

Negotiating Brexit: policing and criminal justice



About this report

A crucial, but under-discussed, aspect of the future relationship between the UK and the European Union (EU) is the extent to which the two sides will work together on policing and criminal justice after Brexit.

The UK has proposed an arrangement in which it would maintain much of its current special status, while the EU is only prepared to offer the UK a deal similar to those it has with other non-member countries.

This report looks at how the two sides can move closer to a mutually agreeable deal.

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Summary

The Government has set out its proposal for the post-Brexit relationship between the UK and the European Union (EU). While debate has focused on the trading arrangements, the Government also wants a close relationship with the EU in the area of policing and criminal justice. This report considers how such a relationship could be achieved.

Co-operation on policing and criminal justice has been an important benefit of the UK's membership of the EU

As the EU has become more integrated, and globalisation has changed the nature of crime, it has become more important for law enforcement authorities to work with their counterparts in other countries. The EU has developed a range of agencies, databases and common processes to make this easier. Police forces and prosecutors across the UK use these tools to gather information on crimes and suspects and to bring people to justice.

The UK already has a bespoke deal on policing and criminal justice

In 2009, as part of the Lisbon Treaty, the UK negotiated the ability to 'opt in' to those EU law enforcement measures which it judged to be in its national interest, and to refuse to take part in others. Theresa May, in her previous role as Home Secretary, decided not to participate in around 100 measures but kept the UK involved in 35.

Failure to agree any future co-operation would have consequences

Without a withdrawal agreement by March 2019, or an agreement on the future relationship by December 2020, the UK will fall back on the patchwork of cumbersome arrangements that predated EU co-operation. This would mean:

- **Extraditing dangerous criminals from the UK would be slower and more bureaucratic.** Currently the UK extradites more than 1,000 people a year to the rest of the EU, using the European Arrest Warrant (EAW). Reverting to the previous, politicised, system of extradition would reduce that number.
- **New barriers would reduce the number of people brought back to the UK to face justice.** Every year, around 100 people are extradited from the rest of the EU to the UK. Without a deal, it will be harder for the UK to bring people who are suspected of committing crimes here, and who have fled to the EU, back to face trial.
- **Law enforcement agencies would find it harder to get crucial information** for investigations, as UK authorities will lose access to huge EU-wide databases. These include the second-generation Schengen Information System (SIS II), which stores information on missing and wanted individuals and objects.

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- **It would be more difficult for UK investigators and prosecutors to collaborate with EU partners**, without initiatives like Europol that provide analytical and financial support to cross-border investigations.

The EU's current negotiating position could lead to reduced co-operation

Both the UK and the EU have said that they want law enforcement co-operation to continue in some form after Brexit. But at the moment, the gap between their respective negotiating positions is significant. The UK is trying to get as near as possible to maintaining existing arrangements when it is outside the EU. The EU, on the other hand, is only offering slightly more than the access available to current third countries (that is, those not in the EU). A deal based on precedent would be better than no deal at all, but it would still be damaging. The countries with the closest security co-operation with the EU, including Norway and Switzerland, do not have access to all EU databases, cannot participate fully in the operations of Europol, the EU's police agency, and have more complicated extradition arrangements with the EU.

If the EU wants continued deep co-operation, it will have to be more flexible

The UK's proposal of a robust, enforceable security agreement should allay many of the EU's concerns: such an agreement would place the UK in a relationship akin to that which the EU shares with its non-EU Schengen neighbours, including Norway and Switzerland, with clear obligations for the UK.

This would require the EU being prepared to recognise that the UK will be unique in its future relationship with the bloc. It has generally been unwilling to do this so far, in part to protect its privileged relationships with non-EU countries who are in the Schengen Area. But given the UK's significant contribution to EU-wide law enforcement measures, as well as the ongoing economic and personal links between the UK and the other member states, the EU should consider offering the UK more than it has offered other non-members.

But the UK will also have to move further

The UK has begun to recognise that it will not be able to maintain its current special status: it has already accepted that even with an extradition arrangement, it will not be able to request some member states to extradite their own citizens – something it can do as an EU member. It will probably have to concede more of its special status, a decision which will face domestic opposition because of existing criticisms of some of these measures.

To get the best possible deal, the UK will need to reassure the EU that it takes the protection of personal data seriously. Furthermore, it should consider areas where it can offer improved co-operation compared with now, to help build goodwill. It will also have to think about how its domestic systems need to change to prepare for any future relationship – particularly where more resources are likely to be needed.

Reaching a deal will be difficult – but the alternative is worse

Making these concessions will be politically difficult for both the UK and the EU. But as many of the people we interviewed for this research told us, a serious reduction in co-operation would only benefit criminals, an outcome that both sides will want to avoid.

1 Introduction

The Government's July 2018 Brexit white paper¹ set out two main areas in which it hoped to negotiate a comprehensive future relationship with the EU: trade and security. Much of the Brexit debate has focused on the first of these.² But the nature of the future security relationship also has enormous significance, determining the extent to which the UK and the EU can continue to co-operate to tackle evolving threats and keep their citizens safe.

As with the future economic partnership, though, negotiations in this area will be complex, with a mutually beneficial outcome far from guaranteed. The Government has divided the future UK–EU security relationship into three parts:

- internal security, which relates to criminal justice and policing co-operation, known as justice and home affairs (JHA) in EU jargon
- external security, covering foreign, defence and international development policy
- wider co-operation, which includes issues such as asylum and illegal migration.³

All three are, of course, hugely important and strongly interconnected. But the first is the most developed at EU level, with the most comprehensive legal framework, which also governs how the EU works with neighbouring non-members. Failure to find a satisfactory way for police and criminal judicial co-operation to continue after Brexit would leave a substantial capability gap, both in the UK and the EU27, making it easier for criminals to operate, and threatening the security of citizens.

Our focus in this report is on this first part of the security relationship.

In Chapter 2, we outline the history of EU law enforcement co-operation, describing its development over time and the reasons for it. We explain the UK's unique position in this context. We then look at some of the most important measures that facilitate co-operation between policing and prosecuting authorities across the EU. We compare them with the more restricted alternatives available to non-EU third countries.

In Chapter 3, we consider the UK's and the EU's respective approaches to the negotiations so far, and the scope for reaching an agreement that maximises co-operation in the future while satisfying other concerns expressed by both parties.

Finally, given that the two sides are currently a long way apart, we suggest moves that the UK and the EU could make to progress the negotiations.

This report draws on interviews with various academics, government officials, legal professionals and others working in policing and criminal justice. All of the content is the responsibility of the authors and any errors are, of course, ours alone.

2 EU co-operation on law enforcement

EU co-operation on law enforcement has developed alongside economic integration. Co-operation between the then European Economic Community (EEC) member states on policing and criminal justice began in the 1970s, two decades after the 1957 Treaty of Rome, which established the four freedoms of movement: of people, goods, capital and services.

In the decades since, the region has become increasingly integrated. The Schengen Area, established in 1995, has abolished internal border checks on people between 22 EU member states and the countries of the European Free Trade Association (EFTA): Iceland, Liechtenstein, Norway and Switzerland. The UK and Ireland negotiated an opt-out of the Schengen Area and a number of the newer EU member states have yet to join.¹ This integration has been economically beneficial but has made cross-border criminal activity harder to prevent and criminals harder to track. This has necessitated increased co-operation between member states on tackling crime.

The 1993 Maastricht Treaty, also known as the Treaty on European Union, marked the first formal acknowledgement of this. It established the 'three-pillar' structure of the new EU:

- European communities, addressing core economic – and related – issues
- common foreign and security policy
- justice and home affairs (JHA).

This third pillar was renamed the 'area of freedom, security and justice' (AFSJ) with the signing of the Amsterdam Treaty in 1999. A special European Council meeting in Tampere, Finland, in the same year established the principle of 'mutual recognition' as the basis for EU-wide co-operation on law enforcement.² Under this principle, a decision made, or process carried out, by the policing or prosecuting authorities of one member state is respected throughout the EU.

That spurred the development of more effective mechanisms for co-operation, which are still in use today. Two EU agencies facilitating police (Europol) and judicial (Eurojust) co-operation were established in 1998 and 2002 respectively. The European Arrest Warrant (EAW), intended to facilitate extradition between EU countries, was introduced in 2004. But member states remained reluctant to share competence on internal security with the European institutions. Co-operation therefore continued on an inter-governmental basis, meaning there was no role for the European Commission and each member state had a veto over new legislation.³

EU member states now work very closely together in a manner not replicated anywhere else in the world

The nature of EU co-operation on law enforcement changed with the Lisbon Treaty, which entered into force in December 2009. This removed the three-pillar structure introduced in Maastricht, and made policing and criminal justice co-operation a shared EU competence, with both the European Parliament and the European Council, generally on a Qualified Majority Voting basis, taking an equal role in the development of new legislation, which is overseen by the European Court of Justice (ECJ).⁴ Co-operation between member states has deepened since then, with new measures being introduced and old mechanisms being updated regularly in recent years. These are often referred to as a 'toolkit' of different mechanisms that combine to provide greater security across the EU.

As noted, much of this co-operation is based on mutual recognition between EU member states' policing and judicial systems. This principle is underpinned by a common commitment to protecting fundamental rights and respecting the jurisdiction of the ECJ. This means that processes such as extradition, which can be highly politicised when negotiated between individual countries, become instead the subject of technical co-operation. Processes are streamlined and the scope for co-operation is broadened as a result.

Michel Barnier, the EU's Chief Brexit Negotiator, has said that the EU's "co-operation [on tackling crime] is both unique and unprecedented".⁵ While some countries may

work closely together, no other region in the world has such close multilateral co-operation in these areas, particularly not with such a formal legal underpinning. And member states continue to develop this to respond to the changing nature of crime, including evolving terrorist and cyber threats. However, deepening co-operation has presented its own set of challenges.


