



INSIGHT

THE CHANGING LANDSCAPE OF UK-EU POLICING AND JUSTICE COOPERATION

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ABSTRACT: The United Kingdom's justice landscape is set to look very different post-Brexit. This *In-sight* explores what form future UK-EU justice arrangements are likely to take. Focus is specifically on extradition, police cooperation through Europol, and information and data sharing. It considers the implications likely future arrangements will have for the UK, with insights on Northern Ireland.

KEYWORDS: European Union – UK – Northern Ireland – extradition – Europol – data sharing.

I. INTRODUCTION

The UK has been an avid user and key developer of European Union (EU) cooperation on matters of policing and justice.¹ Former Prime Minister Theresa May recognised the value of cooperation to some extent; while acting as Home Secretary, she pushed for the UK to opt-in to 35 instruments.² However, the UK's withdrawal from the EU on 31 January 2020, means that its ability to cooperate on policing and justice measures has changed. The UK is not a member of the Schengen area and is no longer an EU Member State, both prerequisites for using many of the cooperation instruments.³

As of May 2020, no dramatic changes have occurred yet. The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019 (Withdrawal Agreement) outlines measures in which the UK can continue to participate until the transition period ends

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¹ European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, *The EU-UK Relationship beyond Brexit: Options for Police Cooperation and Judicial Cooperation in Criminal Matters*, 2018, p. 19, www.europarl.europa.eu.

² V. MITSILEGAS, *European criminal law after Brexit*, in *Criminal Law Forum*, 2017, p. 225; T. DURRANT, L. LLOYD, M. THIMONT JACK, *Negotiating Brexit: policing and criminal justice*, in *Institute for Government*, 2018, www.instituteforgovernment.org.uk.

³ The UK was never a Schengen member but some cooperation is available for non-EU Schengen States.



on 31 December 2020 (or until any agreed extension of the transition period ends).⁴ This includes, for example, the European Arrest Warrant (EAW), the European Criminal Records Information System (ECRIS), Joint Investigation Teams (JITs), and Europol and its Secure Information Exchange Network Application (SIENA). This transition period provides time to negotiate the future UK-EU relationship. At present, it is difficult to know exactly what this will look like. However, an analysis of political leaders' and negotiators' language, combined with knowledge of UK use of cooperation tools and understanding of pre-existing cooperation agreements between the EU and third countries, and interviews undertaken by the authors with policing and justice experts, makes estimations possible.

This piece explores the possible future policing and justice arrangements between the UK and the EU. As identified elsewhere,⁵ a number of interacting factors (including the shared land border with the Republic of Ireland, the level of cross-border cooperation, and the ongoing peace process) have led to predictions that Northern Ireland (NI) will face additional post-Brexit challenges. This piece highlights some of these, while focusing on the general potential consequences for the UK. The following sections outline the EU and UK negotiating positions before exploring the possibilities for cooperation on extradition, Europol, and information sharing.

II. NEGOTIATING POSITIONS

It is clear from the text of the Withdrawal Agreement, and the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom (Political Declaration),⁶ that maintaining policing and justice cooperation is a priority for both the EU and UK. On 25 February 2020, the Council of the EU adopted the Decision Authorising the Opening of the Negotiations with the United Kingdom of Great Britain and Northern Ireland for a New Partnership Agreement (the Decision).⁷ The Decision prioritises, amongst other things, the agreement of future security measures (which includes law enforcement and judicial cooperation).⁸ The Annex to the Council Decision identifies the geographic proximity of the UK; evolving threats; and shared principles, values and interests, as factors that will be taken into consideration for the "security" negoti-

⁴ Agreement of 24 January 2020 on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

⁵ For example, see K. HAYWARD, *The EU's influence on the peace process and Agreement in NI in light of Brexit*, in *Ethnopolitics*, 2018, p. 3 *et seq.*; and BrexitLawNI, *BrexitLawNI Policy Report: Brexit and the Peace Process*, 2018, brexitlawni.org.

⁶ Political Declaration of 19 October 2019 setting out the framework for the future relationship between the European Union and the United Kingdom.

⁷ Council Decision 2020/266 of 25 February 2020 authorising the opening of the negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement.

