

# Post-Brexit law enforcement cooperation

## Negotiations and future options



The **UK** in a  
**Changing Europe**



The UK in a Changing Europe promotes rigorous, high-quality and independent research into the complex and ever changing relationship between the UK and the EU. It is funded by the Economic and Social Research Council and based at King's College London.



# Table of Contents

Introduction .....	5
<b>Section 1</b> – Why EU law enforcement cooperation matters .....	7
<b>Section 2</b> – Europe a la carte: a brief history of UK-EU law enforcement cooperation .....	11
<b>Section 3</b> – “The price of light is less than the price of darkness”: why data matters.....	15
<b>Section 4</b> – Judicial imperialism or “daft red line”? Dispute resolution after Brexit .....	25
<b>Section 5</b> – A second-tier member? The UK’s future relationship with Europol .....	31
<b>Section 6</b> – Avoiding the “honeypot” scenario: future surrender arrangements with the EU.....	37
Conclusions .....	45
References.....	49
Appendix .....	55
Contributors .....	56
Glossary and key terms.....	57

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### Introduction

On 9 May 2016, David Cameron stood at a podium in the British Museum and warned that a vote to leave the EU could threaten peace in Europe. “Can we be so sure that peace and stability on our continent are assured beyond any shadow of doubt?”, he asked. “Is that a risk worth taking?”.<sup>1</sup>

His words provoked ridicule among Leave campaigners. According to *The Times*, it was the backlash against this speech – and a developing media narrative suggesting that ‘Project Fear’ had spiralled out of control – that deterred the Government from publishing a detailed Home Office paper before the referendum.<sup>2</sup> The document argued that Brexit would make the UK less secure from crime and terrorism, and was reportedly drafted with support from MI5 and MI6. It was leaked to the newspaper in August 2017 – long after the British people had voted for the outcome it had counselled against.

According to the most exhaustive account of the referendum published to date, the Government and the official Remain campaign, Britain Stronger in Europe, were influenced by research data indicating that ‘Project Fear’ was not cutting through to voters. Stronger In’s pollster, Andrew Cooper, had apparently struggled to sell the security argument to focus groups.<sup>3</sup> When Cooper

shared some of Cameron’s specific arguments about the value of the EU’s data on suspects of crime and terrorism, “voters simply did not believe him”:

“A typical response was ‘What do you think, they’re going to take our password away from a secret database after we leave the EU? Of course they’re not.’”<sup>4</sup>

Partly as a result, arguments concerning security, crime and terrorism did not figure prominently in the referendum campaign. On the Remain side, the focus was on the economy, while the two Leave campaigns majored on sovereignty and immigration.

Consequently, security-related issues were not to the fore in the minds of most voters, either. A poll taken in May 2016 found that only 6% listed national security as their top issue. When pressed for an opinion, almost a third (29%) thought that national security would be enhanced if the country voted to leave the EU, and only slightly more (34%) thought it would be undermined.<sup>5</sup> Cooper’s focus groups found that the Remain side’s arguments about counter-terrorism were countered by suggestions that the UK should close its borders to keep potential terrorists out.

Even after a number of major terrorist attacks in the UK and Europe during 2017, discussions about the impact of Brexit on law enforcement have been drowned out by debates about trade, immigration and the Court of Justice of the EU (CJEU). This might be because the agencies affected – the police and security services – have not been vocal about Brexit. In contrast, the media has found it easy to source organisations willing to sound off about what Brexit will mean for their sector, be it fishing, aeronautical engineering or pharmaceuticals.

Even the Government's future partnership paper on law enforcement cooperation with the EU, published 15 months after the referendum, does not set out detailed aims or objectives.<sup>6</sup> The EU, for its part, has offered few clues as to its own position.

This lack of communication is problematic. Given the advantages that the UK derives from cooperation with the EU on criminal matters, it is in the interests of both parties that this continues (in some form) in future. However, this is a fiendishly complex area, and future cooperation might involve complex negotiation and significant trade-offs from both sides.

This paper takes a detailed look at three key aspects of law enforcement cooperation between the UK and the EU: data sharing on criminal matters, including access to EU databases; Europol, the European policing agency which supports cross-border law enforcement activities in a number of areas; and the European Arrest Warrant, which facilitates the extradition of individuals between Member States of the EU. This is not to say that other EU tools are not important – one need only think of Eurojust and the European Investigation Order, for example. But the three areas were chosen because we see them as the most significant for UK law enforcement agencies.

Informed by interviews with academics, lawyers and sources from the Government and EU, we offer a balanced assessment of:

- The context for Brexit in the field of law enforcement cooperation;
- The key measures and issues involved in UK-EU law enforcement cooperation;
- The factors that may affect the Government's ability to achieve its objectives in this area; and
- How the negotiations may develop, including any precedents for the involvement of non-EU countries in EU law enforcement measures.

Ultimately, we argue, it is imperative that both sides engage with the detail at an early stage to ensure that law enforcement cooperation does not figure simply as an afterthought in the Brexit negotiations. There are many uncertainties about which aspects of cooperation the UK Government will prioritise, what the EU will demand of the UK in return, what compromises might be made by both sides, and what can be agreed upon before exit day. These will all take time to resolve.

Thus far, it is arguable that neither side has provided sufficient detail – at least in public – about their intentions and ambitions. With Brexit day fast approaching, there is a pressing need for clarity about the likely impact on the law enforcement community of the UK's decision to leave the European Union. At the very least, this might allow the police and other agencies to prepare for the most likely scenarios.

A photograph of two police officers standing in a city square, viewed from behind. They are wearing dark uniforms with 'POLICE' written on their backs. The background shows a large, ornate building with arches and many people walking around. Pigeons are on the ground in the foreground. The image has a warm, yellowish tint.

# SECTION 1

**Why EU law enforcement  
cooperation matters**



### The current threat level

The UK has faced some form of terror threat for the majority of the last 150 years, but it has changed fundamentally over the last few decades. Affordable international travel and the growth of the internet have facilitated communication within and between terrorist cells and criminal groups, radicalisation online, cyber-enabled organised crime, and the ability of criminals to cross borders and continents. In May, the press reported that the problems inherent in travelling to Syria had resulted in the UK becoming more vulnerable to terrorism, as ISIL and Al-Qaeda encouraged their supporters to stage attacks in the West.<sup>7</sup>



The UK's threat level for international terrorism has been at "severe" or higher for three years, with two brief "critical" periods in the aftermath of the May 2017 attack on the Manchester Arena and the September attack in Parsons Green. Within a four month period in 2017, five people were killed in the Westminster Bridge attack of 22 March 2017, followed by 22 deaths in Manchester, eight deaths at London Bridge and one in Finsbury Park, with many more injured in

all four attacks.

The latest assessment of strategic and organised crime by the National Crime Agency (NCA) laid bare the transnational nature of a wide range of criminality in the UK. It reported that:

- Developing threats such as cybercrime are "by definition international in a technologically interconnected world";
- The practices of child sexual exploitation and abuse have been "transformed" by changes in technology, "enabling global contact between victims and offenders" and "increasing grooming opportunities through the use of online social media platforms";
- UK ports, particularly Dover, continue to be targeted by organised crime groups attempting to smuggle people to the UK;
- The UK is an "attractive destination" for "politically exposed persons" to launder the proceeds of bribery and corruption; and
- Albanian criminal groups have "considerable control across the UK drug trafficking market", with expanding influence, and "Turkish and Pakistani groups continue to dominate heroin trafficking to the UK".<sup>8</sup>

In an increasingly interconnected world, UK law enforcement agencies need to cooperate with international partners, spread best practice overseas, and promote the free flow of data and intelligence with their counterparts in the EU and elsewhere.

### How the EU differs from other forms of international cooperation

The EU is by no means the only vehicle for international cooperation in criminal matters. Interpol, for example, facilitates police cooperation across 190 member countries, and the United Nations has its own Global Counter-Terrorism Strategy. But the European Union has, over several decades, cultivated forms of cooperation and mutual recognition in criminal matters that go far deeper than any other form of international collaboration. This includes a core

of common standards and procedures in a wide range of policy areas, underpinned by a shared Charter of Fundamental Rights.

Traditional inter-state relations involve one sovereign state making a request of another, which then decides whether it will comply. This applies to the UK's relationship with many non-EU countries. Within the EU, mutual recognition of judicial decisions means that, regardless of the diversity of judicial systems throughout the bloc, certain decisions taken by judicial authorities in one Member State are recognised in all others.

With the European Arrest Warrant, for example, an unprecedented level of mutual recognition was achieved, making it possible for judicial extradition decisions in one Member State to be easily enforced in another. This contrasts greatly with the way in which judicial decisions in Russia, China and elsewhere are dealt with by British courts, and vice versa.

Clearly, alternative models are available, and there are some who would prefer the UK to have the freedom to diverge from EU standards and procedures in criminal justice. But the Government has made it clear that it gains great value from its relationship with the EU in this area, and that it wants to maintain a high level of cooperation in future.

### **What the UK wants from Brexit**

In September 2017, the Government published a “future partnership paper” on security, law enforcement and criminal justice. It expressed its intention to maintain the “closest possible cooperation” with the EU when it comes to “tackling terrorism, organised crime and other threats to security now and into the future”.<sup>9</sup> It proposed the signing of a wide-ranging treaty with the EU to provide a legal basis for future cooperation, including provisions on “scope and objectives”, “obligations for each side”, and “what mechanism should apply to resolve disputes”.

The Government explicitly rejected a “piecemeal approach” to future law enforcement cooperation, arguing that this would risk creating

“operational gaps”. This suggests that, in the words of the European Council, “nothing will be agreed until everything is agreed”.<sup>10</sup> As we will explore later, this means that agreement on the less challenging aspects of the future law enforcement relationship could be delayed or even stymied by more intractable issues.

The Government hopes to avoid such a scenario by extending the period during which such a treaty can be agreed and ratified. The Prime Minister's Florence speech of 22 September proposed an “implementation period” of around two years, during which the UK “should continue to take part in existing security measures”. She implied that the Government will continue to accept the jurisdiction of the CJEU during that time, stating that the framework for this “strictly time-limited period” would be “the existing structure of EU rules and regulations”.<sup>11</sup> This was confirmed during a subsequent Q&A session.<sup>12</sup>

For all this, however, the future partnership paper includes relatively little detail about the Government's specific priorities or proposals. Large sections are devoted to current EU law enforcement cooperation, the value contributed by the UK in this area, and the practical advantages of maintaining or strengthening cooperation. It also includes proposals for the orderly completion of any operations and data-sharing that will be ongoing on Brexit day.

### **National security versus internal security**

The term “security” is used in relation to foreign affairs, the threat to the UK from state actors, counter-terrorism, cybercrime and serious and organised crime. These topics cover both foreign and home affairs, and both domestic and international policy, including the role of the EU as a vehicle for preventing conflict between European neighbours.

In contrast, this paper focuses on what the EU tends to refer to as “internal security”: areas of activity focused on maintaining the safety of those within the borders of Member States against the activities of criminals and terrorists, rather than other governments or state actors.

The EU treaties make it clear that national security remains the sole responsibility of each Member State, whereas internal security can be supported by cooperation at the EU level.

Before we turn to more detailed elements of law enforcement cooperation, the next section

provides a brief contextual overview of the UK's relationship with the EU on criminal matters, how that relationship has evolved, the UK's reputation in this area, and what this might mean for the Brexit negotiations.





A person in tactical gear, including a helmet and a vest, is holding a clear helmet. The background is a cobblestone street. The image has a blue tint.

# SECTION 2

**Europe a la carte: a brief history  
of UK-EU law enforcement  
cooperation**

### Introduction

Shortly before dawn on 5 September 1972, heavily-armed members of the Palestine Liberation Organisation entered apartments in the Olympic Village of the Munich games. They attacked members of Israel's Olympic team, killing two and taking nine hostages. The resultant German police operation culminated in the death of all nine Israelis, after a bungled shootout at Fürstenfeldbruck Air Base.

Prompted by the Munich Massacre and other terrorist attacks across Europe, the European Council adopted a British proposal for interior ministers to meet to discuss "matters coming within their competence", in particular relating to law and order. The Trevi group was agreed to in principle in 1975 at a Council meeting in Rome, site of the Trevi Fountain, and formalised in Luxembourg in 1976.<sup>13</sup> Initially focused on counter-terrorism, Trevi's work extended over time to cover organised crime and police cooperation more broadly, supported by five working groups.<sup>14</sup>

### Special arrangements

When the European Union was established by the Maastricht Treaty in 1992, cooperation in justice and home affairs (JHA) was brought under the ambit of the EU Treaties for the first time. Over the last two decades, further treaties have strengthened the role of the Court of Justice of the EU (CJEU) and the Commission, which can now bring Member States before the CJEU if they fail to implement new EU laws in JHA.