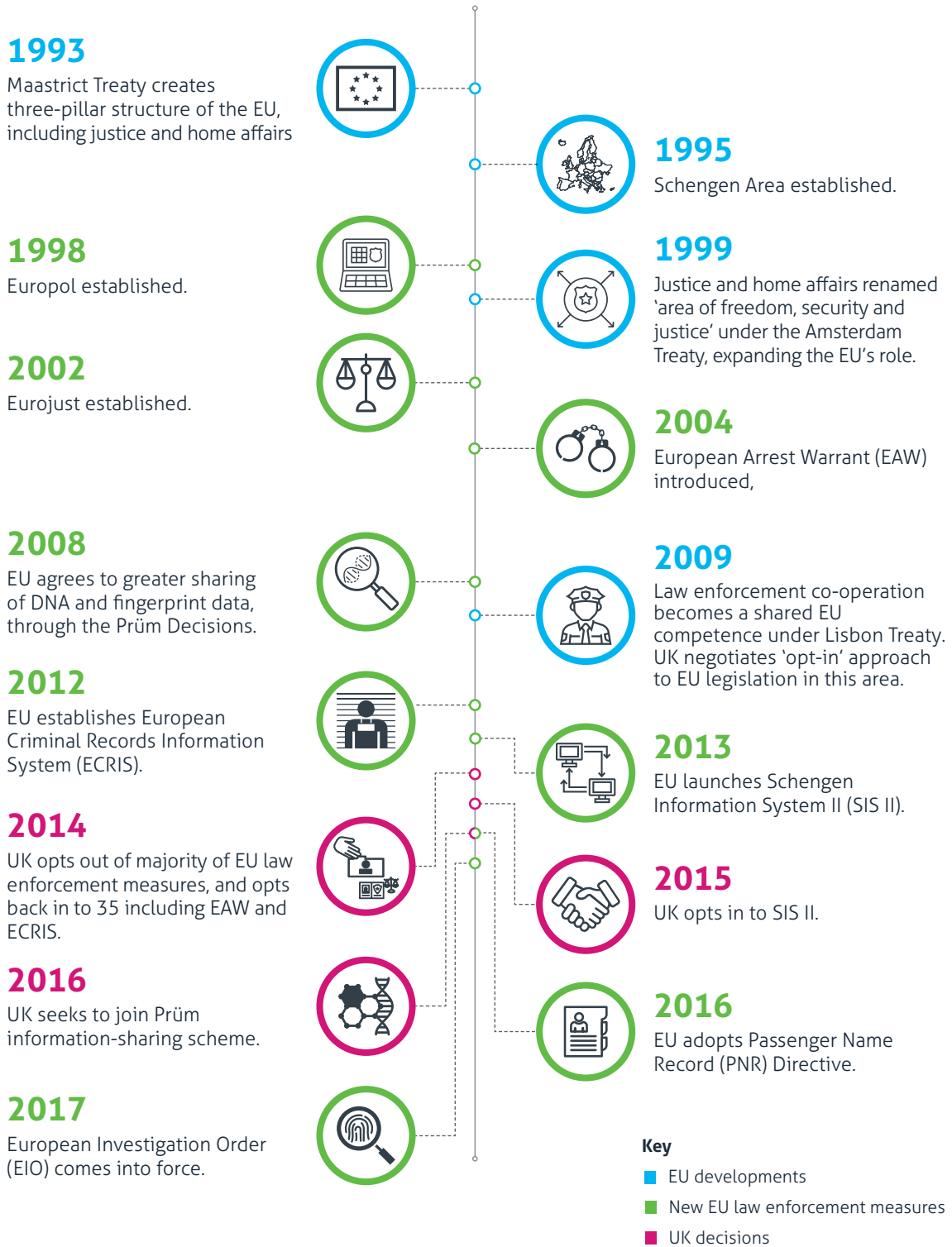
 **no other region in the world has such close multilateral co-operation in these areas**



Figure 1: The development of EU policing and criminal justice co-operation



Source: Institute for Government analysis.

EU co-operation is not without its critics

As this co-operation has developed, questions have been raised about whether the EU is taking the right approach. Many in the UK criticise the idea that the legal systems of certain member states are equal to that of the UK's, pointing out that not all member states are as compliant with human rights laws as the UK.⁶ Fair Trials, an organisation that campaigns around the world for the right to a fair trial and due legal process, has also raised concerns about some of the EU's law enforcement mechanisms. It claims that the EAW, one of the flagship measures in the EU's law enforcement toolkit, can be

used “inappropriately”, with authorities across the EU using it for “small offenses or to investigate people”, which can end up “ruining their lives and those of their family members”.⁷

Authorities in some member states have also raised concerns about their counterparts elsewhere in the EU. For example, the Irish High Court recently sought guidance from the ECJ as to whether it was acceptable to extradite someone to Poland given the changes the Polish Government has made to the judiciary.⁸ In another high-profile example, a regional court in Germany recently approved the extradition of the former Catalan President, Carles Puigdemont, to Spain. However, it declared that he could only face trial for the misuse of public funds, not for ‘rebellion’, which is a crime in Spain but not in Germany.⁹ These cases show the difficulty of treating different legal and political contexts as mutually recognisable.

The UK has a unique relationship with the EU on law enforcement

The UK has always had an exceptional arrangement on policing and criminal justice within the EU, in part because of the concerns noted above. When the EU member states were negotiating the Lisbon Treaty in the 2000s, the UK, along with Ireland, agreed a special arrangement, which allowed it to choose which aspects of EU-wide law enforcement co-operation it wanted to participate in.* Denmark also negotiated a special arrangement, where the default is that it will not participate in new EU law enforcement measures.¹⁰

As Home Secretary, Theresa May opted out of all of the 133 previous EU measures in this area. She argued that “some of the pre-Lisbon measures are useful, that some are less so and that some are now, in fact, entirely defunct”.¹¹ After much internal debate, the UK then opted back in to 35 of the most significant and well-used measures, on the grounds that doing so was in the national interest.¹² It also agreed special arrangements within some of those measures, notably a ‘proportionality’ test on extradition, which allows the UK to refuse requests for minor crimes.¹³ Since then, it has continued to opt in to selected EU policing and justice tools as the *acquis* – the body of EU law – has developed, taking the total number of measures it participates in to around 40.**

The most important of these are considered in Table 1, which also compares them to current third country arrangements and the existing alternatives that the UK would default to if it could not reach an agreement with the EU on the future of this co-operation. The rest of this chapter then assesses how the UK and the EU benefit from these measures and what losing them would mean in practice.

* For a more in-depth discussion of the history of EU policy in this area, see House of Lords European Union Committee, *Brexit: The proposed UK–EU security treaty*, Authority of the House of Lords, 2018, <https://publications.parliament.uk/pa/ld201719/ldselect/lddeucom/164/164.pdf>

** The Government publishes an annual report detailing the measures it has opted in to over the previous 12 months. The latest is: Home Office and Ministry of Justice, *Eighth Annual Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) in Relation to EU Justice and Home Affairs (JHA) Matters (1 December 2016 – 30 November 2017)*, Cm 9580, The Stationery Office, 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684374/eighth-annual-report-to-parliament-eu-justice-home-affairs-matters.pdf

Table 1: Key EU measures for policing and criminal justice co-operation, compared with third country arrangements and no-deal defaults

Area	EU measure	Third country models	Defaults in the case of a no deal
Extradition	<p>The European Arrest Warrant (EAW) allows member states to extradite criminals and accused individuals from other EU countries quickly and easily.</p> <p>It imposes fixed time limits and does not require political approval. On average, an extradition takes 48 days.</p>	<p>Iceland and Norway have partial extradition agreements (not yet in force) with the EU – but member states can refuse to extradite their own citizens.</p> <p>The United States (US) has an agreement with the EU, and individual member states, but extradition still requires political approval, making it much slower.</p>	<p>The 1957 European Convention on Extradition would be the alternative.</p> <p>The Convention does not impose time limits on extradition processes and requests are made through diplomatic channels. The average extradition under the Convention takes a year.</p>
Agencies	<p>The EU agency Europol supports co-operation between EU police forces.</p> <p>Europol membership allows direct access to the Europol Information System (EIS) – a database of people and objects involved in criminal cases, drawing on information from national police forces.</p>	<p>Canada, the US and others station officers in Europol’s headquarters. These officers can join investigations, but cannot instigate operational meetings, sit on the board or have direct access to the EIS.</p> <p>Denmark is not a full member of Europol and Danish police do not have direct access to the EIS. They rely on three officers in Europol’s headquarters.</p>	<p>Interpol facilitates co-operation between police forces globally. However, its analytical capacity is much less developed than Europol’s.</p> <p>UK authorities have concerns about the human rights and policing standards of some Interpol members, meaning they are less willing to share information via Interpol than via Europol.</p>
	<p>The EU agency Eurojust enables co-operation between member states’ investigating and prosecuting authorities.</p> <p>Members can check domestic cases on the Eurojust Case Management System (CMS) to establish whether other countries also have an interest in a case.</p>	<p>Montenegro, Norway, Switzerland and the US have co-operation agreements with Eurojust. They can attend and participate in operational and strategic meetings if invited. However, they do not have access to the CMS and do not sit on the board.</p>	<p>Bilateral arrangements are the only existing international alternative. Posting liaison prosecutors across the EU would be costly and difficult for the UK.</p> <p>But bilateral links do not enable multilateral co-operation. Co-ordinating with more than one country would be significantly more difficult.</p>
Criminal investigations	<p>Europol and Eurojust support Joint Investigation Teams (JITs), in which authorities from multiple countries work together to investigate serious cross-border criminal activity. The agencies provide analytical support, finance and translation services to JITs.</p>	<p>Non-EU countries with operational/co-operation agreements with Europol/Eurojust can join JITs if invited by the relevant member states.</p> <p>Council of Europe member states can initiate JITs but cannot receive Europol/Eurojust funding to participate in them unless they are EU member states.</p>	<p>JITs can be established between Council of Europe member states.</p> <p>As noted above, Interpol provides analytical support to international criminal investigations, but this is not generally as highly regarded as support from Europol or Eurojust.</p>
	<p>The European Investigation Order (EIO) allows member states’ police forces to request assistance directly from their EU counterparts in investigating criminal activity, using common templates and a streamlined process. Authorities must respond within a strict time limit.</p>	<p>No non-EU countries have access to the EIO.</p> <p>Japan has a mutual legal assistance (MLA) agreement with the EU, but this does not require member states to provide assistance within given time limits. MLA agreements also raise questions about which country’s law takes precedence when requests are made.</p>	<p>The 1959 European Convention on Mutual Assistance in Criminal Matters provides for members to send ‘letters rogatory’ to seek support from other members’ authorities.</p> <p>These do not have any time limits and are more bureaucratic as each request must go through government ministries.</p>

