



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

**Brexit and the Implications  
for Justice Co-operation**

**October 2019**

## 1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the Commission) and the Irish Human Rights and Equality Commission (IHREC), working together as the Joint Committee established under the Belfast (Good Friday) Agreement 1998, have been working to promote the strongest possible human rights and equality protections in the context of the United Kingdom's decision in June 2016, to leave the European Union.
- 1.2 In March 2018, the Joint Committee produced a policy statement on Brexit<sup>1</sup> informed by an academic discussion paper<sup>2</sup> commissioned by the Joint Committee and published at the same time. The policy statement identified justice co-operation as a key issue post-withdrawal and recommended that any future cooperative justice arrangements after Brexit, comply with the UK Government's commitment to no diminution of human rights and equality, as a result of Brexit.
- 1.3 New research commissioned by the Joint Committee, "Evolving Justice Arrangements Post-Brexit", has identified a range of areas of justice and policing co-operation, placed in **jeopardy** by Brexit.<sup>3</sup> Co-operation in this field has particular **significance given the land-border between Northern Ireland and Ireland** and increased **North-South policing and justice co-operation**, flowing from the 1998 Agreement.
- 1.4 The Commission is mindful of the **important human rights dimension to cross-border co-operation**, in terms of seeking to protect victims of crime by making it as difficult as possible for human traffickers and others to exploit the border or escape arrest.
- 1.5 In the current absence of parliamentary consensus on the Withdrawal Agreement or any alternative approach, the possibility of the UK exiting the EU without a deal cannot be discounted. **Absent the proposed transition period** under the Withdrawal Agreement, a 'no-deal' exit would result in a **gap between EU exit and new arrangements** being agreed on justice and security, **during which co-operation could be significantly hampered**.
- 1.6 The benefits of maximum co-operation are underscored by the research. Having reviewed the research and analysis of interviews with experts and practitioners in the field, **the Commission is persuaded that anything short of full continuing participation in all current tools and**

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1 [https://www.ihrec.ie/app/uploads/2018/03/Joint-Committee-IHREC-NIHRC-Brexit-Policy-Statement\\_March-2018.pdf](https://www.ihrec.ie/app/uploads/2018/03/Joint-Committee-IHREC-NIHRC-Brexit-Policy-Statement_March-2018.pdf).

2 C Murray, A O'Donoghue, B Warwick 'Discussion Paper on Brexit' (NIHRC, IHREC, 2018)

3 Amanda Kramer, Rachael Dickson and Anni Pues, 'Evolving Justice Arrangements Post-Brexit' (NIHRC, 2019)

**mechanisms will impair efficiency, effectiveness and human rights protection.** What this means in practice is that it will become **more difficult to detect, deter and tackle cross-border crime** and make it more difficult to enforce the law against criminals who have left Northern Ireland and gone elsewhere in the EU, as well as the reverse.

- 1.7 This policy statement draws heavily on the research paper and sets out the views of the Commission. After an overview of current UK-EU co-operation, it looks at the stated negotiating positions or 'red lines' of the UK and the EU, before turning to their implications for ongoing participation in key EU tools and measures, fall-back options and cross-cutting issues that emerge. The paper concludes with recommendations aimed at maximising the opportunities for continuing co-operation.

## 2.0 Current participation in EU tools and measures

- 2.1 EU measures and tools facilitate co-operation in relation to information-sharing, policing, prosecution and judicial co-operation.
- 2.2 The UK participates in the following four main EU measures relating to information-sharing:
- **Schengen Information System (SIS II)** which can create alerts for the movement of persons or objects of interest, as they cross EU borders;
  - **European Criminal Records Information System (ECRIS)** which provides for sharing of criminal record data, including the translation of offences between Member States;
  - **Europol Information system (EIS)**, a criminal intelligence and information database holding information on serious international crimes, suspected and convicted persons, criminal structures, offences and the means used to commit them; and
  - **Passenger Name Records (PNR)** which provides for the sharing of travel information for prevention, detection, investigation and prosecution of terrorist offences and serious crime.
- 2.3 The UK has made preparations to participate in a fifth information-sharing measure, Prüm, which will allow the sharing of biometric data including finger-prints, and wishes to avail of inter-operability (so that a single query could check all systems).
- 2.4 In terms of policing, prosecutorial and judicial co-operation, the key tools, measures and networks include:

- **European Arrest Warrant**, which allows for faster and simpler surrender procedures and an end to political involvement in extradition procedures
- **European Supervision Order** (sometimes referred to as 'Eurobail'), providing for mutual recognition of supervision measures and an alternative to provisional detention
- **European Protection Order**, allowing court protection orders issued in one Member State to be enforced in another
- **European Investigation Order**, a mutual recognition framework for judicial decisions, simplifying and accelerating cross-border criminal investigations
- **Convention on mutual legal assistance in criminal matters** between Member States
- **Europol**, the European Police Office which offers support for law enforcement operations on the ground and provides a hub for information on criminal activities and a centre of law enforcement expertise
- **EUROJUST**, which supports judicial coordination and co-operation between national authorities in combating serious organised crime affecting more than one EU country
- **European Judicial Network**, a network of national contact points for the facilitation of judicial co-operation in criminal matters
- **Victims' Rights Directive**, which establishes minimum standards on the rights, support and protection of victims of crime, including access to justice.