The UK has negotiated various special arrangements over the years to maintain its ability to opt out of measures it does not wish to adopt, such as the abolition of internal border checks under the Schengen Agreement. Under the Lisbon Treaty, the UK was entitled to opt out of a number of JHA measures before they came under the CJEU's jurisdiction and the European Commission's enforcement powers in December 2014. The EU accepted the UK's request to opt out of all measures and opt back into 35 of them, including those relating to the European Arrest Warrant

(EAW) and the UK's membership of Europol.

### Trouble at home

As part of that process, the Government had to deal with a backbench rebellion against the measures it intended to opt back into. Press reports in the run-up to the House of Commons vote suggested that between 60 and 90 Conservative backbenchers were expected to defy the whip and vote against the opt-in.<sup>15</sup> Opposition was directed primarily at the EAW, with Dominic Raab describing the measure as "unworkable", and arguing that "the lack of safeguards in the EAW system invites abuse".<sup>16</sup>

The motion tabled by the Government did not mention the EAW, the measure attracting most opposition from backbenchers, causing the Commons Speaker, John Bercow, to declare that people would be "contemptuous" of the Government's tactics.<sup>17</sup> Only eleven of the measures legally required Parliamentary approval. After failed attempts to filibuster to allow a longer debate on the broader package of measures, 38 Conservative MPs voted against the motion and it was passed.

### What does this mean for Brexit?

The relevance of the UK's 2014 decision to the Brexit negotiations is twofold. First, some observers have suggested that the special arrangements granted to the UK from Maastricht onwards, and particularly during the 2014 opt-out/opt-in episode, have already tested the limits of what the EU27 countries are willing to concede. Steve Peers, Professor of EU Law at the University of Essex, observed at the time that these demands, along with the Conservative Party's plan to hold the EU referendum, had "pushed some other Members States' patience to the breaking point".<sup>18</sup>

Andre Klip, Professor of Criminal Law at Maastricht University, told one of the authors that "patience with the UK has gone", and that the Government's ability to negotiate a bespoke deal on JHA will be lessened in the context of its exit from the bloc. A British source in Brussels



was more optimistic, observing that EU27 states “want to keep us close” on law enforcement cooperation, but acknowledging that there may be challenges connecting the “weeds of details” with high level political ambition.

Second, the opt-in required a Conservative-led Government (albeit in coalition with the Liberal Democrats) to consider precisely which aspects of UK-EU law enforcement cooperation it valued most, and to seek parliamentary approval for its decision. As a result, compared to other areas of its relationship with the EU, the Government has a well-established basis for identifying which aspects of law enforcement cooperation it wants to retain after Brexit.

### **The UK’s reputation within Europe**

The opt-in decision may suggest what the Government values most in relation to JHA cooperation, but it does not tell us how much importance the EU will place on its future ability to work with the UK on criminal matters. This is significant because it may influence the extent to

which the EU is willing to accommodate the UK’s requests.

In its Brexit White Paper, the Government stated that the UK was “starting from a position of strong relations with EU Member States”, and that it had been “at the forefront of developing a number of EU tools which encourage joint working across the continent to protect citizens and our way of life”.<sup>19</sup> In its future partnership paper on this subject, it described the UK as “one of the leading contributors” to the development of EU law enforcement cooperation, bringing “leading capabilities and expertise in security, the delivery of justice and the fight against crime and terrorism”.<sup>20</sup> This has led some MPs and commentators to reject any suggestion that Brexit might undermine cooperation in these areas.<sup>21</sup>

The individuals interviewed for this paper generally agreed that the UK had displayed leadership in this field, but they were divided over the extent to which this could be translated into negotiating leverage. One EU diplomat remarked



that the perception in Brussels is that the UK is “good” at security and “would be missed”, particularly in the areas of counter-extremism and cyber security.

She acknowledged, however, that recent terrorist attacks, along with the NHS’s vulnerability to the Wannacry cyber-attack, may have led some to question whether the UK is “as good as we think we are” in these areas. Similarly, a senior Brussels source commented that while the UK does “bring a lot to the party” when it comes to Europol, it “may overestimate its value.”

A more negative appraisal was provided by a non-British EU source, quoted directly by one of the academics interviewed for this paper. He suggested that the EU27 would be well rid of the UK:

“From our perspective, the UK has been an awkward partner, rocking the boat by trying

to get favourable treatment, and causing endless trouble with the Protocol 36 opt-out – all for nothing”.

The consensus, however, seems to be that the EU recognises the value of UK participation in the law enforcement field. The British EU Commissioner for Security Union, Julian King, said earlier this year that there is “a strong shared sense of the threat and the benefits of co-operation in managing and mitigating it”. Jean-Claude Juncker himself declared in June that a security partnership between the UK and EU would be “essential” after Brexit, telling a German paper that “the fight against terror does not allow us not to work closer together”.<sup>22</sup>

As in so many areas of EU cooperation, however, the devil lies in in the detail. And the detail is rarely as devilish as it is when it comes to data.







# SECTION 3

**“The price of light is less than  
the price of darkness”:  
why data matters**

### Introduction

“Before we had access to these systems, we did not have visibility and we did not know what the risk was. Now we know the art of the possible, [...] and I can’t honestly say to you that the risk wouldn’t increase if we no longer saw that material.

*David Armond, Deputy Director of the NCA, December 2016*

Data and security are inextricably linked. The internet has simultaneously created new forms of criminality, made ‘old’ forms of crime much more transnational in nature, and created new opportunities for British police officers to exchange data, criminal records and intelligence with their counterparts across Europe.

As the threat has changed, so too has the response of the UK and the EU. Day-to-day policing activity often draws on specific EU sources of data on criminal matters, and their value to the fight against crime is widely and enthusiastically acknowledged by the Government. These databases contain, for example, information on suspects wanted for questioning, vehicles linked to specific crimes, and criminal records from across Europe.

Clearly, intelligence-sharing between EU countries long predates the existence of the EU, its databases and its data-sharing legislation. As a result, Pro-Leave voices have questioned the notion that EU countries might cease sharing data after Brexit.

The problem, however, is not that the EU would deliberately retain information of importance to national security. That sort of communication is likely to continue at a bilateral level, regardless of the outcome of the Brexit negotiations. Instead, the UK may lose routine access to a wide range of data which might not be considered vital when it is collected by EU partners, but which could, for example, be crucial to identifying a wider pattern of criminality. At the moment, that intelligence forms part of the broader picture considered by law enforcement officials when assessing risk,

investigating crimes, and pursuing criminal and terrorist networks.

The EU’s position paper on data protection states that “the United Kingdom’s access to networks, information systems and databases established by Union law is, as a general rule, terminated on the date of withdrawal”.<sup>23</sup> So how can the UK ensure that this data-sharing continues when it becomes a third country? What levels of data protection will the UK need to demonstrate in order to exchange data with public agencies and private companies based in the EU? And in the event that the UK diverges from EU standards, will the EU prioritise data protection over intelligence-sharing on criminal matters?

### EU databases

UK law enforcement agencies access a number of sources of data on criminal matters as a direct result of EU membership. Key measures are outlined below, along with details of any precedent for third country access.

#### *The Second Generation Schengen Information System (SIS II)*

Countries participating in SIS II share law enforcement alerts in real time, including on:

- Individuals subject to a European Arrest Warrant
- Missing people
- Witnesses, absconders or others due to appear before judicial authorities
- People or vehicles requiring checks or surveillance, and
- Significant objects, including those requiring seizure or for use as evidence (e.g. firearms or passports).

When an individual is processed by Border Force or when a police officer checks the Police National Database, SIS II data will be flagged up, including on UK nationals wanted for offences committed elsewhere in the EU. The data enables UK police to track the movements throughout Europe of people convicted of serious violent or sexual offences, and to identify vehicles stolen



from UK-based owners and moved overseas.<sup>24</sup>

Norway, Iceland, Switzerland and Liechtenstein have access to SIS II, but the EU’s approval was conditional on them being signatories to the Schengen Agreement, sharing open borders with EU Schengen countries.

### *The European Criminal Records Information System (ECRIS)*

ECRIS allows access to information on the criminal history of any EU citizen. Data is stored in national databases and shared through central authorities on request. Member States are also obliged to inform the home country of any EU national convicted in their courts. According to the leaked Home Office paper prepared prior to the referendum, before ECRIS, the Government knew “virtually nothing” about the offending histories of EU nationals being prosecuted in the UK.<sup>25</sup>

There is no precedent for third country access to ECRIS, but plans are being drawn up to improve its data on non-EU nationals convicted in the EU.

### *The Europol Information System (EIS)*

The Europol Information System contains information on serious international crimes, criminal structures, suspected or convicted individuals, their offences, and certain objects or pieces of information connected to them. Europol members can interrogate the data held on EIS to identify connections relevant to police investigations. Some of Europol’s operational partners can store and query data on EIS via Europol’s operational centre, but they do not have direct access.

### *The Secure Information Exchange Network Application (SIENA)*

SIENA is Europol’s messaging exchange system for sensitive and restricted information. Some of Europol’s operational partners have access to SIENA, including Australia, Canada, Norway, Switzerland, the United States, Liechtenstein and Moldova.

### *Prüm Decisions*

The Prüm Decisions require Member States

to allow reciprocal searches on each other’s databases for fingerprint data, vehicle registration data and DNA profiles. UK participation became operational from 2017, after a 2015 pilot obtained 118 matches from around 2,500 DNA profiles, linked to offences including rape, sexual assault and arson.<sup>26</sup>

Norway and Iceland have negotiated an agreement on access to Prüm (without a direct link to their Schengen membership). The Council has also approved Switzerland and Liechtenstein’s request to launch negotiations regarding their access to Prüm.

### *The Passenger Name Record (PNR) Directive*

Legislation passed in April provides for Member States to set up Passenger Information Units to store data on airline passenger data, to be shared with law enforcement officials (on request) for the prevention of terrorism or serious crime. This must be implemented by participating Member States by May 2018.

Agreements for the transfer of PNR data have been concluded between the EU and the USA, Canada and Australia, with a deal with Mexico under negotiation. The CJEU ruled in July, however, that the Canada agreement lacked adequate protections and should limit the storage of data, forcing the Commission to return to the deal.

### **Which databases does the UK want to retain access to?**

The Government has not made it clear whether it will prioritise any of these systems during its exit negotiations, but it proposes that a UK-EU treaty on law enforcement cooperation should include arrangements for ongoing data exchange. Its future partnerships paper on law enforcement cooperation describes the value of EU systems of data exchange in great detail. It claims that “real-time or very rapid responses, such as those provided by Prüm or SIS II, make a significant difference to the value of the information to operational partners”, while “the systematic

nature of exchange of information such as criminal records can help to deliver fair and robust justice”.<sup>27</sup>

In March, Home Secretary Amber Rudd said that the Government values “the co-operation that we have at present through the European Criminal Records Information System and the Schengen Information System”, and added that “We want our future relationship with the EU to include practical arrangements so that we can engage with it on that basis”.<sup>28</sup>

Based on comments to date, then, it seems likely that the Government will seek continued access to all six systems. With a few notable exceptions (e.g. in relation to SIENA and Prüm), there is little precedent for any of this, so the UK will be in largely uncharted waters.

A senior Brussels source interviewed for this paper was optimistic about the chances of success, stating that “just because it has never been done before, doesn’t mean it can’t be done”. The source said that the EU has developed various mechanisms to allow third countries “to plug into its systems”; adding that it will “require imagination and legal hurdles will be there, but if political goodwill is present then it is not beyond the capabilities of the negotiators”.

The key uncertainty, however, is the extent to which the Government might run into political and practical obstacles along the way. Will it be willing to compromise on other exit commitments if concessions are demanded by the EU27 as conditions for access?

Changes are underway to improve interoperability between these systems: the Commission proposed in June that the mandate of eu-LISA, which manages large-scale IT systems relating to migration and justice (including SIS II), would be expanded to enable it to “roll out technical solutions” to make some of the systems interoperable.<sup>29</sup> This could complicate matters further for the UK – particularly as some of the systems concerned relate to migration rather than data on criminal matters.

There is also a chance that the EU27 will refuse to extend SIS II access to a country which is no longer subject to the free movement of people, given its strong links to the Schengen Agreement, and the possibility that the UK will seek to restrict EU immigration after Brexit.

