity to adopt policies that put the protection of those rights at its core.

The UK opted in to the previous EU data protection framework in the field of law enforcement through the 2014 Regulations. The 2016 Directive replaced this framework and provided not only rules for data exchange between law enforcement authorities, as the previous framework did, but also for data processing performed by those authorities. The UK Government could have potentially opted out from transposing this directive into UK national law but, instead, has chosen to transpose it by including the rules on data processing for law enforcement purposes in the Data Protection Bill 2017.[217] It is not certain when the Bill will receive royal assent and become law, but there are reasons to anticipate this will happen by May 2018.[218] If this happens, the 2016 Directive will be implemented into UK law through the Data Protection Bill before Brexit. This means that the Data Protection Bill will fall into the category of 'retained EU law' under the EU (Withdrawal) Bill. The problem here is the status after Brexit of the EU Charter, to which the 2016 Directive refers, and the CJEU, which interprets the 2016 Directive in light of the EU Charter: the EU (Withdrawal) Bill explicitly excludes the EU Charter and puts an end to the jurisdiction of the CJEU.[219] This problem is thus how the Data Protection Bill ought to be

[217] Data Protection Bill 2017 at: https://www.gov.uk/government/collections/data-protection-bill-2017.
[218] Baroness Williams of Trafford, Minister of State at the Home Office, stated in her evidence before the House of Lords EU Committee that the UK Government 'fully intend[s] to have a regime in place by May 2018'. See House of Lords, *Corrected oral evidence: The EU Data Protection Package*, 26.04.2017. Select Committee on the European Union, Home Affairs Sub-Committee, 26.4.2017, Q55 at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/eu-data-protection-package/oral/69266.html.
[219] Ibid. Clause 5(4), Clause 6.

interpreted and how it is to be amended post-Brexit. According to the EU (Withdrawal) Bill, any retained EU law must be interpreted in accordance with pre-Brexit CJEU case law and the general principles of EU.[220] The corollary effect of this interpretation provision is that EU-sourced law will be exempted from any changes in EU law after Brexit. Insofar as the legal process for amending the Data Protection Bill is concerned, the EU (Withdrawal) Bill confers to the Government temporary powers (two years after exit day) through secondary legislation to change EU-sourced law wherever it deems necessary.[221] This is problematic not only for UK domestic law, as the Government can make changes in pre-Brexit EU law without parliamentary debate or scrutiny, but also for the protection of personal data in the UK after Brexit, as it creates uncertainty regarding the continuity of the commitments for that protection.

Another point worth mentioning here is that the Data Protection Bill has been criticised for its complexity and deficient drafting.[222] As it concerns data processing for law enforcement purposes, such criticisms have hinged on the expansive powers that it confers to the Secretary of State to introduce secondary legislation, as a result of which parliamentary scrutiny would be circumvented, and wide exemptions from data processing rules and data subject rights.[223] In light of these criticisms, the Data Protection Bill might be subject to further amendments until it becomes law. Otherwise, the Bill in its current form may hinder the UK from achieving a positive adequacy decision.

6.1. The role of the UK in the development of policies concerning the protection of personal data for the purposes of law enforcement

The recurrent theme with regards to the UK's participation in EU police and judicial cooperation is the 'pick-and-choose' approach. Despite this approach, the UK has been an influential voice in policies concerning the protection of personal data for purposes of law enforcement, as its support for the development of the 2016 Directive shows. Having underlined this support in her evidence before the House of Lords EU Committee, the UK Information Commissioner (ICO) Elizabeth Denham said that:

> *the UK is pretty special, because of the level of integration we have had with the EU and our role in devising and developing … the law enforcement directive. We have been front and centre in this work, and we have a lot to be proud of in our contributions to the protection of personal data.*[224]

The same point in respect to the UK's role in this area was made in the UK Government's position paper on the exchange and protection of personal data, which stated that 'the UK played a full and active part in negotiations for the new GDPR [General Data Protection Regulation] and the DPD [Data Protection Directive], and the final text reflects a number of

[220] Ibid. Clause 6(3).
[221] Ibid. Clause 7.
[222] Ordish, J., *The Data Protection Bill: contortionist-like drafting,* 19.09.2017. Available at Hopkins, R, *The Data Protection Bill : some initial observations,* 18.09.2017 at:https://panopticonblog.com/2017/09/18/data-protection-bill-initial-observations/.
[223] 'Privacy International's Briefing on the Data Protection Bill for second reading in the House of Lords', *Privacy International*, 6.10.2017, at:https://privacyinternational.org/sites/default/files/Final%20Privacy%20International%25u2019s%20briefing%20on%20the%20Data%20Protection%20Bill.pdf
[224] House of Lords, *Corrected oral Evidence: The EU Data Protection Package*, 08.03.2017. Select Committee on the European Union, Home Affairs Sub-Committee, 08.3.2017, Q25 at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/eu-data-protection-package/oral/48744.html.

key UK priorities'.[225] Brexit entails the loss of an active participant in the negotiations of EU instruments on the protection of personal data.

