

The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT FOR CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters

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, provides expertise on the legal, institutional and technical implications of the UK's future relationship with the EU after Brexit in the areas of police cooperation and judicial cooperation in criminal matters (Chapters 4 and 5 of Title V TFEU).

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ABBREVIATIONS AND ACRONYMS

AFIS	Automated Fingerprint Identification System
AFSJ	Area of Freedom, Security and Justice
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPS	Crown Prosecution Service
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECRIS	European Criminal Records Information System
ECtHR	European Court of Human Rights
EEA	European Economic Area
EFTA	European Free Trade Association
EIO	European Investigation Order
EIS	Europol Information System
EJN	European Judicial Network
EUCARIS	European Vehicle and Driving Licence Information System
EURODAC	European Dactyloscopy
Eurojust	European Union Agency for Criminal Justice Cooperation
Europol	European Union Agency for Law Enforcement Cooperation
GDPR	General Data Protection Regulation
HMRC	HM Revenue and Customs
Interpol	International Criminal Police Organization
JIT	Joint investigation team
LIBE	European Parliament Committee on Civil Liberties, Justice and Home Affairs
MLA	Mutual legal assistance
PNR	Passenger Name Record
SIENA	Secure Information Exchange Network Application

SIS Schengen Information System

SISII Second generation SIS

TFEU Treaty on the Functioning of the European Union

TF50 European Commission Task Force for the Preparation and Conduct of the Negotiations with the UK under Article 50 TEU

VIS Visa Information System

EXECUTIVE SUMMARY

Following the UK's referendum on membership of the European Union, held on 23 June 2016, the UK government notified the EU of the country's intention to leave the Union by the end of March 2019. The negotiations on the framework for, and content of, the future relationship between the UK and the EU started in 2018. One of the central questions concerns the potential options available for the future cooperation between the EU and the UK in the field of police and judicial cooperation in criminal matters. A key challenge in this context will be to reconcile the political expectation of the changing form and nature of the cooperation with the UK as a third country outside of Schengen, with the needs at the operational level, which are in the EU's security interest. In this context, the key may lie in the principle of reciprocity: as long as the additional degree of cooperation strengthens the security of EU and UK citizens, and the partnership is at least as beneficial to the EU and its Member States as it is for the UK, the status of the UK and precedent for such cooperation may be less important.

A second challenge specific to this policy area, in which mutual trust, human rights and exchange of personal data play a key role, is the need for the EU to ensure that following the UK's withdrawal from the EU, the UK's human rights and data protection standards will be equivalent to those in place in the EU. Although the UK legal framework is currently broadly in line with the EU legal framework and the UK is a signatory to the European Convention on Human Rights (ECHR), there are substantial questions over whether the Data Protection Act fully incorporates the data protection elements required by the Charter of Fundamental Rights, concerning the use of the national security exemption from the GDPR used by the UK, the retention of data and bulk powers granted to its security services, and over its onward transfer of this data to third country security partners such as the 'Five Eyes' partners (Britain, the USA, Australia, New Zealand and Canada). Furthermore, there is no guarantee that the UK will continue to align its human rights and data protection standards with those of the EU in the future. Moreover, mutual recognition measures such as the European Arrest Warrant (EAW) rely to an extent on mutual trust in one another's systems, including procedural protections. Therefore, as a prerequisite to the conclusion of any cooperation agreement with the UK in this field, commitment to an ongoing robust set of human rights, including procedural and data protection safeguards, should be required to ensure compliance with existing and future EU data protection legislation.

However, it should be noted that the transition to a new relationship in this field will still be simpler for the UK than it would be for most other Member State, due to the special position the UK was already granted in the area of freedom, security and justice (AFSJ) and the vertical way in which the UK is currently cooperating with other Member States in this field.

Following the UK's withdrawal, a number of Council of Europe Conventions could be considered to provide an adequate level of cooperation in the field of mutual legal assistance, including the setting up of Joint Investigation Teams (through the 1959 European Convention on Mutual Assistance in Criminal Matters and its 1978 and 2001 Protocols), the transfer of prisoners (through the 1983 European Convention on the Transfer of Sentenced Persons and its Additional Protocol), as well as the mutual recognition of financial penalties and of confiscation orders (through the European Convention on the International Validity of Criminal Judgments, if the UK and other Member States ratify it, and the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism). The reliance on the Council of Europe Conventions for cooperation in these matters following the UK's withdrawal would not entail significantly reduced cooperation, as compared to the current situation. Therefore, these areas for cooperation are not to be considered as priority areas by the European Commission during

the negotiations. In addition, the the 1957 European Convention on Extradition could be considered to provide a basic level of cooperation in the field of extradition. Furthermore, the Council of Europe framework, through the ECHR and the jurisdiction of the European Court of Human Rights (ECtHR), will ensure a basic level of protection in terms of procedural safeguards.

Table 1 gives an overview of the EU measures in the field of police cooperation and judicial cooperation in criminal matters, suggesting the level of priority that these measures should be given in the future EU–UK relationship. Priority is assigned depending on (1) the importance of continued cooperation from the EU perspective (i.e. the EU27 security interest); and (2) the existence of an adequate fall-back option after Brexit. The level of feasibility is assigned based on the existence of a precedent for cooperation with third countries, which could indicate politically more or less challenging areas for negotiation. Eurodac has been excluded from this table, as the primary objective of Eurodac lies in its function in the Dublin system. Without the UK participating in this system, access of the UK would provide no added value to the EU.

Table 1: Recommended level of priority to be given to type of cooperation/EU measures during the withdrawal negotiation

Level of priority	Level of feasibility	EU measure/system
High priority – Continued cooperation in some form is in the EU27 security interest and no adequate fall-back option is available	More challenging – No adequate third country precedent for cooperation	<ul style="list-style-type: none"> • ECRIS • SIS II • PNR Directive
	Less challenging – Existence of third country precedent for cooperation	<ul style="list-style-type: none"> • Europol • Eurojust • Prüm Decisions
Medium priority – Fall-back options exist, but these would result in a substantial reduction in the level of cooperation	More challenging – No adequate third country precedent for cooperation	<ul style="list-style-type: none"> • European Arrest Warrant • Confiscation orders
	Less challenging – Existence of third country precedent for cooperation	<ul style="list-style-type: none"> • EIO
Low priority: Adequate fall-back options for cooperation exist under the Council of Europe framework	N/A	<ul style="list-style-type: none"> • MLA and setting up of JITS • Transfer of prisoners • Financial penalties

With regard to the relevant information exchange databases and systems currently used for operational cooperation between the EU and UK, the adoption of available fall-back options (i.e. Interpol, Council of Europe conventions and the Treaty concerning a European Vehicle and Driving Licence Information System (EUCARIS) for access to judicial records, information on missing persons, vehicle ownership and searches of DNA profiles) or third country precedent options (with regard to PNR) or Schengen member precedent options (with regard to SIS II and Prüm¹) would result in a substantial reduction in the level of cooperation when compared to the current situation, including a reduction in the level of intelligence available to the EU. Moreover, no precedent for third country access to the European Criminal Records Information System (ECRIS) exists. Therefore, the negotiation of an agreement on information exchange between the UK and the EU to replace the information exchange through these databases and systems should be considered.

¹ The Prüm Decision grants participating countries access to automated DNA analysis files, automated fingerprint identification systems and vehicle registration data of other participating countries.

Regarding the UK's future cooperation with the EU agencies Europol and Eurojust, no adequate fall-back options are available. There are existing forms of cooperation between both Europol and Eurojust and third countries; however, the level of cooperation outlined in these agreements is in stark contrast to the current situation and would represent a significant reduction in operational cooperation between the EU and the UK. It should be noted, however, that continued cooperation with Europol is considered to be key for the future operational cooperation between the EU and the UK – even more so than cooperation through Eurojust.

For those EU measures where a fall-back option at Council of Europe level is available, it should be noted that cooperation under the 1957 European Convention on Extradition would result in a considerable increase in the length and cost of the extradition process, as compared to the current process under the European Arrest Warrant. Similarly, replacing the European Investigation Order (EIO) and the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, with the above-mentioned Council of Europe Conventions, when compared to the current situation, would result in a substantial reduction in the level of cooperation. For these measures, the negotiation of a bespoke agreement could be considered, while for the EIO, an agreement similar to the agreements in place with Norway and Iceland (cooperation on basis of 2000 EU MLA Convention) could be foreseen.

1. INTRODUCTION

Following the UK's referendum on EU membership held on 23 June 2016, the UK Prime Minister formally invoked Article 50 of the Treaty on European Union (TEU) on 29 March 2017, officially notifying the EU of the UK's intention to depart the Union two years later. In December 2017, the European Commission concluded that sufficient progress had been made in regard to the first stage of the withdrawal negotiations, which concerned the 'Brexit divorce bill', citizens' rights and the Irish border. As a result, the negotiations have progressed to the second phase, which focuses on the framework for, and content of, the future relationship between the UK and the EU.

The European Council's Article 50 guidelines on the framework for the future EU–UK relationship of March 2018² emphasise that 'law enforcement and judicial cooperation in criminal matters should constitute an important element of the future EU–UK relationship in the light of the geographic proximity and shared threats faced by the Union and the UK'.

Similarly, the UK government has on many occasions stressed the importance of, and its desire to, continue cooperation in this policy area, particularly where it pertains to police cooperation on the matters of terrorism and organised crime.³

However, reaching an agreement on the content of any future relationship in the field of police and judicial cooperation in criminal matters could prove to be difficult. In this context, the above-mentioned European Council's Article 50 guidelines⁴ underlined the future status of the UK, i.e. a third country outside Schengen, and emphasised the need for strong safeguards 'that ensure full respect of fundamental rights and effective enforcement and dispute settlement mechanisms'. On the other hand, the UK's position towards the Court of Justice of the European Union (CJEU) and the domestication of the principles of the Charter of Fundamental Rights and Freedoms (particularly where it concerns the protection of personal data)⁵ is well known. This raises the question of the feasibility of negotiating a level of cooperation similar to the cooperation currently in place between the EU and the UK, or whether existing forms of cooperation with third countries could be a potential model for a future relationship with the UK. Moreover, consideration should also be given to other existing legal instruments and organisations providing a framework for cooperation between the EU and the UK beyond that of the EU (e.g. Interpol and the Council of Europe).

In this context, this study explores the potential options for the UK's future involvement in the legal instruments and policies adopted, and activities undertaken, under Chapters 4 and 5 of Title V TFEU, focusing on the UK's future relationship with the EU after Brexit in Europol, Eurojust, mutual legal assistance, extradition, mutual recognition and enforcement of court sentences in criminal matters, as well as in the relevant information exchange databases and systems such as ECRIS and SIS II.

The study's **general objective** is to provide expertise to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) on the legal, institutional and technical implications of the UK's future relationship with the EU after Brexit in the areas of

² European Council (Art. 50) guidelines on the framework for the future EU–UK relationship, 23 March 2018, EUCO XT 20001/18. BXT 25 CO EUR 5 CONCL 2.

³ Peers, S. UK/EU Security Cooperation After Brexit: the UK Government's Future Partnership. Available at: <http://eulawanalysis.blogspot.de/2017/09/ukey-security-cooperation-after-brexit.html>.

⁴ European Council (Art. 50) guidelines on the framework for the future EU–UK relationship, 23 March 2018, EUCO XT 20001/18. BXT 25 CO EUR 5 CONCL 2.

⁵ European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, LIBE, The implications of the United Kingdom's withdrawal from the European Union for the Area of Freedom, Security and Justice. 2017.

police cooperation and judicial cooperation in criminal matters (Chapters 4 and 5 of Title V TFEU).

In particular, this study has the following Specific Objectives:

- **Specific Objective 1:** to identify and provide a complete listing of the legislation and policies in the area of police and judicial cooperation in criminal matters to which the UK is participating as a Member State.
- **Specific Objective 2:** to provide an in-depth analysis of the most important legal instruments, policies and activities where future cooperation could be of use for the EU's future relations with the UK.
- **Specific Objective 3:** to provide a legal, institutional and technical analysis for the UK's future involvement in most important legal instruments, policies and activities, including Europol, Eurojust, information exchange databases, EAW, mutual legal assistance, mutual recognition and enforcement of court sentences in criminal matters.

The study mainly focuses on the future relationship of the EU and the UK after the UK has withdrawn from the EU (i.e. post Brexit). However, relevant documentation and developments from the negotiation phase have also been taken into account, in particular the March 2018 European Council negotiation guidelines and any relevant European Parliament resolutions and positions.

The study is structured as follows:

- Section 2** Provides an overview of the **EU legal framework** in the field of police cooperation and judicial cooperation in criminal matters;
- Section 3** Details the **current UK participation** in EU legislation and policies in the field of police cooperation and judicial cooperation in criminal matters, as well as during a transition period;
- Section 4** Provides an overview of **EU and UK position** on the future relationship in police and judicial cooperation in criminal matters;
- Section 5** Presents a discussion of the **relative importance for the EU of its current cooperation with the UK** in the field of police cooperation and judicial cooperation in criminal matters, focussing on the UK contribution;
- Section 6** Provides an overview of **the forms of potential future UK cooperation** after Brexit in the instruments identified in section 5, as well as an assessment of these options in terms of the feasibility looking at the legal, institutional and technical implications of each option;
- Section 7** Presents **conclusions** and **policy recommendations** in terms of the areas/legal instruments which are foreseen to be least and most problematic in terms of the available options for potential continued participation of the UK presented in section 6.

In addition, there are four appendices as follows:

- **Appendix 1:** Complete list of legislation in the field of police cooperation and judicial cooperation in criminal matters in which the UK is currently participating;
- **Appendix 2:** Case studies;
- **Appendix 3:** Methodology including stakeholders interviewed;
- **Appendix 4:** Bibliography.

2. OVERVIEW OF EU LEGAL FRAMEWORK IN THE FIELD OF POLICE COOPERATION AND JUDICIAL COOPERATION IN CRIMINAL MATTERS

This section provides a summary of the EU legal and policy framework in the field of police cooperation and judicial cooperation in criminal matters, to introduce the different key EU measures and activities in this field which are discussed in further detail in the context of Brexit later on in the study.

Following the Lisbon Treaty, the area of freedom, security and justice (AFSJ) was established, through Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU):

- Police cooperation is covered in Articles 87 to 89 (Chapter 5 of Title V TFEU);
- Judicial cooperation in criminal matters is covered in Articles 82 to 86 (Chapter 4 of Title V TFEU).

2.1. Police cooperation in criminal matters

Police cooperation in criminal matters is the cooperation between the police, customs and other law enforcement services of the Member States. The rationale behind police cooperation is to prevent, detect and investigate criminal offences across the EU. In practice, this cooperation mainly concerns the following serious crimes:

- organised crime;
- drug trafficking;
- trafficking in human beings;
- cybercrime; and
- terrorism.

The main mechanism that facilitates police cooperation in criminal matters at the EU level is the European Police Office, which is expanded upon below, and the EU's information exchange databases and systems, which is outlined in section 2.3.

2.1.1. Europol and the Europol Information System

Europol was established in 1995⁶ and took up its activities on 1 July 1999. In 2009, it was turned into an EU Agency, the European Police Office.⁷ The law enforcement agency's main objective is to 'support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy'.⁸ Specifically, Europol supports the EU Member States in their fight against terrorism, cybercrime and other serious and organised forms of crime through facilitating mutual cooperation between law enforcement authorities of the Member States. The Agency's focus is on large-scale criminal and terrorist networks which pose a significant threat to the internal security of the EU. Although the Agency has no executive powers, and its officials are not entitled to arrest suspects or act without prior approval from competent authorities

⁶ Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention)

⁷ Council Framework Decision of 6 April 2009 establishing the European Police Office, OJ 2009, L-121/37, later repealed and replaced by: Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol).

⁸ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

in the Member States, Europol provides unique services which enhance the effectiveness of traditional law enforcement measures. Additionally, the **Europol Information System (EIS)** is Europol's central criminal information and intelligence database. It covers all of Europol's mandated crime areas, including terrorism.⁹ The EIS contains information on serious international crimes, suspected and convicted persons, criminal structures, and offences and the means used to commit them. It is a reference system that can be used to check whether information is available on a certain person or an object of interest. The Secure Information Exchange Network Application (SIENA) is the platform that enables the exchange of operational and strategic information among Europol liaison officers, analysts and experts, Member States and third parties with which Europol has cooperation agreements.

2.2. Judicial cooperation in criminal matters

The rationale behind the EU competences in the field of judicial cooperation in criminal matters is to tackle the challenge of serious cross-border crime by promoting judicial cooperation. The principle of mutual recognition is now fundamental to judicial cooperation in the EU. Formerly judicial cooperation in the EU had relied on the principle of mutual legal assistance, in which judiciaries voluntarily agreed to assist each other. In order to promote further integration and as an alternative to harmonising laws, the EU conceptualised the transfer of the principle of mutual recognition to the area of criminal law. National measures such as judicial decisions were to be recognised in all other Member States, enabling Member States to work together with a minimum of procedure and formality. In the 1999 Tampere Conclusions, the European Council described mutual recognition as the 'cornerstone of judicial cooperation in criminal justice'.¹⁰ In 2004, The Hague programme expanded on this, stating that steps must be taken to instil mutual confidence between Member States by laying down minimum procedural standards.¹¹ In 2009 the Stockholm Programme re-emphasised this, stating that cooperation between judicial authorities and the mutual recognition of court decisions within the EU must be further developed, and to this end Member States should continue to adopt common minimum rules to approximate criminal law standards, and strengthen mutual trust.¹²

A number of institutions, policies and activities facilitate judicial cooperation in criminal matters at the EU level, such as Eurojust and the European Judicial Network (EJN), mutual legal assistance and mutual recognition policies. These mechanisms are discussed below.

2.2.1. Mutual legal assistance

Mutual legal assistance (MLA) is an important form of cooperation between Member States for the purpose of collecting and exchanging information used in the investigation or prosecution of criminal offences including evidence gathering and exchange and other forms of legal assistance. Authorities from one country may also request evidence which is located in another country in order to assist in criminal investigations or provide evidence to proceedings in another.

⁹ Europol. Crime Areas. Available at: <https://www.europol.europa.eu/crime-areas-and-trends/crime-areas>.

¹⁰ Tampere European Council 15 and 16 October 1999, Presidency conclusions.

¹¹ Communication from the Commission to the Council and the European Parliament of 10 May 2005 – The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice [COM(2005) 184 final – Official Journal C 236 of 24.9.2005].

¹² The Stockholm Programme – An open and secure Europe serving and protecting citizens [Official Journal C 115 of 4.5.2010].

The depth of cooperation is strengthened with specific measures, such as the European Investigation Order and funding for joint investigation teams, which have been adopted to fight transnational crime by 'facilitating the coordination of investigations and prosecutions conducted in parallel across several States'.¹³

One of the primary MLA instruments is the **European Investigation Order (EIO)**, aimed at speeding up the assistance provided by one country to another in criminal investigations and based on the principle of mutual recognition. The EIO was set up as a comprehensive instrument which sets strict deadlines for gathering requested evidence, limits reasons for refusing such requests and reduces administrative burdens.¹⁴

Joint investigation teams (JITs) often facilitate mutual legal assistance in the EU. A JIT carries out criminal investigations in one or more of the involved Member States, where they enable the direct gathering and exchange of information and evidence without the need to use traditional channels of mutual legal assistance. JITs can also be set up with non-EU Member States, through a number of relevant international legal frameworks, including the Second Additional Protocol to the European Convention on Mutual Legal Assistance¹⁵ which provides for the set-up of JITs. The EU legal framework for setting up JITs between Member States is outlined in Article 13 of the 2000 EU Mutual Legal Assistance Convention and the 2002 Framework Decision on JITs.¹⁶

2.2.2. Eurojust and the European Judicial Network

Eurojust, the EU agency dealing with judicial cooperation in criminal matters, was set up in 2002.¹⁷ Eurojust's objective, as outlined in Article 85 TFEU, is 'to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol'. Article 3 of the 2002 Council Decision founding Eurojust¹⁸ states that the objectives of Eurojust shall be: to support the competent authorities of the Member States to render their investigations and prosecutions more effective, and to improve cooperation between the competent authorities of the Member States. One of the key instruments by which Eurojust supports and strengthens coordination and cooperation is through the facilitation and funding of joint investigation teams (JITs), which play a crucial role in combating cross-border serious and organised crime. Additionally, Eurojust facilitates coordination through the provision of a case management system which is accessible to its EU members.

In 1998 a network of national contact points for the facilitation of judicial cooperation in criminal matters was established, called the **European Judicial Network (EJN)**.¹⁹ The network is composed of contact points in the Member States designated by each Member State among central authorities in charge of international judicial cooperation. The EJN establishes direct contacts between competent authorities by providing legal and practical

¹³ Europol, activities and services, joint investigation teams.

¹⁴ College of policing, European Investigation Order, 2017.

¹⁵ Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

¹⁶ Council of the European Union Joint investigation team practical guide.

¹⁷ Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ 2002, L-63/1.

¹⁸ Ibid.

¹⁹ Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network.

information necessary to prepare an effective request for judicial cooperation. The EJN Secretariat forms part of Eurojust's staff, although it functions as a separate unit.

2.2.3. Extradition through the European Arrest Warrant

In 2002, the EU Framework Decision on the European Arrest Warrant (EAW)²⁰ (implemented into UK law by the 2003 Extradition Act²¹) replaced the often lengthy and politically complex system of extradition with a judicial process of surrender. This was designed to improve and simplify extradition procedures, to speed up the return of people from another EU country who have been convicted of, or suspects awaiting prosecution for, a serious crime or who are wanted for prosecution. If the EAW concerns an offence falling within the 32 categories of offence listed in Annex 4, there is no requirement for it to be a criminal offence in both countries. Furthermore, the grounds on which an individual's surrender can be challenged are strictly limited. A Member State can refuse to surrender its own nationals only if one of the grounds for mandatory or optional refusal applies:

- **Mandatory grounds** for refusal are: that the person has already been judged for the same offence, that the individual in question is a minor in the executing country and that the offence committed by the individual in question is covered by an amnesty in the executing country.
- **Optional grounds** include, but are not limited to, grounds such as the lack of double criminality for offences other than the 32 outlined in Annex 4, territorial jurisdiction, pending criminal procedure in the executing country and statute of limitations.

In applying the EAW, Member States must also respect the procedural safeguards for suspects and accused persons legislated by the EU: the right to information, the right to interpretation and translation, the right to have a lawyer, the right to be presumed innocent and to be present at trial, special safeguards for children suspected and accused in criminal proceedings and the right to legal aid. The EAW is thus a mechanism by which individuals wanted in relation to significant crimes are extradited rapidly between EU Member States to face prosecution or to serve a prison sentence for an existing conviction.

2.2.4. Mutual recognition of court sentences

The four relevant EU legal instruments for **mutual recognition and enforcement of court sentences** in criminal matters are the Framework Decisions on the application of the principle of mutual recognition to:

- Judgments and probation decisions with a view to the supervision of **probation measures and alternative sanctions**²²
- Judgments in criminal matters imposing **custodial sentences or measures involving deprivation of liberty**²³: this Framework Decision ensures that EU Member States recognise judgments in criminal matters imposing prison sentences in one another's

²⁰ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

²¹ The Extradition Act 2003. c.41.

²² Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

²³ 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.

national laws or decisions. In practical terms, it sets up a system for the transfer of convicted prisoners back to the EU Member State of which they are nationals (or normally live in) or to another EU country with which they have close ties so that they serve their prison sentence there.

- **Confiscation orders**²⁴: this Framework Decision allows a judicial authority in one EU Member State to send an order to freeze or confiscate property directly to the judicial authority in another EU Member State where it will be recognised and carried out without any further formality.
- **Financial penalties**²⁵: this Framework Decision introduces specific measures, under the principle of mutual recognition, allowing a judicial or administrative authority to transmit a financial penalty directly to an authority in another EU Member State and to have that fine recognised and executed without any further formality.

2.3. Information exchange databases and systems used for police and judicial cooperation

Finally, several **information exchange databases and systems** were set up by the EU which allow for the sharing of data relevant to law enforcement among Member States and Schengen third countries. The information exchange databases and systems used for police cooperation and judicial cooperation in criminal matters in the EU are:

- the **Schengen Information System** (SIS), established in 2007,²⁶ is a European-wide alerts system that includes real-time alerts for wanted or suspected criminals. **Schengen Information System II** (SIS II) is an updated European-wide IT system that helps facilitate European cooperation for law enforcement, immigration and border control purposes through enabling competent national authorities to enter and consult alerts on wanted or missing individuals and missing objects. SIS II comprises a system and national interfaces in the participating Member States. SIS II is available to both Member States and Schengen third countries.
- the **European Criminal Record Information System** (ECRIS),²⁷ which is a pan-EU data exchange system used by Member States to exchange information on criminal convictions. It is a decentralised system that enables Member States' competent authorities to exchange data with other Member States to improve the exchange of information on 'criminal proceedings against an individual, recruitment procedures with regard to posts involving direct and regular contact with children and information exchange for any other purpose according to national law'.²⁸ ECRIS is currently only available to Member States.
- **Prüm**, established in 2008,²⁹ is a system designed to improve the exchange of information on fingerprints, DNA and vehicle registration data between national police and judicial authorities. It grants reciprocal access to national databases containing

²⁴ Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

²⁵ Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

²⁶ Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of second generation Schengen Information System, OJ 2007, L-205/63.

²⁷ 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.

²⁸ European Parliament. Interoperability of Justice and Home Affairs Information Systems. 2017.

²⁹ 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 2008 L 210 (Prüm Decision).

fingerprints, DNA and vehicle registration data. This reciprocal access is currently available to Member States and to Norway and Iceland – participating Schengen third countries.