2.5 These tools and measures are supported by a range of legislation and Framework Decisions on the application of the principle of mutual recognition in relation to judgements, penalties or confiscation orders, for example.<sup>4</sup>

### 3.0 UK and EU negotiating positions

3.1 To date, the UK's 'red lines' in relation to the negotiations have involved rejection of both the Charter of Fundamental Rights of the EU (the Charter)<sup>5</sup> and the jurisdiction of the Court of Justice of the EU (CJEU)<sup>6</sup>, while the EU's position has been firm on the importance of fundamental rights and independent judicial oversight of co-operation.<sup>7</sup> This begs

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<sup>4</sup> n3, page 21

<sup>5</sup> Excluded from 'retained EU law' under European Union (Withdrawal) Act 2018, section 5(4)

<sup>6</sup> White Paper on the Future Relationship between the UK and the EU, 12 July 2018, page 97

<sup>7</sup> Guidelines from the European Council (Article 50) on the Framework for the Future EU-UK Relationship, paragraph 13

questions about the potential limits of future co-operation and the alternative approaches that might be required if continuing participation in EU mechanisms is not possible.

- 3.2 In March 2018, the EU signalled in its Negotiating Guidelines, its “determination to have as close as possible a partnership with the UK”<sup>8</sup>, while cautioning:

*At the same time, the European Council has to **take into account the repeatedly stated positions of the UK, which limit the depth of such a future partnership***<sup>9</sup> [emphasis added]

- 3.3 The Guidelines went on to elaborate on the European Council’s aspirations, subject to agreement on safeguards:

*law enforcement and judicial cooperation in criminal matters should constitute an important element of the future EU-UK relationship ... taking into account that the UK will be a third country outside Schengen. The future partnership should cover effective exchanges of information, support for operational cooperation between law enforcement authorities and judicial cooperation in criminal matters. **Strong safeguards will need to be established that ensure full respect of fundamental rights and effective enforcement and dispute settlement mechanisms;**...*<sup>10</sup> [emphasis added]

- 3.4 The UK Government confirmed a corresponding wish to maintain and develop existing justice and security co-operation. A White Paper published in July 2018 proposed a new security partnership based on:

*“**maintaining existing operational capabilities**...including the ability for law enforcement agencies to share critical data and information and practical co-operation to investigate serious criminality and terrorism – cooperating on the basis of existing tools and measures” and “**participation by the UK in key agencies, including Europol and Eurojust**”.*<sup>11</sup> [emphasis added]

- 3.5 The White Paper also committed the UK to membership of the EHCR and recognised the role of the CJEU in interpreting EU law.<sup>12</sup>

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8 Guidelines from the European Council (Article 50) on the Framework for the Future EU-UK Relationship, paragraph 3

9 Guidelines from the European Council (Article 50) on the Framework for the Future EU-UK Relationship, paragraph 4

10 Guidelines from the European Council (Article 50) on the Framework for the Future EU-UK Relationship, paragraph 13

11 The Future Relationship between the United Kingdom & the European Union, HMG, July 2018, CM9593, pg 10

12 White Paper on the Future Relationship between the UK and the EU, 12 July 2018, section 2.3, para. 19 and section 4.5.1, para. 42.

3.6 The EU responded positively to the commitments within the White Paper, on data protection and membership of the ECHR, its chief negotiator, Michel Barnier, stating:

*These are important safeguards. They enlarge the possibilities of what we can do together on internal security, in particular on data exchange.*<sup>13</sup>

3.7 The progress made and the outstanding challenges, were reflected in the UK EU Political Declaration on the Future Relationship, which remains the most up-to-date joint statement on the subject, though not ratified by the UK Parliament.<sup>14</sup>

3.8 While the Political Declaration recognises that the CJEU is the sole arbiter on the interpretation of EU law, the document does not otherwise anticipate the UK falling within its jurisdiction. It states that the future relationship should incorporate “the UK’s continued commitment to respect the framework of the European Convention on Human Rights”<sup>15</sup> but does not commit the UK to retention of the EU Charter.

3.9 These decisions appear to have informed the ambition of the document overall. Whereas there is specific mention of certain specific data-sharing measures e.g. Prüm and a commitment to “work together to identify the terms for the United Kingdom’s cooperation via Europol and Eurojust”, the document is silent on key tools such as the European Arrest Warrant and SIS II.

## **4.0 Key measures, precedent for third-country participation, fall-back options & implications**

4.1 Researchers interviewed a range of experts and practitioners and considered key measures and tools to which the UK is party, the benefits of the measures and any precedent for third-country participation. They found that in some areas there is no precedent for third-party participation and in others, partial access is granted to Schengen countries and may not, therefore, be granted to the UK. Alternative or fall-back options are also considered – where such options exist – and the potential risks associated with reverting to previous or informal arrangements.

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<sup>13</sup> Statement by Michel Barnier at the press conference following his meeting with Dominic Raab, UK Secretary of State for Exiting the EU, 26 July 2018

<sup>14</sup> Draft Political Declaration setting out the framework for the future relationship between the EU & the UK, 22/11/18

<sup>15</sup> Ibid. at paragraph 7

## Information-sharing – EU databases

4.2 Subject to strong human rights safeguards, the international sharing of information in relation to crime, can help protect people from human rights abuses and ensure that justice is not unduly delayed for suspects or victims of crime.

