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UK-EU POST-BREXIT COOPERATION IN COUNTER TERRORISM

Abstract: The withdrawal of the United Kingdom ('UK') from the European Union ('EU') has had serious implications across the board, not only in terms of trade and business but also in many other fields, including justice and home affairs. Within that latter field, counter-terrorism policy is a key element and the implications for the continuing cooperation between the UK and the EU after Brexit were singularly grave. In view of the importance attached to this cooperation in counter terrorism, both sides saw it as in their best interests to try and mitigate the impact of withdrawal on security matters. Without being able to replicate the situation pre-Brexit, the two sides have nevertheless attempted to forge as close a relationship as far as possible within existing legal parameters. This work will look at how the parties have dealt with the identification and tracking of inter-state movement of terrorists; the cooperation with EU agencies; and the extradition of terrorists to the UK. It will further add some ideas on how to progress the implementation and enforcement of counter-terrorism policy between the two parties.

Keywords: Trade and Cooperation Agreement, counter-terrorism policy, tracking terrorist movements, exchange of data, extradition.

1. INTRODUCTION

The UK withdrawal from the EU has resulted in its loss of access to various EU law enforcement databases, collaboration with EU agencies and use of the European Arrest Warrant for extradition with profound negative impacts on cooperation in the practical aspects of policing, criminal justice and security including counter-terrorism activities.¹

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1 On the field of EU counter-terrorism policy, there is an abundant literature including a number of monographs, e.g.: D. Spence (ed.), *The European Union and Terrorism*, John

The treaty signed between the UK and the EU in December 2020, the Trade and Cooperation Agreement ('TCA'),² provides a section outlining the basis for substantial ongoing cooperation between the parties in justice and home affairs. In particular, Article 768 of that Agreement concerns cooperation on 'Counter terrorism' that includes collaboration on 'preventing and countering violent extremism and the financing of terrorism' and requires the parties to establish a regular dialogue on these matters, including operational cooperation and exchange of information. Nevertheless, the obvious hallmark of this cooperation is the way in which the executives of both parties remain in complete charge of it, to the exclusion of any parliamentary and civil society oversight.

The aim of this presentation then is to look at how Brexit has impacted in the field of counter terrorism in relations between the UK and the EU, especially: the change of legal regime; the extent to which pre-withdrawal levels of cooperation have been retained; and the evolution of new practices and procedures to cope with the shortfalls after Brexit. It will also briefly look at what mitigations are in place as well as proposals that might be made to improve the situation between the parties and thus help repair – to some extent – the damage caused by the UK's departure.

2. COUNTER-TERRORISM POLICY AS AN EU MEMBER STATE: THE UK'S LEGAL POSITION AND ROLE

As a Member State, the UK's counter-terrorism relationship with the EU possessed broadly two key elements. First, it had negotiated a default position in not participating in EU justice and home affairs measures but could rather choose to opt in to such measures if it decided to do so.³ As a consequence, each EU

Harper, London, 2007; J. Argomaniz, *The EU and Counter-Terrorism. Politics, polity and policies after 9/11*, Routledge, Abingdon 2011; O. Bures, *EU Counterterrorism Policy: a Paper Tiger?*, Ashgate, Farnham, 2011; M. O'Neill, *The Evolving EU Counter-terrorism Legal Framework*, Routledge, London, 2011; R. Bossong, *The Evolution of EU Counter-Terrorism: European Security Policy after 9/11*, Routledge, London, 2012; C. C. Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law*, Hart, Oxford, 2012; M. Puchwein, *The EU Counter Terrorism Strategy: The Management of Counter Terrorism Actors*, AV Akademikerverlag, Saarbrücken, 2014; F. de Londras, J. Doody, *The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism*, Routledge, London, 2015; J. Argomaniz, O. Bures, C. Kaunert (eds.), *EU Counter-Terrorism and Intelligence: A Critical Assessment*, Routledge, London, 2016; C. Andreeva, *The Evolution of Information-sharing in EU Counter-terrorism: A Post-2015 Paradigm Shift?*, Edward Elgar, Cheltenham, 2023.

- 2 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part: 2020 OJ L444/14 (provisional version); and 2021 OJ L149/10 (definitive version). References throughout are to the latter version.
- 3 For a summary of the history of EU-UK cooperation on justice and home affairs, see the following report: House of Lords European Union Committee, 'Brexit: Future UK-EU

police and criminal justice measure (law, policy or bureaucratic system) in which the UK participated – including those on counter-terrorism – was the subject of a positive decision on its part, and this approach persisted after the Lisbon Treaty changes of 2009.⁴

Secondly, the UK also belonged to several bilateral and multilateral partnerships, especially regarding intelligence-sharing, with other EU Member States. Since the EU has no dedicated terrorism-related institutions of its own, such as a police force or intelligence service, it cannot as such contribute directly to counter terrorism itself but rather acts in a complementary way, e.g., to facilitate links between services across the Union, sharing of information from EU databases and speeding up the process of extradition between Member States.⁵

Yet the EU's own counter-terrorism system has been criticized for its high level of bureaucratization; a huge fragmentation between national services with their differing approaches to the issue; problems (in some instances) with a willingness to work together; and a system seen as being very complex and suffering from too much focus on institutions rather than results. Taken together, these elements produce delays in the system and slow answers to a (potential) threat when counter-terrorism is itself fast moving and requires a swifter and more coordinated and dynamic response.

Before its withdrawal, the UK had had a significant impact in developing the EU's policy in the field of counter terrorism, dating back to 1976 with the Trevi Group and the earlier intergovernmental meetings on terrorism in 1971 and 1972.⁶ With the changes wrought by the Maastricht and Amsterdam Treaties in the 1990s, counter terrorism was brought more formally within the institutional structures of the EU, with the UK maintaining a pre-eminent role in that particular operational field. In fact, using the British national strategy as its model,⁷ the EU produced its own Counter-Terrorism Strategy in 2005.⁸ In addition,

Security and Police Cooperation', 16 December 2016, *HL Paper 77* of Session 2016-17, pp. 6-9.

4 Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) (pre-Brexit Consolidated Versions 2010): 2010 OJ C83/290 and 2010 OJ C83/295.

5 See discussions in points 3.1.–3.3. in the text below.

6 T. Bunyan, "Trevi, Europol and the European state", *Statewatching the new Europe: a handbook on the European state* (ed. T. Bunyan), Statewatch, London, 1993, Section II.

7 For information on the UK Counter-Terrorism Strategy 2005, see, e.g., House of Commons Home Affairs Committee, 'Project CONTEST: The Government's Counter-Terrorism Strategy', 29 June 2009, *HC Paper 212* of Session 2008-09, pp. 5-11. This Strategy has been subsequently updated more recently, post Brexit, in 2018 and 2023.

