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Experts

**Crime, justice &
security co-operation
with the EU after
Brexit**

Crime, justice & security co-operation with the EU after Brexit

Introduction

Since the 1990s there has been a noticeable increase in cross-border crime, terrorism and people trafficking. Whilst definitions vary, law enforcement agencies across the world have identified substantial increases in international crime following the end of the Cold War, the global increase in trade and the development of new technology which facilitates criminal activity. There has also been a marked increase in terrorist attacks since the September 11 2001 attacks in the United States.¹

The EU has developed increasingly sophisticated policy measures in response to the change in the threat level, very often at the urging of the UK. The UK's departure from the European Union (EU) means extensive changes in the arrangements for co-operation in the fields of crime, justice and security between the UK and the EU (an EU policy field often referred to within the UK as justice and home affairs (JHA) but known as the Security Union inside the EU).²

The implications for law enforcement in the UK of these changes are important. In particular, the UK lost direct access to a number of important EU databases, lost the right to extradite through the fast-track European Extradition Warrant and can no longer rely on EU civil law co-operation in areas such as contract and family law. Some, but by no means all, of these gaps can be partly filled through alternative international co-operation instruments as well as through the provisions in the UK-EU Trade & Co-operation Agreement (TCA).³

This paper explains the changes to how crime and justice co-operation with the EU operates today and assesses how it compares to the pre-Brexit position. It is complementary to an earlier Senior European Experts paper, *Brexit: The Implications for Justice & Home Affairs*, published in 2017, which has more background on the history of JHA policy.⁴

¹ Europol, the European Police Office, an agency of the EU, publishes an annual serious and organised crime threat assessment. See the most recent edition: Europol, *EU SOCTA – Serious and Organised Crime Threat Assessment: A Corrupting Influence: The Infiltration and Undermining of Europe's Economy and Society by Organised Crime*, 12 April 2021

² Title V of Part Three of the Treaty on the Functioning of the European Union: Area of Freedom, Security and Justice

³ Article numbers in this paper come from *Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part*, 2021 OJ L 149/10

⁴ An additional complication arises out of the separate legal jurisdictions of Scotland and Northern Ireland but this paper does not cover them in detail.

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1. UK-EU crime & justice co-operation: scale and impact

The end of the Cold War, the advent of globalisation and the development of the internet all have had the unintentional consequence of facilitating the growth in cross border crime, including drug smuggling, people trafficking, terrorism and cybercrime. The first global assessment was made by the United Nations in 2010 and since its creation, the European Police Office (Europol), the EU's police co-operation agency, has published regular threat assessments.⁵

The growth in cross border crime has significantly affected the UK and British police forces have made increasing use of EU co-operation mechanisms in response; this can be seen across a range of EU policies.

In terms of extradition, the number of people wanted from the UK who were actually surrendered to another EU Member State via the European Arrest Warrant (EAW) rose from 24 in 2004 to 1,390 in 2016/17 before falling back to 689 in 2019/20. The numbers wanted by the UK and surrendered rose from 19 in 2004 to 231 in 2019/20.⁶ Following changes made some years ago, these suspects were likely to have been accused of serious criminal offences. There are two important improvements with the EAW from the previously used 1957 Council of Europe convention. The first is the requirement for surrender within 30 days if the wanted person is found in your country; it took about a year before the EAW. The second is the limitations in the EAW on the right to refuse extradition.

The European Criminal Records Information System (ECRIS) enables police forces in EU Member States to request any criminal records information on a suspect held by other member countries. The increase in the use of ECRIS by British police can be seen in the six-fold increase in the exchange of messages between UK forces and their EU opposite numbers between May 2012 (35,734 messages) and March 2017 (239,843 messages).⁷

⁵ UN Office on Drugs and Crime, *The Globalisation of Crime: A Transnational Organized Crime Threat Assessment*, 17 June 2010

⁶ Statistics on extradition are published by the National Crime Agency: see 'European Arrest Warrants', 7 March 2021

⁷ ACRO Criminal Records Office, 'ACRO celebrates five years of ECRIS', 2017

During EU membership, the EU's extensive Schengen Information System II (SIS II) database was linked to the UK's police national computer. UK forces used SIS II no less than 603 million times in 2019.⁸ The great value of SIS II was the ability to do searches of the database in real time. The British police were also regular users of the database to post alerts to forces in other EU countries – there were 2.9 million UK alerts on SIS II by 2019.