4.3 Access to EU databases hinges on member state compliance with data protection rules and human rights standards, in particular, the Charter. In the UK EU Political Declaration on the Future Relationship, the parties state that they are “committed to ensuring a high level of personal data protection”<sup>16</sup> to facilitate data-flows between them and that they intend to make arrangements for co-operation between their regulators, to that end. The document references two of the five databases above, stating that the parties “should establish reciprocal arrangements for timely, effective and efficient exchanges of Passenger Name Record (PNR) data...DNA, fingerprints and vehicle registration data (Prüm)”.<sup>17</sup>

*“...ECRIS would return a criminal record from a Member State for that person...within ten days. Without this system, an approximate timeline to receive this information is sixty days.”*

**Interview with justice and security expert, 9 April 2019**

4.4 Absence of reference to SIS II, ECRIS and EIS are consistent with the EU’s expressed position that:

***based on the UK's positions, our cooperation will need to be organised differently. It will rely on effective and reciprocal exchanges, but not on access to EU-only or Schengen-only databases.***<sup>18</sup> [Emphasis added.]

4.5 Our research highlights limited precedent for third-country access or effective alternative databases. **No non-EU, non-Schengen, country has any form of access to SIS II**, for example, loss of access to which would be ‘calamitous’ according the House of Commons Home Affairs Committee.<sup>19</sup> A highly valued system, updated in live time and available directly to officers on patrol, SIS II was accessed 603 million times by UK officers in 2018.<sup>20</sup> Access to data held under EIS and ECRIS may be negotiable, subject to restrictions and also to longer timelines. Access to

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16 Ibid. paragraph 8

17 n12, paragraph 88

18 Speech by Michel Barnier at the European Union Agency for Fundamental Rights, Vienna, 19 June 2018

19 UK-EU Security Co-operation after Brexit: Follow-up report, Home Affairs Committee, July 2018

20 SIS II 2018 Statistics Factsheet, available here: <https://www.eulisa.europa.eu/Publications/Reports/SIS%202018%20statistics.pdf>

special category data, such as prior sex offences, would have to be considered in terms of Charter Article 8 standards on privacy.

- 4.6 To maximise the UK's chances of securing access to EU networks of information, it has sought a data-protection adequacy decision from the EU. If granted, it would be subject to periodic review and any co-operation depending upon it could include a 'guillotine clause' to stop co-operation if UK standards fall below requirements. The periodic reviews could create opportunities to enhance the protection of privacy in the UK if, for example, it facilitated debate on surveillance measures currently exempt from EU data protection standards, due to UK reliance on a national security exception.

### Extradition

- 4.7 The UK is one of the most active users of the **European Arrest Warrant (EAW)**<sup>21</sup>, which has led to **higher numbers of successful extraditions, dropped average extradition times to 48 days, and decreased four-fold the cost of extradition** since becoming operational in 2004. It has also led to **increased human rights protections** for individuals facing extradition, due mainly to interventions by the CJEU, on violations of the Charter. Should the UK leave the EU without any arrangements in place, it would have to rely on the **1957 Council of Europe Convention on Extradition** which allows political input to decision-making, is not subject to the same time limits and does not require participating countries to extradite their own citizens.

*“For the PSNI, the EAW is particularly critical in our continued collaboration with An Garda Síochána and ensuring that the border cannot be used by criminals to evade prosecution.”*

PSNI Chief Constable, George Hamilton, 20 June 2018, Belfast Telegraph

- 4.8 There is **no precedent for third country participation in the EAW**; indications are that it is likely the UK will have to negotiate a new arrangement. The Political Declaration states:

*the Parties should establish effective arrangements based on streamlined procedures and time limits enabling the United Kingdom and Member States to surrender suspected and convicted persons efficiently and expeditiously, with the possibilities to waive the requirement of double criminality, and to determine the*



*applicability of these arrangements to own nationals and for political offences.*<sup>22</sup>

- 4.9 Extradition under the EAW has been a feature of improved North-South and UK-Ireland co-operation facilitating progress on a matter of historic political difficulty and sensitivity. A return to previous, less effective arrangements, which have not been developed in line with modern human rights standards, poses a particular problem in that context.

### **Policing and Prosecutorial Co-operation**

- 4.10 The extent of future UK participation in EU policing and prosecutorial measures is uncertain. In the **Political Declaration**, the parties state they will “**work together to identify the terms for the United Kingdom’s cooperation via Europol and Eurojust**”<sup>23</sup>. The document goes on to raise the potential for **practical co-operation including joint investigation teams** on the basis of what is “**appropriate to the UK’s future status**”.<sup>24</sup>
- 4.11 In addition to information-exchange, EU measures such as the European Investigation Order, the European Supervision Order and the European Protection Order, enable police and law enforcement agencies to assist each other with investigations; obtain evidence from one another; increase speed and efficiency; and offer enhanced support and protection for victims and witnesses of crime.
- 4.12 Though the **European Investigation Order** (EIO) has only been in operation since February 2018, our research found there has already been recognition of the benefits as compared with the International Letter of Request (ILOR) system in terms of speed, introducing mutual recognition of judicial decisions and specified timeframes<sup>25</sup>. **No non-EU countries participate in the EIO**. Ireland does not participate in the EIO so co-operation takes place via the ILOR system.
- 4.13 The **European Supervision Order** (ESO) deals with pre-trial detention, enabling an accused person to remain in their home state, under supervision, to await trial elsewhere. The ESO is therefore seen as a measure that contributes to fairer criminal proceedings, addressing some of the concerns about the disproportionate use of the EAW for minor offences. **No fall-back mechanism is available** for the ESO and there is

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22 n12, paragraph 89

23 n12, paragraph 88

24 n12, paragraph 90

25 n3, page 45

no precedent for third-country involvement. Ireland has not opted into this measure so UK participation will not affect North-South co-operation.

