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국제학석사학위논문

# **Brexit and the Judicial Cooperation in Criminal Matters of the EU**

브렉시트와 유럽연합의 형사사법공조

2021년 2월

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**Master's Thesis of International Studies**

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# **Abstract**

## **Brexit and Judicial Cooperation in Criminal Matters of the EU**

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The United Kingdom withdrew from the European Union on January 31, 2020, following the result of the Brexit referendum held in 2016. Its withdrawal was expected to some extent, given that from the early stage of the EU, the UK was reluctant toward its creation as well as its development and that it had not fully supported EU policies as an active member even after it joined it. After the intense negotiations between the two Parties during the transition period of Brexit, the UK entirely forfeited from the EU making a new prospective relationship as a third country. However, it was less than perfect since only vague settlement in some parts of their future relationship was agreed. Among the agreed fields of cooperation, the security cooperation, which also covers police and judicial cooperation in criminal matters, is the representing one.

This study examines the impact of Brexit on the cooperative relationship in criminal matters of the EU. Specifically, by assessing each position of the EU and the UK and analyzing different types of cooperation measures in criminal matters, this thesis aims to understand how the relationship between the EU and the UK will

change and what kind of positions and approaches they will take accordingly.

**Keywords:** Brexit, European Union, Judicial Cooperation in Criminal Matters, Criminal Cooperation, EU-UK Relationship

**Student Number:** 2012-22125

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# **I. Introduction**

## **1. Research Background**

On January 1, 2021, the United Kingdom (hereinafter “UK”) completely came out of the European Union (hereinafter “EU”). After 47 years from its join in the European Economic Community (hereinafter “EEC”), the predecessor of the EU, in 1973, the UK forfeited its membership of the EU and left from all affiliated regimes and institutions. Almost half a decade later since the beginning of the EU integration, their relationship entered into a phase of a great change. Because the UK had been an important member of European communities ever since it joined the ECC, its decision to depart from the EU was shocking not only to the community itself but also to other parts of the world. In fact, it was not an abrupt decision. Before the 2016 referendum by a margin of 51.89% to 48.11%, which resulted in Brexit, there had been several internal disturbances on the same issue from the first referendum held in 1975. Until 2016, the results of referenda had always been UK’s retention of its EU membership. However, this time was different and it became the first Member State to leave the EU.

The Brexit was finally brought to realization five years after the 2016 referendum, but the EU-UK relationship will continue to be in a state of confusion, causing significant changes in the areas of economic, political, social and security cooperation. Among all these areas, judicial cooperation in criminal matters (hereinafter “criminal cooperation”) has not been the area that received the most

attention. However, in the case relating to Catalan politicians where the European Arrest Warrants were issued and the 2015 Paris Attack where the Joint Investigation Team was operated, such cooperation solved crimes that threatened European security in an efficient and effective manner.<sup>1</sup> Considering its role and influence to the European society, the criminal cooperation is an integral part of its peace and security in terms of the necessity and effects.

With the growth of inter-state interactions, the need for international cooperation in criminal law area has increased. Active international migration, diversifying cross-border crimes, rapidity and mobility of criminals, and development of information and communications showed that the crimes of the present time can no longer be handled only by individual police and judicial system of one country. International crimes that threat the world security cannot be effectively dealt by the separate judicial systems and jurisdictions of different countries. This is why criminal cooperation has developed along with such changes. Reflecting these points, the United Nations enacted agreements including the “United Nations Convention against Transnational Organized Crime” and the “United Nations Convention against Corruption” for effective response to rapidly changing supranational crimes and to encourage the Member States to actively participate. Inevitably, cooperation in criminal affairs became a global trend.

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<sup>1</sup> Brière, C. 2020. Brexit and its consequences for cooperation in criminal matters. <https://europeanlawblog.eu/2020/02/03/brexit-and-its-consequences-for-cooperation-in-criminal-matters/>

Starting from the “Council of Europe Conventions on Mutual Legal Assistance in Criminal Matters” in 1959, the EU began to seek its own criminal cooperation based on the common goal and mutual trust among EU members. Along with the fulfilment in economic integration, its cooperation had been extended to military and home affairs jurisdiction based on the similarities that the EU countries share each other. In consideration of the need, the European Council led the cooperation in criminal matters by adopting several agreements to provide basis for its establishment and development. Even though the integration of criminal law among the EU members took longer than other fields of cooperation, it has developed into the widest and the most developed one compared to that of other regions. Among all the existing institutions and measures of criminal cooperation, those of the EU are assessed as the most effective and advanced ones. Although they had gradually developed, they had settled successfully and are well-operated with EU Member States’ active participation and involvement. They are certainly expected to be made full use of in the future as they have been until now.

Despite of its passive attitude and support for the EU and its institutions, the UK had been a leading member of its cooperation in criminal affairs. However, as a non-EU country after it exited the transition period on January 1, 2021, the UK would be deprived of its membership of several measures of EU’s criminal cooperation. It means it can no longer have access to integral parts of the cooperation including EU databases, mutual recognition and joint investigations. The new status of the UK, which is a prerequisite for many of measures and regimes for

criminal cooperation, will have significant impacts to its security.

On December 2020, a week before the transition period of Brexit came to an end, “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” (herein after “EU-UK Trade and Cooperation Agreement”) had been concluded on certain issues. This agreement included both Parties’ consent on security matters in which they decided to continue existing criminal cooperation. Boris Johnson, the UK Prime Minister, again assured the continuance as well as protection of their criminal and police cooperation. He also reassured that the UK will remain its ability to catch the criminals and exchange information and know-hows just like it used to do before Brexit. However, the reality is that the UK left from most of its criminal cooperation measures either entirely or partially, and no sufficient details or methods for those measures have been ideally settled yet. Up until the recent Brexit negotiations, the EU and the UK ceaselessly shared their ideas and negotiated on these matters, but they only came out with a little constructive outcome.

Despite being one of the most important and vital areas of cooperation for both the EU and the UK, it seems to be difficult to narrow the gap between them and the future relationship cannot be easily predicted. They share common objectives and willingness to sustain criminal cooperation and surely are aware of the importance. However, their views and desires are different in various ways.

Consequently, the changes the EU and the UK had gone through and are expected to face in this field has become one of the cores when discussing their future relationship. Hence, by studying how the negotiations of criminal cooperation between the two Parties have progressed, this thesis aims to examine the impact of Brexit on their uncertain future relationship as well as on the overall system of European criminal cooperation.

## **2. Research Question**

As mentioned above, the EU's criminal cooperation is a highly developed and advanced system, which efficiently and effectively serves to protect peace and security of the EU. Not only it has achieved a high level of integration, various professional measures and institutions in each detailed sub-area of the field are also noticeable characteristics. Through the establishment for their respective roles and performance for specific purposes, those measures and institutions have successfully developed individually within a single cooperation system. However, their roles and effects are facing uncertainty as Brexit would significantly affect the whole system of criminal cooperation for both the EU and the UK.

Both Parties have made great efforts in negotiations to achieve satisfactory results for all. However, they seem to be going through a lot of difficulties in narrowing their different positions. While both Parties desire to continue

cooperation, they seem to find it difficult to reach an agreement due to differences in views toward the general positions and holistic picture of the cooperation. Furthermore, it seems that the diversity and complexity of various affiliated sub-institutions and measures of the cooperation in terms of their compositions and roles make compromising even harder.

Since 2016, abundant amount of studies had been conducted on the effect of Brexit on the EU-UK criminal cooperation. Although these existing literatures have already studied the development of the EU's criminal cooperation and the UK's role within it, and stated their views on possible future relationship between the two Parties, most of them were either normative or macro explanations or reviews of certain specific institutions. Few studies have been found which focused on how the UK's participation would change depending on different institutions and measures, especially the possibility and ways of a third country's participation. Given that its cooperation has developed in diverse and complex ways, it should not be overlooked that all affiliated institutions and measures will certainly not change uniformly in one direction.

Based on such thoughts and findings, this thesis will explore the following research question:

- What kind of partnership in criminal cooperation do the EU and the UK aim to have? How will they change compared to their relationship before Brexit? What would be the forms of their criminal cooperation after Brexit? Would the

methods of cooperation differ according to the types of the cooperation measures?

### **3. Literature Review**

Criminal cooperation, in general, means a form of mutual assistance conducted by a country at the request of another country in connection with investigation, prosecution, trial procedures and recognition of criminal decisions. Its purpose is to keep security and safety of people as well as society by preventing and combating crimes and guarantee the parties to resolve criminal issues easily within the cooperation system.<sup>2</sup> Criminal cooperation can be made and conducted in various forms either based on bilateral or multilateral agreements or through bilateral or supranational institutions. These forms of cooperation are advantageous in terms of effectiveness and efficiency in dealing with all kinds of cross-border international crimes.