But Steve Peers argued that other Member States have their own interests to consider, and would not want to lose the UK’s data on stolen vehicles, individuals subject to arrest warrants, and other pieces of information that are of value to their own law enforcement agencies.

### **How can the UK ensure continued data exchange after Brexit?**

The Government’s future partnership paper on law enforcement cooperation proposes a model that is “underpinned by shared principles, including a high standard of data protection and the safeguarding of human rights”. Its paper on the exchange and protection of personal data suggests that it will seek consistency in this area after Brexit, stating that the UK and EU should:

“[...] agree early in the process to mutually recognise each other’s data protection frameworks as a basis for the continued free flows of data between the EU (and other EU adequate countries) and the UK from the point of exit, until such time as new and more permanent arrangements come into force.”

When the UK becomes a third country, it will fall under Section V of Directive 2016/680, which covers transfers of data to third countries or international organisations.<sup>30</sup> This allows the Commission to decide, “with effect for the entire Union”, if third countries offer an adequate level of data protection, to allow data transfer to take place without specific authorisation.

According to the Directive, this assessment of adequacy (leading to an ‘adequacy decision’) must include consideration of that country’s respect for the rule of law, access to justice, compliance with international human rights norms and standards, specific processing

activities, independent data protection supervision, cooperation with other Member States’ data protection authorities, and effective and enforceable rights for data subjects.<sup>31</sup>

In the absence of such an adequacy decision, transfers can be allowed where safeguards have been provided via:

“[...] A legally binding instrument which ensures the protection of personal data or where the controller has assessed all the circumstances surrounding the data transfer and, on the basis of that assessment, considers that appropriate safeguards with regard to the protection of personal data exist.”

In a recent report, the Home Affairs Sub-Committee of the House of Lords EU Committee examined EU data protection rules in detail. It acknowledged that most third countries exchanging data on criminal matters with the EU rely on alternative ‘legally binding instruments’, because they have not obtained an adequacy decision from the Commission.<sup>32</sup>

But the Committee was warned by Professor Valsamis Mitsilegas, Professor of European Criminal Law at Queen Mary University of London, that within the law enforcement field (as opposed to other forms of data transfer), the fall-back position for the UK as a third country without an adequacy decision was “less clear”. He advocated seeking an adequacy decision to provide certainty to law enforcement authorities.<sup>33</sup>

The Committee endorsed this position, saying that it was persuaded by the view that “the UK is so heavily integrated with the EU” that “it would be difficult for the UK to get by without an adequacy arrangement”.<sup>34</sup>

It argued that the “lack of tried and tested fall-back options” for data sharing in law enforcement “would raise concerns about the UK’s ability to maintain deep police and security cooperation with the EU and its Member States in the immediate aftermath of Brexit.”<sup>35</sup>

The Government’s data protection paper suggests that a future UK-EU model for exchanging data “could build on the existing adequacy model”, and that:

“Early certainty around how we can extend current provisions, alongside an agreed negotiating timeline for longer-term arrangements, will assuage business concerns on both sides and should be possible given the current alignment of our data protection frameworks.”<sup>36</sup>

It is not entirely clear from this whether the Government anticipates that the UK can leave the EU without an adequacy decision, extending current provisions before negotiating “longer-term arrangements”, or whether it will seek a version of “the existing adequacy model” before Brexit day, to cover the proposed two-year implementation period.

If the EU agrees to an implementation period and the UK accepts relevant data protection standards (and the CJEU’s jurisdiction) during that period, there might be more time for both parties to agree to any long-term arrangements. But even if the UK can continue to access EU databases without an adequacy decision during this transitional period, a decision may be required before a treaty on future law enforcement cooperation can be agreed and ratified. This might necessitate the conclusion of the adequacy process at an early stage in the negotiations on the long-term future relationship.

### **Obtaining an adequacy decision from the European Commission**

For third countries requiring an adequacy decision on data protection, the process involves:

- A proposal from the Commission to determine data adequacy;
- An opinion from Member States’ data protection authorities and the European Data Protection Supervisor;
- Approval by a committee comprising representatives of Member States;
- Adoption by the College of Commissioners; and

- The possibility, at any time, that the Council and European Parliament might request that the Commission amends or withdraws the adequacy decision if it “exceeds the implementing powers provided for in the Directive”.<sup>37</sup>

To date, the Commission has approved the flow of data between the EU and Andorra, Argentina, Canada (commercial organisations), the Faroe Islands, Guernsey, Israel, the Isle of Man, Jersey, New Zealand, Switzerland and Uruguay.

Rosemary Jay and Stewart Room, both senior data protection lawyers, have emphasised the intricacy of the process leading to an adequacy decision. In evidence to the Home Affairs Sub-Committee of the Lords EU Committee, Jay suggested that the UK would need to become a third country before it could happen, and Room said that the small number of third countries with an adequacy decision was indicative of “the amount of time and complexity that attaches to the development of an adequacy decision.”<sup>38</sup>

Anthony Walker, Deputy CEO of TechUK, said that it would “take in the range of about two years to go through the various stages.”<sup>39</sup>

If this interpretation is correct, the Government might be wise to seek assurances about transitional arrangements for data protection at a relatively early stage in the negotiations, as well as a potential timeline for an adequacy decision before or after March 2019.

### **What can we learn from the EU-US Umbrella Agreement?**

The USA is arguably the EU’s most important partner when it comes to intelligence and law enforcement cooperation, so its experiences may hold some clues to the UK’s future treatment by EU institutions.

In 2000, the Commission decided that the USA met adequate data protection standards for the exchange of data for commercial purposes, in the so-called ‘Safe Harbour’ decision. In 2015, the CJEU ruled in a case brought by an Austrian citizen named Maximillian Schrems, referred by

the High Court of Ireland. It was prompted by the data collection practices revealed by the Edward Snowden leaks, including provisions that allowed the US Government to collect information on foreigners outside the US, via internet companies such as Facebook.

In its ruling in *Schrems*, the CJEU declared the Safe Harbour Decision invalid, with the result that US companies requiring data transfer from the EU had to strike ‘model contract clauses’ in each case – agreements that authorise the transfer of data from EU states to third countries without adequacy decisions. The ‘Privacy Shield’ – the replacement adequacy decision negotiated in the aftermath of *Schrems* – offers additional data protection measures, and has been operational since July 2016, although it is now facing its own legal challenge before the CJEU.

The transfer of data for law enforcement purposes is governed by the so-called Umbrella Agreement, which entered into force in February. A key feature of the Umbrella Agreement is that EU citizens are given the same judicial redress rights before US courts as US citizens, if the US authorities deny access or rectification, or if they unlawfully disclose personal data. In an interview for this paper (speaking in a personal capacity), Professor Hans Nilsson, former Head of the Division of Fundamental Rights and Criminal Justice at the Council of the EU, suggested that this was a major concession on the part of the US negotiators, having been a “red line for several years”.

The Umbrella Agreement does not cover data exchange between national security services, but the exposed practices of the US intelligence agencies may have been taken into consideration by the Commission and by other EU actors.

For example, in *Schrems*, the CJEU declared that the Safe Harbour scheme was invalid on the basis that it enabled “interference with the fundamental rights of persons” because “national security, public interest and law enforcement requirements of the United States prevail” over the provisions of the scheme.<sup>40</sup> In other words, the Court rejected Safe Harbour precisely because it allowed exceptional violation of data protection

in the interests of national security. The ruling also noted that the US was able to process data in a manner “beyond what was strictly necessary and proportionate to the protection of national security”.<sup>41</sup>

In a paper produced for the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) in 2015 by the EP’s Directorate-General for Internal Policies, it was observed that the practice of information-sharing on criminal matters “extends well beyond what might be characterized as core national security crimes”. It concluded that it is appropriate to make “at least passing reference” to the activities of US intelligence agencies such as the NSA, “because of the possibility that the personal data collected by such government authorities will eventually be used by the police and prosecutors in a criminal investigation.”<sup>42</sup>

### **What does this mean for UK data protection standards?**

The experience of the USA suggests that the activities of security services may be ‘fair play’ for the EU’s scrutiny of the UK’s data protection framework, even if those activities are not covered by any subsequent UK-EU agreement on data-sharing. And if the CJEU is willing to let data protection concerns stand in the way of exchanging data with the world’s largest economy, it is unlikely to treat the UK any differently.

The EU Treaties make it clear that “national security remains the sole responsibility of each Member State”,<sup>43</sup> whereas the EU has powers to agree a range of measures dealing with criminal justice and police cooperation, which are intended to ensure “a high of level of security”.<sup>44</sup> These include Europol, data sharing on criminal matters and the European Arrest Warrant.

But there is a key difference between the manner in which the EU treats Member States and third countries. Ruth Boardman, a Partner at Bird & Bird solicitors, told the Lords Home Affairs Sub-Committee that national security concerns “cannot be used as a reason to prevent a free flow of data” between the UK and the EU

while the UK remains a Member State. When considering whether a third country has adequate data protection standards, however, she advised that the EU may look at the data protection framework around national security legislation.<sup>45</sup>

The Government has pointed out that the UK’s data protection standards will be consistent with the EU’s on the day the UK leaves the EU.<sup>46</sup> But Boardman has highlighted a paradox here: namely, that higher standards may be required of third countries than are required of EU Member States.<sup>47</sup> This may expose the practices of UK intelligence agencies to a new level of scrutiny by EU institutions.

### **How big data is used by UK intelligence agencies**

Given that the EU may examine the activities of the UK intelligence agencies when assessing its data adequacy, it is worth considering what sort of practices might fall under its gaze.

A 2016 review of ‘Bulk Powers’ by David Anderson QC, then the Independent Reviewer of Terrorism Legislation, provides a helpful summary of the myriad ways in which personal data is accessed by intelligence and security services. This includes retrieving so-called ‘bulk personal datasets’ (BPDs) relating to a number of individuals, most of whom are not the intended target of intelligence analysts. These datasets can include passenger lists, financial information, telephone directories and information regarding involvement in commercial activities.<sup>48</sup> The Government has stated that BPDs may be acquired “from other public sector bodies or commercially from the private sector”.<sup>49</sup> This includes companies based in the EU and other overseas territories.

Intelligence agencies are able to gain exemptions from the Data Protection Act (and the Privacy and Electronic Communications Regulations, which implement the European ‘e-privacy Directive’).<sup>50</sup> Such exemptions are granted when a national security certificate has been issued by a Minister of the Crown. This can also remove restrictions on the transfer of data from BPDs to countries outside the EEA, even if the recipient will not



provide an adequate level of data protection.<sup>51</sup>

Access to personal data by law enforcement and intelligence agencies is a subject mired in controversy. Campaigners such as Liberty have launched multiple legal challenges against British intelligence agencies over their use of personal data, including in relation to GCHQ's 'Tempora' surveillance programme, which was revealed to the public by the Edward Snowden leaks.<sup>52</sup>

Anderson argued in March that the Government's latest major piece of surveillance legislation – the Investigatory Powers Bill (now Act) – “gets most important things right”, adding that it “restores the rule of law and sets an international benchmark for candour”.<sup>53</sup> But he observed that the power to require internet service providers to retain internet connection records is “controversial”, and seen by some as “an undue invasion of privacy”.<sup>54</sup> There lies the biggest risk to an EU data adequacy decision.

### The bulk retention of data

The Investigatory Powers Act (IPA) 2016 allows the Secretary of State to require a telecommunications operator to retain communications data for up to 12 months, so that it can be accessed later by intelligence agencies under certain conditions.<sup>55</sup>

This means that information connected to users of a service, including the people they email and the websites they visit, must be kept by an operator or internet service provider for 12 months before they are deleted, in case the Government want to access a specific person's records for investigatory purposes.

Liberty has challenged this practice repeatedly, and the Open Rights Group described it last year as “intrusive and unacceptable in a democracy”.<sup>56</sup> In June, the High Court granted permission for Liberty to launch a judicial review into the IPA.<sup>57</sup>

A legal challenge by Tom Watson MP (represented by Liberty) against the IPA's predecessor legislation, the Data Retention and Investigatory Powers Act 2014, was referred to the CJEU by the Court of Appeal of England and Wales. It resulted in a ruling by the CJEU that Member States

“may not impose a general obligation to retain data on providers of electronic communications services”.<sup>58</sup>

According to the Commission, the implications of this ruling are being “analysed, and the Commission will develop guidance as to how national data retention laws can be constructed in conformity with the ruling”. The European Council said in June that “effective access to electronic evidence is essential to combating serious crime and terrorism” and that, subject to appropriate safeguards, “the availability of data should be secured”.<sup>59</sup> The *Watson* challenge has again been referred to the CJEU by the UK's Investigatory Powers Tribunal, in a judgment stating that the original ruling would “effectively cripple” the security and intelligence agencies' bulk data capabilities.<sup>60</sup>

The official EU position on bulk data retention thus remains unclear, but Member States may find themselves subject to repeated CJEU rulings if they do not operate in a manner consistent with the Court's pro-privacy views. Valsamis Mitsilegas suggests that it will be “difficult for the Commission to say something contrary” to the Court's rulings against bulk retention.