⁸ *Ibid.*

ations.⁹ It also includes important issues that will influence the future arrangements. Part 3, para. 2, contains two clues about what the EU is willing to agree to:

“The security partnership should provide for close law enforcement and judicial cooperation in relation to the prevention, investigation, detection and prosecution of criminal offences, *taking into account the UK's future status as a non-Schengen third country that does not provide for the free movement of persons*. The security partnership should ensure reciprocity, preserve the autonomy of the Union's decision making and the integrity of its legal order and *take account of the fact that a third country cannot enjoy the same rights and benefits as a Member State*”.¹⁰

Another requirement of the future agreement is the UK's continued commitment to respect human rights. This is outlined in the Annex to the Decision: “the envisaged partnership should provide for *automatic termination* of law enforcement cooperation and judicial cooperation in criminal matters *if the UK were to denounce the ECHR*. It should also provide for automatic suspension if the United Kingdom were to abrogate domestic law giving effect to the ECHR” (emphasis added).¹¹

On 29 January 2018, the European Commission published its internal preparatory discussions on the framework for the future relationship: “Police and judicial cooperation in criminal matters”.¹² This document also describes the factors that determine the degree of EU cooperation with third countries: “EU-27 security interest; shared threats and geographic proximity; existence of a common framework of obligations with third countries (e.g. Schengen, free movement); risk of upsetting relations with other countries; respect for fundamental rights, essentially equivalent data protection standards; and strength of enforcement and dispute settlement mechanisms”.¹³ With the Decision closely mirroring the Commission's vision, it is expected that the EU will emphasise these factors in determining future partnership arrangements.

The above excerpts make clear that the EU seeks a close relationship with the UK, but with limits. They emphasise that the UK is unlikely to achieve better access than non-EU Schengen countries, and highlight the requirement of reciprocity. They also stipulate that cooperation will continue to be based upon the principle of mutual trust, meaning the UK will need to demonstrate commitment to core values, such as human rights and data protection.

⁹ Annex to the Council Decision 2020/266 authorising the opening of the negotiations with the United Kingdom, cit., part III, para. 1, p. 115.

¹⁰ *Ibid.*, p. 117 (emphasis added).

¹¹ *Ibid.*, p. 118.

¹² Internal EU27 Preparatory discussions on the framework for the future relationship, *Police and judicial cooperation in criminal matters*, 2018, ec.europa.eu.

¹³ *Ibid.*

The UK published a document outlining its approach to the negotiations in February 2020.¹⁴ This document emphasises that “the safety and security of our citizens is the Government’s top priority”¹⁵ and continuously refers to cooperation being in the best interests of both the UK and EU. It recognises that due to the UK’s position as a non-Schengen third country, access to some of the current policing and justice cooperation mechanisms (such as SIS II) will not be possible. That said, it is clear that the UK aspires to maintain cooperation as close as possible to what it currently enjoys. There are a number of examples, many of which are discussed below, where the UK states that it should enjoy cooperation beyond existing precedents for non-Schengen third countries.

Despite a clear desire to maintain some level of justice cooperation, the UK has been engaging in behaviour that is damaging to its chances of securing the closest possible partnership. For example, the media has reported that UK negotiators will reject EU demands for the UK to remain signed up to the European Convention on Human Rights (ECHR).¹⁶ Such a rejection would damage mutual trust and affect available cooperation options.

III. EXTRADITION

The EAW was adopted in 2002,¹⁷ replacing the 1957 Council of Europe Convention on Extradition.¹⁸ It has greatly improved extradition between Member States; the advantages, discussed below, could be lost with EU exit. Only Member States use the EAW and there is no precedent of third countries participating.

The UK currently has two options: rely on the 1957 Convention or negotiate a separate extradition arrangement with the EU. The latter is the stated intention of both EU and UK negotiators. The Political Declaration states that: “The parties should establish effective arrangements based on streamlined procedures and time limits enabling the United Kingdom and Member States to surrender suspected and convicted persons efficiently and expeditiously, with the possibilities to waive the requirement of double criminality, and to determine the applicability of these arrangements to own nationals and for political offences”.¹⁹

The Annex to the Decision largely reflects this language, adding that the “envisaged partnership should establish effective arrangements based on streamlined procedures

¹⁴ UK Government Policy Paper of 26 February 2020, *The Future Relationship with the EU: The UK’s Approach to Negotiations*, www.gov.uk.

¹⁵ *Ibid.*, part 2, para. 27.