- 4.14 Under the **European Protection Order (EPO)**, victims of crime who are granted protection from an aggressor in one Member State can benefit from similar protection if they travel to another Member State, including the power for police in other countries to arrest an individual in breach. Again, **no non-EU states participate in the EPO**. The UK could, however, decide to continue to recognise EPOs issued elsewhere, though negotiation would be required to ensure recognition of any domestic orders issued in the UK, or to agree a reciprocal power of arrest. Ireland has not opted into the EPO.
- 4.15 Co-operation between agencies to obtain evidence, pass information, process fines etc., is facilitated by judicial decisions and networks including **Eurojust** and the **European Judicial Network (EJN)**, **mutual legal assistance** and **mutual recognition** policies. A summary of key measures, UK and Irish participation and any precedent for third country participation, is included as Appendix 2.

## 5.0 Cross-cutting issues, oversight and accountability

### North-South co-operation

- 5.1 As the Joint Committee found in its earlier research<sup>26</sup>, **common EU membership** has provided a **supportive framework** for devolved institutions in Northern Ireland, North-South relationships and UK-Irish relationships. Equality provisions of the 1998 Agreement, for example, have been underpinned by EU directives. Free movement rights under the CTA have been supplemented by EEA free movement rights. Similarly, the Joint Committee's research found amongst practitioners and experts, **high levels of support for, and reliance on, EU measures to support North-South co-operation on justice and policing, under the auspices of the North/South Intergovernmental Agreement on Co-operation on Criminal Justice Matters<sup>27</sup>**, including the **Cross Border Policing Strategy<sup>28</sup>** and the **Joint Agency Task Force (JATF)** on organised crime<sup>29</sup>. Many EU measures cannot be replicated on a bilateral UK-Ireland basis, given Ireland's commitments as an EU Member State.

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26 [https://www.ihrec.ie/app/uploads/2018/03/Joint-Committee-IHREC-NIHRC-Brexit-Policy-Statement\\_March-2018.pdf](https://www.ihrec.ie/app/uploads/2018/03/Joint-Committee-IHREC-NIHRC-Brexit-Policy-Statement_March-2018.pdf)

27 Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland on Co-operation on Criminal Justice Matters See also <https://www.justice-ni.gov.uk/topics/justice-and-law/north-south-and-eu-cooperation> and [http://www.justice.ie/en/JELR/Pages/criminal\\_justice\\_co-operation](http://www.justice.ie/en/JELR/Pages/criminal_justice_co-operation)

28 The Cross Border Policing Strategy 2016 covers areas including Operations; Rural Policing; Community Relations; Intelligence Sharing; ICT; Service Improvement; and Emergency Planning.

29 Established under section A 3.2 of A Fresh Start – The Stormont Agreement and Implementation Plan, 17/11/2015

While there is evidence of very positive relationships between agencies and bodies either side of the border, this cannot substitute for, or address, for example, UK exclusion from EU databases. As one expert put it, no matter how good the relationships, not even the most senior officials “can break the law to help each other”. This does not impact all measures since Ireland has not opted into some of the measures in which the UK participates.

- 5.2 The research findings are confirmed by the UK EU North/South Co-operation mapping exercise. The UK Government released a document in June identifying 142 areas of cross-border co-operation impacted by Brexit and acknowledging the degree to which certain areas are underpinned partially, or fully, by EU law/policy. These include the Joint Agency Taskforce on Organised Crime, and cross-border police co-operation, specifically “liaison, training, disaster planning, joint investigations and communications”.<sup>30</sup> An EU report on the same exercise, also published in June, further highlights civil judicial co-operation facilitated by EU instruments:

*“...there are a lot of bilateral measures but they all cite EU law as a basis.”*

**Interview with justice and security expert, 9 April 2019**

*including in the area of family law, which facilitate payment of maintenance, recognition of divorces, access custody decisions by enabling the mutual recognition and enforcement of civil judgements across borders*<sup>31</sup>

See Appendix 3 for a list of the justice and security measures identified.

### **The Charter of Fundamental Rights of the EU**

- 5.3 Adopted by the EU on a non-binding basis in 2000, the Charter of Fundamental Rights of the EU became law under the Treaty of Lisbon in 2009 and comprises **54 articles, including socio-economic rights as well as civil and political rights**. It has the **same legal status as the Treaties** and binds the EU institutions at all times but only applies to Member States when they are acting within the scope of EU law. It draws into one document the foundational rights and principles of the EU which are set out in the Treaties, recognised in case law of the CJEU, or found in the common constitutional traditions and international obligations of member states.

