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**Brexit:
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Introduction

Crime, terrorism and people smuggling are no respecters of international borders. The European Union (EU) has developed a complex set of justice and home affairs (JHA) policies and tools to make it easier for the authorities of Member States to deal with cross-border crime. As recently as 2014 the Government opted back into the principal measures of JHA policy which they regarded as important to our security. These include: the European Arrest Warrant, which ensures swift extradition of those wanted for imprisonable offences; extensive police co-operation through the EU police agency Europol; co-operation between courts and judges via Eurojust; the Schengen Information System II database, which enables Member States to protect their borders by sharing details of wanted and dangerous persons; and the Passenger Name Recognition system which helps to identify criminals and terrorists on flights. The UK makes extensive use of these EU instruments and the European Arrest Warrant is now the legal basis for extradition between the UK and the other EU Member States. For that reason Ministers have stated that “maintaining the strong security co-operation we have with the EU” is one of its four main objectives in the Brexit negotiations.¹

Should the United Kingdom leave the EU in 2019, agreement will have to be reached by then with the remaining EU Member States both to ensure that cases under way when the UK leaves do not collapse as a result and, just as importantly, to provide for crime and justice co-operation on a durable basis thereafter. An important element of such an agreement would be how to enable the UK to participate in new EU JHA policies in future, if it wanted so to do.

This paper explains the justice and home affairs issues that arise from the UK's departure from the EU and looks at possible ways of resolving them.

The UK's current JHA relationship with the EU

The Evolution of EU Justice & Home Affairs Policy

The EU's involvement in justice and home affairs matters has evolved over time in response to the growing need to deal with increasing cross-border crime and the difficulty of bringing criminals to justice caused by a lack of effective European co-operation. The UK has been a key driver of this JHA policy agenda over the years.

The legal basis of JHA policy was first included in the EU Treaties in the 1992 Maastricht Treaty and then extended in the 1997 Amsterdam and 2009 Lisbon Treaties. Originally a small part

¹ Rt Hon. David Davis MP, Secretary of State for Exiting the European Union: HC Deb 12 October 2016, vol 615, cols 327-328

of the EU's work implemented on an inter-governmental basis, JHA policy is now far more important and is managed through the EU institutions, that is, the Commission proposes policies, the Council of Ministers and the Parliament decide on them and Member States implement them, all subject to the jurisdiction of the Court of Justice of the European Union.²

The UK-EU relationship in JHA

At the time of the 1997 Amsterdam Treaty it was agreed that JHA policy should come under the Commission and the Council. The then British Government negotiated an opt-out/opt-in arrangement by which the UK (and also Ireland) could choose whether or not to participate in most JHA policies. The UK also decided (along with Ireland) not to join the Schengen border co-operation area, which was incorporated into the EU Treaties at the time.

The UK's current JHA policy relationship with the EU is based on the Lisbon Treaty. The Coalition Government decided that the UK would continue to participate in JHA policy measures and Theresa May, as Home Secretary, led the negotiations for the UK to opt back into 35 key instruments whose legal status had been changed by the Lisbon Treaty.³ Mrs May said at the time that if the UK failed to stay in those JHA policies, that:

would risk harmful individuals walking free and escaping justice, and would seriously harm the capability of our law enforcement agencies to keep the public safe.⁴

Under current UK JHA arrangements, the Government can decide whether or not to participate in each proposed EU policy instrument on a case by case basis. If it does not wish to participate, it cannot be made to do so. The other Member States can decline to allow the UK (and Ireland) to participate in measures that form part of the body of law concerning the Schengen area as the UK has chosen to stay out of Schengen.