8 Council of the European Union, 'The European Union Counter-Terrorism Strategy', 14469/3/05 REV 4, Brussels, 30 November 2005. See also European Commission, Staff Working Paper 'Taking stock of EU Counter-Terrorism Measures': COM(2010)386 final. For the most recent paper from the Union on this, see European Commission, Communication 'A Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond': COM(2020) 795 final.

positive British influence⁹ can be seen in certain EU initiatives, such as the Counter Terrorism Centre ('CTC') in Europol as well as the EU rules on passenger name record data ('PNRD').¹⁰

Moreover, in operational terms, the UK model for counter terrorism was highly respected for the efficiency of British intelligence, its better organization, and fewer inter-agency barriers. Perhaps most importantly from both an efficiency and an effectiveness perspective, the UK changed continental European culture and operational structuring through its intelligence-led counter-terrorism policing concept. The previous functional separation between the intelligence services and the police that was prevalent on the continent was replaced rather by integration of their operations, working to a shared agenda and using the same databases. By bringing the two services together from the very start of investigations into (possible) terrorist plots,¹¹ providing for the timely exchange of vital information and speeding up of the investigation process itself, the British model of counter terrorism was incorporated into the EU. Chief among the reasons for such a change in approach may be traced to the appointment in 2009 of Robert Wainwright, former director of the UK's National Crime Agency, to lead Europol and his introduction of British intelligence management systems to the organization.¹² Britain's leadership role in moulding EU security structures was confirmed with Sir Julian King becoming European Commissioner for the Security Union in September 2016.

3. IMPACT OF WITHDRAWAL ON UK COUNTER-TERRORISM POLICY WITH EU

In the aftermath of the June 2016 referendum, both parties considered various options in the field of counter terrorism in order, initially, to 'plug the gap' in the period immediately after UK withdrawal while considering the replacement of existing forms of cooperation in this field, albeit with a reduced efficacy. During

9 D. Anderson, 'The Terrorism Acts in 2015', Report of the Independent Reviewer of Terrorism Legislation, December 2016, pp. 21-22: available at <<https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2016/12/TERRORISM-ACTS-REPORT-1-Dec-2016-1.pdf>>, accessed 19 April 2024.

10 Directive (EU) 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime: 2016 OJ L119/132.

11 P. Clarke, "Intelligence-Led Policing in Counter-Terrorism: a Perspective from the United Kingdom", *Combating Transnational Terrorism* (eds. J. K. Wither, S. Mullins), Procon, Sofia, 2016, 149-161; D. Omand, "Keeping Europe Safe: Counterterrorism for the Continent", *Foreign Affairs*, September/October 2016, 83-93.

12 D. Armond, Deputy Director of the National Crime Agency, quoted in the House of Commons Exiting the European Union Committee, *The Government's negotiating objectives: the White Paper*, Third Report, 4 April 2017, *HC Paper 1125 of Session 2016-17*, p. 73.

the eventual transition period (February-December 2020),¹³ the Withdrawal Agreement ('WA') allowed the UK largely to retain the position in the counter-terrorism sector as it had previously enjoyed as an EU Member State (including access to relevant databases).¹⁴

In addition, the WA made provision for an on-going use of the EAW scheme by the UK during an agreed transition period following exit from the EU.¹⁵ Any EAW requests made before the transition period had ended would be processed. Nevertheless, during the transition period, an EU Member State could refuse to execute a warrant for one of its own nationals.¹⁶ Similarly, the UK could similarly declare that it would not surrender British nationals to that EU Member State.

With the eventual failure to conclude any form of a separate, overarching Security Partnership as originally foreseen¹⁷ (and discussed below¹⁸), the parties had to revert to including provisions in the TCA¹⁹ – then under negotiation – to try and minimize the reduction in the level of their pre-existing cooperation in counter terrorism.

In particular for present purposes, the consequent disruption that Brexit caused to active British participation in the erstwhile formulation, implementation and enforcement of EU counter-terrorism policy had the potential to expose the UK to risks in three key areas (to be discussed in turn), viz.: (1) the identification and tracking of inter-state movement of terrorists; (2) the cooperation with EU agencies; and (3) the extradition of terrorists to the UK.

3.1. The identification and tracking of terrorists – access to EU data after Brexit

(a) Pre Brexit

While an EU Member State, the UK participated in a number of what are primarily data-sharing platforms and was thus required to comply with EU data

13 Art. 126 of EU/EAEC and UK, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ('WA'): 2019 OJ C384/I/01.

14 Art. 63 WA.

15 Art. 62(1)(b) WA.

16 Art. 185, third paragraph WA.

17 European Council, Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, 25 November 2018, Brussels, Part III, paras. 78-117: 2019 OJ C384/I/178.

18 See point 4.1. in the text below.

19 For a full analysis of the field, see C.-C. Cîrlig, "Law enforcement and judicial cooperation in criminal matters under the EU-UK Trade and Cooperation Agreement", *Briefing* PE 690.627, May 2021, European Parliamentary Research Service, Brussels (2021): available at <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2021\)690627](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)690627)>, accessed 20 April 2024.

protection standards in using those platforms. In the last 25 years or so, the EU has developed internally various data systems within the area of transnational police and criminal investigations linked to matters of counter terrorism, but with little precedent for participation of states outside of the EU or Schengen area. Among the most important systems which the UK opted into as an EU Member State, the following are the most relevant:

- (i) Europol Information System ('EIS'):²⁰ A database of Europol which pools information on more than 86,000 suspected criminals and terrorists from across the EU that allows national investigators directly to check as to whether information on a potential terrorist suspect exists in any other Member States' systems.
- (ii) Passenger Name Records ('PNR'):²¹ This database comprises information collected and processed by air carriers' control systems on passenger flight details as part of the travel booking process. It may include details of how travel was booked and for whom, contact details, and travel itinerary. With such information, national crime agencies are able to access this data to identify terrorist suspects in advance of travel, including those travelling under aliases, and so track relevant individuals and allow analysis of travel patterns. Data sharing agreements are in place with Australia, Canada and the USA²² for which PNR agreements the EU possesses exclusive competence to negotiate and sign.
- (iii) Prüm:²³ Through a Council Decision in 2008 (based on the earlier non-EU Prüm Convention²⁴), this system allows national agencies to check automatically with profiles held in the databases of other EU Member States for DNA profiles, fingerprints found at a crime scene and vehicle registration information. In respect of third countries, Norway and Iceland²⁵

20 Regulation (EU) 2016/794 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA: 2016 OJ L135/53. See also European Commission, Communication 'Overview of information management in the area of freedom, security and justice': COM(2010) 385 final, p. 16.