Databases

The Schengen Information System II (SIS II) shares information on missing and wanted people and objects. Information entered into member states' national police systems is accessible immediately across the EU, including on individual police officers' computers/devices and at border entry points.

The UK does not have access to Schengen-specific data on SIS II.

The four non-EU Schengen Area associate countries – **Iceland, Liechtenstein, Norway and Switzerland** – have full access to SIS II.

No non-EU, non-Schengen country has any form of access to the database.

The best alternative is the **Interpol notice system and databases**, including 'red notices' for wanted individuals.

Notices for missing people and objects have to be uploaded from National Central Bureaus in Interpol member states, so transmission is not immediate. Interpol then issues the notice to police forces around the world or in one specific region.

The **European Criminal Records Information System (ECRIS)** allows authorities in one member state to check whether an individual has any convictions in other member states, to inform investigations and sentencing and bail decisions.

No non-EU country has access to ECRIS.

Countries with MLA agreements with the EU can request criminal records information on a case-by-case basis.

The 1959 European Convention on Mutual Assistance in Criminal Matters provides for criminal records exchange. However, this process is not as quick or straightforward as ECRIS – member states are only required to transmit criminal records data once a year.

The **Prüm Convention** allows member states to access each other's national databases for DNA profiles, fingerprints and vehicle registration data.

The only non-EU countries with access to Prüm are **Iceland and Norway, Liechtenstein and Switzerland** have begun negotiating access to the database.

Interpol runs databases on DNA, fingerprints and vehicle information, but these are subject to the same constraints as other Interpol data.

The **Passenger Name Record (PNR)** Directive obliges airlines to provide information on passengers on flights to and from the EU, as well as many within the EU, to member states' authorities. Member states can check the data against other databases and must respond to requests for PNR data from Europol, other member states and associated third countries.

Australia, Canada and the US have PNR agreements with the EU.

These do not allow for the same level of co-operation between third-country and member states' authorities as member states enjoy with each other.

Air carriers transmit **Advance Passenger Information (API)** data, which is less detailed than PNR information, to member states. However, if the UK is not party to PNR, it will not have straightforward access to API data transmitted to other member states.

Both sides will lose out if co-operation is reduced

As Table 1 shows, the arrangements which the UK will fall back on if no better deal is reached do not provide anywhere near the current levels of co-operation.

Extraditing dangerous criminals from the UK will be slower and more bureaucratic

Given the ease of crossing borders within the EU and Schengen Area, it is not difficult for people to move to another country in the hope of evading authorities. But law enforcement agencies have access to a speedy, straightforward way to extradite criminals and accused individuals so that they can face trial or serve sentences: the European Arrest Warrant (EAW). This has transformed the previously laborious and politicised process into a simplified system of exchange between member states.

The UK extradited fewer than 60 people a year to any country before the introduction of the EAW.¹⁴ It now extradites more than 600 to Poland alone, and around 1,100 in total, each year.¹⁵ Since 2009, 10,000 criminals have been taken off the UK's streets on the basis of warrants from other member states, the vast majority of whom are foreign nationals.¹⁶

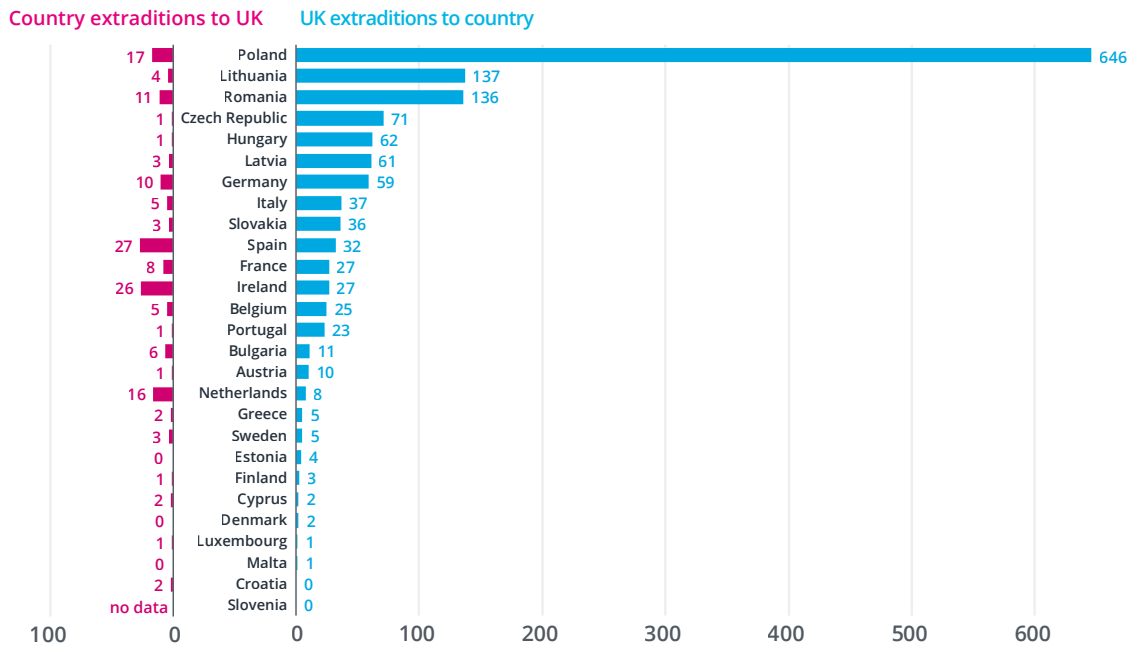
Police and prosecuting authorities agree that the UK benefits from the EAW enormously, not least because the average time taken to extradite people has dropped from over a year before the EAW to just 48 days under the scheme.¹⁷ Continued EAW membership is one of their top priorities in the Brexit negotiations. As an illustration of the importance of this, it took 10 years for Rachid Ramda, one of the perpetrators of the 1995 Paris bombings, to be extradited from the UK to France under the 1957 European Convention on Extradition.¹⁸ More recently, French national Zakaria Chadili, who allegedly trained with a jihadist organisation in Syria for a month in 2013, was arrested on an EAW in the UK and extradited to France just 47 days later, where he was sentenced to six years in prison.¹⁹

New barriers could reduce the number of people brought to justice – on both sides of the Channel

The UK also uses the EAW to ensure that people who commit crimes in the UK and then flee to the rest of the EU are brought back to face justice. The requirement to extradite 'own nationals' is particularly noteworthy here. Of the more than 1,000 individuals sent to the UK on an EAW since 2009, more than 300 were nationals of the countries that extradited them.²⁰ The Crown Prosecution Service (CPS) has estimated that 22 member states would no longer do this if the UK was not part of the EAW.²¹ A number of countries, including Germany, have clauses in their constitutions that do not allow the extradition of their own citizens unless it is to another EU member state, so will not be able to extradite their citizens to the UK once the UK leaves the EU, regardless of the specific extradition arrangement that is negotiated.²²

As noted, the EU extradites a large number of criminals and accused individuals from the UK and so delays will also have an impact on member states' abilities to bring people to justice. Figure 2 shows that, in 2016, the UK extradited more people to 24 out of 27 EU member states than were extradited to it. Countries with large immigrant populations in the UK, such as Poland, Lithuania and Romania, were particular beneficiaries of this.

Figure 2: Number of extraditions to/from the UK and each member state, 2016



Source: Institute for Government analysis of the National Crime Agency's European Arrest Warrant 2016 statistics

UK access to the Schengen Information System II (SIS II), which member states use to put out alerts for wanted individuals whose location is unknown, is also crucial. The EAW is directly linked to SIS II, which means that anyone subject to an alert can be flagged and apprehended at the UK border. The National Crime Agency (NCA) prioritises SIS II alerts for the UK, sending them on to the relevant local police forces to carry out a provisional arrest if they believe an individual is already in the country. Losing this capability could reduce the volume of extraditions between the UK and the rest of the EU considerably.

If the UK cannot negotiate a new extradition agreement with the member states, it will have to revert to the 1957 European Convention on Extradition. As noted in Table 1, this is a much slower process than the EAW as it is a political and diplomatic process, rather than a technical, judicial one. But the Convention also makes extradition more difficult by offering more grounds for refusal on the part of the state receiving the request, and for appeal on the part of the requested person. Member states are also under no obligation to respond to requests under the Convention in a set timeframe. Moreover, a number of member states revoked their domestic legislation providing for the Convention when they implemented the EAW.²³ In the absence of the EAW, or any bilateral agreement, the UK would have no legal grounds for co-operation on extradition with those countries.