¹⁶ E. MALNICK, *Boris Johnson rejects EU demands to bind UK to European human rights law*, in *The Telegraph*, 29 February 2019, www.telegraph.co.uk.

¹⁷ Council Framework Decision (EC) 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

¹⁸ European Convention on Extradition of 13 December 1957.

¹⁹ Political Declaration, *cit.*, part III (II) B 87.

subject to judicial control and time limits”.²⁰ It also allows for the EU to “declare, on behalf of any of its Member States, that nationals will not be surrendered, as well as to allow for the possibility to ask for additional guarantees in particular cases”.²¹

The document setting out the UK’s negotiating approach states that, “the agreement should provide for fast-track extradition arrangements, based on the EU’s surrender agreement with Norway and Iceland which came into force in 2019, but with appropriate safeguards for individuals beyond those in the European Arrest Warrant”.²² The UK is unlikely to receive a better arrangement than non-EU Schengen countries, like Iceland and Norway, because they have made further commitments to the EU than the UK has been willing to. These agreements, such as the EU-Iceland/Norway Agreement, still fall short of the EAW. There are two significant exceptions. First, under Art. 7, parties can refuse to extradite their own nationals “only under certain specified conditions”.²³ Second, Art. 6 creates a political exception: while states may not refuse to extradite if the offence is political in nature, the parties can decide to place limitations on this for terrorism offences.²⁴

Any UK-EU extradition agreement will likely contain a nationality exception. This was already built into Art. 185 of the Withdrawal Agreement, which also provides for reciprocal refusal by the UK.²⁵ Austria, Germany and Slovenia have been clear that they will not extradite their nationals to the UK during the transition period because their respective constitutions bar them from surrendering people to non-EU countries.²⁶ Thus, the likelihood of similar language in any extradition arrangement is high.

Based upon the EU-Iceland/Norway agreement, insertion of a political exception clause is likely. This excludes people who commit offences of a political nature from being surrendered. Considering the circumstances in NI, this is something that should be resisted. The political exemption clause contained in the 1957 Convention was often used to prevent extradition between the UK and the Republic of Ireland during the conflict.²⁷ Considering the impact of Brexit on the peace process,²⁸ this aspect of the arrangements should not follow the EU-Iceland/Norway model.

²⁰ Annex to the Council Decision 2020/266, cit., part III, para. 2, B 123.

²¹ *Ibid.*

²² UK Government, *UK’s Approach to Negotiations*, cit., Part 2, para. 51.

²³ Agreement of 28 June 2006 between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, Art. 7.

²⁴ *Ibid.*, Art. 6: This refers to offences contained in Arts 1 and 2 of the Council of Europe Convention on the Suppression of Terrorism, or Arts 1 to 4 of the Council Framework Decision on combatting terrorism.

²⁵ Withdrawal Agreement, cit., Art. 185.

²⁶ Declaration by the European Union made in accordance with the third paragraph of Article 185 of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland and the European Union and the European Atomic Energy Community.

²⁷ A. KRAMER, R. DICKSON, A. PUES, *Evolving Justice Arrangements Post-Brexit’ Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission*, 2019, p. 35, www.ihrec.ie

Another issue to consider is the transmission of warrants. Under Art. 12 of the EU-Iceland/Norway agreement, where the location of the requested person is known, the issuing judicial authority transmits the warrant directly to the executing judicial authority. Where the whereabouts are unknown, or if the judicial issuing authority decides, the Second generation Schengen Information System (SIS II) will be used to transmit alerts that act as warrants. As the UK will be outside SIS II following the transition period, it will not be able to use it for transmission. Thus, not only will the UK be missing out on vital information, new avenues for transmission will need to be agreed and developed.²⁹ This presents safety concerns, particularly considering that the UK has a relatively open land border with an EU member state.

Elements of the EU-Iceland/Norway agreement and the negotiating positions taken by the EU may help mitigate against some of the potential problems. First, as outlined in the Political Declaration, it is possible that the extradition agreement could waive the “dual criminality” requirement typically present in extradition law.³⁰ Something similar to the EAW rule in relation to the 32 crimes could be inserted into the agreement, which would help to increase extradition process efficiency.³¹

Second, based upon the language of the Withdrawal Agreement, Annex to the Council Decision, and the UK negotiating document, all parties seem receptive to inserting time limits into the extradition agreement. EAW time limits produced benefits for operational cooperation, victims and witnesses, and procedural justice rights.³² If agreed, the arrangement could be based upon Art. 20 of the EU-Iceland/Norway agreement which imposes strict deadlines on executing authorities.