Another area where policies concerning the protection of personal data are relevant is the use and sharing of personal data in the context of law enforcement. The UK has been a key player in shaping policies in this area, although sometimes in conflict with EU rules on the protection of personal data. The most prominent example is the now invalid Data Retention Directive (DRD), for which the UK was the major driving force. The DRD provided for the storage of individual's telecommunications data for the purpose of possible access by police and security agencies in relation to an investigation, detection and prosecution of serious crimes.[226] The UK also backed the adoption of the PNR Directive, which requires air carriers to make available to the authorities of Member States (in order to combat terrorism and serious and organised crime) a wide range of information about passengers entering or departing the EU, and in some cases taking intra-EU flights.[227] It is hard to predict whether the UK's absence would mean that policies on the use of personal data by law enforcement will tilt more strongly towards protection of personal data rather than enhancing security. While Professor Valsamis Mitsilegas shared this view in his evidence hearing before the House of Lords EU Affairs Committee, he added that 'the UK absence from the negotiating table will be a loss for the EU and the other member states, because the UK has always been very constructive as a negotiator and in terms of the substance of the instruments'.[228]

6.2. Important areas and challenges for future cooperation

EU policies about the protection of personal data are a major issue for future EU-UK police and judicial cooperation. This cooperation has been built upon the sharing of personal data, which depended on the UK being an EU member. EU-UK data sharing will be hindered by Brexit unless the UK complies with EU law on the requirements for third-country data transfer. This means that EU27 law enforcement authorities can no longer access UK data relevant for law enforcement purposes. This can have security implications, as it would be less easy to find wanted persons or objects for law enforcement purposes if they are in the UK. The UK National Crime Agency's 2015 Annual Report indicated that the UK Financial Intelligence Unity (UKFIU) received 1,566 requests for financial intelligence from its international partners between October 2014 and September 2015 – and almost 800 requests came from EU Member States.[229] These statistics indicate that there is a mutual interest in maintaining unhindered personal data transfer between the UK and the EU for purposes of law enforcement after Brexit in order to preserve the security of citizens. [230]

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[225] Department for Exiting the European Union (2017), *The exchange and protection of personal data*, op. cit., paragraph 13.

[226] Council of the European Union, *Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC*, OJ L 105/54, 13.4.2006. This Directive was pushed through when the UK held the Presidency of the European Council and in the aftermath of attacks in Madrid (March 2004) and London (July 2005). See Jones, C., 'Background to the EU Data Retention Directive', *EU Law Analysis Blog, 0*7.4.2014 at: http://eulawanalysis.blogspot.co.uk/2014/04/background-to-eu-data-retention.html.

[227] Council of the European Union, *Directive (EU) 2016/681*, op. cit.

[228] House of Lords*, Corrected oral evidence: The EU Data Protection Package,* 01.03.2017. Select Committee on the European Union, Home Affairs Sub-Committee, 01.3.2017, Q15 at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/eu-data-protection-package/oral/48742.html.

[229] NCA, *Suspicious Activity Report (SARs) Annual Report, 2015,* p.8 at: http://www.nationalcrimeagency.gov.uk/publications/677-sars-annual-report-2015/file.

[230] The UK's willingness to maintain law enforcement co-operation has been expressed in various platforms. See for example, Department for Exiting the European Union , *The United Kingdom's exit from and new partnership with the EU', op. cit., section 11. Along the same line, facilitating cross-border data transfer for that co-operation has been considered vital for the UK. See House of Lords 'Brexit: future UK-EU security and police cooperation,*

However, there are various challenges against achieving a workable agreement. The following sub-sections will deal with the key challenges: (1) whether the UK after Brexit can satisfy the requirements for third-country data transfer under the EU legal framework for data protection for law enforcement purposes; and (2) whether there is a precedent for third-country participation in the existing EU-UK data exchange mechanisms for purposes of law enforcement.

6.2.1. Requirements for data transfer to a third country

The implementation of the 2016 Directive in UK law does not mean that after Brexit data will continue to flow to the UK from the EU. Once the UK leaves the EU, it becomes a third country under the terms of the 2016 Directive and thus falls within that Directive's provisions regarding the transfer of personal data to third countries.[231] According to these provisions, data transfer is an exception; it can be done if the requirements laid out in the 2016 Directive are met. Therefore, data may only be transferred if it is necessary for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and prevention of threats to public security. Moreover, the data controller in the third country must fulfil the requirements under the directive of a controller.[232] Data transfer can also take place on the basis of an adequacy finding by the European Commission.[233] Such a finding establishes that the third country offers an equivalent standard of data protection to what is available within the EU.[234] An adequacy finding enables the transfer of personal data between EU Member States and the third country without any further authorisation.[235] The 2016 Directive further prohibits the third country from the onward transfer of data to another third country that does not offer the required data protection standards under EU law.[236]

The 2016 Directive provides the fundamental criteria which the European Commission has to take into consideration when carrying out an adequacy assessment. An assessment must consider the rule of law, respect for human rights and fundamental freedoms, the third country's legislation on national security and criminal law, its international commitments in relation to personal data protection, the existence and effectiveness of independent supervisory authority for data protection, the existence of effective and enforceable data subject rights, and effective administrative and judicial redress.[237] This adequacy assessment by the European Commission does not merely check the bits of data protection legislation of the third country; rather, it takes a comprehensive look at that country's data protection legislation, including the legal framework for which data are processed for national security purposes.

The Directive further gives the European Commission the task of ongoing monitoring on the functioning of the third-country adequacy decision and carrying out periodic surveys of

op. cit., 2017, para. 86. Speaking before the House of Lords EU Affairs Committee, Baroness Williams of Trafford, who is Minister of State at the Home Office, said that '*in a world of increasing mobile threats ... data and data-sharing is one of our first lines of defence'* and that it was therefore '*absolutely vital that law enforcement agencies work together across borders to share information in order to protect the public*'. See House of Lords (2017), *Corrected oral evidence: The EU Data Protection Package, 26.04. 2017,* op. cit., Q55.

[231] 2016 Directive, Chapter V (Article 35 and ff.).

[232] Ibid. Article 35(1) (a)-(b).

[233] Ibid. Article 36.

[234] The adjective 'adequate' was interpreted as 'essentially equivalent' in the CJEU's *Schrems* decision. CJEU (2015), *Maximillian Schrems v Data Protection Commissioner*, C: 362/14, para. 73. The judgement of 6 October 2015 is available at : http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014CJ0362&from=de.

[235] 2016 Directive, Article 36(1).

[236] Ibid. Preamble, paragraph 64, and Article 35.