However, the scope and contents of cooperation implemented between the countries vary due to different legal systems, judicial institutions and criminal procedures of each country. Furthermore, the fact that countries unavoidably need to sacrifice a great deal of sovereignty has always been the greatest weakness of integration in this field. This is why it is often perceived as one of the most difficult

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<sup>2</sup> [https://eur-lex.europa.eu/summary/glossary/police\\_judicial\\_cooperation.html](https://eur-lex.europa.eu/summary/glossary/police_judicial_cooperation.html)

and tardy fields of cooperation.

With the increase of international exchanges and the advanced means of transportation, the international cooperation in criminal justice area, which had not been problematic in the past, has become an important task. When looking at current crime patterns, criminal methods are becoming more sophisticated and diversified due to internationalization and rapidly developing information and communication technologies. In addition, the damages derived from these crimes are not limited within one country's border and reaching a serious level that threatens not only regional but also global security. Nevertheless, the investigation, data collection and law enforcement agencies of an individual country directly responding to transnational crimes face considerable problems in terms of disputes over jurisdiction, varying degrees of socioeconomic development and legal systems among countries. Eventually, many states began to realize the need to effectively respond to rapidly changing transnational criminal patterns for the security as a whole through the establishment of bilateral or multilateral agreements and shared institutions based on these agreements. Along with such global changes and efforts, the system of cooperation between a few individual countries or even a wide range of regions began to develop. The so-called criminal cooperation had inevitably become a global trend.

Criminal cooperation of the EU is considered one of the most advanced and well-established forms of cooperation in the world, being similar to the system

of federal governance.<sup>3</sup> Compared to other regions, the strengthened integration in this part had been achieved through high level of mutual dependence and trust among EU countries, creating shared common criminal procedural values.<sup>4</sup> It has been developed divisionally in four categories of police cooperation, judicial cooperation, information exchange and extradition. Each category has its own unique institutions and agencies established for specific purposes and efficient operational features. However, it is now faced with uncertain changes by Brexit.

Numerous academic works have studied, analyzed and predicted post-Brexit criminal cooperation between the Parties. Of the existing literatures, the forecast of how the future participation of the UK in the area of criminal cooperation of the EU would look like could be generally categorized into four scenarios: the UK's (1) no participation at all, (2) participation as an ordinary third state outside of the EU, (3) active participation as it used to be before Brexit and (4) participation as a fully-fledged member of the cooperation.<sup>5</sup>

Considering current status of the EU-UK negotiations progressed so far, the first scenario of 'no participation at all' and the last scenario of 'participation as a fully-fledged member' seem extremely unlikely to happen. The first scenario, which is

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<sup>3</sup> Hufnagel, S. 2020. "European Union Judicial Cooperation in Criminal Matters: Law and Practice." <https://www.qmul.ac.uk/euplant/blog/items/european-union-judicial-cooperation-in-criminal-matters-law-and-practice.html>

<sup>4</sup> *Ibid.*

<sup>5</sup> Lonardo, L. 2018. "EU Common Foreign and Security Policy after Brexit: A Security and Defence Treaty for the 'Deep and Special Partnership'." DCU Brexit Institute.

to decide not to be a part of EU's advanced system of criminal cooperation by denying its utility, is not only out of tune but also definitely not what the UK wants. The fourth scenario is also very unlikely to happen when considering the EU's consistent position on Brexit, which opposes to UK's full participation just like any other EU Member State even after Brexit.

The second scenario of 'the participation as an ordinary third state outside the EU', which is the most realistic, is supported by majority of the authors of existing literatures. This idea is mainly backed up by the facts that both Parties have conflicting views on the conditionality relating to fundamental rights in the criminal cooperation procedures. While the EU demands the UK for continued participation and commitments to the European Court of Human Rights (hereinafter "ECHR") as conditions for maintaining cooperation, the UK opposes to it.<sup>6</sup> In other words, it depends on how much the UK promises to commit and make to meet EU's requests relating to issues of human rights.<sup>7</sup> Academics have also highlighted another practical issue that EU Member States do not tend to grant or accept flexibility for the UK as its "cherry-picking" participation in Justice and Home Affairs (hereinafter "JHA") areas and its self-made decision to solely leave the EU have pushed some EU

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<sup>6</sup> Brière, C. 2020. "Conditionality in defining the future cooperation in criminal matters between the United Kingdom and the European Union." ERA Forum Journal of the Academy of European Law, 20: 515 - 531.

<sup>7</sup> Willems, A. 2018. <http://blogs.lse.ac.uk/brexit/2018/03/29/why-britains-habit-of-cherry-picking-criminal-justice-policy-cannot-survive-brexit/>

members patience to breaking point.<sup>8</sup>

The way to make the second scenario happen is either to conclude tailored EU-UK agreements or to have separate agreements with each EU countries individually. The former way is more desirable because it guarantees legal certainty, maintaining the range of application for the cooperation at EU level for both Parties and ensuring efficiency by keeping their close and interdependent relationship.<sup>9</sup> The latter method is rather a feasible way when considering the status quo. If the UK does not make much effort or when the EU rejects the UK's proposals to maintain close criminal cooperation, the UK will have no choice but to have a quite normal relationship just like a non-member country. In this case, not only various well-operating EU criminal assistances may cease to apply, but also it may not guarantee the same treatment of the counterparts to the requests of the UK for cooperation unlike the requests of the EU Member States.<sup>10</sup>

The third scenario, which is more optimistic compared to the second scenario, is also supported by numerous authors. Academics argue that for the good and interests of all EU countries, the UK will retain flexibility in participation in most of the EU's cooperation in criminal affairs based on special 'bespoke' agreements.<sup>11</sup>

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<sup>8</sup> Curtin, D. 2017. "Brexit and the EU area of Freedom, Security and Justice: Bespoke Bits and Pieces." Istituto Di Diritto Politica E Sviluppo.

<sup>9</sup> Mitsilegas, V. 2017. "European criminal law without the United Kingdom? The triple paradox of Brexit." *New Journal of European Criminal Law*, 8(4): 437 - 438.

<sup>10</sup> *Ibid.*

<sup>11</sup> Lonardo, L. 2018. "EU Common Foreign and Security Policy after Brexit: A Security and Defence

The rationale behind the third scenario is UK's considerable input commitments to the EU's judicial cooperation. As the UK has been an avid user and key developer of EU's major police and criminal cooperation measures, they believe that the EU Member States would be afraid of losing existing network and close partnership with the UK.<sup>12</sup>

The authors who support the third scenario further emphasizes that the EU would use the outcome of its criminal cooperation negotiation with the UK as an opportunity to fashion and engineer future legal partnership that it may want to establish with other third countries.<sup>13</sup> In this case, the future EU-UK relationship might face few changes resulting in sustainability and stability of current advanced cooperation.

As reviewed above, the existing literatures had conducted thorough studies and critical reviews, and presented several possible scenarios for the future EU-UK partnership of criminal cooperation. Although various measures belong to one large framework of criminal cooperation, it is difficult to assertively determine the future forms of post-Brexit cooperation in one certain way because the types, compositions, roles and effects of these measures are all different. Detailed reviews of each type and holistic as well as comparative analyses are certainly required to more precisely

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Treaty for the 'Deep and Special Partnership'." DCU Brexit Institute.

<sup>12</sup> Kramer, A. and Dickson, R. 2020. "The Changing Landscape of UK-EU Policing and Justice Cooperation." *European Papers*, 5(1): 479 – 492.

<sup>13</sup> *Ibid.*

comprehend how the cooperation in these measures will change after Brexit.

Most of the existing literatures either gave normative and macro overviews and prospects in general or focused in one or two specific measures of the EU-UK criminal cooperation after Brexit. However, few works had reflected the fact that the two Parties' negotiating approaches may differ from one measure to another according to their characteristics including compositions, roles and operating elements.

In order to contribute to the existing works, this thesis reviewed the development of the EU-UK criminal cooperation, and summarized the institutions and measures of cooperation into 4 categories: (1) police cooperation, (2) judicial cooperation, (3) information exchange, and (4) extradition. In addition to that, the thesis compared and analyzed four different representative measures from each category for further advanced reviews. Based on this comparison and analyses, this study tried to determine the post-Brexit judicial cooperation through detailed type-specific reviews that the existing literatures had overlooked. Through this approach, it will be able to go further from existing reviews by understanding how the cooperation in different measures would change after Brexit based on their distinctive features.