Third, the Annex to the Council Decision provides for the possibility of subjecting extradition arrangements to judicial control. While the UK negotiating document does not contain any direction on this, subjecting extradition to judicial control should be a priority. Moving extradition from judicial avenues (back) to political ones would be regressive as it reduces procedural consistency. The historical complications in securing extraditions politically in NI could underscore the importance of this issue.³³

The EAW solved many historic politicised extradition issues in NI. If suitable arrangements are not put in place by the end of the transition period, the 300-mile-long land border and the more restrictive grounds under the 1957 Convention could be used to commit crime and evade justice. Former Chief Constable of the PSNI, George Hamilton, stated, “[f]or the PSNI, the EAW is particularly critical in our continued collaboration

²⁸ For example, see BrexitLawNI, *Policy Report*, cit.

²⁹ One such avenue is the use of Interpol Red Notices, see: Extradition (Provisional Arrest) Bill (HL Bill 106).

³⁰ Political Declaration, cit., Part III (II) B 123.

³¹ Agreement between EU, Iceland and Norway Agreement, cit., Art. 3, para. 4.

³² A. KRAMER, R. DICKSON, A. PUES, *Evolving Justice Arrangements*, cit., p. 36.

³³ *Ibid.*

with An Garda Síochána and ensuring that the border cannot be used by criminals to evade prosecution”.³⁴ Generally, failing to successfully negotiate an extradition agreement and relying on the 1957 Convention would be detrimental to the effective functioning of criminal justice across the UK and EU.

IV. EUROPOL

One of the most important EU police cooperation tools is Europol. As an EU Member State, the UK has been an active member and a key developer of Europol.³⁵ However, following the transition period the UK will cease to be a full member. Both the UK and the EU recognise the value of police cooperation, but also agree that the level of cooperation possible has changed. The Political Declaration reflects this: “[t]he Parties recognise the value in facilitating operational cooperation between the United Kingdom’s and Member States’ law enforcement and judicial authorities, and will therefore work together to identify the terms for the United Kingdom’s cooperation via Europol and Eurojust”.³⁶

The negotiating priorities published by the EU and the UK contain similar perspectives on the possibilities for cooperation. The Annex to the Council Decision states that “[t]he envisaged partnership should provide for cooperation between the United Kingdom and Europol and Eurojust in line with arrangements for the cooperation with third countries set out in relevant Union legislation”.³⁷ Similarly, the UK’s approach to negotiations document contends that the future agreement should: “provide for cooperation between the UK and Europol to facilitate multilateral cooperation to tackle serious and organised crime and terrorism. The UK is not seeking membership of Europol. Europol already works closely with a number of non-EU countries, including the US, through dedicated third country arrangements”.³⁸

However, it differs slightly to the EU’s position by arguing that the agreement “could go beyond existing precedents given the scale and nature of cooperation between the UK and Europol. For example, the UK was the highest contributor of data to Europol for strategic thematic and operational analysis in 2018”.³⁹

As identified, Europol membership is reserved for EU Member States. Non-EU Schengen countries are not accorded membership. Under previous arrangements, the closest relationship third countries could maintain was that established through opera-

³⁴ M. BAIN, *Brexit: Northern Ireland security at risk if UK kicked out of EU extradition system, warns police chief*, in *Belfast Telegraph*, 20 June 2018, www.belfasttelegraph.co.uk.

³⁵ European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs, *The EU-UK Relationship beyond Brexit*, cit., p. 30.

³⁶ Political Declaration, cit., part III (II) B 86.

³⁷ Annex to the Council Decision 2020/266, part III 2 B 122.

³⁸ UK Government, *UK’s Approach to Negotiations*, cit., part 2, para. 46.

