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Data Sharing and EU-UK Judicial
and Police Cooperation before
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Introduction

Serious and organised crime, including cyber-crime and terrorism often have a cross-border dimension. International cooperation constitutes a key element of the process of combatting crime at the national level. The principle of mutual recognition underpins the EU architecture for legal assistance and enables Member States to take timely and effective action when tackling illicit activities of different character. Data sharing on criminal justice matters within the EU is an essential component of crime prevention. Over the past two decades, the EU has dedicated a considerable effort in turning information exchange among competent authorities in Member States into a vital asset for the implementation of a coherent multi-layered strategy for tackling the cross-border dimension of criminal activities.

This report focuses on the ways in which the EU-UK judicial and police cooperation has been affected as a result of the UK's decision to leave the EU. It provides an overview of the main EU instruments for data sharing on security-related and criminal justice matters and summarises the main changes in the state of EU-UK judicial and police cooperation following Brexit.

Data sharing on security-related and criminal justice matters in the EU

This section outlines the existing framework for data exchange on security-related and criminal justice matters within the EU. Relevant mechanisms cover two broad areas, namely border control and fight against terrorism and other serious crime. Principal instruments in these areas that are pertinent to the process of information exchange are those concerning the set-up, operation, and maintenance of the existing integrated technical databases. Key regulations in each domain are briefly discussed.

Border control

Council Decision 2004/512/EC establishes a system – Visa Information System (VIS) – for visa data exchange among Member States allowing authorised national authorities to enter and update visa data from third country nationals wishing to enter the Schengen area and to consult these data electronically.¹ VIS is a centralised system comprising a database, an Automated Fingerprint Identification System (AFIS), and communication infrastructure connecting national systems and consulate services in third countries.²

¹ **Council Decision 2004/512/EC** establishing the Visa Information System (VIS), 8 June 2004; **Visa Information System (VIS)**, 2022

² Mirja Gutheil et al. *The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters*, Study commissioned by European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Civil Liberties, Justice, and Home Affairs (LIBE Committee), July 2018. Also see **Key documents and legislation on VIS**, 2022

Regulation (EC) No 1987/2006 establishes a second generation Schengen Information System ('SIS II') to promote the maintenance of public security and public policy and the safeguarding of security in the territories of EU Member States.³ This Regulation lays down the conditions and procedures for the entry and processing in SIS II of alerts in respect of third-country nationals, the exchange of supplementary information and additional data for the purpose of refusing entry into, or a stay in, a Member State. Each Member State is responsible for setting up, operating, and maintaining its own national system (N. SIS II) and connecting this system to a uniform national interface (NI-SIS II) which is part of the Central SIS II.

Regulation (EU) No 603/2013 establishes the European Dactyloscopy (EURODAC) – EU's asylum fingerprint database – which enables authorities in Member States to determine whether individuals applying for asylum have applied for asylum in another Member State or have illegally transited through another Member State.⁴ The EURODAC system supports the implementation of EU Regulation 604/2013 concerning the examination of applications of third-country nationals for international protection in EU Member States.⁵

³ **Regulation (EC) No 1987/2006** of the European Parliament and of the Council on the establishment, operation and use of the second generation Schengen Information System (SIS II), 20 December 2006

⁴ **Regulation (EU) No 603/2013** of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, 26 June 2013; Mirja Gutheil et al. *The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters*, Study commissioned by European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Civil Liberties, Justice, and Home Affairs (LIBE Committee), July 2018

⁵ **Regulation (EU) No 604/2013** of the European Parliament and of the Council establishing

Fight against terrorism and other serious crime

Council Framework Decision 2006/960/JHA establishes the rules under which Member States' law enforcement authorities may exchange existing information and intelligence effectively and expeditiously for the purpose of conducting criminal investigations or criminal intelligence operations.⁶ This Framework Decision does not automatically enable the use of information and intelligence as evidence before a judicial authority, nor does it oblige Member States to provide such data to be used in court. The use of information and intelligence shared under this Framework Decision is subject to the national data protection provisions of the receiving Member State. Competent authorities that are providing the intelligence may, pursuant to their national legislation impose conditions on how the information and intelligence are used.