21 Directive (EU) 2016/681, note 10 above.

22 In July 2017, the CJEU issued an Opinion stating that provisions of the PNR Agreement with Canada were incompatible with the EU Charter of Fundamental Rights, such as the processing of sensitive data (religious and philosophical beliefs, trade union membership or sex life): Opinion 1/15, *EU-Canada PNR Agreement*, ECLI:EU:C:2017:592.

23 Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime: 2008 OJ L 210/1.

24 Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration: 2617 UNTS 3.

25 Council Decision on the signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the European Union

- as well as Switzerland²⁶ and Liechtenstein²⁷ agreed to apply certain provisions of these Decisions.
- (iv) Second Generation Schengen Information System (“SIS II”):²⁸ This database contains information on over 35,000 people wanted under an EAW as well as alerts on suspected foreign terrorist fighters, missing or wanted individuals as well as on persons and objects (e.g., dangerous weapons, vehicles) of interest to EU law enforcement agencies. SIS II thus allows EU Member State law enforcement agencies to share and receive alerts in real time, thereby speeding up and easing cooperation in border security and policing. Each participating EU Member State

and Iceland and Norway on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, and the Annex thereto: 2009 OJ L353/1.

- 26 Council Decision (EU) 2022/2536 on the conclusion of the Agreement between the European Union and the Swiss Confederation on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, of Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, and the Annex thereto, and of Council Framework Decision 2009/905/JHA on accreditation of forensic service providers carrying out laboratory activities: 2022 OJ L328/94.
- 27 Council Decision (EU) 2022/2537 on the conclusion of the Agreement between the European Union and the Principality of Liechtenstein on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, of Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, and the Annex thereto, and of Council Framework Decision 2009/905/JHA on accreditation of forensic service providers carrying out laboratory activities: 2022 OJ L328/96–97.
- 28 Most recently on three 2018 Regulations: Regulation (EU) 2018/1860 on the use of the Schengen Information System for the return of illegally staying third-country nationals: 2018 OJ L312/1; Regulation (EU) 2018/1861 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006: 2018 OJ L312/14; and Regulation (EU) 2018/1862 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU: 2018 OJ L312/56. An upgraded SIS entered into operation on 7 March 2023: European Commission, ‘Security Union: The renewed Schengen Information Systems enters into operation’, *Press Release* IP/23/1505, 7 March 2023, Brussels: available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1505>, accessed 20 April 2024.

has a SIRENE ('Supplementary Information Request at the National Entry') Bureau providing further information on alerts and coordinating activities in relation to SIS II alerts. These alerts allow for discreet markers to monitor an individual's movements.²⁹ For counter-terrorism purposes, a national agency can issue an alert for discreet checks regarding an individual suspected of terrorist activities or deemed to pose a domestic or transnational security threat.

- (v) European Criminal Records Information System ('ECRIS'):³⁰ This is a secure electronic system that enables the rapid exchange of information on criminal records and convictions – including terrorist information – between Member States' authorities.³¹ No third countries have access to ECRIS so that Norway and Switzerland have to use the more cumbersome and slower system under the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters.³²
- (vi) Intelligence Analysis Centre ('INTCEN'):³³ This civilian unit provides intelligence and awareness to the High Representative of the European Union for Foreign Affairs and the External Action Service with a focus is on sensitive geographical areas, counter terrorism (with its own Counter-Terrorist Cell) and the proliferation of weapons of mass destruction and other global threats.

Taken together, the Union's work in coordinating and expediting collaborations across Member States through its various platforms and databases provides

29 In comparison, the Interpol equivalent (I-24/7) contains a fraction of the alerts and requires partners to actively check Interpol notices thus slowing down the process of obtaining information: Romyana van Ark, 'Post Brexit EU (In)Security', 6 June 2019, International Centre for Counter-Terrorism, The Hague: available at <<https://www.icct.nl/publication/post-brexit-eu-insecurity>>, accessed 20 April 2024.

30 Directive (EU) 2019/884 amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third-country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA: 2019 OJ L151/143; and Regulation (EU) 2019/816 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726: 2019 OJ L135/1.

31 HM Government, The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues, *Background Note*, 9 May 2016, pp. 2-8: available at <<https://www.gov.uk/government/publications/the-uks-cooperation-with-the-eu-on-justice-home-affairs-foreign-policy-and-security-issues-background-note>>, accessed 20 April 2024.

32 European Convention on Mutual Assistance in Criminal Matters, 20 April 1959, Strasbourg, ETS No. 30.

33 Originally mentioned under its previous incarnation in Art. 4(3)(a), third indent, of Council Decision 2010/427/EU on establishing the organisation and functioning of the European External Action Service: 2010 OJ L201/30.

national authorities with an array of possibilities to use in order to render more effective their counter-terrorism operations, both domestically and in cooperation with their opposite numbers in other Member States.

(b) Post-Brexit possibilities

By leaving the EU, the UK forfeited its right to access EU databases aimed at criminality and terrorist activities. For INTCEN, there was clearly no possibility of continuing to enjoy access to it while both the Prüm and the PNR systems were expressly mentioned in the Political Declaration³⁴ accompanying the Withdrawal Agreement and it was thus considered that they would be reproduced in some form in the TCA.

This left the EIS, SIS II and ECRIS databases out of the picture and accordingly the strong likelihood of no further access for British crime agencies. While EIS was intimately linked to the post-Brexit arrangements with Europol (discussed below), the SIS II plays a significant role in tracking individuals under surveillance by intelligence agencies and is absolutely crucial to intelligence sharing so that losing access to it posed the serious risks of (severely) circumscribing the exchange and sharing of information between relevant crime agencies in the UK and the EU. Further, no access to ECRIS would cause delays in retrieving time-sensitive intelligence, crucial in the aftermath of a terrorist attack; it would equally have substantial practical implications with a response to a request about a foreign national's criminal history taking an average of 66 days, compared to ten under ECRIS.³⁵

One or two options were still available to address this putative loss of access. As with other issues, the UK remains a member of the Council of Europe and could therefore use the more cumbersome procedure under the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters.³⁶

Alternatively, the UK could seek an 'adequacy decision' from the EU by which the EU recognizes that a third country offers an adequate level of data protection so that personal data can flow from the EU (plus Iceland, Liechtenstein and Norway) to that third country without the need for any further safeguards.³⁷ Although these decisions used to apply solely to data transfers in the commercial sector under the

34 Political Declaration, note 17 above, para. 84.

35 Van Ark, note 29 above.

36 1959 Convention, note 32 above.