³⁹ *Ibid.*, para. 47.

tional agreements,⁴⁰ designed to enhance cooperation with Europol, allowing for the exchange of general intelligence, strategic technical information, and personal data. Schengen countries, such as Iceland and Norway, as well as non-Schengen third countries like Canada, the US, and Australia have concluded operational agreements.⁴¹

Denmark, an EU Member State, exercised opt-outs on post-Lisbon Treaty EU JHA legislation, which formally excluded it from Europol.⁴² However, through a bespoke agreement with the Commission concluded in 2017, Denmark was designated a third country and was therefore able to negotiate a cooperation agreement with Europol.⁴³ Unlike agreements concluded with other third countries, Denmark has greater access to information, and some ability to participate in meetings and the Management Board.⁴⁴ Under Art. 10 of the Agreement, Denmark does not have access to Europol databases directly. However, Art. 10, para. 6, facilitates enhanced information exchange, including Danish-speaking staff to process requests.⁴⁵ Further, upon invitation, Art. 8 allows Denmark to participate in “meetings of the Heads of Europol National Units” and attend the Management Board as “an observer without the right to vote”.⁴⁶

The UK’s negotiating document suggests that the Government hopes to conclude an agreement similar to, or more enhanced, than Denmark. Given the EU’s language, and the fact that a current Member State (Denmark) was not accorded the same level of cooperation – such as direct access to databases – it seems unlikely that the UK will achieve superior cooperation. Further, as the UK will be a non-Schengen third country, it is very unlikely that the EU would agree to greater cooperation than it currently has with Schengen countries, like Iceland and Norway.

While all previous cooperation agreements had been negotiated by the Director of Europol, responsibility for negotiations has shifted to the European Commission.⁴⁷ This shift could also mark a change in the negotiating approach, although this will remain to be seen. Considering all of the above factors, under the new cooperation regime, the

⁴⁰ Europol, Partners and Agreements, www.europol.europa.eu.

⁴¹ Europol, Operational Agreements, www.europol.europa.eu.

⁴² Protocol no. 22 on the position of Denmark, Consolidated version of the Treaty on the Functioning of the European Union.

⁴³ European Scrutiny Select Committee, Meeting Conclusions of 19 April 2017. publications.parliament.uk.

⁴⁴ European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs, *The EU-UK Relationship beyond Brexit*, cit. p. 35.

⁴⁵ Europol Agreement with Denmark, Art. 10, para. 6.

⁴⁶ *Ibid.*, Art. 8.

⁴⁷ Europol, How does Europol co-operate with non-EU countries and International Organisations?, www.europol.europa.eu.

most likely outcome for the UK will be a working arrangement that would contain similar provisions to the former standard operational agreements.⁴⁸

A working arrangement between Europol and the UK will not provide an adequate level of cooperation. These agreements stand “in stark contrast to the current situation and would represent a significant reduction in operational cooperation between the EU and the UK”.⁴⁹ Europol is key in keeping Europe safe by preventing, detecting and investigating serious criminal activities – particularly organised crime, cybercrime, terrorism, drug trafficking, money laundering and trafficking in human beings.⁵⁰ The level of information sharing that takes place, for example through the Europol Information System (EIS) and the Secure Exchange Information Network (SIENA), is essential for Europol’s success. With a working arrangement, the UK will no longer have direct access to the database, instead relying on a request-based system of information exchange.⁵¹ Brian Donald, the former Europol Chief of Staff, has confirmed that despite the Government’s proposals to remain part of Europol through a working arrangement, an “adverse impact” should be expected.⁵² He explained that “around 40% of all cases processed by Europol have a UK law enforcement connection”.⁵³ At an operational level these changes mean: “if you’re a third party you have to raise a request and get it responded to, unlike as a member when you have access to the system, then it’s a lot quicker – and that counts in a live investigation”.⁵⁴

One of the key issues for policing is the speed at which information exchange takes place through the EIS. Marie-Claire Maney, Head of Investigations and Prosecutions, Revenue Commissioners, has argued that “Europol has proven very efficient and quick in circulating information to EU countries” and removing the UK’s access to EIS is very likely to undermine the speed at which vital information can be transmitted.⁵⁵ Rob Wainwright, the former Director of Europol, has also alluded to this, stating the “UK derives specific operational value from all the main databases, including the Europol Information System”.⁵⁶

⁴⁸ Regulation 2016/794 of 11 May 2016 of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

⁴⁹ European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs, *The EU-UK Relationship beyond Brexit*, cit., p. 10.

⁵⁰ Regulation 2016/794, cit.

⁵¹ Europol, Operational Agreements, cit.

⁵² L. DEARDEN, *Brexit could worsen UK crime and damage security across Europe, Europol warns*, in *Independent*, 27 October 2017, www.independent.co.uk.