The Prum Decisions of 2008 provide a core framework for promoting cross-border cooperation among law enforcement authorities in the EU. Council Decision 2008/615/JHA is intended to step up cross-border cooperation on criminal justice matters, particularly as regards the exchange of information between authorities responsible for the prevention and investigation of criminal offences.⁷ The Decision set rules covering the following areas:

- provisions on the conditions and procedure for the automated transfer of DNA profiles, dactyloscopic data and certain national vehicle registration data;

the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, 26 June 2013

⁶ **Council Framework Decision 2006/960/JHA** on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, 18 December 2006

⁷ **Council Decision 2008/615/JHA** on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, 23 June 2008; **Council Decision 2008/616/JHA** on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, 23 June 2008

- provisions on the conditions for the supply of data in connection with major events with a cross-border dimension;
- provisions on the conditions for the supply of information in order to prevent terrorist offences;
- provisions on the conditions and procedure for stepping up cross-border police cooperation through various measures (e.g. joint operations, assistance in connection with mass gatherings disasters and serious accidents).

Under Article 26 of this Decision, the processing of personal data by the receiving Member State is permitted solely for the purposes for which the data have been supplied. Processing for other purposes requires prior authorisation of the Member State administering the file and is subject only to the national law of the receiving Member State.

Council Decision 2008/616/JHA lays down the necessary administrative and technical provisions for the implementation of Decision 2008/615/JHA, in particular as regards the automated exchange of DNA data, dactyloscopic data, and vehicle registration data.⁸ Article 5 of this Decision requires that Member States take all necessary measures to ensure that automated searching or comparison of relevant data is possible 24 hours a day and seven days a week. In the event of technical faults, it requires that Member States agree on temporary alternative information exchange arrangements.

Directive 2016/680 complements the data protection measures defined in the Prüm Decisions. This Directive lays down the rules relating to the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.⁹

⁸ **Council Decision 2008/616/JHA** on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, 23 June 2008

⁹ **Directive (EU) 2016/680** of the European Parliament and of the Council on the protection of

Directive 2016/681 enables the use of passenger name record (PNR) data of passengers on extra-EU flights for the purposes of preventing, detecting, investigating and prosecuting terrorist offences and serious crime.¹⁰ Passenger name record comprises the information corresponding to the travel requirements for making flight reservations and managing these by the booking and participating air carriers for each journey booked. This Directive regulates the transfer of PNR data by air carriers and its processing and exchange by and between Member States. Member States can choose to apply the provisions of this Directive to intra-EU flights, as well.

Directive 2019/884 contains provisions regarding the operation of the European Criminal Records Information System (ECRIS).¹¹ ECRIS databases and communication infrastructure enable the exchange of information on convictions between EU Member States in a uniform, fast, and compatible way providing easy access to the criminal history of suspects and accused, including in which Member States an individual has previously been convicted.¹² As such, ECRIS can be used as a tool for preventing offenders from escaping the consequences of previous convictions in another EU Member State. ECRIS contains detailed records for convicted EU nationals. Relevant data on non-EU nationals whilst available is not easily accessible.

natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, 27 April 2016

¹⁰ **Directive (EU) 2016/681** of the European Parliament and of the Council on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, 27 April 2016

¹¹ **Directive (EU) 2019/884** of the European Parliament and of the Council amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third-country nationals and as regards the European Criminal Records Information System (ECRIS), 17 April 2019

¹² See **European Criminal Records Information System (ECRIS)**, 2022

EU-UK judicial and police cooperation pre- and post-Brexit

This section focuses on the effects of Brexit on the EU-UK judicial and police cooperation. It examines three inter-connected domains:

- The relationship between the UK and relevant EU entities such as Europol and Eurojust;
- The state of the EU mechanisms for mutual legal assistance;
- The state of the EU mechanisms for information exchange concerning security-related and criminal justice matters.

EU specialised bodies for judicial and police cooperation and the UK

Europol provides support to police officers and law enforcement services in the fight against terrorism and other forms of serious crime, including internet-based crime. It serves as a major ‘clearing house’ of personal data and information that Member States deposit with the organisation.¹ The Europol Information System (EIS) is the agency’s central criminal information and intelligence database containing records on serious international crimes, suspected and convicted persons, criminal structures, and offences and the means used to commit them.² The data available on EIS remains under the full control of the inputting entity

¹ CEPS and QMUL Task Force, *Criminal Justice and Police Cooperation between the EU and the UK after Brexit: Towards a principled and trust-based partnership*, Centre for European Policy Studies (CEPS), August 2018

² See **Europol Information System (EIS)**, 2022

(the data owner) who is responsible for verifying that the supplied data are up-to-date, reliable, and accurate, and stored in compliance with the established time limits. The inserted data cannot be altered by Europol or another Member State.