Law enforcement agencies will find it harder to get crucial information for investigations

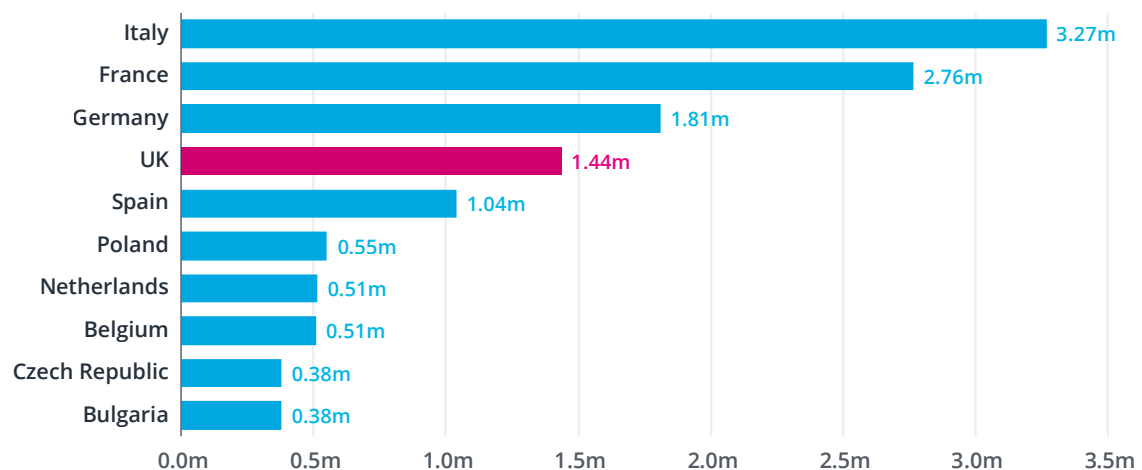
At the moment, when UK police forces are investigating crimes, they have access to huge EU-wide databases, which store information on wanted individuals, criminal records and other relevant data. This means that even if there is no information on a suspect in UK systems, investigators may be able to find relevant data from other European authorities. Interviewees made the point that this data is incredibly useful in both investigating crimes and prosecuting individuals.

The UK benefits significantly from its access to SIS II, the largest EU-wide database. SIS II currently contains almost 76.5 million alerts on missing and wanted people and objects. It was consulted more than five billion times in 2017, with 539 million of those queries coming from the UK.²⁴ As noted above, SIS II can be used to identify individuals wanted by a member state when their location is unknown. These kinds of 'speculative alerts' via SIS II also make it significantly easier for the UK to locate items that either have been stolen or are wanted as evidence in a criminal case.

Interviewees stressed that no other databases come close to SIS II. The Europol Information System (EIS), the closest equivalent, contains substantially less data, and is used less frequently. This is partly because SIS II is more user-friendly. The database is accessible through domestic police computer systems (even for police on the streets), lets users automate many alerts and queries, and is updated across the bloc in real time.

It is harder to know exactly how other member states benefit from UK access to SIS II. As Figure 3 shows, the UK created the fourth highest number of alerts of any EU member state in 2017.²⁵ It also sent almost 10,000 reports to member states following their hits on UK data. But earlier this year, as part of a routine investigation into member states' implementation of SIS II, the European Commission found "serious deficiencies" in the way the UK participates in the database. Its report highlighted concerns around the UK's failure to properly protect data and to "respond adequately to requests [for information] from other EU member states".²⁶ According to Labour MEP Claude Moraes, the headline finding was that the UK was "taking out more than it was giving".²⁷

Figure 3: Top 10 member states by number of alerts created on the Schengen Information System II (SIS II), 2017

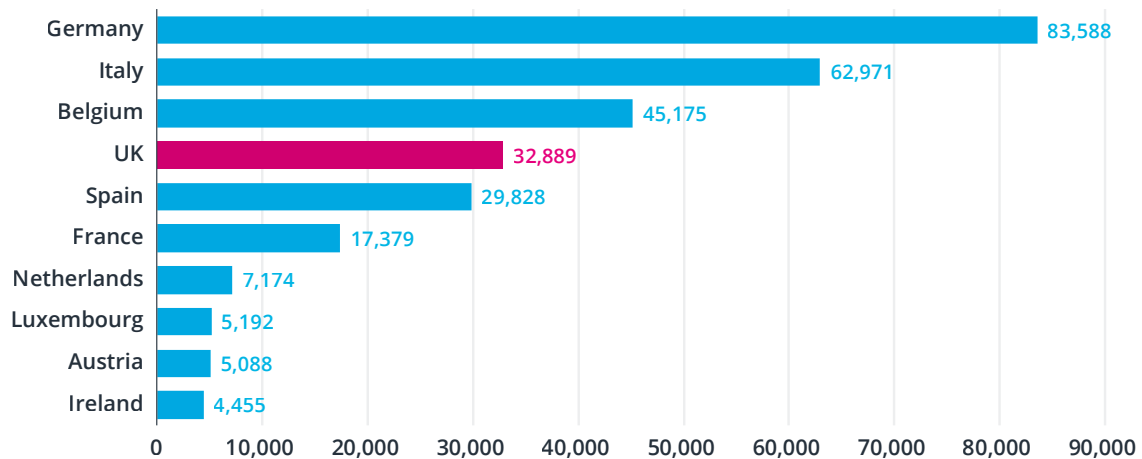


Source: Institute for Government analysis of eu-LISA SIS II – 2017 statistics

The UK also benefits enormously from the European Criminal Records Information System (ECRIS). Interviewees stressed the utility of having easy access to criminal records throughout the law enforcement process – from risk assessments made by police during an investigation, to decisions about whether to offer bail, the judgment of the case in court, and ultimately the sentencing of criminals. The large population of EU migrants in the UK means that it is one of the heaviest users of the system, making

the second largest number of requests of any country after Germany.²⁸ But, as Figure 4 shows, it also means that the UK notifies member states of new convictions of their nationals more often than all but three other member states.²⁹ This information is crucial for other member states if their nationals were to return home and is particularly valued where a conviction may have an impact on the nature of future employment, for example with convicted sex offenders.

Figure 4: Top 10 member states by number of European Criminal Records Information System (ECRIS) notifications, 2016



Source: Institute for Government analysis of European Commission ECRIS data

The benefits of access to Passenger Name Record (PNR) data and the Prüm database are more difficult to quantify, because they are more recent. The PNR Directive is something that the UK was particularly vocal in advocating,³⁰ and is expected to massively increase the ability of member states to identify suspicious travel patterns and track the movements of individuals considered a possible threat to public security. While other countries including the US have agreements with the EU on PNR data, these do not allow for the same level of co-operation between these countries and member states. The UK has stressed the importance of maintaining its current access to EU PNR information, but losing access to PNR data from the UK, which is an aviation hub and has the EU's largest airport in London Heathrow,³¹ would also create a significant gap for other member states.

The UK Government opted out of Prüm in 2014, due to concerns that it would not be able to implement the necessary changes to computer systems ahead of the EU's deadline, but decided to opt back in in 2015 following the success of a small-scale pilot and its clear benefits over the Interpol alternative.³² Although it planned to connect to the system fully by 2020, progress has stalled over the UK's refusal to exchange DNA profiles on individuals who have been arrested but not convicted of crimes, as other member states do.³³ However, the UK argues that its DNA database will be of interest to the rest of the EU, as it holds roughly the same number of DNA profiles as all the other Prüm participants put together.³⁴


It will be more difficult for UK investigators and prosecutors to collaborate on cross-border cases with EU partners

One of the most tangible results of increased law enforcement co-operation between EU member states is joint working between their police forces and prosecutors. There is a range of opinion about the extent to which this will carry on after Brexit but broad consensus that the current close working between UK authorities and their EU counterparts will not continue uninterrupted.

One of the measures in the European toolkit is the Joint Investigation Team (JIT), in which police forces from different countries work together on investigations of cross-border crime. The Second Protocol to the 1959 European Convention on Mutual Assistance in Criminal Matters³⁵ allows signatory states to form JITs, as does the 2000 United Nations Convention against Transnational Organized Crime.³⁶ But since their establishment in 1998 and 2002 respectively, EU agencies Europol and Eurojust have played an important role in supporting JITs. These agencies provide analytical and legal support to the JITs, as well as funding and translation to the participating member states.

 **in 2016 and 2017, the UK contributed more to Europol's Serious and Organised Crime analysis projects than any other country**

Their support for cross-border working goes beyond JITs, however. Europol, for example, employs around 100 crime analysts, who work to identify patterns of criminality in intelligence provided by partners across the EU and beyond.³⁷ The UK currently seconds five national experts to sit within analysis projects, keeping abreast of relevant issues. Interviewees stressed how useful this analysis is for tackling cross-border crime. The information from these

 analysis projects is stored on the Europol Analysis System (EAS). Member states' police forces do not access the EAS directly, but request information from Europol analysts. However, Europol is planning to provide direct access to the EAS for member states in the future.

As well as a consumer of Europol information, the UK is an important producer of information and analysis: in 2016 and 2017, the UK contributed more to Europol's Serious and Organised Crime analysis projects than any other country.³⁸ Sir Rob Wainwright, former Director of Europol, has said that the "UK is in the top three of member states that contribute intelligence".³⁹ This information is stored in the Europol Information System (EIS) database.