- The new **EU Passenger Name Records** rules (PNR) – on 27 April 2016, the European Parliament and the Council adopted Directive (EU) 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (the EU PNR Directive). The Directive notably provides for the obligation of air carriers to transfer to Member States the PNR data they have collected in the normal course of their business.³⁰
- The **Visa Information System (VIS)** is a database which contains information on visa applications by third country nationals who require a visa to enter the Schengen area. It is a centralised system with communication infrastructure linked to national systems and consulates in third countries. The VIS is composed of two systems: the VIS central database and an Automated Fingerprint Identification System (AFIS). The system was designed to facilitate the exchange of data between Member States on applications and subsequent decisions for short-stay visas in order to facilitate the examination of these applications and related decisions.³¹
- The **European Dactyloscopy (EURODAC)** is the EU's asylum fingerprint database which contains information collected from individuals applying for asylum and irregular border-crossers, which is transmitted to the EURODAC central system. The database enables authorities in Member States to determine whether individuals applying for asylum have applied for asylum in another Member State or have illegally transited through another Member State. The database has gone through a number of expansions and upgrades since becoming operational in January 2003, introducing access to law enforcement in 2013 and, as established by the current Regulation governing the system,³² the current key objective of the database is to serve the implementation of the Dublin Regulation.³³ Member States' law enforcement authorities and Europol's access to EURODAC is limited to the comparison of fingerprints linked to criminal investigations with those contained in the EURODAC Central System for the purpose of prevention, detection or investigation of terrorist offences or of other serious criminal offences³⁴. This access by law enforcement authorities is governed by the safeguards including the requirement to initially check all available criminal records databases. Additionally, this approach does not alter the fact that the comparison and data transmission for law enforcement purposes is a strictly ancillary objective of the database, which ensures that law enforcement must follow strict rules for access, including limiting the search to only the most serious crimes such as murder and terrorism.³⁵

³⁰ Directive (EU) 2016/681 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.

³¹ European Parliament. Interoperability of Justice and Home Affairs Information Systems. 2018.

³² 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 an application for international protection 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).

³³ 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 an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

³⁴ Regulation (EU) No 603/2013, Article 1(2), juncto Article 19.

³⁵ European Parliament. Interoperability of Justice and Home Affairs Information Systems. 2018.

3. UK PARTICIPATION IN THE FIELD OF EU POLICE AND JUDICIAL COOPERATION IN CRIMINAL MATTERS

The UK has always held a special position as an EU Member State in terms of its participation in the field of police and judicial cooperation in criminal matters. This section details how the UK currently participates (as a Member State) in EU legislation, policies and activities in the field of police and judicial cooperation in criminal matters, as well as how the UK will participate in these measures during the transition period.

3.1. Current UK participation

Three protocols annexed to the Treaties define the opt-out and opt-in rights of the UK in the area of freedom, security and justice (AFSJ) on a case-by-case basis establishing different derogation regimes for different policy areas.

As part of the Lisbon Treaty negotiations the UK (and Ireland) negotiated a Protocol excluding them from participation in legislation proposed or adopted pursuant to Title V TFEU, unless they decided to opt into it. This led to the inclusion of **Protocol (No. 21)** to the EU Treaties, (also known as the 'opt-in Protocol') on the position of the United Kingdom and Ireland in respect of the AFSJ. Articles 3 and 4 of the Protocol provide for the UK to notify the Council that it wishes to participate in the negotiations either 'within three months after a proposal or initiative has been presented to the Council pursuant to Title V' (of the TFEU) or 'any time after its adoption by the Council pursuant to Title V'. The opt-in is not conditional on the approval of the Council and only requires a unilateral notification letter from the UK. In addition, the UK government has asserted that the opt-in Protocol applies to certain provisions within international agreements the EU had agreed on, despite the absence of a legal base in Title V.³⁶

Secondly, under the 'opt-out' **Protocol (No 19)**, the UK may request to take part in some or all provisions of the Schengen acquis. However, according to the Protocol, participation in the area covered by the provisions of the Schengen acquis is possible only after the legislative procedure has been concluded and is conditional upon unanimous approval of the other EU Member States in the Council.

Protocol No. 36, also called the 'block opt-out' protocol, related to the transitional period of five years after the entry into force of the Lisbon Treaty with regard to the applicability of the powers of the Court of Justice of the European Union to the pre-Lisbon third pillar acquis, i.e. police and judicial cooperation in criminal matters. According to Article 10(5) of Protocol 36 the UK had the right to decide to accept this condition or for the pre-Lisbon third pillar acquis to cease to apply to the UK altogether. In this context, in June 2014, the UK decided for the latter to happen, and made use of the right to opt back into a selected set of policy measures, namely 35 AFSJ acts.³⁷

In addition, the UK decided to opt in to:

- 11 of 23 new legislative proposals in 2015;
- 12 of the 36 new proposals adopted in 2016; and
- 11 of the 18 new proposals through to December 2017.³⁸

³⁶ House of Commons, The UK's opt-in Protocol: implications of the Government's approach. Available at: <https://publications.parliament.uk/pa/ld201415/ldselect/lddeucom/136/13604.html>.

³⁷ HM Government, Decision pursuant to Article 10(5) of Protocol 36 to The Treaty on the Functioning of the European Union, July 2014.

³⁸ JHA opt-in and Schengen opt-out protocols.

In terms of the measures mentioned in the previous section, the UK has opted in to all measures, with the exception of Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, and Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation). With regard to SIS II, the UK participates only in the context of law enforcement cooperation. With regards to VIS, Council Decision 2008/633/JHA on access for consultation of the VIS³⁹ states in its preamble that although the Decision does not apply to the UK, in accordance with Council Framework Decision 2006/960/JHA⁴⁰, information contained in the VIS can be provided to the United Kingdom by the competent authorities of the Member States whose designated authorities have access to the VIS, for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences. Similarly, the national visa register of the UK can be provided to the competent law enforcement authorities of the other Member States.

Despite having been instrumental in their inception, the UK has not opted in to most of the directives relating to **procedural safeguards**⁴¹ for suspects and accused persons as set out in the 2009 Roadmap,⁴² such as the right to legal assistance, the right to legal aid, and safeguards for children. These protections amplify those set out in the European Convention on Human Rights (to which the UK is a signatory) and enable them to be relied on more readily in national courts at the point of breach, rather than having to exhaust all national remedies as for ECHR. Set out in the 2009 Roadmap, legislating these protections was considered necessary in order to strengthen the mutual trust that is a prerequisite for effective mutual recognition. This means that although broadly similar protections are in place, the guarantees provided would be inferior and they would not be under the jurisdiction of the EU and the Court of Justice. England and Wales (Scotland is a separate jurisdiction) does make provision for many of these rights within its national legislation. The right to legal assistance for suspects questioned by the police in the UK, for example, is provided for under s.58 Police and Criminal Evidence Act 1984.⁴³

A comprehensive list of pre-Lisbon instruments and measures which the UK opted back into in 2015 and a list of the EU legislation adopted under Title V TFEU to which the UK opted in between 1 December 2009 and 1 January 2018 can be found in Appendix 1.

³⁹ Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences.

⁴⁰ Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union.

⁴¹ The UK did opt into the Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings; Directive of the European Parliament and of the Council on the right to information in criminal proceedings; Directive on establishing minimum standards on the rights, support and protection to victims of crime.

⁴² Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01).

⁴³ s.58 Police and Criminal Evidence Act 1984, Section 58. Scotland has only recently legislated to provide custodial legal advice to suspects, following the case of *Cadder* which ruled that *Salduz* required suspects held in police custody to have access to a lawyer in order to comply with Article 6 ECHR.

3.2. UK participation during the transition period

On 19 March 2018, the EU and UK negotiators reached a political deal on the terms of a Brexit transition period in a new draft withdrawal agreement.⁴⁴ It should be noted that the provisions on the transition laid down in part four of the draft agreement will not be legally binding until the final withdrawal treaty is signed. According to Article 121 of the draft agreement, the transition period will start on 29 March 2019 (the day the UK legally leaves the EU) and end on 31 December 2020 – a 21-month period.

Article 122(1) of the draft agreement specifies that the **UK will remain bound by EU law applicable to it**: ‘Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period’.

Article 122(5) specifies that the relevant provisions within Protocol and 19 and 21 relating to **measures which amend, build upon or replace an existing measure adopted pursuant to Title V of Part Three of the TFEU** by which the UK is bound before the date of entry into force of the withdrawal agreement shall continue to apply mutatis mutandis during the transition period.

With regard to **new measures**, Article 122(5) states that the UK will no longer have the right to notify its wish to take part in the application of new measures pursuant to Title V of Part III of the TFEU other than those referred to in Article 4a of Protocol No 21. However, Article 122 (5) further states that in order to support continuing cooperation between the EU and the UK, the EU may invite the UK to cooperate in relation to new measures adopted under Title V of Part III TFEU, ‘under the conditions set out for cooperation with third countries in the relevant measures’.

In addition, title V of the draft agreement lays down specific provisions on **pending issues**, i.e. police and judicial cooperation proceedings which are still ongoing before the end of the transition period. For example Article 58 (1)(b) states that with regard to EAW, where the requested person was arrested before the end of the transition period for the purposes of the execution of an EAW, Council Framework Decision 2002/584/JHA shall apply for the purpose of this cooperation between the EU Member States and the UK.

⁴⁴ Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 35 – Commission to EU27. Available at: https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf.

4. OVERVIEW OF EU AND UK POSITION ON THE FUTURE RELATIONSHIP IN POLICE AND JUDICIAL COOPERATION IN CRIMINAL MATTERS

4.1. The EU's vision of the future relationship in police and judicial cooperation in criminal matters

The EU is yet to publish a specific analysis expanding on the form and content of the future relationship it desires with the UK in the field of police and judicial cooperation in criminal matters from a legal perspective. However, since the UK referendum, the European Parliament, the European Council and European Commission's 'Task Force for the Preparation and Conduct of the Negotiations with the UK under Article 50 TEU' (from here on referred to as TF50) have published documents outlining their guidelines on the framework for the future relationship. These are summarised below.

4.1.1. European Parliament position on the framework of the future EU–UK relationship

On 14 March 2018, the European Parliament adopted the **Resolution on the framework of the future EU–UK relationship**.⁴⁵ This resolution addressed the future relationship between the UK and EU as it pertains to 'foreign policy, security cooperation and development cooperation' as well as 'internal security'.

In the resolution, the European Parliament reiterated that the conclusion of an association agreement between the EU and the UK could 'provide an appropriate framework for the future relationship, and secure a consistent governance framework, which should include a robust dispute resolution mechanism, thus avoiding a proliferation of bilateral agreements and the shortcomings which characterise the EU's relationship with Switzerland'.⁴⁶ Furthermore, the resolution proposed that this relationship be based on the following four pillars:

- Trade and economic relations;
- Foreign policy, security cooperation and development cooperation;
- Internal security; and
- Thematic cooperation.

The resolution notes that 'the UK as a third country will not be able to participate in the EU's decision-making process and that EU common positions and actions can only be adopted by EU Member States'. It does, however, point out that 'this does not exclude consultation mechanisms that would allow the UK to align with EU foreign policy positions, joint actions, notably on human rights, or multilateral cooperation, especially in the frameworks of the UN, OSCE and Council of Europe'. However, such cooperation would be conditional on full compliance with, *inter alia*, EU fundamental rights.

In addressing 'internal security', the resolution stresses that 'it is in the mutual interest of the EU and the UK to establish a partnership that ensures continued security cooperation to face shared threats, especially terrorism and organised crime, and avoids the disruption of information flows in this field'. However, the resolution continues by drawing red lines with regard to the UK's influence in this area by stating that 'third countries (outside the Schengen area) do not benefit from any privileged access to EU instruments, including databases, in this field, nor can they take part in setting priorities and the development of the multiannual strategic goals or lead operational action plans in the context of the EU policy cycle'. Therefore, it is implicit within the resolution that despite the mutual interest of the EU and the UK in continued cooperation, the current arrangements and instruments will need to be

⁴⁵ European Parliament resolution of 14 March 2018 on the framework of the future EU/UK relationship, 2018.

⁴⁶ Ibid.

adapted to fit the UK's new status as a third country, with the resolution stating that there is '[a] need to protect ongoing procedures and investigations involving the UK, through transitional arrangements'. Furthermore, the resolution goes on to state that 'separate arrangements will have to be found with the UK as a third country with regard to judicial cooperation in criminal matters, including on extradition and mutual legal assistance, instead of current arrangements such as the European Arrest Warrant'.

In the context of developing the future relationship in this field, this resolution suggests that 'future cooperation can be developed on the basis of non-Schengen third-country arrangements enabling the exchange of security-relevant data and operational cooperation with EU bodies and mechanisms (such as Europol and Eurojust)'. The resolution 'stresses that such cooperation should provide legal certainty, must be based on safeguards with regard to fundamental rights as set out in the European Convention on Human Rights and must provide a level of protection at least equivalent to that of the Charter, additionally it should fully respect EU data protection standards and rely on effective enforcement and dispute settlement'. In summary, the resolution reflects the European Parliament's position acknowledging the benefits of continued police and judicial cooperation with the UK to the EU's internal security, while emphasising the third country status of the UK following withdrawal, granting the UK no special accommodations based on its prior membership of the EU.

4.1.2. European Commission position

The TF50 slides presented to the Council Working Party (Article 50) on 15 June 2018 reiterate the EU's 'objective and its components' with regard to the EU27 approach to the EU–UK future relationship,⁴⁷ reiterating the EU's objective that 'law enforcement and judicial cooperation in criminal matters should constitute an important element of the future EU–UK relationship, while taking into account that the UK will be a third country outside Schengen'.⁴⁸ The TF50 slides expand upon this objective, stating that the building blocks or components underlying the broad objective rest on the following principles:

- effective exchanges of information;
- support for operational cooperation between law enforcement authorities;
- judicial cooperation in criminal matters; and
- measures against money laundering and terrorism financing.

Additionally, the TF50 suggests a number of safeguards pertaining to fundamental rights, data protection and dispute settlements. Both the fundamental rights safeguards, which denote that the UK remain party to the European Convention of Human Rights (ECHR), and the data protection safeguards, which would require an Adequacy decision on UK data protection standard⁴⁹s, should include provision for a so-called 'guillotine clause'.⁵⁰ The TF50 states that this clause would be invoked should the UK have the adequacy decision declared invalid by the CJEU or should the UK leave the ECHR.

On 19 June 2018, in his speech on 'post-Brexit police and judicial cooperation in criminal matters' delivered at the joint event hosted by the European Commission and the European Union Agency for Fundamental Rights (FRA), the Commission's chief Brexit negotiator Michel

⁴⁷ Task Force for the Preparation and Conduct of the Negotiations with the UK under Article 50 TEU. Internal EU27 preparatory discussions on the framework for the future relationship on police and judicial cooperation in criminal matters. 18 June 2018. TF50 (2018) 18/6. Commission to EU27.

⁴⁸ Ibid.

⁴⁹ Please see section 6 for a further discussion on the legal possibilities for ensuring adequate data protection safeguards, beyond the requirement of an Adequacy decision.

⁵⁰ Ibid.

Barnier noted that in any future relationship the UK will have limited access to EU security databases. Mr Barnier emphasised that law enforcement is data-driven, stressing the importance of having an effective exchange of information between police forces and judicial authorities in the EU Member States and the UK. Mr Barnier also pointed to the need for information exchanges between the UK and EU Agencies – Europol and Eurojust – on terrorism and serious cross-border criminality. However, Mr Barnier stated that ‘based on the UK’s positions, our cooperation will need to be organised differently. It will rely on effective and reciprocal exchanges, but not on access to EU-only or Schengen-only databases.’⁵¹

4.1.3. Potential factors determining the degree of cooperation

The European Commission’s TF50 has outlined, without prejudice to discussions on the framework of the future relationship, the options for cooperation which it believes should be available for a third country in the area of police and judicial cooperation in criminal matters, along with the likely consequences of applying each third country model to the UK. As outlined in the TF50 slides presented to the Council Working Party (Article 50) on 23 January 2018 on the ‘Internal EU27 preparatory discussions on the framework for the future relationship on police and judicial cooperation in criminal matters’,⁵² the factors determining the degree of the EU cooperation with third countries more generally are, in the Commission’s view:

- EU27 security interest;
- shared threats and geographic proximity;
- existence of a common framework of obligations with third countries;
- risk of upsetting relations with other countries;
- respect for fundamental rights, essentially equivalent data protection standards; and
- strength of enforcement and dispute settlement mechanisms.

The European Council’s Article 50 Guidelines published in March 2018⁵³ also refer to the relevance of the shared threats and geographic proximity: ‘law enforcement and judicial cooperation in criminal matters should constitute an important element of the future EU–UK relationship in the light of geographic proximity and shared threats’.

4.2. The UK government’s vision of the future relationship in police and judicial cooperation

In the UK government’s white paper published in February 2017, ‘The United Kingdom’s exit from, and new partnership with, the European Union’, section 11, ‘cooperating in the fight against crime and terrorism’, states that the UK ‘will continue to work with the EU to preserve UK and European security, and to fight terrorism and uphold justice across Europe’.⁵⁴ Additionally, the UK expresses the desire to continue working closely and sharing information with the EU: ‘[with the] constantly evolving [threat], our response must be to work more closely with our partners, including the EU and its Member States, sharing information and supporting each other in combating the threats posed by those who wish us harm’. Section

⁵¹ European Commission and the European Union Agency for Fundamental Rights. Speech, 19 June 2018. Michel Barnier. Post-Brexit police and judicial cooperation in criminal matters.

⁵² Task Force for the Preparation and Conduct of the Negotiations with the UK under Article 50 TEU. Internal EU27 preparatory discussions on the framework for the future relationship on police and judicial cooperation in criminal matters. 29 January 2018. TF50 (2018) 26/2. Commission to EU27.

⁵³ European Council (Art. 50) guidelines on the framework for the future EU-UK relationship, 23 March 2018, EUCO XT 20001/18. BXT 25 CO EUR 5 CONCL 2.

⁵⁴ UK Government White Paper, The United Kingdom’s exit from, and new partnership with, the European Union, 2 February 2017.

11 concludes: 'we [the UK] will seek the best deal we can with the EU ... [in which] public safety in the UK and the rest of Europe will be at the heart of our negotiation'.⁵⁵

Following the broad scope of 12 priority areas outlined by Prime Minister Theresa May in her Lancaster House speech on the new partnership with the European Union⁵⁶, a government future partnership paper was published on 18 September 2017⁵⁷, with a more specific focus on the UK and EU's future relationship in matters of 'Security, law enforcement and criminal justice'. Although the paper does not provide specific legal proposals that the UK will be seeking, it once again reiterates the UK government's desire 'to build a new, deep and special partnership with the European Union' and outlines its objectives for the future relationship in the area of police and judicial cooperation on criminal matters, which the UK suggests should be underpinned and built upon by three core objectives to⁵⁸:

- protect the safety and security of citizens and uphold justice in the UK and across the EU;
- maintain the closest and most cooperative of partnerships, continuing the longstanding traditions of friendship between the EU27 and the UK; and
- continue to cooperate on the basis of shared democratic values and respect for the rule of law.

To date, the UK government's clearest and most detailed vision of its future relationship with the EU is presented in the white paper on "The future relationship between the United Kingdom and the European Union", published on 12 July 2018⁵⁹. In section 2.3 on law enforcement and criminal justice cooperation, the UK government proposes, what it calls an 'ambitious partnership with the EU that goes beyond existing precedents in this area'⁶⁰. It suggests this relationship should cover: mechanisms for rapid and secure data exchange, practical measures to support cross-border operational cooperation and continued UK cooperation with EU law enforcement and criminal justice agencies⁶¹. Although the paper acknowledges the consequences of Brexit for the nature of the security relationship between the EU and the UK, the paper suggests that it is vital that both parties maintain legal, practical and technical capabilities in the future, highlighting that there is a mutual interest in avoiding the creation of unnecessary gaps in operational capabilities.

Most saliently, the UK government puts forth its desire for a coherent and legally binding agreement on internal security that sets out respective commitments. In this regard, the UK's ambition is to 'cooperate on the basis of existing tools and measures that support these capabilities, amending legislation and operational practices as required and as agreed to ensure operational consistency between the UK and the EU'⁶². The UK envisages that within this agreement will sit appropriate horizontal provisions on agreed safeguards that will underpin the future relationship, to include robust governance arrangements and a dispute resolution mechanism supported by comprehensive data protection arrangements. The paper also reiterates the UK is committed to its membership of the ECHR.

⁵⁵ UK Government White Paper, The United Kingdom's exit from, and new partnership with, the European Union, February 2017.

⁵⁶ Speech by Theresa May, Lancaster House, 17 January 2017.

⁵⁷ Department for exiting the European Union, Security, law enforcement, and criminal justice – A Future partnership paper, September 2017.

⁵⁸ Ibid.

⁵⁹ UK Government White Paper, The future relationship between the United Kingdom and the European Union, July 2018.

⁶⁰ Ibid, pp. 54-63.

⁶¹ Ibid, p.55.

⁶² Ibid, p.56.

In terms of practical cooperation, the UK government seeks continued participation in Europol and Eurojust, going beyond the terms of existing third country agreements. With regards to Europol, it states that “the UK would not be able to maintain its current contribution to Europol” on the basis of an agreement similar to those currently existing with other third countries.⁶³ Where the UK participates in an EU agency, the UK will respect the remit of the CJEU⁶⁴.

On extradition, the white paper recognises the challenges to the full operation of the EAW in the UK as a third country, but aims to address this issue during the implementation period of the Withdrawal Agreement (see section 4.2.1. below), underpinned by “mutual trust generated by the long history and experience of operating the EAW between the UK and the EU”.⁶⁵ The UK also proposes to continue the exchange of evidence in cross-border criminal investigations on the basis of the EIO and is seeking full participation rights in JITs, including the ability to initiate them.⁶⁶

The white paper also specifically addresses the data exchange tools within the context of police and judicial cooperation, referencing the UK’s desire for continued participation in, and contribution to, the data exchange mechanisms of PNR, SIS II, ECRIS and Prüm⁶⁷. The white paper suggests that without continued UK participation and contribution in these systems and databases, there would be a significant loss of capability which would reduce the UK’s and the EU’s ability to protect citizens across Europe. The UK government proposes an agreement in this regard, which would allow for the exchange of sensitive information and data including information about airline passengers, criminal records, DNA, fingerprint, vehicle registration and “alerts to police and border forces, with access to systems that allow for efficient responses”.⁶⁸

In terms of data protection, the white paper states that the future EU-UK relationship should: ‘provide for the continued exchange of personal data between the UK and the EU with strong privacy protections for citizens’⁶⁹. The UK government acknowledges the importance of aligning, and remaining in alignment with, EU data protection standards, referring to the UK’s recent Data Protection Act 2018 which “strengthened UK standards in line with the EU’s General Data Protection Regulation (GDPR) and the Law Enforcement Directive”. According to the white paper, this provides a unique starting point “of trust in each other’s standards and regulatory alignment on data protection” for an extensive agreement on the exchange of personal data, building on the existing adequacy framework.⁷⁰

4.2.1. The EU Withdrawal Act

On 26 June 2018 the European Union (Withdrawal) Act⁷¹ became law in the UK. The EU (Withdrawal) Act is a piece of UK legislation that repeals the European Communities Act 1972, under which EU legislation was incorporated into UK law after the UK accession to the European Communities. The Act does not include specific provisions on police and judicial cooperation in criminal matters after Brexit. However, a few elements are relevant to note, for the future relationship in the area of police and judicial cooperation:

⁶³ Ibid, p.62.

⁶⁴ Ibid, p. 62.

⁶⁵ Ibid, p. 60.

⁶⁶ Ibid, p. 61.

⁶⁷ Ibid, pp. 56-59.

⁶⁸ Ibid, p. 57.

⁶⁹ Ibid, pp. 73-75.

⁷⁰ Ibid, p. 75.

⁷¹ European Union (Withdrawal) Act 2018, Available at: <http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted/data.htm>.

- The **Charter of Fundamental Rights** will not be transferred into UK national law. Even though such proposals were made, the House of Commons rejected this proposal (i.e. amendment 5), with the House of Lords accepting this decision;
- The Act will not prevent the UK from **replicating EU law** adopted after the UK withdrawal and including it in its national law (amendment 32)⁷²;
- The Act will not prevent the UK from continuing to participate in **EU agencies**, such as Europol and Eurojust, following the UK's withdrawal from the EU (amendment 32)⁷³;
- **Retained EU law:** The Act transfers general principles of EU law into domestic law, by transposing directly applicable already existing EU law into UK national law. In this regard, the Act allows for legal challenges to be made if in the three years following UK withdrawal from the EU, UK law fails to comply with the general principles of EU law.

4.2.2. UK proposal of a comprehensive Security Agreement

As stated in the UK white paper of July 2018, the UK is seeking an ambitious partnership covering foreign policy, defence, development, as well as “law enforcement and criminal justice cooperation”.⁷⁴ The UK government's position paper ‘Framework for the UK–EU Security partnership’ of May 2018⁷⁵ highlights the forms of police and judicial cooperation the UK considers to be key to maintaining a similar level of cooperation and coordination as follows:

- practical operational cooperation;
- multilateral cooperation through EU agencies; and
- data-driven law enforcement.

The UK government expresses the opinion that ‘while existing precedents for EU cooperation with third countries under Title V of Part Three TFEU provide context, they are not the right starting point for a future UK–EU partnership’.⁷⁶ Rather, the UK government believes that, given its ‘leading capabilities and expertise in security, its history in the delivery of justice and its influence and involvement in the fight against crime and terrorism’ the right approach is to explore and design a new model with the EU, as part of wider discussions on the deep and special partnership. The UK government justifies the need for this bespoke relationship by stating that ‘there are clear practical benefits to each side from sustaining deep, broad and dynamic cooperation in the fight against crime and terrorism in view of the evolving and growing nature of cross-border threats, as well as the proven value in operating a suite of mutually reinforcing arrangements’.⁷⁷ In that context, the UK has proposed the development of a strategic agreement that provides a ‘comprehensive framework for future security, law enforcement and criminal justice cooperation between the UK and the EU’,⁷⁸ which would provide a legal basis for the UK's continued cooperation in the key instruments outlined in the following section. This agreement would outline the scope and objectives of this cooperation and the dispute resolution mechanisms required.

⁷² Institute for Government, EU Withdrawal Bill: amendments and debates, 2018.

⁷³ Ibid.

⁷⁴ UK Government White Paper, The future relationship between the United Kingdom and the European Union, July 2018, p. 51.

⁷⁵ Department for exiting the European Union, Framework for the UK–EU Security Partnership, May 2018.

⁷⁶ Department for exiting the European Union, Security, law enforcement, and criminal justice – A Future partnership paper, September 2017.

⁷⁷ Department for exiting the European Union, Security, law enforcement, and criminal justice – A Future partnership paper, September 2017.

⁷⁸ Department for exiting the European Union, Security, law enforcement, and criminal justice – A Future partnership paper, September 2017.

5. ASSESSMENT OF THE MOST IMPORTANT EU LEGAL INSTRUMENTS FOR COOPERATION WITH THE UK

This section presents an analysis of the current UK participation and cooperation with the EU in the field of police cooperation and judicial cooperation in criminal matters (i.e. the legal instruments listed in the previous section), in terms of its importance from the EU's perspective.