Current JHA Policy

Three important agencies of the EU oversee the delivery of the various JHA policy instruments in close co-operation with Member States. These agencies are:

- Europol – the EU police co-operation agency run by Rob Wainwright (from the UK) and based in The Hague; one survey showed that, during 2011, an average of 1,300 messages a month passed via the UK's Europol liaison office relating to international investigations; the UK was in the top five Member States in terms of adding information to the Europol database;⁵
- Eurojust – the justice co-operation agency, also in The Hague, which enables judges and magistrates to co-operate across borders; the UK was involved in around 18 per cent of new cases opened by Eurojust in 2011 and 2012;⁶

² For a more detailed description of the evolution of EU JHA policy and the UK's participation in it, see House of Lords European Union Committee, *7th Report of Session 2016–17: Brexit: Future UK-EU security and police co-operation*, HL 77, 16 December 2016, pp. 5-14

³ The Lisbon Treaty brought all JHA measures under the jurisdiction of the Court of Justice of the European Union and the UK had to decide whether it wished to continue to participate under this new provision

⁴ The Prime Minister: HC Deb 10 November 2014, vol 587, cols 1228-1229

⁵ HM Government, *Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*, Cm 8671, 9 July 2013, p. 46, para 83

⁶ HM Government, *supra* n. 5, p. 60

- Frontex – the EU's border and coastguard agency, whose remit has recently been expanded, which assist Member States to secure the EU's external borders; the UK is not a full participant in Frontex because of it being outside the Schengen area but it regularly participates in individual Frontex operations, indeed has been the lead state for one of them, and it is represented at its board meetings.⁷

Three of the major legal instruments of JHA policy in the crime and justice field are:

- the European Arrest Warrant (EAW), which replaced previous bilateral extradition arrangements in EU which were less effective, slower and more costly not least because they were politicised in some countries (*e.g.* Ireland);
- the European Investigation Order, which comes into force in May 2017 (the UK has opted in); this will be the main instrument for transferring evidence between Member States in future;
- the European Supervision Order, complementary to the EAW; this avoids EU citizens being held in custody awaiting trial in other Member States for less serious offences and allows them to be bailed in their home country.

The UK makes extensive use of these instruments. For example, in the case of the European Arrest Warrant, 5,184 people were arrested under an EAW in England and Wales, and 4,005 were surrendered to another EU country between April 2009 and April 2013; of these only 181 were British nationals. Over the same period, 507 people were surrendered to the UK from another EU country; of these, 277 were British nationals. Extradition under the EAW takes about three months; from non-EU countries, it takes roughly 10 months.⁸

One area of co-operation that is not a legal instrument as such but is crucial and is subject to tight regulation is the sharing of data relating to crime and justice. This is of vital importance as all contemporary law enforcement agencies rely on the gathering, storage and retrieval of such data. Much of this is highly sensitive, for example, DNA material, criminal records and information on people's movements. The UK makes extensive use of the EU's databases, including that maintained by Europol (to which the UK is the joint largest contributor of information) and the border information system known as Schengen Information System II.⁹ For example, as a senior official of the National Crime Agency explained recently, the Schengen Information System is:

linked to the police national computer, so a policeman on the streets in Birmingham can stop a car, do a check on it, find it is stolen in France and that the occupants are wanted for serious offences.¹⁰

These databases operate to EU data protection standards and safeguards against abuse of them lie partly in the EU's Charter of Fundamental Rights.

⁷ Bernard Ryan, 'Brexit and Borders: Schengen, Frontex and the UK', Free Movement, 19 May 2016

⁸ See HM Government, *supra* n. 5, p. 94, para 79

⁹ David Armond, Deputy Director General, National Crime Agency to the House of Commons Committee on Exiting the European Union: *Oral evidence: the UK's negotiating objectives for its withdrawal from the EU*, HC 1072, 28 February 2017, Q1151, p. 10

¹⁰ *Ibid.*, Q1136, p. 2

The future UK-EU relationship

When speaking to the House of Commons Committee on Brexit, the former Independent Reviewer of Terrorism Legislation, David Anderson QC, said of the UK's JHA relationship with the EU:

if we cannot replicate things as good as we have, then the fight against crime of all kinds is going to be more difficult.¹¹