## **4. Research Methodology**

The methodology of this thesis is based on descriptive and qualitative analyses to comprehend the past and current positions as well as to forecast possible future forms of the EU-UK partnership in the field of criminal cooperation.

The achievements of the negotiations progressed so far are analyzed by reviewing the texts of “Political Declaration setting out the framework for the future relationship between the European Union and United Kingdom” (hereinafter “EU-UK Political Declaration”),<sup>14</sup> “the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community” (hereinafter “Withdrawal Agreement”),<sup>15</sup> “Draft Text of the Agreement on the New Partnership with the United Kingdom”,<sup>16</sup> and the EU-UK Trade and Cooperation Agreement.<sup>17</sup>

In order to understand each Party’s stance in the Brexit negotiations of criminal cooperation, the documents published by the EU including decisions and regulations and the publications by the UK government, including White Papers, were reviewed. Other materials including directives issued by EU institutions or the

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<sup>14</sup> European Commission. 2019. “Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom” (2019/C 384I/02).

<sup>15</sup> European Commission. 2020. “Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community” (2019/C 384 I/01)

<sup>16</sup> European Commission. “2020 Draft Text of Agreement on the New Partnership with the United Kingdom”

<sup>17</sup> “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”

governmental bodies of the UK, speeches or press release made by Brexit negotiators of both Parties, presenting, describing or inferring each Party's stance, were used to analyze their positions.

Further to conduct comparative analysis, this paper selected one representative measure from each category of the EU's criminal cooperation. Among the various institutions and measures in each category which will be discussed below in the next chapter of "Judicial Cooperation in Criminal Matters of the EU", representative measures which will be reviewed in this thesis were selected based on the following standards: (1) the measures that are considered the most successful in terms of operation and cooperation, (2) the measures that have one of the largest participating Member States, and (3) two measures that allow participation of a third country and two that restrict it. Particularly, the third standard was established to compare the differences in the possible future forms of cooperation with respect to the possibility of a third country's participation. In consideration of the above standards, (1) Europol of police cooperation, (2) Eurojust of judicial cooperation, (3) Schengen Information System (hereinafter "SIS") of information exchange, and (4) European Arrest Warrant (hereinafter "EAW") of extradition were chosen to be reviewed in this paper. Coincidentally, the UK forfeited its membership of all these four measures on the date of its exit on January 1, 2021.

A qualitative study based on the comparison between the institutions that permit a third country participation and those that do not permit was conducted on

the four measures that let the UK out to understand the similarities and differences of the UK's negotiation approaches and its future partnership with the EU. The materials and data collected are existing literatures, official documents produced by the EU, including European Council, Parliament, and Commission, as well as the UK government, press and articles on Brexit and EU's criminal cooperation. For balanced understanding, these were retrieved from various sources of databases of the EU and the UK and European journals as well as British journals.

## **5. Structure of Thesis**

This thesis is composed of 5 parts: (i) Introduction, (ii) Judicial Cooperation in Criminal Matters of the EU, (iii) Judicial Cooperation in Criminal Matters of the UK, (iv) the EU-UK Relationship beyond Brexit and (v) Conclusion.

In the chapter of "Introduction", research background, research question, literature review, research methodology and structure of thesis are contained. Here, the overall framework of this thesis including what it tries to find how it will be presented are introduced.

The chapter of "Judicial Cooperation in Criminal Matters of the EU" explains the system of EU's criminal cooperation. As this thesis categorizes judicial cooperation measures into four categories (police cooperation, judicial cooperation, information exchange and extradition), this chapter explains four major EU

instruments from each category: Europol, Eurojust, SIS II and EAW.

In the chapter of “Judicial Cooperation in Criminal Matters of the UK”, the UK’s basic status in this field before Brexit as well as during the transition period and its past participation before Brexit are analyzed. Here, the four measures reviewed in the second chapter is assessed regarding the participation of the UK.

In the chapter of “The EU-UK Relationship beyond Brexit”, the overall future relationship in criminal matters after Brexit is analyzed by reviewing relative agreements, declarations, speeches and all other relevant materials made by the EU and the UK. Furthermore, by (1) analyzing each position of European Council, European Parliament, European Commission and the UK, and (2) assessing the possible ways of how the UK can participate in the measures of criminal cooperation as a country outside the EU as well as the Schengen area, this thesis explains what kind of approaches the UK would take and how the relationship between the two Parties change after Brexit.

In the chapter of “Conclusion”, the analyses of negotiations, assessment of both Parties’ positions, findings on the UK’s approaches in different measures of the criminal cooperation, and suggestions for the future partnership are summarized.

## **II. Judicial Cooperation in Criminal Matters of the EU**

### **1. Development of Judicial Cooperation in Criminal Matters of the EU**

The EU's multilateral cooperation in criminal affairs for its security and peace started on different levels and basis of different legal foundations and instruments.<sup>18</sup> Based on the Articles 82 to 86 of the "Treaty on the Functioning of the European Union" (hereinafter "TFEU"), EU's initial goal and pursued strength in the field of criminal cooperation was to fight against serious transnational crimes and promote efficient and effective assistance.<sup>19</sup> However, JHA was not the most concerned and cared area in the early stage of the EU's development process. The security integration and the development of criminal cooperation in Europe progressed very slowly compared to other areas of integration. Unlike other fields of cooperation, criminal cooperation was difficult to achieve rapid development due to the possibility of unavoidable infringement of each Member State's sovereignty to some extent. The legal system of each state varied while the understandings of criminal cooperation were also different. However, as the cross-border crimes evolved, becoming more sophisticated and tactful, and the dependence between the EU countries became intensified, the views began to change.

Criminal cooperation in the EU initiated based on two mother conventions: "1957 European Convention on Extradition" and "1959 European Conventions on Mutual Legal Assistance in Criminal Matters".<sup>20</sup> Up until late 1980's, the EU

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<sup>18</sup> [https://www.coe.int/t/dghl/cooperation/lisbonnetwork/Themis/Criminal/Paper2\\_en.asp](https://www.coe.int/t/dghl/cooperation/lisbonnetwork/Themis/Criminal/Paper2_en.asp)

<sup>19</sup> European Parliament. 2018. "The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters."

<sup>20</sup> It has been ratified by 47 Member States of the Council of Europe with three other non-EU countries: Chile, Israel and the Republic of Korea.

Member States started to cooperate on an intergovernmental basis based on these two conventions.

A specific visible starting point of the development in this field was in 1990 when a group of EU countries agreed to abolish their border controls under the Schengen Treaty. Along with this agreement, a package of police cooperation measures were agreed to deal with criminals who might abuse or misuse this freedom to cross border. It was followed by the Treaty of Maastricht<sup>21</sup> in 1992, which made provisions for certain forms of criminal justice legislation on an intergovernmental basis. The measures based on the treaty were organized in different forms and their roles and authorities were rather restricted.<sup>22</sup>

However, as cross-border crimes and terrorism grew, existing legal frameworks had further developed new measures, which intensified the security integration and strengthened criminal cooperation.<sup>23</sup> From 1999, when the EU framework was incorporated based on the Treaty of Amsterdam, to 2009, the EU Member States agreed on approximately 130 related measures covering affairs of the substantive and procedural criminal laws, mutual recognition, harmonization of procedures, information sharing and law enforcement. In 2002, the Treaty of Nice introduced

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<sup>21</sup> It is the first written text that regulates any kind of police and judicial cooperation in intergovernmental basis.

<sup>22</sup> Dawson, J. 2017. "Brexit: implications for policing and criminal justice cooperation". House of Commons Library.

<sup>23</sup> Hufnagel, S. 2020. "European Union Judicial Cooperation in Criminal Matters: Law and Practice." <https://www.qmul.ac.uk/euplant/blog/items/european-union-judicial-cooperation-in-criminal-matters-law-and-practice.html>

the amendments for enhanced cooperation, in which Eurojust was introduced as an instrument. In 2009, the Treaty of Lisbon combined and put these measures together into one under the EU law, in which the enforcement powers of the European Commission and the Court of Justice of European Union (hereinafter “CJEU”) applied.<sup>24</sup>

When looking at these developments and changes, the transition of perspectives and forms of security and criminal cooperation can be clearly understood. Traditionally, the early stage of EU’s criminal cooperation was in interim forms where only Parties which needed it participated. Consequently, the relationship between European countries within criminal cooperation had strong inter-governmentalistic and temporary nature. The requests as well as responses for cooperation were made individually to each counterpart, causing repetition of procedures. The assistance was based on their voluntary and mutual consent to cooperate. The information or know-how obtained through the cooperation was not be able to be shared, used or developed for other cooperation. Considering these inconveniences and procedural burdensome, the EU took actions for change. For its need of combating and solving criminal problems, the EU conceptualized the “principle of mutual recognition” at the level of EU’s criminal law, established supranationalistic measures for efficiency and effectiveness and made harmonized conditions that were applied to all.