37 According to Art. 45(3) of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation): 2016 OJ L119/1. The European Commission may decide, by means of an implementing act, that a third country, a territory or one or more specified sectors within a third country, ensure(s) an adequate level of protection. Under this condition, transfers of personal data to a third country may take place without the need to obtain any further authorisation, as provided for in Art. 45(1) and recital 103 of Regulation (EU) 2016/679.

2016 General Data Protection Regulation ('GDPR'), the European Commission was granted the power to adopt them for the law enforcement sector through the Law Enforcement Directive ('LED').³⁸ However, existing adequacy decisions took many years to negotiate and the UK would need to be a third country before it could be subject to such a decision that risked a gap between the end of the Brexit transition period and an adequacy decision taking effect.³⁹ Further, obtaining an adequacy decision depended partly on the UK's legal framework for data processing for national security purposes and maintaining of a similar level of protection in processing private data to that of the EU.⁴⁰ The UK would thus be required to mirror changes in the EU within the data protection field to maintain an adequate level of protection.⁴¹ Lastly, an adequacy decision is not granted for a specific period of time but is reviewed by the European Commission at least every four years.⁴² A negative review would thus lead to withdrawal of permission from any type of UK access to the relevant databases for security purposes. Consequently, the UK's failure to retain some form of access to SIS II and ECRIS would have amounted to a significant downgrade of policing and security capabilities at a time when cross-border crime and terrorism related security threats were increasing.

(c) Current situation

Bearing in mind the concerns of the previous section, the provisions of the TCA and the relevant adequacy decision of the European Commission have helped – to some extent – to plug the gaps in information sharing between the EU and the UK post Brexit.

As already noted, the arrangements under Prüm⁴³ and PNR databases were carried on through the TCA. On the one hand, under Title II of Part Three

38 Art. 36 and recitals 67-71 of Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data and repealing Council Framework Decision 2008/977/JHA: 2016 OJ L119/89.

39 House of Lords European Union Committee, 'Brexit: The EU Data Protection Package', 18 July 2017, *HL Paper 7* of Session 2017-19, p. 32.

40 S. Alegre *et al.*, "The implications of the United Kingdom's withdrawal from the European Union for the Area of Freedom, Security and Justice", *PE 596.824, Policy Department for Citizens' Rights and Constitutional Affairs*, DG for Internal Policies of the European Union, European Parliament, December 2017, 63.

41 House of Lords European Union Committee, 'Brexit: The EU Data Protection Package', note 39 above, p 4.

42 Art. 45(3) of Regulation (EU) 2016/679, note 37 above; and Art. 36(3) of Directive (EU) 2016/680, note 38 above.

43 Council Decision (EU) 2022/1014 on the position to be taken on behalf of the Union vis-à-vis the United Kingdom of Great Britain and Northern Ireland regarding the determination under Article 540(2) of the Trade and Cooperation Agreement between the

(Articles 527-541 TCA), cooperation based on the Prüm system is continued, thereby allowing the automated exchange of DNA, fingerprints and vehicle registration data through national contact points which TCA provisions are mostly similar to the Prüm Decisions. On the other hand, Title III of Part Three (Articles 542-562 TCA) provides for continued UK access to PNR data for flights departing from the EU, and vice-versa, subject to safeguards on use and storage of the data (although, besides the TCA provisions, data transfers depend on an EU adequacy decision). The TCA provisions again largely reflect those of the EU PNR Directive and take into account the 2017 Opinion of the Court of Justice of the European Union ('CJEU') on the EU-Canada PNR agreement.⁴⁴ In particular, the UK may process PNR data from the EU strictly for the purpose of preventing, detecting, investigating or prosecuting terrorist offences or serious crime.

However, for ECRIS and SIS II the situation has, as expected, changed. Although the UK lost access to ECRIS, the TCA states that exchanges will take place 'electronically in accordance with the technical and procedural specifications' laid down in Annex 44 TCA. In practice, since EU Member States will continue to use ECRIS to cooperate with the UK, the UK will build its own infrastructure ('UKRIS') that is compatible with ECRIS.

For UK law enforcement, the Interpol databases have replaced SIS II. In order to achieve the best level of cooperation between the UK and EU Member States, it will be necessary for those Member States to introducing alerts twice, once in SIS II database and once in the Interpol system, so making Interpol information available to Member State authorities. In this sense, bilateral agreements – permitted within the terms of Title IV of Part Three of the TCA (Article 563 TCA) – could facilitate future information exchange.

Lastly, the European Commission adopted two adequacy decisions in June 2021, one under the GDPR⁴⁵ and the other for the LED.⁴⁶ Together they allow for the free flow of data from the EU and to the UK where it benefits from an essentially equivalent level of protection to that guaranteed under EU law. The adequacy decisions also facilitate the correct implementation of the TCA which

European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, of the date from which personal data relating to DNA profiles and dactyloscopic data as referred to in Articles 530, 531, 534 and 536 of that Agreement may be supplied by Member States to the United Kingdom: 2022 OJ L170/68.

44 See Opinion 1/15, *EU-Canada PNR Agreement*, note 22 above.

45 Commission Implementing Decision (EU) 2021/1772 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom (notified under document C(2021)4800): 2021 OJ L360/1.

46 Commission Implementing Decision (EU) 2021/1773 of 28 June 2021 pursuant to Directive (EU) 2016/680 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom (notified under document C(2021)4801: 2021 OJ L360/69.

foresees the exchange of personal information, for example for cooperation on judicial matters. Both decisions contain strong safeguards in the case of future divergence, such as a ‘sunset clause’ that limits the duration of adequacy to four years. In this way, the adequacy decisions will need to be renewed by June 2025.

3.2. The cross-border counter-terrorism collaboration – cooperation with EU agencies after Brexit

(a) Pre Brexit

In the counter-terrorism sector, Europol has increasingly strengthened its role for police liaison and cooperation across the continent and beyond.⁴⁷ As an EU agency since 2010, it supports law enforcement authorities and facilitates cooperation between them by processing data and making links between crimes committed in different countries as well as providing access to law enforcement intelligence from the other EU Member States. Europol accordingly supports information exchange, provides operational analysis, lends technical expertise and generates strategic reports.