David Anderson interpreted this situation in an article for *Counsel* magazine earlier this year:

“Put bluntly, the UK will not be trusted with the personal data of EU citizens unless it can demonstrate that it will afford those data equivalent protection to that which is available in the EU. Recent EU case law in this field, which prioritises data privacy over operational efficacy, will thus remain problematic even after Brexit.”<sup>61</sup>

Likewise, Eduardo Ustaran, a partner at Hogan Lovells, said: “What the UK needs to do is convince the Commission — and perhaps one day the European Court of Justice — that the Investigatory Powers Act is compatible with fundamental rights”, adding that it would be “a tall order”.<sup>62</sup>

The Government is launching a consultation on its response to the *Watson* ruling, and a senior



legal source interviewed for this paper said that it was a “no brainer” that the regime will have to be amended. But the source suggested that the Government would “stand its ground” on bulk retention in the interests of national security.

The EU’s treatment of the USA offers few clues here. The EU-US Umbrella Agreement does not rule out bulk retention, but states that any agreement on the transfer of bulk data “must contain a specific provision on the applicable retention period.” However, the Umbrella Agreement does not in itself serve as a legal basis for data transfer: an additional agreement on a more specific matter will be required before data can be transferred under the Umbrella’s framework.<sup>63</sup>

In fact, it is questionable whether the Umbrella Agreement even qualifies as an adequacy decision. And, in a leaked document, the European Parliament’s legal advisors described it as “not compatible with primary EU law and the respect for fundamental rights”.<sup>64</sup>

In summary, despite the fact that national security remains the sole responsibility of Member States, it is possible that the activities of the UK intelligence agencies and their governing legislation could hinder the ability of the UK to obtain an adequacy decision.

This may not stem the flow of data to the UK on matters of national security, if Member States regard such exchanges as beyond the competency of the EU. But it may result in the Commission refusing the UK access to key data-sharing mechanisms, such as SIS II and ECRIS. And, in the context of a comprehensive UK-EU treaty on law enforcement cooperation, it could result in delays to resolving the future of the UK’s relationship with Europol, its surrender arrangements with the EU, and a whole host of crucial law enforcement measures.

### Future divergence and the Court of Justice

The UK’s data protection problems may not end with an adequacy decision, either. The jurisdiction of the CJEU also plays a role here.

Let’s assume that the UK Government successfully procures an adequacy decision that takes effect from March 2019, or from the end of a two year implementation period, and negotiates ongoing access to EU databases as part of its proposed law enforcement treaty with the EU. What happens if its data protection regime changes in future?

A future Government may feel under pressure to respond to a terrorist attack on British soil, by further extending the surveillance powers of the police and other law enforcement agencies, for example. Alternatively, the EU might move to tighten its own data protection regime and revisit its agreements with third countries to ensure harmony. What happens then?

David Anderson told the Committee on Exiting the EU that the perception, “which I think is accurate”, is that “we [the UK] have been the ones in Europe pushing for greater operational efficiency, and the Germans and the east Europeans have been pushing for more data protection.”<sup>65</sup> After the UK leaves the EU, Anderson predicted that “the relative fondness of the remaining 27 for data protection is only going to increase”, and the perception “that we are too nosy is not going to go away”.<sup>66</sup>

The future jurisdiction of the CJEU might also pose a barrier to adequacy and access to data exchange mechanisms. The USA may not consider itself within the CJEU’s jurisdiction, but the *Schrems* ruling ultimately acted as a potential obstacle to data exchange, requiring the Commission to return to the negotiating table to draw up an agreement with stronger protections for data subjects. The UK could find itself in the same situation if the adequacy of its data protection standards is challenged before the CJEU in future.

Canada, too, has found that the CJEU may act as an obstacle to its intended cooperation with the EU on law enforcement. In July, following a request from the European Parliament, the Court ruled that the Commission could not conclude an agreement with Canada over access to PNR data, forcing both parties to return to the negotiating table.<sup>67</sup>

The Court declared that several of the PNR agreement's provisions were incompatible with the fundamental rights recognised by the EU.<sup>68</sup> It stated that "a transfer of sensitive data to Canada requires a precise and particularly solid justification, based on grounds other than the protection of public security against terrorism and serious transnational crime", and concluded that the provisions on the transfer, retention and processing of sensitive data were accompanied by "no such justification".<sup>69</sup>

Lorna Woods, Professor of Internet Law at the University of Essex, observed that Brexit negotiators "now have a clearer indication of what it will take for an agreement between the EU and a non-EU state to satisfy the requirements of the Charter [of Fundamental Rights], in the ECJ's view".<sup>70</sup> The Court declared that the new PNR agreement should allow air passengers to be notified if their PNR data is disclosed to authorities or individuals, and should guarantee oversight of PNR processing rules "by an independent supervisory authority".<sup>71</sup>

The PNR ruling adds further weight to the suggestion that the EU might prioritise data protection over security and counter-terrorism. Even if the Commission broadly agrees with the UK Government on the balance between these two objectives, the CJEU may slap down any agreement that it views as inconsistent with the EU Charter of Fundamental Rights – which is more extensive than the European Convention on Human Rights (as incorporated into UK domestic law by the Human Rights Act).<sup>72</sup>

As yet, there are no third countries outside Schengen with access to SIS II, and no third countries with access to ECRIS. The Commission may use the UK's unprecedented requests – assuming they are made – as a chance to impose higher standards than those demanded of the USA and others, including on the jurisdiction of the CJEU. Regardless of such conditions, the examples made of the USA and Canada demonstrate that the exchange of data with EU countries cannot escape the CJEU's rulings altogether.

### Summary and conclusions

Law enforcement professionals and Government ministers have been vocal about the benefits that the UK derives from EU data on criminal matters. David Armond, Deputy Director General of the NCA, said last year that SIS II had been an "absolute game changer for the UK". And Brandon Lewis (then Policing Minister) told the House of Commons in January that the system:

"[...] ensures that vital intelligence is shared internationally to help prevent threats from across the world. Joining has seen us arrest and extradite wanted people including drug traffickers, murderers and paedophiles whom we would not otherwise even have known about."

The EU is unlikely to want to lose such data from the UK, either. It seems highly likely, however, that the UK will require some form of approval from the Commission before data transfer can take place between the EU and the UK as a third country, at least on a routine basis. The Lords Home Affairs Sub-Committee suggests that, in the absence of a tried-and-tested fall-back option, the Government should seek a formal adequacy decision. And the Government's own paper on the subject also acknowledges that a future model for data exchange would be based on the adequacy model.

As outlined in this section, this process might involve EU scrutiny over activities that usually fall outside the remit of EU data protection standards. And the ever-present matter of the CJEU's jurisdiction, relevant to so many areas of the UK's relationship with the EU, is likely to rear its head when the UK seeks to formalise its future access to vital law enforcement databases.

As this issue more than demonstrates, political rhetoric is rarely able to capture the level of detail likely to come into play in these negotiations. It will not be enough for the EU to desire ongoing data exchange with the UK, and vice versa. Recent CJEU rulings show that both parties need to think long-term to ensure that the final package can stand the test of time. There is much to lose if they fail.





# SECTION 4

**Judicial imperialism or  
“daft red line”?  
Dispute resolution after Brexit**

### Introduction

A week before the referendum, the Vote Leave campaign said that a vote to exit the EU would allow Parliament to introduce a Bill during the current session of Parliament, which would “immediately end the rogue European Court of Justice’s control over national security” and “end the growing use of the EU’s Charter of Fundamental Rights to overrule UK law”.<sup>73</sup>

No such legislation has been introduced, but the Government’s Brexit White Paper said that it would “take control of our own affairs” and “bring an end to the jurisdiction in the UK of the Court of Justice of the European Union (CJEU).”<sup>74</sup> The Prime Minister’s Florence speech (and subsequent Q&A) indicated that the Government is likely to accept the Court’s jurisdiction during the proposed “implementation period”, but not beyond it.<sup>75</sup>

Polling data suggests that this is also a key priority of Leave voters. When respondents were asked in April which of four objectives they considered most important for Brexit, “the UK no longer being subject to judgments from the European Court of Justice” came second only to “the UK no longer paying into the EU budget”, and was judged as more important than the outcomes on immigration and trade.

A smaller poll found that a net 62% of Leave voters would consider Brexit “not worth it” if “The Court of Justice continues to have jurisdiction over some UK laws”, with only 22% considering it still worthwhile. By that measure, the CJEU’s jurisdiction was considered a more significant ‘red line’ to Leave voters than ongoing financial contributions to the EU, no reduction in immigration from the EU, no additional money for UK public services, a recession with job losses, a hard Irish border, no access to the single market, and Scottish independence.<sup>76</sup>

Such data lends weight to arguments that the UK must break away from the CJEU in order to deliver on Brexit. Once again, however, this

objective is more complex and challenging than it might first appear.

### A red line for the Government?

In August, the Government released a future partnership paper on judicial cooperation after Brexit, proposing that the EU and UK could agree on an alternative model to the CJEU for dispute resolution, such as a Joint Committee or an arbitration panel. The paper acknowledged that some EU agreements with third countries, “where cooperation is facilitated through language which is identical in substance to EU law”, can specify that “account is to be taken of CJEU decisions when interpreting those concepts”.<sup>77</sup> It also referred to agreements in which the third countries must keep CJEU case law “under constant review”.

The Government refers to the model adopted for the Moldova Association Agreement, in which the arbitration panel can make a joint decision to make a voluntary referral to the CJEU for a binding interpretation. If such a model applied to any UK-EU agreement, both sides would have to be in agreement before a question could be put to the CJEU.

Some have interpreted these examples as possible concessions on a CJEU ‘red line’. But they demonstrate that the Government is wedded to its commitment to end the Court’s direct jurisdiction, at least in its current form. And this will have implications for law enforcement cooperation.

### CJEU jurisdiction over law enforcement measures

In its future partnership paper on law enforcement cooperation, the Government acknowledged that any treaty in this area would need to provide for “dispute resolution over, for example, interpretation or application of the agreement”, but it re-emphasised that “the UK will no longer be subject to direct jurisdiction of the CJEU” after Brexit.<sup>78</sup>

The CJEU currently has jurisdiction over the 35



JHA measures which the UK chose to opt into in 2014, including Europol and the European Arrest Warrant. Since the Lisbon Treaty, the Commission has been able to refer Member States to the Court in relation to implementation failures in the policing and criminal justice sphere.<sup>79</sup>

Outlined below is a brief summary of the possible implications of the UK avoiding the CJEU’s jurisdiction on the three key areas considered by this report: data-sharing, the EAW and Europol.

### *Data sharing on criminal matters*

As outlined in the last section, it is possible that the EU will push for commitments regarding the CJEU’s jurisdiction in any agreement over data-sharing on criminal matters. Although there is some precedent for the exchange of such data between the EU and third countries outside the Schengen agreement, the UK is likely to seek as-yet-unparalleled levels of access to EU data on criminal matters, including the crucial information held on SIS II and ECRIS.

These measures are currently only accessible either to countries falling under the jurisdiction of the CJEU or to signatories of the Schengen agreement, which accept the borderless free movement of people, so the UK will be venturing into unknown territory. Norway and Iceland have access to Prüm and SIS II (without accepting CJEU jurisdiction), but ECRIS remains a Member-State-only system.

Presumably, a data adequacy decision from the Commission could facilitate the UK’s future access to systems such as SIS II and ECRIS, if it includes a mutually-agreed mechanism for oversight of the UK’s data protection standards. Any such agreement could then be referred to in any subsequent EU decisions (or an over-arching treaty) regarding the UK’s access to specific databases and data-sharing measures.

There is some precedent for third countries negotiating alternative dispute resolution mechanisms: the US Umbrella Agreement (regarding data exchange on criminal matters) allows EU citizens to challenge the use of

their data before the US courts. But Catherine Barnard, Professor of EU Law at the University of Cambridge, suggested that the “stakes are so high” in relation to UK data protection that the EU is unlikely to accept much less than the status quo.