[237] Ibid. Article 36(2).

developments in that country.[238] If the European Commission decides that the third country no longer provides an adequate level of protection, it can repeal, amend, or suspend the adequacy decision. As a consequence, data cannot be transferred to that country except in the limited circumstances for which data transfer is permitted without having to rely on an adequacy scheme. According to Article 35(1) (d) of the 2016 Directive, Member States can transfer personal data in the absence of an adequacy scheme if the recipient authority offers appropriate safeguards in accordance with the conditions laid out in Article 37. Additionally, under limited circumstances laid out in Article 38, Member States can transfer personal data in the absence of both an adequacy scheme and appropriate safeguards offered by the recipient authority.

If the EU is to retain data flows for the purposes of law enforcement to the UK, the UK will have to comply with the requirements for transfer of data to a third country. Therefore, the UK will have to seek an adequacy decision by the European Commission and prepare itself for scrutiny of its data protection framework by the Commission. Otherwise, transfer of data for the purposes of law enforcement will be hindered except in the limited circumstances mentioned above. Transferring data under these circumstances is not ideal because there is less legal certainty for the law enforcement authorities of the EU Member States than a comprehensive adequacy decision.[239] For its part, the UK Government does not favour such an outcome because the ability to transfer data under these circumstances are more limited than under an adequacy decision.[240] Equally important is the prohibition that the UK cannot transfer data to another third country whose data protection standards do not meet EU standards. This, in turn, could cause problems with the UK sharing EU-originated data with a third country for the purposes of law enforcement cooperation. This problem is all the more serious with regards to the UK's law enforcement cooperation with the US: when the UK ceases to be a member of the EU, the EU-US Umbrella Agreement, the framework for EU-US data transfers for purposes of law enforcement, will not apply to it.[241] The UK Government's position is that data flows between the UK and third countries with existing EU adequacy decisions can continue on the same basis after the UK's withdrawal, given that such transfers could conceivably include EU data.[242] To do this, the UK Government said that it intends to 'liaise with those third countries to ensure that existing arrangements will be transitioned over at the point of exit'.[243] This seems to imply that the UK may seek an umbrella-style agreement with the US in order to secure its data exchanges with the US.

There are some potential obstacles to confirming that UK data protection standards offer an equivalent standard of protection to that available in the EU. The surveillance practices of the UK's intelligence agency, General Communications Headquarters (GCHQ), are the first obstacle. An adequacy finding by the European Commission includes the assessment of a third country's legal framework for data processing for national security purposes, which means that these surveillance practices will come under the spotlight. Had the UK stayed in the EU, these activities would never have been the subject of scrutiny by the EU because

[238] Ibid. Article 36(3)-(4).
[239] Having discussed possible fall-back options for the adequacy decision, Professor Valsamis Mitsilegas said in his evidence before the House of Lords' EU Affairs Committee that '*in terms of security, the fall-back is even less clear, so adequacy will give certainty, including to the law enforcement authorities of the remaining EU member states*'. House of Lords, *Corrected oral evidence: The EU Data Protection Package, 0*1.03.2017, op. cit., Q11.
[240] HM Government*, The exchange and protection of personal data,* op. cit., Annex A, para. 5.
[241] The Agreement between the United States of America and the European Union on the Protection of Personal Information relating to the Prevention, Investigation, Detection, and Prosecution of Criminal Offences. Available at: http://ec.europa.eu/justice/newsroom/data-protection/news/160602_en.htm.
[242] Department for Exiting the European Union, *The exchange and protection of personal data,* 2017, op. cit., note 31.
[243] Ibid.

national security is outside the scope of EU law. However, the CJEU's *Schrems* decision, which considered the legality of the European Commission's adequacy finding of the 'Safe Harbour' principles scheme that enabled data transfers from the EU to US businesses, shows that the surveillance practices of a third-country intelligence agency can become a cause of concern for cross-border data transfer.[244] When analysing whether US law offered an adequate level of protection, the Court questioned the extent of possible national security derogations and their interferences with the fundamental rights of the persons whose data were transferred from the EU to the US.[245] The Court invalidated the European Commission's adequacy decision on the ground that there was an insufficient examination of the powers of the US National Security Agency (NSA) to access the personal data of EU citizens once they reach US shores.[246] As a consequence, how UK intelligence agencies can get access to individual personal data must also be taken into account when considering the level of protection afforded by UK laws for personal data falling within the scope of the 2016 Directive. Here, attention must be paid to the ongoing legal challenges before the European Court of Human Rights (ECtHR) and domestic challenges to UK surveillance practices.[247] The UK Investigatory Powers Tribunal (IPT), which oversees the surveillance practices of UK public authorities, has examined the application of EU law on the practice of UK intelligence agencies accessing communications data (data related to who called whom, when, and where) in bulk for the purposes of national security.[248] The IPT held – seemingly by the agreement of all parties – that CJEU should decide on the legality of the practice of accessing communications data in bulk for the purposes of national security but refused to expedite referral to CJEU. Even though a CJEU decision may take some time to be made, the CJEU is expected to have an important impact on the future of EU-UK data transfer. Moreover, although the Data Protection Bill introduces data processing rules for intelligence agencies in light of the Council of Europe's Convention on automatic processing of data, it is questionable whether these rules would be sufficient to prove that the UK provides the required level of personal data protection.[249] These rules complement other UK legislation on intelligence services, such as the Investigatory Powers Act (IPA), whose impact in terms of securing an adequacy decision for the UK is discussed below, and this other legislation provides for national security exemptions.[250] Additionally, the provisions under which intelligence can be shared with authorities outside the UK falls short of providing minimum safeguards for protecting personal data and privacy.[251]

The second obstacle to a positive adequacy finding is the UK's data retention regime and the CJEU's decision in *Tele2 and Watson*, where the 2014 Data Retention and Investigatory Powers Act (DRIPA) came under the Court's scrutiny.[252] The DRIPA was rushed into the UK Parliament in 2014 after the CJEU had struck down the DRD in its *Digital Rights Ireland*