A new EU Regulation updating Europol’s governance structure, objectives and tasks, which the UK opted in to, was adopted in May 2016.⁴⁸ It gives the CJEU jurisdiction to give judgment pursuant to any arbitration clause in a contract concluded by Europol and also permits the European Data Protection Supervisor to oversee the processing of personal data by Europol and can refer a matter to the CJEU or intervene in actions brought before the CJEU.⁴⁹ Yet removal of the UK from CJEU jurisdiction was one of the May and Johnson government’s ‘red lines’ in the negotiations.⁵⁰

(b) Post-Brexit possibilities

Since the UK would cease to be a Member State upon withdrawal, the level of its cooperation with Europol would be noticeably reduced in intensity for

47 F. König, *The Rise of EU Police Cooperation: Governing Differentiated Integration*, Routledge, London, 2023, chapters 3–5.

48 Regulation (EU) 2016/794, note 19 above.

49 Arts. 43(3)(h) and (i), 48 and 49 of Regulation (EU) 2016/794, note 19 above.

50 V. Miller, “Brexit: red lines and starting principles”, *House of Commons Library Briefing Paper* No. 7938, 21 June 2017, p. 6: available at <<https://researchbriefings.files.parliament.uk/documents/CBP-7938/CBP-7938.pdf>>. On this issue, see F. Dehousse, “The European Union is exaggerating in its demands for Brexit, especially about the European Court of Justice’s future role”, *Egmont Royal Institute of International Relations website*, 29 May 2017, Brussels (2017): available at: <<https://www.egmontinstitute.be/eu-exaggerating-in-its-demands-for-brexit>>. Both accessed 20 April 2024.

which situation the 2016 Europol Regulation provided for two possibilities⁵¹, i.e., either (i) the EU would conclude an international agreement with the UK as a third country; or (ii) the European Commission would need to make a data adequacy decision.

The UK sought to secure a partnership with Europol that was above and beyond any operational agreement already concluded by the EU with a third country. In this, the British government looked to securing its own bespoke deal along the lines of the cooperation agreement between Denmark and the EU.⁵² As a consequence of its opt-out from all EU justice and home affairs legislation adopted after the Lisbon Treaty entered into force and no ability to selectively opt in (unlike the UK had while an EU Member State), Denmark managed to negotiate a hybrid arrangement somewhere between a full member and a third party in view of its continued EU membership. It thus interacts with Europol on broadly the same footing as other third countries though it enjoys observer status at Europol's Management Board and Management Board working groups. In addition, Denmark was required to recognise the jurisdiction of the CJEU and the competence of the European Data Protection Supervisor, to implement fully in domestic law the relevant EU directive on data protection in police matters and, not surprisingly, maintain its membership of both the EU and the Schengen area. In view of the foregoing the cooperation agreement with Denmark necessarily fell short of full membership of Europol, its operations and decision-making as well as access to its databases.⁵³

The alternative then was for the UK to negotiate with Europol to secure either a strategic agreement providing for the exchange of general intelligence, strategic and technical information or a more extensive operational agreement. Having a strong record of operational cooperation with (non-EU) international partners – like Serbia,⁵⁴ Australia, Canada, Switzerland and the USA as well as Interpol – these operational agreements allow third countries: (i) to participate in Europol analysis projects but only with the agreement of relevant Member States; (ii) to exchange data but do not have direct access to the EIS; (iii) to be

51 Art. 25(1) of Regulation (EU) 2016/794, note 19 above.

52 Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and the European Police Office, updated 1 August 2022: available at <https://www.europol.europa.eu/sites/default/files/documents/operational_agreement_europol_denmark.pdf>, accessed 20 April 2024.

53 European Commission, 'Declaration by the President of the European Commission, Jean-Claude Juncker, the President of the European Council, Donald Tusk and the Prime Minister of Denmark, Lars Løkke Rasmussen', *Press Release No. IP/16/4398*, 15 December 2016, Brussels: available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_16_4398>, accessed 20 April 2024.

54 Agreement on Operational and Strategic Cooperation between the Republic of Serbia and the European Police Office, updated 15 October 2020: available at <<https://www.europol.europa.eu/partners-collaboration/agreements/republic-of-serbia>>, accessed 20 April 2024.

invited to meetings of Heads of Europol National Units but not to Management Board and Management Board working group meetings; and (iv) to station liaison officers at Europol headquarters and access Europol's secure messaging system (Secure Information Exchange Network Application, 'SIENA').

(c) Current situation

With the UK being the first Member State to leave the EU, there was no precedent for what a future relationship between the UK and Europol would involve, especially given the EU's justified refusal to countenance any arrangement that merely reproduced the previous cooperation with the UK and the British government's own red lines in the negotiations.

Title V of Part Three of the TCA (Articles 564-579 TCA) sets out the arrangements for UK cooperation with Europol. In terms of substantive law, it lays down the list of crimes within Europol's competence and related criminal offences.⁵⁵ Were the EU to change the list of crimes under Europol's mandate, then the Specialised Committee on Law Enforcement and Judicial Cooperation (set up under Article 8(1)(r) TCA) has the power to amend the relevant annex of the TCA in order to bring it into line with the amended list. The scope of cooperation covers exchange of personal data, as well as exchange of specialist knowledge; general situation reports; results of strategic analysis; information on criminal investigation procedures and on crime prevention methods; participation in training activities; advice and support in criminal investigations, and operational cooperation.

However, in order to implement this Title, the parties were required to negotiate an operational agreement. This process was successfully concluded in September 2021 with a Working and Administrative Arrangement between Europol and the competent UK authorities represented by the NCA.⁵⁶

3.3. The extradition of terrorists to the UK – the surrender of EU citizens to UK jurisdiction after Brexit

(a) Pre Brexit

With Brexit, the UK lost its access to the European Arrest Warrant ('EAW') regime that, since its introduction, had greatly enhanced the timeline and

55 The forms of crime listed in Annex I to the Europol Regulation are copied into Annex 41 of the TCA.

56 Working and Administrative Arrangement establishing cooperative relations between the competent authorities of the UK and Europol, updated 20 December 2023: available at <https://www.europol.europa.eu/cms/sites/default/files/documents/wa_with_united_kingdom_-_implementing_the_tca.pdf>, accessed 20 April 2024.

efficiency of the extradition of suspects and criminals between EU Member States.⁵⁷ As a legal framework based on mutual trust between the relevant national authorities and without recourse to the executive,⁵⁸ the EAW greatly facilitates extradition of individuals between EU Member States so that they face prosecution for a crime of which they are accused ('accusation warrants') or to serve a prison sentence for an existing conviction ('conviction warrants'). One of its main advantages over other systems of extradition is that it has noticeably reduced the time of extraditions within the EU so that cases that had previously taken months or years, are now resolved in a matter of weeks.