His concern reflects the very real risks if the UK is unable to reach agreement with the EU on future JHA co-operation. These are:

- a dangerous cliff-edge when we leave if no alternative arrangements are in place which could result in dangerous criminals and terrorists escaping justice;
- the loss over time of the capacity of UK law enforcement agencies to tackle cross-border crime – the scale of that risk is indicated by the use the UK makes of JHA agencies and instruments;
- poorer quality arrangements for extradition without the EAW, in particular that it will take longer, some offences could be excluded and it could become politicised again;
- loss of access in real time to EU JHA databases and/or difficulties over data protection law because the UK will not be allowed access unless it meets EU data protection standards;
- loss of ability to influence the direction of EU JHA policy because the UK will not have a seat at the table and potential loss of momentum in this field without the UK to drive greater co-operation;
- potential for the UK to be excluded from future EU policies in JHA that would be to our advantage;
- impact on our non-EU relationships because of the weakening of the UK's role in EU JHA policy, for example with the US and the other "five eyes" countries.

These risks explain why it is such a high priority to obtain a new relationship, albeit one outside the EU. There are a number of possible arrangements in future. In the opinion of those most directly involved, none are likely to establish a relationship as strong and as effective as we have now. A major risk is time: it took five to 12 years to negotiate existing third country JHA agreements.¹²

There are some advantages in this part of the UK's negotiation with the EU because of our leading role in this policy and the assets we bring to the current JHA relationship. But these advantages could be outweighed by concerns within the EU over other aspects of the negotiations. In addition, any agreement will require the endorsement of the European Parliament as well as that of the other Member States, and potentially national legislation in those Member States.

¹¹ David Anderson QC to the House of Commons Exiting the European Union Committee, *supra* n. 9, Q1136, p. 2

¹² *Ibid.*, Q1138, p. 3

Options for the future relationship

The EU has established co-operation agreements with a number of third countries. These provide possible models for an EU-UK agreement but they all have considerable weaknesses.

In terms of inter-agency co-operation, a number of third countries already have a relationship with both Europol and Eurojust. In terms of Europol, such co-operation is on one of two bases: strategic co-operation partners (including Russia, Turkey, Ukraine), where there is no transmission of personal data; and operational co-operation partners (including Australia, Canada, Norway, Switzerland and the USA), who have access to intelligence and data but who do not sit on the management board or have any say in the running of Europol.¹³ The weaknesses of these arrangements for Europol compared to those we have now have led the National Crime Agency to call for a bespoke agreement better than any current third country arrangements. For example, even as an operational partner the UK would no longer have access to the Europol Information System, which stores information on suspected and convicted criminals and terrorists from across the EU and is in daily use by British police forces.¹⁴ The difficulty of any bespoke arrangement is that Europol is an agency of the EU, coming under the EU institutions, including the jurisdiction of the Court of Justice.

There are several third country arrangements. With Eurojust, as with Europol, these offer a more distant relationship than the UK has now. The Director of Public Prosecutions has said that the relationship with Eurojust is its main concern in the Brexit negotiations and she noted that third countries do not have access to the Eurojust case management system which is used regularly by the Crown Prosecution Service (CPS).¹⁵ The CPS also considers continued UK participation in Joint Investigation Teams as “absolutely vital”.

No longer being able to use the European Arrest Warrant arguably poses the single biggest challenge because it replaced extradition arrangements established in the 1950s which were slower, less effective and cannot any longer be used by many EU Member States because they have repealed the necessary domestic legislation. The Director of Public Prosecutions has described the EAW as “three times faster and four times less expensive” than the alternatives.¹⁶ The difficulties of coming up with an alternative are demonstrated by the fact that it took Norway and Iceland 13 years to reach extradition arrangements with the EU and they have yet to enter into force. Moreover, Iceland and Norway were able to negotiate this agreement largely because they are members of the Schengen area, so it is in the interests of most EU Member States to reach such an agreement with them. The UK is not a member of Schengen and has said it will not join.