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<sup>30</sup> Published as correspondence received by the UK Parliament’s Exiting the EU Committee

<sup>31</sup> Mapping of North/South Co-operation, June 2019, text available here: [https://ec.europa.eu/commission/sites/beta-political/files/mapping\\_of\\_north-south\\_cooperation\\_0.pdf](https://ec.europa.eu/commission/sites/beta-political/files/mapping_of_north-south_cooperation_0.pdf)

- 5.4 **The Charter builds on the ECHR, but goes further, including, for example, a free-standing right to equality** and enhanced provisions on the rights of the child and data protection. The UK High Court has noted that Article 8 of the Charter “clearly goes further, is more specific, and has no counterpart” in other privacy laws.<sup>32</sup>
- 5.5 The Commission, like many others<sup>33</sup>, takes the view that **failure to retain the Charter will result in a loss of protection in terms of substantive rights, direct enforceability and remedies**, albeit that rights only apply in areas of EU competence. In concluding its “Rights after Brexit” inquiry, the House of Lords EU Justice Subcommittee has written to the Secretary of State raising concerns that failure to retain the Charter would result in a diminution of rights and stating that:
- if substantive rights were reduced after Brexit, we question whether the United Kingdom would be able to continue to participate in certain programmes with the EU, particularly those relating to data exchange and extradition.*<sup>34</sup>
- 5.6 It is clear from CJEU jurisprudence referenced in the next section, that Charter rights increasingly underpin decisions around co-operation.

### **The Court of Justice of the European Union (CJEU)**

- 5.7 Our research found “**broad consensus that the UK’s current position on the removal of (future) oversight and adjudication by the CJEU will likely be a sticking point for the UK-EU security and justice arrangements**”.<sup>35</sup>
- 5.8 The House of Lords EU Committee concluded, for example, that:
- it is conceivable that it could be a requirement of any future UK-EU extradition agreement for the UK formally to take account of relevant CJEU case law that develops post-Brexit.*<sup>36</sup>
- 5.9 The Court of Justice of the EU was established in 1952, to “ensure that in the interpretation and application of the Treaties, the law is observed”.<sup>37</sup> The CJEU plays a key role in ensuring that tools and measures relating to justice co-operation are human rights compliant in design and operation.

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32 Davis v. Secretary of State for the Home Department, CO/3665/2014, CO/3667/2014, CO/3794/2014, 17/07/15

33 This view is shared, for example, by independent legal opinion commissioned by the Equality and Human Rights Commission. See also the House of Lords EU Justice Subcommittee letter to the Secretary of State, 25 June 2019

34 House of Lords EU Justice Subcommittee letter to the Secretary of State, 25 June 2019

35 n3, page 84

36 ‘Brexit: judicial oversight of the European Arrest Warrant’, House of Lords EU Committee, July 2017 paragraph 40

37 Article 19(1) Treaty on the European Union

- 5.10 Our research highlights two examples in relation to extradition, where the **CJEU has increasingly emphasised fundamental rights**: Lanigan<sup>38</sup>, in which it was held that the EAW must be interpreted in light of the Charter; and Căldăraru<sup>39</sup>, in which the Court stated that EAWs could be postponed or abandoned if a risk of fundamental rights violations was established. In response to referral from the Irish Supreme Court in RO, the CJEU has also held recently that in the absence of substantial grounds to believe a person is at risk of being deprived of their rights under EU law, an EAW must be executed while the UK remains in the EU. It also held that it will remain the task of judicial authorities to examine whether there are substantial grounds for such a belief once the UK has left the EU.<sup>40</sup>
- 5.11 **Whatever co-operation and access to EU mechanisms is negotiated, a mechanism for oversight will be required.** The Commission wishes to ensure that if the UK is outside the CJEU's jurisdiction, human rights are enforceable by another means. Our research concludes that, in respect of justice co-operation, given the types of decisions to be taken e.g. enforcement of criminal judgements, and the impact of decisions on individuals, a court is the only suitable oversight vehicle. Retention of the jurisdiction of the CJEU in relation to justice co-operation, may be the most straightforward approach. If not, a new court would be required.

### **Mutual recognition**

- 5.12 Mutual recognition arrangements are gradually replacing mutual legal assistance, **enabling faster and higher level co-operation**.<sup>41</sup> This has been **made possible by common standards and protections**. All EU tools and measures must be compatible with the Charter as well as the ECHR. They are also subject, as discussed above, to the independent judicial oversight of the CJEU. Removal of underpinning guarantees therefore poses a risk; as our research found, for example:

*Member States are unlikely to extradite their nationals to a country in which their human rights protections are not a on a par with those provided throughout the EU.*<sup>42</sup>

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38 Case C-237/15PPU, 16 July 2015

39 Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru, 5 April 2016

40 Case C-327/18 PPU, Minister for Justice and Equality v RO, Preliminary Opinion, 19 September 2018 – see ruling and para. 49. See also, Minister for Justice v O'Connor [2018] IESC 3.

41 See European Commission webpages on judicial co-operation and mutual legal assistance

42 n3, page 94

5.13 The EU has made clear the limitations that flow from failure to retain the EU Charter or to allow for the jurisdiction of the CJEU as the judicial oversight mechanism for co-operation. Mr Barnier has referred to the **consequences of leaving the EU "ecosystem" based on common rules and safeguards, shared decisions, joint supervision and implementation and a common Court of Justice**. This led him to conclude:

*To negotiate an ambitious new relationship with the UK, which we all want, we need more realism on what is possible and what is not when a country is outside of the EU's area of justice, freedom and security and outside of Schengen.*<sup>43</sup>

### **Inter-connectedness of EU measures**

5.14 EU measures on justice co-operation are inter-connected; **to focus on gaining access to particular measures or databases overlooks the degree to which each may be less effective, or even misused, in the absence of related tools**. If ongoing UK participation in the European Arrest Warrant were secured, for example, but not participation in the European Supervision Order or European Investigation Order, a more severe measure could be over-used.