### *The European Arrest Warrant*

In its recent report, the Lords EU Committee highlighted the possible consequences of the UK leaving the jurisdiction of the CJEU for its future extradition arrangements. Cases concerning individuals in custody are subject to an expedited version of the CJEU’s preliminary ruling procedure, in which it rules on questions of EU law referred to it by Member States’ national courts. Through this procedure, the CJEU has ruled on a number of aspects of the EAW and its implementation.<sup>80</sup>

The Committee recognised that the surrender agreement between the EU and Norway and Iceland was a possible model – it features political dispute resolution procedure, without subjecting either country to the jurisdiction of the CJEU. But it also raised concerns about “the prospect of a ‘cliff-edge’ in our extradition arrangements” if the Government does not accept the jurisdiction of the CJEU during any transitional period.<sup>81</sup> The Prime Minister’s Florence speech may have assuaged these concerns: if the EU agrees to an implementation period on the Government’s proposed terms, including extended jurisdiction of the CJEU, then continued access to the EAW might be possible. This will be explored in further detail later in this report.

### *Europol*

The new legislative framework for Europol – the Europol Regulation (effective May 2017) – allows for the European Data Protection Supervisor (EDPS) to oversee the processing of personal data by Europol, and allows the EDPS to refer a matter to the CJEU or intervene in actions brought before the CJEU.<sup>82</sup> It also gives the CJEU jurisdiction over any arbitration relating to a Europol contract.<sup>83</sup>

Camino Mortera-Martinez of the Centre for

European Reform argued that the UK will need to accept at least “partial ECJ oversight” if it wants a bespoke agreement with Europol, particularly in relation to its data protection standards.<sup>84</sup> But other third countries’ operational partnerships with the agency do not require CJEU oversight.

The supplemental agreement signed by the USA with Europol – covering the exchange of personal data – merely commits the two parties to “oversight according to their applicable law and procedures”, and states that “The Parties shall utilize their respective administrative, judicial or supervisory bodies that will ensure an appropriate level of independence of the oversight process”.<sup>85</sup>

Denmark’s operational agreement with Europol does include a commitment to accept the jurisdiction of the CJEU, but it does so anyway, as an EU Member State. Article 20 of the agreement states that questions regarding its validity or interpretation may be referred to the CJEU, and enables the Commission to bring a complaint to the CJEU concerning non-compliance with any obligation within the agreement.<sup>86</sup> There is a chance that this provision was included to show the UK what it can expect from its own negotiations on Europol.

The UK’s future relationship with Europol is examined in further detail below.

### **Alternative dispute resolution mechanisms**

The UK Government’s White Paper on Brexit said that dispute resolution mechanisms are “common in EU-Third Country agreements”, and offered a number of examples, including EU-Switzerland bilateral arrangements, which currently allow for a number of joint committees to oversee different principal agreements.

Sources in Brussels suggested that Switzerland’s piecemeal model is a subject of irritation within the EU. The country is negotiating a ‘framework accord’ with the EU to bring all of its agreements together in one place. Progress has been delayed in recent years by disagreements regarding the free movement of people.<sup>87</sup>

There are also obvious differences between

Brexit and EU-Swiss relations, which have evolved over decades. Given the scale of the Brexit negotiations and the short timescale involved, it seems possible that both parties might seek a single dispute resolution model to arbitrate over any aspect of future UK-EU agreements or treaties, including the proposed treaty on law enforcement.

One option for the withdrawal agreement could be to render it subject to arbitration by the court of the European Free Trade Association (EFTA), as proposed by the Belgian President of the ECJ, Koen Lenaerts, in August.<sup>88</sup> The EFTA court has judges from the three EFTA countries under its jurisdiction – Norway, Iceland and Leichtenstein (Switzerland is an EFTA member but not under the jurisdiction of the court). Its rulings are not binding on its members; nor are they obliged to seek guidance from it. But membership of the court would still require some level of deference to foreign judges.

Furthermore, one source in the European Parliament pointed out that the EFTA court has never departed from the CJEU’s rulings, and Lenaerts similarly warned that it “must attain a uniform or homogeneous jurisprudence” with its neighbour.<sup>89</sup> The Lords EU Committee points out that the EFTA court’s jurisdiction was not extended to cover the Norway/Iceland deal on the EAW, so it might not be appropriate for the purposes of any law enforcement treaty.<sup>90</sup> Nevertheless, the President of the EFTA court, Carl Baudenbaucher, has spoken positively of this option.<sup>91</sup>

Professor Catherine Barnard, Professor of EU Law at the University of Cambridge, interpreted the Government’s future partnership paper on enforcement and dispute resolution as an indication that the UK is “heading in the direction of the EFTA court”, but noted that it also leaves the door open for multiple dispute resolution mechanisms for different UK-EU agreements. On that basis, the EFTA court could be used for any trade agreement, with different models applied to law enforcement and data protection.



Barnard also suggested that there would be significant logistical challenges inherent in any model that requires the establishment of a new court or joint committee, at a time when there are already “capacity issues” for the civil service. And she pointed out that an original proposal for an EEA court, comprising judges from the ECJ and from EEA states, was rejected by the CJEU, on the basis that ECJ judges could face conflicts between their role within the EEA court and their need to promote ever-closer union between EU states. Any similarly bespoke model for the UK would presumably face the same challenge.

### **Fantasy or pragmatism?**

James Blitz of the *FT* has suggested that May’s stance on the CJEU has “astonished Europeans”. He added: “They say she has failed to recognise that the ECJ is the arbiter of the single market and that her rigid position makes it difficult for the UK to sign a comprehensive trade deal”.<sup>92</sup>

Others point to the high level of public support in the UK for leaving the court’s jurisdiction, and its significance in undermining the sovereignty of the UK Parliament. Jacob Rees-Mogg told the BBC that the ECJ “cannot be our senior court for a day after we leave the EU”, adding that if the UK cannot “make our laws according to our own democratic principles” then “we are still in the European Union”.<sup>93</sup> He suggested, for example, that the UK should have the option to implement criminal record checks on EU nationals entering the country without risking a legal challenge from an EU court.

The CJEU issue looms so large that it may require resolution before the Brexit talks turn to security and home affairs cooperation. Without consensus on a dispute resolution mechanism for EU citizens wanting to uphold their rights under the withdrawal agreement, it may be impossible for the negotiators to pass the ‘sufficient progress’ test required to move onto discussing aspects of the UK’s future relationship with the EU. Agreement on an implementation period could enable talks to progress, assuming the UK accepts the CJEU’s jurisdiction during the two year period,

but that may depend on the extent to which the UK will guarantee the future rights of EU nationals.

There remains the possibility that both parties may agree to a compromise. James Blitz reported that David Davis “is said by colleagues to be more flexible”, and has been “exploring ways in which the ECJ might have a limited backstop role”.<sup>94</sup> And “secret Belgian negotiating minutes”, reportedly seen by *The Times* in July, stated that “Alternatives to the role of the [ECJ] should be considered”.<sup>95</sup>

But an EU diplomat interviewed for this paper said that Ministers will have “very little room for manoeuvre” on the CJEU, “or anything that looks like the CJEU”. And Tom Nuttall, Charlemagne correspondent for *The Economist*, suggested that the CJEU is “very jealous of its legal privileges” in relation to EU law. Andre Klip acknowledged that “this is something that the UK wants to the point that it is almost inevitable that the EU will have to accept it”, but argued that “the UK cannot create an area of EU law that is out of the reach of the Court of Justice”.

### **Summary and conclusions**

Whatever position the UK Government finally reaches on the jurisdiction of the CJEU over law enforcement cooperation between the UK and the EU, there is no obvious alternative model of dispute resolution currently available. Unless resolved beforehand, there is a risk that negotiations on various aspects of cooperation – from Europol to data protection standards – could be thwarted by disagreements over the European court.

Ultimately, this may have to be settled (to some extent) before the two parties commence formal negotiations on law enforcement cooperation. But there is also a chance that any dispute resolution ‘fix’ on citizens’ rights under the withdrawal agreement will be unsuitable for other areas, including law enforcement cooperation.

The most-discussed alternative model – the EFTA court – has less direct power than the CJEU,

but still entails the UK accepting rulings made (partly) by non-British judges in a European court, which may make it an undesirable alternative for many. But if the Brexit talks fail to reach a better compromise agreement, and with the clock ticking towards Brexit Day, the Government might find it difficult to keep everyone happy.

As this paper seeks to demonstrate, this is just one of many areas in which both negotiating parties must consider carefully how much they desire law enforcement cooperation over the maintenance of various 'red lines'. Many observers will be hoping that they have some workable long-term solutions up their sleeves.







# SECTION 5

**A second-tier member? The  
UK's future relationship with  
Europol**



### Introduction

“We are the largest contributor to Europol, so if we left Europol ... then we would take our information - this is in the legislation - with us. The fact is the European partners want us to keep our information in there, because we keep other European countries safe as well. This isn’t a huge contentious issue.”

*Amber Rudd, Home Secretary*

Europol is the closest that the EU has to its own police force. It is a major hub for cross-border cooperation and joint operations against serious and organised crime, cybercrime and counter-terrorism. Criminals have always crossed borders, but the internet has opened up new opportunities for transnational criminality, including mass cyber-attacks, human trafficking by organised criminal groups, and the radicalisation of terrorists online.

Europol began life as a German proposal for an EU policing body, which it raised at a Council meeting in Luxembourg in 1991. The Europol Convention eventually entered into force in 1998, and the agency’s tasks and mandate have been extended over its lifetime to enable it to combat various forms of organised crime, cybercrime and terrorism. It operates from headquarters in the Hague, has liaison officers from 41 countries located in one place, and is currently headed up by the British ex-MI5 analyst, Rob Wainwright. Europol became a full EU agency in 2010.

The Government has made it clear that it wants the closest possible relationship with Europol in future. Brandon Lewis said in October 2016 that the UK’s “co-operation and membership of Europol will obviously continue in full with us as a full and strong contributing member”, highlighting that the agency “predates the European institutions”.<sup>96</sup>

It is widely acknowledged that the UK has played a leading role in shaping Europol, influencing its strategic priorities, its working practices and many of its operational successes. But Europol

remains an EU agency with a membership exclusively comprising EU Member States. It has close operational relationships with many third countries – but will that be enough for the UK?

Is it realistic for the UK to hope for a ‘bespoke’ relationship with the agency, going beyond what third countries have achieved in the past? And what would be the impact of a lesser partnership than the UK desires?

### What does Europol do?

Before 2010, Europol was an international organisation funded by direct contributions from EU Member States. In June 2010, the original Europol Convention was replaced with a Council Decision, which turned the organisation into an EU agency funded through the EU budget, subject to European Commission staff rules and financial regulations.

The Council Decision and subsequent Europol Regulation (effective May 2017) have also extended the agency’s mandate and tasks. Key areas of work for Europol now include cybercrime, counter-terrorism, migrant smuggling, organised crime and money laundering.

Europol provides Member States (and, in some cases, its operational partners) with six main forms of support:

- Operational coordination and support: a 24/7 operational centre is a hub for data exchange between Europol, Member States and third countries;
- Information exchange: data on operational matters is shared through SIENA and the Europol Information System, and knowledge/best practice is exchanged through the Europol Platform for Experts;
- Strategic analysis: the agency’s analysis products support the identification of priorities in the fight against terrorism and organised crime;
- Intelligence analysis and forensics: Europol analysts provide research and support to law enforcement agencies across the EU, including forensic support for the fight against illicit

drug production, payment card fraud and cybercrime;

- Training/capacity building in cybercrime, through the European Cybercrime Centre, 'EC3'; and
- Joint Investigation Teams (JITs):<sup>97</sup> law enforcement authorities in two or more Member States can enter into JITs for a fixed period of time and for a specific purpose, possibly with the participation of a competent authority from outside the EU.

### The UK's role in Europol

The UK has been an influential participant in Europol, particularly since Rob Wainwright became its Director in 2009. According to Government papers prepared during the referendum campaign, the UK uses Europol more than any other Member State. A 17-person liaison team from the Metropolitan Police and other agencies is based at its headquarters, and an additional 50-or-so UK law enforcement officials are employed directly by Europol.<sup>98</sup>

This situation did not emerge by chance: Britain has deliberately tried to enhance and improve Europol by promoting UK law enforcement practices. David Armond, Deputy Director of the NCA, said last year that his organisation had put "all our weight" behind assisting Rob Wainwright as Europol Director, having mounted a campaign to put him in place in order to improve the agency's efficiency and effectiveness.<sup>99</sup>

Armond told the Home Affairs Select Committee that Wainwright's tenure had rendered the organisation "unrecognisable from the one that went before", adding that "most of the systems that make Europol effective are a complete lift and shift from the UK intelligence model. We are seen as influential in driving forward the business."<sup>100</sup>

The value that the UK gains from Europol membership is relatively easy to quantify. Armond said that UK officers sent 37,000 messages the year before to Europol Member States via SIENA, relating primarily to "UK high-priority threats like

child sexual exploitation, firearms, cybercrime and organised immigration crime".<sup>101</sup>

Europol, UK law enforcement agencies and their EU counterparts have concluded a number of successful joint operations, through JITs and other forms of cooperation. Key successes include:

- The arrest of 126 individuals from a Romanian organised crime network, who were involved in trafficking and exploiting Roma children;
- 184 arrests in relation to the world's largest child pornography network (including 121 in the UK); and
- Nine custodial sentences (from English courts) in relation to the trafficking, prostitution and rape of 33 victims in the Czech Republic.