[244] *Schrems*, op. cit.
[245] Ibid. paragraphs 84-88.
[246] Ibid. paragraphs 88-90 and 97-98.
[247] For the ECtHR, see *Big Brother and Others v. the United Kingdom* (Communication Case) (Application No 58170/13); *Bureau of Investigative Journalism and Alice Ross v. the United Kingdom* (Communication Case) (Application No. 62322/14); *10 Human Rights Organisations v. the United Kingdom* (Communication Case) (Application No. 24960/15); for the UK, see *Privacy International v. Secretary of State for Foreign and Commonwealth Affairs et al.* [2016] UKIPTrib 15_110-CH; and Privacy International*, Bulk Personal Datasets Challenge*. Avaialable at: https://privacyinternational.org/node/843.
[248] Privacy International v. Secretary of State, op. cit., 'Tribunal says EU judges should rule on legality of UK surveillance powers', *The Guardian*, 8.09.2017 at: https://www.theguardian.com/world/2017/sep/08/snoopers-charter-tribunal-eu-judges-mass-data-surveillance.
[249] Data Protection Bill, part 4.
[250] Ibid. part 4, chapter 6.
[251] 'Briefing on the Data Protection Bill', *Privacy International*, 2017, op. cit., pp. 10-13.
[252] CJEU, *Tele2 Sverige AB v. Post– och telestyrelsen and Secretary of State for the Home Department v. Tom Watson and Others*, 2016, C-203/15.

decision.[253] The CJEU invalidated the DRD because it decided that indiscriminate data retention practices aimed at combating terrorism and serious crime were disproportionate and violated the right to privacy and personal data protection of EU citizens.[254] The 2014 DRIPA reinstated the data retention provisions of the now invalid Data Retention Directive. Its legality was challenged in the CJEU in the joined cases of *Tele2 and Watson* on the grounds that it violated the right to privacy and data protection. On 21 December 2016, only a few days before DRIPA expired, the CJEU delivered its much-awaited judgment. Affirming its decision on the Data Retention Directive, the CJEU held that EU law precluded general and indiscriminate retention regimes because they exceeded 'the limit of what is strictly necessary and cannot be considered to be justified, within a democratic society.'[255]

The following are the key findings of Tele2 and Watson:

- The data retention regime must be limited to the purpose of combating serious crime rather than ordinary crime.[256]
- Only targeted data retention regimes are permissible under EU law insofar as they limited that retention in relation to 'categories of data to be retained, the means of communication affected, the persons concerned and the retention period adopted, to what is strictly necessary'.[257] In order to meet the strict necessity requirement, the regime in question must provide 'clear and precise rules governing the scope and application of such a data retention measure and impos[e] minimum safeguards, so that the persons whose data has been retained have sufficient guarantees of the effective protection of their personal data against the risk of misuse'.[258] Moreover, there has to be 'a connection between the data to be retained and the objective pursued'.[259]
- Access to data by law enforcement can only be granted for retained data of persons who are suspected of planning, committing or having committed a serious crime or of being implicated in one way or another in such a crime.[260]
- Access to data must be subject to a prior review carried out by a court or an independent administrative body.[261]
- Individuals in respect of which retained information is accessed by public authorities must be notified once such notification can no longer jeopardise the investigation.[262]

The CJEU referred the case back to the UK Court of Appeal for a decision on the extent to which DRIPA was consistent with EU requirements.[263] In the meantime, DRIPA was repealed and replaced, from 1 January 2017, by IPA. However, *Tele2 and Watson* will inevitably have an impact on this Act.[264] The IPA provides data retention powers similar to,

[253] CJEU, *Digital Rights Ireland v. The Minister for Communications, Marine and Natural Resources and Others*, Joined Cases C293/12 and C594/12, 2013.
[254] *Digital Rights Ireland*, op. cit., para. 71.
[255] *Tele2 and Watson*, op. cit., para. 107.
[256] Ibid., para. 102.
[257] Ibid., para. 108.
[258] Ibid., para. 109.
[259] Ibid., para. 110.
[260] Ibid., para. 119.
[261] Ibid., para. 120.
[262] Ibid. para. 121.
[263] Ibid. para. 124. Speaking before the House of Lords EU Committee, Baroness Williams of Trafford said that 'in the light of the CJEU judgment, and in order to bring an end to the litigation, the Government have accepted to the Court of Appeal that the Act was inconsistent with EU law in two areas'. See House of Lords (2017), 'Corrected oral evidence: The EU Data Protection Package, 26.04.2017', op. cit., Q66.
[264] House of Lords, *Brexit: the EU data protection package', op. cit., p. 135; X. Tracol, 'The judgment of the Grand Chamber dated 21 December in the two joint Tele2 Sverige and Watson cases: The need for a harmonised legal framework on the retention of data at EU level', Computer Law & Security Review: The International Journal of Technology Law and Practice, 2017*, doi: 10.1016/j.clsr.2017.05.003; All-Party Parliamentary Group on the Rule

and in some instances, more extensive than those provided under DRIPA.[265] It allows for access to retained communications data for purposes other than combating serious crime, such as public health protection and tax assessment.[266] It provides several categories of bulk warrants that do not have to be limited to particular people, times, and geographical areas; these warrants are, by default, not targeted.[267] Access to communications data is not subjected to prior judicial review, except where it is granted by local authorities.[268] The IPA does not provide for any notification procedure for individuals. It flows from these observations that IPA contains some provisions which are not reconciled with the CJEU's findings in *Tele2 and Watson*. Therefore, unless the IPA is revisited in light of those findings, a positive adequacy finding in relation to the UK's data protection standards might be unlikely after Brexit. In fact, the judicial review proceedings against IPA at the national level helps position the controversies surrounding this Act.[269]