5.15 The study has further identified linkages between justice co-operation and areas where agreement has been reached – e.g. Common Travel Area (CTA): if people can move freely within the CTA, that creates a policing and justice challenge to mitigate the risk of the border being exploited by those seeking to evade responsibility for crime or human rights abuses.

### **Delay and uncertainty**

5.16 **EU measures have speeded up and streamlined co-operation; alternatives will result in delay and uncertainty** for those accused and for victims and witnesses of crime. This connects to the issue of mutual recognition mentioned above. Currently, if someone commits a serious crime in Northern Ireland, then moves to Dublin, the PSNI can go to a local court to seek a European Arrest Warrant which will be recognised in Dublin rather than having to go through a more lengthy international process. Our research points out that delay and uncertainty **could result in a reduction in public confidence**, again something particularly unhelpful in the Northern Ireland context.

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<sup>43</sup> Speech by Michel Barnier at the EU Agency for Fundamental Rights, Vienna, 18 June 2018

## Over-lapping competencies

5.17 Added to the complexity of North-South co-operation on justice and policing, is the fact that operational aspects of justice and policing issues are devolved in Northern Ireland, whereas national security and counter-terrorism are not. Given that the operation of Northern Ireland institutions and agencies will be directly impacted by the future UK EU justice and security relationship, the **devolved institutions should be involved in, and contribute to, the development of proposals**. This is in line with the principles of co-operation, consultation and communication set out in the Memorandum of Understanding between the UK Government and devolved Ministers, agreed in October 2013.<sup>44</sup>

## No diminution and justice

5.18 The UK Government made a public commitment in December 2017 to ensuring that “**no diminution of rights is caused by its departure from the European Union**”.<sup>45</sup> The Draft Withdrawal Agreement reflected this in Article 4 of the Ireland/Northern Ireland Protocol, as the rights included the Rights, Safeguards and Equality of Opportunity section of the Belfast Good Friday Agreement 1998, insofar as those rights or safeguards are protected by virtue of EU membership.<sup>46</sup>

5.19 Currently, **citizens in Northern Ireland benefit from rights under the EU Charter in areas where EU law is being applied** – e.g. under EU justice and policing co-operation measures; the loss of the Charter could result in a diminution of rights in the context of the same or similar co-operation ongoing.

5.20 In some areas, **rights developed within the EU system are unprecedented e.g. the Victims directive**<sup>47</sup> – a good example of a measure which underpins a relevant commitment in the 1998 Agreement and should therefore be protected under the no diminution commitment.

5.21 Irrespective of the future of the Draft Withdrawal Agreement, the Commission believes the standing **political commitment of December 2017, to no diminution of rights, provides a basis for bespoke legal solutions**, including in the area of justice and security.

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44 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/316157/MoU\\_between\\_the\\_UK\\_and\\_the\\_Devolved\\_Administrations.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf)

45 Joint EU-UK Report on Phase 1 of Negotiations, 8 December 2017, paragraph 52

46 Article 4, Protocol on Ireland/Northern Ireland, Draft Withdrawal Agreement, 14 November 2018

47 2012/29/EU

## 6.0 Conclusions

Based on our research, the Commission has concluded that:

- **Anything short of full participation in all EU tools and measures will impair co-operation, efficiency and human rights and have significant practical impact** in terms of preventing, detecting and enforcing the law in relation to cross-border crime and providing proper oversight and accountability.
- The UK Government's stated '**red lines**' in relation to withdrawing from the EU Charter of Fundamental Rights and the jurisdiction of the CJEU, are **likely to limit opportunities for co-operation**, therefore its commitments on human rights and independent judicial oversight will be key to providing a basis for new arrangements.
- The **human rights** protections, developed over time within the **EU system**, including the centrally important EU Charter, are **not matched under the limited alternative mechanisms available**.
- Flowing from the Belfast (Good Friday) Agreement 1998, **North-South policing and justice co-operation, is highly dependent upon EU measures and access to EU-wide tools**.
- **Leaving the EU without a deal** would mean no transition period and create **gaps in access to EU tools and measures for co-operation** which could be problematic, not least in terms of **human rights protection** and **North-South co-operation**.

## 7.0 Recommendations

To ensure that the '**no diminution of rights**' commitment is honoured in all scenarios, including a 'no deal' exit from the EU, the Commission makes the following key recommendations:

- **The UK should seek to negotiate maximum co-operation with the EU in justice and policing.**
- In order to achieve **maximum co-operation**, the UK's commitment to the **ECHR** must be clear in any future agreement; the Commission also recommends retention of the **EU Charter but**, in the absence such a commitment, the UK should **legislate to ensure equivalent domestic protections** and confirm its commitment to international best practice, by **incorporating international conventions** to which it is signatory.
- **Independent international of oversight of such co-operation is required**, either by remaining within CJEU jurisdiction or by establishing a new court with equivalent powers to those available to the CJEU.

See Appendix 1 for a full list of recommendations arising from the research.