As outlined in the European Parliament's Resolution on the framework of the future EU–UK relationship,⁷⁹ it is in the mutual interest of the EU and the UK to establish a partnership that ensures continued security cooperation. The EU27 security interest is considered a key element in the decision-making on the degree of cooperation that should exist after the withdrawal from the UK, as the UK and the EU face a number of shared threats to their citizens, including terrorism and serious organised crime.

Therefore, for the purpose of this study, the 'importance' of a certain instrument has been based mostly on whether the cooperation taking place under a given EU legal instrument is in the EU27 security interest, by focusing on:

- the use of the instrument by the UK;
- the contribution of the UK to the instrument;
- perception of stakeholders, in particular at the EU level.

The European Commission's 'Task Force for the Preparation and Conduct of the Negotiations with the UK under Article 50 TEU', in a slide deck presented to the Council Working Party (Article 50) on 23 January 2018 on the 'Internal EU27 preparatory discussions on the framework for the future relationship on police and judicial cooperation in criminal matters',⁸⁰ outlined the building blocks of the future relationship as the exchange of security relevant data, support for operational cooperation and judicial cooperation in criminal matters. Therefore, these building blocks of the future relationship could be interpreted as the forms of police and judicial cooperation that the EU believes are of most benefit to the EU and the remaining 27 Member States.

Similarly, in the Council's Article 50 Guidelines,⁸¹ the Council stated its desire for the future partnership to 'cover effective exchanges of information, support for operational cooperation between law enforcement authorities and judicial cooperation in criminal matters'.

The list of measures highlighted by most stakeholders consulted as part of the study as being most relevant and important for the EU and its Member States, aligns with those measures, namely: EU Agencies (Europol and Eurojust), the EAW, the EIO, the mutual recognition of court sentences and information exchange databases. In addition, joint investigation teams (JITs) were raised by the interviewees and study experts as being a key instrument in the police and judicial cooperation. However, it was also noted that at the same time, the UK could continue to cooperate with EU Member States through JITs through a number of Council of Europe and UN frameworks.

Table 2 provides evidence of the UK contribution and use by the UK of these different EU measures in the field of police and judicial cooperation in criminal matters, which underlines

⁷⁹ European Parliament Resolution of 14 March 2018 on the framework of the future EU–UK relationship (2018/2573(RSP)).

⁸⁰ Task Force for the Preparation and Conduct of the Negotiations with the UK under Article 50 TEU. Internal EU27 preparatory discussions on the framework for the future relationship on police and judicial cooperation in criminal matters. 29 January 2018. TF50 (2018) 26/2. Commission to EU27.

⁸¹ European Council (Art. 50) guidelines on the framework for the future EU–UK relationship, 23 March 2018, EUCO XT 20001/18. BXT 25 CO EUR 5 CONCL 2.

the importance of these measures. Despite the UK's right, and decision to use this right, to opt out of proposals relating to the area of freedom, security and justice, it has played an important role in the development of police and judicial cooperation mechanisms at the EU level. The UK engages with Member States to facilitate police and judicial cooperation through 'data sharing tools, practical cooperation arrangements, and a number of EU agencies'.⁸² The UK's contribution to the development of practical measures to improve information exchange and cooperation have, in turn, helped to improve the 'ability of operational partners'.⁸³

Stakeholders consulted as part of the study highlighted the importance of informal mechanisms of cooperation and the values of personal contacts between judicial and law enforcement communities in different Member States. These personal relationships will not cease to exist following the UK's withdrawal, but as institutional relationships they may become harder to sustain as personnel move on and contacts within key institutions are lost.

Unlike the majority of other Member States, the UK exercises its cooperation and collaboration in a vertical way. The Home Office acts as a single point of contact for all outgoing and incoming requests for cooperation with other countries (including the EU27). As a result, a significant number of the personal relationships that currently exist between the UK and the Member States in the field of police and judicial cooperation are with staff within the UK Home Office – which will be a likely relevant partner for the EU after the withdrawal.

However, as discussed in multiple secondary sources, and acknowledged by stakeholders and practitioners in the field, many, if not all, of the EU legal instruments that the UK participates in act as a comprehensive and holistic body of instruments or toolkit and any selection of individual measures would result in the reduced effectiveness of the entire patchwork. Furthermore, the links between related measures, such as the importance of SIS II for the current effective functioning of the European Arrest Warrant, highlighted the interdependence of a number of measures and therefore of the relative increase in importance of these measures due to their interdependency.

Detailed statistics and data on the Member State contribution to the different measures in the field of police cooperation and judicial cooperation in criminal matters are not generally available (e.g. number of extraditions under the EAW per Member State per year). However examples of the UK contribution to a number of EU instruments were included in a few UK House of Commons reports, in the oral evidence provided to the different committees of the UK House of Commons, and in a few other research documents and articles. Table 2 presents these examples of the UK contribution to the different EU legal instruments.

⁸² Department for exiting the European Union, Security, law enforcement, and criminal justice – A Future partnership paper, September 2017.

⁸³ Department for exiting the European Union, Security, law enforcement, and criminal justice – A Future partnership paper, September 2017.

Table 2: UK's contribution to a number of key measures in the field of police cooperation and judicial cooperation in criminal matters

EU measure	UK participation in EU measure
Europol & EIS	<ul style="list-style-type: none"> • The UK has played a leading role in the development of Europol's activities and, as highlighted by a Europol spokesperson, 'is also one of the leading sources of intelligence contributing to Europol's databases on serious and organised crime'.⁸⁴ • The UK has the largest liaison bureau of any EU Member State, with 17 British liaison officers currently posted in Europol.⁸⁵ • Europol's Internet Referral Unit was based upon the UK's Counter-Terrorism Internet Referral Unit. • The UK was a founding member of the Joint Cybercrime Action Taskforce (J-CAT).⁸⁶ • The UK made over 7,400 intelligence contributions to Europol Analysis Projects in 2016 and, as of September 2017, the UK was participating in over 40 Joint Investigation Teams. The UK is the 'second largest contributor to Europol information systems and is copied in to 40% of the institution's data messages'.⁸⁷ • The approximate share of Europol casework that 'is thought to have a British focus' is 40%, and the UK authorities 'initiated some 2,500 cases for cross-border investigation'.⁸⁸ • Furthermore, the UK currently participates in all 13 of Europol's current operational priority projects.
Eurojust & JITs	<ul style="list-style-type: none"> • UK active involvement with JITs.⁸⁹
European Judicial Network (EJN)	<ul style="list-style-type: none"> • The UK's EJN structure includes 16 members. It consists of one National Correspondent (NC), one Tools Correspondent (TC) and 14 Contact Points (CPs). The NC, TC and one of the CPs are based at the Home Office.
European Investigation Order	<ul style="list-style-type: none"> • The European Investigation Order is a new instrument, which came into effect in the EU on 22 May 2017 (31 July 2017 in the UK). • Oral evidence provided by the Crown Prosecution Service to the House of Lords European Union committee suggests that for both

⁸⁴ Rob Wainwright quoted in Politico. Europol first in line for life after Brexit. Available at: <https://www.politico.eu/article/europol-first-in-line-for-life-after-brexitvb-law-enforcement-rob-wainwright/>

⁸⁵ House of Commons. Home Affairs Committee. UK–EU security cooperation after Brexit. Oral evidence taken on 7 March 2017, Q141.

⁸⁶ Statewatch. Policing the internet: how Europol takes action against undesirable content online. July 2017.

⁸⁷ House of Commons. Home Affairs Committee. Oral evidence: Home Office delivery of Brexit: policing and security co-operation, HC 635. 23 January 2018.

⁸⁸ Rand Corporation. Defence and security after Brexit. Available at: https://www.rand.org/content/dam/rand/pubs/research_reports/RR1700/RR1786z1/RAND_RR1786z1.pdf

⁸⁹ House of Commons. Home Affairs Committee. UK–EU Since 2009, the UK has been involved in over EUR2.5 million of Eurojust-funded JITs. Following the UK's departure from the EU some EU27 countries may experience significant impacts on both investigative resources and security in the absence of security cooperation after Brexit. Fourth Report of Sessions 2017–19. 14 March 2018.

EU measure	UK participation in EU measure
	Member States and the UK, the EOI will be an important measure which replaces the more cumbersome letters of request. ⁹⁰
European Arrest Warrant (EAW)	<ul style="list-style-type: none"> • Extradition of individuals to EU Member States by the UK: The UK has contributed to developing an effective EAW through the arrest and surrender of individuals to other Member States. During 2016–2017, 1,735 individuals were arrested in the UK on the basis of an EAW, bringing the total number of individuals arrested in the UK on the basis of an EAW to over 12,000 since April 2009.⁹¹ Furthermore, the UK has, from 2004 to 2015, extradited over 8,000 individuals accused or convicted of a criminal offence to other Member States.⁹² This is in stark contrast to the less than 60 individuals extradited each year by the UK to any country before the entry into force of the EAW. • Extradition of individuals to the UK by Member States: Conversely, the UK receives approximately 100 surrenders from other Member States each year through EAWs and between 2009 and 2016 over 1,000 individuals were extradited to the UK by Member States, including over 300 surrenders by Member States of their own nationals.⁹³
Mutual recognition of custodial sentences	<ul style="list-style-type: none"> • From 2010 to 2011, the UK returned 1,019 individuals back to EU Member States to serve the remainder of their custodial sentence; from 2015 to 2017 this number more than tripled to 3,451.⁹⁴
Mutual recognition of confiscation orders	<ul style="list-style-type: none"> • Since the entry into force of the Framework Decision 2006/783/JHA until November 2016, the UK enforced 69 requests for other EU Member States resulting in the freezing of GBP170 million.⁹⁵
Mutual recognition of financial penalties	<ul style="list-style-type: none"> • Between June 2010 and September 2012, England and Wales received 393 cases from other Member States, with an average value of approximately GBP240 per penalty.⁹⁶ • There were 126 outgoing penalties from England and Wales to other Member States between December 2010 and October 2012 with an average value of approximately GBP400 per penalty.⁹⁷

⁹⁰ House of Lords, European Union Committee, Brexit: future UK–EU security and police cooperation, 16 December 2016.

⁹¹ House of Commons. Home Affairs Committee. UK–EU security cooperation after Brexit. Fourth Report of Sessions 2017–19. 14 March 2018.

⁹² House of Commons. Home Affairs Committee. UK–EU security cooperation after Brexit. Fourth Report of Sessions 2017–19. 14 March 2018.

⁹³ House of Commons. UK–EU security cooperation after Brexit. Fourth Report of Session 2017–19. Written evidence submitted by the National Crime Agency (PSC0009). 14 March 2018.

⁹⁴ House of Commons Hansard. Removal of Foreign National Offenders and EU Prisoners, 6 June 2016.

⁹⁵ House of Commons. Select Committee on the European Union, Home Affairs Sub-Committee, Corrected oral evidence: Brexit: future EU–UK security and police co-operation.

⁹⁶ UK Parliament, European Scrutiny committee, The UK's block opt-out of pre-Lisbon criminal law and policing measures, 2012.

⁹⁷ UK Parliament, European Scrutiny committee, The UK's block opt-out of pre-Lisbon criminal law and policing measures, 2012.

EU measure	UK participation in EU measure
Prüm Decision	<ul style="list-style-type: none"> Following a parliamentary debate, the UK chose to opt in to Prüm. The UK is investing heavily in its IT systems to allow EU countries to search the UK's DNA, fingerprint and vehicle registration databases.
PNR Directive	<ul style="list-style-type: none"> The PNR Directive is a new instrument, which Member States were obliged to apply from 25 May 2018, and therefore currently there is little data on its current application and uptake. However, the UK was the first EU country to have a fully functioning Passenger Information Unit and has played an active role in the development of this capability at an EU level. The UK is one of 14 Member States, as of 8 June 2018, that has communicated to the Commission the measures it has adopted to transpose the Directive, namely The Passenger Name Record Data and Miscellaneous Amendments Regulations 2018.⁹⁸ Additionally, the UK is one of 10 Member States that has notified the Commission of the application of the PNR Directive in intra-EU flights as of 8 June 2018.
ECRIS Decision	<ul style="list-style-type: none"> Since its introduction ECRIS has become a key information exchange mechanism and in 2015/16 the majority of the over 155,000 requests for overseas criminal convictions information were made to EU Member States through ECRIS. The UK has made a significant contribution to the effectiveness of ECRIS as the fourth largest user of the system. In 2016, the UK sent and received 173,251 requests and notifications through the EU, 'a significant number of which were submitted through ECRIS',⁹⁹ and notified Member States of 35,509 convictions of their nationals in the UK,¹⁰⁰ enabling national law enforcement agencies to ensure that the offending history of their nationals is correct. Furthermore, the UK responded to 13,460 requests for information from the EU related to UK nationals and has experienced an approximately 30% increase in the number of requests in the last three years.
Schengen Information System II (SIS II)	<ul style="list-style-type: none"> The UK connected into SIS II on 13 April 2015 but only participates in the law enforcement aspects.¹⁰¹ Despite the fact that the UK operates the Schengen Information System II only within the context of law enforcement cooperation, the UK reported 12.91% of total accesses to SIS II in 2016, second only to France (20.1%).¹⁰² Similarly, the UK reported 10.46% of total accesses to SIS II in 2017, behind France (19.17%) and Spain (11.31%).¹⁰³ UK law enforcement officials accessed SIS II over 539 million times in 2017. Of the 76.5 million alerts to people and

⁹⁸ The Passenger Name Record Data and Miscellaneous Amendments Regulations 2018. No. 598.

⁹⁹ House of Commons. UK–EU security cooperation after Brexit. Fourth Report of Session 2017–19. Written evidence submitted by the National Crime Agency (PSC0009). 14th March 2018.

¹⁰⁰ Ibid.

¹⁰¹ European Commission, Schengen Information System II – Questions and answers, 2013.

¹⁰² Eu-Lisa. SIS II – 2017 Statistics. February 2018.

¹⁰³ Ibid.

EU measure	UK participation in EU measure
	objects on the system in 2017, 1.2 million were shared by the UK. ¹⁰⁴ There were '9,832 UK hits on non-UK alerts and 16,782 non-UK hits on UK alerts' in 2017. Furthermore, of the 13,103 non-UK hits on UK alerts through SIS II, 94.3% of these are alerts for individuals including 'terrorists, travelling sex offenders and fugitives'. ¹⁰⁵
Visa Information System (VIS)	<ul style="list-style-type: none"> As an instrument that is part of the Schengen acquis, which the UK does not participate in, the UK has been denied access to information on the VIS by the CJEU. However, in specific cases national authorities and Europol may request access to the data kept in the VIS. Furthermore, the VIS was introduced in the UK for applicants for Schengen visas from participating Member States in November 2015.
European Dactyloscopy (EURODAC) ¹⁰⁶	<ul style="list-style-type: none"> The UK was the fifth largest contributor of data sets on Category 1 individuals, applicants for international protection of at least 14 years of age, with 3.3% of all transactions in 2016 and 4.8% of all transaction in 2017.¹⁰⁷ Additionally, the UK provided 3.4% of the hits related to data for applicants for international protection who have lodged a previous application for international protection in another Member State in 2017, the eighth largest of any Member State.¹⁰⁸

¹⁰⁴ House of Commons. UK–EU security cooperation after Brexit. Fourth Report of Session 2017–19. Written evidence submitted by the National Crime Agency (PSC0009). 14 March 2018.

¹⁰⁵ Ibid.

¹⁰⁶ Eurodac is not a law enforcement measure, but it allows Member States' law enforcement authorities and Europol to compare fingerprints linked to criminal investigations with those contained in EURODAC, only for the purpose of the prevention, detection and investigation of serious crimes and terrorism and under strictly controlled circumstances and specific safeguards; in particular, by including a requirement to check all available criminal records databases first and limiting searches only to the most serious crimes, such as murder and terrorism.

¹⁰⁷ EU-LISA. Eurodac – 2017 Statistics. February 2018.

¹⁰⁸ Ibid.

6. POTENTIAL FORMS OF FUTURE UK COOPERATION AFTER BREXIT

This section presents the potential options for a future UK–EU relationship in the field of police cooperation and judicial cooperation in criminal matters, focusing on potential options for continued UK cooperation through Europol, Eurojust, joint investigation teams, mutual legal assistance (including the European Investigation Order), extradition (including the European Arrest Warrant), and mutual recognition of court sentences in criminal matters. For each type of cooperation and legal instrument, the sub-section presents:

- an overview of the existing forms of cooperation between the EU and third countries;
- the potential options in terms of forms of cooperation and the future relationship with the UK, starting with the current arrangement, followed by the default or fall-back option (i.e. the situation on 1 April 2019 if no agreement is negotiated), to bespoke agreements with higher degrees of cooperation foreseen. For each option the legal procedure required is presented as well.

Finally, an assessment of these options in terms of the feasibility, looking at the legal, institutional and technical implications of each option, is provided.

6.1. Europol (including Europol Information System)

6.1.1. Existing forms of cooperation with third countries

There are currently two forms of partnership agreements between Europol and third countries, depending on the relationship Europol has with the country:

- Strategic agreements or
- Operational agreements.

While the common aim of these forms of agreements is to enhance cooperation between Europol and the country in question, there is a significant difference in the level of cooperation afforded by each.

Strategic arrangements are limited to the exchange of general intelligence and strategic and technical information. This includes strategic and technical information on 'forms, methods and means of committing offenses, new types of drugs, technologies and materials used to produce drugs, methods for the examination and identification of drugs, channels for transferring illegally acquired funds, new forms and methods of combating crime, forensic police and investigating methods, training methods and centres of excellence, and criteria for the evaluation of law enforcement activities'.¹⁰⁹ The countries currently employing strategic agreements with Europol are the People's Republic of China, the Russian Federation and Turkey.

Operational agreements allow for this exchange of general intelligence and strategic and technical information, but in addition they enable the exchange of information, including personal data. As well as the strategic and technical information exchanged in a strategic agreement, an operational agreement enables the exchange of personal data, described as any information 'relating to an identified or identifiable natural person; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an

¹⁰⁹ Rosanò, Alessandro, Protecting Europe beyond Its Borders: The Agreements between Europol and Third States or International Organizations (October 30, 2016). *Cadernos de Direito Actual*, Vol. 4, 9-21, 2016. Available at SSRN: <https://ssrn.com/abstract=2865209> .

identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity'.¹¹⁰ Those countries with operational agreements with Europol are Albania, Australia, Bosnia and Herzegovina, Canada, Colombia, the Former Yugoslav Republic of Macedonia, Georgia, Iceland, Liechtenstein, Moldova, Monaco, Montenegro, Norway, Serbia, Switzerland, Ukraine and the United States.

However, another model of cooperation exists with Denmark, which has the particular position of having withdrawn from Europol, while still being a member of the EU. Following the referendum on the Danish opt-out from Title V of Part Three of the TFEU (area of freedom, security and justice) in 2015 (including withdrawal from Europol), a bespoke operational agreement was signed between Denmark and Europol in 2017. This '**Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and Europol**' allows the continued involvement of Denmark in Europol. Despite the fact that Europol is typically only permitted to reach agreements with non-Member States, it was agreed 'exceptionally that Denmark can be treated as third country in this context to ensure a continued relationship with Europol'.¹¹¹ Through the agreement:

- Recital (3) and Article 10(6) of the cooperation agreement only provide for indirect access to Europol's information exchange databases and systems (i.e. EIS, Secure Information Exchange Network Application (SIENA)) via Danish-speaking Europol staff or Seconded National Experts. Unlike non-Member States on Europol's cooperation list, Denmark is not obliged to justify why it asks for access to the Agency's databases;
- Denmark maintains a presence of Danish-speaking Europol staff or seconded national experts at Europol's headquarters for treating Danish requests to input, receive, retrieve and cross-check data 24/7;
- Denmark partakes in joint investigation teams (JITs); and
- Denmark, upon invitation, may:
 - participate in meetings of Europol's Heads of Europol National Units; and
 - attend meetings of Europol's Management Board and its subgroups in an observer status without voting rights.

Furthermore, Europol will exchange information with Danish competent authorities and will inform Denmark of information concerning it without delay. In return, Denmark continues to contribute to Europol's budget.

Table 3 illustrates the different elements included in each of the agreements.

¹¹⁰ 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.

¹¹¹ Minister's Explanatory Memorandum of 15 February 2017 on the Council Implementing Decision.

Table 3: Summary of existing models of participation in Europol

Form of cooperation	Access to general intelligence and strategic technical information	Ability to exchange information, including personal data	Joint Analysis projects	Liaison Officers	Access to SIENA	Access to EIS	Right to participate in meetings of Heads of Europol National Units	Membership of the Management Board	Management Board voting rights	Ability to lead operational projects	Joint Operational projects
Strategic Agreements	X										
Operational Agreements	X	X	X	X	X	No direct access					If the purpose is relevant to the country, or agreed by all participating Member States
Danish Operational Agreement	X	X	X	X	X	Semi-direct access	Observer status	Only upon invitation			X
Full membership of Europol	X	X	X	X	X	X	X	X	X	X	X

6.1.2. Potential options for the future relationship with the UK – Europol

Table 4 shows the potential options for future UK cooperation with Europol.

Table 4: Summary of options for the future relationship between Europol (including EIS) and the UK

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
(1) Current situation: Cooperation based on full EU membership of Europol	The UK is currently a full member of Europol with representation and voting rights on the Europol Management Board regarding current and future activities of the Agency, adoption of the Agency's budget, programming documents, annual reports, internal audit and data protection.	N/A
(2) Default option: Reliance on Interpol and bilateral police cooperation	Should the UK not conclude any agreement with Europol, it will be forced to rely on cooperation through Interpol and bilateral agreements with Member States. Furthermore, following the 'originator principle', the UK will remain the owner of the data it introduced into the databases and, therefore, can decide to remove this data following its withdrawal. Conversely, the UK would have to stop processing (using) all personal data it has received from Europol.	N/A
(3) Strategic agreement similar to those in place with other third countries	This option presents a significantly reduced level of police cooperation as outlined in Table 3, allowing only for the exchange of general intelligence and strategic and technical information.	Negotiation of an agreement between the UK and Europol.
(4) Operational agreement similar to those in place with other third countries	Providing a greater level of cooperation than a strategic agreement, this option enables the exchange of information which includes personal data.	Negotiation of an agreement between the UK and Europol. An adequacy decision or treaty ensuring the protection of the personal data to be processed will be a prerequisite to concluding such an agreement with the UK. Failing the above, the operational agreement itself will need to contain provisions ensuring essentially equivalent data protection safeguards.
(5) Bespoke operational agreement	This option involves the negotiation of an agreement between Europol and the UK that outlines greater operational cooperation than the standard operational agreement. It is very likely that this enhanced cooperation would not be as comprehensive as the agreement between Denmark and Europol, given (i) Denmark is a member of the EU, and (ii) it would necessitate a robust agreement on the protection of personal data (see section 6.7.4.).	A bespoke operational agreement between Europol and the UK could be negotiated as a separate agreement or as part of the creation of an overarching security agreement between the EU and the UK that provides a framework for the UK's continued cooperation with Europol. An adequacy decision or treaty ensuring the protection of the personal data to be processed will be a prerequisite. Failing the above, the bespoke operational agreement itself will need to contain provisions ensuring essentially equivalent data protection safeguards.

With regard to option 4, a number of stakeholders noted that the agreement between Denmark and Europol was based upon Denmark's status as an EU Member State and its participation in Schengen. A further discussion about the potential implications of the UK status as a non-Schengen third country after Brexit, in terms of the feasibility of such options, can be found in section 6.7.

6.2. Mutual legal assistance (EIO and JITs)

6.2.1. Mutual legal assistance and the European Investigation Order

a. Existing forms of cooperation with third countries – MLA (including EIO)

There is no current form of third country participation in the European Investigation Order (EIO). However, Norway and Iceland have an agreement with the EU¹¹² applying certain provisions of the EU mutual legal assistance Convention of 29 May 2000¹¹³ and its 2001 Protocol, including provisions for JITs. Other Council of Europe members facilitate mutual legal assistance through the Council of Europe 1959 Convention on mutual legal assistance, which also allows for the set-up of JITs. The difference between the Council of Europe MLA Convention and the EU 2000 MLA Convention is minimal, for the UK and other Member States which have ratified the Second Additional Protocol to the Council of Europe Convention.¹¹⁴ The main divergence between the two instruments is that the Council of Europe Convention does not include provisions for the interception of telecommunication. Other third countries, such as Japan and the United States, have negotiated mutual legal assistance agreements with the EU, which include provisions for setting up JITs.

b. Potential options for the future relationship with the UK – MLA (including EIO)

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
(1) Current arrangement – Cooperation based on the 2000 EU MLA Convention and the EIO	As a full EU member, the UK participates in the 2000 European Union convention on Mutual Legal Assistance and the 2001 additional protocol. Additionally, since 31 July 2017 the UK has chosen to partake in the European Investigation Order, which applies timescales and the principle of mutual recognition to requests for and exchange of the transfer of evidence.	N/A
(2) Default option – Cooperation based on Council of Europe MLA Convention	MLA cooperation on the basis of the Council of Europe 1959 Convention ¹¹⁵ and its 1978 Protocol ¹¹⁶ and 2001 Protocol ¹¹⁷	No action required for the EU or those Member States that ratified the CoE Convention. Those Member States who have not ratified the Convention ¹¹⁸ would need to negotiate bilateral agreements with the UK or ratify the Convention or

¹¹² Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto.

¹¹³ Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, Brussels, 29 May 2000.

¹¹⁴ Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

¹¹⁵ European Convention on Mutual Assistance in Criminal Matters 1959.

¹¹⁶ Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 1978.

¹¹⁷ Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 2001.

¹¹⁸ Greece, Italy, Luxembourg.