While both the UK and the rest of the EU benefit from the UK's membership of Europol, the UK is unlikely to be able to maintain its current arrangement. The closest relationship that non-member states have with the agency take the form of 'operational partnerships', which have been signed by partners including Norway and the US.⁴⁰ Operational partnerships do not give the non-member full access to the EIS but interviewees were less concerned by this, given it contains less information than other EU databases. A bigger challenge would be the fact that operational partners are unable to receive Europol funding and translation support to participate in JITs – and can only join EU-supported JITs if invited by a member state. What is more, if the plan

to allow member states to check the EAS directly goes ahead, this will not be extended to operational partners. All interviewees were of the view that these arrangements would be damaging for the UK.

In contrast, Sir Rob Wainwright, in oral evidence on EU policing and security co-operation to the Home Affairs Committee in July 2018, was of the view that such an arrangement would not have a significant impact on day-to-day co-operation between UK and EU authorities, as the UK would still be present in Europol's headquarters. He suggested that the "so-called US kind of mode... more or less provides what the UK has today".⁴¹ However, he did say that such an arrangement would entail a "loss of strategic influence"⁴² for the UK compared with its current standing, in part because as a non-member state the UK would no longer be involved in decisions about the management of Europol.

If the UK is demoted to the status of an operational partner, there would be practical ramifications for other member states. The UK has been leading on 25 of the 150 operational actions that Europol had planned for 2018, and of the EU's 13 priority crime areas (EMPACT – European Multidisciplinary Platform Against Criminal Threats – projects) the UK is the 'driver' on two and 'co-driver' on a further four.⁴³ None of these leading roles would be possible as an operational partner, and would need to be taken on by other EU countries in the absence of the UK.

With no agreement on co-operation between the UK and Europol, the main alternative would be Interpol, which also provides analytical resources.⁴⁴ Interpol's headquarters, in Lyon and Singapore, also provide a forum for law enforcement authorities to meet and discuss investigations of mutual interest. However, because of the wider membership of Interpol (192 countries), there is much less mutual trust between members, and UK and other European authorities are more hesitant about providing as much information to Interpol as they do to Europol. UK authorities are also sceptical about the quality of Interpol data and analysis. Interviewees were clear that the UK will not be able to rely on Interpol to replace all the benefits of Europol membership.

 the UK will not be able to rely on Interpol to replace all the benefits of Europol membership 

Many of these problems would be particularly acute on the island of Ireland

While the UK works closely with many EU member states' authorities, one of the most important partners is, of course, Ireland. The Police Service of Northern Ireland (PSNI) works very closely with its Irish counterpart, An Garda Síochána. At various hearings in Westminster and Stormont, Northern Irish police officers and officials have stressed the importance of ongoing co-operation, given the open border and frequent movement of people between the two jurisdictions.⁴⁵

The EU's toolkit of law enforcement measures has helped to depoliticise what was a very sensitive issue of police and judicial co-operation during the second half of the 20th century. As David Lavery, of the Northern Irish Department of Justice, told the Stormont Committee for Justice, during the Troubles there was "an almost toxic relationship" between Northern Irish and Irish authorities, which meant that

extradition across the border could take years.⁴⁶ As a result, the PSNI “treasures” the European Arrest Warrant (EAW), which has simplified the process.⁴⁷ As Ireland has repealed its domestic legislation providing for the European Convention on Extradition, there is no way to extradite individuals between the UK and Ireland other than through the EAW.⁴⁸ If the UK cannot negotiate a deal with the EU as a whole, some form of bilateral arrangement with Ireland will be a priority; but this would be more likely to be politicised like the arrangements that preceded the development of the EU framework.

The UK has been a significant driver of the EU’s approach to crime and justice

The influence that the UK has enjoyed over the development of the EU toolkit will also end. The House of Lords European Union Committee describes how the UK “has been a leading protagonist in driving and shaping the nature and direction of cooperation”, playing a leading role in Europol and Passenger Name Records (PNR).⁴⁹ The UK has also been influential in getting other member states and the EU institutions to recognise the importance of robust human rights safeguards in their approach to the EAW.⁵⁰ Once the UK has left the EU, it will be much harder – if not impossible – to influence the direction of these measures but, if the UK manages to maintain access to some of them, it will still have to follow EU rules.

However, interviewees stressed that while the UK may have shaped the EU tools to suit itself, to some extent UK involvement has also benefited other member states. They highlighted the capability of British police and intelligence communities, the experience of British lawyers and judges working in the EU, and British standards (in terms of prison inspection and respecting the rights of defendants, for example), as areas where the EU has benefited from UK know-how and experience.

The UK will have a bigger gap to plug if it loses access to these measures

The UK will, inevitably, be affected disproportionately by reduced co-operation in this area. For a measure such as the EAW, a member state particularly affected by the UK leaving the EU can address this with one new bilateral agreement. The UK would need 27 to do the same. Similarly, while member states will lose access to intelligence on criminals and items related to crimes provided by UK authorities, the UK will lose access to the information provided by the police forces of 27 other countries.

But the EU will find it harder to tackle crime as well

Complicating co-operation with the UK could prove a significant loss to the other 27 member states too. As several interviewees told us, a reduction in co-operation between UK and EU law enforcement agencies will only make it easier for criminals to operate across Europe. Ultimately, it will be ordinary citizens – and victims – who lose out. Blocking UK access to the European Criminal Records Information System (ECRIS), for instance, could mean that an EU national convicted of a serious crime on this side of the Channel could return to their home country after having served their sentence and apply for jobs, where it would be more difficult for local authorities there to find out about their history.

There is no doubt that reducing co-operation will affect the UK more substantively. But as many of our interviewees told us, there are no upsides for the other member states either. Therefore, negotiators should ensure that discussions on the future security

relationship are not affected by the parallel negotiations on the future economic relationship between the UK and the EU. There will be winners and losers from the eventual trade deal; but both sides will lose out if a criminal can evade capture or prosecution simply by crossing the Channel.

3 The scope for agreement

The UK's and the EU's negotiating positions began very far apart, with the UK hoping to maintain the practical co-operation it has now, and the EU unwilling to move beyond the limited arrangements agreed with third countries in the past. Those positions have come closer together in recent months, but not by much. To minimise the risk posed by Brexit to the safety of citizens in the UK and the EU, the two sides need to move closer still.

If the EU wants to preserve co-operation, it should acknowledge the benefits of the new legal framework proposed by the UK. On the basis that this framework offers a means of binding the UK to obligations, similar to the way the Schengen Association Agreements¹ bind non-EU Schengen countries, the EU should extend its current offer for co-operation much further.

The UK, for its part, will have to accept that it cannot maintain its privileged position on law enforcement. It should be willing to concede some of the unique benefits it has negotiated in the past, and improve its implementation of EU measures in the future.

The opening salvos

The UK's priority is maintaining operational capacity

The UK has published a number of papers outlining its ambitions for the post-Brexit relationship on policing and criminal justice. The first of these, its 'future partnership' paper published in September 2017, expressed a desire to "maintain, deepen and strengthen operational and practical cooperation".² The relationship, underpinned by a new legal framework to reflect the UK's third country status, would go "beyond existing third country arrangements" and "reflect the exceptionally broad and deep security relationship that exists today".³

The Prime Minister, in a speech in Munich in February 2018, declared that the UK is "unconditionally committed to maintaining" Europe's security and that the UK wanted to "preserve our operational capabilities".⁴ A technical note and presentation in May 2018 reinforced this position, specifying that the UK wanted to "sustain... co-operation on the basis of existing EU measures".⁵ Government officials confirmed that the UK was requesting continued co-operation in all 40 of the measures the UK is currently part of, with no operational change, thus maintaining both sides' ability to protect their citizens.

The technical note suggested that this could be possible under a comprehensive legal agreement or treaty, taking existing "strategic agreements that provide for co-operation between the EU and third countries on a particular area of the *acquis*", such as the Schengen Association Agreements, as precedents.⁶ This agreement would provide for continued dialogue between the UK and the EU on the development of new measures, and would allow the UK to participate in future versions of any of the tools it had negotiated access to.

It would also give legal underpinning to the trust necessary to continue law enforcement co-operation. From the EU's perspective, it would ensure that the UK continues to follow EU rules on the measures it participates in. It would also offer important guarantees for the UK. As already noted, questions have been raised around extradition as to whether all member states' approach to human rights is sufficient. A new legal agreement would provide a way for the UK to hold member states to account on human rights standards, as well as vice versa.

The UK has also proposed a new agreement on data protection, which would underpin the entirety of the future relationship.⁷ Under this agreement, the UK and the EU would co-operate on the development and enforcement of data protection regulation, and collaborate in resolving any disputes. This would remove the uncertainty inherent in the EU's current approach to dealing with non-members' data protection regimes, in which the European Commission can unilaterally decide to end data-sharing.⁸

The EU was originally unwilling to go beyond third country precedents

The European Council guidelines of March 2018 said that "law enforcement and judicial cooperation in criminal matters should constitute an important element of the future EU-UK relationship in the light of the geographic proximity and shared threats faced by the Union and the UK".⁹

However, the UK's original ambition was summarily dismissed by the European Commission's negotiating team in June 2018. Its counter-proposal, delivered through a slide pack and speech by Michel Barnier, went no further than existing third country precedents.¹⁰ While the European Commission expressed a desire to agree streamlined mechanisms for policing and judicial co-operation – including around extradition – it offered no access to EU databases or flagship tools such as the EAW. On UK membership of the agencies and a future PNR agreement, its proposals mirrored the EU's arrangement with the US.

the UK's original ambition was dismissed by the European Commission

To move further, Michel Barnier said, the UK needed to be more explicit in its commitments to uphold human rights and ensure adequate standards of data protection, as well as its acknowledgement of the continuing role of the European Court of Justice (ECJ). The European

Commission emphasised that any strategic dialogue would threaten the autonomy of the EU's decision-making process, and that a dynamic relationship would not be possible without a rolling obligation to adopt new EU laws to ensure coherence, as is the case for Schengen member states. There was no acknowledgement of the UK's proposal to negotiate an overarching legal agreement.¹¹

The UK has adapted its initial position

The Government's white paper on the future relationship, published in July 2018, showed movement on a number of these issues.¹² First, it committed the UK to remaining part of the European Convention on Human Rights (ECHR). Second, it accepted the sole competence of the ECJ in interpreting EU rules. It outlined a model for resolving disputes on future co-operation that allowed for referral to the ECJ where they related to questions of EU law.¹³

While the UK reiterated a desire to continue “strategic and operational dialogues”, it emphasised that the proposed legal framework would respect “the EU’s decision-making autonomy”. This acknowledged that the UK would no longer be part of the formal decision making on this *acquis* after Brexit. It also committed explicitly to amend “legislation and operational practices as required and as agreed to ensure operational consistency between the UK and the EU”.¹⁴

The white paper proposed that a joint committee would decide whether to incorporate new rules into the agreement after “a period of consultation and adaptation”. However, it made clear that it will be the UK Parliament that ultimately decides whether to update UK law. This would mean that a future Parliament could choose not to do so, which would lead to the suspension of “the relevant part of the future relationship”.¹⁵ It is not clear whether this would be an individual law enforcement measure or the security agreement as a whole.