Wainwright has said that the UK is "rightly regarded as a natural leader" on security issues, but that the "fullest benefits" of Europol go to Member States. These are the two key factors at play here: does the UK's reputation in law enforcement place it in line for a unique and bespoke relationship with Europol? Or will Europol, as an EU agency, be limited to a relationship with the UK that goes no further than its partnerships with other third countries? And if so, what would that mean for Britain's relationship with Europol?

### Previous third country operational agreements

Europol has negotiated operational agreements with 16 non-EU countries, as well as strategic agreements with a further four (China, Russia, Turkey and Ukraine). Operational agreements allow for the exchange of information, including personal data, whereas strategic agreements are limited to general intelligence sharing.

In December, *The Telegraph* quoted a "senior Government source" who suggested that the UK would be "pushing for an American-style model where we're outside the EU but very much still part of Europol". Activities enabled by the US-Europol agreement include:

- Cooperation in relation to drug trafficking, human trafficking, trafficking of nuclear/

radioactive substances, people smuggling, motor vehicle crime, terrorism and forgery of money;

- The exchange of law enforcement information between the US and Europol, via a designated point of contact on both sides;
- The placement of US liaison officers in Europol and vice versa;
- Consultation on policy issues on “matters of common interest”; and
- Exchange of expertise (e.g. through training courses).<sup>102</sup>

The US has no seat on the Europol Management Board, and thus no official influence on the strategic direction or day-to-day management of the agency. Rob Wainwright highlighted earlier this year that operational partners have been prevented from joining Europol’s operational projects, “because at least one of our full members did not consent to that application”.<sup>103</sup> And indirect access to databases can create delays, he said, because the request from the operational partner goes to “the representative in our head office”, who then “passes it onto our unit and we find a hit and it comes back down the channel, so there is a time lag”.<sup>104</sup>

Wainwright also pointed out that the process by which Europol operational agreements are negotiated has changed. The new Europol Regulation – effective from May 2017 – means that the UK may be the first country to seek an operational partnership with Europol under new arrangements, rather than via a “tried and tested route”.<sup>105</sup> In any case, the UK is in a unique position as a soon-to-be former Member State that has played a leading role within the agency.

### **What are the chances of the UK getting a bespoke deal?**

In response to a question about the UK’s relationship with Europol, Brandon Lewis told the House of Commons in January that he was “looking to make sure that we get the bespoke deal that is right for this country”. The UK will not be the first country to seek a unique relationship

with the agency, though: the Danish experience might hold some clues to the UK’s future treatment.

Denmark went to the polls in December 2015, voting to reject a proposal for the country to replace its block opt-out on EU JHA measures with a new model that would allow it to opt into the new Europol Regulation. A vote in favour of the opt-in would have enabled it to retain its membership of the agency. The referendum result forced the country to negotiate an “operational cooperation agreement” with Europol, which may provide a model for the UK’s deal.

A Danish source interviewed for this paper said that the Danish Government had sought a better deal, but had nevertheless presented the final agreement to the public as a “huge success”. It was suggested that the country had sought direct access to Europol databases and a place on the management board, but both had been denied, despite the fact that Denmark is an EU Member State, and its budget contributions to Europol will remain the same.

Instead, Denmark has ‘observer status’ on the Europol management board, so it can participate in meetings but does not have voting rights. Unlike third countries, it can request information from Europol databases without justifying it, and can do so round-the-clock, via a specific member of Danish-speaking staff (or “seconded national experts” at Europol).<sup>106</sup> Danish liaison officers will also be based at the Europol headquarters.

A Commission statement, released when the deal was concluded, said that the Danish solution was “a tailor-made arrangement allowing for a sufficient level of cooperation, including the exchange of operational data and the deployment of liaison officers”. It added that Denmark, being “fully in line with European data protection rules”, will have “a unique status which will allow for much closer ties with Europol without amounting to full membership.”<sup>107</sup>

The Danish agreement will be reviewed in 2020, and can continue only if Denmark remains an EU Member State and a signatory of the Schengen



Agreement. Despite the fact that Denmark is subject to the jurisdiction of the CJEU as a full Member State, the agreement is explicit about the Court's oversight. Some sources interviewed for this paper suggested that this was intended to send a message to the UK.

An EU diplomat said that the Danish deal "gets us 80% there" in relation to the UK's future access to data, liaison staff and other elements of cooperation with Europol. But Denmark remains a Member State of the EU and subject to the jurisdiction of the CJEU. What is the likelihood of the UK getting a bespoke deal that goes further than the Danish agreement?

Rob Wainwright told the Home Affairs Select Committee that Europol was concerned about the impact of the UK having only indirect access to Europol databases (as Denmark now does), due to the volume of enquiries it would be likely to send. He said that the UK is "one of the most active users of our platforms", so any requirement to "channel their requests on a daily basis" would create "an enormous burden on the organisation".

As a result, he said, there would be "some business imperative on the side of Europol that would also want to consider how we manage the effects of that; and that might influence, perhaps, the position that the Commission would take in the negotiations".<sup>108</sup>

The UK's strategic leadership within Europol, its vast contributions to Europol databases, and its strong involvement in all of Europol's operational projects may put it in a robust position to achieve an unprecedented agreement with the agency. This could, for example, include direct access to databases and some form of associate membership of the Management Board.

But the Commission may be wary of the Danes' reaction to a superior deal for the UK. Danish politicians and diplomats may balk at any UK-EU agreement on Europol that goes further than their own, and Hans Nilsson suggests that Denmark's deal "is probably the best [the UK] can get" on Europol.

The issue of data protection is also key to the UK's future relationship with the agency. Without maintaining its status as a trusted recipient of personal data, the UK is unlikely to retain access to Europol databases, and it might have trouble retaining full involvement in its operational projects. A data adequacy decision may be required before the agency can fully conclude an operational agreement with the UK.



The Government's future partnership paper indicated that the UK's future relationship with Europol could form part of an overarching treaty on UK-EU law enforcement cooperation. If this approach is taken, a protracted disagreement over any of the issues explored in this report could risk delaying a future agreement on Europol. It is not even clear that the UK can remain a member of Europol during any implementation period, so a transitional arrangement might be required before a law enforcement treaty can be agreed and ratified.

### Summary and conclusions

Europol is a vital element of the UK's law enforcement cooperation with the EU, and British leadership of the agency has apparently resulted in great improvements to its effectiveness and efficiency. The UK's dominant role within Europol arguably puts it in a unique position when negotiating its future relationship with the agency, as a third country and an operational partner.

But where there's a will, there is not always a way. Data adequacy rears its head again, and will probably be required before a partnership deal can be agreed. Denmark has set a precedent which might be helpful to the UK – it allows for observer status on the Management Board, for example – but which also draws some possible red lines for the UK's future deal.

Without direct access to Europol databases, the UK might overwhelm the agency with requests, and its vital expertise in law enforcement might

be lost from Europol's operational projects, so perhaps the EU (and Denmark) will concede that something different is needed. But with the Commission leading the negotiations, Europol's wishes might not be the only determinant of the EU's position.

Either way, it would reassure many in the law enforcement field if progress was made on a new UK partnership with Europol at the earliest possible stage in the negotiations. Transitional Europol membership will probably need to form part of the Government's proposed "implementation period" from March 2019 – particularly if the EU is unwilling to treat the UK as a third country (for the agreement of an operational partnership) before exit day – but this may be easier said than done. Many informed commentators are concerned that such uncertainty could put at risk the valuable working relationships between UK law enforcement officers and their counterparts across the EU.







# SECTION 6

**Avoiding the “honeypot”  
scenario: future surrender  
arrangements with the EU**



### Introduction

In an eighth-floor flat in New Southgate in North London in 2005, four men gathered and assembled home-made bombs containing hydrogen peroxide and chapatti flour. On 21 July, they ventured into the London transport network, armed with their rudimentary devices.

Hussein Osman headed for Shepherd's Bush and attempted to detonate his device. His bomb, like all of those made by the group, failed to explode. Osman fled, first to Brighton and then to mainland Europe via a Eurostar train.

He was traced to Italy via his mobile phone use, and extradited with a European Arrest Warrant. He returned to the UK on 22 September 2015, just over three months after committing the crime for which he was later convicted, and 56 days after the warrant for his extradition was issued. Osman was later sentenced to life imprisonment for conspiracy to murder, with a minimum of 40 years behind bars.

It's worth contrasting this with the case of Rachid Ramda, who was found guilty of conspiring in an explosion which killed eight people and injured 87 at a Paris metro station in 1995. He was arrested in London less than four months after the bombings, before the European Arrest Warrant was in force. French authorities requested his removal from Belmarsh Prison, under the 1957 Council of Europe Convention on Extradition, to face trial in France.

Ramda successfully fought his extradition in multiple legal proceedings until the end of 2005, when he was finally handed over to French custody and convicted four months later. Failed extradition attempts were linked to doubts about whether Ramda could be guaranteed a fair trial in France, and to evidence that another individual accused of making the bombs used in the attack, Boualem Bensid, had been the victim of police brutality.<sup>109</sup>

### Background

The European Arrest Warrant facilitates extradition between Member States of the EU, so that individuals wanted for a criminal offence

can face prosecution or serve a prison sentence for an existing conviction. It is not the first or only arrangement of this kind, but it does offer a number of advantages over any previous setup.

The Government's future partnership paper on law enforcement cooperation made little mention of the EAW, but the Prime Minister appears to value it. As Home Secretary in 2014, she told the press that getting rid of the EAW would make the UK "a honeypot for all of Europe's criminals on the run from justice".<sup>110</sup>

Having stood firm on this against a concerted backbench rebellion, she seems likely to seek a close approximation to the EAW after Britain leaves the EU. Prior to the referendum, she said that Britain would have to "negotiate alternative arrangements" if it was not a member of the EU, but that it "might not be possible with every country".<sup>111</sup>

Her successor set a more optimistic tone in March of this year. Amber Rudd said that it was "a priority" for the Government "to ensure that we remain part of the [EAW] arrangement", and stated that "our European partners want to achieve that as well".<sup>112</sup> In contrast, the majority of legal experts seem to agree that the terms of the EAW – as an EU legal framework with no provisions for third country membership – mean that the UK cannot remain within it after it leaves the EU, and must negotiate an alternative surrender agreement.<sup>113</sup>

There may be both practical and financial costs to losing access to the EAW, even in the short term. The Home Office document leaked to *The Times* in August said that it costs £62,000 on average to extradite an individual to a non-EU country, compared with £13,000 under the EAW.<sup>114</sup> It also takes approximately three times as long to extradite an individual to or from a non EU country.<sup>115</sup>

So what does the EAW offer its members, and how might the UK extradite its criminals in future? What role might the CJEU play in these negotiations, and what is the realistic likelihood of a speedy agreement?



### **EAW key characteristics**

The EAW has been in force since 2004. After a warrant is issued and an individual is arrested by local law enforcement authorities, extradition hearings usually take place within 21 days, with extradition taking place within 10 days of the final court ruling. In a recent paper, Camino Mortera-Martinez explained that the EAW is “exceptional” in three key ways.

First, it requires Member States (subject to exceptions) to surrender any individual accused of an offence carrying a penalty of 12 months or more in the Member State that issues the EAW. Contrary to normal extradition law, it also abolishes the requirement of ‘double criminality’, if the offence is on a list of 32 categories, including terrorism, child sexual exploitation and kidnapping. Most extradition treaties only oblige the receiving country to extradite the individual if

the act is also an offence under its own domestic law.

Second, it prevents Member States from refusing to extradite their own nationals, despite many having domestic rules or constitutions that would otherwise prevent them from doing so.<sup>116</sup> Several Member States had to amend their constitutions in order to extradite their own citizens to an EU country under the EAW.