It provides a simplified procedure by means of which an EU Member State is able to issue a warrant for an arrest and extradition that is valid throughout the whole of the EU. Moreover, EU Member States can no longer refuse to surrender their own nationals unless they themselves assume responsibility for the execution of the prison sentence against the wanted individual. In addition, a 'double criminality check' is not required for 32 categories of offences including crimes related to terrorism. In other words, an offence need not to be an offence in both EU Member States provided that the offence in question is sufficiently serious.

Lastly and perhaps even more importantly in many respects, an EAW is subject to strict time limits, with final decisions in the extraditing EU Member State must be made within 60 days of arrest or within 10 days were the defendant to consent to the surrender. The surrender must occur as quickly as possible on a date agreed between the relevant authorities and no later than 10 days after the final decision on the EAW's execution. The simplification and speeding up of procedures using the EAW has altered the counter-terrorist environment in the EU. A comparative example will illustrate the impact.⁵⁹

In the pre-EAW era, France requested the extradition from the UK of Rachid Ramda who was wanted by the French authorities for his alleged part in several bombings of the Paris Metro between July and October 1995 that had caused a number of fatalities and injuries. In all, France made three requests for his extradition in the period 1995-1996. However, it took some ten years until he was finally surrendered to the French authorities, having gone through a series of nine separate legal proceedings.

By contrast, using an EAW, the UK was able to bring back Hussain Osman from Italy in 2005 in a mere 56 days to try him as one of the failed 21/7/2005 London Tube bombers. He and his compatriots had targeted three Tube trains and a bus (attempting to repeat the 7/7/2005 attack) but the devices failed to go

57 2002/584/JHA: Council Framework Decision on the European arrest warrant and the surrender procedures between Member States: 2002 OJ L190/1.

58 Unlike the requirements under the Council of Europe system of extradition: European Convention on Extradition, 13 December 1957, Strasbourg, ETS No. 24 and its three Additional Protocols (First Additional Protocol, 15 October 1975, Strasbourg, ETS No. 86; Second Additional Protocol, 17 March 1978, Strasbourg, ETS No. 98; and Third Additional Protocol, 10 November 2010, Strasbourg, ETS No. 209).

59 Van Ark, note 29 above.

off. Osman fled to the continent but was arrested within eight days in Italy and returned to the UK, as already noted, in 56 days.

(b) Post Brexit possibilities

From these examples, it becomes quite evident that various British agencies dealing with crime in general and terrorism in particular – viz., the Crown Prosecution Service, the National Crime Agency ('NCA') and the Metropolitan Police Counter Terrorism Coordinator – regarded the UK's continuing participation in the EAW as a top priority in the negotiations with the EU. The fall-back position in case of no agreement in this area would have been the 1957 Council of Europe Convention on Extradition to which the UK and all EU Member States were parties. However, this solution was not regarded as optimal in the circumstances and would mark a large step back from the previous form of cooperation under the EAW system:⁶⁰

- (1) The EAW is basically a transaction between judicial authorities where the role of the executive is removed. By contrast, applications under the 1957 Convention need to be made via diplomatic channels, with government minister approval required at a number of points in the process.
- (2) The EAW framework imposes strict time limits at each stage of the process and is considered to be substantially faster than the 1957 Convention that does not impose the same time limits. Overall, the EAW the previous arrangements based on the 1957 European Convention on Extradition.⁶¹ The lack of Convention provisions on mutual recognition of judicial orders triggers this lengthy process.
- (3) Article 6 of the 1957 Convention provides that states can refuse an extradition request for one of their own nationals. The EAW framework abolished this own nationals' exception based on the concept of EU citizenship.

Alternatively, the arrangement on extradition that the EU had previously agreed between Norway and Iceland (neither of which is a member of the EU but are in the Schengen area) could form a more effective model.⁶² However, this

60 House of Lords European Union Committee, 'Brexit: Future UK-EU Security and Police Cooperation', note 3 above, p. 36.

61 According to the UK's Institute for Government, an EAW-based extradition takes on average 48 days, whereas an extradition under the rules of the 1957 Convention can take up to a year. See T. Durrant, L. Lloyd, M. T. Jack, *Negotiating Brexit: policing and criminal justice*, Institute for Government, London, September 2018, p. 10: available at <<https://www.instituteforgovernment.org.uk/publication/report/negotiating-brex-policing-and-criminal-justice>>, accessed 21 April 2024.

62 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: 2006 OJ L292/2.

treaty took 13 years to enter into force after it was signed in 2006 (although it was considered that both parties would want to have a post-Brexit procedure in place much faster).⁶³

Aside from the lengthy negotiation process, there are two other significant differences between the EAW scheme and the EU-Iceland/Norway agreement. The latter arrangement enables all parties to refuse extradition of their own nationals.⁶⁴ More significantly, it includes a ‘political offence’ exception in respect to terrorism offences.⁶⁵ In practice, if this provision is ever utilised, an EU Member State could refuse to extradite a suspected terrorist to Iceland or Norway, and vice versa, if their terrorism-related offences are regarded as political in nature.

(c) *Current situation*

The EAW has been replaced by the new arrest warrant (‘AW’) under Articles 596-632 TCA as the key component of the new extradition system between the EU and the UK, pursuant to which individuals may be surrendered between jurisdictions. This is closely along the lines of the EU-Iceland/Norway agreement which means not only the inclusion of the political offence exception for terrorism⁶⁶ but also the refusal of EU Member States to extradite their own nationals.⁶⁷ In addition, at the instigation of the UK, the principle of proportionality is to apply to both sides in their cooperation under the arrest warrant.⁶⁸ Lastly, Article 599(2) TCA also subjects surrender to double criminality as a general rule although, on the basis of reciprocity, this requirement may be abolished for 32 offences (the same as in the EAW FD) by notifying the Specialised Committee on Law Enforcement and Judicial Cooperation.⁶⁹

63 C. Mortera-Martinez, ‘Plugging in the British: EU justice and home affairs’, *CER Policy Brief*, Centre for European Reform, 31 May 2018, Brussels, pp. 8-9: available at <https://www.cer.eu/sites/default/files/pbrief_plugin_jha_31.5.18.pdf>, accessed 20 April 2024.

64 Art. 7 of the 2006 Agreement, note 62 above.

65 Art. 6 of the 2006 Agreement, note 62 above.

66 Belgium, Czechia, Denmark, France, Croatia, Italy, Cyprus, Poland, Portugal, Slovakia, Finland, Sweden have already notified their intention not to invoke the political offence exception for terrorist offences.