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
		the second additional Protocol 2001. ¹¹⁹
(3) Cooperation based on the 2000 EU MLA Convention	Cooperation on the basis of the 2000 Mutual Legal Assistance Convention, ¹²⁰ through the negotiation of a bespoke agreement similar to the one concluded by the EU with Norway and Iceland. This option goes beyond the CoE MLA Convention by outlining provisions for the interception of telecommunications. However, the agreements with Norway and Iceland are based on these countries' participation in Schengen since the MLA Convention is in part the further development of the Schengen acquis by the EU.	Negotiation of an agreement between the EU and the UK similar to the one concluded by the EU with Iceland and Norway.
(4) Cooperation based on EIO through a bespoke agreement .	The bespoke agreement would replicate the functions of the EIO (implementing mutual recognition). This instrument involves a higher degree of cooperation than the EU 2000 MLA convention as it removes the need for international letters of request and applies time restrictions on the servicing of evidence.	Negotiation of a bespoke agreement between the EU and the UK
(5) Cooperation based on the EIO using Article 26(4) of the CoE 1959 Convention on MLA	Article 26(4) of the CoE 1959 Convention on MLA states that 'where mutual assistance in criminal matters is practised on the basis of uniform legislation or of a special system providing for the reciprocal application in their respective territories of measures of mutual assistance, these Parties shall, notwithstanding the provisions of this Convention, be free to regulate their mutual relations in this field exclusively in accordance with such legislation or system'. ¹²¹ Under this option the EIO, which does not entirely replace the traditional framework, would become the sole instrument applicable.	Member States and the UK could make a declaration to the Council of Europe, stating that their MLA relations will be governed exclusively by national legislation implementing the EIO. This declaration would be made at the Member State level. This is not so much a legal procedure required; rather, submitting a revised declaration would clarify the situation. This has previously only happened for the 1957 Extradition Convention and EAW, e.g. for Austria declaration of 18 March 2005. ¹²² Additionally, Member States will need to make an amendment in their national legislation (to include the UK) in the provisions implementing the EIO Regulation. It will be up to the Member States to decide whether or not they will extend the scope of the EIO regime to the UK. So, in essence, this option is close to a bilateral agreement.

¹¹⁹ Greece, Italy, Luxembourg.

¹²⁰ Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, Brussels, 29 May 2000.

¹²¹ European Convention on Mutual Assistance in Criminal Matters 1959, Article 26(4).

¹²² Reservations and Declarations for Treaty No.024 – European Convention on Extradition.

6.2.2. Joint Investigation Teams (JITs)

a. Existing forms of cooperation with third countries – JITs

The EU legal framework for setting up joint investigation teams (JITs) between Member States can be found in Article 13 of the 2000 EU Mutual Legal Assistance Convention and the 2002 Framework Decision on JITs.

Forms of participation by third countries include the Agreement between the EU and Iceland and Norway on the application of certain provisions of the EU 2000 Convention on MLA and the 2001 Protocol¹²³ and Article 5 of the Agreement on Mutual Legal Assistance between the European Union and the United States of America.¹²⁴ Furthermore, Article 27 of the Police Cooperation Convention for South-East Europe (PCC-SEE) provides a legal basis for a number of third countries to participate in JITs with several Member States.¹²⁵ Finally, Article 20 of the Second Additional Protocol to the European Convention on Mutual Legal Assistance constitutes the legal bases for the setting up of JITs with Council of Europe countries.¹²⁶

b. Potential options for the future relationship with the UK – JITs

Current arrangement and potential options following Brexit	Description of arrangement	Legal required procedure
(1) Current arrangement – Cooperation based on EU legal framework	The UK and EU Member States currently partake in JITs under Article 13 of the 2000 EU Mutual Legal Assistance Convention and the 2002 Framework Decision on JITs. Which allow for the set-up of EU-funded JITs with other Member States or third countries, which can be facilitated through Eurojust.	N/A
(2) Default option – JITs set up based on international instruments / No UK participation in joint investigation teams.	Under this option the UK would cease to be able to set up JITs through the EU legal framework. Instead, from the EU's perspective the UK's functioning in JITs would be equivalent to any other non-EU Council of Europe country with which it can set up JIT agreements. However, a number of applicable instruments are available for setting up JITs outside of the EU legal framework. Referencing several of these legal bases in the JIT agreement may be necessary. The content of the provisions related to the JITs will justify the specific arrangement. ¹²⁷	The applicable legal procedure below may be used to set up JITs with the UK. <ul style="list-style-type: none"> Article 20 of the Second Additional Protocol to the European Convention on Mutual legal Assistance. Article 9 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Article 19 of the United Nations Convention against Transnational Organised Crime (UNTOC)

¹²³ Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol.

¹²⁴ Agreement on mutual legal assistance between the European Union and the United States of America.

¹²⁵ Member States: Austria, Bulgaria, Hungary, Romania, Slovenia, third countries: Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Moldova, Montenegro, Serbia.

¹²⁶ Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

¹²⁷ Council of the European Union Joint investigation team practical guide.

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
		<ul style="list-style-type: none"> Article 49 of the United Nations Convention against Corruption (UNCAC)

6.3. Extradition (incl. European Arrest Warrant)

6.3.1. Existing forms of cooperation with third countries – Extradition (incl. EAW)

There is currently no form of participation by third countries in the European Arrest Warrant (EAW). Extradition between the EU and non-EU countries is not governed by EU law, except where the EU has agreed specific treaties on this issue, and is instead ‘governed by a combination of national law and bilateral and multilateral treaties’,¹²⁸ including the Council of Europe’s 1957 European Convention on Extradition.¹²⁹

The EU has agreed extradition treaties with the United States and with Iceland and Norway. However, Norway and Iceland are the only non-EU countries to have negotiated a specific surrender arrangement that shares a number of provisions with the EAW¹³⁰ that govern the strict time limits and procedures for the decision to execute the arrest warrant, which forms the key added benefit of the EAW over the Council of Europe Convention on Extradition.

6.3.2. Potential options for the future relationship with the UK – Extradition (incl. EAW)

There is no current form of participation by third countries in the European Arrest Warrant, but the options for the UK’s future relationship with the EU in the field of extradition proceedings more generally (if the EU limits itself to current forms of participation) are shown in Table 5.

Table 5: Summary of options for the future relationship between the EU and the UK

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
(1) Current situation: Cooperation based on the European Arrest Warrant	The UK implemented the Framework Decision introducing the European Arrest Warrant through Parts 1 and 3 of the Extradition Act 2003, which came into force on 1 January 2004. The UK participated fully in the European Arrest Warrant.	N/A
(2) Default option: Cooperation based on the Council of Europe’s 1957 Convention on Extradition	This option reflects the EU’s ability to use the Council of Europe’s extradition framework. However, this would result in a considerable increase in the time taken and cost of the extradition process. Furthermore, surrender requests would be directed through the	No action required for the EU or those Member States that ratified the CoE Convention. However, while all Member States have ratified the Convention, not all Member States have ratified all four of the additional Protocols, due in part to their replication of provisions similar to

¹²⁸ Peers, S. <http://eulawanalysis.blogspot.co.uk/2016/09/extradition-to-non-eu-countries-limits.html>.

¹²⁹ Council of Europe. European Convention on Extradition. European Treaty Series – No. 24. Paris, 13.XII.1957.

¹³⁰ House of Commons. The European Arrest Warrant. Briefing Paper Number 07016. 18 April 2017.

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
	Secretary of State, resulting in a more cumbersome and politicised procedure.	those of the EAW. Therefore, a number of Member States may be required to ratify the additional Protocols in order to replicate these provisions in this default option.
(3) Cooperation based on the EAW through a bespoke agreement between the UK and the EU	This option involves the negotiation of a bespoke extradition agreement that adopts a number of the EAW's provisions. The agreement arranged between the EU and Norway and Iceland, which contains a number of similar provisions to the EAW but with the noticeable inclusion of the Member State's right to waive this extradition principle if it concerns political offences or if extradition of own nationals is laid down in the Member States constitution, could act as a template for this bespoke agreement. However, a number of stakeholders noted in this regard that the agreement between the EU and Norway and Iceland was based upon their participation in Schengen, which will not apply to the UK following the UK's withdrawal from the European Union.	Negotiation between the EU and the UK on a bespoke agreement. A number of Member States would be required to make a constitutional amendment in their national legislation in order to include the UK in the list of countries to which they could surrender their own nationals in accordance with the provisions implementing the EAW Council Framework Decision. ¹³¹
(4) Cooperation based on the EAW by using Article 28(3) of the Council of Europe 1957 Convention on Extradition	According to Article 28(3) of the Council of Europe 1957 Convention on Extradition: ¹³² 'Where, as between two or more Contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provisions of this Convention.' Given that the decision to extend the scope of the EAW regime to the UK rests with individual Member States, this option is, in essence, a series of bilateral agreements, which could result in a fragmented system where a number of Member States refuse to amend their declarations to include the UK, thereby significantly reducing the effectiveness of this option.	While this is not a legal procedure, each Member State would be required to submit an amendment to the existing Member States declarations to the Council of Europe, extending its application to the EU Member States and the UK. Member States will be required to make a similar constitutional amendment in their national legislation in order to include the UK to the list of countries to whom they could surrender their own nationals in accordance with the provisions implementing the EAW Council Framework Decision. ¹³³

¹³¹ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

¹³² Council of Europe. European Convention on Extradition. European Treaty Series – No. 24. Paris, 13.XII.1957.

¹³³ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

6.4. Eurojust and the European Judicial Network

6.4.1. Existing forms of cooperation with third countries – Eurojust

There are currently two forms of participation by third countries in Eurojust. One is a simple **cooperation agreement**, and the other is a cooperation agreement with the **posting of Liaison Prosecutors**. The difference between these two agreements is illustrated in Table 6.

Table 6: Summary of existing models of participation by third countries in Eurojust

Form of Agreement	Liaison Prosecutor	Operational and strategic meetings	Participate in Joint investigation teams under Eurojust
Cooperation Agreement			X
Cooperation Agreement with posting of a Liaison Prosecutor	X	Upon invitation	X

6.4.2. Potential options for the future relationship with the UK – Eurojust

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
(1) Current arrangement – Cooperation based on Full EU membership of Eurojust	Eurojust was set up in 2002 through Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ 2002, L-63/1. As a current EU Member State the UK has full access to the benefits of Eurojust to include national representation in the college, Eurojust Management Board representation, access to the case management system and Eurojust-facilitated JITs, including funding.	N/A
(2) Default option – No institutionalised cooperation between the UK and Eurojust.	Withdrawal from Eurojust, would mean no mechanism for formal judicial cooperation between EU/UK. Cooperation could be envisaged on the basis of ad hoc request or joining Eurojust's third country contact point network	N/A
(3) Cooperation agreement without the posting of a Liaison Prosecutor similar to the one with Iceland, Moldova, Liechtenstein, Ukraine and the former Yugoslav Republic of Macedonia.	A cooperation agreement, without the posting of a Liaison Prosecutor to Eurojust facilities at The Hague but allowing for participation in JITs funded by Eurojust. Under this option there is no provision for access to the Eurojust Case	A future relationship involving a cooperation agreement without the posting of a liaison prosecutor could be entered into through a memorandum of understanding between the UK and the EU.

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
	Management System or management board meeting. Additionally, the third state is not party to the EJM.	
(4) Cooperation agreement with the posting of a liaison prosecutor similar to EU agreement with Switzerland and the USA.	A cooperation agreement, with the UK posting Liaison Prosecutors to Eurojust, allowing, to a certain extent, for the UK to engage in in similar manner to full Eurojust members, such as participation in JITS, and, upon invitation, attendance and participation in operational and strategic meetings. Under this option there is no provision for access to the Eurojust Case Management System or management board meeting. Additionally, the third state is not party to the EJM.	Negotiation of an agreement between the EU and the UK, using similar format as what currently exists for Switzerland and the USA.

It should be noted that any third country agreement between Eurojust and the UK would only be concluded after consultation by Eurojust with the Joint Supervisory Body concerning the provisions on data protection.¹³⁴ This would require the UK to align, and to remain in alignment, with EU data protection standards.

6.5. Mutual recognition of court sentences

6.5.1. Transfer of prisoners

a. Existing forms of cooperation with third countries – Transfer of prisoners

The transfer of prisoners between the EU and Council of Europe parties is governed by the Council of Europe's 1983 Convention on the Transfer of Sentenced Persons.¹³⁵ There is currently no other institutionalised form of cooperation between the EU and third countries concerning the mutual recognition of custodial sentences. Norway had sought to enter an agreement relating to the transfer of prisoners, but the negotiations have been halted.

b. Potential options for the future relationship with the UK – Transfer of prisoners

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
Current arrangement – Cooperation based on the mutual	Following the block opt-out in 2014 the UK chose to re-join the framework decision on mutual recognition of custodial sentences. The policy applies	N/A

¹³⁴ Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ 2002, L-63/1.

¹³⁵ Council of Europe convention on the transfer of sentenced persons, 1983.

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
recognition of custodial sentences	the principle of mutual recognition to the recognition of judgments in criminal matters imposing prison sentences in one another's national laws or decisions.	
The default position – Council of Europe legislation	Fall-back on the 1983 Council of Europe Convention on the Transfer of Sentenced Persons ¹³⁶ and the Additional Protocol to the 1983 Convention on the Transfer of Sentenced Persons (ETS No. 167), ¹³⁷ which together largely replicate the functionality of the EU Framework Decision on custodial sentences.	All Member States have ratified this Convention; however, those Member States that have not ratified the 1997 additional protocol (i.e. Italy, Portugal and Slovakia) would need to negotiate agreements with the UK or ratify the Convention.
Bespoke agreement on mutual recognition of court sentences	Negotiate an agreement which replicated the same functionality as the Framework Decision.	This option would require negotiating a bilateral agreement. There is no precedent for an agreement of this type.

6.5.2. Financial penalties

a. Existing forms of cooperation with third countries – financial penalties

There is currently no other institutionalised form of cooperation between the EU and third countries concerning the mutual recognition of financial penalties, except for the overarching European Convention on the International Validity of Criminal Judgments (ETS 070), which does not apply the principle of mutual recognition and is currently only ratified by 11 Member States and not by the UK.¹³⁸

b. Potential options for the future relationship with the UK – financial penalties

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
Current arrangement – Cooperation based on the mutual recognition of financial penalties	Following the block opt-out in 2014 the UK chose to re-join the framework decision on mutual recognition of financial penalties. The policy applies the principle of mutual recognition to the recognition and execution of a financial penalty directly from the responsible authority in one Member State to another EU Member State.	N/A
The default position – Council of Europe legislation	The UK could ratify the European Convention on the International Validity of Criminal Judgments (ETS 070). ¹³⁹ This convention also relates to fines, confiscations and disqualifications, but on a more limited basis than EU law.	This option would require the UK to first ratify the Council of Europe convention. Additionally, this Convention has currently only been ratified by 13 Member States, so those Member States who have not yet ratified the Convention would need to

¹³⁶ Council of Europe Convention on the Transfer of Sentenced Persons, 1983.

¹³⁷ Additional Protocol to the Convention on the Transfer of Sentenced Persons.

¹³⁸ European Convention on the International Validity of Criminal Judgments, 1970.

¹³⁹ European Convention on the International Validity of Criminal Judgments (ETS 070).

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
		negotiate agreements with the UK or ratify the convention.
Bespoke agreement on mutual recognition of court sentences	Negotiate an agreement which replicated the same functionality as the EU Framework Decision.	This option would require negotiating a bilateral agreement. There is no precedent for an agreement of this type.

6.5.3. Confiscations

a. Existing forms of cooperation with third countries – Confiscation order

The recognition and servicing of confiscation orders between the EU and Council of Europe parties is, similar to financial penalties, governed by Convention on the International Validity of Criminal Judgments¹⁴⁰ as well as the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.¹⁴¹ In addition, the UN legal framework includes provisions for the collection of proceeds of crime on a more limited basis.

b. Potential options for the future relationship with the UK – Confiscation order

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
Current arrangement – Cooperation based on the mutual recognition of confiscation orders	Following the block opt-out in 2014 the UK chose to re-join the framework decision on mutual recognition of confiscation orders. It applies the principle of mutual recognition to allow the judicial authority in one EU Member State to send an order to freeze or confiscate property directly to the judicial authority in another EU Member State.	N/A
The default position – Council of Europe legislation	Fall-back on a number of Council of Europe Conventions including: the Council of Europe Convention on the International Validity of Criminal Judgments ¹⁴² and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, ¹⁴³ which even allows for bilateral asset sharing agreements (similar to the EU framework). This position would be further complemented by a range of thematic UN treaties which also foresee execution of confiscations of the proceeds of the crimes.	As stated above, this option would require the UK to first ratify the CoE Convention on the International Validity of Criminal Judgments. Additionally, it would require those Member States who have not ratified the Convention on the International Validity of Criminal Judgments, to negotiate agreements with the UK, to ratify the convention or apply the more limited UN legal framework.

¹⁴⁰ European Convention on the International Validity of Criminal Judgments (ETS 070).

¹⁴¹ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

¹⁴² European Convention on the International Validity of Criminal Judgments (ETS 070).

¹⁴³ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
Bespoke agreement on mutual recognition of court sentences	Negotiate an agreement which replicated the same functionality as the EU Framework Decision.	This option would require negotiating a bilateral agreement. There is no precedent for an agreement of this type.

6.6. Information exchange databases and systems

International transfers of personal data to third countries, as the UK will be following its withdrawal from the EU, require safeguards to ensure that the principle of adequate protection is respected when transferring the data. While the UK is part of the EU, it is considered adequate and therefore data can be transferred freely between the UK and other Member States. Following its withdrawal, transfers of personal data from the EU to the UK will be subject to EU rules on transfers to a third country. The UK will therefore be required to obtain an adequacy decision from the Commission, declaring that the UK offers a level of data protection that the Commission considers essentially equivalent to the EU level. The adoption of an adequacy decision involves 'a proposal from the European Commission, an opinion of the European Data Protection Board, an approval from representatives of EU Member States (Committee) and the subsequent adoption of the decision by the European Commissioners'.¹⁴⁴ The effect of obtaining an adequacy decision would be that personal data may be freely exchanged from the EU to the UK without the need for additional safeguards.

6.6.1. Existing forms of cooperation with third countries – databases and systems

Table 7 gives an overview of access to information exchange databases and systems by Member States, non-Member States, Schengen area third countries and other third countries.

Table 7: Summary of access to information exchange databases and systems

Information exchange databases and systems	Available to Member States	Available to non-EU Schengen Area third countries	Available to non-EU and non-Schengen area third countries
Second Generation Schengen Information System (SIS II)	X	X	
The European Criminal Records Information System (ECRIS)	X		
The PRÜM Decisions	X	X	
Passenger Name Record (PNR)	X		EU carriers provide PNR
Visa Information System (VIS)	X	X (Associated Dublin states)	

¹⁴⁴ Directive (EU) 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, Article 36, Article 51(g) and Article 58; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Article 9, Article 44 and Article 70(s).

Information exchange databases and systems	Available to Member States	Available to non-EU Schengen Area third countries	Available to non-EU and non-Schengen area third countries
	(Only those Member States part of the Schengen acquis)		
European Dactyloscopy (EURODAC)	X	X	

a. Second Generation Schengen Information System (SIS II)

SIS II is currently available only to EU Member States and non-EU countries within the Schengen Area (Switzerland, Norway, Liechtenstein and Iceland).

b. Exchange of criminal records (incl. ECRIS)

ECRIS is currently only available to EU Member States and there is currently no precedent for direct third country access to ECRIS, including for those Schengen Area Members that are not Member States. However, through Article 13 of the Council of Europe Convention on Mutual Assistance in Criminal Matters of 1959, members of the Council of Europe may obtain information from ECRIS through requests to Member States.

c. Exchange of passenger name records (including PNR)

The EU has concluded international PNR agreements with the United States, Australia and Canada. However, at this stage, the new EU–Canada Agreement has not entered into force due to the European Parliament voting to seek the opinion of the CJEU. The CJEU declared that the agreement may not be concluded in its current form as it did not meet the requirements stemming from the fundamental rights recognised by the EU, with provisions incompatible with the respect for private life and the protection of personal data. The ruling highlighted that the provisions in the agreement on the ‘retention of data, its use and its possible subsequent transfer to Canadian, European or foreign public authorities entail an interference with the fundamental right to respect for private life’.¹⁴⁵ Furthermore, the CJEU outlined that the provisions on the transfer of sensitive data to Canada and on the processing and retention of that data are incompatible with fundamental rights. The Court did not generally object to the transfer and processing of PNR data, but ruled that the agreement should provide for precise and clear legal bases for the transfer and processing of such data. The agreement is currently being renegotiated in light of the Court’s ruling.

d. Exchange DNA and fingerprints (incl. Prüm)

Norway and Iceland have negotiated an agreement on access to Prüm that ‘explicitly considered’¹⁴⁶ the current relationship between the EU and these countries, as well as their membership of the Schengen area. In addition, the Council has approved requests by Switzerland and Liechtenstein to launch negotiations regarding gaining access to Prüm.

¹⁴⁵ Opinion of the Court (Grand Chamber) of 26 July 2017. Opinion pursuant to Article 218(11) TFEU – Draft agreement between Canada and the European Union – Transfer of Passenger Name Record data from the European Union to Canada – Appropriate legal bases – Article 16(2), point (d) of the second subparagraph of Article 82(1) and Article 87(2)(a) TFEU – Compatibility with Articles 7 and 8 and Article 52(1) of the Charter of Fundamental Rights of the European Union. Case Opinion 1/15.

¹⁴⁶ House of Commons. Home Affairs Committee. UK–EU security cooperation after Brexit. Fourth Report of Sessions 2017–19.

e. Visa Information System (VIS)

The Visa Information System is currently only available to members of the Schengen area. However, in exceptional circumstances, data obtained from the VIS by a Member State may be transferred or made available to a third country or an international organisation, namely in an “exceptional case of urgency”:

- If “exclusively for the purposes of the prevention and detection of terrorist offences and of other serious criminal offences as a third country”¹⁴⁷;
- If “necessary in individual cases for the purpose of proving the identity of third-country nationals, including for the purpose of return”, and where the conditions in Article 31 (2) VIS Regulation are satisfied.¹⁴⁸

f. European Dactyloscopy (EURODAC)

EURODAC is currently only available to EU Member States and the four associated Dublin States: Iceland, Norway, Liechtenstein and Switzerland.

6.6.2. Potential options for the future relationship with the UK

a. SIS II and ECRIS

Continued UK access to SIS II and ECRIS will rely on the UK negotiating a bespoke arrangement with the EU due to the fact that no current alternative participation models exist.

Table 8: Summary of options for the future relationship between the EU and the UK – SIS II and ECRIS

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
(1) Current situation: Cooperation based on full UK participation in ECRIS and partial participation in SIS II	The UK fully participates and is currently connected to ECRIS. The UK is connected to the SIS II database but participates only in the law enforcement aspects.	N/A
(2) Default option: No access to SIS II and ECRIS	This option entails the reliance of the Member States on Interpol to enable checks of persons in UK police databases, criminal records and information on missing persons from the UK. Additionally, the UK and Member States may request access to judicial records through Article 13 of the Council of Europe Convention on Mutual Assistance in Criminal Matters of 1959. Furthermore, following the ‘originator principle’, the UK will remain the owner of the data it introduced into the databases and	N/A

¹⁴⁷ See Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, Article 8(4); Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), Article 3(3).

¹⁴⁸ Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), Article 31 (2).

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
	therefore can decide to remove this data following its withdrawal.	
(3) Bespoke agreement between the EU and the UK	As no current models exist for third party access to these information databases/systems, the only option available is the negotiation of a bespoke agreement that creates a framework for continued UK participation.	<p>A bespoke agreement between the EU and the UK could be negotiated as a separate agreement or as part of the creation of an overarching security agreement between the EU and the UK that provides a framework for the UK's retaining access to ECRIS and SIS II.</p> <p>An adequacy decision or treaty ensuring the protection of the personal data to be processed will be a prerequisite to concluding such an agreement with the UK. Failing the above, the bespoke agreement itself will need to contain provisions ensuring essentially equivalent data protection safeguards.</p>

b. PNR

While the PNR Directive ensures that the PNR data from passengers flying into the EU from the UK will continue to be provided to the Member States, continued access to PNR data of those flying into the UK for the EU will require the negotiation of a bespoke agreement between the EU and the UK.

Table 9: Summary of options for the future relationship between the EU and the UK – PNR

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
(1) Current situation: Cooperation based on full UK compliance with the PNR Directive	The UK transposed the PNR Directive and has applied the PNR Directive in intra-EU flights as of 8 June 2018. Additionally, the UK has had an established regime for PNR since 2008.	N/A
(2) Default option: No EU access to PNR data for those flying into the UK	<p>This option results in the loss of access to PNR data of those flying into the UK for the EU Member States and Europol. However, the EU will retain access to PNR data of those flying into the EU from the UK.</p> <p>Through Article 11 of the PNR Directive, allowing for ad hoc exchange of information with third countries, Member States could transfer EU PNR data to the UK on a case-by-case basis.</p>	N/A
(3) Bespoke agreement between the EU and the UK similar to those with Australia and the US	This option entails the negotiation of an agreement between the EU and the UK that grants the UK direct access to transfers by air carriers of PNR data to the UK, based upon similar	A bespoke agreement between the EU and the UK could be negotiated as a separate agreement or as part of the creation of an overarching security agreement between the EU and the UK that provides a framework for the UK's continued access to EU PNR data. An

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
	agreements between the EU and Australia and the United States.	adequacy decision or treaty ensuring the protection of the personal PNR data to be processed will be a prerequisite to concluding such an agreement with the UK. Failing the above, the bespoke agreement itself will need to contain provisions ensuring essentially equivalent data protection safeguards.
(4) Bespoke agreement between the EU and the UK	This option entails the negotiation of an agreement between the EU and the UK that allows for the EU to have access to PNR data from those flying into the UK, the continued collection of PNR data of those flying into the EU from the UK and reciprocally granting access to the UK of PNR data of those flying into the EU.	A bespoke agreement between the EU and the UK could be negotiated as a separate agreement or as part of the creation of an overarching security agreement between the EU and the UK that provides a framework for the EU's continued access to UK PNR data. An adequacy decision or treaty ensuring the protection of the personal PNR data to be processed will be a prerequisite to concluding such an agreement with the UK. Failing the above, the bespoke agreement itself will need to contain provisions ensuring essentially equivalent data protection safeguards.

c. Prüm

The UK could continue to have access to Prüm through the negotiation of an agreement between the EU and the UK on Prüm.