## **Appendix 1 – Recommendations from “Evolving Justice Arrangements Post-Brexit”<sup>48</sup>**

1. Because of the interconnectedness of EU measures in the area of justice and security, it is strongly recommended that any future arrangement should aim to be as comprehensive as possible and cover judicial and police cooperation as well as any data sharing arrangements. All experts interviewed for this project highlighted that maintaining access to all of the current EU justice and security arrangements would be ideal. In order to secure the effectiveness of law enforcement systems, it is imperative to retain as many of the existing tools as possible through a future partnership agreement.
2. The UK and the EU should secure continued policing and prosecutorial cooperation. In particular, it is recommended the UK retains access to Europol and Eurojust cooperation frameworks to ensure that operational capabilities and collaboration in the area of policing and criminal justice continue. However, it is noted that third-country access options may be limited and in this case, the UK should work to minimise disruption.
3. The UK and the EU should secure the continuation of data-sharing arrangements. Access to tools such as SIS II and ECRIS facilitate speedy information sharing and retrieval, whereas a loss of these measures would result in delays in proceedings. To that end, joint data protection standards are pivotal to facilitate mutual trust with EU Member States and ensure protection for citizens.
4. The approach must encompass a strong commitment to the protection of human rights. The foundation of mutual trust in the legal process is only justified if the legal processes encompass a commitment to the rule of law, the protection of human rights and, as part of this, a commitment to data protection.
5. Any evolving justice and police cooperation system requires an independent judicial oversight mechanism with adjudicative powers to ensure effective protection and enforceability of human rights. This could be secured through a new court system, or – simpler, more cost effective, and avoiding any danger of disadvantages to UK citizens – the UK should retain access to the Court of Justice of the European Union (CJEU).
6. The UK’s commitment to the European Convention on Human Rights should be built into any future justice and security agreement. This will help to ensure that there is no loss of human rights protections and safeguard trust with EU Member States. The UK should also reaffirm its commitment to Council of Europe legal instruments on cooperation in criminal law matters and efficiency of justice.
7. The UK should retain the Charter of Fundamental Rights of the European Union. If the UK does not retain the Charter, it must make an effort to update domestic protections to provide equivalent protections and make them accessible to the public.

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<sup>48</sup> Amanda Kramer, Rachael Dickson and Anni Pues, ‘Evolving Justice Arrangements Post-Brexit’ (NIHRC, 2019)

Additionally, the UK should retain commitments to human rights contained in secondary EU law, such as the Victim's Rights Directive, European Supervision Orders, and European Protection orders to indicate its commitment to rights protection.

8. An independently appointed panel of human rights experts should be tasked with completing *ex ante* human rights impact assessments. These panels must be comprised of equal representation from each of the jurisdictions making up the UK. It is suggested that they be composed, for example, of representatives from existing human rights bodies, such as National Human Rights Institutions. Further, due to the interconnectedness of justice and security measures, these assessments must be undertaken for each element of future arrangements. In the event that human rights issues are discovered, the agreements should be returned to negotiators to be addressed.

9. A human rights ground for refusal must be built into the future UK-EU extradition arrangement. The negotiation of a future extradition arrangement presents an opportunity for the UK and EU to better protect the human rights of individuals facing extradition. Building in a human rights bar would require the UK and the EU Member States to refuse extradition if it would be incompatible with an individual's Convention Rights (something which exists domestically in the UK, but is not part of the EAW).

10. The UK should commit to implement any progressive changes to human rights law that come out of the EU in the future. This will help to ensure continued cooperation and bolster the environment of mutual trust.

11. The future UK-EU justice and security arrangement should be forward looking. This means that the UK should keep pace with legal developments in the EU and build into the agreement the opportunity to opt-in to future justice and security mechanisms.

12. Any treaty on future cooperation in this area must refer to both justice and security in its title. This will avoid one element being subsumed by another.

13. It is essential that any future negotiations involving human rights issues are conducted in close cooperation between the UK Government and the devolved administrations in the UK. This will help to ensure respect for overlapping competencies that exist in the complex constitutional arrangements within the UK.

## Appendix 2: Key instruments, opt-in/out status & third-country participation

Instrument	Functions	UK	Ireland	Third-country participation
<b>Information-sharing</b>				
<b>Schengen Information System (SIS II)</b>	Security and border management – creates alerts in relation to cross-border movement of person or object of interest.	IN Only law enforcement cooperation (since 2015)	OUT	<b>Iceland, Norway, Lichtenstein and Switzerland</b> have full access to SISII (inc border control and vehicle registration parts as Schengen Associates). No non-EU, non-Schengen country has any form of access.
<b>ECRIS</b> (application of Framework Decision 2009/315/JHA)	Sharing of criminal record data (inc. translation of offences between Member States)	IN	IN	No precedent for third-country access. Third countries with MLA agreements can request criminal record information on a case-by-case basis.
<b>Europol Information System (EIS)</b>	Central criminal information and intelligence data base (no access by local force; holds information on accused, not just those convicted)	IN (UK Commission Presidency advanced the system)	IN	Non-EU countries who station officers at Europol do not have direct access. Note: Denmark is an EU Member State but not a full member of Europol so its police do not have direct access to EIS, only the 3 officers stationed there who deal with all national requests.
<b>Passenger Name Records (PNR)</b>	Sharing of travel data for prevention, detection, investigation and prosecution of terrorist offences and serious crime	IN Since May 2018	IN Since May 2018	PNR Agreements have been concluded with <b>Australia, Canada and the US</b> . However, they do not allow the same level of cooperation as MS authorities enjoy with each other (less detailed, less immediate).
<b>Prüm</b>	Sharing of DNA, biometric and vehicle data	Preparations complete (awaiting parliamentary approval)	OUT	<b>Iceland and Norway</b> have negotiated access. Lichtenstein and Switzerland have begun the negotiation process.