The UK has played a leading role in the development of Europol's activities ranking the second largest contributor to Europol information systems.³ The UK has also made a significant contribution to Europol's Analysis Projects (AP) which focus on specific crime areas and enable specialists to prioritise resources and ensure purpose limitation to provide tailored support to national law enforcement authorities.⁴ The UK's Counter-Terrorism Internet Referral Unit has served as a model for the EU Internet Referral Unit (EU IRU) which supports counter-terrorism efforts by detecting and investigating malicious content on the internet and in social media.⁵ And the UK has actively promoted the need for tackling cyber-crime being among the founding members of Europol's Joint Cybercrime Action Taskforce (J-CAT).⁶

Title V of the Agreement on Law Enforcement and Judicial Cooperation in Criminal Matters contained in the Trade and Cooperation Agreement (TCA) that was concluded between the EU and UK in late 2020 addresses Europol-UK cooperation post-Brexit. Europol has initiated a procedure for operational cooperation with the UK as a third state.⁷ Un-

³ Mirja Gutheil et al. *The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters*, Study commissioned by European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Civil Liberties, Justice, and Home Affairs (LIBE Committee), July 2018

⁴ See **Europol Analysis Projects**, 6 December 2021

⁵ Mirja Gutheil et al. *The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters*, Study commissioned by European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Civil Liberties, Justice, and Home Affairs (LIBE Committee), July 2018; <https://www.europol.europa.eu/about-europol/european-counter-terrorism-centre-ectc/eu-internet-referral-unit-eu-iru>

⁶ See Europol, **Joint Cybercrime Action Taskforce (J-CAT)**, 17 June 2022

⁷ See, Europol, **Conditions applicable to the cooperation with the UK since 1 January 2021**, Press release, 29 April 2021. Also see, **Trade and Cooperation Agreement between the**

der the provisions of the TCA, the UK will designate a national contact point that will act as conduit for information and personal data sharing between Europol and the UK's competent authorities.⁸ The UK will also second one or more liaison officers to the Europol's offices in the Hague. Prior to Brexit, the UK had the largest liaison bureau at the Europol Headquarters.⁹ Europol has the right to second liaison officers to the UK which requires the UK to ensure that these officers enjoy direct access to relevant domestic databases, and that they will act and work appropriately within the constraints of their working and administrative arrangements, while reflecting the UK's new status as not being a Member State.¹⁰ Besides exchange of personal information, additional areas of cooperation between Europol and the UK may include:

- Exchange of specialist knowledge;
- General situation reports;
- Results of strategic analysis;
- Information on criminal investigation procedures;
- Information on crime prevention methods;
- Participation in training activities;

Provision of advice and support in individual criminal investigations and operational cooperation.¹¹

European Union and the United Kingdom, 2020

⁸ House of Lords, European Union Committee, *Beyond Brexit: policing, law enforcement and security*, 7 February 2021

⁹ Mirja Gutheil et al. *The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters*, Study commissioned by European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Civil Liberties, Justice, and Home Affairs (LIBE Committee), July 2018

¹⁰ House of Lords, European Union Committee, *Beyond Brexit: policing, law enforcement and security*, 7 February 2021

¹¹ House of Lords, European Union Committee, *Beyond Brexit: policing, law enforcement and security*, 7 February 2021

It is worth noting that the extent to which third countries can participate in Europol activities is significantly limited when compared to the benefits which full membership of the agency offers. For example, under the terms of the present agreement the UK is no longer involved in the governance of the EU police agency. But there are also practical constraints. A 2018 study published by the Centre for European Policy Studies (CEPS) summarises these as follows: “Law enforcement authorities of third countries with an operational agreement with Europol are allowed to input data but also to make inquiries for information stored in the EIS, yet their access to the agency’s databases is indirect. This means that incoming third countries’ requests to search the EIS are channeled through the liaison officer(s) posted at the agency’s headquarters, and they are then forwarded to the competent Europol Unit. Also, third parties are not granted the same ‘from the field’ access to the EIS currently granted to UK and EU police authorities. Third countries’ participation in Europol’s operational projects is only allowed upon unanimous agreement of all EU Member States that are full members of the agency. Operational partners of Europol cannot act as ‘project leaders’ or ‘co-leaders’ of projects implemented in the priority areas (smuggling, human trafficking, cybercrime, etc.) identified as part of the EU policy cycle.”¹²