Table 10: Summary of options for the future relationship between the EU and the UK – Prüm

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
(1) Current situation: Cooperation based on the UK's decision to join the Prüm Decisions.	The UK notified the EU of its desire to join the Prüm Decisions in January 2016 and this was approved by the European Commission in May 2016. The system was due to become operational in the UK in 2017. However, to date, the UK is not fully operational.	N/A
(2) Default option: No access to Prüm	This option entails the reliance of the Member States on Interpol (for fingerprints) and bilateral Member State cooperation to enable searches of DNA profiles as well as the reliance on the Treaty concerning a European Vehicle and Driving Licence Information System (EUCARIS) for checks of vehicle ownership and driving licences. Furthermore, following the 'originator principle', the UK will remain the owner of the data it introduced into the databases and	N/A

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
	therefore can decide to remove this data following its withdrawal.	
(3) Bespoke agreement between the EU and the UK similar to those with Iceland and Norway	This option represents the negotiation of an agreement between the UK and the EU to apply certain provisions of Council Decision 2008/615/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, based upon the agreement between the EU and Iceland and Norway.	The negotiation of the UK's continued access to Prüm could form part of an overall agreement that provides a framework for the UK's access to all the information exchange databases discussed above. An adequacy decision or treaty ensuring the protection of the personal data to be processed will be a prerequisite to concluding such an agreement with the UK. Failing the above, the bespoke agreement itself will need to contain provisions ensuring essentially equivalent data protection safeguards.

d. Visa Information System (VIS)

The UK does not participate in or have direct access to the Visa Information System (VIS). As a Schengen instrument, the VIS Regulation¹⁴⁹ applies to EU countries with the exception of the United Kingdom and Ireland. However, pursuant to the preamble of Council Decision 2008/633/JHA, "information contained in the VIS can be provided to the United Kingdom and Ireland by the competent authorities of the Member States whose designated authorities have access to the VIS pursuant to this Decision" for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences.¹⁵⁰

Following Brexit, the UK could continue to have limited indirect access to VIS data as a third country (as described in section 6.6.1.e.).

Table 11: Summary of options for the future relationship between the EU and the UK – Visa Information System (VIS)

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
(1) Current situation: Cooperation based on indirect access to VIS data	Pursuant to Council Decision 2008/633/JHA, the UK is currently eligible to receive data contained in the VIS for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences. Additionally, the national visa register of the United Kingdom can be provided to the competent law enforcement authorities of the other Member States.	N/A

¹⁴⁹ Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation).

¹⁵⁰ Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences.

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
(2) Default option: Third country access to VIS data	This option would similarly entail no access to VIS data. However, in an exceptional case of urgency, Member States with VIS access could transfer or make available data to the UK (see section 5.6.1.e. for further details).	N/A

e. European Dactyloscopy (EURODAC)

As the EURODAC system is intrinsically related to the Dublin III Regulation, UK access to the EURODAC is likely to be dependent on whether an agreement is negotiated between the EU and the UK on UK participation in the Dublin system. Without the UK participating in this system, access of the UK would provide no added value to the EU.

Table 12: Summary of options for the future relationship between the EU and the UK – European Dactyloscopy (EURODAC)

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
(1) Current situation: Cooperation based on full UK participation in EURODAC	The UK fully participates and is currently connected to EURODAC.	N/A
(2) Default option: No UK access to EURODAC	<p>This option would mean the loss of UK access to EURODAC and therefore the loss of data on future asylum seekers and irregular migrants in the UK by the EU. However, as by default the UK will not be party to Dublin III Regulation following its withdrawal (unless otherwise agreed), access to data on UK asylum seekers and irregular migrants is of questionable value to the EU. If an agreement is negotiated on EU–UK cooperation through the Prüm regime, the EU and the UK could still exchange data on fingerprints and DNA.</p> <p>Furthermore, following the ‘originator principle’, the UK will remain the owner of the data it introduced into the databases and can therefore decide to remove this data following its withdrawal.</p>	N/A
(3) Bespoke agreement between the EU and the UK	This option would require the UK to negotiate an agreement that ensures it remains party to the Dublin III Regulation as well as an agreement that grants the UK continued access to EURODAC.	A bespoke agreement on the UK’s continued access to EURODAC between the EU and the UK could be negotiated as a separate agreement or as part of the creation of an overarching agreement between the EU and the UK that ensures the UK remains party to the Dublin III Regulation and additionally provides a framework for the EU’s continued access to EURODAC. An adequacy decision or treaty ensuring the protection of the

Current arrangement and potential options following Brexit	Description of arrangement	Legal procedure required
		personal data to be processed will be a prerequisite to concluding such an agreement with the UK. Failing the above, the bespoke agreement itself will need to contain provisions ensuring essentially equivalent data protection safeguards.

6.7. Implications and feasibility of the future relationship between the EU and the UK

6.7.1. The UK as a non-Schengen third country

Any new agreement governing the future relationship between the EU and the UK will require the consent of the European Parliament and adoption of a decision by the European Council. With regard to the consent of the European Parliament, consideration will likely be given to the status of the UK as a non-Schengen third country, compared to the status of other third countries that have previously entered into cooperation agreements with the EU in this field. The factor 'Risk of upsetting relations with other countries', was listed by the TF50¹⁵¹ as one of the factors determining the degree of cooperation with third countries. The European Parliament resolution on the framework of the future EU/UK relationship¹⁵² stated in this regard that 'third countries (outside the Schengen area) do not benefit from any privileged access to EU instruments, including databases, in this field, nor can they take part in setting priorities and the development of the multiannual strategic goals or lead operational action plans in the context of the EU policy cycle'.

Therefore, the fact that the UK will be a non-Schengen third country is likely to play a role at the political level when considering the potential options, with a higher degree of cooperation foreseen. For example, a number of existing forms of cooperation by third countries in SIS II, the EAW and the operational agreement between Denmark and Europol are contingent upon the third countries' and Denmark's membership of the Schengen area, which raises questions over the political considerations of the adoption of these forms of cooperation for the UK following its withdrawal. However, it is also important to note in this regard that the UK currently participates in parts of the Schengen acquis relating to police and judicial cooperation – a key issue in the practical feasibility of these proposed forms of cooperation.

Thus, although some of the potential options identified above include a bespoke agreement with the UK similar to existing agreements the EU has with Denmark or third countries such as Iceland, the status of the UK as a non-Schengen third country is generally considered as a challenge in terms of the political considerations of achieving the highest degree of cooperation.

6.7.2. Duration of the negotiation of agreements

Another general consideration when assessing the different options available may be the duration of negotiating the different forms of participation, compared to the need for a speedy

¹⁵¹ Task Force for the Preparation and Conduct of the Negotiations with the UK under Article 50 TEU. Internal EU27 preparatory discussions on the framework for the future relationship on police and judicial cooperation in criminal matters. 29 January 2018. TF50 (2018) 26/2. Commission to EU27.

¹⁵² European Parliament resolution of 14 March 2018 on the framework of the future EU/UK relationship, 2018.

conclusion of an agreement to ensure continuity of cooperation without interruption. While there is significant variance in the time taken to negotiate agreements with third countries, a number of the current agreements between the EU and third countries have taken years to negotiate, highlighting the risk of continuity of cooperation given the unprecedented level of cooperation with a third country that the UK will represent.

6.7.3. Legal implications

The legal implications in terms of the legal requirements for each potential option identified, have been presented in the tables for each option above. However, some general remarks can be made as well:

a. Requirements for ratification or constitutional amendments at national level

The area of freedom, security and justice is an area of shared competence between the EU and its Member States.¹⁵³ Thus, any international agreement in this area will have to be concluded by both the EU and the EU Member States (i.e. the EU Member States must give their consent). Depending on the specific type of international agreement concluded between the EU and the UK, it may be required for the Member States to ratify it (i.e. to formally consent to be bound by the agreement) in order for it to come into force. Member States each apply their own domestic procedures for ratification, in the case of agreements between the EU with third countries where Member States need also to ratify. In accordance with the constitutions and legislation of each Member State (or if stipulated in the agreement itself) certain international agreements require approval of national parliaments in order to be ratified and enter into force.¹⁵⁴ However, to date, no treaty governing Justice and Home Affairs concluded with third countries has required national ratification.

Furthermore, the option for the future relationship between the EU and the UK in extradition based on the EAW, and on MLA based on the EIO by submitting a declaration to the Council of Europe (please see sections 6.2 and 6.3 above), may require constitutional amendments in the Member States.

b. Potential constitutional obstacles in national legal framework

Most of the legal instruments adopted at EU level, and in particular the EAW, represented a paradigm shift in the existing cooperation, as the new system of cooperation overcame any constitutional obstacles present in the national legislation of Member States. However, without the EU legal instruments in place, these constitutional obstacles to international cooperation will still apply with third countries, in particular with regard to cooperation on extradition. For example, the extradition agreements between the EU and Norway, even though closely linked to the EAW system, still have some differences: even though the general principle is that national extradition should be possible, the countries are allowed to have a reservation if the extradition request concerns (1) political offences or (2) extraditions of own nationals.

c. Bilateral agreements

Although many of the bespoke agreements presented above are suggesting an international agreement between the EU and the UK, such an agreement could be complemented with bilateral agreements between certain Member States and the UK. For example, one could imagine a general extradition agreement between the EU and the UK, and additionally for

¹⁵³ Treaty on the Functioning of the European Union, Article 4 (2) (j).

¹⁵⁴ European Parliament, Briefing: Ratification of international agreements by EU Member States, November 2016.

those Member States which have these constitutional obstacles discussed above, to conclude bilateral agreements. There is a precedent for such an approach: for example, the EU has an extradition agreement with the United States, while bilateral extradition agreements also exist between some EU Member States and the United States. However, it should be noted that such bilateral agreements cannot be concluded in areas where the EU has exclusive competence to conclude international agreements¹⁵⁵, or where the EU has adopted common rules for implementing a policy (as in those cases the EU Member States may no longer enter into agreements with non-EU countries affecting those rules).¹⁵⁶

6.7.4. Fundamental rights implications

'Respect for fundamental rights' and 'essentially equivalent data protection standards' have been identified by the TF50¹⁵⁷ as factors determining the degree of cooperation with third countries. Similarly, the recent Parliament resolution¹⁵⁸ stressed that cooperation between the EU and the UK 'should provide legal certainty, must be based on safeguards with regard to fundamental rights as set out in the European Convention on Human Rights and must provide a level of protection essentially equivalent to that of the EU Charter, additionally it should fully respect EU data protection standards and rely on effective enforcement and dispute settlement'. It should be noted that the minimum standards required would only extend to those human rights relevant to the field of police cooperation and judicial cooperation in criminal matters.

a. Data protection

Most of the forms of EU–UK police cooperation and judicial cooperation in criminal matters mentioned in this study include the exchange of data and information and therefore have implications in terms of data protection. The negotiation and conclusion of any agreement with the UK on these forms of cooperation (as described above) is only likely to succeed if the UK's rules and procedures are in line with the EU data protection standards as currently laid down in the GDPR and Directive 2016/680 and transposed into UK legislation with the Data Protection Act.¹⁵⁹

In this regard, the European Council's guidelines state that following the UK's withdrawal the exchange of personal data should be 'governed by Union rules on adequacy with a view to ensuring a level of protection essentially equivalent to that of the Union'.¹⁶⁰ This means that the 'UK would have to obtain an adequacy decision from the European Commission in order to allow for data exchange with the EU and this decision would have to be reviewed approximately every five years'. However, for the UK to obtain such an adequacy decision could prove to be challenging. Firstly, the UK has made use of several exemptions in its transposition of the General Data Protection Regulation (GDPR) into UK legislation (i.e. the UK Data Protection Act):

¹⁵⁵ Treaty on the Functioning of the EU (TFEU), Article 3.

¹⁵⁶ Treaty on the Functioning of the EU (TFEU), Article 216.

¹⁵⁷ Task Force for the Preparation and Conduct of the Negotiations with the UK under Article 50 TEU. Internal EU27 preparatory discussions on the framework for the future relationship on police and judicial cooperation in criminal matters. 29 January 2018. TF50 (2018) 26/2. Commission to EU27.

¹⁵⁸ European Parliament resolution of 14 March 2018 on the framework of the future EU/UK relationship, 2018.

¹⁵⁹ The Data Protection Act 2018, c. 12.

¹⁶⁰ European Council (Art. 50) guidelines on the framework for the future EU–UK relationship, 23 March 2018, EUCO XT 20001/18. BXT 25 CO EUR 5 CONCL 2.

- **National security exemptions to the GDPR:** As outlined in the EU Law Enforcement Directive,¹⁶¹ an adequacy assessment on third countries will take into account legislation concerning national security. The UK, as a Member State, has relied on the national security exemptions of the GDPR to exempt the powers conferred by the Investigatory Powers Act 2016 to the UK security services. However, following the UK's withdrawal, the GDPR will no longer apply to the UK and therefore the UK will no longer be able to rely on this exemption to exclude the activities of the UK's security services.
- **Immigration control exemption GDPR:** When transposing the GDPR, the UK has made use of the exemptions for 'the maintenance of effective immigration control' or 'the investigation or detection of activities that would undermine the maintenance of effective immigration control'.¹⁶² Following the UK's withdrawal from the EU, the UK may subject all non-UK citizens, and therefore all EU citizens, to this exemption.

Furthermore, the likelihood of the UK being granted an adequacy decision could be further complicated by questions over whether the UK Data Protection Act and the UK Investigatory Powers Act 2016 fully incorporate the data protection elements of the EU Charter of Fundamental Rights. In particular, the provisions of the Investigatory Powers Act 2016 on the retention of communications data and the bulk powers of the UK security services could provide further complications to the UK being granted an adequacy decision. A ruling by the CJEU on the Investigatory Powers Act 2016 provision to allow the retention of communications data for up to 12 months required the UK to amend these powers in order to comply with the Charter of Fundamental Rights.

Another potential obstacle to the UK achieving an adequacy decision is the onward transfer of data to non-EU countries, through the 'Five Eyes' partners. If these transfers are considered to fall under the scope of the adequacy decision, a greater proportion of the UK's data protection practices will be subject to review after the UK's withdrawal than currently is the case. In the event of a legal challenge to an adequacy decision, this would result in the CJEU having a more significant say on UK data protection law after the UK's withdrawal than while the UK remains a Member State.

A final obstacle to the UK's adequacy status is the continued jurisdiction of the CJEU. As a decision taken by the Commission (thus by an EU institution), the adequacy decision is subject to review by the CJEU irrespective of whether the third country has accepted the CJEU's jurisdiction.¹⁶³

In the UK government's future partnership paper,¹⁶⁴ the UK government has proposed an alternative bespoke option to continue the exchange of information between the EU and the UK following the UK's withdrawal, through a UK–EU model that builds on the existing adequacy model and enables the continued access to key databases for the UK, while also maintaining existing exemptions for the surveillance activities of the UK security services under national security, as well as onward transfers to other third countries of this EU data. This proposed framework would form part of a bespoke overarching security agreement between the EU and the UK and suggests the arrangement of a mutual recognition agreement, proposing a role for the UK's Information Commissioner at the EU level to maintain effective regulatory cooperation and dialogue. However, at this stage no detail has

¹⁶¹ Directive (EU) 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.

¹⁶² The Data Protection Act 2018. C 12.

¹⁶³ See for the annulment of an adequacy decision CJEU, C-362/14, 6 October 2015

¹⁶⁴ Department for exiting the European Union, Security, law enforcement, and criminal justice – A Future partnership paper, September 2017.

been provided on the legal basis of such a bespoke agreement and no current precedent exists, raising questions over the feasibility of negotiating such an agreement.

Given the potential challenges for the UK in obtaining an adequacy decision, and given that the need for UK data protection safeguards to be 'essentially equivalent to that offered by EU law' is likely to be a prerequisite to the conclusion of any cooperation agreement with the UK in this field, the conclusion of a separate comprehensive international agreement on data protection could be considered. Such an agreement, which would include all the necessary principles and obligations to ensure that the protection afforded by the UK is at least 'essentially equivalent to that offered by EU law', could be an alternative or complementary tool to the adequacy decision as described above. Such an agreement with the UK could include a 'guillotine clause' allowing cooperation with the UK to be halted in the event the UK's data protection standards fall short of those of the EU. Although such an agreement could provide a consultation mechanism for dispute settlement, it cannot exclude the jurisdiction of the CJEU. As the agreement itself will form part of EU law, it will be subject to the jurisdiction of the CJEU. If the protection of personal data does not meet minimum standards, the EU will have to withdraw from the agreement.

b. Human rights, including procedural safeguards

The European Parliament highlighted the condition of full compliance with EU fundamental rights in its Resolution on the framework of the future EU–UK relationship of March 2018.¹⁶⁵ Similarly, the TF50, in its slides of June 2018, also suggested that a number of safeguards pertaining to fundamental rights and dispute settlement be put in place, including a provision for a so-called 'guillotine clause' should the UK choose to withdraw from the ECHR.¹⁶⁶

With regard to potential forms of cooperation with the UK in extradition proceedings, significant questions remain over how the UK will ensure that fundamental rights are upheld and whether it will introduce national legislation to enshrine the EU Charter for Fundamental Rights and the jurisdiction of the CJEU that this entails, or continue to use the European Convention on Human Rights (ECHR) and the jurisdiction of the European Court on Human Rights (ECtHR). EU cooperation measures, such as the EAW, require similar levels of rights protection across all EU states – countries will be unwilling to surrender their citizens without being confident that they will be treated fairly. Although the ECHR provides broadly equivalent protections in the area of fair trial rights and freedom from arbitrary arrest, the guarantees of the ECHR are insufficient: they are set out in broad terms, there is scope for differential application across criminal justice systems through the margin of appreciation and the Court is unable to enforce its decisions. The EU measures ensure a greater degree of uniformity and can be relied upon at the point of breach, i.e. directly in the national courts, without having to first exhaust national remedies, as is the case for Article 6 ECHR fair trial rights. Although rooted in Convention rights, EU protections do more than simply replicate those of the ECHR and to rely solely on interpretations of the European Court of Human Rights would amount to a regression in rights protection.¹⁶⁷

¹⁶⁵ European Parliament resolution of 14 March 2018 on the framework of the future EU/UK relationship, 2018.

¹⁶⁶ Task Force for the Preparation and Conduct of the Negotiations with the UK under Article 50 TEU. Internal EU27 preparatory discussions on the framework for the future relationship on police and judicial cooperation in criminal matters. 18 June 2018. TF50 (2018) 18/6. Commission to EU27.

¹⁶⁷ For example, in May 2016, the Estonian Supreme Court rejected the argument that the Directive on the right to information in criminal proceedings provided greater protections for the suspect than had the ECHR. Considering it an *acte clair*, the Court followed the (more restrictive) jurisprudence of the ECtHR. See Soo (2017: 341-2)

Therefore, and in particular with regard to the EAW, there are a number of questions over the viability of concluding an agreement without a linked agreement that creates a framework for mutual recognition and mutual trust between the EU and the UK. In particular, mutual trust builds upon harmonised minimum standards, which, following the UK's withdrawal from the EU, will cease to be binding on the UK.

c. Effective enforcement and dispute settlement

The fall-back option in terms of fundamental rights standards to be applied in the cooperation between the EU and UK after the withdrawal of the UK from the EU will be the European Convention on Human Rights, to which the UK is a signatory, and the jurisdiction of the European Court on Human Rights (ECtHR).

For some legal instruments, such as the EAW, the future cooperation with the UK may still require the UK to abide by the jurisdiction of the Court of Justice of the European Union (CJEU). In this regard, the House of Lords select committee has produced a report on the 'judicial oversight of the European Arrest Warrant', which concluded that as it is the UK government's intention to 'remove the UK entirely from the jurisdiction of the Court of Justice of the European Union (CJEU) ... it does not seem at all clear how the UK will remain part of EAW arrangements if it is outside the European Union, with no jurisdiction for the CJEU'. However, in contrast to this argument and as highlighted by the European Economic Area and the Schengen association agreements, there are countries that are applying EU law but are not within the CJEU's jurisdiction.

With regard to CJEU jurisdiction over information and data exchange systems and databases, there is precedent for third country access to EU data without the jurisdiction of the CJEU (such as non-EU Schengen countries access to SIS II). However, the agreement with these countries stipulates that if any substantial difference between the CJEU and non-EU Schengen countries courts arises on the interpretation of their agreement with the EU which cannot be settled by discussion in the Mixed Committee, the agreement may be terminated, and the Mixed Committee keeps under review the case law of the CJEU. It remains to be seen whether a similar clause would be acceptable to the UK.

Moreover, questions remain over the negotiation of a dispute resolution mechanism satisfactory to both the EU and the UK, in particular in relation to the continued participation in Europol. However, a number of mechanisms currently exist that govern the settlement of disputes between Europol and third countries.

6.7.5. Technical implications

In addition to the above, a few more practical implications and challenges should be envisaged when considering the potential options for the future relationship with the UK presented above:

- Should an agreement be reached for the UK's continued participation in the EAW, there are significant questions over whether the current level of effectiveness and efficiency of the EAW can be maintained without continued UK access to SIS II.
- The existing forms of cooperation by third countries on extradition proceedings are contingent upon constant review of the development of the case law of the CJEU, as well as the development of the case law of the competent courts of the national courts, and therefore require the set-up of a mechanism to ensure regular mutual transmission of such case law.

- Of significant importance is the 'originator principle' or 'principle of originator control',¹⁶⁸ applicable to data shared with Europol, which ensures that Member States are the owners, and continue to keep absolute control of, the information they shared with Europol. The originator principle is also a core principle of the information exchange architecture within the wider system of EU classified information.¹⁶⁹ This thus means that the UK is (and will continue to be) the owner of the data it introduced into the Europol and potentially other EU databases. It could therefore be possible that following its withdrawal from the EU, the UK decides to remove this data from the databases, if no agreement is put in place for continued cooperation through these databases. However it should be noted that the originator principle would also apply to data transferred to the UK by the EU or the Member States.

¹⁶⁸ See Council Decision 2009/968/JHA of 30 November 2009, Adopting the Rules on the Confidentiality of Europol Information, 2009 O.J. (L 332/17); 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, 2009 O.J. (L 325/6); Abazi, the future of Europol's parliamentary oversight: a great leap forward? German law journal: review of developments in German, European and international jurisprudence, 15(6), 1121-1144, 2014.

¹⁶⁹ Council Decision 2013/488/EU of 23 September 2013 on the Security Rules for Protecting EU Classified Information, 2013 O.J. (L 274); Abazi, the future of Europol's parliamentary oversight: a great leap forward? German law journal: review of developments in German, European and international jurisprudence, 15(6), 1121-1144, 2014.

7. CONCLUSIONS AND POLICY RECOMMENDATIONS

Following the UK's withdrawal from the EU, the UK as a former Member State will be a third country with an unprecedented legacy in terms of the scale and level of cooperation it has had with the EU in the field of police and judicial cooperation in criminal matters. In this regard, the UK will not be a conventional third country. Additionally, the UK will continue to experience the same transnational security threats, such as terrorism, cybercrime and other serious organised crime, as the rest of the EU. The UK's expertise will continue to be relevant for EU27 security interests.

As outlined above, there is significant scope for cooperation in the field of police cooperation and judicial cooperation in criminal matters with the UK through the Council of Europe framework. Furthermore, the Council of Europe framework, through the European Convention on Human Rights (to which the UK is a signatory) and the jurisdiction of the European Court on Human Rights (ECtHR), will ensure a basic level of protection in terms of procedural safeguards.

Of significant importance to the future relationship is the issue of data protection. Many of the key instruments of police cooperation and judicial cooperation in criminal matters have implications in terms of data protection. The negotiation and conclusion of any agreement with the UK that includes the exchange of information including personal data will require the UK to ensure that its procedures are in line with the EU data protection standards, as currently enshrined in the GDPR and Directive 2016/680.

With the above in mind, the options for the future relationship between the EU and the UK in the field of police cooperation and judicial cooperation in criminal matters presented in section 6 can be grouped in the following way:

- 1) Areas of cooperation where the fall-back option could be considered to provide an adequate level of cooperation;
- 2) Areas of cooperation where a fall-back option is available, but would result in a reduction of the degree of cooperation and the negotiation of an agreement could be considered; and
- 3) Areas of cooperation where no fall-back option is available, but there are existing cooperation agreements with third countries which could be considered for use in the UK context.

1) Areas of cooperation where the fall-back option could be considered to provide an adequate level of cooperation

As outlined above, the Council of Europe provides a number of conventions that can be considered to provide an adequate level of cooperation in the fields of mutual legal assistance (including participation in Joint Investigation Teams), the transfer of prisoners, and mutual recognition of financial penalties. Therefore, the reliance on these Council of Europe conventions for cooperation on these matters following the UK's withdrawal would not entail significantly reduced cooperation, as compared to the current situation.

2) Areas of cooperation where a fall-back option is available, but would result in a reduction of the degree of cooperation and the negotiation of an agreement could be considered

In addition to those areas mentioned above, fall-back options that rely on Council of Europe conventions exist in the fields of extradition, mutual legal assistance and mutual recognitions of confiscation orders which could be used to replace the cooperation that currently exists

under the European Arrest Warrant, the European Investigation Order and the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. However, when compared to the current situation, the adoption of these fall-back options for future cooperation between the UK and the EU would result in a substantial reduction in the level of cooperation. For these measures, the negotiation of an agreement, based on existing agreements between the EU and third countries, could be considered.

Similarly, fall-back options exist for some of the data exchange databases and systems currently used for operational cooperation between the EU and UK. As mentioned in section 6, the EU may rely on Interpol, Council of Europe conventions and on the Treaty concerning a European Vehicle and Driving Licence Information System (EUCARIS) for access to judicial records, information on missing persons, vehicle ownership and searches of DNA profiles. However, similar to the EU measures above, the adoption of these fall-back options would result in a substantial reduction in the level of cooperation when compared to the current situation, and therefore the negotiation of an agreement could be considered. However, it should be noted that apart from access to Prüm, no precedent for third country access to the Schengen Information System II and the European Criminal Records Information System exists.

3) Areas of cooperation where no fall-back option is available, but there are existing cooperation agreements with third countries which could be considered for use in the UK context

Regarding the UK's future cooperation with the EU agencies Europol and Eurojust and its relationship with the PNR Directive,¹⁷⁰ no fall-back options are available. There are existing forms of cooperation between both Europol and Eurojust and third countries, as well as agreements for the EU to share PNR data with third countries. However, the level of cooperation between Europol and third countries outlined in these agreements is in stark contrast to the current situation between Europol and the UK and represents a significant reduction in operational cooperation. Additionally, the existing forms of the exchange of PNR data with third countries does not involve the reciprocal exchange from these third parties to the EU. Therefore, the adoption of an agreement similar to those would create a substantial gap in PNR data of passengers travelling into the UK for the EU.