The EU has moved its position in response but is still constrained by its existing relationships

Responding to the white paper, Michel Barnier said that the commitment to the ECHR and the recognition of the ECJ’s sole competence over EU law opened up new possibilities in the internal security negotiations, particularly around data exchange.¹⁶ The EU subsequently widened its offer, but only to include a proposed agreement on participation in Prüm.¹⁷ It still seems reluctant to engage with the UK’s proposal of a comprehensive security agreement, let alone the detail of how such an arrangement could work.

This can be explained partly by EU concerns about offering the UK anything approximating membership. The European Council’s negotiating guidelines state that a non-member cannot have the same benefits as a member state.¹⁸ Moreover, they specify that the unique relationship that the EU has with non-EU Schengen countries would limit how much it could offer the UK as “a third country outside Schengen”.¹⁹

The EU will be aware that its non-EU Schengen neighbours are watching closely to see what the UK manages to negotiate. The Norwegian Government’s strategy paper on co-operation with the EU for 2018–21 stated that it “will seek to ensure that Norway can also take part in closer cooperation with the EU in these areas” if the UK succeeds in negotiating “new arrangements” in law enforcement co-operation.²⁰ The EU has not shown any appetite to re-open discussions on its security relationships with the Schengen partner countries and will be reluctant to negotiate an arrangement with the UK that forces it to do so.

The EU is also constrained by the deal that Denmark has negotiated to participate in Europol. Although an EU member state, Denmark is not a full member of Europol, having decided in a referendum in 2015 to maintain an opt-out negotiated in the early 1990s at the time of the Maastricht Treaty²¹ and reaffirmed in the Lisbon Treaty.²² Denmark’s deal allows operational co-operation between Denmark and Europol, including some data exchange, but does not “in any way equal full membership of Europol”.²³ The agreement is also “conditioned on Denmark’s continued membership of the European Union and of the Schengen area”.²⁴ This arrangement is likely to affect what the EU is willing to offer the UK for its future relationship with Europol.

While the EU has begun to react to the changes in the UK's position, its approach is still bound by the existing relationships it has with other countries, particularly the Schengen member states. It should recognise that what the UK is proposing moves it closer to those countries and be prepared to offer more co-operation.

By endorsing the UK's overarching approach, and extending its offer further, the EU can move towards a deal

The UK's proposal for a security agreement is the most practical negotiating option EU co-operation with third countries on policing and criminal justice typically takes place on the basis of individual treaties negotiated at different points in time on specific measures. But as with the trade negotiations, the UK is in a very different position from other third countries. It already follows the same rules as the EU and participates in many EU measures. Maintaining existing co-operation as far as possible – not redesigning it from scratch – will benefit both sides.

A comprehensive agreement that largely continues co-operation as now will almost certainly be easier – and faster – for the UK and the EU to negotiate than tens of different treaties covering individual tools. Arrangements with third countries on individual policing and judicial measures typically take years to agree. The EU's extradition arrangement with Iceland and Norway took 13 years to negotiate (2001–14) and is still not in force, as not all EU member states have ratified the treaty.²⁵ But the UK does not have much time: any future security partnership will need to be settled, and ratified by each member state,^{*} by the end of the planned transition period – 31 December 2020. An overarching internal security agreement may be the only viable model.

A single, broader agreement also offers a more practical way of setting out the obligations of both sides in the future, and ensuring that they are enforced consistently and effectively. Michel Barnier has stressed that the future relationship with the UK “will need to be based on strong safeguards on fundamental rights, data protection and dispute settlement”.²⁶ These issues are, as one interviewee pointed out, “joined at the hip”. A future agreement – whether data protection is included or dealt with separately as the UK has proposed²⁷ – would include an effective mechanism for settling disputes. Any perceived breach of rights could therefore be resolved through this.

A comprehensive security agreement would create a relationship that binds the UK and EU together

The arrangement that the Government is proposing, if accepted by the EU, would place the UK in a similar relationship to the Schengen countries in terms of their co-operation with the EU on law enforcement. The UK could agree to follow EU updates to measures covered by the agreement or choose to suspend that part of the agreement if it no longer wanted to participate. While the UK would not be a Schengen member, its white paper proposal would see it become part of what the European Commission has referred to as a “common framework of obligations”,²⁸ requiring it to maintain alignment with EU rules where they relate to the internal security toolkit.

* If the future relationship is a UK–EU treaty, this will likely require approval by each member state, as well as the European Parliament, as ‘justice and home affairs’ is not an exclusive EU competence.



The UK's proposal for a relationship akin to the Schengen arrangement should open up access to more of those measures. By offering to negotiate UK participation in Prüm, which no non-Schengen third country currently has, the EU has implicitly acknowledged that the UK is seeking to place itself in an exceptional position. But it is unclear why the same line of reasoning does not unlock UK access to parts of the Schengen Information System II (SIS II) (as a non-Schengen country, the UK does not have access to the whole database now) and which has proven to have enormous operational value to both sides.

The UK ending the free movement of people – and the potential introduction of barriers to the free movement of vehicles and goods – might be used as an argument to revoke UK access to other measures open to the Schengen countries, such as SIS II. This would likely be premised on an expected decrease in cross-border crime as the UK and EU economies slowly become less integrated. But there are already significant numbers of EU nationals living in the UK.²⁹ And flows of citizens, cars and everything else will almost certainly continue to be more substantial between the EU and the UK than with any other non-EU country – and certainly more significant than flows between the EU and Iceland – a Schengen state with SIS II access.

The EU should consider offering the UK more than it has other third countries

The UK is unique in its willingness to put in place many more substantial safeguards than any other non-Schengen third country. It is also an important partner to the EU because of its law enforcement expertise, and the fact that millions of EU citizens already live in and visit the UK, and will likely continue to do so after Brexit. Clearly, Denmark's special arrangement is likely to constrain what the UK can negotiate with Europol. However, for other important measures, there is seemingly no practical reason why the EU cannot extend a special arrangement to the UK.

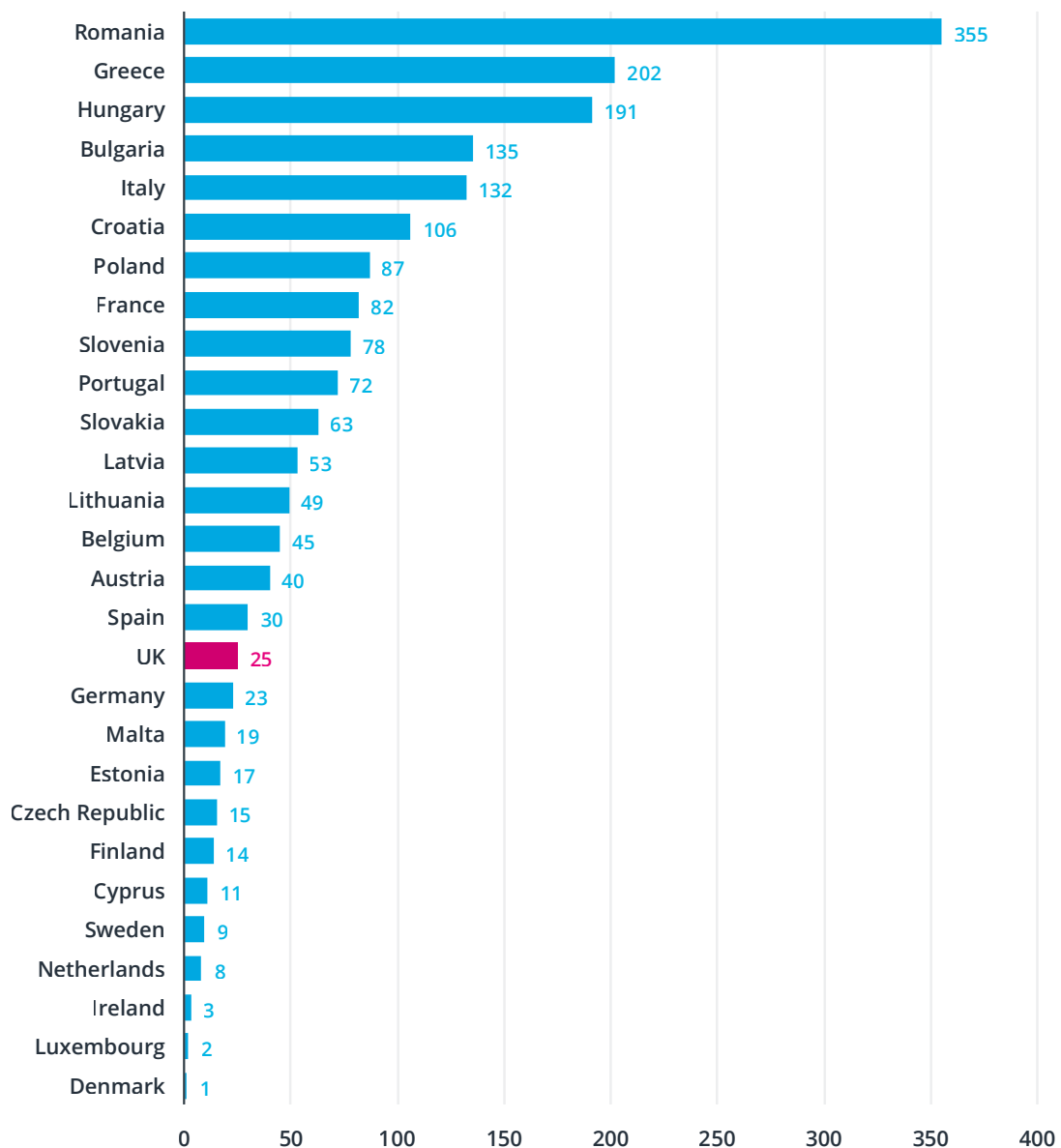
There is one area in which the EU has already offered the UK something more than Schengen countries: access to Passenger Name Records (PNR). While there are existing non-Schengen third country precedents for this – similar agreements have already been negotiated with Australia, Canada and the US – it still indicates a willingness to go beyond Schengen precedents for a non-Schengen third country, if that country's participation in a measure is sufficiently operationally significant. The EU should consider this for other measures.