Thirdly, the UK's attitude towards CJEU decisions might be problematic in satisfying the requisite data protection standards for data transfer. According to the EU (Withdrawal) Bill, the EU Charter and CJEU decisions will no longer be applicable in the UK after Brexit.[270] Yet it would be impossible to disregard those decisions with regards to privacy and data protection. CJEU will interpret the 2016 Directive in light of the EU Charter. This means that when assessing the adequacy of data protection standards afforded in a third country under the 2016 Directive, the European Commission will do so in light of the CJEU's interpretation of the Directive. The impact on a non-EU country of the EU Charter and CJEU's privacy and data protection decisions was evident in *Schrems.* The Court held that a non-EU country (in this case, the US) must demonstrate 'a level of protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order' and that CJEU had the jurisdiction to decide whether the transfer of personal data to that country complies with EU law.[271] Moreover, as mentioned above, the IPT accepted that the CJEU should decide on the legality of the practice of UK intelligence agencies of accessing communications data in bulk for national security purposes. Therefore, the UK will need to take into account CJEU decisions, particularly those relating to privacy and data protection, after Brexit.

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of Law, Meeting Report: EU Law, the Investigatory Powers Act, and UK-EU Cross-Border Crime and Security Cooperation, 14.03.2017', p. 3. Available at: https://www.biicl.org/documents/1634_2017-04-29_-_appg_report_14_march_2017.pdf?showdocument=1.

[265] Murray, D., 'Regulating Surveillance in the UK', *blog post*, The Hebrew University of Jerusalem Cyber Security Research Center Cyber Law Program, 18.8.2017 at: http://csrcl.huji.ac.il/people/regulating-surveillance-uk; A. Patrick, A., 'Who sees when you're sleeping? Who sees when you're awake*?', blog post, UK Human Rights Blog,* 21.12.2016. Available at: https://ukhumanrightsblog.com/2016/12/21/who-sees-you-when-youre-sleeping-who-knows-when-youre-awake/.

[266] IPA, Section 61(7).

[267] Ibid., Part 6.

[268] Raine, T., 'The CJEU and Data Retention: A Critical Take on the *Watson* Case', *blog post, UK Constitutional Law Blog,* 16.1.2017, at: https://ukconstitutionallaw.org/2017/01/16/thomas-raine-the-cjeu-and-data-retention-a-critical-take-on-the-watson-case/.

[269] Liberty, a civil liberties and human rights advocacy group based in the UK, initiated the legal challenge against the IPA, which they considered as unlawful following *Tele2* and *Watson*. See 'Government IS breaking the law by collecting everyone's internet and call data and accessing it with no independent sign-off and no suspicion of serious crime' (press release), *Liberty,* 21.12.2016 at: https://www.liberty-human-rights.org.uk/news/press-releases-and-statements/government-breaking-law-collecting-everyones-internet-and-call. In June 2017, the UK High Court permitted Liberty to lodge the complaint by May 2018 at the latest. At the next phase of this challenge, Liberty is waiting for a decision on its application for a cost capping order. See 'Liberty gets go-ahead to challenge Snoopers' Charter in the High Court' (press release), *Liberty* 30.6.2017, at:https://www.liberty-human-rights.org.uk/news/press-releases-and-statements/liberty-gets-go-ahead-challenge-snoopers%E2%80%99-charter-high-court. In response to criticisms on the unlawfulness of IPA, the Home Secretary Amber Rudd stated that she will seek support from her colleagues across the EU in finding ways to keep data retention schemes despite the CJEU's findings in *Tele2* and *Watson*. See 'UK to press EU for loopholes in surveillance ruling', *Financial Times,* 25.11.2017 at: https://www.ft.com/content/ee3adeb0-e2f4-11e6-8405-9e5580d6e5fb.

[270] EU (Withdrawal) Bill, Clause 5(4) and 6.

[271] *Schrems*, para. 73, paragraphs 60-61.

The UK Government is keen on maintaining data transfers for the purposes of law enforcement after Brexit.[272] It has also confirmed that it will achieve this goal by way of seeking an adequacy decision.[273] More importantly, it is confident that the UK will secure a positive adequacy finding because it would have already implemented the 2016 Directive through Data Protection Bill, through which the UK law on data protection will be in line with the new EU data protection regime.

There are two issues worth mentioning here. The first is that the UK Government does not mention its data retention regime, which could be an obstacle in securing a positive adequacy decision. That said, the UK Government highlighted its view of a UK-EU data transfer as respecting UK sovereignty, 'including the UK's ability to protect the security of its citizens and its ability to maintain and develop its position as a leader in data protection'.[274] This suggests that the UK Government would stick to its position when its data retention regime is brought to the negotiation table.

The second issue is that maintaining data transfer on the basis of that decision does not promise to be smooth after Brexit because the legal process involved in reaching that decision might take some time. Although there has not been an adequacy decision made in accordance with the 2016 Directive, the timeframe for reaching adequacy decisions in relation to data transfers for commercial purposes under the Data Protection Directive[275], which is still in force at the time of writing and is due to be replaced by the General Data Protection Regulation in May 2018, can give an indication of the time it will take to reach an adequacy decision under the 2016 Directive, as both Directives provide for the same legal process for an adequacy decision finding (i.e., the procedure for the European Commission's implementing acts).[276] For Switzerland, the average time for reaching an adequacy decision was one year.[277] Moreover, the UK can only seek an adequacy decision once it ceases to be a member of the EU, so any decision cannot be made before Brexit. All this raises the issue of seeking a transitional arrangement in relation to data transfer for law enforcement purposes into the Withdrawal Agreement so that any transfers are not interrupted pending an adequacy decision for the UK.[278] Although not mentioned expressly, the UK Government hinted in its position paper on the exchange and protection of personal data that it welcomes such an arrangement. In that position paper, it called for an early agreement in mutually recognising 'each other's data protection frameworks as a basis for the continued free flows of data between the EU (and other EU adequate countries) and the UK from the point of exit, until such time as new and more permanent arrangements come