Eurojust seeks to promote and facilitate cooperation between investigating and prosecuting authorities within the EU by providing a forum for coordination meetings and specialised expertise on practical and procedural issues concerning joint cross-border activities. Eurojust hosts the Joint Investigation Teams (JITs) Network Secretariat and supports national authorities in setting up and operating JITs.¹³ JITs bring together prosecutors, judges, and law enforcement professionals of two or more countries. Prior to Brexit, the UK was actively involved with JITs activities.¹⁴

¹² CEPS and QMUL Task Force, *Criminal Justice and Police Cooperation between the EU and the UK after Brexit: Towards a principled and trust-based partnership*, Centre for European Policy Studies (CEPS), August 2018

¹³ Eurojust, *Joint Investigation Teams (JITs)*, 2022

¹⁴ Mirja Gutheil et al. *The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters*, Study commissioned by European Parlia-

Under the terms of the TCA, cooperation between Eurojust and the UK to combat serious crimes is still possible. To this end, the UK will have at least one contact point to Eurojust within the UK's competent authority and a Domestic Correspondent for Terrorism Matters designate, as well as a seconded Liaison Prosecutor to Eurojust in The Hague.¹⁵ In contrast to Europol, Eurojust grants to third countries access to services that are similar to those offered to full members. When third countries post their authorities at Eurojust, they can benefit from the support of the agency almost as if they were EU Member States.¹⁶ This includes, for example, participation in JITs and, upon invitation, attendance and participation in operational and strategic meetings.¹⁷ However, under cooperation agreements with third countries there is no provision for access to the Eurojust Case Management System or management board meetings. Third countries are not members of the European Judicial Network (EJN).¹⁸

Mechanisms for mutual legal assistance

Box 1 provides information about key EU legal assistance instruments that continued to apply before the entry into force of the TCA between the EU and UK (before 1 January 2021).¹⁹

ment's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Civil Liberties, Justice, and Home Affairs (LIBE Committee), July 2018

¹⁵ House of Lords, European Union Committee, *Beyond Brexit: policing, law enforcement and security*, 7 February 2021

¹⁶ CEPS and QMUL Task Force, *Criminal Justice and Police Cooperation between the EU and the UK after Brexit: Towards a principled and trust-based partnership*, Centre for European Policy Studies (CEPS), August 2018

¹⁷ Mirja Gutheil et al. *The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters*, Study commissioned by European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Civil Liberties, Justice, and Home Affairs (LIBE Committee), July 2018

¹⁸ See **European Judicial Network**, 2022

¹⁹ Eurojust, **Judicial cooperation in criminal matters between the European Union and the United Kingdom from 1 January 2021**, 1 February 2021

Box 1: Key EU legal assistance instruments

- The Convention established by the Council on Mutual Legal Assistance in Criminal Matters between the Member States of the EU in 2000 seeks to supplement the provisions and facilitate the application of the European Convention on Mutual Assistance in Criminal Matters of 1959 and its Additional Protocol of 1978.²⁰ The 1959 Convention adopted by the Council of Europe requires Contracting Parties to afford to each other the widest measure of mutual assistance in proceedings in respect of criminal offences as regards evidence gathering, hearing of witnesses, experts, and prosecuted persons, etc.²¹ The Additional Protocol complements the provisions of the Convention and withdraws the possibility to refuse assistance solely on the ground that the request concerns an offence which the requested Party considers a fiscal offence.²² It extends international co-operation to the service of documents concerning the enforcement of a sentence and similar measures and adds provisions relating to the exchange of information on judicial records.
 - Council Framework Decision 2002/584/JHA establishes the European arrest warrant (EAW) and the surrender procedures between Member States for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.²³ Between 2004 and 2015, the UK extradited over 8,000 individuals accused or convicted of a criminal offence to other Member States which is in stark contrast to the less than 60 individuals extradited each year by the UK to any country before the entry into force of the EAW.²⁴
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²⁰ **Council Act** establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, 29 May 2000