Third, it does not enable use of a ‘political exception’ (or political offence) clause. Without this exclusion, terrorism suspects could be granted safe haven in another Member State, on the basis that their crimes are regarded as political in nature.<sup>117</sup> This previously served as a barrier to Irish republican terrorism suspects being extradited from Ireland to the UK to face charges.

Supporters of the EAW argue that it has sped up

and streamlined the extradition process, making it easier, quicker and cheaper to bring offenders to justice. Its detractors have argued that it operates unfairly, favouring the prosecuting authorities over the rights of suspects and defendants.<sup>118</sup>

### The UK's use of the EAW

The UK's use of the EAW has grown significantly since it was introduced in 2004. In the first year of its use, UK courts surrendered 24 individuals and issued 96 warrants. In 2015/16, those figures had grown to 1,271 and 241 respectively.<sup>119</sup>

The UK surrendered 7,436 individuals wanted by other EU Member States under the EAW between 2009 and 2016, including 134 for murder, 93 for child sex offences, 194 for armed robbery and 614 for drugs trafficking.<sup>120</sup> During the same period, the UK issued 1,669 warrants and 901 individuals were surrendered to Britain, including 110 for child sex offences, 160 for drugs trafficking, 53 for murder and 69 for rape.

The paper prepared by the Home Office and leaked to *The Times* provides a number of examples of the UK's use of the EAW, including that of Hussein Osman. In one example, a Slovak national named Zdenko Turtak was traced to his home country after beating and raping an 18-year-old woman in Leeds. He was sentenced to 14 years' imprisonment in October 2015.<sup>121</sup> The leaked document points out that Turtak's extradition would have been impossible without the EAW, because Slovakia refuses to extradite its own citizens under alternative extradition arrangements.

### The Norway/Iceland deal

Norway and Iceland commenced negotiations for a surrender agreement with the EU in 2001, concluding them formally in 2014. The agreement is still not in force three years later, because Iceland has not ratified it (for constitutional reasons). The Norway/Iceland agreement is similar to the EAW, but with two key discretionary bars to extradition: an option for parties to refuse to extradite their own nationals, and a political offence exception.

In many ways, replicating the Norway/Iceland deal may be the UK's best chance of concluding a surrender agreement quickly enough to avoid a hiatus in Britain's extradition capabilities. Even if transitional access is an option during any implementation period, a bespoke long term arrangement may be lengthy to conclude. This could further complicate the conclusion of any overarching treaty on future law enforcement cooperation.

That said, Steve Peers and John Spencer, Professor Emeritus of Law at the University of Cambridge, both pointed out that the EU has a lot more to lose if it cannot extradite criminals to or from the UK as easily. In comparison to the Norway/Iceland negotiations, there may be a lot more political energy and will to reach a rapid agreement on the UK's future extradition arrangements.

Hans Nilsson suggests that a "copy/paste" version of the Norway/Iceland agreement would be the best way to avoid coming up against major constitutional problems, although it would also make it impossible to extradite some individuals from their home countries back to the UK to face charges.

This is because some countries amended their constitutions for the EAW to allow extradition to any country with which an international agreement has been concluded, but others, such as Germany and Slovenia, restricted it to EU countries (or countries belonging to an international organisation for which an extradition treaty had been signed).<sup>122</sup>

This could cause major problems for prosecuting authorities. John Spencer reported that, pre-EAW, British police officers were invited to support prosecution in countries which would not extradite their own citizens to the UK, but the complications involved in prosecuting crimes in foreign courts often made this impracticable.

Further difficulties could be caused by a political exception provision. Steve Peers reported that earlier Irish constitutional amendments ensured that the EAW was compatible with the Irish constitution, but those amendments arguably





might not apply to any UK-EU extradition deal. Any such provision could be exploited by defence lawyers seeking to prevent the extradition of suspected republican terrorists from Ireland to the UK to face prosecution.

### **Dispute resolution and the CJEU**

If the UK seeks to replicate the provisions of the EAW as closely as possible when the UK leaves the EU, what would this mean for the jurisdiction of the CJEU?

Press reports in August suggested that the Government intends for Supreme Court judges to have the ability to block the extradition of British citizens, acting as the final body of appeal for the enactment of a European Arrest Warrant.<sup>123</sup> In reality, that is already the case, subject to possible referral to the CJEU for an opinion. But the CJEU can rule on points of law in relation to the EAW, and its jurisdiction is bound to play some role in negotiations over a future UK-EU extradition agreement.

The Norway/Iceland deal requires only that the contracting parties:

“[...] keep under constant review the development of the case law of the Court of Justice of the European Communities,

as well as the development of the case law of the competent courts of Iceland and Norway relating to these provisions and to those of similar surrender instruments.”<sup>124</sup>

It adds that, to this end, “a mechanism shall be set up to ensure regular mutual transmission of such case law”. In theory, as acknowledged by the Lords, there is no reason why a similar arrangement couldn’t apply to any UK-EU agreement. But Camino Mortera-Martinez has pointed out that the mechanism is not yet in place, “and it is unclear how it would work, who would be part of it, and what would happen if it were asked to rule on issues of criminal procedure and fundamental rights (as only courts can do this).”<sup>125</sup>

The deal also provides for a political dispute resolution mechanism: in the event of a dispute between either Iceland or Norway and an EU Member State, it can be referred to “a meeting of representatives of the governments of the Member States of the European Union and of Iceland and Norway, with a view to its settlement within six months”.<sup>126</sup>

The criminal barrister Andrew Langdon QC told the Home Affairs Sub-Committee of the Lords EU Committee that political dispute resolution

mechanisms are common to many extradition arrangements, which might mean the inclusion of “an obligation on the parties to seek resolution as soon as possible”, and “they might appoint specific people whose job will be to resolve disputes”.<sup>127</sup>

Steve Peers agreed with Langdon. He also suggested that the Government’s willingness to pay due account to the CJEU’s case law in civil cases – as indicated by its future partnership paper on future civil judicial cooperation – might suggest that it would be content for the courts to do the same in relation to the EAW.<sup>128</sup>

Like in the case of data protection, however, the UK cannot escape the direct impact of rulings of the court, because the CJEU will retain its jurisdiction over the EU Member States with which the UK concludes any extradition agreement.

One can easily envisage a scenario, for example, in which an EU citizen challenges their requested extradition to the UK under a UK-EU agreement or treaty, and the court in that citizen’s home country refers the case to the CJEU for a ruling. The practical implications of any negative CJEU ruling – for example, one that declares that the UK-EU treaty is incompatible with the EU’s Charter of Fundamental Rights – would be significant.

According to Catherine Barnard, the CJEU would be likely to recognise the practical importance of an extradition agreement (or broader law enforcement treaty), and give the UK and Commission a defined period in which to renegotiate, before the agreement ceases to apply. There is a chance, however, that it might strike an agreement down with immediate effect. In practice, this would not give the UK the sort of freedom from the CJEU that many might have envisaged.

### Post-Brexit extradition arrangements

Legal experts appear united in their view that the UK cannot remain a member of the European Arrest Warrant (an EU legal framework) after Brexit. The Prime Minister acknowledged this prior to the referendum, when she was Home Secretary.

*The Guardian’s* report on the future partnership paper on law enforcement stated that the Government wanted its future cooperation with the EU to include “Replication of the provisions of the European arrest warrant system [...] without belonging to the system”.<sup>129</sup> But the partnership paper itself did not refer to the Government’s intentions for the EAW.

As outlined above, the Government may face considerable challenges if it attempts to secure a replica of the EAW as a third country, as suggested by *The Guardian’s* coverage.

Alternative models include the Norway/Iceland deal, the 1957 Council of Europe Convention on Extradition, and bilateral arrangements with Member States.

The Norway/Iceland arrangements have been referred to as undesirable by some, on the basis that the agreement took a long time to negotiate and has still not been ratified. But Steve Peers pointed out that this is due to Iceland’s non-ratification, rather than problems with EU Member States. And the length of time taken to conclude the agreement may reflect the relative political importance placed by the EU on extradition to and from those countries. The volume of extraditions between the UK and EU might provide impetus for both parties to conclude an agreement more speedily. This model nevertheless has major deficiencies when compared to the EAW, as outlined above.

Some have suggested that the UK could fall back on the 1957 Council of Europe Convention on Extradition if it ‘falls out’ of the EAW before negotiating an alternative agreement. But legal experts interviewed for this paper suggested that some Member States may have rescinded the Council of Europe treaty when incorporating the EAW into their domestic law. This was also highlighted by witnesses who gave evidence to the Lords Home Affairs Sub-Committee’s inquiry.<sup>130</sup>

In addition, extraditions under the Convention were more costly and slower, as demonstrated by the Rachid Ramda example (which took place

before the EAW was in force). It took an average of 18 months to extradite an individual under the Convention, compared with 15 days for uncontested EAW cases and 48 days for contested ones – partly because it placed no time limits on each stage of the process.<sup>131</sup>

The Convention allowed Member States to refuse to extradite their own nationals, and it did not include recent additions to the Extradition Act in relation to proportionality. It also took place via diplomatic channels rather than judicial authorities, so extraditions would require the approval of the Secretary of State.<sup>132</sup>

A European legal source from the judicial sector, interviewed for this paper, suggested that the EU might make it difficult for the UK to conclude any extradition deal quickly, and that there was a lot more goodwill within the individual Member States, which generally place a lot of trust in the British judicial system. The source suggested that the UK might be better placed to negotiate 27 different extradition agreements with each Member State, rather than dealing with the EU’s demands.

Witnesses giving evidence to the Lords Home Affairs Sub-Committee last year disagreed, with an NCA representative telling peers that it would be “optimal [...] to have a treaty with the EU as opposed to going around and negotiating with 27 Member States”.<sup>133</sup> More recently, Mike Kennedy, former President of Eurojust, described that option as “impossible” within the Article 50 period.<sup>134</sup> Some legal experts also consider that the EU has ‘exclusive competence’ to negotiate in this area, which would mean that Member States cannot cut bilateral deals with the UK.

As if to demonstrate how inextricably linked are the key elements of cooperation explored in this paper, the UK’s future access to SIS II also plays a significant role here. SIS II is the database through which EAW information is shared between Member States. So even if the UK can somehow remain within the EAW, or negotiate an alternative arrangement along similar lines, it might have trouble disseminating and receiving

arrest warrants if it is locked out of that database.

## Summary and conclusions

The Government clearly values the EAW, and the evidence suggests that it has led to speedier (and less expensive) extraditions of some very dangerous individuals. Although the Government’s future partnership paper includes scant detail on the Government’s plans, media reports and Ministerial statements suggest that it will seek a very close approximation to the EAW after Brexit.

Many legal experts regard the Norway/Iceland agreement as the model most achievable for the UK. But it was lengthy to negotiate and allows Member States to refuse to surrender their own nationals. Any alternative would be likely to require constitutional change in countries such as Germany and Slovenia (which, for the same reasons, may not be prepared to accommodate transitional access to the EAW after Brexit). And a ‘political exception’ provision might cause problems if the UK wants Ireland to extradite suspected republican terrorists to face charges in British courts.

More positively, Norway and Iceland’s agreement does provide some precedent for a political dispute resolution mechanism; albeit with a requirement that the third countries must keep the CJEU’s rulings “under constant review”, and with the possibility that the agreement could be terminated if a dispute cannot be resolved by diplomatic means.

Presumably, the Government will seek to include future surrender arrangements in its proposed law enforcement treaty with the EU. Given the substantial challenges outlined above, this risks delaying the agreement of less contentious areas of cooperation.

It is also not clear that the constitutional changes implemented by other Member States, to enable them to extradite their own citizens under the EAW, would apply to the UK as a third country during any implementation period, even if it continues to accept the jurisdiction of the CJEU.



The EAW may even require amendment in order to allow the UK to access it during this period, assuming it will be considered a third country after 29 March 2019.

Both sides may desire a rapid conclusion, but experts suggest that the legal complexities

involved in negotiating surrender agreements are considerable. As a result, this is arguably the area of law enforcement cooperation which the UK is most at risk of failing to resolve before the date set for Brexit.



A blue flag with yellow stars, resembling the European Union flag, is flying in the foreground. In the background, the clock tower of Big Ben is visible against a clear sky. The word "Conclusions" is written in white text across the center of the image.

# Conclusions

This paper has assessed the issues raised by Brexit in three key areas of law enforcement cooperation with the EU: data sharing on criminal matters, Europol and the European Arrest Warrant. There is much at stake here, and a strong will on both sides to maintain high levels of law enforcement cooperation in the interests of public safety and national security. Thus far, however, neither side has engaged strongly with the detail in public, nor demonstrated much awareness of the trade-offs that might be required in order to achieve their aims.