[272] Department for Exiting the European Union, *Security, law enforcement and criminal justice: A future partnership paper,* 18.9.2017, note 4 at: https://www.gov.uk/government/publications/security-law-enforcement-and-criminal-justice-a-future-partnership-paper.
[273] As noted in Chapter 2, 'The UK wants to explore a UK-EU model for exchanging and protecting personal data, *which could build on the existing adequacy model*' (emphasis added). Department for Exiting the European Union (2017), 'The exchange and protection of personal data', op. cit., note 4.
[274] Ibid. note 22.
[275] The countries for which an adequacy decision was reached under the Data Protection Directive at the time of writing are the following: Andorra, Argentina, Canada, Switzerland, Faeroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand and Eastern Republic of Uruguay.
[276] Council of the European Union (1995), *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*. OJ L 281, 23.11.1995.
[277] The Article 29 Working Party gave its opinion on the level of data protection afforded in Switzerland on 7 June 1999; the European Commission adopted an adequacy decision for that country on 26 July 2010. See Article 29 Working Party Opinion No 5/99 on the level of personal data in Switzerland (5054/99/final, 7 June 1999), at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/1999/wp22_en.pdf; and European Commission (2000), *Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data provided in Switzerland*, OJ L 215, 25.8.2000.
[278] Calls for transitional arrangements were made before the House of Lords EU Committee. See House of Lords, *Brexit: the EU data protection package,* 2017, op. cit., paragraphs 97-100.

into force'.[279] In Prime Minister Theresa May's speech in Florence, she asked the EU27 to agree on a two-year transitional period after Brexit, which indicates the UK Government's intention to rely on transitional arrangements if necessary.[280]

There are, though, two problems about possible transitional arrangements for UK-EU data transfers. One problem is that these arrangements do not abolish the risk of a negative adequacy decision for the UK or a legal challenge against a positive adequacy decision. The other problem is that the UK considers CJEU jurisdiction and the application of the EU Charter as redline, risking a possible rejection by the UK on any expansion of the EU Charter or CJEU jurisdiction for the duration of the transitional arrangements. This could frustrate reaching any such arrangements in the first place. Besides, transitional arrangements have to correspond with EU standards in general and those of data protection in particular, which indicates that the adequacy requirements would prevail in striking any arrangement.[281]

If the two-year period under Article 50 of TEU is extended to cover the transitional period, or the UK-EU data transfer are included in the transitional arrangements, EU law will apply to the UK and the personal data will continue to flow in the interim period. In the absence of any transitional arrangements, be it under Article 50 or under a withdrawal agreement, the safest option for the protection of personal data is to transfer personal data from the EU to the UK on the basis of the limited circumstances under the 2016 Directive (Articles 35, 37, and 38) until an adequacy decision is reached for the data protection in the UK.

6.2.2. UK access to EU law enforcement databases

The UK participates in the following EU measures on data exchange in the field of law enforcement: SIS II, ECRIS, EU PNR, and the Prüm Decision. Withdrawal from the EU means that the UK will no longer have access to the information held in these databases. Whether this will have security implications for the EU depends on whether the UK's participation in these databases is a benefit for the EU.

In relation to SIS II, the UK received over 150,000 alerts from other Member States, representing 0.22% of the total 700 million alerts issued in the calendar year 2016.[282] In the same timeframe, the UK had the second-most accesses to SIS II, with over 510 million access times, representing 12.9% of the over 3.98 billion total access times.[283] These data show that the UK has heavily relied on SIS II, whose utilisation is also linked with EAW (it is the mechanism through which information on an EAW is sent).[284] In his evidence before the House of Lords EU Affairs Committee, David Armond, Deputy Director-General of the NCA, said of SIS II:

> *[U]ntil recently, only one third of European arrest warrants were on the Police National Computer in this country because it was not clear whether the person named was likely to be in the UK. Now we have visibility of all European arrest warrants, and it is for that*

[279] Department for Exiting the European Union, *The exchange and protection of personal data,* 2017, op. cit., note 29.
[280] Peers, S. 'Bridge over troubled legal water? Legal issues of the Brexit transition period', *blog post, EU Law Analysis,* 24.9.2017 at: http://eulawanalysis.blogspot.co.uk/2017/09/bridge-over-troubled-legal-water-legal.html.
[281] According to the CJEU's *Kadi II* decision, an international agreement cannot prevail to prejudice EU primary law and EU constitutional foundations. See CJEU, *Kadi and Al Barakaat International Foundation v Council and Commission*, Case C-402/05 P and C-415/05, 2008.
[282] SIS II – 2016 Statistics', *eu-LISA*, 2.2.017, pp. 9-10 at: http://www.eulisa.europa.eu/Publications/Reports/SIS%20II%20-%20Statistics%202016.pdf.
[283] Ibid. pp. 7-8.
[284] For discussions on the EAW after BREXIT, see Chapter 3 of this study.

reason that last year we saw a 25% increase in the number of those warrants executed and people arrested.[285]

As a consequence, the lack of UK participation in SIS II after Brexit will make it harder to find wanted persons if they are in the UK.

With regards to ECRIS, UK participation in this database is of great importance for the EU27. In 2016 the UK was the second-most active Member State (after Germany) to ECRIS in terms of total volume of notifications on new convictions, requests and replies to requests, representing 13.7% of nearly 2 million notifications.[286] That same year it was also the second-most active Member State in requesting information on previous convictions (26.7%).[287] Moreover, the UK was one of the Member States with the highest number of operational interconnections, receiving 13,220 of nearly 365,000 requests for information from other Member States in 2016.[288]

As far as the UK's participation in the Prüm Decision goes, there is no information about how the UK utilises this database because it has yet to connect to the database in 2017 and is only due to fully participate in it in 2020.[289] Along the same lines, the implementation of the EU PNR Directive is due in May 2018, so there are no statistics on Member State usage of the PNR Scheme. Yet because the UK began using and collecting PNR data for law enforcement purposes over a decade ago, it can be said to be a front-runner in using PNR data.[290] As the first Member State to set up a PNR scheme, the UK's importance for the EU27 in relation to the EU PNR Scheme lies in its expertise and experience.