²¹ Council of Europe, **European Convention on Mutual Assistance in Criminal Matters**, 1959

²² Council of Europe, **Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters**, 1978

²³ **Council Framework Decision 2002/584/JHA** on the European arrest warrant and the surrender procedures between Member States, 13 June 2002

²⁴ Mirja Gutheil et al. *The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters*, Study commissioned by European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Civil Liberties, Justice, and Home Affairs (LIBE Committee), July 2018

- Council Framework Decision 2003/577/JHA establishes the rules under which a Member State shall recognise and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings.²⁵ Since the entry into force of the Framework Decision 2006/783/JHA until November 2016, the UK enforced 69 requests for other EU Member States resulting in the freezing of GBP170 million.²⁶
- Council Framework Decision 2008/675/JHA determines the conditions under which, in the course of criminal proceedings in a Member State against a person, previous convictions handed down against the same person for different facts in other Member States, are taken into account.²⁷ Such information may be obtained under applicable instruments of mutual legal assistance or extracted through the existing mechanisms for exchange of criminal records.
- Council Framework Decision 2008/909/JHA establishes rules for mutual recognition of judgements and enforcement of custodial sentences.²⁸ From 2010 to 2011, the UK returned 1,019 individuals back to EU Member States to serve the remainder of their custodial sentence; from 2015 to 2017 this number more than tripled to 3,451.²⁹
- Council Framework Decision 2009/829/JHA lays down rules for mutual recognition of decisions on supervision measures as an alternative to provisional detention.³⁰ This includes procedures for monitoring the supervision measures imposed on a natural person and the surrender of the person concerned in case of breach of these measures.

²⁵ **Council Framework Decision 2003/577/JHA** on the execution in the European Union of orders freezing property or evidence, 22 July 2003

²⁶ Mirja Gutheil et al. *The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters*, Study commissioned by European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Civil Liberties, Justice, and Home Affairs (LIBE Committee), July 2018

²⁷ **Council Framework Decision 2008/675/JHA** on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, 24 July 2008

²⁸ **Council Framework Decision 2008/909/JHA** on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, 27 November 2008

²⁹ Mirja Gutheil et al. *The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters*, Study commissioned by European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Civil Liberties, Justice, and Home Affairs (LIBE Committee), July 2018

³⁰ **Council Framework Decision 2009/829/JHA** on the application, between Member States of

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- Directive 2011/99/EU sets out the rules for issuing a European protection order to enable extending the application of already adopted protection measures in the territory of another Member State.³¹
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- Directive 2014/41/EU sets out the rules for issuing a European Investigation Order (EIO).³² EIO is a relatively new instrument (in force since 2017) which covers any investigative measure with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team.
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Even before the entry into force of the TCA, the UK decided to opt out of certain legal instruments which means that the application of these instruments ceased before 1 January 2021. Among these instruments was Council Framework Decision 2008/947/JHA that lays down rules for mutual recognition of probation decisions and supervision of probation measures and alternative sanctions,³³ as well as several directives concerning criminal procedural rights, including those guaranteeing the right of access to a lawyer and the right of access to legal aid.³⁴ Directives concerning criminal procedural rights which the UK opt into and continued to apply during the so called transition period (during which the TCA was being negotiated) include Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings; Directive

the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, 23 October 2009

³¹ **Directive 2011/99/EU** of the European Parliament and of the Council on the European protection order, 13 December 2011

³² **Directive 2014/41/EU** of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, 3 April 2014

³³ **Council Framework Decision 2008/947/JHA** on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, 27 November 2008

³⁴ **Directive 2013/48/EU** of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, 22 October 2013; **Directive (EU) 2016/1919** of the European Parliament and of the Council on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, 26 October 2016

2012/13/EU on the right to information in criminal proceedings; and Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.³⁵

Since 1 January 2021, EU legal instruments, including those concerning mutual legal assistance no longer apply in the UK.³⁶ Under the terms of the TCA, surrender procedures (replacing the EAW) and procedures for freezing and confiscation are regulated as self-standing areas. By contrast, mutual legal assistance is not self-standing area, as it is regulated by both the Conventions of the Council of Europe and the TCA provisions.