<b>Policing, prosecutorial &amp; judicial co-operation</b>				
<b>Europol</b> (European Police Office)	offers support for law enforcement operations on the ground; a hub for information on criminal activities; and a centre of law enforcement expertise	IN	IN	Non-EU countries with operational/cooperation agreements with Europol/Eurojust can join JITs if invited but have no power to initiate investigations. Council of Europe member states can initiate JITs but cannot receive Europol/Eurojust funding to participate unless they are EU Member States.
<b>European Arrest Warrant</b> (Framework Decision 2002/584/JHA)	allows for faster and simpler surrender procedures and an end to political involvement in extradition procedures	IN	IN	<b>Norway</b> and <b>Iceland</b> have partial extradition agreements (not yet in force, signed 2006 <sup>49</sup> ). <b>USA</b> has an extradition agreement with the EU, and bilateral arrangements with Member States, but the process is still subject to political approval. <sup>50</sup>
<b>European Public Prosecutor's Office</b>	will be an independent and decentralised prosecution office of the EU, with the competence to investigate, prosecute and bring to judgment crimes against the EU budget, such as fraud, corruption or serious cross-border VAT fraud	OUT	OUT	EPPO jurisdiction is within EU territory. Third states thus would not be participants although cooperation may be necessary depending on the case, most likely through Eurojust networks. <sup>51</sup>
Convention on <b>mutual legal assistance</b> in criminal matters between Member States (29/05/2000)	strengthens cooperation between judicial, police and customs authorities	IN	IN	<b>Japan</b> has an MLA with the EU but there are no specified timeframes for responses to requests.

49 Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway OJ L 292, 21 October 2006.

50 Agreement on extradition between the European Union and the United States of America OJ L 181, 19 July 2003; Article 5(1) 'Requests for extradition and supporting documents shall be transmitted through the diplomatic channel'.

51 EPPO Regulation 2017/1939, recital n. 10 states '[...] this Regulation should establish a close relationship between them based on mutual cooperation'.

<b>EUROJUST</b> (est in 2002 and amended in 2003 and 2009)	supports judicial coordination and cooperation between national authorities in combating serious organised crime affecting more than one EU country	IN	IN	<b>Montenegro, Norway, Switzerland</b> and the <b>USA</b> have co-operation agreements with Eurojust. They can attend and participate in operational and strategic meetings if invited. However, they cannot access the Case Management System and do not sit on the board. <sup>52</sup>
<b>European Judicial Network</b> (Council Decision 2008/976/JHA)	a network of national contact points for the facilitation of judicial cooperation in criminal matters	IN	IN	Cooperation with third-countries is governed by international law. <sup>53</sup>
<b>European Supervision Order</b> (Framework Decision 2009/829/JHA)	mutual recognition of supervision measures and an alternative to provisional detention	IN	OUT	No non-EU countries have access to the ESO.
<b>European Protection Order</b> (Directive 2011/99/EU)	allows court protection orders issued in one MS to be enforced in another	IN	OUT	No non-EU countries have access to the EPO.
<b>European Investigation Order</b> (Directive 2014/41/EU)	mutual recognition of judicial decisions, and simplifies and accelerates cross-border criminal investigations	IN	OUT	No non-EU countries have access to the EIO.
<b>Victims' Rights Directive</b> (2012/29/EU)	establishes minimum standards on the rights, support and protection of victims of crime, including access to justice	IN	IN	No non-EU countries participate in the VRD.

52 See research paper for details (n3).

53 Resolution of Commission on Crime Prevention and Criminal Justice on Strengthening of regional networks for international cooperation in criminal matters, Nineteenth Session of the United Nations Commission on Crime Prevention and Criminal Justice, Vienna 2010; White Paper on the implementation of the Explanatory Memorandum and cooperation with other EJM partners, 43rd Plenary meeting of the EJM, Rome 2014.

### **Appendix 3 – Extract from Technical explanatory note on North-South co-operation mapping exercise: Justice and Security issues<sup>54</sup>**

- 126 Intergovernmental agreement on criminal justice cooperation, including public protection project advisory group; victims and survivors services project advisory group; forensic science project advisory group; youth justice project advisory group; and criminal justice and social diversity project advisory group
- 127 Mutual legal assistance in criminal matters
- 128 Intergovernmental agreement on police cooperation, including protocols for police cooperation and cross-border secondments and eligibility for posts in policing
- 129 Northern Ireland Related Terrorism threat
- 130 Multi-agency cooperation on fuel fraud
- 131 Multi-agency cooperation on organised crime and drugs
- 132 Extradition/Surrender, including European Arrest Warrant
- 133 Access to shared law enforcement information systems
- 134 Criminal asset seizure
- 135 Transfer of prisoners
- 136 Civil judicial cooperation
- 137 Other aspects of criminal justice cooperation
- 138 Joint Investigation Teams

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<sup>54</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/762820/Technical\\_note-\\_North-South\\_cooperation\\_mapping\\_exercise\\_\\_2\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/762820/Technical_note-_North-South_cooperation_mapping_exercise__2_.pdf)

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