The UK's participation in EU law enforcement databases has operational significance in terms of the volume of information sent and received and because of the UK's expertise and experience. However, there are two obstacles to the continuity of the UK's participation in these databases. The first obstacle is that there is no precedent in some of the databases for access by non-EU (ECRIS) and non-Schengen (SIS II) countries. Participant countries have access to these databases either because they are EU Member States or they have joined the Schengen acquis (such as Iceland, Liechtenstein, Norway, and Switzerland). As far as the Prüm goes, non-EU Member States who have secured participation (Iceland and Norway) are also members of Schengen acquis. Yet the fact that the Prüm decision itself does not form part of the Schengen acquis suggests that the UK could participate in it on the basis of an international agreement reached after Brexit in relation to TFEU Article 216

[285] House of Lords, *Corrected oral evidence: Brexit: Future UK-EU Security and Police Co-operation,* 12.10.2016. Select Committee on the European Union, Home Affairs Sub-Committee, 12.10.2016, Q15 at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-future-ukeu-security-and-policing-cooperation/oral/41072.html.

[286] European Commission, *Draft Report from the Commission to the European Parliament and the Council concerning the exchange through the European Criminal Records Information System (ECRIS) of information extracted from criminal records between the Member States,* p. 4 at: https://ec.europa.eu/info/sites/info/files/statistical-report-on-use-of-ecris_june2017_en.pdf.

[287] Ibid. p. 11.

[288] European Commission*, Draft Report,* op. cit., pp. 7, 13.

[289] In 2015 the UK Government ran a pilot programme with Spain, Germany, France, and the Netherlands. The UK obtained 118 matches (from around 2,500 DNA profiles) covering offences such as rape, sexual assault, arson and burglary. See Home Office, *Prüm Business and Implementation Case,* 2015, p. 6 at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480129/prum_business_and_implementation_case.pdf. On the UK's 2020 entry into Prüm, see House of Lords*, Brexit: future UK-EU security and police cooperation,* 2016, op. cit., para. 107.

[290] House of Commons, *The E-Borders Programme*, 2009 at: https://publications.parliament.uk/pa/cm200910/cmselect/cmhaff/170/17004.htm. Passenger data are collected and shared according to the Code of Practice on the management of information, shared by the Border and Immigration Agency, Her Majesty's Revenue and Customs, and the Police, adopted under Section 37 of the Immigration, Asylum and Nationality Act 2006.

regardless of its non-participation in the Schengen acquis.[291] Iceland and Norway, after two years of negotiations, signed international agreements on their participation.[292] Nevertheless, it is premature to speculate about the benefits for the EU27 of UK participation because the UK has not fully participated in the Prüm yet.

The second obstacle is that even if the UK can conclude an agreement with the EU on data transfer for the purposes of law enforcement, it will still have to prove that it maintains an equivalent level of data protection as the EU. As the CJEU's opinion on the EU-Canada PNR Agreement demonstrates, an agreement can be challenged before the CJEU and struck down.[293] Moreover, this opinion is of great importance for the future of any PNR data transfer deal with the UK. The CJEU held that the PNR data transfer scheme provided under that agreement was incompatible with privacy and data protection rights enshrined under the EU Charter. This decision demonstrates the need to closely evaluate the EU PNR scheme and PNR data transfer agreements with third countries in light of the EU Charter.[294]

6.3. Conclusions and recommendations

The UK's withdrawal from the EU means that UK-EU data sharing for law enforcement purposes will be hindered unless the UK demonstrates that it will afford equivalent personal data protection to that which is available in the EU. As a non-EU third country, the UK will be required to meet higher standards than EU Member States. It will no longer be able to rely on the national security exemption, and thus its surveillance and data retention schemes will come under scrutiny.[295] Additionally, the EU Charter and CJEU decisions on privacy and data protection will have bearing for the UK, albeit indirectly.

If the UK wishes to retain or replace its participation in or access to existing EU measures on data exchange for law enforcement purposes after Brexit, the recurring theme is that its data protection standards will have to be adequate compared to those of the EU. As *Schrems* and the CJEU's opinion on the EU-Canada PNR Agreement, failure to comply with EU data protection standards has major consequences for the future relationship between the EU and UK in this sensitive area of law enforcement.

The UK Government has confirmed that it will align its national law with the 2016 Directive. However, its position after Brexit is less clear. It has not confirmed whether it will seek an adequacy decision when the UK ceases to be a member of the EU. The best option for both sides is to have an adequacy decision for UK data protection standards after Brexit and, in

[291] House of Lords, *Brexit: future UK-EU security and police cooperation,* 2016, op. cit., para. 113.
[292] Council of the European Union, *Council Decision 2010/482/EU of 26 July 2010 on the conclusion of the Agreement between the European Union and Iceland and Norway on the application of certain provisions of Council Decision 2008/516/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, and the Annex thereto*, OJ L 238, 9.12.2010.
[293] CJEU, *Opinion 1/15 of the Court (Grand Chamber) of 26 July 2017*, ECLI:EU:C:2017:592.
[294] Following the CJEU's opinion, the European Commission stated that it will make an analysis of the Opinion and work closely with other third countries with which the EU has PNR data transfer agreements in order to ensure the compliance of that transfer with the Opinion, the Treaty, and the EU Charter. See European Commission, *EU-Canada PNR agreement: Commission statement on the Opinion of the European Court of Justice'* (press release), 26.7.2017 at:http://europa.eu/rapid/press-release_STATEMENT-17-2105_en.htm. NGOs have called for suspending the international agreements on PNR data transfers and the EU PNR scheme; see 'In win for privacy, European rejects EU-Canada "PNR" agreement' (press release), *Accessnow*, 26.7.2017 at: https://www.accessnow.org/win-privacy-european-court-rejects-eu-canada-pnr-agreement/ and 'PNR: EU Court rules that draft EU/Canada air passenger data deal is unacceptable (press release)', *EDRi,* 28.7.2017 at: https://edri.org/pnr-eu-court-rules-draft-eu-canada-air-passenger-data-deal-is-unacceptable/.
[295] TEU, Article 4(2).

the meantime, rely on the provisions in the 2016 Directive on the circumstances in which data can be transferred outside an adequacy scheme.