 **there is seemingly no practical reason why the EU cannot extend a special arrangement to the UK** 

There is no third country precedent for access to the European Criminal Records Information System (ECRIS), for instance – Schengen or non-Schengen. But the EU has not given any justification for denying the UK access to the database, beyond the fact that no other non-member state has it. Given the UK's significance in this measure and its willingness to undertake a wealth of obligations in this space to maximise future co-operation, the EU should either go beyond precedents, or explain why it cannot – and make clear why its concerns outweigh the threat posed to EU citizens by UK non-participation.

The EU should also bear in mind that the UK has been one of the better member states in terms of how it fulfils its legal obligations. A previous Institute for Government report found that the number of actions brought against the UK before the ECJ is well below average.³⁰ Furthermore, as shown in Figure 5, between 2013 and 2017 the UK was found to have violated the European Convention on Human Rights (ECHR) less often than more than half of the other member states, including similar-sized countries such as France and Italy.³¹ The EU should be reassured, both by the UK's record in front of the European Court of Human Rights and the Government's commitment to the Convention, that the UK will not downgrade its human rights protections.

Figure 5: EU member states' violations of the European Convention on Human Rights (ECHR), 2013–17



Source: Institute for Government analysis of European Court of Human Rights statistics

The UK's approach would allow the EU to prioritise the safety of its citizens while maintaining essential safeguards

The UK is proposing a model for the future relationship that maximises operational capability, prioritising the safety of citizens on both sides, while allowing the EU to ensure that the relationship is underpinned by appropriate safeguards.

If the EU is serious about wanting close co-operation with the UK on law enforcement, it should take this proposal seriously. While the integrity of the Single Market is paramount to the EU, law enforcement is already more flexible – hence the unique relationships of the UK, Ireland and Denmark currently. Clearly, the EU offering the UK something beyond existing precedents would raise eyebrows in non-EU Schengen states and beyond. But there is a question mark over why EU relationships with these countries need to be so rigid and unchanging anyway.

There is apparently already discussion around raising the level of co-operation for third countries in Europol, and that could be extended to other measures as EU law continues to develop. The priority, after all, should not be to mollify politicians, but to keep citizens safe.

Of course, the EU is not alone in needing to reconsider its current position. To reach a mutually beneficial outcome, the UK will need to continue to move its negotiating position too.

The UK needs to accept that its relationship with the EU cannot stay exactly as it is now

To unlock more progress, the UK may need to give up some of its existing perks

The UK would struggle to invent an arrangement on law enforcement co-operation with the EU that suits it better than the one it has now. As detailed in Chapter 2, it has only opted in to measures that, after intense scrutiny, it has decided are in its national interest. It does not have to participate in anything it has decided it does not want to. For measures it participates in but considers imperfect, it has often managed to negotiate its own special exemptions and amendments to ensure they suit the UK better. Moreover, being a member state has allowed the UK to co-operate on internal security without its approach to national security – especially with respect to the handling of personal data by the intelligence services – coming under substantive scrutiny.

A number of member states... expressed frustration at the bespoke arrangements the UK sought in 2014

The UK's proposed security agreement is an acknowledgement that its relationship with the EU will need a different legal underpinning after Brexit. But it will need to go further. The European Council's guidelines specify that a non-member state cannot have the same benefits as a member state.³² Negotiating continued access, on current terms, to the 40 law enforcement measures it participates in, when not a member state, will likely be impossible.

Moreover, by selectively adopting only those measures that suit it, the UK has undermined trust across the bloc. A number of member states, including France,

Germany and the Netherlands, expressed frustration at the bespoke arrangements the UK sought when opting back in to certain justice and home affairs issues in 2014.³³ Some interviewees interpreted the limited nature of the offer put forward by Michel Barnier in June 2018, and the repeated emphasis on the fact that trust does not 'fall from the sky', as a reflection of the UK's damaged standing. If it wants to rebuild this trust, the UK could begin by volunteering to give up some of its existing special arrangements, rather than waiting to be compelled to do so.

The need to make trade-offs is especially likely around extradition

There is one area in which the UK has already compromised: the extradition of member states' own nationals. The current draft of the Withdrawal Agreement specifies that where member states have constitutional bars on extraditing their own nationals, this will be respected during the planned transition period that will run from 30 March 2019 to the end of 2020.³⁴ In its July 2018 white paper, the UK Government went a step further, proposing that the extradition arrangements for the transition period "should be the basis for the future relationship on extradition", meaning that it will not ask those countries to rewrite their constitutions for the future relationship either.³⁵ However, the white paper only refers to those countries with constitutional barriers, suggesting that the UK will seek to strike an agreement that maintains reciprocal extradition arrangements with the other member states that have legal, but non-constitutional, barriers to extraditing their own citizens.

But there are likely to be other barriers to continued UK participation in the European Arrest Warrant (EAW). One relates to the 'procedural rights' of suspects and accused people during the judicial process. In 2014, the UK decided not to opt in to four of the six EU directives that govern these rights.³⁶ The Government argued at the time that its own rights provisions were more than adequate, and expressed an unwillingness to let the details of its judicial process be determined by the EU and governed by the ECJ.³⁷

However, in his statement responding to the white paper, Michel Barnier made clear that even a "swift and effective" extradition arrangement that is more limited than the EAW would need to be "based on the procedural rights for suspects".³⁸ As Professor Valsamis Mitsilegas has argued, the EU may insist that these directives are adopted before any comprehensive extradition agreement can be finalised, from the standpoint both of guaranteeing the fundamental rights of its citizens when extradited to the UK, and of maintaining the coherence of the EU's body of law in this area.³⁹ If this is so, the UK could end up opting in to more EU measures after Brexit than it does now.

In 2014, the UK also made a number of amendments to the Extradition Act 2003 that set it apart from many other member states in its implementation of the EAW. One of these was a provision to make sure that an individual is only extradited "when the requesting state has already made a decision to charge and a decision to try" them,⁴⁰ avoiding prolonged pre-trial detention. This formalised in domestic law the stated purpose of the EAW to avoid cases like that of Andrew Symeou, who spent 10 months in pre-trial detention when he was extradited to Greece – only to be eventually acquitted.⁴¹ Another amendment was to allow the UK to refuse extradition requests for minor crimes where it considers extradition disproportionate.⁴² The UK has also always had the ability to refuse to extradite people on human rights grounds.

Interviewees indicated that the first of these amendments has slowed down the process of extradition from the UK, which has been frustrating for some member states. The second has equivalents in other countries' domestic legislation – such as Germany's – and proportionality is widely recognised as an issue with the EAW. But both may need to be put up for negotiation if the UK wants continued access to the EAW. Given the existing criticisms of the EAW system, watering down the UK's current safeguards may well be politically difficult for the Government, although a new security agreement with specific obligations on both parties may help to address domestic concerns.

The UK will need to address the EU's legitimate concerns about the way it handles personal data

To continue co-operation as now – particularly around access to databases and participation in EU agencies – the UK will need to be fully compliant with EU data protection standards. Compliance is assessed by the European Commission, which rewards successful countries with an 'adequacy' decision, allowing data exchange between them and the EU. This will be granted if the Commission considers a third country's handling of personal data to be compliant with the Charter of Fundamental Rights (CFR), relevant sections of the EU treaties and ECJ case law, and one or both of the General Data Protection Regulation (GDPR) and the Police and Criminal Justice Directive, depending on the nature of the exchange being sought.⁴³

But regardless of what the Commission concludes, the ECJ can also strike down agreements around data exchange if an individual or member state refers them to the ECJ for scrutiny. The European Council and European Parliament can also ask the Commission to rescind an adequacy judgment.⁴⁴

There have already been two ECJ judgments ruling that the UK's handling of personal data is not currently in line with EU law, including in response to a legal challenge originally brought by David Davis, before he was appointed Brexit Secretary.⁴⁵ The ECJ judgments relate to the UK's handling of data under the Investigatory Powers Act 2016 (the so-called 'snooper's charter'), especially with respect to data retention and the bulk collection of data by the security services, which arguably contravene fundamental rights as enshrined in the CFR.