67 The Member States which do not surrender their nationals are Germany, Greece, France, Croatia, Latvia, Poland, Slovenia, Slovakia, Finland, Sweden. Others make surrender of their nationals conditional on reciprocity or transferring the person to the Member State to serve the sentence (Bulgaria, Czechia, Austria, Denmark, Estonia, Cyprus, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Portugal, Romania). The UK will not invoke the nationality exception; it will refuse to surrender nationals only when the acts are not an offence under UK law, or if there are clear political motivations behind the warrant.

68 Art. 597 TCA.

69 In this respect, Belgium, Ireland, Greece, Spain, France, Italy, Cyprus, Lithuania, Luxembourg, Hungary, The Netherlands, Austria, Poland, Portugal, Romania have already waived double criminality for the listed 32 offences (reciprocity).

4. POSSIBLE FURTHER MITIGATION OF EFFECTS OF BREXIT

4.1. Potential new Security Agreement between the EU and the UK

For the period after Brexit, the parties had initially looked towards some form of enhanced degree of collaboration based on an overarching agreement.⁷⁰ In fact, the idea of maintaining a high-level security relationship after Brexit was paramount in the mind of the UK government as evidenced in its formal notification for withdrawal⁷¹ and it continued to pursue this theme, at least under the premiership of Theresa May. In a speech delivered in January 2017, she had already noted that, 'At a time when together we face a serious threat from our enemies, Britain's unique intelligence capabilities will continue to help to keep people in Europe safe from terrorism'. She continued in the same vein later on, stating that, 'our future relationship with the European Union [should] include practical arrangements on matters of law enforcement and the sharing of intelligence material with our EU allies'.⁷² And again, in her speech in Florence in September 2017, the Prime Minister May declared her ambition to achieve 'a bold new strategic agreement that provides a comprehensive framework for future security, law enforcement and criminal justice cooperation' which would be 'unprecedented in its depth, in terms of the degree of engagement that we would aim to deliver'.⁷³ Such an agreement, she argued, would be built on 'our shared principles, including high standards of data protection and human rights'.

This point was reiterated that same month when the UK government published a document setting out its vision for UK-EU cooperation on security,

70 E. Haves, 'Proposed UK-EU Security Treaty', *House Lords Library Briefing* No. 58/2018, 23 May 2018, London: available at <<https://researchbriefings.files.parliament.uk/documents/LLN-2018-0058/LLN-2018-0058.pdf>>, accessed 20 April 2024.

71 Prime Minister's Office, *Prime Minister's letter to Donald Tusk triggering Article 50*, 29 March 2017, London, p. 4: available at <<https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>>, accessed 20 April 2024.

72 Prime Minister's Office, *The government's negotiating objectives for exiting the EU: PM speech*, Lancaster House, London, 17 January 2017 (last updated, 3 February 2017): available at <<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>>, accessed 20 April 2024.

73 Prime Minister's Office, *PM's Florence speech: A new era of cooperation and partnership between the UK and the EU*, 22 September 2017: available at <<https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>>. This position was repeated in her subsequent Munich speech: Prime Minister's Office, *PM speech at Munich Security Conference*, 17 February 2018: available at <<https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018>>. Both accessed 20 April 2024.

law enforcement and criminal justice. In this paper, the government argued that ‘it is in the clear interest of all citizens that the UK and the EU sustain the closest possible cooperation in tackling terrorism, organised crime and other threats to security now and into the future.’⁷⁴ The government argued for a treaty between the UK and the EU which would provide a legal basis for continued cooperation on security.

For its part, the EU was equally forthcoming about its support for a possible strategic partnership. For example, the European Council’s negotiating guidelines of April 2017 stated that ‘the EU stands ready to establish partnerships in areas unrelated to trade, in particular the fight against terrorism and international crime, as well as security, defence and foreign policy.’⁷⁵ In its subsequent guidelines adopted at the December 2017 European Council meeting, this position was confirmed.⁷⁶ Yet despite a willingness to continue with this idea during 2018⁷⁷, with her failure to get the EU-UK Withdrawal Agreement passed by the British Parliament three times, May’s resignation opened the way for the subsequent premiership of Boris Johnson wanting to ‘get Brexit done’ as soon as possible and a government more wedded to ‘global Britain’ in its security and defence aspirations, consideration of this security partnership fell by the wayside.⁷⁸

More recently the UK Labour Party – with a general election due by the end of this year – is keen to reset British relations with the EU in the field of defence and security. In this respect, various proposals made by the Shadow Foreign Secretary, David Lammy,⁷⁹ suggest a new arrangement reminiscent of Theresa

74 HM Government, *Security, law enforcement and criminal justice: a future partnership paper*, 18 September 2017, p. 2: available at <<https://www.gov.uk/government/publications/security-law-enforcement-and-criminal-justice-a-future-partnership-paper>>, accessed 20 April 2024.

75 European Council, ‘European Council (Art. 50) guidelines for Brexit negotiations’, *Press Release*, 29 April 2017, Brussels: available at <<https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/>>, accessed 20 April 2024.

76 European Council, ‘European Council (Art. 50) guidelines for Brexit negotiations’, *Press Release*, 15 December 2017, Brussels: available at <<https://www.consilium.europa.eu/en/press/press-releases/2017/12/15/european-council-art-50-guidelines-for-brexit-negotiations/>>, accessed 20 April 2024.

77 European Council, ‘European Council (Art. 50) guidelines on the framework for the future EU-UK relationship’, *Press Release*, 23 March 2018, points 3, 13 and 14: available at <<https://www.consilium.europa.eu/en/press/press-releases/2018/03/23/european-council-art-50-guidelines-on-the-framework-for-the-future-eu-uk-relationship-23-march-2018/>>; and HM Government, *Framework for the UK-EU Security Partnership*, 9 May 2018: available at <<https://www.gov.uk/government/publications/framework-for-the-uk-eu-security-partnership>>. Both accessed 20 April 2024.

78 B. Martill, “The future of UK-EU security cooperation in the shadow of Ukraine”, *LSE blog*, 6 June 2023: available at <<https://blogs.lse.ac.uk/politicsandpolicy/the-future-of-uk-eu-security-cooperation-in-the-shadow-of-ukraine/>>, accessed 20 April 2024.

79 R. Whitman, “Lammy at ‘em: securing a security pact with Europe”, 1 February 2023, *UK in a Changing Europe website*, London (2023): available at <<https://ukandeu.ac.uk/lammy-at-em-securing-a-security-pact-with-europe/>>, accessed 20 April 2024.

May's original wish for a privileged security agreement with the EU, complemented by strong bilateral relationships.