Thus, overall, while a number of fall-back options exist that could be considered to provide an adequate level of cooperation between the UK and the EU, for a number of EU legal instruments the fall-back option, or option based on existing models of cooperation, would represent a significant reduction in operational cooperation. However, while practitioners desire the closest possible cooperation, there must be a balance of rights and obligations in the future relationship between the UK and the EU. As a member of the EU participating in a number of cooperation mechanisms in the field of police and judicial cooperation in criminal matters and subject to the same rules in other relevant fields (such as the protection of personal data or the protection of Fundamental Rights), the standards existing in the UK once it leaves the Union could be assumed to be similar to those of the EU. There is, however, a political expectation that, following its decision to withdraw from the EU, the UK should not be granted the same levels of cooperation as it currently enjoys. Therefore, there must be recognition of the trade-off between political expectations over the prohibition on granting the UK a level of cooperation that does not currently exist with third countries, with the

¹⁷⁰ 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.

acknowledgement of the operational requirements of practitioners to minimise any impact of the UK's withdrawal to the security of the Union.

7.1. Policy recommendations

On the basis of the above findings and conclusions, the study makes the following policy recommendations:

Policy recommendation 1: Prioritisation of negotiating an agreement with the UK on areas where no adequate fall-back option exists for cooperation

The European Parliament should pass a resolution calling on the European Commission to prioritise the negotiation of an agreement for those areas of cooperation where continued cooperation is in the interests of the EU and its Member States, but where no adequate default or fall-back position is available. The areas of police cooperation and judicial cooperation in criminal matters that should be prioritised in this regard are continued operational cooperation between the UK and Europol and Eurojust, continued data and intelligence exchange such as criminal records, information on missing persons and passenger information. In addition, a level of cooperation beyond the one foreseen under the Council of Europe conventions could be beneficial to the EU in the field of extradition and requesting of evidence, as well as on mutual recognition of confiscation orders.

Policy recommendation 2: Human rights and dispute settlement

The European Parliament should monitor the human rights standards in place in the UK after Brexit, including their application in the field of police cooperation and judicial cooperation in criminal matters. If evidence suggests that the UK standards are not equivalent to those in the EU, the European Parliament should ensure the 'guillotine clause' (if included in the EU–UK cooperation agreements) comes into force.

In the field of criminal justice, mutual trust and shared values form the basis for cooperation between Member States. In the EU, this trust is underpinned by a shared set of rights and obligations, as set out in the Charter of Fundamental Rights, and where any violation would fall under the jurisdiction of the CJEU. Although following the UK's withdrawal, the UK would start from a position where its legal framework is in line with the EU legal framework and where it is a signatory to the European Convention on Human Rights (ECHR), there is no guarantee this will continue to be the case in the future. Therefore, as a prerequisite to any cooperation agreement with the UK in this field, a robust set of fundamental rights safeguards should be put in place. In this regard, the European Parliament should make sure that any cooperation between the EU and the UK is dependent on the UK respecting these fundamental rights safeguards. As it is likely that the cooperation agreements with the UK will include a guillotine clause allowing for cooperation with the UK to be halted in the event that the UK's human rights standards are lower than those of the EU, the role of the Parliament could be to ensure this clause is enforced if and when this is appropriate.

Policy recommendation 3: Data protection

The European Parliament should ensure that the personal data of EU and non-EU citizens are adequately protected following the UK withdrawal from the EU, by calling on the European Commission to ensure that, as a precursor to the conclusion of any cooperation agreement with the UK in the field of police cooperation and judicial cooperation in criminal matters, a robust set of data protection safeguards will be put in place.

As most of the key instruments of police cooperation and judicial cooperation in criminal matters involve the exchange of personal data, data protection is of significant importance to the future relationship between the EU and the UK in this field. Therefore, as a prerequisite to the conclusion of any agreement with the UK that includes the exchange of information, the EU has to ensure (through a separate treaty or an adequacy decision) that UK procedures are in line with EU data protection standards, currently enshrined in the GDPR and Directive 2016/680, to ensure that the protection afforded by the UK is at least equivalent to that offered by EU law. It will also be important to ensure that this is monitored to ensure that any lapse in the standards of data protection afforded by the UK results in the suspension or cancellation of the agreements in place.

Policy recommendation 4: Cooperation on the basis of reciprocity

During the negotiation of any agreement with the UK in the field of police cooperation and judicial cooperation in criminal matters, the Parliament should ensure that a balance is struck between the political expectation of the changing form and nature of the cooperation with the UK as a third country outside of Schengen, with the needs at the operational level which are in the EU27 security interest. Similarly, the European Parliament should encourage Member States to recognise the trade-off between the political expectations of not granting the UK rights similar to the rights it was granted as an EU Member State, with the acknowledgement of the operational requirements of practitioners to minimise any impact of the UK's withdrawal on the security of the Union.

Following the UK's withdrawal from the EU, the UK will be a third country with an unprecedented legacy, in terms of its current alignment with the EU legal framework, as well as the scale and level of cooperation it has had with the EU in the field of police and judicial cooperation in criminal matters. Moreover, the UK and the EU face similar, if not the same, transnational security threats, such as terrorism, cybercrime and other serious organised crime, and therefore the UK's expertise will continue to be relevant for the EU security interest.

However, while practitioners desire the closest possible cooperation, there must be a balance of rights and obligations in the future relationship between the UK and the EU. In this context, there is a political expectation that, following its decision to withdraw from the EU, there should be consequences such as that the UK should not be granted the same levels of access to databases and systems and levels of cooperation as it currently enjoys.

In this context, the key in striking a balance between this political expectation and operational needs may lie in the principle of reciprocity. As long as the additional degree of cooperation strengthens the security of EU and UK citizens, and the partnership is at least as beneficial to the EU and its Member States as it is for the UK, the status of the UK and precedent for such cooperation should be less relevant.

APPENDICES

Appendix 1: COMPLETE LIST OF LEGISLATION IN THE FIELD OF POLICE COOPERATION AND JUDICIAL COOPERATION IN CRIMINAL MATTERS IN WHICH THE UK IS PARTICIPATING

EU legislation in which the UK is participating

Acts the UK opted to re-join under Article 10(5) of Protocol 36 (TFEU)

The table below presents an overview of the 35 AFSJ Acts the UK opted to re-join following the entry into force of the Treaty of Lisbon in 2009 following the UK's block opt-out.

No	Title of EU legislation
	Schengen Measures
1	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.
2	Convention implementing the Schengen Agreement of 1985: Article 39 to the extent that that this provision has not been replaced by Council Framework Decision 2006/960/JHA, Article 40, Article 42 and 43 (to the extent that they relate to article 40), Article 44, Article 46, Article 47 (except (2)(c) and (4)), Article 54, Article 55, Article 56, Article 57, Article 58, Articles 59 to 69 (to the extent necessary in relation to the Associated EFTA States) Article 71, Article 72, Article 126, Article 127, Article 128, Article 129, Article 130, and Final Act – Declaration N° 3 (concerning article 71(2))
3	Council Decision 2000/586/JHA of 28 September 2000 establishing a procedure for amending Articles 40(4) and (5), 41(7) and 65(2) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders
4	Council Decision 2003/725/JHA of 2 October 2003 amending the provisions of Article 40(1) and (7) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders
5	Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)
6	Commission Decision 2007/171/EC of 16 March 2007 laying down the network requirements for the Schengen Information System II
	Non-Schengen Measures
7	Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or property related to, crime.

No	Title of EU legislation
8	Council Decision 2000/375/JHA to combat child pornography on the internet
9	Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders
10	Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes
11	Council Decision 2000/641/JHA of 17 October 2000 establishing a secretariat for the joint supervisory data-protection bodies set up by the Convention on the establishment of a European Police Office (Europol Convention), the Convention on the Use of Information Technology for Customs Purposes and the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders (Schengen Convention)
12	Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States
13	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
14	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
15	Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network
16	Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime
17	Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime
18	Council Decision 2003/659/JHA amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime
19	Council Decision 2009/371/JHA establishing the European Police Office (Europol)
20	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
21	Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files
22	Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information
23	Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions of supervision measures as an alternative to provisional detention

No	Title of EU legislation
24	Joint Action 98/700/JHA of 3 December 1998 concerning the setting up of a European Image Archiving System (FADO)
25	Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of Member States in respect of exchanging information
26	Council Decision 2002/348/JHA of 25 April 2002 concerning security in connection with football matches with an international dimension
27	Council Decision 2007/412/JHA of 12 June 2007 amending Decision 2002/348/JHA concerning security in connection with football matches with an international dimension
28	Joint Action 97/827/JHA of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime
29	Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams
30	Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties
31	Council Act of 18 December 1997 drawing up the Convention on mutual assistance and cooperation between customs administrations (Naples II)
32	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 purposes of their enforcement in the European Union
33	Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union
34	Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings
35	Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial

UK opt-ins between 2009 and 2018

The table below presents the EU legislation adopted under Title V TFEU, pertinent to the field of police and judicial cooperation in criminal matters, to which the UK has opted in between 1 December 2009 and March 2018.¹⁷¹

No	Title of EU legislation	Lead Department (UK)	Date of publication UK Decision
1	Initiative for a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings	Ministry of Justice	15/12/2009
2	Agreement between the European Union and Iceland and Norway on the application of certain provisions of Council Decision 2008/615/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	Home Office	18/12/2009
3	Agreement for a simplified extradition arrangement between Member States of the European Union (EU) and Iceland and Norway	Home Office	18/12/2009
4	Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol	Home Office	18/12/2009
5	Agreement between the European Union and Japan on mutual legal assistance in criminal matters	Home Office	18/12/2009
6	Initiative for a Directive of the European Parliament and of the Council on the European Protection Order	Ministry of Justice	5/1/2010
7*	Proposal for a Council Regulation amending Decision 2008/839/JHA on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II)	Home Office	8/2/2010

¹⁷¹ UK Home Office and Ministry of Justice, JHA (Title V) opt-in and Schengen opt-out decisions taken between 1 December 2009 and the present. Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695125/Opt-in_webpage_update_-_data_-_March_2018.pdf

No	Title of EU legislation	Lead Department (UK)	Date of publication UK Decision
8*	Arrangement between the European Union and the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation on the participation by those States in the work of the committees which assist the European Commission in the exercise of its executive powers as regards the implementation, application and development of the Schengen acquis	Home Office	18/3/2010
9*	Amending Proposal for a Regulation (EU) No 1077/2011 of the European Parliament and of the Council on establishing an Agency for the operational management of large-scale IT systems in the area of freedom, security and justice	Home Office	30/3/2010
10	Proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA	Home Office	30/3/2010
11	Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA	Ministry of Justice	30/3/2010
12	Council Decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program (TFTP)	HM Treasury	12/7/2010
13	Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters	Home Office	29/04/2010
14	Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings	Ministry of Justice	23/7/2010
15	Proposal for a Directive of the European Council and of the Parliament on attacks against information systems, repealing Council Framework Decision 2005/222/JHA	Home Office	30/09/2010
16	Proposal to recast the EURODAC Regulation concerning the comparison of fingerprints for the effective application of the Dublin Regulation	Home Office	11/10/2010

No	Title of EU legislation	Lead Department (UK)	Date of publication UK Decision
17	Proposal for a Council Decision on the signing and conclusion of the European Convention on the legal protection of services based on, or consisting of, conditional access	Department for Culture Media and Sport	22/12/2010
18	Proposal for a directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime	Home Office	9/2/2011
19	Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service	Home Office	20/5/2011
20	Directive on establishing minimum standards on the rights, support and protection to victims of crime	Ministry of Justice	24/5/2011
21	Proposal for a Council Decision on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security	Home Office	29/11/2011
22	Proposal for a Regulation of the European Parliament and of the Council laying down general provisions on the Asylum and Migration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management	Home Office	10/1/2012
23*	Proposal for a directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data	Ministry of Justice	27/1/2012
24*	Proposal for a Council Regulation on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II)	Home Office	10/5/2012
25*	Regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify the application of the Schengen acquis	Home Office	26/6/2012
26	Proposal for a Regulation of the European Parliament and of the Council on the establishment of EURODAC (with law enforcement access)	Home Office	27/6/2012

No	Title of EU legislation	Lead Department (UK)	Date of publication UK Decision
27	Amended proposal for a Regulation of the European Parliament and of the Council establishing an action programme for customs in the European Union for the period 2014–2020 (Customs 2020) and repealing Decision N° 624/2007/EC	HM Revenue and Customs	31/08/2012
28	Amended proposal for a Regulation of the European Parliament and of the Council establishing an action programme for taxation in the European Union for the period 2014–2020 (Fiscalism 2020) and repealing Decision N° 1482/2007/EC	HM Revenue and Customs	4/9/2012
29	Proposal for a Council Decision on the conclusion of the Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data	Home Office	26/8/2013
30	Proposal for a Council Decision concerning the relocation of the European Police College (CEPOL)	Home Office	14/12/2013
31	Proposal for a Council Decision to conclude an agreement extending the European Asylum Support Office (EASO) to the Associated States	Home Office	13/12/2013
32	Proposal for a Council Decision on the approval on behalf of the European Union of the Hague Convention of 30 June 2005 on Choice of Court Agreements	Ministry of Justice	3/2/2014
33	Proposal for a Regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions	HM Treasury	29/1/2014
34	Proposal for a Regulation of the European Parliament and of the Council on reporting and transparency of securities financing transactions	HM Treasury	29/1/2014
35	Proposal for a Regulation of the European Parliament and of the Council repealing certain acts in the field of police cooperation and judicial cooperation in criminal matters (REFIT)	Home Office	9/1/2015
36	Council Decision to authorise the opening of negotiations for an agreement between the EU and Mexico for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime	Home Office	18/5/2015
37	Proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System	Home Office	25/1/2016

No	Title of EU legislation	Lead Department (UK)	Date of publication UK Decision
	(ECRIS), and replacing Council Decision 2009/316/JHA		
38	Proposal for a Regulation 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 an application for international protection lodged in one of the Member States by a third country national or a stateless person], for identifying an illegally staying third country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes	Home Office	19/8/2016
39	Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA	Home Office	11/5/2016
40	Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders	Home Office	13/3/2017
41	Proposal for a Regulation of the European Parliament and of the Council on the establishment, operation and use of the Schengen Information System in the field of police cooperation and judicial cooperation in criminal matters, amending Regulation (EU) No 515/2014 and repealing Regulation (EC) No 1986/2006, Council Decision 2007/533/JHA and Commission Decision 2010/261/EU	Home Office	03/04/2017
42	Proposal for a Regulation of the European Parliament and of the Council establishing a centralised system for the identification of Member States holding conviction information on third country nationals and stateless persons (TCN) to supplement and support the European Criminal Records Information System (ECRIS TCN system) and amending Regulation (EU) No 1077/2011	Home Office	27/07/2017
43	Proposal for a Regulation of the European Parliament and of the Council on the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, and amending Regulation (EC) 1987/2006 and Council	Home Office	01/08/2017

No	Title of EU legislation	Lead Department (UK)	Date of publication UK Decision
	Decision 2007/533/JHA and repealing Regulation (EU) 1077/2011		
44	Recommendation for a Council Decision authorising the opening of negotiations on an Agreement between the European Union and Canada for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime	Home Office	06/12/2017
45	Proposal for a Regulation on a Framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration)	Home Office	05/06/2018

Appendix 2: Case Studies

a. Europol

European Union Agency for Law Enforcement Cooperation
Description of the instrument
<p>The European Union Agency for Law Enforcement Cooperation (Europol) is the EU's law enforcement agency. Europol's main objective is to 'support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy'.¹⁷² Specifically, Europol supports the EU Member States in their fight against terrorism, cybercrime and other serious and organised forms of crime through facilitating mutual cooperation between law enforcement authorities of the Member States.</p>
Current legal basis of the instrument
<p>The current legal basis for Europol is the Regulation (EU) 2016/794 on the European Union Agency for Law Enforcement Cooperation (Europol),¹⁷³ which aligned the previous framework of Europol (Council Decision 2009/371/JHA) with the requirements of the Lisbon Treaty.</p>
Description of the UK's participation in the instrument
<p>The UK government notified the European Parliament of its intention to opt in to the new Europol Regulation in line with its right to do so under protocol 21 of the TFEU. Following its opt-in to the Regulation, and as a Member State of the European Union, the UK is a full member of Europol, with representation and voting rights on the Europol Management Board regarding current and future activities of the Agency, adoption of the Agency's budget, programming documents, annual reports, internal audit and data protection. The UK maintains a designated Europol National Unit for engagement between UK Law Enforcement and Europol, which is managed by the UK's National Crime Agency (NCA). Furthermore, Mr Rob Wainwright, a UK national, was Director of Europol from 16 April 2009 until 1 May 2018.</p>
Description of the UK's contribution to and current use of the instrument
<ul style="list-style-type: none"> • The UK has played a leading role in the development of Europol's activities and, as highlighted by a Europol spokesperson, 'is also one of the leading sources of intelligence contributing to Europol's databases on serious and organised crime'.¹⁷⁴ • The UK has the largest liaison bureau of any EU Member State with 17 British liaison officers currently posted in Europol.¹⁷⁵ • Europol's Internet Referral Unit was based upon the UK's Counter-Terrorism Intern Referral Unit.

¹⁷² Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

¹⁷³ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

¹⁷⁴ Rob Wainwright quoted in Politico. Europol first in line for life after Brexit. Available at: <https://www.politico.eu/article/europol-first-in-line-for-life-after-brexityb-law-enforcement-rob-wainwright/>

¹⁷⁵ House of Commons. Home Affairs Committee. UK–EU security cooperation after Brexit. Oral evidence taken on 7 March 2017, Q141.

European Union Agency for Law Enforcement Cooperation

- The UK was a founding member of the Joint Cybercrime Action Taskforce (J-CAT).¹⁷⁶
- The UK made over 7,400 intelligence contributions to Europol Analysis Projects in 2016 and, as of September 2017, the UK was participating in over 40 Joint Investigation Teams. The UK is the 'second largest contributor to Europol information systems and is copied in to 40% of the institution's data messages'.¹⁷⁷
- The approximate share of Europol casework that 'is thought to have a British focus' is 40%, and the UK authorities 'initiated some 2,500 cases for cross-border investigation'.¹⁷⁸
- Furthermore, the UK currently participates in all 13 of Europol's current operational priority projects.

Existing alternative forms of participation by other Member States and third countries including participation by EFTA/EEA countries

There are currently two forms of partnership agreements between Europol and third countries, depending on the relationship Europol has with the country:

- Strategic agreements; and
- Operational agreements.

While the common aim of these forms of agreements are to enhance cooperation between Europol and the country in question, there is a significant discrepancy in the level of cooperation afforded by each. Strategic arrangements are limited to the exchange of general intelligence and strategic and technical information. In contrast, operational agreements enable a great level of exchange of information, including personal data. The countries currently employing strategic agreements with Europol are the People's Republic of China, the Russian Federation and Turkey. Those countries with operational agreements with Europol include Albania, Australia, Canada, Colombia, Georgia, Iceland, Moldova, Norway, Serbia, Switzerland, Ukraine and the United States.

However, another model of cooperation exists with Denmark, which has the particular position of having withdrawn from Europol, while still being a member of the EU. Following the referendum on the Danish opt-out from Title V of Part Three of the TFEU (area of freedom, security and justice) in 2015 (including withdrawal from Europol), a bespoke operational agreement was signed between Denmark and Europol in 2017. This agreement, the 'Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and Europol', allows for continued Danish cooperation with Europol as a third country rather than a Member State, despite the fact that the Europol is typically only permitted to reach agreements with non-Member States and therefore 'it was agreed exceptionally that Denmark can be treated as third country in this context to ensure a continued relationship with Europol'.¹⁷⁹ Despite Denmark's withdrawal from Europol, recital (3) and Article 10(6) of the cooperation agreement provide for indirect access to Europol's information exchange databases and systems (EIS, SIENA) via Danish-speaking Europol staff or seconded national experts to treat Danish requests to input, receive, retrieve and cross-check data 24/7. Additionally, the agreement enables Denmark to partake in joint investigation teams as well as be invited to continue to participate in meetings of Europol's

¹⁷⁶ Statewatch. Policing the internet: how Europol takes action against undesirable content online. July 2017.

¹⁷⁷ House of Commons. Home Affairs Committee. Oral evidence: Home Office delivery of Brexit: policing and security co-operation, HC 635. 23 January 2018.

¹⁷⁸ Rand Corporation. Defence and security after Brexit. Available at: https://www.rand.org/content/dam/rand/pubs/research_reports/RR1700/RR1786z1/RAND_RR1786z1.pdf.

¹⁷⁹ Minister's Explanatory Memorandum of 15 February 2017 on the Council Implementing Decision.

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Heads of Europol National Units and may be invited to attend meetings of Europol's Management Board and its subgroups in an observer status without voting rights. Furthermore, Europol will exchange information with Danish competent authorities and will inform Denmark of information concerning it without delay. Unlike non-Member States on Europol's cooperation list, Denmark is not obliged to justify why it asks for access to the agency's databases. Furthermore, the agreement requires Denmark to continue to contribute to Europol's budget.

Potential form(s) of future UK participation in formal and informal cooperation

The potential options for future UK participation in Europol are:

- **Default option:** Reliance on Interpol and bilateral police cooperation: Should the UK not conclude any agreement with Europol, it will be forced to rely on cooperation through Interpol and bilateral agreements with Member States.
- **Strategic agreement** similar to those in place with other third countries. This option presents a significantly reduced level of police cooperation, allowing only for the exchange of general intelligence and strategic and technical information.
- **Operational agreement** similar to those in place with other third countries: Providing a greater level of cooperation than a strategic agreement, this option enables the exchange of information which includes personal data.
- **Bespoke operational agreement** similar to that agreed with Denmark: This option involves the negotiation of an agreement between Europol and the UK that outlines greater operational cooperation than the standard operational agreement. It is very likely that this enhanced cooperation would not be as comprehensive as the agreement between Denmark and Europol, given that (i) Denmark is still a member of the EU, and (ii) it would necessitate a robust agreement on the protection of personal data.

All of the current agreements for third countries and the bespoke agreement enjoyed by Denmark would represent a significant reduction in the level of police cooperation between the UK and the EU and would impact the efficiency and effectiveness of Europol to the remaining 27 Member States.

Legal procedures for continued UK participation

Following the UK's withdrawal from the EU, the UK would automatically leave Europol and in order for the UK to continue cooperation with Europol it would be required to conclude one of the agreements discussed in the section above.

The legal procedures required for each of the proposed options are:

- **Default option:** No legal procedure is required for this option.
- **Strategic agreement:** This will require the negotiation of an agreement between the UK and Europol
- **Operational agreement:** This will require the negotiation of an agreement between the UK and Europol
- **Bespoke operational agreement:** This will require the negotiation of an agreement between the UK and Europol

An agreement between Europol and the UK could be negotiated separately or as part of the creation of an overarching security agreement between the EU and the UK that provides a framework for the UK's continued participation in Europol. The proposed strategic agreement between the EU and the UK that the UK has outlined in its 'Security, law enforcement and criminal justice: A future partnership paper' would be a treaty that provides a legal basis for continued cooperation between the UK and the EU in this area

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that includes a bespoke relationship with Europol. Whilst the UK has expressed a desire to continue UK cooperation with Europol at a similar level as it currently enjoys, at this stage the details of this proposed bespoke cooperation with Europol are unclear.

In order for the UK to be eligible to enter an agreement with Europol, the EU has the following options:

- to conclude an international agreement with the UK, including a justice and home affairs chapter with the UK; or
- for the European Commission to make a data adequacy decision.

Feasibility and Technical implications of the proposed potential form(s) of continued UK participation

A number of challenges exist in agreeing a bespoke operational and strategic arrangement between Europol and the UK. In addition to the considerations regarding Denmark's status as a Member State and the agreement being subject to the jurisdiction of the CJEU, the bespoke operational agreement between Denmark and Europol is also conditional upon Denmark being bound by the European Convention on Human Rights and would comprise an obligation for Denmark to apply Directive 2016/680¹⁸⁰ 'with respect to the personal data exchanged pursuant to this Agreement'¹⁸¹ as well as recognising the role of the European Data Protection Supervisor. Furthermore, the Agreement details the requirement for Denmark to 'appropriately contribute financially to Europol's budget'.¹⁸²

With regard to the UK agreeing an operational agreement of a similar level of cooperation as that agreed between Europol and Denmark, consideration will likely be given to the status of the UK as a non-Schengen third country. The status of the UK as a non-Schengen third country is generally considered as a challenge in terms of the feasibility of achieving the highest degree of cooperation with Europol.

Therefore, any agreement with the UK which allows the exchange of information, in particular through the use of the Europol Information System (EIS), will require the UK to be governed by Union rules on adequacy and to maintain essentially equivalent data protection standards. Similarly, questions remain over the negotiation of a dispute resolution mechanism satisfactory to both the EU and the UK for an agreement between the UK and Europol. Furthermore, the UK will be required to provide a level of protection of fundamental rights essentially equivalent to those enshrined in the European Charter of Fundamental Rights. These remain critical issues that are at odds with the UK's current proposals for continued UK participation in Europol.

As the EU's draft withdrawal agreements explicitly states that the UK will not be involved in the decision-making of agency, this creates an uncertainty about the UK's relationship with Europol during the transition period. The commitment of the EU to extend effective Member State status to the UK during the transition period contradicts the EU's proposals for the UK's relationship with Europol during the transition period, which would not allow the UK to retain its governance role in Europol.

¹⁸⁰ Directive (EU) 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.

¹⁸¹ Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and Europol.

¹⁸² Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and Europol.

b. Eurojust

Eurojust
Description of the instrument
<p>The European Union Agency for Criminal Justice Cooperation (Eurojust) is the EU's agency tasked with supporting and strengthening coordination and cooperation between national investigating and prosecuting authorities in relation to terrorism and serious and organised crime, affecting two or more Member States.</p> <p>Eurojust's work involves facilitating the execution of European Arrest Warrants (EAWs), the requests for mutual legal assistance, bringing together national authorities in coordination meetings to agree a specific approach to a case, and providing legal, technical and financial support to Joint Investigation Teams (JITs).</p> <p>Eurojust is headquartered in The Hague. The agency operates multilaterally through co-located National Desks, which are small teams of representatives from each Member State, headed by a National Member. The 28 seconded National Members, of which there is one representative from each Member State, form the College of Eurojust, which is responsible for the organisation and operation of the agency. Eurojust's management board has the responsibility of guiding the strategic direction of the agency.</p>
Current legal basis of the instrument
Eurojust was established in February 2002 by Council Decision 2002/187/JHA, ¹⁸³ amended in 2009. ¹⁸⁴
Description of the UK's participation in the instrument
Following the block opt-out in December 2014 the UK opted to re-join all three Council Decisions as part of the 35 pre-Lisbon police and criminal justice measures. Following its opt-in to the Regulation and as a Member State of the European Union, the UK is a full member of Eurojust, with representation, in the form of a National Member, in the College of Eurojust.
Description of the UK's contribution to and current use of the instrument
<p>The UK posts a national representative to the Eurojust desk. This national representative sits on the Eurojust Management Board and is therefore able to provide input on the strategic direction of the agency.</p> <p>The UK is one of the countries with the highest participation in Joint Investigation Teams (JITs). Since 2009, the UK has been involved in over EUR2.5 million of Eurojust-funded JITs. The UK has set up and participated in teams for both specific operations and for thematic reasons, in order to combat emerging criminal threats.</p> <p>Eurojust has stated that of the 1,441 cases in which Member States requested assistance via Eurojust in 2011, 197 were from the EU27 towards the UK,¹⁸⁵ constituting approximately 14% of the total.</p> <p>The number of requests for assistance from Eurojust by EU Member States has been steadily increasing over the last five years. In 2017, of the 2,550 cases in which Eurojust</p>

¹⁸³ Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime.