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<sup>24</sup> *Ibid.*

Described as a cornerstone of criminal cooperation by the European Parliament,<sup>25</sup> the mutual recognition made it possible that the national measures and judicial decisions were recognized in all other Member States, resulting in increased efficiency and reduced procedural burdens. Furthermore, specifically established and developed cooperation measures have been adapted to efficiently and effectively fight transnational crimes at EU level. After all, the security integration and judicial cooperation initially operated on the basis of inter-state cooperation in certain sectors separately and they gradually but surely developed into more integrated and advanced forms of regimes and institutions at the EU level.

## **2. Measures of Judicial Cooperation in Criminal Matters of the EU**

As the EU has one of the most advanced criminal cooperation, it has numerous related sub-measures established and developed for different specific purposes. These legal and policy frameworks can be largely categorized into four groups: (1) police cooperation, (2) judicial cooperation, (3) information exchange and (4) extradition. The table below sets out the EU's major leading measures of each category.

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<sup>25</sup> European Parliament. 1999. "Tampere European Council 15 and 16 October 1999, Presidency conclusions." [https://www.europarl.europa.eu/summits/tam\\_en.htm](https://www.europarl.europa.eu/summits/tam_en.htm)

**Table 1. List of EU's leading measures of criminal cooperation**

<b>Categories</b>	<b>Leading measures</b>
<b>Police cooperation</b>	Europol
<b>Judicial cooperation</b>	Eurojust European Judicial Network European Investigation Order Joint Investigation Teams
<b>Information exchange</b>	Schengen Information System European Criminal Record Information System Prüm EU Passenger Name Records Visa Information System European Dactyloscopy
<b>Extradition</b>	European Arrest Warrant

As explained in 'Research Methodology' chapter, this thesis chose four leading measures from each category based on three standards: (1) the measures that are considered the most successful in terms of operation and cooperation, (2) the measures that have one of the largest participating Member States, and (3) two measures that allow the participation of a third country and two that restrict it. As a result, this thesis reviewed Europol, Eurojust, SIS and EAW. Because this thesis sought to predict future EU-UK partnership in each measure, it mainly focused on and explained the role and operational methods, especially the way how a third country participates in it.

## 1) Europol

Europol, established by the Europol Convention<sup>26</sup> in 1995, is EU's law enforcement agency which was made to combat international crimes and terrors that threat European peace and security by cooperating in various forms and exchanging information between each competent police authority of the Member States. It can be described as an "investigation supporting center" for the European investigation agencies under the decisions and orders of the Commission. The roles, activity and function of Europol are regulated in the Article 88 of TFEU.

Europol's main roles include (1) supporting investigations operated by investigating agencies in EU countries, (2) supporting exchanges of crime-related information for the community, (3) providing analyses on gathered information and (4) supporting expert information on individual investigation. Even though it does not have executive powers which is an area to be developed further, compared to the old measures based on traditional conventions, it allows the Member States to conduct efficient and effective collaborations in dealing criminal cases.

With respect to the relationship with third countries, Europol forms partnership with third countries in two ways: by strategic agreements or operational agreements.<sup>27</sup> The former type of agreement only allows sharing strategic data and

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<sup>26</sup> Representatives of the Governments of the Member States. 1995. Convention based on Article K. 3 of the Treaty on European Union, on the establishment of a European Police Office

<sup>27</sup> Europol has a one of a kind cooperation with Demark based on the Agreement on Operational and Strategic Cooperation between the Kingdom of Demark and Europol.

technical information while the latter type allows a third country to exchange broader range of information including private information and personal data. China, Russia and Turkey cooperate with Europol through strategic agreements while many other countries, including the United States, have operational agreements with Europol.

## **2) Eurojust**

Eurojust, established by the decision of the Tampere European Commission in 2002, is considered the most successful model among the international criminal cooperation. Established based on the Articles of 85 and 86 of TFEU, it is an organization that reports judicial activities throughout Europe and cooperates to fight against transnational crimes with judiciary bodies in each Member State. The objectives of Eurojust are (1) to aid judicial authorities<sup>28</sup> of the Member States, (2) to guarantee effective investigation and prosecution, and (3) to enhance cooperation.<sup>29</sup> The roles of Eurojust include investigation and prosecution of certain acts delegated by the Member States, cooperation with other agencies in relation to them, coordination of criminal jurisdiction, formation of and support for Joint Investigation Teams (hereinafter “JITs”) and collection as well as provision of necessary information. Eurojust works and cooperates closely with other EU

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<sup>28</sup> Competent authorities include judges, prosecutors, or police officers depending on the Member Countries.

<sup>29</sup> Article 3 of the Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime.

institutions like Europol and allow non-EU countries to participate with few restrictions.

Among several instruments under Eurojust, JIT is the prominent one that coordinates, supports and strengthens its activities. It is a temporarily operated tool, typically between 12 to 24 months, for the international cooperation in criminal matters to carry out criminal investigations. It enhances direct cooperation and communication between authorities to efficiently handle increased, sophisticated and organized criminal activities.

With respect to the relationship with non-member countries, there are two ways for them to participate in cooperation with Eurojust: by a standard cooperation agreement or a cooperation agreement which also allows the posting of liaison prosecutors. Both agreements do not allow a third country to take any role or part in the case management or to participate in management board meeting. However, the latter agreement guarantees a third country to participate in operational and strategic meetings of Eurojust in similar manner to full membership of the Agency. Regardless of types of agreement, non-member countries must meet the standards for the data protection and consult with Eurojust in connection with it before concluding the agreement.<sup>30</sup>

Currently, 27 countries are the members of Eurojust and non-European

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<sup>30</sup> Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime

countries such as Iceland, Lichtenstein, Macedonia, Moldova, Montenegro, Norway and the Unites States of America are also in cooperation agreements with it.

### **3) Schengen Information System**

Established in 2007, the first generation SIS (hereinafter “SIS I”), is a measure at EU level for security and border management.<sup>31</sup> The second generation SIS (hereinafter “SIS II”) is a database which provides real time alerts for suspected or wanted people or objects that competent agencies of the Member States need or are interested in.<sup>32</sup> As SIS II contains information that covers the Schengen area, it aims to ensure facilitation of border control and immigration cooperation by allowing the member countries to provide or share information and data of criminal suspects, people who enter the Schengen area without permission, missing persons, stole, lost or embezzled items.

SIS II possesses and supervises about 70 million alerts on persons or objects

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<sup>31</sup> Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of second generation Schengen Information System, Regulation (EC) No 1986/2006 of the European Parliament and of the Council of 20 December 2006 regarding access to the Generation Schengen Information System (SIS II) by the services in the Member States responsible for issuing vehicle registration certificates, and Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II)

<sup>32</sup> Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA

in relation to border control, customs and law enforcement authorities.<sup>33</sup> About two million end-users have access to the stored data and information which can be used anytime.<sup>34</sup> SIS II is only available to the countries that are EU members or non-member countries inside the Schengen zone including Iceland, Liechtenstein, Norway and Switzerland.

#### **4) European Arrest Warrant**

EAW, which was introduced in the wake of an international anti-terrorism campaign after the 9/11 terrorist attacks in the US, was formed and initiated as a mean to replace the existing extradition and recall laws. It is a measure that requires all Member States to transfer criminal suspects, including those of foreign nationality, from countries that issue warrants so that they can be arrested, put on a trial and detained. Before the establishment of EAW, the system of extradition and the procedures of surrender were lengthy and complex. However, the establishment of EAW in 2002 allowed the Member States to enjoy simplified procedures of extradition and rapid return of suspected or convicted people. Before EAW, the whole process of extradition took 1 year in general. However, EAW shortened the time to about 50 days.

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<sup>33</sup> Dawson, J. 2017. "Brexit: implications for policing and criminal justice cooperation". House of Commons Library.