A key aspect of the previous extradition arrangements in Europe was their politicised nature. In each country, there was invariably a requirement for a government Minister to make the final decision as to whether a citizen could be extradited to a third country. In addition, it was possible to refuse extradition on the grounds that the offence was political. Both of these obstacles resulted in the UK being unable to extradite people accused of the most serious

¹³ Bill Hughes, former Director-General of the Serious Organised Crime Agency (SOCA), to the House of Lords European Union Committee, *supra* n. 2, pp. 17-18

¹⁴ *Ibid.*, p. 18, para 56

¹⁵ Alison Saunders, Director of Public Prosecutions, Crown Prosecution Service to the House of Lords European Union Committee, *ibid.*, pp. 22-23, para 76

¹⁶ *Ibid.*, p. 37, para 136

offences, including terrorism. The prospect of extradition once again being politicised is a particular danger in the UK-Ireland relationship. Working through the EU, including the use of the European Arrest Warrant, has normalised the criminal justice relationship between Britain and Ireland. Some countries did not allow their citizens to be extradited at all under the 1959 Convention which the EAW effectively replaced; Germany has adopted this position in relation to the EU extradition agreement with Iceland and Norway.¹⁷

Common concerns

In all circumstances, we will have to address:

- The role of the Court of Justice – the Prime Minister has said that the UK must not be subject to the Court's jurisdiction in future. But that is difficult to reconcile that with the wish to remain part of EU JHA policies; a possible way forward would be an agreement by the UK to ensure that its law respected the same standards as EU law (as Iceland and Norway have undertaken to do over extradition) but as David Anderson QC has put it, "it is likely to mean a high degree of ECJ influence over the development of our own law";
- Data protection – this as a particularly difficult area because the UK is seen as less supportive of data protection and civil liberties than other Member States; such issues delayed the EU-Canada Passenger Name Recognition agreement (which might not have got through the EU but for British support); Professor Steve Peers has suggested that this "is going to be the single biggest difficulty" in negotiations on JHA policy; the bottom line is that the UK needs a data adequacy designation before the EU will share data with us, this will have to show that our data protection laws offer equivalent levels of protection to EU law;¹⁸
- Diminution of effectiveness – British police will lose real time access to the EU databases such as Schengen II; as a third country Norway has to ask Europol to do the search for it; the UK has played a central role in transforming Europol under its current director from an agency that "looked more like a talking shop into a structured, pan-European organisation" (David Anderson QC) but it will not play any role in Europol's direction or management in future.¹⁹

One further difficulty will be to ensure that new JHA measures adopted after Brexit will permit the UK to join them if it wishes to do so with the minimum of delay and complication.

Conclusion

The UK's ambitions for this part of the Brexit negotiation are clear and ambitious; the Government wants to retain the closest possible security collaboration with the E27. If that is to be possible then the UK is going to have to address some difficult questions, including but not limited to, the jurisdiction of the Court of Justice, the budgetary issues and the need to maintain data protection to EU standards. Failure to reach agreement in this policy area would leave the UK unable to extradite wanted persons from other countries, without access to vital intelligence for our security and isolated from the rest of European JHA co-operation.

¹⁷ David Anderson QC to the House of Commons Exiting the European Union Committee, *supra* n. 9, Q1142, p. 6

¹⁸ *Ibid.*, Q1140, p. 5; Steve Peers to the House of Commons European Union Committee, *supra* n. 9, Q1155, pp. 13-14

¹⁹ David Armond, *supra* n. 9, *op. cit.*, Q1151, p. 11

It might also find its relationship with non-EU countries damaged because the loss of its influence on JHA policy and practice. This is one area of the negotiation where there is more at stake for the UK than many in Britain realise. But it is also one where the mutual interest to the UK and the 27 other Member States of a close and effective working relationship post-Brexit is most obvious. In the letter to the President of the European Council triggering Article 50, the Prime Minister emphasised this mutual interest in reaching agreement.

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Senior European Experts

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