7. CONCLUSION

At this stage, it is difficult to assess the impact Brexit will have on the AFSJ. Over the years the UK has been ambivalent in its engagement with the AFSJ. It has provided political and practical leadership in some areas, particularly in the operational field for Europol and Eurojust, but it has blocked developments or stood aside in other areas. The implications of Brexit for the EU are complex. The EU's negotiating position in the various areas covered by the AFSJ will require a careful analysis of the risks and opportunities for the EU and its Member States, which may not always have shared interests. There may be a need to balance immediate operational needs with wider implications for policy development and greater integration in the EU.

On an operational level, to ensure that continued bilateral cooperation is possible after Brexit, there is an urgent need to address some legal issues relating to cross-border cooperation, whether at an institutional level (such as agreements with Eurojust) or at a Member State level. The technical issues of transitional provisions to be included in the Withdrawal Agreement should be discussed as soon as possible in order to provide legal certainty for ongoing proceedings.

Many of the AFSJ areas affect the daily lives of people. Family law should not be considered an area of negotiation subject only to the principle of reciprocity. Whatever the UK position in this area might be, European families should not be held hostage to the political turbulence surrounding Brexit. The EU should explore ways of ensuring, to as great an extent as possible, legal certainty in the EU27 following Brexit.

The EU will need to bear in mind the implications of the decisions it makes on the AFSJ for the integrity of EU law. To ensure that Brexit does not weaken the foundations of the AFSJ itself, the importance of the role of the CJEU and the rights and principles set out in the EU Charter need to be fundamental.

This study makes the following recommendations:

On **border checks, asylum and immigration, including free movement of persons**:

- An agreement which protects the rights in course of being acquired and exercised by citizens of the EU28 Member States (whether EU27 citizens in the UK or British citizens in the EU27) should be a priority;
- The cut-off date for the acquisition of rights should be no earlier than the date Brexit actually happens;
- Supranational adjudication of disputes, accessible to national courts through a reference procedure, is critical to the correct application of any agreement.

On **judicial cooperation**:

- Article 50 negotiations should, as soon as possible, address the question of transitional arrangements for judicial cooperation in the Withdrawal Agreement, setting out detailed proposals on the cut-off point for ongoing proceedings to continue under existing arrangements so as to ensure legal certainty.
- Eurojust should notify the Council as soon as possible of its plans to negotiate an agreement with the UK following withdrawal and start the process required to conclude such an agreement in parallel to Article 50 negotiations.

- EU27 Member States should identify any areas in their domestic legislation that may require amendment to rely on alternative international or regional frameworks for continued cooperation with the UK and make preparations for such amendments.
- The EU should explore and identify at an early stage any potential barriers to reaching an agreement with the UK for a new instrument to replace the EAW and other mutual recognition instruments, based on the model for Norway and Iceland.
- The EU should explore the possibility of the UK adhering to the Lugano Convention following Brexit, identifying the potential legal requirements needed for this to occur.
- To ensure the best possible outcomes for families and children, the EU should carry out a gap analysis in relation to civil cooperation on family law to identify particular vulnerabilities and priorities for agreement.

On **police cooperation:**

- Consideration should be given to how the withdrawal and future agreements will affect the normative power and relations between EU institutions and other international agreements in which EU Member States are also members as well as the position of EU Member States in global and transatlantic intelligence networks, as well as global policing institutions.
- The question of interoperability between data bases and operational systems should be kept at the forefront of discussions in this area.

On **personal data protection:**

- The best option for both sides is to rely on an adequacy finding by the European Commission on the basis of Article 36 of the 2016 Directive.
- In an alternative scenario in which the EU enters into an international agreement with the UK on data exchange in the field of law enforcement, EU primary law such as the EU Charter and CJEU case law should be taken into account.
- The Withdrawal Agreement should include reference to the future of the EU-UK data exchange for law enforcement purposes. Transitional arrangements must correspond with EU standards in general and those of data protection in particular.
- The safest option for protecting the fundamental rights of individuals whose personal data have been transferred to the UK in the interim period is to rely on the limited circumstances under the 2016 Directive (Articles 35, 37, and 38) in which data can be transferred outside the adequacy scheme.
- The EU must pay particular attention to discussions surrounding legal challenges to UK surveillance practices - an insufficient consideration of these practices means that any future arrangement on EU-UK data transfer for law enforcement purposes after Brexit, be it an adequacy finding by the European Commission or an international agreement signed by both parties, may face a legal challenge before the CJEU and risk being declared void.
- Attention must be paid to the level of protection afforded to the personal data in the UK in reaching an international agreement with the UK on the transfer of personal data. The European Parliament should not approve an international agreement if it believes that UK data protection standards are not equivalent to those in the EU.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, appraises the implications of the United Kingdom's withdrawal from the European Union for the Area of Freedom, Security and Justice and protection of personal data for law enforcement purposes. It maps the various policy areas in which the UK is currently participating and analyses the requirements for the disentanglement of the UK from them, as well as the prerequisites for possible UK participation in AFSJ policies after withdrawal. Furthermore, it provides an assessment of the political and operational impact of Brexit for the EU in the Area of Freedom, Security and Justice.

Print ISBN 978-92-846-2206-1 doi 10.2861/082495 QA-04-17-967-EN-C
PDF ISBN 978-92-846-2205-4 doi: 10.2861/021448 QA-04-17-967-EN-N