⁵³ A. PICKEN, *Scots Europol boss warns Brexit vote could be a “huge boost for criminals”*, in *The Sunday Post*, 13 June 2016, www.sundaypost.com.

⁵⁴ *Ibid.*

⁵⁵ Association for Criminal Justice Research and Development, 12th Annual Conference, *The Brexit Impact on Criminal Justice Cooperation in Ireland*, 6 October 2017.

⁵⁶ McMahon Legal, *Brexit (An Irish Guide)*, brexitlegal.ie.

In terms of police cooperation on the island of Ireland, the UK's changing status within Europol is unlikely to have serious consequences. While EU law underpins much of the police cooperation between An Garda Síochána (AGS) and the Police Service of Northern Ireland (PSNI) – and they were increasingly using EU tools for cooperation – the two police forces have a long history of cooperation. What appears increasingly likely is that as UK access to EU policing cooperation tools is removed/restricted, AGS and PSNI will return to informal methods of cooperation.⁵⁷ This would put an immediate higher burden on both police forces to share proactively and, due to the loss of the range of data provided in the databases, also likely have longer term effect of hindering the detection of trends and patterns across cases. Some have also raised concerns over what this might mean for human rights protections and oversight of police activities.⁵⁸ Where this change may be more impactful is in relation to criminal activities that involve the UK, Ireland, and a third country. As Jimmy Martin, Assistant Secretary, Department of Justice and Equality in the Republic of Ireland acknowledges, “while traditionally the Gardaí have had very strong bilateral links with UK police forces, Europol is increasingly playing a role in facilitating cross border police operations particularly when there are more than 2 countries involved”.⁵⁹ Therefore, the capacity for this type of cooperation will change.

V. EUROPEAN DATABASES AND ACCESS TO INFORMATION

Continued access to information and opportunities for data sharing cuts across all aspects of (future) policing and justice cooperation between the UK and the EU. Policing has become increasingly intelligence-led, with officers relying on up-to-date and accessible data to carry out their duties effectively. Serious crimes – such as terrorism, organised crime, and cybercrime – do not respect borders, which makes continued access to information held in other EU jurisdictions imperative. In addition to the EIS, the UK participates in the criminal justice element of SIS II (not border management aspects), ECRIS, PNR, and Prüm. These systems facilitate access to criminal records, ongoing investigations, persons and items of interest, travel movements, and DNA profiles.

Under Theresa May, the UK government indicated its commitment to retaining access to EU systems and signalled that they aimed to streamline operations and improve efficiency.⁶⁰ Prüm only became fully operational in the UK in 2019. The fact that the UK was continuing efforts to implement Prüm after it had decided to leave the EU, indicates both UK interest in maintaining access as well as the added value these databases provide. It is

⁵⁷ A. KRAMER, R. DICKSON, A. PUES, *Evolving Justice Arrangements*, cit., p. 50.

⁵⁸ *Ibid.*

⁵⁹ Association for Criminal Justice Research and Development, 12th Annual Conference, *The Brexit Impact*, cit.

⁶⁰ UK Home Office, UK and EU law enforcement boost cooperation on DNA databases, 13 June 2019, www.gov.uk.

evident from the UK's negotiating approach that it highly prioritises retaining access to data.⁶¹ However, concerns have been raised about UK abuse of these systems and the unauthorised downloading and further sharing of data.⁶² While continued access to the UK's data would be in the interest of the EU, and indeed is emphasised in the Annex to the Council Decision,⁶³ EU negotiators expect the UK to adhere to strict data protection requirements and may attach other conditions about onward sharing with third-countries.⁶⁴

Three provisions in the Political Declaration provide clues about what future data sharing will look like: "Recognising that effective and swift data sharing and analysis is vital for modern law enforcement, the Parties agree to put in place arrangements that reflect this, in order to respond to evolving threats, disrupt terrorism and serious criminality, facilitate investigations and prosecutions, and ensure the security of the public".⁶⁵

Criminal justice practitioners indicated that any slowing of operational effectiveness during the transition to new arrangements – or worse, loss of existing capabilities – would affect public security and safety.⁶⁶ A benefit of the current suite of EU cooperation tools is that data is automatically integrated. If integration was lost, the administrative burden of manually inputting data could affect policing on an operational level. Timeliness is essential for effective policing; and is already under pressures due to staffing and budget restrictions.⁶⁷ Recent government commitments to recruit more officers would not expand forces beyond pre-cut levels⁶⁸ which would not be sufficient to meet any increased administrative burden.