¹⁸⁴ Council Decision 2009/426/JHA On the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.

¹⁸⁵ Interview undertaken with representative of Eurojust for the purpose of this study.

Eurojust

assistance was requested, 290 were from the EU27 toward the UK, constituting approximately 11.4% of the total. Thus, the EU27's use of the UK national desk for judicial cooperation is increasing in nominal terms and has remained consistent in percentage terms.¹⁸⁶

The director of public prosecutions of the UK Crown Prosecution Service (CPS) listed Eurojust as 'among their top priorities for any forthcoming negotiation on Brexit'.¹⁸⁷ The ability to work in real time, multilaterally rather than bilaterally, in a co-located site with translation and legal advice available, have been highlighted by the UK authorities as forming the key benefits of their membership of Eurojust.¹⁸⁸

Existing alternative forms of participation by other Member States and third countries including participation by EFTA/EEA countries

In accordance with Article 26(1) of the Eurojust Decision, Eurojust may conclude agreements with third countries. Eurojust has **cooperation agreements** with a number of third countries, including the United States, Norway, Switzerland, Iceland, Montenegro, The Former Yugoslav Republic of Macedonia, Moldova, Liechtenstein and Ukraine. Eurojust's closest cooperation agreements are with the United States of America, Switzerland, Montenegro and Norway.

These four countries post **Liaison Prosecutors** to Eurojust who in many instances can engage in the same forms of participation as full Eurojust members, such as access to the facilitation of Eurojust-funded JITs, and, upon invitation, attendance and participation in operational and strategic meetings. A representative of Eurojust consulted as part of this study noted in this regard that levels of engagement are assumed to vary dependent on the third countries' willingness to engage in the day-to-day operation of Eurojust; the Swiss are said to be most engaged with two representatives on site, with the US representative, acting as needed out of Brussels.¹⁸⁹

These countries are **not entitled to participate in the Eurojust management board meetings** and as such they have no influence over the strategic direction of the agency. However, they may be invited to discussions by the Eurojust president if necessary.

Furthermore, these third countries **do not have access to the Eurojust case management system**, which allows the competent national authorities to 'cross-check any national cases or investigations against the Eurojust database' in order to establish whether to engage other Member States. However, stakeholders consulted as part of this study expressed different perceptions of the importance of this mechanism, highlighting that alternative mechanisms of cross-checking exist, such as direct messages sent through SIENA in cooperation with Europol, or through informal channels.

Furthermore, although these third countries may participate in **JITs** they are not entitled to receive funding from Eurojust for JITs solely involving other third countries.

In addition to the nine third country cooperation agreements entered into by Eurojust, the agency has concluded agreements with 42 third country judicial contact points which make

¹⁸⁶ Interview undertaken with representative of Eurojust for the purpose of this study.

¹⁸⁷ House of Commons. Home Affairs Committee. UK–EU security cooperation after Brexit. Fourth Report of Sessions 2017–19.

¹⁸⁸ House of Commons. Home Affairs Committee. UK–EU security cooperation after Brexit. Fourth Report of Sessions 2017–19.

¹⁸⁹ Interview undertaken with representative of Eurojust for the purpose of this study.

Eurojust

up **Eurojust's third country judicial contact point network**. These relationships are strategic cooperation arrangements with no transmission of personal data between states.

Potential form(s) of future UK participation in formal and informal cooperation

The potential options for future UK participation in Eurojust are:

- **Default option** No institutionalised cooperation between the UK and Eurojust.
- **Cooperation agreement without the posting of a liaison prosecutor** similar to the one with Iceland, Moldova, Liechtenstein, Ukraine and the former Yugoslav Republic of Macedonia.
- **Cooperation agreement with the posting of a liaison prosecutor** similar to EU agreement with Switzerland and the USA.

A third country **cooperation agreement with the posting of a liaisons prosecutor** – replicating what currently exists may prove the most fruitful form of future cooperation from an EU perspective. As there is already precedence for such an agreement, these existing agreements could be used as a blueprint for an agreement with the UK. It was noted that the main barrier to such an agreement would be the issues around data protection. While one stakeholder consulted argued that this may not be such a significant issue for the UK given that the UK has currently transposed EU data protection legislation, there are significant questions over whether this has been fully implemented. Furthermore, safeguards would need to be put in place to ensure continued alignment, with the UK ensuring that data protection standards pertaining to the area of justice and home affairs remain at least equivalent following the UK's departure from the Union.

A cooperation agreement of this nature would allow for continued strategic and operational cooperation on judicial matters within the context of Eurojust. A relationship of this type would allow for continued cooperation without sacrificing the security of the Union, or jeopardising the priority granted to full EU Members, or risking third country influence in the framing of EU justice legislation.

An agreement with a lower degree of cooperation would include a **cooperation agreement without the posting of a liaisons prosecutor to Eurojust**, similar to those currently in place with Liechtenstein, Moldova, the Former Yugoslav Republic of Macedonia and Iceland. From an EU perspective, this arrangement could risk undermining the close cooperation built up between the EU and the UK over many years. Furthermore it could undermine the contribution the UK has made within Eurojust particularly with regard to the EAW and JITs.

A third form of the future partnership as it pertains to judicial cooperation would be the default option of **no institutionalised cooperation between the UK and Eurojust**. This would mean no formal institutionalised mechanism for formal judicial cooperation between the EU and the UK. Cooperation would then be on the basis of ad hoc requests or joining Eurojust's third country contact point network.

Legal procedures for continued UK participation

- **Default option** No institutionalised cooperation between the UK and Eurojust: In the case of the default option where judicial cooperation functioned on the basis of ad hoc requests no legal procedures would need to take place to facilitate this option.
- **Cooperation agreement without the posting of a liaison prosecutor** similar to the one with Iceland, Moldova, Liechtenstein, Ukraine and the Former Yugoslav Republic of Macedonia. This option could be enacted into through the negotiation of a memorandum of understanding between the UK and Eurojust.

Eurojust

- **Cooperation agreement with the posting of a liaison prosecutor:** This option would require the negotiation of an agreement between the EU and the UK, using a similar format to what currently exists in the agreements with Switzerland and the USA.

Feasibility and Technical implications of the proposed potential form(s) of continued UK participation

Future cooperation with Eurojust has implications for the protection of personal data of EU citizens. In order to allow for data exchange between the UK and EU Member States, particularly when participating in joint investigations, the UK's data protection standards would need to be aligned (and importantly remain aligned) to EU standards.

It is important to note that the UK has ratified the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which would represent the default position. Under this Convention, 'the parties are required to take the necessary steps in their domestic legislation to apply the principles it lays down in order to ensure respect in their territory for the fundamental human rights of all individuals with regard to processing of personal data'.¹⁹⁰ However significant questions remain over the UK's current implementation of the EU's current data protection legislation.

Furthermore, a bespoke relationship would likely involve a UK contribution to Eurojust's budget; another contentious issue from the UK's perspective. Payment into the EU budget would require the acceptance of oversight by OLAF (the European anti-fraud office) and the accompanying accountability mechanisms involving the CJEU.

Other feasibility issues concern the length of time it might take to reach an agreement similar to the current third country cooperation agreements. For example, the cooperation agreement between Switzerland and Eurojust took seven years of negotiations. Additionally, third countries cooperation agreements without a liaison prosecutor involved protracted discussions – Liechtenstein and Moldova took five and six years respectively to negotiate bilateral agreements with Eurojust. However, negotiations may be less lengthy given that the UK comes from a starting point of existing Eurojust membership.

c. Mutual Legal Assistance and the European Investigation Order

Mutual legal assistance including the European Investigation Order

Description of the instrument

Mutual legal assistance (MLA) is a type of judicial cooperation between countries for the purpose of collecting and exchanging information. It is often used to obtain information that cannot be obtained on a police cooperation basis; for example, where a judicial order or other compulsory measure must be used to source the desired information or evidence. In practice, it is often utilised in operations requiring coercive means across the EU. Its implications are cross-cutting in the sense that they consist of mechanisms applicable to EU agencies to include Eurojust and Europol.

The European investigation order (EIO) is one of the EU's mutual legal assistance measures. The EIO enables the judicial authorities of one Member State to request that

¹⁹⁰ The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108).

Mutual legal assistance including the European Investigation Order

evidence be obtained in another Member State. The EIO is designed to replace a series of existing measures including the 1959 Council of Europe Convention on Mutual Legal Assistance in Criminal Matters and the 2000 EU Convention on Mutual Assistance in Criminal Matters.¹⁹¹ The EIO's aim is to replace these measures with a single mechanism intended to make cross-border investigations faster and thus more efficient and effective. The principle of mutual recognition forms the basis of the EIO, which means that the request must be accepted and acted upon without further formality, representing a more enhanced form of judicial cooperation vis-à-vis the EU 2000 Convention on Mutual Assistance in Criminal Matters. Once an EIO is recognised by the Member States, the relevant executing authority within the receiving State has 90 days by which to gather the evidence for the requesting state.

Current legal basis of the instrument

The EU MLA measures which this cases study will focus on are:

- The EU 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its 2001 protocol and;
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

Description of the UK's participation in the instrument

Under the EIO, an EU Member State sends outgoing EIOs to be serviced through the Home Office, while orders related to taxation go to HM Revenue and Customs (HMRC). The central authority, in most instances the UK's Home Office, processes the request, forwarding it to the relevant executing authority, which depends on the type of request. One of the important features of the EIO once it has been recognised by the Home Office, is that the executing authority then has 90 days by which to gather the evidence for the requesting state.

The basic principles concerning mutual legal assistance are written into UK law under the Crime (International Co-operation) Act 2003, with the EIO implemented under The Criminal Justice (European Investigation Order) Regulations 2017.¹⁹²

Description of the UK's contribution to and current use of the instrument

Oral evidence provided by the Crown Prosecution Service to the House of Lords European Union committee suggests that, for both Member States and the UK, the EIO is beginning to replace the more cumbersome letters of request, with approximately 50% of requests now being serviced this way.

Existing alternative forms of participation by other Member States and third countries including participation by EFTA/EEA countries

Currently there is no precedent for third country participation in the EIO.

However, alternative forms of participation exist in the field of MLA more generally. The default option for third countries participation in the field of MLA would involve cooperation based on the Council of Europe 1959 Convention on Mutual Assistance in Criminal

¹⁹¹ Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, Brussels, 29 May 2000.

¹⁹² The Criminal Justice (European Investigation Order) Regulations 2017, STATUTORY INSTRUMENTS, 2017 No. 730.

Mutual legal assistance including the European Investigation Order

Matters,¹⁹³ its 1978 Protocol¹⁹⁴ and its 2001 Protocol.¹⁹⁵ This Council of Europe MLA Convention is one of the few conventions ratified by all 49 members, including all 28 EU Member States. It provides for mutual legal assistance through international Letters of Request, a significantly more cumbersome and time-consuming process.

The second existing alternative form of cooperation in the area of MLA involves cooperation based on the 2000 EU MLA Convention. As part of the further development of the Schengen acquis, the EU has concluded such agreements with Norway and Iceland (which are members of the EEA and of the Schengen Area).¹⁹⁶

Potential form(s) of future UK participation in formal and informal cooperation

The potential options for future EU–UK cooperation in the form of MLA are:

- **Default option:** Cooperation based on Council of Europe MLA Convention;
- **Cooperation based on the 2000 EU MLA Convention:** similar to that of Norway and Iceland, which applies certain provisions from the 2000 EU MLA Convention;
- **Cooperation based on EIO through a bespoke agreement:** the EU and the UK could negotiate a bespoke agreement which would replicate the functions of the EIO (implementing mutual recognition). This option involves a higher degree of cooperation than the EU 2000 MLA convention as it removes the need for international Letters of Request and applies time restrictions on the servicing of evidence, but would not be as broad in scope.
- **Cooperation based on the EIO:** Under this option, the EIO, which does not entirely replace the previous framework, would remain applicable between the EU and the UK and would become the sole applicable instrument. Such cooperation is allowed under the Council of Europe 1959 Convention on MLA: Article 26(4) of which states that 'where mutual assistance in criminal matters is practised on the basis of uniform legislation ... these Parties shall, notwithstanding the provisions of this Convention, be free to regulate their mutual relations in this field exclusively in accordance with such legislation or system'.

Having chosen to leave the EU, it is clear that no MLA arrangement should prioritise a UK request for MLA, over the requests between Member States. By allowing full access to the EIO, with its time provisions for the servicing of documents, the EU would risk prioritising the requests of the UK over Member States.

Legal procedures for continued UK participation

- **Default option:** Cooperation based on Council of Europe MLA Convention: No action required for the EU or those Member States that ratified the CoE Convention and its second additional protocol. However, those Member States who have not ratified the second additional protocol would need to negotiate bilateral agreements with the UK or ratify it.
- **Cooperation based on the 2000 EU MLA Convention:** the UK and EU would need to negotiate an agreement similar to the one concluded by the EU with Iceland and

¹⁹³ European Convention on Mutual Assistance in Criminal Matters 1959.

¹⁹⁴ Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 1978.

¹⁹⁵ Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 2001.

¹⁹⁶ Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto.

Mutual legal assistance including the European Investigation Order

Norway, many of the provisions of which could, in theory, be incorporated into a similar agreement with the UK. However, the current agreement with Iceland and Norway is based upon their membership of the Schengen Area, of which the UK is not a member.

- **Cooperation based on a bespoke arrangement** between the UK and EU would require the negotiation an agreement which replicated the functionality of the EIO without undermining the benefits afforded to Member States.
- **Cooperation based on the EIO:** Member States and UK would need to make a declaration/notification to the Council of Europe as per Article 26(4) of the CoE 1959 Convention on MLA, stating that their MLA relations will be governed exclusively by national legislation implementing the EIO. This declaration would be made at the Member State level. Additionally, Member States would need to make an amendment in their national legislation to include the UK in the provisions implementing the EIO Regulation. The crucial point is that the decision will reside with the Member States to decide whether or not they will extend the scope of the EIO regime to the UK. So, in its essence, this option comes close to a bilateral agreement.

Feasibility and Technical implications of the proposed potential form(s) of continued UK participation

The feasibility of any future form of cooperation would rest on the EU and UK's ability to negotiate an agreement concerning the jurisdiction of the CJEU and the UK's accompanying obligations to accountability and oversight structures. The relationship in this area will have to continue to build upon the principle of mutual trust for any agreement in the field of mutual legal assistance to remain fortified.

Future cooperation in the field of mutual legal assistance looks inevitable given the fall-back position of the Council of Europe Convention on MLA, which all EU Member States have ratified. Rather, the question of the future relationship concerns the level of continued cooperation within key instruments such as the EIO. Although an agreement on an amended form of the EIO arrangement might be possible, it is unlikely to be as efficient nor as effective as the current relationship. A future relationship which binds the Member States and the UK to the same time constraints for the servicing of evidence written, as is currently afforded by the EIO arrangement, could be seen as giving UK entities the same rights as Member States. Yet an EIO type arrangement without time restrictions would likely leave the UK at the back of the line when it comes to servicing of evidence requests, which would risk entering a reciprocal relationship in which Member State requests to the UK experience reduced priority.¹⁹⁷

d. European Arrest Warrant (EAW)

European Arrest Warrant (EAW)

Description of the instrument

¹⁹⁷ House of Lords, European Union Committee, Brexit: future UK–EU security and police cooperation, 16 December 2016.

European Arrest Warrant (EAW)

The European Arrest Warrant (EAW) is an instrument through which Member States can issue a warrant for arrest and extradition, which has validity throughout the European Union. The EAW is a simplified procedure that ensures that extradition decisions are made by judicial authorities alone.¹⁹⁸

The EAW outlines strict time limits for warrants, with final decisions from the extraditing country required to be made within 60 days of arrest, or within 10 days should the defendant consent to the surrender. Furthermore, the EAW ensures that Member States are not able to refuse to surrender their own nationals, limits the grounds for refusal and does not contain requirements for double criminality.¹⁹⁹

The simplified extradition procedure introduced through the EAW is 'significantly faster and cheaper than its predecessor arrangements, based on the 1957 European Convention on Extradition'.²⁰⁰ In stark contrast to these strict time limits and highlighting the impact of the European Arrest Warrant, the extradition to France of Rachid Ramda, one of the perpetrators of the Paris bombings of 1995, took 10 years under the previous surrender arrangements.²⁰¹

Current legal basis of the instrument

The basis of the European Arrest Warrant is Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), which superseded the extradition arrangements between EU Member States outlined in the Council of Europe's 1957 European Convention on Extradition.

Description of the UK's participation in the instrument

The Framework Decision introducing the European Arrest Warrant was implemented in the UK by Parts 1 and 3 of the Extradition Act 2003, which came into force on 1 January 2004.

Description of the UK's contribution to and current use of the instrument

- **Extradition of individuals to EU Member States by the UK:** The UK has contributed significantly to the efficient and effective use of the EAW through the arrest and surrender of individuals to other Member States. During 2016–2017, 1,735 individuals were arrested in the UK through an EAW, bringing the total number of individuals arrested in the UK through the EAW to over 12,000 since April 2009.²⁰² Furthermore, the UK has, from 2004 to 2015, extradited over 8,000 individuals accused or convicted of a criminal offence to other Member States.²⁰³ This is in stark contrast to the less than 60 individuals extradited each year by the UK to any country before the entry into force of the EAW.
- **Extradition of individuals to the UK by Member States:** Conversely, the UK receives approximately 100 surrenders from other Member States each year through

¹⁹⁸ House of Commons. Home Affairs Committee. UK–EU security cooperation after Brexit. Fourth Report of Sessions 2017–19.

¹⁹⁹ European Justice Portal, European Arrest Warrant.

²⁰⁰ House of Commons. Home Affairs Committee. UK–EU security cooperation after Brexit. Fourth Report of Sessions 2017–19.

²⁰¹ House of Commons. Home Affairs Committee. UK–EU security cooperation after Brexit. Fourth Report of Sessions 2017–19.

²⁰² House of Commons. Home Affairs Committee. UK–EU security cooperation after Brexit. Fourth Report of Sessions 2017–19. 14 March 2018.

²⁰³ House of Commons. Home Affairs Committee. UK–EU security cooperation after Brexit. Fourth Report of Sessions 2017–19. 14 March 2018.

European Arrest Warrant (EAW)

EAWs and between 2009 and 2016 over 1,000 individuals were extradited to the UK by Member States, including over 300 surrenders by Member States of their own nationals.²⁰⁴

Existing alternative forms of participation by other Member States and third countries including participation by EFTA/EEA countries

There is currently no form of participation by third countries in the European Arrest Warrant. Extradition between the EU and non-EU countries is not governed by EU law, except where the EU has agreed specific treaties on this issue, and is instead 'governed by a combination of national law and bilateral and multilateral treaties',²⁰⁵ including the Council of Europe's 1957 European Convention on Extradition.²⁰⁶

The EU has agreed extradition treaties with the USA and with Iceland and Norway. However, Norway and Iceland are the only non-EU countries to have negotiated a specific surrender arrangement that shares a number of provisions with the EAW²⁰⁷ that govern the strict time limits and procedures for the decision to execute the arrest warrant, which forms the key added benefit of the EAW over the Council of Europe Convention on Extradition.

Potential form(s) of future UK participation in formal and informal cooperation

As there are no current forms of participation by third countries in the European Arrest Warrant, the options for the UK's future relationship with the EU in the field of extradition proceedings are:

- **Default option:** Cooperation based on the Council of Europe's 1957 Convention on Extradition. This option reflects the EU's ability to use the Council of Europe's extradition framework. However, this would result in a considerable increase in the time taken and cost of the extradition process. Furthermore, surrender requests would be directed through the Secretary of State, resulting in a more cumbersome and politicised procedure.
- Cooperation based on the EAW through a **bespoke agreement** between the UK and the EU. This option involves the negotiation of a bespoke extradition agreement that adopts a number of the EAW's provisions. The agreement arranged between the EU and Norway and Iceland, which contains a number of similar provisions to the EAW but with the noticeable inclusion of the Member State's right to waive this extradition principle if it concerns political offences or if extradition of own nationals is laid down in the Member State's constitution, could act as a template for this bespoke agreement.
- (3) Cooperation based on the EAW by using **Article 28(3) of the CoE 1957 Convention on Extradition**. According to Article 28(3) of the CoE 1957 Convention on Extradition,²⁰⁸ 'Where, as between two or more Contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provisions of this Convention'. Given that the decision to extend the scope of the EAW regime to the UK rests with individual Member States, this option is, in essence, a series of bilateral agreements, which could result in a fragmented

²⁰⁴ House of Commons. UK-EU security cooperation after Brexit. Fourth Report of Session 2017–19. Written evidence submitted by the National Crime Agency (PSC0009). 14 March 2018.

²⁰⁵ Peers, S. <http://eulawanalysis.blogspot.co.uk/2016/09/extradition-to-non-eu-countries-limits.html>.

²⁰⁶ Council of Europe. European Convention on Extradition. European Treaty Series – No. 24. Paris, 13.XII.1957.

²⁰⁷ House of Commons. The European Arrest Warrant. Briefing Paper Number 07016. 18 April 2017.

²⁰⁸ Council of Europe. European Convention on Extradition. European Treaty Series – No. 24. Paris, 13.XII.1957.

European Arrest Warrant (EAW)

system where a number of Member States refuse to amend their declarations to include the UK, thereby significantly reducing the effectiveness of this option.

Legal procedures for continued UK participation

- **Default option:** Cooperation based on the Council of Europe's 1957 Convention on Extradition. No legal procedure is required for this option.
- Cooperation based on the EAW through a **bespoke agreement** between the UK and the EU. Negotiation between the EU and the UK on a bespoke agreement. A number of Member States will be required to make a constitutional amendment in their national legislation (to include the UK) in the provisions implementing the EAW Council Framework Decision.²⁰⁹
- Cooperation based on the EAW by using **Article 28(3) of the CoE 1957 Convention on Extradition**: While not a legal procedure, each Member State would be required to submit an amendment to the existing Member State's declarations to the Council of Europe, extending its application to the EU Member States and the UK. Member States will be required to make a similar constitutional amendment in their national legislation (to include the UK) in the provisions implementing the EAW Council Framework Decision.²¹⁰ As discussed, it will be up to the individual Member States to decide whether to amend their declarations to include the UK.

Feasibility and Technical implications of the proposed potential form(s) of continued UK participation

Option 2, Cooperation based on the EAW through a **bespoke agreement** between the UK and the EU, is based on the agreement between the EU and Norway and Iceland. However, a number of stakeholders noted in this regard that the agreement between the EU and Norway and Iceland was, in turn, based upon their participation in Schengen, which will not apply to the UK following the UK's withdrawal from the European Union. Therefore, the fact that the UK will be a non-Schengen third country is likely to have implications for the feasibility of this potential option. However, the UK currently participates in parts of the Schengen acquis relating to police and judicial cooperation, a key issue in the practical feasibility of these proposed forms of cooperation.

As discussed above, Options 2 and 3 may require constitutional amendments in some Member States in order to be enacted, which brings additional difficulties and legal procedures to concluding continued cooperation with the UK over extradition proceedings. Additionally, as Option 3 relies on individual Member States, it could result in a system that does not cover extradition between the UK and all Member States, which could significantly reduce its effectiveness in extraditing Member States nationals from the UK.

Additionally, the options for continued UK participation raise constitutional obstacles in national legal frameworks to cooperation on extradition. As outlined above, despite the agreement between the EU and Iceland and Norway replicating a number of the provisions of the EAW, there are constitutional obstacles surrounding the extradition of Member States' nationals to third countries which gives Member States the right of exemption if the extradition concerns (1) political offences, (2) extraditions of own nationals.

²⁰⁹ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

²¹⁰ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

European Arrest Warrant (EAW)

There is a question over the possibility of concluding an agreement over continued cooperation with the UK over extradition without the introduction of a linked agreement that creates a framework for mutual recognition and mutual confidence between the EU and the UK. Additionally, the UK will be required to provide a level of protection of fundamental rights essentially equivalent to those enshrined in the Charter of Fundamental Rights. Furthermore, future cooperation with the UK on the EAW may still require the UK to abide to the jurisdiction of the CJEU.

Should an agreement be reached for the UK's continued participation in the EAW, there are significant questions over whether the current level of effectiveness and efficiency of the EAW can be maintained without continued UK access to SIS II.

e. Mutual recognition of court sentences in criminal matters

Mutual recognition of court sentences

Description of the instrument

The **Framework Decision on mutual recognition of prison sentences** ensures that EU Member States agree to recognise judgments in criminal matters imposing prison sentences in one another's national laws or decisions.²¹¹ In practical terms, it sets up a system for the transfer of convicted prisoners back to the EU Member State of which they are nationals (or normally live) or to another EU country with which they have close ties so that they serve their prison sentence there.

The **Framework Decision on mutual recognition of confiscation orders** allows a judicial authority in one Member State to send an order to freeze or confiscate property directly to the judicial authority in another Member State, where it will be recognised and carried out without any further formality.²¹²

The **Framework Decision on mutual recognition of financial penalties** introduces specific measures, under the principle of mutual recognition, allowing a judicial or administrative authority to transmit a financial penalty directly to an authority in another EU Member State and to have that fine recognised and executed without any further formality.²¹³

Current legal basis of the instrument

The legal basis of the relevant EU legal instruments pertaining to mutual recognition of court sentences are:

- 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;

²¹¹ 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.