<sup>34</sup> *Ibid.*

Like explained above, the EAW has greatly reduced time and costs in extradition and summons, making it easier to fight against international crime crossing borders. However, problems arose as the warrants were issued indiscriminately for non-serious misconduct without sufficiently scrutinizing the requirements of issuance. To overcome the side-effects, the EU legislated safeguards of procedural requirements that must be met by all the Member States. It includes the right to interpretation and translation, the right to have a lawyer, the right to be presumed innocent and to be present at trial, special safeguards for children suspected and accused in criminal proceedings and the right to legal aid.<sup>35</sup>

EAW is a member-only measure. Because it requires compliance with EU's high standards of requirements and protection to avoid abuse of EAW, only European countries can participate in it. There are no cases of third country participation.

### **III. Judicial Cooperation in Criminal Matters of the UK**

#### **1. UK's Status in the Area of Judicial Cooperation in Criminal Matters of the EU**

The UK, which had been skeptical and passive about the integration of the

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<sup>35</sup> Gutheil, M. et al. 2018. "The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters." *Policy Department for Citizens' Rights and Constitutional Affairs*.

European Community, did not take an active position in the development of the strongly integrated EU. It was not different for the criminal and security cooperation area. The UK has always held a special position and had contrasting views towards the EU's criminal cooperation. It had taken on the role of a passive balancer or reluctant observer rather than an active participant or a strong supporter in the judicial cooperation process. However, it also has been a leading country in certain aspects of the development.

Traditionally, the UK was a Member State with certain reluctance to develop institutions and organizations at EU level to support criminal cooperation. While Germany and Benelux countries accepted French Minister Shuman's proposal to establish European Community, the UK rejected it. Rather it created the European Free Trade Association on its initiative to create a separate economic bloc.

When the UK acceded to the Lisbon Treaty, it reserved its right to opt-out in specific areas including cooperation in criminal matters. The Protocol No. 21, which is a special opt-out clause for the UK, let it decide whether to be bound by measures of Freedom, Security and Justice or CJEU judgments. However, the UK was also guaranteed to participate in some cooperative measures when it accepts the usefulness or need by discretionary opt-in clause. The UK exercised its rights from time to time. Sometimes, it exercised opt-in clause at the stage of proposal of the measure like in the case of European Investigation Order. Sometimes, it exercised it after the adoption such as in the case for the Europol Regulation. Moreover, it was

granted a specific transitional right to decide to stay or withdraw from the related EU instruments of criminal cooperation before the transition period, the date of entry into force of the Lisbon Treaty. Ultimately, the UK, which was given preferential authority compared to other Member States, could exercise its flexibility on deciding whether to make full use of EU criminal cooperation or not. This specific regime allowed the UK to participate in a manner of “à la carte” in which the UK had freedom to decide its participation in certain regimes, different types of participation and degree of cooperation in different areas of criminal justice.<sup>36</sup>

Yet, the UK was also an initiative leader in some of EU’s criminal cooperation. The most notable example of its active participation is when mutual recognition was first proposed as a principle by Jack Straw, the Home Secretary of 1998 European Council. After its introduction and application in the 1999 conclusion of Tampere European Council, the principle became the fundamental prerequisite and basis for the cooperation in criminal justice area.<sup>37</sup> The UK was a strong supporter of certain institutions like Europol, Eurojust and EAW. It made the second largest contribution to the Europol information system. Many of these instruments were managed by leaders from the UK. In Europol, a British person, Sir Rob Wainwright, served as the Director for almost a decade. Out of five Presidents who directed Eurojust, two were British.

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<sup>36</sup> Brière, C. 2020. “Brexit and its consequences for cooperation in criminal matters.” <https://europeanlawblog.eu/2020/02/03/brexit-and-its-consequences-for-cooperation-in-criminal-matters/>

<sup>37</sup> *Ibid.*

## 2. UK's Participation before Brexit

The UK had benefited from various EU measures of criminal cooperation. Below is the review of the UK's participation in (1) Europol, (2) Eurojust, (3) SIS II and (4) EAW in terms of its role and contribution within each measure.

### 1) Europol

The UK was a great supporter as well as an active participant of Europol. As mentioned above, from 2009 to 2018, Europol was led by a British Rob Wainwright.<sup>38</sup> After the British government's decision to opt-in 2016 Europol Regulation, and its entry into force in 2017, Brandon Lewis<sup>39</sup> stated that:

*“Opting in Europol will maintain operational continuity for UK law enforcement ahead of the EU existing the EU, ensuring our Liaison Bureau at Europol is maintained, and that law enforcement agencies can continue to access Europol systems and intelligence. This decision is without prejudice to discussions on the UK's future relationship with Europol when outside the EU.”*<sup>40</sup>

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<sup>38</sup> He was the former Head of the International Division of the UK's Serious and Organised Crime Agency.

<sup>39</sup> He was the former Minister for Policing and Fire Service.

<sup>40</sup> Lewis, B. 2016. Letter dated 14 November 2016 to the Chair of the European Scrutiny Committee, House of Commons.

From numerous comments of officials and notes made by the government<sup>41</sup>, it is clear that the UK laid stress on its membership of Europol and perceived it as one of the most essential and valuable measures among those of criminal cooperation.

## 2) Eurojust

The UK was also an active member of Eurojust. Out of five Presidents until now, two were British. The Crown Prosecution Service and National Crime Agency (hereinafter “NCA”) mentioned that the UK has been a heavy user of Eurojust and emphasized the significance of JITs by describing it as “absolutely vital”.<sup>42</sup>

Stephen Rodhouse, who was the former representative of the National Police Chief’s Council (hereinafter “NPCC”) and the Metropolitan Police Service of the UK, had stated about Eurojust as:

*“valuable facility for bringing Member States together on high profile investigation where facilities such as translation and the access to legal advice were hugely significant.”*<sup>43</sup>

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<sup>41</sup> UK Parliament. 2016. European Union Committee –Brexit: future UK-EU security and police cooperation. 7th Report of Session 2016-17.

<sup>42</sup> House of Lords European Union Committee. 2016. “Brexit: future EU-UK security and police co-operation.”

<sup>43</sup> <http://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/770/5.htm>

Even though the UK has traditionally thought that the transnational European integration could be a threat to its sovereignty, these statements of related agencies of the UK and many other more show its changed perception and emphasis on the cooperation with judicial authorities of other foreign countries through the development of and facilitation by Eurojust.<sup>44</sup>

### 3) Schengen Information System

As the UK was not a Schengen country, it was not able to use SIS I for border and immigration control. Inevitably, the access to various kinds of information on Schengen-wide alerts was not possible in the past.<sup>45</sup> However, it became possible from 2015 when the UK was able to use SIS II in the law enforcement aspects for police and criminal law purposes. Out of its 29 to 30 Member States, the UK took a proportion of more or less 10% annually from the beginning of its participation. The table below shows how actively the UK accessed to and used the SIS II.<sup>46</sup>

**Table 2. Numbers of Access of the UK and the Member States to SIS II**

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<sup>44</sup> Ligeti, K. and Robinson, G. 2017. ““Bespoke” UK-EU Police and Judicial Cooperation Post-Brexit.” *Criminology in Europe*.

<sup>45</sup> [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system_en)

<sup>46</sup> Statics are collected from “EU Open Data Portal”

Year	2015	2016	2017	2018	2019
<b>Total access of the UK</b>	253,003,886 (8.7%)	514,160,087 (12.91%)	541,258,014 (10.46%)	603,569,274 (9.8%)	571,697,394 (9%)
<b>Total access of MS</b>	2,908,184,143	3,983,457,108	5,173,194,992	6,185,199,597	6,666,377,199

The UK had highlighted the importance information sharing by SIS II. It specifically recognized its role and importance in tackling the threats by Iraqi or Syrian terrorists which made tracking of their movement, including entry or leave across the European continent, possible and easy to achieve.<sup>47</sup> The NCA and the NPCC had both emphasized the importance of access to SIS II by describing it as *"integrated into our system."*<sup>48</sup>

#### 4) European Arrest Warrant

EAW has been a key tool for NCA and it also had close partnership with other related agencies of the UK. Since 2004, the UK had requested, arrested and surrendered almost 30,000 individuals suspected or convicted of crimes to or from other Member States. According to the Agency, extradition requests, arrests and

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<sup>47</sup> HM Government. 2016. "The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues"

<sup>48</sup> House of Lords European Union Committee. 2016. "Brexit: Future UK-EU Security and Police Cooperation." paras 89-91.

surrenders to the UK under the EAW increased from 6,714 in 2010 to 17,087 in 2019. Requests made by the UK to other Member States have gone up from 526 to 784 over the same period. Tables below demonstrates the increased numbers of requests, arrests, surrenders of wanted from and by the UK during 10 years from 2010 to 2019.<sup>49</sup>

**Table 3. Numbers of Wanted from the UK by European Arrest Warrant**

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total
<b>Requests</b>	4,369	6,512	6,290	5,522	13,460	12,613	13,797	19,515	15,995	15,056	113,129
<b>Arrests</b>	1,307	1,332	1,331	1,775	1,519	2,041	1,843	1,510	1,394	1,250	15,302
<b>Surrenders</b>	1,038	1,079	1,025	1,126	1,097	1,149	1,431	1,164	873	781	10,763

**Table 4. Numbers of Wanted by the UK by European Arrest Warrant**

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total
<b>Requests</b>	252	226	271	219	228	228	348	278	176	273	2,499
<b>Arrests</b>	141	151	148	170	156	150	185	198	219	277	1,795
<b>Surrenders</b>	133	136	136	127	145	123	156	174	185	234	1,549

Looking at the statistics of the use of EAW by the British government, it is noted that both the UK and other member countries of EAW had benefited from the measure with the UK as an active member.