The Political Declaration further states: "The Parties should establish reciprocal arrangements for timely, effective and efficient data exchanges of Passenger Name Record (PNR) data and the results of processing such data stored in respective national PNR processing systems, and of DNA, fingerprints and vehicle registration data (Prüm)".⁶⁹

The negotiating priorities of the EU⁷⁰ and UK⁷¹ contain very similar language around future access to these databases. These are the only databases expressly named in the

⁶¹ UK Government, *UK's Approach to Negotiations*, cit., part 2, paras 35-47.

⁶² European Parliament resolution of 12 February 2020 on the proposed mandate for negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland (2020/2557 (RSP)) paras 32-34.

⁶³ Annex to the Council Decision 2020/266, part III 2 A.

⁶⁴ *Ibid*, para 32.

⁶⁵ Political Declaration, cit., part III (II) A 83.

⁶⁶ A. KRAMER, R. DICKSON, A. PUES, *Evolving Justice Arrangements*, cit., p. 69.

⁶⁷ Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (2020) *PEEL Spotlight Report: Diverging Under Pressure* (HMICFR).

⁶⁸ BBC, *Police recruitment: Officials say Boris Johnson's 20,000 target is too low*, in *BBC News*, 8 February 2020, www.bbc.com.

⁶⁹ Political Declaration, cit., part III (II) A 84.

⁷⁰ Annex to the Council Decision 2020/266, part III 2 A, 119 and 120.

⁷¹ UK Government, *UK's Approach to Negotiations*, cit., part 2, paras 37 and 40-42.

Political Declaration because, unlike other databases, these models are open to non-Schengen third countries.⁷² However, the EU has only concluded Prüm agreements with Schengen Associated Countries (Iceland, Norway, Switzerland, and Lichtenstein). PNR Agreements have been concluded with the USA and Australia, so continued exchange between the UK and EU should be possible as long as the UK abides by key data protection safeguards. The EU Court of Justice can hamper the conclusion of agreements. It ruled that data protection was inadequate in the EU-Canada PNR agreement concluded in 2014,⁷³ resulting in new negotiations beginning in 2018.⁷⁴

Finally, the Political Declaration states: “The Parties should consider further arrangements appropriate to the United Kingdom’s future status for data exchange, such as exchange of information on wanted or missing persons and objects or criminal records, with the view to delivering capabilities that, in so far as is technically and legally possible, and considered necessary and in both Parties’ interests, approximate those enabled by relevant Union mechanisms”.⁷⁵

These preferences allude to the cooperation that the UK currently enjoys via SIS II. Unlike Prüm and PNR, there is no precedent for non-Member States to participate. SIS II is technologically advanced and alerts law enforcement agencies to individuals and objects of interest when they cross internal and external EU borders. These alerts are sent directly to on-duty officers via smartphone devices and use GPS data to notify those closest to the person/object. Alerts can relate to people subject to an EAW (as detailed above), otherwise wanted, or under surveillance in another Member State. Stolen cars, property, or passports can also be tracked and flagged to authorities. In 2017, the UK accessed SIS II 539 million times.⁷⁶

Clearly, the UK hopes to replicate the capabilities provided by SIS II. The UK’s approach to the negotiations state that:

“The agreement should provide a mechanism for the UK and EU Member States to share and act on real-time data on persons and objects of interest including wanted persons and missing persons. This capability is currently provided by the Second-Generation Schengen Information System (SIS II), making alerts accessible to officers on the border as well as to front-line police officers in the UK ... The agreement should provide capabilities similar to those delivered by SIS II, recognising the arrangements established between the EU and non-EU Schengen countries (Switzerland, Norway, Iceland and Lichtenstein)”.⁷⁷

⁷² European Commission, Press release of 25 February 2020, *Future EU-UK Partnership: Question and Answers on the negotiating directives*, ec.europa.eu.

⁷³ Court of Justice, opinion 1/15 of 26 July 2017 [GC].

⁷⁴ Negotiations were concluded in 2019, see Legal Observatory procedure file for detail of ongoing process: oeil.secure.europarl.europa.eu.