4.2. Non-EU cooperation in counter-terrorism strategy

The UK remains a member of the Counter Terrorist Group ('CTG'),⁸⁰ a non-EU body located in The Hague where the heads of intelligence agencies of EU Member States plus Norway and Switzerland meet to encourage members to share intelligence and facilitate operational cooperation. It has the capability to undertake counter-terrorism operations globally and provides valuable proactive and sometimes pre-emptive threat intelligence that would otherwise be unavailable. But this informal group together with the Kilowatt network, the Mega-tonne network and the Club de Berne (the CTG's initiator), that have been set up as European intelligence-sharing networks for counter terrorism, are no substitute for direct cooperation through the relevant EU agencies already discussed.

Moreover, compared to these less structured arrangements, the EU arrangements are formally based on relevant provisions of the EU treaties and underscored by human rights standards contained in the CFR and the ECHR. Yet the legal bases also act as constraints – owing to data protection rules enforced by the Court of Justice of the European Union ('CJEU') which judicial body had previously ruled⁸¹ that evidence gained through the bulk-intercept operations of the UK's Government Communications Headquarters ('GCHQ') were disproportionate and thus unlawful.

And yet it is GCHQ with its unrivalled signal intelligence capacities, combined with the UK-US intelligence-sharing and cooperation arrangement and with the 'Five Eyes' alliance between the USA, UK, Australia, Canada and New Zealand, that continue to provide British security services with a global reach and probably their most significant and successful international counter-terrorism collaborations to date. Withdrawal of the UK has accordingly impacted on the EU in its operations in the area of counter terrorism and this should not be overlooked either. In this way, the EU has lost a very strong Member State, with a very efficient intelligence whose collaboration on counter terrorism has proved beneficial on many occasions. Moreover, its access to the data collected by the UK's intelligence services has officially come to an end.

80 P. P. Seyfried, "A European Intelligence Service? Potentials and Limits of Intelligence Cooperation at EU Level", *Security Policy Working Paper* No. 20/2017, Federal Academy for Security Policy/Bundesakademie für Sicherheitspolitik ('BAKS'), Berlin (2017), p. 3, available at: <<https://www.baks.bund.de/en/working-papers/2017/a-european-intelligence-service-potentials-and-limits-of-intelligence>>, 20 April 2024.

81 Case C-623/17, *Privacy International v. Secretary of State for Foreign and Commonwealth Affairs*, ECLI:EU:C:2020: 790.

4.3. UK-EU Counter-Terrorism Dialogue under the TCA

The first UK-EU Counter-Terrorism Dialogue was held in Brussels on 2 February 2024.⁸² The dialogue was established by the terms of the Article 768(3) TCA and is designed to enhance cooperation on counter terrorism. Participants discussed a broad spectrum of issues, including assessments on the terrorist threat as well as strategic approaches for prevention and response in order to protect citizens. Best practice and expertise on counter terrorism were also shared and discussed, including responses to terrorist content online and financing of terrorism.

The UK delegation was chaired by Jonathan Emmett, Director of Counter-Terrorism and Homeland Security Strategy in the Home Office, who was accompanied by officials from the Home Office, the Foreign, Commonwealth and Development Office and a police representative from the UK's Liaison Bureau at Europol. On the EU side, which included an observer from the Belgian Presidency on behalf of EU Member States, the Dialogue was chaired by Nadia Costantini, Special Envoy for Counter-Terrorism, of the European External Action Service ('EEAS'). Representatives were present too from the European Commission, including Deputy Director-General from the Directorate General for Migration and Home Affairs, Olivier Onidi, and the EU Counter-Terrorism Coordinator's Office.

5. CONCLUSION

Brexit has certainly put UK-EU security operations and intelligence cooperation at significant risk and the current absence of any formal security partnership to underpin such cooperation is a noticeable failure. Loss of access to the relevant databases, the termination of the EAW and the retrograde steps in relations with EU agencies have added to the general malaise in counter-terrorism cooperation since Brexit. The main impact of UK withdrawal has already been felt in terms of time and efficiency and the significant risk that the UK and the EU were facing a security downgrade⁸³ continues to stoke fears that a terrorist outrage in the UK would leave the country vulnerable and ineffective in its response. Thankfully, according to available data, such fears have so far proven to be overwrought and that in fact the cooperation between both parties on counter terrorism is still flourishing at similar levels before UK withdrawal,

82 EEAS Press Team, 'Counterterrorism: EU and UK hold dialogue on shared priorities and approaches', 2 February 2024, Brussels (2024); available at <https://www.eeas.europa.eu/eeas/counterterrorism-eu-and-uk-hold-dialogue-shared-priorities-and-approaches_en>, accessed 20 April 2024.

83 For a critical parliamentary report, see: House of Commons Home Affairs Committee, 'Home Office preparations for the UK exiting the EU', Twelfth Report, 7 December 2018, *HC Paper 1674* of Session 2017-19.

due to the determination of the professionals concerned to ensure the reinforcement of any perceived weakened links after Brexit.⁸⁴

In this sense, the picture is starting to improve, if only incrementally – the new Conservative government of Rishi Sunak at Westminster has sought to reset its relations with the EU, with the first meetings of the Counter-Terrorism Dialogue taking place in February 2024 (as noted above). Moreover, the Labour Party has called for the substantial enhancement of Britain's security partnership with the EU. With the British general election slated for later this year, there is a possibility of evolving such a partnership in the short term although it faces difficulties from the EU side in securing a 'bespoke' security agreement.⁸⁵ In fact, developing the EU's counter-terrorism efforts in a more dynamic and competent manner is likely not only to revive its own commitment to fighting terrorism but would also indicate its openness to working together with third countries in this common project. At this present juncture, then, a deterioration in the intelligence-sharing partnerships post Brexit has definitely created risks and hazards for the parties concerned, given the mobility of transnational criminal and terrorist groups. While intelligence cooperation has not ended and UK security (apparently) has not so far suffered dramatically in the aftermath of Brexit, nevertheless specific discontinuities will continue to impact adversely on security capabilities, with the principal ones concerning the effects upon the UK of its disconnection from the EU's relevant policy frameworks, reduced access to EU databases and networks as well as an increase in time and complexity to what were previously swifter and more efficient procedures, e.g., with extradition and surrender.

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84 H. B. Jaffel, "Britain's European connection in counter-terrorism intelligence cooperation: everyday practices of police liaison officers, Intelligence and National Security", *Intelligence and National Security*, 35/7 (2020), 1007–1025.

85 J. Wachowiak, R. G. Whitman, J. Grogan, *Report: UK-EU Foreign, Security & Defence Cooperation*, 27 March 2024, *UK in a Changing Europe website*, London (2024), 13-15: available at <<https://ukandeu.ac.uk/reports/uk-eu-foreign-security-and-defence-cooperation/>>, accessed 20 April 2024.

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