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<sup>49</sup> <http://nationalcrimeagency.gov.uk/who-we-are/publications>

### 3. UK's Status during the Transition Period

During the period from January 31 to December 31, 2020, the UK's status was a combination of status of quo in some part and a loss of its right and duty in other part. At the time of UK's leave on January 31, 2020, the Withdrawal Agreement was ratified. It prescribed both general and specific terms of Brexit to ensure that the withdrawal process happens systemically in good order and ensure legal certainty after the suspension of application of EU laws, treaties and measures.<sup>50</sup> With regard to the criminal cooperation, the agreement provided rules and mechanisms on terminating proceedings of criminal investigation, information exchange in which the UK was involved.<sup>51</sup>

During the period of transition, the UK could no longer enjoy the EU membership. While negotiating future partnership with the EU, it could not participate in the process of decision-making or management as it was a third country. However, the authority and effects of relevant agencies and measures of criminal justice granted by related EU laws and treaties were maintained to the British residents, including natural and juridical persons, during the period of transition.

Until the period of transition after Brexit, the Withdrawal Agreement retained

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<sup>50</sup> European Commission. 2020. "Questions and Answers on the United Kingdom's Withdrawal from the European Union on 31 January 2020"

<sup>51</sup> *Ibid.*

limited membership in criminal justice area for the UK, allowing it to use major instruments with few changes during the limited period of time. In regard of its opt-in and opt-out rights, the UK could not exercise its right to opt-in to completely new instruments during the transition period. However, it was able to choose to opt-in existing measures or opt-out the instruments it was bound by before Brexit.<sup>52</sup> Furthermore, the EU could invite the UK to new measures of cooperation in the form and conditions of third country participation.

In regard of continuity of existing cooperative relationship or institutions, the UK's status varied. The UK retained its access and status in Europol<sup>53</sup> and Eurojust<sup>54</sup> but it did not have authority to participate in the management of the two agencies. It continued to participate in some of the cooperation measures including European Investigation Order, and was able to utilize some of the databases such as SIS II and European Criminal Record Information System. EAW was also applied to the UK but other Member States were able to refuse UK's surrender request of its nationals. The jurisdiction of the European Courts over the UK had been also continued during the transition period.

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<sup>52</sup> *Ibid.*

<sup>53</sup> Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) [2016] OJL135/53

<sup>54</sup> Regulation (EU) 2018/1727 on the European Union Agency for Criminal Justice Cooperation (Eurojust) [2018] OJ L295/138 (Eurojust Regulation)

## **IV. The EU-UK Relationship beyond Brexit**

### **1. Positions of the EU and the UK on their Future Relationship**

Ever since the EU-UK negotiations on the criminal cooperation initiated, they have shared the same objectives and intentions to maintain “comprehensive, close, balanced and reciprocal law enforcement and judicial cooperation in criminal matters.”<sup>55</sup> Their common desires have been roughly but clearly expressed in numerous ways and places. We can also find them in the EU-UK Political Declaration and the Withdrawal Agreement.

To achieve such goal, they have had countless formal and informal discussions and held several rounds of negotiations to build up new cooperative relationship in not only criminal cooperation but also all sectors of their interests. At first, there were different views and opinions between the two Parties but as reflected in the EU-UK Trade and Cooperation Agreement, they were able to fulfil their goals in general by agreeing to continue cooperation in criminal affairs.

The table below shows the major events in Brexit negotiations in chronological order.

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<sup>55</sup> “Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom” [2020] OJ C34/12

**Table 5. Chronology of the Brexit Negotiations<sup>56</sup>**

<b>DATE</b>	<b>Events and description</b>
<b>June 23 2016</b>	The Brexit referendum was held. 51.89% of the voters voted for UK's exit from the EU.
<b>June 19 2017</b>	Under the Article 50 of TFEU, the EU and EU-UK Brexit negotiations initiated.
<b>December 8 2017</b>	Both Parties agreed on the provisions dealing with the rights of citizens and financial settlement.
<b>March 19 2018</b>	Both Parties agreed on the conditions and provisions of Brexit including the period of transition.
<b>November 25 2018</b>	The draft withdrawal agreement was made by the Parties.
<b>March 12 2019</b>	The UK asked the EU to delay the time of Brexit to June 30, 2019 after its Parliament voted down the plan of Prime Minister T. May to depart the EU.
<b>March 21 2019</b>	The EU members approved UK's request to delay its exit until May 22, provided that the UK Parliament approves the Withdrawal Agreement before March 29, 2019. However, the UK rejected the agreement.
<b>April 10 2019</b>	The EU members again decided to give the green light to the delay of Brexit until October 31, provided that the UK participate in the elections of European Parliament.

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<sup>56</sup> Brundsdon, J. 2020. "Brexit timeline: How the talks have unfolded and what happens next." *Financial Times*. November 23.

<b>May 23 2019</b>	The UK participated in the elections of European Parliament.
<b>September 6 2019</b>	The legislation with respect to the delay of Brexit was passed in the UK provided that no agreement is made with the EU by October 19, 2019.
<b>October 17 2019</b>	Both Parties approved the Withdrawal Agreement.
<b>October 19 2019</b>	Considering the process of legislation with respect to the Withdrawal Agreement, UK requested the EU to delay Brexit until January 31, 2020.
<b>October 29 2019</b>	Leaders of EU members approved the UK's request of postponing Brexit until January 31, 2020, or earlier if both Parties compromise on several conditions of the Withdrawal Agreement before the delayed date.
<b>January 23 2020</b>	The House of Commons voted in favor of the Withdrawal Agreement and the House of Lords approved it.
<b>January 29 2020</b>	The Withdrawal Agreement was approved by the European Parliament.
<b>January 31 2020</b>	The UK came out of the EU. The transition period started as indicated in the Withdrawal Agreement.
<b>March 2 2020</b>	The first round of future EU-UK relationship talks began between the two Parties in Brussels.
<b>June 30 2020</b>	The legal deadline for the extension of transition period was passed without UK's request.
<b>September 6 2020</b>	The move of the UK's plan for new legislation that would override key parts of the Withdrawal Agreement caused crisis as the EU argued that the UK's attempt was an infringement of the international law and threats to the peace of Northern Ireland.

<b>October 16 2020</b>	Mr. Johnson suspended the future relationship negotiations, saying that the EU was not serious about the talks.
<b>January 1 2021</b>	The EU-UK Trade and Cooperation Agreement was concluded. The new EU-UK relationship began.

Even though the EU and the UK decided to maintain criminal cooperation, it is still not decided in detail how to continue specifically and they are uncertain on what will happen. However, from the words announced, written and expressed by negotiators as well as leaders of each side in those discussions, negotiations, interviews and press, we could get the gist of the direction to where criminal cooperation goes at the moment and estimate the feasible forms of it in the future.

Until the latest rounds of new partnership negotiations between the two Parties, they only had a slightest constructive discussion on criminal and police cooperation with a meager progress due to their different views and targets. The differences between each Party's innermost desires can be seen in various ways.