²¹² Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

²¹³ Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

Mutual recognition of court sentences

- Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders; and
- Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties
- Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

Description of the UK's participation in the instrument

The UK has opted into the three mutual recognition measures listed above as well as the Framework Decision amending them (which applies only to the Framework Decisions which the UK has opted back into):

- **Mutual recognition of prison sentences:** The UK has implemented the Framework Decision through the Repatriation of Prisoners Act 1984.²¹⁴
- **Mutual recognition of confiscation orders:** Written into Proceeds of Crime Act (POCA) 2002.²¹⁵
- **Mutual recognition of financial penalties:** The Framework Decision was implemented into England, Wales and Northern Ireland law in 2009, through the Criminal Justice and Immigration Act 2008.²¹⁶ There was a minor amendment made through the Criminal Procedure Rules 2011.²¹⁷

In relation to the above-mentioned instruments, the Crown Prosecution Service (CPS) has stated that it sees the instruments as a 'very important package' that allows them to ask other Member States to recognise UK orders and enforce them abroad.²¹⁸

The UK has not, however, opted back into Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.²¹⁹

Description of the UK's contribution to and current use of the instrument

Mutual recognition of prison sentence: The EU is beginning to see more EU nationals being removed from UK prisons and returned to serve prison sentences in their home Member State. From 2010–11 the UK returned 1,019 individuals back to EU Member States to serve the remainder of their custodial sentence and, from 2015–17, this number more than tripled, to 3,451²²⁰ individuals.

Mutual recognition of confiscation orders: Member States are making an increased number of requests to the CPS asking them to freeze assets in the UK. Additionally, a

²¹⁴ Repatriation of Prisoners Act 1984.

²¹⁵ Proceeds of Crime Act (POCA) 2002, 3 December 2014.

²¹⁶ Criminal Justice and Immigration Act 2008.

²¹⁷ Criminal Procedure Rules 2011.

²¹⁸ House of Lords, European Union Committee, Brexit: future UK–EU security and police cooperation, 16 December 2016.

²¹⁹ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

²²⁰ House of Commons Hansard. Removal of Foreign National Offenders and EU Prisoners, 6 June 2016.

Mutual recognition of court sentences

number of Member States that had previously never made requests to the UK have recently begun to make requests. The proceeds of the asset confiscation are split 50:50 when the value is over GBP10,000, providing an incentive to cooperate on both sides.²²¹

Mutual recognition of financial penalties: Between June 2010 and September 2012, England and Wales received 393 cases from other Member States, with a total value of just over GBP90,000 and an average value of approximately GBP240 per penalty. There were 126 outgoing penalties from England and Wales to other Member States between December 2010 and October 2012. The total value of the outgoing penalties in this period was approximately GBP50,000, with an average value of approximately GBP400 per penalty.²²²

Existing alternative forms of participation by other Member States and third countries including participation by EFTA/EEA countries

There is currently no third country precedent for participation in any of these Framework Decisions.

It has been suggested that the EU–UK relationship could fall back on a number of Council of Europe Conventions, which currently form the basis on which the UK and other Member States cooperate with certain non-EU countries:

- The existing alternative form of **cooperation for the transfer of prisoners** is the 1983 Council of Europe Convention on the Transfer of Sentenced Persons²²³ and the Additional Protocol to the 1983 Convention on the Transfer of Sentenced Persons.²²⁴
- The existing alternative form of **cooperation for financial penalties** involves the European Convention on the International Validity of Criminal Judgments,²²⁵ of which the UK is currently not a signatory.
- The existing alternative form of **cooperation for confiscations** involves the Council of Europe Convention on the International Validity of Criminal Judgments (ETS 070) and on the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.²²⁶

However, these instruments are generally regarded as being less effective than the EU instruments as the Framework Decision builds on and extends the scope of these Council of Europe arrangements.

Potential form(s) of future UK participation in formal and informal cooperation

Two potential forms of cooperation that could be foreseen with regard to all three instruments are:

- The **default position** – Council of Europe legislation
- **Bespoke agreement** on mutual recognition of court sentences

²²¹ House of Lords, European Union Committee, Brexit: future UK–EU security and police cooperation, 16 December 2016.

²²² UK Parliament, European Scrutiny committee, The UK's block opt-out of pre-Lisbon criminal law and policing measures, 2012.

²²³ Council of Europe convention on the transfer of sentenced persons, 1983.

²²⁴ Additional Protocol to the Convention on the Transfer of Sentenced Persons.

²²⁵ European Convention on the International Validity of Criminal Judgments (ETS 070).

²²⁶ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

Mutual recognition of court sentences

For the **transfer of prisoners**, the default position involves fall-back on the 1983 Council of Europe Convention on the Transfer of Sentenced Persons²²⁷ and its Additional Protocol (ETS No. 167), which largely replicates the functionality of the Framework Decisions on custodial sentences.

For **financial penalties**, the default Council of Europe legislation would involve the UK signing up to the European Convention on the International Validity of Criminal Judgments (ETS 070).²²⁸ However, this convention has not been ratified by 14 of the EU27 Member States, including France, Italy, Germany and Poland.²²⁹ This convention also relates to fines, confiscations and disqualifications but on a more limited basis than EU law.

For **confiscations**, the default Council of Europe legislation involves falling back on a number of Council of Europe Conventions including: The Council of Europe Convention on the International Validity of Criminal Judgments (ETS 070) and on the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism,²³⁰ which even allows for bilateral asset-sharing agreements, similar to the EU framework. This position would be complemented by a range of UN treaties which also foresee execution of confiscations of the proceeds of the crimes.

The **bespoke option** for each of the above would involve negotiating an agreement which replicated the same functionality as the Framework agreements.

Legal procedures for continued UK participation

As all Member States have ratified the 1983 Council of Europe Convention on the Transfer of Sentenced Persons, the legal procedures required for the **transfer of prisoners** under the Council of Europe legislation therefore would only require those Member States that have not ratified the 1997 Additional Protocol²³¹ to negotiate agreements with the UK or ratify the Convention.

The legal procedures required for the **financial penalties** under Council of Europe legislation would require the UK to ratify the CoE convention on the International Validity of Criminal Judgments (ETS 070).²³² Additionally, this Convention has currently only been ratified by 13 Member States, so those Member States who have not yet ratified the Convention would need to negotiate agreements with the UK or ratify the Convention.

The legal procedures required for **confiscations** under Council of Europe legislation would similarly require the UK to first ratify the CoE Convention on the International Validity of Criminal Judgments. Additionally, it would require those Member States that have not ratified the Convention on the International Validity of Criminal Judgments, to negotiate agreements with the UK, ratify the convention or apply the more limited UN legal framework.

Feasibility and Technical implications of the proposed potential form(s) of continued UK participation

²²⁷ Council of Europe convention on the transfer of sentenced persons, 1983.

²²⁸ European Convention on the International Validity of Criminal Judgments (ETS 070).

²²⁹ Chart of signatures and ratifications, European Convention on the International Validity of Criminal Judgments (ETS 070).

²³⁰ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

²³¹ Additional Protocol to the Convention on the Transfer of Sentenced Persons.

²³² European Convention on the International Validity of Criminal Judgments (ETS 070).

Mutual recognition of court sentences

These legal instruments have important implications relating to procedural safeguards and victims' rights. Any agreement in the field of mutual recognition of court sentences will need to be underpinned by mutual confidence between the EU and UK with regard to upholding at least equivalent standards of human rights.

Often these four mutual recognition measures are seen as a package, where the removal of elements of them would reduce the functionality of another. As a result, the feasibility of future UK cooperation in any one of these measures will depend significantly on the wider relationship within the field of mutual recognition of judgments. Another issue surrounding the potential to enter into a specific agreement replicating one of these mutual recognition frameworks involves the length of time and complexity of the negotiation process for bespoke arrangements. For example, the process concerning the Norwegian agreement on the European Arrest Warrant was initiated pre-Lisbon, and has today still not entered into force; however, it should also be noted that the treaty on Norway's participation in Schengen was negotiated in less than two years. Furthermore, although Norway aspired to conclude an agreement with the EU in relation to mutual recognition of prison sentences, this process has currently been halted. However, the Vice President of Eurojust noted that, given the UK's current and unprecedented position of already partaking in such agreements, a specific agreement(s) may not be as time consuming or as complex as in another case.²³³

f. Information exchange databases and systems

Information exchange databases and systems

Description of the instrument

The Second Generation Schengen Information System (SIS II)

SIS II is a European-wide IT system that facilitates European cooperation in law enforcement by enabling national police authorities to enter and search for alerts on missing and wanted individuals and lost and stolen objects. The information contains 'clear instructions on what to do when the person or object has been found'.²³⁴ Furthermore, SIS II is used to disseminate European Arrest Warrants through Member States.

The Prüm Decisions

The Prüm Decisions require Member States to allow the reciprocal searching of Member States' databases for DNA profiles, vehicle registration data and fingerprints.

The European Criminal Records Information System (ECRIS)

ECRIS is the secure electronic exchange mechanism through which Member States are able to quickly exchange thousands of pieces of information on convictions made in other Member States.

PNR

Passenger name record (PNR) data is information that is collected by air carriers and is a record of passengers' travel requirements, which can include but is not limited to,

²³³ Interview Klaus Meyer-Cabri, Vice President of Eurojust.

²³⁴ House of Commons. Home Affairs Committee. UK–EU security cooperation after Brexit. Fourth Report of Sessions 2017–19.

Information exchange databases and systems

information such as the travel itinerary, ticket information, contact details, means of payment and baggage information. The PNR Directive provides an obligation for air carriers to transfer to Member States the PNR data they have collected.

Current legal basis of the instrument

The Second Generation Schengen Information System (SIS II)

SIS II was established with Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II).

The Prüm Decisions

The Prüm Decision stems from the multilateral treaty signed in 2005 by Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria. The treaty has been transformed into an EU legal instrument, 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.

The European Criminal Records Information System (ECRIS)

The legal basis for the establishment and governance of ECRIS is 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 and 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.

PNR

PNR data is governed by the PNR Directive, Directive (EU) 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

Description of the UK's participation in the instrument

The Second Generation Schengen Information System (SIS II)

The UK connected to the SIS II database on 13 April 2015. While SIS II also covers immigration and asylum data, the UK only takes part in law enforcement aspects.

The Prüm Decisions

The UK exercised its right to opt out from the Council Decision, effective from 1 December 2014. However, the UK notified the EU of its desire to join the Prüm Decisions in January 2016 and this was approved by the European Commission in May 2016. The system was due to become operational in the UK in 2017, but as of June 2018, it is not operational.

The European Criminal Records Information System (ECRIS)

The UK fully participates and is currently connected to ECRIS.

PNR

The PNR Directive is a new instrument, which Member States were obliged to apply from 25 May 2018 and therefore currently there is little data on its current application and uptake. The UK transposed the PNR Directive and has applied the PNR Directive in intra-EU flights as of 8 June 2018.

Information exchange databases and systems

Description of the UK's contribution to and current use of the instrument

The Second Generation Schengen Information System (SIS II)

- The UK connected into SIS II on 13 April 2015 but only participates in the law enforcement aspects.²³⁵
- Despite the fact that the UK operates SIS II only within the context of law enforcement cooperation, the UK reported 12.91% of total accesses to SIS II in 2016, second only to France (20.1%).²³⁶ Similarly, the UK reported 10.46% of total accesses to SIS II in 2017, behind France (19.17%) and Spain (11.31%).²³⁷ UK law enforcement officials accessed SIS II over 539 million times in 2017. Of the 76.5 million alerts to people and objects on the system in 2017, 1.2 million were from the UK.²³⁸ There were '9,832 UK hits on non-UK alerts and 16,782 non-UK hits on UK alerts' in 2017. Furthermore, of the 13,103 non-UK hits on UK alerts through SIS II, 94.3% of these are alerts for individuals including 'terrorists, travelling sex offenders and fugitives'.²³⁹

The Prüm Decisions

- Following a parliamentary debate, the UK chose to opt in to Prüm.
- The UK is investing heavily in its IT systems to allow EU countries to search the UK's DNA, fingerprint and vehicle registration databases.

The European Criminal Records Information System (ECRIS)

- Since its introduction ECRIS has become a key information exchange mechanism and in 2015/16 the majority of the over 155,000 requests for overseas criminal convictions information were made to EU Member States through ECRIS. The UK has made a significant contribution to the effectiveness of ECRIS as the fourth largest user of the system. In 2016, the UK sent and received 173,251 requests and notifications through the EU, 'a significant number of which were submitted through ECRIS',²⁴⁰ and notified Member States of 35,509 convictions of their nationals in the UK,²⁴¹ enabling national law enforcement agencies to ensure that the offending history of their nationals is correct. Furthermore, the UK responded to 13,460 requests for information from the EU related to UK nationals and has experienced an approximately 30% increase in the number of requests in the last three years.

PNR

- The PNR Directive is a very new instrument and therefore there is currently little data on its current application and uptake. However, the UK was the first EU country to have a fully functioning Passenger Information Unit and has played an active role in the development of this capability at an EU level.

²³⁵ European Commission, Schengen Information System II – Questions and answers, 2013.

²³⁶ EU-Lisa. SIS II – 2017 Statistics. February 2018.

²³⁷ EU-Lisa. SIS II – 2017 Statistics. February 2018.

²³⁸ House of Commons. UK–EU security cooperation after Brexit. Fourth Report of Session 2017–19. Written evidence submitted by the National Crime Agency (PSC0009). 14 March 2018.

²³⁹ House of Commons. UK–EU security cooperation after Brexit. Fourth Report of Session 2017–19. Written evidence submitted by the National Crime Agency (PSC0009). 14 March 2018.

²⁴⁰ House of Commons. UK–EU security cooperation after Brexit. Fourth Report of Session 2017–19. Written evidence submitted by the National Crime Agency (PSC0009). 14 March 2018.

²⁴¹ House of Commons. UK–EU security cooperation after Brexit. Fourth Report of Session 2017–19. Written evidence submitted by the National Crime Agency (PSC0009). 14 March 2018.

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- The UK is one of 14 Member States, as of 8 June 2018, that have communicated to the Commission the measures it has adopted to transpose the Directive, namely The Passenger Name Record Data and Miscellaneous Amendments Regulations 2018.²⁴²
- Additionally, the UK is one of 10 Member States that have notified the Commission of the application of the PNR Directive in intra-EU flights as of 8 June 2018.

Existing alternative forms of participation by other Member States and third countries including participation by EFTA/EEA countries

The Second Generation Schengen Information System (SIS II)

SIS II is currently available only to EU Member States and non-EU countries within the Schengen Area (Switzerland, Norway, Liechtenstein and Iceland).

The Prüm Decisions

Norway and Iceland have negotiated an agreement on access to Prüm, that 'explicitly considered'²⁴³ the current relationship between the EU and these countries as well as their membership of the Schengen area. In addition, the Council has approved requests by Switzerland and Liechtenstein to launch negotiations regarding gaining access to Prüm.

The European Criminal Records Information System (ECRIS)

ECRIS is currently only available to EU Member States and there is currently no precedent for third country access to ECRIS, including those Schengen Area Members that are not Member States.

PNR

The EU has concluded international PNR agreements with the United States, Australia and Canada. However, at this stage, the new EU–Canada Agreement has not entered into force due to the European Parliament voting to seek the opinion of the CJEU. That agreement is being renegotiated in light of the Court's ruling.

Potential form(s) of future UK participation in formal and informal cooperation

The Second Generation Schengen Information System (SIS II) and the European Criminal Records Information System (ECRIS)

(1) Default Option: No access to SIS II and ECRIS. This option entails the reliance of the Member States on Interpol to enable checks of persons in UK police databases, criminal records and for information on missing persons from the UK. Additionally, the UK and Member States may request access to judicial records through Article 13 of the Council of Europe Convention on Mutual Assistance in Criminal Matters of 1959.

(2) Bespoke agreement between the EU and the UK. As no current models exist for third party access to these information databases/systems, the only option available is the negotiation of a bespoke agreement that creates a framework for continued UK participation.

PNR

(1) Default option: No EU access to PNR data for those flying into the UK. This option would result in the loss of access to PNR data of those flying into the UK for the EU Member

²⁴² The Passenger Name Record Data and Miscellaneous Amendments Regulations 2018. No. 598.

²⁴³ House of Commons. Home Affairs Committee. UK–EU security cooperation after Brexit. Fourth Report of Sessions 2017–19.

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States and Europol. However, the EU will retain access to PNR data of those flying into the EU from the UK. Through Article 11 of the PNR Directive, allowing for ad hoc exchange of information with third countries, Member States could transfer EU PNR data to the UK on a case-by-case basis.

(2) **Bespoke agreement** between the EU and the UK similar to those with Australia and the US. This option entails the negotiation of an agreement between the EU and the UK that grants the UK direct access to transfers by air carriers of PNR data to the UK, based upon similar agreements between the EU and Australia and the United States.

(3) **Bespoke agreement** between the EU and the UK. This option entails the negotiation of an agreement between the EU and the UK that allows for the EU to have access to PNR data from those flying into the UK, the continued collection of PNR data of those flying into the EU from the UK and reciprocally granting access to the UK of PNR data of those flying into the EU.

The Prüm Decisions

(1) **Default option:** No access to Prüm. This option entails the reliance of the Member States on Interpol (for fingerprints) and bilateral Member State cooperation to enable searches of DNA profiles as well as the reliance on the Treaty concerning a European Vehicle and Driving Licence Information System (EUCARIS) for checks of vehicle ownership and driving licences.

(2) **Bespoke agreement** between the EU and the UK similar to those with Iceland and Norway. This option represents the negotiation of an agreement between the UK and the EU to apply certain provisions of Council Decision 2008/615/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, based upon the agreement between the EU and Iceland and Norway.

Legal procedures for continued UK cooperation

The Second Generation Schengen Information System (SIS II) and the European Criminal Records Information System (ECRIS)

(1) **Default option:** No access to SIS II and ECRIS. No legal procedure required for this option.

(2) **Bespoke agreement** between the EU and the UK. A bespoke agreement between the EU and the UK could be negotiated as a separate agreement or as part of the creation of an overarching security agreement between the EU and the UK that provides a framework for the UK's retaining access to ECRIS and SIS II.

PNR

(1) **Default option:** No EU access to PNR data for those flying into the UK. No legal procedure required for this option.

(2) **Bespoke agreement** between the EU and the UK similar to those with Australia and the US. A bespoke agreement between the EU and the UK could be negotiated as a separate agreement or as part of the creation of an overarching security agreement between the EU and the UK that provides a framework for the UK's continued access to EU PNR data.

Information exchange databases and systems

(3) **Bespoke agreement** between the EU and the UK: A bespoke agreement between the EU and the UK could be negotiated as a separate agreement or as part of the creation of an overarching security agreement between the EU and the UK that provides a framework for the EU's continued access to UK PNR data.

The Prüm Decisions

(1) **Default option:** No access to Prüm. No legal procedure required for this option.

(2) **Bespoke agreement** between the EU and the UK similar to those with Iceland and Norway: The negotiation of the UK's continued access to Prüm could form part of an overall agreement that provides a framework for the UK's access to all the information exchange databases discussed above.

Feasibility and Technical implications of the proposed potential form(s) of continued UK participation

As discussed above, the only agreements that currently allow third countries access to SIS II and Prüm are dependent on the third countries' membership of the Schengen area and there is 'no legal basis in the EU treaties for a non-EU, non-Schengen country to participate in Schengen'. Therefore, significant questions remain over the feasibility of the UK negotiating continued access following its withdrawal. This is supported by the EU Council's decision to refuse access to the Visa Information System, which is related to the Schengen area, to the UK and furthermore by the CJEU's subsequent ruling in favour of the Council. Similarly, no agreement currently exists that enables access to ECRIS for third countries and therefore any agreement between the UK and the EU would be bespoke and require significant negotiation.

An agreement with the UK which allows the exchange of information, as would be required for continued UK access to the information exchange databases and systems, will require the UK to be governed by Union rules on adequacy and to maintain essentially equivalent data protection standards. Furthermore, the UK will be required to provide a level of protection of fundamental rights essentially equivalent to those enshrined in the Charter of Fundamental Rights.

Appendix 3: Methodology

The data collection for this in-depth analysis was undertaken from April to June 2018. Data collection was undertaken through desk research and interviews, as well as six case studies.

Desk research

The initial data collected for the study was through a desk research exercise. The study team examined relevant documentation in relation to existing legislation, policies and activities in the field of judicial cooperation and police cooperation in criminal matters to produce an updated and comprehensive profile of all legislation, policies and activities that the UK participates in. Additionally, desk research was used to investigate the current positions of the UK and EU institutions with regard to the future relationship between the EU and the UK in the field of police and judicial cooperation. Data relevant to the case studies and to the development of options for potential continued participation by the UK in police and judicial cooperation measures were also collected through desk research.

Case studies

The table below shows the final list of case studies. Data relevant to the case studies were collected via desk research and interviews. The case studies were used to examine in greater detail the process by which specific police and judicial cooperation in criminal matters is conducted. The aim the case studies was to illustrate the current arrangements in each of the six key areas of police cooperation and judicial cooperation in criminal matters.

	Case Study
1	Europol (including EIS)
2	Eurojust (including EJN)
3	European Arrest Warrant
4	Mutual Legal Assistance and European Investigation Order
5	Information Exchange Databases (including ECRIS, SIS II, Prüm and PNR)
6	Mutual recognition and enforcement of court sentences in criminal matters

Interviews

As part of the study 12 interviews were undertaken with stakeholders from the list in Table 12. The objective was to gather stakeholder input on the importance, from the EU perspective, of specific instruments for police and judicial cooperation in criminal matters and for confirmation of the criteria used for the assessment of the importance of instruments for police and judicial cooperation in criminal matters. Additionally, interviews were used to gather stakeholder input on the potential forms of continued UK cooperation, including the implications and feasibility.

Table 12 outlines the rationale for initially contacting specific national authorities as part of the interview programme. However, it should be noted that in the end not all of the countries listed in the table were available to provide input through an interview.

Table 13: Rationale for countries to be contacted for interview

Country	Rationale
Belgium	Belgium was selected due to the demonstrated importance of police and judicial cooperation in recent terrorism investigations.
Denmark	Denmark was selected due to its special status with regard to the AFSJ and due to its conclusion of a bespoke agreement for continued participation in Europol.
France	France was selected due to the significant police and judicial cooperation between France and the UK and the substantial contribution of French police and judicial authorities to information exchange databases and existing bilateral border arrangements with the UK.
Germany	Germany was selected due to the significant police and judicial cooperation between Germany and the UK and the substantial contribution of Germany police and judicial authorities to information exchange databases.
Ireland	Ireland was selected due to the geographic proximity to the UK, the importance of police and judicial cooperation in criminal matters between the UK and Ireland following the UK's withdrawal from the EU and due to Ireland's opt-out from legislation adopted in the AFSJ.
Latvia	Latvia was selected to represent those Member States with smaller populations in order to ensure the study investigated a wide range of Member States.
Netherlands	The Netherlands was selected due to the due to the significant police and judicial cooperation between the Netherlands and the UK.
Norway	Norway was selected due to its arrangement of bespoke agreements with the EU with regard to the European Arrest Warrant, Prüm and mutual legal assistance.
Poland	Poland was selected due to the significant police and judicial cooperation between Poland and the UK, in particular through the European Arrest Warrant.

Table 14: List of stakeholders interviewed

Stakeholder organisation	Stakeholders contacted	Interview date
EU Institution		
European Commission	Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU	Interview undertaken on 29 May 2018
Eurojust	National Member for the United Kingdom, Eurojust	Interview undertaken on 4 May 2018
	National Member for Germany, Eurojust	Interview undertaken on 17 May 2018
Europol	Head of UK Liaison Bureau.	Interview undertaken on 11 May 2018
	EU Coordination Division, Europe Directorate United Kingdom Home Office, Europol.	Interview undertaken on 8 May 2018
Civil Institution		
European Criminal Law Association	Committee Member	Interview undertaken on 3 May 2018
European Criminal Bar Association	Advisory Board Member	Interview undertaken on 3 May 2018
General Contacts		
Independent	Former Executive Director, Europol	Interview undertaken on 11 June 2018
Carlos Pinto de Abreu e Associados – Sociedade de Advogados	Legal practitioner	Interview undertaken on 8 May 2018
National authorities		
Police Scotland	Detective Chief Inspector	Interview undertaken on 16 May 2018
Federal Criminal Police Office (BKA)	IZ 12 – EU and International Police Cooperation	Interview undertaken on 8 June 2018
Polish National Police	Coordination Division of Non-Operational Cooperation, International Police Cooperation Bureau, National Police Headquarters	Provided written response

Appendix 4: Bibliography

Legal Documents

Additional Protocol to the Convention on the Transfer of Sentenced Persons, 1997.

Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 1978.

Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol.

Agreement on mutual legal assistance between the European Union and the United States of America.

Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and Europol.

Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, Brussels, 29 May 2000.

Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention).

Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime.

Council Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

Council Decision 2003/659/JHA amending decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.

Council Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

Council Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of second generation Schengen Information System.

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 (Prüm Decision).

Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences.

Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network.

Council 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.

Council Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions.

Council Decision 2009/968/JHA of 30 November 2009, Adopting the Rules on the Confidentiality of Europol Information, 2009 O.J. (L 332/17)

Council Decision 2009/426/JHA on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.

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.

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.

Council Decision 2013/488/EU of 23 September 2013 on the Security Rules for Protecting EU Classified Information, 2013 O.J. (L 274)

Council Decision of 6 April 2009 establishing the European Police Office, later repealed and replaced by; Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol).

Council of Europe. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 2005.

Council of Europe. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1981.

Council of Europe. Convention on Mutual Assistance in Criminal Matters 1959.

Council of Europe. Convention on Extradition. Reservations and Declarations for Treaty, 1969.

Council of Europe. Convention on the International Validity of Criminal Judgments, 1970.

Council of Europe. Convention on the International Validity of Criminal Judgments. Chart of signatures and ratifications.

Council of Europe. Convention on the transfer of sentenced persons, 1983.

Council of Europe. European Convention on Extradition, 1957.

Council of the European Union Joint investigation team practical guide, 2016.

Criminal Justice and Immigration Act 2008.

Criminal Procedure Rules 2011.

Directive (EU) 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.

Directive (EU) 2016/681 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.

European Council, (Art. 50) guidelines on the framework for the future EU–UK relationship, 23 March 2018.

HM Government, Protocol 36 to The Treaty on the Functioning of the European Union, July 2014.

Proceeds of Crime Act 2002.

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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, provides expertise on the legal, institutional and technical implications of the UK's future relationship with the EU after Brexit in the areas of police cooperation and judicial cooperation in criminal matters (Chapters 4 and 5 of Title V TFEU).

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