⁷⁵ Political Declaration, cit., part III (II) A 85.

⁷⁶ EU-Lisa, *SIS II – 2017 statistics*, 2018, www.eulisa.europa.eu, p. 7.

⁷⁷ UK Government, *UK’s Approach to Negotiations*, cit., part 2, paras 43-45.

Contrastingly, the Annex to the Council Decision largely mirrors the Withdrawal Agreement, stating: “[...] the envisaged partnership should provide for alternatives for simplified, efficient and effective exchanges of existing information and intelligence between the United Kingdom and Member States law enforcement authorities, in so far as is technically and legally possible, and considered necessary and in the Union’s interest. This would include information on wanted and missing persons and objects”.⁷⁸

The EU elaborates on this, firmly stating that SIS II is not available to non-Schengen third countries as it is linked with freedom of movement and was designed to contribute to security within the EU.⁷⁹ The need for alternative data sharing methods to be developed with simplified avenues for achieving this is reiterated. The possibility for real-time data sharing is not mentioned, nor is the development of a new database.

SIS II is not just a high-level policing tool; it is used by personnel “on the beat” conducting their day-to-day activities. Interviewees indicated SIS II allows cooperation to begin early in the investigation process which benefits the speed and effectiveness of operations. EAWs are also automatically updated, reducing lag time. It is difficult to predict what kind of agreement will be concluded for sharing such data. At present, the most likely scenario appears to be some kind of reciprocal arrangement on a case-by-case basis. Not having access to real-time data sharing through SIS II will detrimentally affect officers’ abilities to conduct intelligence-led policing, as well as efficiency and effectiveness of day-to-day operations.

In relation to ECRIS, the EU negotiating directives state: “The envisaged partnership should put in place arrangements on exchange of information on criminal records appropriate to the United Kingdom’s future status with the view of delivering capabilities that, in so far as technically and legally possible and considered necessary and in the Union’s interest, approximate those enabled by the Union instrument”.⁸⁰

The UK position is similar: “[...] the agreement should provide for capabilities similar to those provided by the European Criminal Records Information System (ECRIS). ECRIS is a secure, automated, electronic system providing for the exchange of criminal records information held on countries’ own national databases within specific deadlines”.⁸¹

Like SIS II, one of the benefits of access to ECRIS relates to time. ECRIS reduces the time to access criminal record data from 60 days to 10 days.⁸² Clearly information sharing on criminal records is a priority for both the EU and UK, but it is difficult to predict what this will look like as no non-EU countries have access. It is possible that case-by-case data sharing will be agreed.

⁷⁸ Annex to the Council Decision 2020/266, cit., part III 2 A, 121.

⁷⁹ European Commission, Press release of 25 February 2020, *Future EU-UK Partnership*, cit.

⁸⁰ Annex to the Council Decision 2020/266, part III 2 B, 125.

⁸¹ UK Government, *UK’s Approach to Negotiations*, cit., part 2, para. 36.

⁸² A. KRAMER, R. DICKSON, A. PUES, *Evolving Justice Arrangements*, cit., p. 65.

Whether the new arrangements between the UK and the EU are able to provide the same levels of efficiency and interoperability appears unlikely – but also variable across different tools. While the EU appears to be willing to provide similar levels of future access for PNR and Prüm, it is much less likely that the UK will have access to SIS II and ECRIS data through the existing databases. Data security is central to the EU, and heightened given the sensitive nature of data held for justice and security reasons. If the UK continues to advocate withdrawal from the ECHR it could see its ability to develop desirable data sharing arrangements undermined.

VI. CONCLUSION

The post-Brexit justice landscape in the UK is set to look significantly different. At a time when the world is progressively more integrated and people are increasingly exploiting national borders to commit crime, the UK's ability to participate in these instruments has never been more important. However, as a non-Schengen third country, the UK will not enjoy the same level of access to EU tools facilitating extradition, policing cooperation, and information sharing. Losing or having altered access to these measures produces consequences in terms of the efficiency and effectiveness of the UK criminal justice system – particularly for policing. Further, due to the unique circumstances of Northern Ireland, present additional and require specific consideration within the negotiations. Despite the government's proposals to maintain the highest levels of justice cooperation possible, as suggested by Brian Donald, "adverse impacts" should be expected.⁸³

⁸³ L. DEARDEN, *Brexit could worsen UK crime*, cit.