In structural terms of the agreement, the differences in standpoints between the two Parties can be noticed as they pursue different modalities of the agreement for the outcomes of the negotiations. The European Commission, which is the mandated negotiator, wrote negotiated directives into one unified draft agreement and has the authority to amend it,<sup>57</sup> while the UK published its own documents,

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<sup>57</sup> Annex to Council Decision, Directives for the negotiations of a new partnership with the UK (Brussels, 25 February 2020) 5870/20 ADD1 REV3

similar to the draft written by the European Commission, explaining its positions on certain matters of the negotiation in detail.<sup>58</sup> The EU prefers a single agreement to several sectorial agreements while the UK's preference is exactly the opposite.<sup>59</sup>

Also, with regard to the modalities of cooperation, they seemed to have slightly different views. The EU, while supporting the continuance of criminal cooperation with the UK, had a stance similar to “hard Brexit”, a virtual full-scale breakup between each other. The negotiations it had with the UK were conducted under the premise of the UK as an ordinary third country. However, its position was much similar to the concept of “soft Brexit”. Even after the transition period, it desired to maintain the similar level of its past partnership with the EU as an ordinary non-EU state. It wanted to secure access to and competences in the existing judicial cooperation measures of the EU and be able to cooperate with EU Member States without much changes or restrictions. After all, the UK longed for a special status of a counterpart of cooperation given privileges and preferentially treated just like an EU member.

The below is the analyses of the general position of European Council, European Parliament, European Commission and the UK government.

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<sup>58</sup> UK government, 2020. “DRAFT Agreement on Law Enforcement and Judicial Cooperation in Criminal Matters”

<sup>59</sup> Brière, C. 2020. “Conditionality in defining the future cooperation in criminal matters between the United Kingdom and the European Union.” *ERA Forum Journal of the Academy of European Law*. 21, pp.515-531.

## 1) European Council

The European Council is basically supportive of maintaining and close relationship with the UK after Brexit. Among numerous effective and efficient means of criminal cooperation, it specifically highlights the continuance of information exchange and mutual recognition.<sup>60</sup> In “the Decision Authorising the Opening of the Negotiations with the United Kingdom of Great Britain and Northern Ireland for a New Partnership Agreement”<sup>61</sup> adopted on February 25, 2020, the Council emphasized the future partnership mentioned in the EU-UK Political Declaration and the Withdrawal Agreement which includes an “*ambitious, broad, deep and flexible partnership in criminal justice.*” The Annex to the Council Decision contains two clues about what the EU is willing to agree to:

*“The security partnership should provide for close law enforcement and judicial cooperation in relation to the prevention, investigation, detection and prosecution of criminal offences, taking into account the UK’s future status as a non-Schengen third country that does not provide for the free movement of persons. The security partnership should ensure reciprocity, preserve the autonomy of the Union’s decision making and the integrity of its legal order and take account of the fact that a third*

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<sup>60</sup> European Council. 2018. “Europe Council (Art.50) Guidelines on the framework for the future EU-UK relationship.”

<sup>61</sup> Council Decision 2020/266 of 25 February 2020 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement

*country cannot enjoy the same rights and benefits as a Member State.”*<sup>62</sup>

The wordings above emphasize two important conditions for the negotiations. The first is that the negotiations for criminal cooperation should be conducted on the premise of UK's new status deprived of EU membership which is also a prerequisite for using many of the related measures. The second is that the security partnership should be based on reciprocity because the UK, outside the EU, cannot obtain the same rights and privileges of EU countries. To sum up these two conditions, the position of the European Council is that the UK should be treated just like an ordinary third state.

## **2) European Parliament**

In “2018 Resolution on the framework of the future EU-UK relationship”, the European Parliament emphasized that it will only approve the future EU-UK partnership in criminal cooperation if the UK accepts its position of a third country which do not have more rights or less obligations compared to other ordinary third counterparts of the cooperation.<sup>63</sup>

In respect of the need for criminal cooperation, European Parliament recognizes the importance of their partnership based on shared goals and interests

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<sup>62</sup> Annex to the Council Decision 2020/266 authorising the opening of the negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement

<sup>63</sup> *Ibid.*

for continued cooperation in security by combating cross-border crimes or terrors and avoidance of severance of information sharing during the cooperation process.<sup>64</sup>

However, it draws a line in the sand by noting,

*“The UK as a third country will not be able to participate in the EU’s decision-making process and that EU common positions and actions can only be adopted by EU Member States. ... However, third countries outside the Schengen area do not benefit from any privileged access to EU instruments, including databases, in this field, nor can they take part in setting priorities and the development of the multiannual strategic goals or lead operational action plans in the context of the EU policy cycle. Separate arrangements will have to be found with the UK as a third country with regard to judicial cooperation in criminal matters including on extradition and mutual legal assistance instead of current arrangements such as the European Arrest Warrant. The future cooperation can be developed on the basis of non-Schengen third-country arrangements enabling the exchange of security-relevant data and operational cooperation with EU bodies and mechanisms such as Europol and Eurojust.”*<sup>65</sup>

Maintaining its position, European Parliament additionally expressed its position on criminal cooperation in the “2020 Resolution on the proposed mandate for negotiations for a new partnership with the United Kingdom of Great Britain

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<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

and Northern Ireland”.<sup>66</sup> In consideration of UK’s new status as a third state outside of Schengen zone, it is stated that:

*“The UK cannot have direct access to EU information systems data or participate in the management structures of the EU agencies in the area of Freedom, Security, and Justice. It cannot have access to the Schengen Information System. Passenger Name Record and Prüm as well as operational cooperation via Europol and Eurojust must be based on strong safeguards and conditions and fully comply with the CJEU Opinion 1/15.”*<sup>67</sup>

As seen from the resolutions above, it is found that that the European Parliament acknowledges the importance as well as benefits of EU-UK criminal cooperation for European peace and security. However, like European Council, it emphasizes that the UK, outside the EU and Schengen zone, is unlikely to achieve the same access as before Brexit or better access than any other ordinary non-EU Schengen countries, giving the UK no special benefits that it used to enjoy as an EU member before Brexit.

### **3) European Commission**

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<sup>66</sup> European Parliament. 2020. “Resolution of 12 February 2020 on the proposed mandate for negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland” (2020/2557(RSP))

<sup>67</sup> *Ibid.*

European Commission's position is not very different from that of European Parliament. Many sources contain Commission's positions and this thesis reviewed 2018 and 2020 internal preparatory discussions published by the Commission as well as the announcements and speeches made by Michel Barnier, the Chief Brexit negotiator of the Commission.

The internal preparatory discussions on the framework for the future relationship published in 2018 by the Commission noted that,

*“Comprehensive, close and reciprocal cooperation is needed, in balance with: (1) the UK's future status as a non-Schengen third country without free movement of persons; and (2) safeguards for the future cooperation, including ECHR, data protection, effective enforcement and dispute settlement.”*<sup>68</sup>

According to the excerpts above, it is found that the EU seeks a close relationship with the UK but with limits. The UK will not have better status or access than any other non-EU Schengen countries. Furthermore, it emphasizes the importance of reciprocity that the UK will need to show commitments based on the mutual trust to continue partnership with the EU.

Its stance is also well depicted in the announcements and speeches made by the Negotiator Barnier. In 2018, he mentioned that the criminal cooperation including data exchanges through Europol and Eurojust, is important between the

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<sup>68</sup> European commission. 2020. “Internal EU-27 preparatory discussions on the future relationship: law enforcement and judicial cooperation in criminal matters”

two Parties, but also emphasized that they should cooperate in a different form by saying,

*“In any future relationship, the UK will have limited access to EU security databases ...based on the UK's positions, our cooperation will need to be organized differently. It will rely on effective and reciprocal exchanges, but not on access to EU-only or Schengen-only databases.”*<sup>69</sup>

During the speech on January 9, 2020 in Stockholm, he maintained similar position and emphasized the establishment of a new partnership by saying,

*“We will have to rebuild a partnership with the United Kingdom, which will remain a great country that is a friend, ally and neighbor.”*<sup>70</sup>

The Commission's position appears to recognize the importance of the criminal cooperation for the sake of both parties' interests, but it does not agree with maintaining the same close ties as before the Brexit within the EU institutions and systems.

The EU-UK Political Declaration reconfirmed all the stances of the EU bodies as follows:

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<sup>69</sup> European Commission and the European Union Agency for Fundamental Rights. 2018. Speech by Michel Barnier. Post-Brexit police and judicial cooperation in criminal matters.

<sup>70</sup> Barnier, M. 2020. [https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/future-partnership\\_en](https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/future-partnership_en)

*The law enforcement and judicial cooperation in criminal matters should constitute an important element of the future EU-UK relationship, while taking into account that the UK will be a third country outside Schengen. When and where these interests are shared, the Parties should cooperate closely at the bilateral level and within international organisations.*<sup>71</sup>

They agreed to create an ambitious partnership but did not presuppose the situation before Brexit. It can be analyzed that the premise of the future partnership that the European Commission perceives as a red line is UK's position as a third state outside the EU which should be treated equally like any other third countries no more and no less.