The most recently developed database used by British police is the so-called Prüm database of crime scene and DNA records. During a Parliamentary committee hearing in 2020, Deputy Assistant Commissioner Richard Martin of the Metropolitan Police told members that:

going through Interpol to try to get crime scene matches, DNA and all that kind of thing used to take about four months; it now takes 15 minutes, if that.

By the time the UK left, it had access to “over 80% of all crime scenes and DNA samples across the EU” through Prüm, allowing it to match crime scene data with overseas suspects. In addition, the UK had uploaded data on about four million UK convicted persons.⁹

UK police forces also made use of the SIENA messaging system (part of Europol), which enabled police in the UK to message forces in other parts of Europe and share information.

2. General framework for co-operation

In the light of the extensive use the UK made of EU crime and justice policies, it was an important UK negotiating objective to achieve a continuing high level of co-operation after Brexit.

Article 522 of the TCA lays down general objectives for co-operation in the fields of crime and justice. These provisions exclude national security and require the UK to remain subject to the European Convention on Human Rights (ECHR); if the UK left the ECHR, crime and justice co-operation would cease (Art. 524). There are special provisions on data protection (Art. 525) reflecting the sensitivity of this subject in many EU Member States; data protection is a theme that runs through all the crime and justice provisions of the TCA. Finally, in this section, the TCA establishes the Special Committee on Law Enforcement and Judicial Co-operation as the forum for the parties to discuss these issues.

A medium-term issue is the question of changes in the relevant EU law. If EU law in this field is amended “substantially” (Art. 541), then the EU can propose amendments to this part of the TCA. If the parties fail to reach agreement on those amendments in nine months, then the EU can suspend this part of the TCA for up to nine months or extend the suspension for nine months beyond the initial suspension. This could be important in the future as the UK has lost the influence it had as a Member State over the shaping of EU policy and in this specific field, lost its right to opt out or opt in to EU crime and justice measures that it had held since the 1997 Amsterdam Treaty.

⁸ See evidence of Deputy Assistant Commissioner Richard Martin, of the National Police Chiefs' Council, cited in House of Lords European Union Committee, *25th Report of Session 2019–21: Beyond Brexit: Policing, law enforcement and security*, HL Paper 205, 26 March 2021, p. 22, para 60

⁹ Deputy Assistant Commissioner Richard Martin giving evidence to the House of Lords Select Committee on the European Union, Home Affairs Sub-Committee and Justice Sub-Committee, ‘Corrected oral evidence: Criminal Justice Cooperation after Brexit’, 3 March 2020, Q8

3. Police & security co-operation

There are many provisions in the TCA covering police and security co-operation but these provisions are on the basis that the UK is now a third country, *i.e.* it is no longer an EU Member State with right to participate in EU law and justice policies or to make use of its agencies and facilities. Although the co-operation provided for in the TCA is greater than that with other third countries, the UK has lost its real time access to EU databases in several cases, which will impact on operational effectiveness.

Broadly speaking, for UK forces to now access an EU database, they must go through a national point of contact with either Europol (or other EU agency) or that of the relevant EU Member State to request the information (Art. 535).

But in the case of the Prüm data, the TCA allows for automatic exchange of DNA, fingerprint and vehicle registration data (Art. 527). The TCA makes detailed provision for the mechanisms for all these kinds of data, and forensic material, to be exchanged through the national points of contact. The continuance of the Prüm exchanges will depend on an EU evaluation of the UK systems involved but Ministers have expressed the view that as UK forces were already following EU requirements at Brexit, this should not be a problem.¹⁰ Senior police officers have welcomed the arrangements for continuing Prüm data exchanges.

Passenger Name Record (PNR) data is routinely exchanged between countries to facilitate cross border civil aviation. This has long been a sensitive area for the EU with the initial EU/US agreement on PNR being struck down by the European Court of Justice after objections from the European Parliament. The TCA makes specific provision for PNR data exchanges between the UK and EU (Art. 542). As a third country, the UK must delete such data after the individual concerned has left the country. A derogation will allow it to temporarily retain such data as the UK does not have the technical capability to comply with EU rules as yet.¹¹

British experts in border control have welcomed the PNR arrangements but as one put it, the test will be whether PNR data continues to arrive “before the plane lands”, so that it can be acted upon.¹² There is also the question of the future alignment between the EU and the UK on PNR policy; if the EU makes changes the UK would need to respond.