The surrender agreement in the TCA largely replicates the EAW, insofar as it respects the condition of double criminality unless the offence for which an EAW was issued is not featured on the list of 32 offences contained in 2002/584/JHA.³⁷ However, the TCA introduces the principle of proportionality which enables judges to consider a range of factors when considering a surrender warrant including relevant human rights obligations under their national law, whether something is an offence under national legislation, or whether the request for surrender is politically motivated.³⁸ Under the TCA, extradition is refused on three grounds:

³⁵ **Directive 2010/64/EU** of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, 20 October 2010; **Directive 2012/13/EU** of the European Parliament and of the Council on the right to information in criminal proceedings, 22 May 2012; **Directive 2012/29/EU** of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, 25 October 2012

³⁶ EU instruments concerning pending requests for legal between EU Member States and the UK received before 1 January 2021 remained applicable. This included the EAW as long as it was received before 1 January 2021 and if the requested person was arrested before that date for the execution of the EAW. See Eurojust, **Judicial cooperation in criminal matters between the European Union and the United Kingdom from 1 January 2021**, 1 February 2021

³⁷ Eurojust, **Judicial cooperation in criminal matters between the European Union and the United Kingdom from 1 January 2021**, 1 February 2021

³⁸ House of Lords, European Union Committee, **Beyond Brexit: policing, law enforcement and security**, 7 February 2021

1. if the offence on which the arrest warrant is based is covered by an amnesty in the executing state, where that state had jurisdiction to prosecute the offence under its own criminal law;
2. if the executing judicial authority is informed that the requested person has been finally judged by a state in respect of the same acts, provided that, if a penalty has been imposed, it has been enforced, is in the process of being enforced or can no longer be enforced under the law of the sentencing state; or
3. if the person who is the subject of the arrest warrant may not, owing to the person's age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing state (Article LAW.SURR.80).³⁹

Additional grounds for non-execution of the arrest warrant include but are not limited to the following: (1) if the alleged offence does not exist in the executing state; (2) if surrender is sought for a political offence; or (3) if the requested person is a national of a state that has invoked fundamental constitutional principles barring the extradition of its own-nationals (Article LAW.SURR.81).⁴⁰ As concerns criminal procedural rights, the TCA include additional provisions for the right to legal assistance, to be informed of the contents of the warrant for their surrender (including, where necessary through a written translation), and to an interpreter.⁴¹ The authority that executes the arrest warrant decides whether the requested person should remain in detention and can order their provisional release at any time in accordance with the domestic law of the executing state provided that adequate measures are taken to prevent the person from absconding (Article LAW.SURR.90).⁴²

³⁹ **Trade and Cooperation Agreement between the European Union and the United Kingdom, 2020**

⁴⁰ **Trade and Cooperation Agreement between the European Union and the United Kingdom, 2020**

⁴¹ House of Lords, European Union Committee, *Beyond Brexit: policing, law enforcement and security*, 7 February 2021

⁴² **Trade and Cooperation Agreement between the European Union and the United King-**

The provisions of the TCA regarding mutual legal assistance supplement the application of the European Convention on Mutual Assistance in Criminal Matters and its Additional Protocols. The Second Protocol which entered into force in 2004 takes into account the changing nature of cross-border crime in the light of political and social developments in Europe and technological developments throughout the world and broadens the range of situations in which mutual assistance may be requested.⁴³ The new regime is inspired by Directive 2014/41/EU that introduces the EIO but unlike this Directive, it is not based on the principle of mutual recognition.⁴⁴ Under the principle of mutual recognition, the executing state is essentially obliged to recognise and ensure execution of the request of the other country.⁴⁵ Instead of treating the decisions of a requesting state as if they were domestic decisions, subject to certain exceptions, under the new regime there is only an obligation to assist other states.⁴⁶ The latter obligation is limited to what is expressly set out in the TCA; in all other circumstances, the limitations to international cooperation imposed by domestic law will apply. Requests for mutual assistance thus need to meet the following conditions: (1) that the request is necessary and proportionate for the purposes of the proceedings, taking into account the rights of the suspect or accused; and (2) that the investigative measure(s) indicated in the request could have been ordered under the same conditions in a similar domestic case (Article LAW. MUTAS.116).⁴⁷ The TCA envisages the possibility of recourse to a different investigative measure than the one indicated in the

dom, 2020

⁴³ Council of Europe, **Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters**, 2001