This should concern all those involved in the law enforcement community, who face major uncertainty over the future of the UK's involvement in crucial forms of cross-border cooperation in the fight against crime and terrorism. The Home Office may need to prepare, for example, for the impact on the police and Border Force of any loss of access (even temporarily) to systems such as SIS II and ECRIS, alongside dealing with any new immigration system arising from Brexit. It may not have the capacity to do so at short notice.

The Government hopes that it can delay such a scenario by seeking to extend all current arrangements on law enforcement cooperation throughout a two year "implementation period", during which it is likely to accept the jurisdiction of the CJEU. If its status after March 2019 becomes that of a third country, however, there may be significant legal obstacles to maintaining the status quo.

Clearly, both parties need to give serious consideration to the concessions that they might be willing to make in order to fulfil their objectives in this field. Ultimately, they must more clearly define their 'red lines', and consider what trade-offs they might be forced to make in the interests of public safety.

Despite their shared intentions to cooperate closely in future, nothing can be taken for granted or left until the last minute to resolve. For the UK Government, for example, the need to extract itself from the jurisdiction of the CJEU may take

precedence over its desire to retain access to SIS II. For the EU, the protection of the privacy of EU citizens may be more important than its access to UK criminal records. Both sides will have to give careful consideration to the long term implications of these decisions before they commence these negotiations.

Outlined below are a number of key questions for the Government and the EU, the majority of which will require answers in the near future. When they emerge, they will give a clearer indication of what the future holds for law enforcement cooperation between the UK and its former EU partners.

### **Key questions for the UK Government**

#### *On data sharing*

Which of these sources of data and information, if any, are a priority for the UK Government to retain access to after Brexit: a) SIS II, b) ECRIS, c) Prüm, d) the Europol Information System, and e) the PNR Directive?

Will the UK seek a data adequacy decision from the EU before the end of the Article 50 negotiating period?

What will be the Government's response if the EU demands an end to the bulk retention of data by UK authorities, including for national security purposes, as a condition for an adequacy decision?

#### *On the CJEU*

What dispute resolution mechanism is the UK willing to make available to EU and UK citizens in relation to any agreement on data sharing in criminal matters?

#### *On Europol*

Will the UK seek an operational partnership with Europol before it becomes a third country?

Will it seek a partnership that goes further than Europol's agreements with a) the USA and b) Denmark? If so, in what manner?



### *On the European Arrest Warrant*

Will the UK seek a surrender agreement that goes further than the Norway/Iceland agreement with the EU? Will it seek to exclude the political exception provision, and to ensure that Member States are forced to extradite their own citizens?

Will the UK seek to commence negotiations on a future surrender agreement before the end of the Article 50 period?

### **Key questions for the EU**

#### *On data sharing*

When the UK becomes a third country, will it require an adequacy decision before it can exchange data on criminal matters with the EU?

Will the UK be able to continue to share data with the EU during any implementation period, without an adequacy decision?

If not, would the EU be willing to commence the adequacy decision process before the end of the Article 50 period?

What is the likelihood of the UK retaining access to a) SIS II, b) ECRIS, c) Prüm, d) the Europol Information System, and e) the PNR Directive during an implementation period?

Will a data adequacy decision be required before negotiations can conclude on the UK's long-term access to any of these sources of data?

What conditions would the EU place on the UK in exchange for long-term recognition of the UK's data protection framework?

When assessing the UK's data adequacy when (or before) it becomes a third country, will the EU take into account the activities of the UK security services?

#### *On the CJEU*

If the UK seeks a treaty with the EU on future law enforcement cooperation, what will the EU demand in relation to the jurisdiction of the CJEU?

Is the EU willing to consider the EFTA court, or

any alternative model, as a way of resolving disputes in relation to a future UK-EU treaty on law enforcement cooperation?

#### *On Europol*

Will the UK require an operational partnership agreement with Europol before the commencement of any implementation period, or can it retain its current membership during that period?

If not, is the EU willing to agree an operational partnership agreement between Europol and the UK before the end of the Article 50 period, in preparation for its transition to third country status?

What is the likelihood of the UK securing an operational partnership agreement with Europol that goes further than Denmark's agreement?

Could the UK retain access to Europol's management board when it leaves the EU - even as an observer, like Denmark?

In light of the volume of data flow between the UK and Europol, would the EU consider giving the UK direct access to Europol's data?

Will the EU require a data adequacy decision before it concludes an operational partnership agreement between the UK and Europol?

Will the EU seek to include the jurisdiction of the CJEU in any operational partnership agreement between the UK and Europol?

#### *On the European Arrest Warrant*

What is the likelihood of the UK negotiating a post-Brexit surrender agreement along the lines of the Norway/Iceland agreement?

What is the likelihood of an agreement that goes further than Norway/Iceland, including a) excluding the political exception provision, and b) ensuring that EU Member States extradite their own nationals to the UK?

Will it be possible for the UK to maintain transitional access to the EAW during any implementation period, while negotiating a new surrender agreement?

### Implications for UK law enforcement capabilities

The implications of Brexit for the UK law enforcement community depend fundamentally on the answers to the questions above, as well as the pace and success of the negotiations, and the extent to which law enforcement cooperation is prioritised by both parties over other objectives.

The cost of failure would be high. As one senior EU source put it, “this is one area where there will be all sorts of very, very nasty consequences if nothing was agreed”.

Without SIS II, for example, individuals who pose a risk to the UK might be able to pass through border control with no warning of their status as a suspect of a serious crime.

Without an agreement with Europol, the UK’s cooperation with EU partners on serious and

organised crime might be compromised, and it would lose access to vital information about criminal suspects and witnesses.

Without access to the European Arrest Warrant, or an alternative surrender agreement, individuals wanted for crimes in the UK may be able to languish in European countries for years before they face justice in Britain. And the UK might struggle to remove foreign criminals wanted for committing serious crimes overseas.

Rob Wainwright said in 2016 that it would be “naïve for us to expect that there will be no political calculation applied” by any of the parties in the Brexit negotiations. But he concluded: “in the end, because of the prevailing interest in maintaining collective security, the grown-ups in the room will probably ensure that those interests are maintained.”<sup>135</sup>

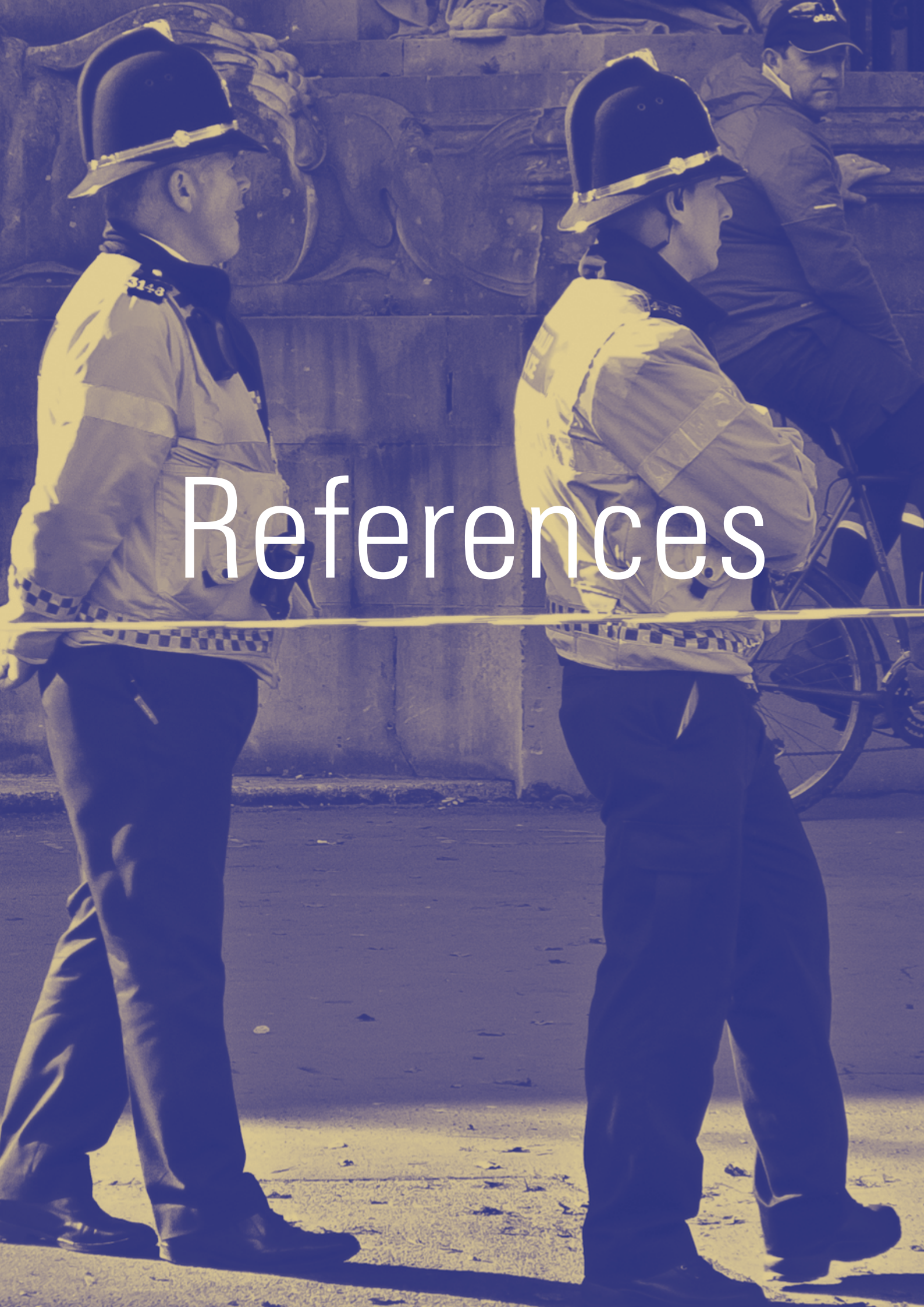
Over to the grown-ups.

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# Appendix



### Contributors

This paper has been informed by a series of interviews with individuals in academia, government, European institutions, law and the media. To encourage candour, interviewees were offered anonymity when it could enable them to speak more freely, and are referred to in this paper as unspecified sources. Academic interviewees (who were willing to provide attributable quotes) included:

- **Professor Catherine Barnard**, Professor of European Union Law, University of Cambridge
- **Professor Andre Klip**, Professor of Criminal Law and Criminology, Maastricht University
- **Professor Valsamis Mitsilegas**, Professor of European Criminal Law, Queen Mary University of London
- **Professor Hans G. Nilsson**, Visiting Professor at the College of Europe and former Head of the Division of Fundamental Rights and Criminal Justice at the Council of the European Union
- **Professor Steve Peers**, Professor of EU and Human Rights Law, University of Essex, and
- **Professor John Spencer CBE**, Professor Emeritus of Law, University of Cambridge.

The authors are indebted to all those who spared their time to provide invaluable insights for this paper, both anonymously and on-the-record.

### Glossary and key terms

Term	Definition
CJEU	The Court of Justice of the European Union – includes the European Court of Justice (ECJ). The CJEU interprets and enforces EU law.
Council of the European Union	The voice of EU Member State Governments – ministers meet according to policy areas to coordinate and amend EU law and policy, together with the European Parliament.
ECRIS	The European Criminal Records Information System: allows access to information on the criminal history of any EU citizen.
EAW	The European Arrest Warrant: facilitates extradition between Member States of the EU, so that individuals wanted for a criminal offence can face prosecution or serve a prison sentence for an existing conviction.
European Commission	The EU's executive arm: the Commission draws up proposals for new European Union legislation, and may be given powers to implement certain decisions of the European Parliament and the Council of the EU.
European Council	Made up of the Heads of State or Government of all EU Member States; the EC sets the EU's overall political agenda.
European Parliament	The EU's directly-elected law-making body (together with the Council), comprising 751 MEPs who are elected every five years.

Europol	The EU's law enforcement agency: Europol co-ordinates and supports law enforcement activity against serious and organised crime across the EU.
EU27	The remaining Member States of the EU after the UK leaves in March 2019.
PNR Directive	Passenger Name Record Directive: provides for Member States to set up Passenger Information Units to store data on airline passenger data, to be shared with law enforcement officials (on request) for the prevention of terrorism or serious crime.
Prüm	The Prüm Decisions require Member States to allow reciprocal searches on each other's databases for fingerprint data, vehicle registration data and DNA profiles.
SIS II	The Second Generation Schengen Information System: countries participating in SIS II can share and receive law enforcement alerts in real time, including on individuals subject to a European Arrest Warrant, people requiring surveillance and stolen vehicles.



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