In relation to the important SIS II database, the UK has lost all access as it is only available to EU Member States or countries that have joined the Schengen passport free area. SIS II was created to enable law enforcement to manage free movement. It enables authorised national personnel to:

- enter and consult alerts on third country nationals (*e.g.* at borders);
- enter and consult alerts on wanted persons or objects related to criminal offences;
- check vehicle registration information in real time.¹³

¹⁰ Home Office Minister, Kevin Foster MP cited in House of Lords European Union Committee, *supra* n. 8, p. 15, para 35

¹¹ This complex issue is explained in House of Lords European Union Committee, *supra* n. 8, pp. 18-19, paras 44-47

¹² Sir Julian King, former EU Commissioner, speaking to the House of Lords European Union Committee: see *supra* n. 8, p. 20, para 50

¹³ For more information, see European Commission, ‘Schengen Information System’, 15 May 2021

A senior police officer told Parliament that no longer being able to access SIS would be: “a significant loss of capability in terms of access to data, which is automated and integrated within our systems”.¹⁴

To manage without SIS II, the UK needs two things to happen. First, that EU Member States (and the other European countries that are in the Schengen area, namely Iceland, Norway, Liechtenstein and Switzerland) post alerts on the Interpol I-24/7 system at the same time as they put them on SIS II. This creates a requirement for double-keying by European police forces, something UK law enforcement has been trying to persuade them to do through its liaison officers.¹⁵ Second, officers at the UK National Crime Agency must put the new Interpol notices on to the Police National Computers in a matter of hours so that officers on the frontline can access the information. The NCA are switching to a robot-based system to enable automation of this process.¹⁶ They are also discussing with Interpol how to change to a real-time system for alerts in future.¹⁷

Even if these arrangements are effective, as the police have pointed out the absence of an alert posted by an EU country on the I-24/7 system means that UK officers may fail to detain someone who they are suspicious about, meaning a criminal or terrorist evades justice.¹⁸ In addition, in terms of border security, the information coming via I-24/7 must be transferred to the Border Force Warnings Index, the system used at ports and airports to alert officers to wanted and suspicious persons. SIS II data was previously transferred to the Warnings Index automatically but data from Interpol has to be added manually.

In the future, the EU is creating a new pre-border clearance scheme (European Travel Information & Authorisation System, ETIAS) which will be linked to SIS II. As things stand, the UK will have no access to the data collected through this system.

4. Europol

As a member of the EU, the UK was a strong supporter of and contributor to the European Police Office (Europol). As a third country the UK cannot be a member of Europol or be represented on its management board but the TCA does enable it to continue to co-operate and share information with it. These co-operation arrangements enable the UK to participate in (but not initiate) joint investigative teams (JITs). These joint teams are one of the key ways in which Europol works, enabling law enforcement from several countries to co-operate in tackling cross border crime in a specific case. The UK was participating in over 40 JITs, for example, in September 2017.

The UK and Europol will work together through liaison officers appointed to each other. The TCA does permit data transfers between UK agencies and Europol, although the scope is more restricted than before Brexit. Nonetheless, police in the UK are pleased with the level of co-operation they have had with Europol so far since Brexit.¹⁹

¹⁴ Assistant Chief Constable Peter Ayling, National Police Chiefs' Council, giving evidence to the House of Lords Select Committee on the European Union, Security and Justice Sub-Committee, 'Corrected oral evidence: Post-Brexit UK-EU security co-operation', 26 January 2020, Q7

¹⁵ *Ibid.*, Q27

¹⁶ Written evidence of the National Crime Agency submitted to the EU Security and Justice Sub-Committee: 'Written Evidence PBS0001 - Post-Brexit UK-EU Security Cooperation', 10 March 2021

¹⁷ *Supra* n. 14, Q24

¹⁸ See House of Lords Select Committee on the European Union, Home Affairs Sub-Committee and Justice Sub-Committee, 'Corrected oral evidence: Criminal Justice Cooperation after Brexit', 3 March 2020

¹⁹ See House of Lords European Union Committee, *supra* n. 8, p. 33, para 111

5. Eurojust

Future UK and EU co-operation in the field of criminal justice prosecutions will operate in a similar way to Europol, that is, through appointed liaison officers (Art. 580). As with Europol, the focus is on co-operation in tackling serious crime and terrorism. The UK will appoint a Liaison prosecutor on secondment to Eurojust, there are national points of contact and Eurojust has the power to appoint a Liaison Magistrate to work with the UK (Art. 586). The TCA enables the exchange of both personal and non-personal data (Arts. 588-592).²⁰

6. Extradition

The European Extradition Warrant arrangements have been replaced by new ones in the TCA (Art. 596). The new process will apply where the offence exists also in state from which a person is being sought, save for certain listed offences (599).²¹ The principle of proportionality applies (597), to deter extradition for trivial offences. Unlike the EAW, countries have the right to refuse extradition for their own citizens (Art. 603); so far 10 EU Member States have notified the UK that they intend to exercise this right.²² It is also possible for countries to refuse extradition for “political offences” (601(h)) but unlike the 1957 Convention, this cannot be applied in the case of terrorist offences.