⁴⁴ Eurojust, **Judicial cooperation in criminal matters between the European Union and the United Kingdom from 1 January 2021**, 1 February 2021

⁴⁵ Eurojust, **European Investigation Order**, 2022

⁴⁶ Gary Pons, **Freezing and confiscation under the EU-UK Trade and Cooperation Agreement**, 8 March 2021

⁴⁷ **Trade and Cooperation Agreement between the European Union and the United Kingdom**, 2020

request for mutual assistance if the latter does not exist under the law of the requested state, or would not be available in a similar domestic case (Article LAW.MUTAS.117).⁴⁸ The requested state decides whether to execute the request for mutual assistance no later than 45 days after the receipt of the request (by contrast, the time limit under the EIO Directive is 30 days).

The arrangements concerning freezing and confiscation aim to provide the widest extent possible of cooperation within the framework of proceedings in criminal matters comprising of (1) investigative assistance, (2) provisional measures, and (3) confiscation.⁴⁹ These arrangements are not based on the principle of mutual recognition but follow a similar logic as the new regime on mutual legal assistance. Relevant requests need to respect the principles of necessity and proportionality (Article LAW.CONFISC.1 (5)).⁵⁰

Mechanisms for the exchange of information

Box 2 provides information about the participation of the UK in the existing mechanisms for data sharing on security-related and criminal justice matters before the TCA was concluded.

⁴⁸ **Trade and Cooperation Agreement between the European Union and the United Kingdom, 2020**

⁴⁹ Eurojust, **Judicial cooperation in criminal matters between the European Union and the United Kingdom from 1 January 2021**, 1 February 2021

⁵⁰ **Trade and Cooperation Agreement between the European Union and the United Kingdom, 2020**

Box 2: UK participation in the EU mechanisms for data sharing

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- The UK opted in to the Prum Decision and has been investing in its IT systems to allow EU Member States to search the UK's DNA, fingerprint, and vehicle registration databases.
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- The application of the PNR Directive started in 2018. The UK was the first EU country to have a fully functioning Passenger Information Unit and played an active role in the development of this capability at an EU level. The UK was among the EU Member States that notified the European Commission of the application of the PNR Directive in intra-EU flights.
-
- Since its introduction, the ECRIS system has become a key information exchange mechanism. The UK was the fourth largest user of the system and made a significant contribution to the effectiveness of ECRIS. For example, in 2016, the UK sent and received 173,251 requests and notifications through the EU, a significant number of which were submitted through ECRIS, and notified Member States of 35,509 convictions of their nationals in the UK, enabling national law enforcement agencies to ensure that the offending history of their nationals is correct.
-
- The UK connected into SIS II in 2015 but only participated in the law enforcement aspects. In this capacity, the UK was among the most frequent system users.
-
- Since the UK did not participate in the Schengen acquis, the country was denied access to the VIS system. It was still possible for national authorities and Europol to request access to the data kept on VIS in specific cases. In 2015, VIS was introduced in the UK for applicants for Schengen visas from participating Member States.
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- The UK was an active user of the EURODAC system and a major contributor of data sets to the system.
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Source: Mirja Gutheil et al. **The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters**, Study commissioned by European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Civil Liberties, Justice, and Home Affairs (LIBE Committee), July 2018.

The TCA contains provisions concerning reciprocal cooperation between the competent law enforcement authorities of the United Kingdom, on the one side, and the Member States, on the other side, on the automated transfer of DNA profiles, dactyloscopic data and certain

domestic vehicle registration data (Article LAW.PRUM.5).⁵¹ The new regime essentially ensures that the UK is able to preserve its access to the Prum system.⁵² However, the TCA does not specify to what extent the UK is obliged to follow any subsequent EU legislative amendments concerning Prüm data, i.e. in the event that the Prum regime evolves further, the UK will have a choice whether or not to align its standards with the new requirements.