As a member state, the UK has some room for manoeuvre: national security is the responsibility of member states and outside the EU's competence. But the EU holds third countries to a higher standard. Canada's agreement on PNR ended up in front of the ECJ because of concerns about data protection, and there are similar concerns regarding the Australian and US agreements.⁴⁶ In 2015, the EU's 'Safe Harbour' agreement with the US was declared invalid by the ECJ on the grounds that the US was failing to protect the fundamental rights of EU citizens whose data had been transferred there.^{47*}

The UK's new Data Protection Act 2018 could also cause problems. A January 2018 report from the Joint Committee on Human Rights questioned whether the Act (then a

* To enable a new agreement on data, the US had to amend the US Privacy Act of 1974 so that EU citizens had equal rights of access to civil remedies in the US.

// the UK may need to explicitly incorporate Article 8 of the Charter of Fundamental Rights into UK law

Bill) “offers protection that is equivalent to Article 8” of the CFR, concerning rights to the protection of personal data.⁴⁸ The Act also waives data protection rights in areas relating to immigration control, again in apparent contravention of EU fundamental rights protections.⁴⁹

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As the House of Commons Home Affairs Committee has argued, the UK may need to explicitly incorporate Article 8 of the CFR into UK law and reconsider the immigration exception in the Data Protection Act if it wants to secure an adequacy decision and avoid being challenged before the ECJ in future.⁵⁰ But the Government has refused to transfer the CFR into UK law, arguing that the rights that it protects are already on the UK statute book.⁵¹

The UK is aware of the difficulties it is likely to face. In evidence to the House of Commons Exiting the EU Committee, the Information Commissioner confirmed that work was already under way to respond to EU concerns around the UK’s handling of data.⁵² But as yet there has been no clear proposal as to what that work entails. Given the tight timelines, these issues need to be addressed as a matter of urgency. Only then is there any chance of the EU even considering the UK’s proposal for a reciprocal arrangement on data protection.

The UK can rebuild goodwill with the EU by showing it takes co-operation seriously

While the UK is an important law enforcement partner for many EU states, it sometimes takes more than it gives; and a number of interviewees suggested that the value of its contributions has been undermined by the way in which it has fulfilled its obligations.

On mutual legal assistance, reduced resources in the police and the HM Courts and Tribunals Service (HMCTS) have made responding to requests very difficult. The European Investigation Order (EIO) is intended to make this easier. But there are already concerns that the UK does not respond on time to many EIO requests, although this is difficult to assess as there is, as yet, no detailed data on EIO responses available.

And, as noted in Chapter 2, the European Commission recently concluded that the UK’s implementation of the Schengen Information System II (SIS II) is highly unsatisfactory. Similarly, the EU is not impressed with the UK’s approach to sharing DNA and other data through the Prüm convention. If the UK wants to strengthen its claim to be an excellent partner on policing and criminal justice, build trust and put itself in the best position to have influence beyond Brexit, it should prioritise fulfilling its obligations properly in the coming months.

A number of interviewees also suggested that the UK can build goodwill by providing more informal, bilateral support to individual member states. As noted in Chapter 2, UK authorities are seen as experts with experience that other member states can learn from. Expanding the support it provides to other member states could help the UK gain support for its proposals from individual EU governments.

Given the EU–UK relationship is unlikely to remain the same, the UK should think about how its domestic systems need to adapt

Negotiating the new relationship is not the only challenge facing the UK. As it is highly unlikely that law enforcement co-operation will continue exactly on current terms, changes will be needed to the way that the UK manages its work with EU member states. As noted above, the EU’s law enforcement measures are particularly beneficial because they are efficient, straightforward and much less bureaucratic than the previous arrangements. If the UK has to rely on the existing alternatives, more resources will be needed to manage them.

On extradition, Home Office officials will need to be more involved in cases, which may require greater political oversight, taking up ministers’ time as well. If police forces have reduced access to SIS II, they may be forced to rely more on Interpol notices and databases to locate wanted individuals, which are time-consuming to use. Interviewees said that hundreds of extra police officers would be needed for the UK to replicate all its SIS II alerts as Interpol notices. In reality, the police would simply put out fewer notices – but new roles would still need to be created for people making decisions about which cases to prioritise.

Similar resource challenges would be raised elsewhere in the legal system. For example, if prosecutors cannot work with their EU counterparts through Eurojust, the Crown Prosecution Service (CPS) (and its Scottish and Northern Irish counterparts) may want to post more liaison prosecutors to EU capitals. These lawyers need to be confident in the language and legal system of the country they are posted to.

Recruiting and training these new staff members will be a significant undertaking. It will take time and money, and will be necessary to some extent regardless of the eventual deal struck between the UK and the EU. The Home Office and the Ministry of Justice therefore need to begin preparing now to increase staff numbers, to deal with the likely more cumbersome processes for working with EU counterparts in the future.

 **Recruiting and training...
new staff members will
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As well as greater resources, the UK needs to be prepared for other changes. For example, as the Government has already acknowledged, the UK will not be able to maintain its current arrangements on the EAW.⁵³ Depending on how far extradition arrangements with the EU change, the Extradition Act 2003, which legislated for the EAW in the UK, may need to be amended. Parliamentary time ahead of Brexit is already at a premium and is likely to remain so during the planned transition period. The Government will have to prioritise which legislative changes it wants to make.

The current draft of the Withdrawal Agreement contains a provision for a standstill transition, which would maintain UK participation in these measures with few changes during that time.⁵⁴ In this scenario, the Government will have until December 2020 to ensure that it is prepared. However, this does not account for what would be necessary in a ‘no deal’ scenario. In a leaked letter to Home Secretary Sajid Javid, the Association of Police and Crime Commissioners’ (APCC) cross-party Brexit working group warned

that in the event of no deal, “considerable additional resource would be required for policing to operate using non-EU tools [and] recruitment, vetting and training of staff to use these tools would take a substantial amount of time.”⁵⁵ This is time the Government will not have if the UK left the EU without a deal in March 2019.

Of course, the UK’s legal and policing systems are not standing still at the moment either. As noted in the Institute for Government’s *Performance Tracker*, the police, criminal courts and prison systems have all faced significant budgetary cuts and reform programmes in recent years.⁵⁶ In April 2018, the Lord Chief Justice told the House of Lords Constitution Committee that he had serious concerns about judicial recruitment – and its impact on how effectively courts can operate – as well as the need for ‘modernisation’ of the courts system.⁵⁷ These are issues that the Government will need to deal with alongside addressing operational gaps created by Brexit.

Regardless of the deal on future law enforcement co-operation that the UK and the EU agree, the status quo will not be maintained so the sooner the Government starts preparing for these changes, the better. Not only is this necessary to try to prevent too large an operational gap in the event of no deal, it may also help the UK to become a better partner in the short term, which could in turn help to secure a better long-term arrangement.

4 Conclusion

Both the UK and the EU agree that it is important that co-operation on law enforcement continues after Brexit, but there remains a significant gap between the two sides' negotiating positions. The UK's proposal that post-Brexit co-operation should, in effect, work as it does now has not been welcomed by the EU; however, existing precedents and defaults do not come close to building the kind of capability that both sides say they want.

A mutually beneficial deal is possible if both sides are flexible

An arrangement that goes beyond the EU's current offer, while recognising that the UK will no longer be a member state, is possible. But it will require flexibility and goodwill in both London and Brussels. If it wants to continue working closely with the UK after Brexit, **the EU should consider:**

- **accepting a comprehensive security agreement** as the best way of maintaining practical co-operation while ensuring that the UK complies with its obligations
- **acknowledging that the UK is in a special position** in terms of its close relationship with the EU and the role it has already played in both developing and contributing to these measures.

If it wants the EU to go beyond existing precedents, **the UK should consider:**

- **agreeing to give up more of its current bespoke arrangements**, for example with regard to extradition and procedural rights
- **setting out how the Government plans to address EU concerns** around the UK's approach to data protection, as well as working to better fulfil its obligations while it remains an EU member state.

The UK will also need to prepare for the domestic implications of the inevitable change in its law enforcement relationship with the EU. While these are hard choices, if both sides are pragmatic it should be possible to agree an unprecedented, mutually beneficial relationship. The alternative is a breakdown in co-operation that would make it harder for law enforcement officials to co-operate across the Channel and the Irish border. This is in neither side's interests.

Even with these compromises, the UK and the EU still face complex negotiations

As ever with Brexit, the issue of future UK–EU co-operation on law enforcement is more complicated than it first seems. Even if the EU accepts that a new security agreement will be necessary and the UK better addresses EU concerns, these will only be the first steps. More detailed discussions over the scope and form of this agreement, and how it would relate to other aspects of the future relationship, will still be needed.

List of abbreviations

AFSJ	Area of freedom, security and justice
APCC	Association of Police and Crime Commissioners
API	Advance Passenger Information
CFR	Charter of Fundamental Rights
CMS	Case Management System
CPS	Crown Prosecution Service
EAS	Europol Analysis System
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECRIS	European Criminal Records Information System
EEC	European Economic Community
EFTA	European Free Trade Association
EIO	European Investigation Order
EIS	Europol Information System
EU	European Union
GDPR	General Data Protection Regulation
HMCTS	HM Courts and Tribunals Service
JHA	Justice and home affairs
JIT	Joint Investigation Team
NCA	National Crime Agency
PNR	Passenger Name Record
PSNI	Police Service of Northern Ireland
SIS II	Schengen Information System II
UK	United Kingdom
US	United States

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