Although less extensive than the EAW, the extradition provisions in the TCA in many ways duplicate the EAW system and are similar to those adopted by the EU in respect of Norway and Iceland. They are certainly more effective than the provisions of the 1957 Convention.

7. Other provisions

TCA contains provisions for other forms of mutual assistance (Art. 633) in crime and justice. There are measures to ensure co-operation on the financing of terrorism. In addition, co-operation on cyber security will continue with the UK able to work with the EU’s Cyber Security Agency.

8. Dispute settlement

The parts of the TCA concerned with crime and justice have their own dispute settlement provisions (Art. 695 *et seq.*). In principle, the aim is to settle disputes by mutual consent, beginning with consultations and then reference to the Specialised Committee on Law Enforcement and Judicial Co-operation and/or to the Partnership Council. These bodies can resolve the matter by agreement. If they are unable to do so, the parties can suspend use of part of the relevant parts of the TCA with three months’ notice. This could lead the other party to withdrawing all co-operation under this part of the TCA; parties can end their suspension with prior notice.

The crime and justice part of the TCA may be terminated “at any moment” (Art. 692) by either party giving nine months’ notice of their intention. The crime and justice provisions would

²⁰ The details of the arrangements are set out in Eurojust, *Judicial cooperation in criminal matters between the European Union and the United Kingdom from 1 January 2021*, 1 February 2021

²¹ Time limits of 10 days for making a decision on an extradition request where the person sought consents and 60 days when they do not; the latter deadline can be extended by a further 30 days (Art. 615).

²² They are: Croatia, Finland, France, Germany, Greece, Latvia, Poland, Slovakia, Slovenia and Sweden. In addition, Austria and the Czech Republic will only extradite their own nationals if the wanted person consents.

also lapse if the UK left the European Convention on Human Rights. The European Court of Justice remains the ultimate arbiter on all EU law, including crime and justice legislation and related treaty provisions, as far as it affects EU Member States and EU institutions.

9. Civil justice co-operation

Three EU regulations (known as the Brussels Regulations) cover important aspects of commercial and family law, including parental responsibility and maintenance. The value of these regulations lies in the ability to resolve disputes involving cross border businesses or families and to ensure that judicial decisions are enforced.

The UK Government had assured Parliament that it would seek a negotiated solution to the problems caused by the UK withdrawing from the EU in terms of civil and family law; only in February 2020 did the Government state that it had decided not to seek such an agreement with the EU. The UK has instead joined, or applied to join, relevant international conventions in order to fill the gap, where possible, including the 2005 Hague Choice of Court Convention. In terms of commercial law, English law contract clauses will continue to be recognised by EU courts.

The UK has applied to join the Lugano Convention, which dates from 1988 and provides for jurisdiction by civil courts and the enforcement and recognition of judgments across its member countries (at the time all members of the EC or EFTA). This convention would cover civil and commercial law and some aspects of family law, including maintenance. Although the UK applied to join Lugano in April 2020, the European Commission has opposed this on the grounds that it is a “flanking measure” of the Single Market.²³ A collective decision by the EU Member States is awaited.

10. Assessment

The crime and justice co-operation part of the TCA has been described as “thin gruel compared with what went before” by a senior figure in the Law Society.²⁴ But the co-operation is certainly better than a no deal outcome would have been. The result of the negotiations is a mixed picture with the UK maintaining good levels of co-operation in some areas (e.g. Europol) but losing important capabilities (e.g. SIS II) in others and impaired co-operation over extradition. The positive elements include:

- continuing co-operation in the main fields of cross-border crime and terrorism;
- a better and more comprehensive extradition framework than the 1957 Convention, avoiding a return to the “Costa del crime” of the 1980s;
- better than expected co-operation in several fields, including Prüm data, PNR and criminal records;
- a comprehensive package of measures covering not only police work but criminal justice, mutual assistance and cybercrime.