The TCA contains lays down rules under which passenger name record (PNR) data may be transferred to, processed and used by the United Kingdom competent authority for flights between the EU and the United Kingdom (Article LAW.PNR.18).⁵³ Such data need to be processed strictly for the purposes of preventing, detecting, investigating or prosecuting terrorism or serious crime. The following requirements apply:

- the safeguards applicable to the handling of PNR data are applied on an equal basis and without unlawful discrimination;
- the processing of special categories of personal data is prohibited;
- the UK must implement regulatory, procedural or technical measures to protect PNR data against accidental, unlawful or unauthorised access, processing or loss;
- the UK shall ensure compliance verification and the protection, security, confidentiality, and integrity of PNR data through, for example, encryption, limited access by officials, and retention in secure physical environments;

⁵¹ **Trade and Cooperation Agreement between the European Union and the United Kingdom, 2020**

⁵² House of Lords, European Union Committee, *Beyond Brexit: policing, law enforcement and security*, 7 February 2021

⁵³ **Trade and Cooperation Agreement between the European Union and the United Kingdom, 2020**

the UK shall ensure that any breach of data security is subject to effective and dissuasive corrective measures which may include sanctions.⁵⁴

Under the terms of the TCA, the UK may derogate from the obligation to delete all PNR data after individuals leave the UK provided that there is objective evidence from which it may be inferred that certain passengers present the existence of a risk in terms of the fight against terrorism and serious crime (Article LAW.PNR.28 (4)).⁵⁵ To this end, the new regime envisages a process for supervising the UK's derogation.⁵⁶

Under the terms TCA, the UK no longer has access to the ECRIS system but under the new regime, criminal records data will be shared with the EU on a very similar basis to that which applied when the UK had access to the system.⁵⁷ Exchange of relevant information will take place electronically and within time frames that are comparable to those of pre-Brexit arrangements. The UK and EU Member States also need to take measures to inform one another of all criminal convictions in respect to their nationals at least once per month (Article LAW.EXINF.122 (2)).⁵⁸ By contrast, under the TCA the UK has lost access to SIS II and EURODAC.⁵⁹

⁵⁴ House of Lords, European Union Committee, *Beyond Brexit: policing, law enforcement and security*, 7 February 2021

⁵⁵ *Trade and Cooperation Agreement between the European Union and the United Kingdom*, 2020

⁵⁶ House of Lords, European Union Committee, *Beyond Brexit: policing, law enforcement and security*, 7 February 2021

⁵⁷ House of Lords, European Union Committee, *Beyond Brexit: policing, law enforcement and security*, 7 February 2021

⁵⁸ *Trade and Cooperation Agreement between the European Union and the United Kingdom*, 2020

⁵⁹ House of Lords, European Union Committee, *Beyond Brexit: policing, law enforcement and security*, 7 February 2021

Conclusion

When considering the impact of Brexit on EU-UK judicial and police cooperation, there are at least three aspects that merit specific attention.

First, fight against crime continues to be a high-priority area both in the EU and UK. Illicit cross-border activities, such as organised crime, terrorism, money laundering, human trafficking, and internet-based crime pose security challenges to EU Member States and the UK alike and expose their common vulnerabilities. Identifying options for close cooperation in addressing these challenges and countering their pernicious manifestations is fundamental to the process of strengthening security and law enforcement within Europe.¹

Second, the new regime for judicial and police cooperation established by the provisions of the TCA has redefined some of the key principles that underpin judicial and police cooperation within the EU. Some might view this new system as a viable alternative that might be less constraining and less bureaucratically burdensome; however, making the new arrangements work effectively would inevitably incur significant costs, as many of the avenues for efficient cooperation, including those for data sharing have permanently been restructured and in some cases even removed.

Third, the tangible effects of Brexit in the area of judicial and police cooperation are yet to be evaluated. Making these arrangements work will require a deep commitment to a common ethos that cherishes rule

¹ James Black et al. *Defence and security after Brexit: Understanding the possible implications of the UK's decision to leave the EU – Compendium report*, RAND Corporation, 2017

of law, respect for human rights, and democratic values. The functioning of the new regime for judicial and police cooperation could be seen as a test as much as it could be considered an opportunity for further developing and improving the existing EU frameworks for crime prevention. In turn, it is possible to approach this regime as a common testing ground and a peer-learning experience that would enable both sides to identify and tackle potential weaknesses and gaps and devise mutually beneficial solutions for countering common security challenges.

PRE-RIGHTS



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