²³ European Commission, *Communication from the Commission to the European Parliament and the Council: Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention*, COM (2021) 222 final, 4 May 2021, p. 4

²⁴ Tim O’Sullivan, ‘The UK-EU Trade and Cooperation Agreement: Law enforcement and judicial cooperation in criminal matters’, *The Law Society*, 29 December 2020

The negative aspects include:

- loss of the real-time element of previous co-operation which was invaluable in an era when criminals have so much access to technology to outsmart law enforcement; this is particularly true of SIS II, the I-24/7 Interpol database is only a partial substitute and dependent on the goodwill and efficiency of EU police forces to keep it updated;
- loss of UK leadership in a policy field vital to the UK national interest; co-operation continues but the UK will no longer be able to influence EU policy as effectively;
- complexity, with many treaty articles to be considered; it will require exceptional careful following of procedure; this will make it expensive to operate and that may diminish how frequently it is utilised;
- it is vulnerable to legal challenge; the limits of the TCA provisions are likely to be tested, at least in its early years;
- risk of on-going potential change as every time the EU updates its crime and justice law the relevant parts of the TCA may have to be amended, adding further complexity and uncertainty;
- the five year overall review clause included in the treaty could be problematic.²⁵

The question of data exchange hangs over the whole of this part of the TCA. It is not simply a question of the EU's initial decision about whether the UK's national laws on data protection and data security were adequate. To maintain crime and justice co-operation the UK will have to ensure that its data standards match those of the EU on an on-going basis; the data adequacy decision of the Commission only lasts for four years.²⁶ The sensitivity of this area is demonstrated by the fact that the European Data Protection Supervisor has already issued an opinion in February 2021 questioning the legality of the new arrangements concerning exchange of PNR data with the UK.²⁷ The European Parliament has long taken a tougher line on data privacy than the Commission and the Council and in a recent resolution indicated that it might challenge the Commission if it recognised (as it has now done) the UK's data protection system as adequate.²⁸ Under Article 693 any finding of "serious and systemic deficiencies" in UK data handling would endanger all crime and justice co-operation with the EU.

As regards civil and commercial law co-operation, the absence of any provision for it in the TCA represents a significant blow to many families and businesses, both in the UK and the EU, as it will make common but personally important disputes more difficult to resolve. The alternatives available do not cover all the same ground and it remains uncertain that the UK will be able to accede to the Lugano Convention. As one leading law firm has put it, the UK has chosen a "hard Brexit" on civil law co-operation.²⁹

²⁵ A review of the TCA will automatically occur after five years and then every five years thereafter (Art. 776); Article 691 refers to each party agreeing the terms of this review in respect of the crime and justice parts of the TCA.

²⁶ The Commission adopted two decisions on adequacy of UK data protection law on 28 June 2021, one of these related to crime and justice: see European Commission, 'Data protection: Commission adopts adequacy decisions for the UK', IP/21/3183, 28 June 2021

²⁷ The opinion is non-binding. See European Data Protection Supervisor, *Opinion 3/2021: EDPS Opinion on the conclusion of the EU and UK trade agreement and the EU and UK exchange of classified information agreement*, 22 February 2021

²⁸ See 'European Parliament resolution of 21 May 2021 on the adequate protection of personal data by the United Kingdom', 2021/2594(RSP)

²⁹ Xavier Taton et al., "Hard Brexit" for judicial cooperation in civil and commercial matters - what does it mean for governing law and dispute resolution clauses in international commercial contracts?, Linklaters, 5 January 2021

Future co-operation

Are there opportunities for strengthening future co-operation? Could the UK expand the current agreement to cover more areas or to deepen existing co-operation? Technically the answer to both questions must be “yes”. In the field of crime and justice, the UK Government has shown a desire to maintain existing co-operation and as the needs of police and other agencies evolve, both in the UK and the EU, co-operation could be further developed and perhaps expanded. A lot will depend on the extent of operational co-operation at working level and whether that builds trust.

In civil and family law, however, a change of mind would be needed to enable an agreement to be negotiated and the EU Member States would have to decide to reject the Commission's position on the UK's accession to the Lugano Convention. EU Member States would also need to be united in wanting to fill the void before there could be any significant amendment to the TCA.


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Senior European Experts

The Senior European Experts Group is an independent body consisting of former high-ranking British diplomats and civil servants, including several former UK ambassadors to the EU, and former officials of the institutions of the EU.

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