#### **4) United Kingdom**

During the EU-UK Political Declaration, the UK showed its intention and vision of a future partnership as follows:

*“There would be comprehensive, close, balanced and reciprocal law enforcement and judicial cooperation in criminal matters [...] underpinned by long-standing commitments to the fundamental rights of individuals, including continued adherence and giving effect to the ECHR, and adequate protection of personal data [...] and*

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<sup>71</sup> European Commission. 2019. “Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom” (2019/C 384 I/02), *Official Journal of the European Union*.

*to the transnational ne bis in idem principle and procedural rights.<sup>72</sup> The Parties agree that the scale and scope of future arrangements should achieve an appropriate balance between rights and obligations – the closer and deeper the partnership the stronger the accompanying obligations. It should reflect the commitments the United Kingdom is willing to make that respect the integrity of the Union’s legal order, such as with regard to alignment of rules and the mechanisms for disputes and enforcement including the role of the Court of Justice of the European Union (CJEU) in the interpretation of Union law.<sup>73</sup>”*

The UK’s ambition is to maintain the relationship between the EU in the area of criminal cooperation. Its clear and detailed vision of future relationship is well described in the 2018 White Paper relating to its post-Brexit partnership with the EU.<sup>74</sup> It says,

*“It is vital that both Parties maintain legal, practical and technical capabilities for cooperation in the future. The UK currently participates in around 40 EU tools that support and enhance police and judicial cooperation in criminal matters. Many of these tools work together to provide an integrated operational system to identify, pursue and prosecute criminals and terrorists. The UK therefore proposes an ambitious partnership with the EU that goes beyond existing precedents in the area,*

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<sup>72</sup> *Ibid.* Paragraphs 80 to 81

<sup>73</sup> *Ibid.* Paragraphs 82 to 83

<sup>74</sup> HM Government. 2018. “The Future Relationship between the United Kingdom and the European Union”

*covering: (a) mechanisms for rapid and secure data exchange; (b) practical measures to support cross-border operational cooperation; and (c) continued UK cooperation with EU law enforcement and criminal justice agencies.”*<sup>75</sup>

On February 2020, the UK government published another document on the matters of future partnership with the EU. Here, it made clear that it is prepared to discuss an agreement on criminal cooperation including arrangements to facilitate information and data sharing used in judicial enforcement, operational methods between judicial authorities and other criminal cooperation measures that both Parties are interested in.<sup>76</sup> It further emphasized the need for continued cooperation as close as possible to what it had enjoyed before Brexit without constraining the autonomy as well as independence of the UK's judicial system without interference from the EU or accepting the influence of the CJEU over any disputes with the EU. Furthermore, it stated that the UK should enjoy cooperation beyond existing precedents for non-Schengen third countries by specifically presenting their proposals for each measure of criminal cooperation.<sup>77</sup> In doing so, it suggested establishing a special agreement that contains suitable and bespoke mechanisms for criminal cooperation including information sharing, law enforcement and operational

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<sup>75</sup> *Ibid.* p.55

<sup>76</sup> HM Government. 2020. “The Future Relationship with the EU: The UK's Approach to Negotiations”

<sup>77</sup> *Ibid.*

cooperation between authorities in charge of the cooperation.<sup>78</sup>

To sum up what the UK government aspires, while it agrees with the EU's constant prerequisite that the non-member UK should be treated just like other third states outside of the EU and Schengen area, it strongly argues the precedents of the ways for the third countries to participate in EU criminal cooperation are not the appropriate starting point in their negotiations for future relationship. Rather, it believes that its future conciliation with the EU must be founded on the establishment of a special tailor-made partnership because (1) the UK has leading capabilities and expertise in security that are essential for all European countries and (2) it is beneficial as well as practical to sustain close relationship between the two Parties to defeat evolving cross-border crimes and European-wide terrors.

While the UK shares the same objectives in the criminal cooperation area, it has two major different views. First is that the UK wants to have a separate independent agreement in this field. Second is that the UK strongly requests the EU for more favorable and privileged treatment compared to any other non-Schengen third countries. After all, the UK, which all alone decided to give up its EU membership, has been negotiating the future forms of criminal cooperation in the directions it wants without conceding anything.

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<sup>78</sup> *Ibid.*

## **2. Analysis for the Potential Forms of Judicial Cooperation in Criminal Matters**

Although the EU and the UK decided to continue criminal cooperation, the level of it is inevitably not the same as before. The UK decided to remain in some of EU's criminal cooperation measures but it forfeited its membership of Europol, Eurojust, SIS II and EAW after it exited the transition period from January 1, 2021. The cooperation between the two Parties has been assured but how it will be continued remains uncertain. Considering the negotiations between the two Parties which try to avoid retreat from the current level of cooperation, it is thought that their relationship will not be completely severed. In language, it could reduce some of the losses as well as risks derived from them in each category of criminal cooperation, but at the same time, the future of these measures and the relationship between the two Parties depends on how the new arrangements come out.

From the analyses and findings of this study, we can grasp the potential forms of future EU-UK criminal cooperation. As the two Parties share the common understandings that the UK will participate in the cooperation as a non-Schengen third country, it can choose to participate through either existing instruments or regimes with limited authority or a separate agreement especially designed for the UK to be treated more favorably.

In Europol and Eurojust, in which non-EU countries are permitted to participate for cooperation, the UK has relatively higher possibilities to discuss future

relationship based on the existing forms of third country's participation. On the other hand, in SIS II and EAW, which is open to Member State-only, it needs to begin new relationship with the EU from the start line. Below are the possible prospected forms of continued cooperation in Europol, Eurojust, SIS II and EAW.

## **1) Europol**

The UK lost its seat at Europol by Brexit. It is expected to cause complexities in efficient cross-border criminal and terrorism investigations. Because the membership of Europol is reserved for EU Member States, non-EU Schengen UK can only maintain the relationship either through strategic agreement or operational agreement.

The UK decided to continue partnership with Europol through the operational agreement. The British liaison officers are still allowed to be sent to Europol headquarter to engage in trans-border cooperation. Like before, the UK still maintains its access to the Secure Information Exchange Network Application and can be benefited from rapid and effective system of information exchange including private personal data.<sup>79</sup> Since the UK government had strongly insisted that it is not sufficient for the UK to have ordinary types of agreements like other third

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<sup>79</sup> <https://www.gov.uk/government/publications/agreements-reached-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-european-union/summary-explainer#part-3--law-enforcement-and-judicial-cooperation-in-criminal-matters>

countries<sup>80</sup> and argued that existing precedents will not be the proper reference, both Parties compromised to supplement the agreement by a more detailed working arrangement.<sup>81</sup>

The most likely way for the UK to participate in Europol will be having a working arrangement that contains similar provisions to the former standard operational agreements with something extra. Taking account of the contribution made by the UK to the Agency, based on any of the precedent models, the UK would want to request the EU for extra such as the authority to access directly to its databases in which none of third countries have.

## **2) Eurojust**

As mentioned above, law enforcement experts of the UK identify the continued relationship with Eurojust as a priority in Brexit negotiation. Reflecting these points, both the UK and Eurojust decided to keep multilateral cooperation in investigation, prosecution and execution in criminal cases. However, because Eurojust does not provide third country for membership, the UK will only participate in it just like any other third country. Consequently, it will be able to

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<sup>80</sup> House of Lords European Union Committee. 2016. "Brexit: Future UK-EU Security and Police Cooperation, House of Lords European Union Committee" HL Paper 77. para 58

<sup>81</sup> Article LAW.EUROPOL.59: Working and administrative arrangements of 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

second a Liaison Prosecutor to the headquarter of Eurojust and exchange private personal information with the Agency.

According to the EU-UK Trade and Cooperation Agreement<sup>82</sup>, both Parties left rooms for supplements and more detailed working arrangements to be discussed in the future. Considering its contribution to the agency, the UK will try to ask for more than what a normal third country is granted when discussing detailed working arrangements. The negotiations within the Agreement will include acceptable demands, including trivial details in favor of the UK, but may also have demands, even it may be hard to make it happen, that outstretch general rights of a third country, including participation in Agency management.

### **3) Schengen Information System II**

The Agreement confirmed several strong data protection commitments, but the UK lost its access to the system after the transition period without any substitute system. Even though the NCA had expressed worries about the potential loss of access to SIS II,<sup>83</sup> both Parties had not covered how their relationship would change with respect to SIS II. Richard Martin, the Deputy Assistant Commissioner of the

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<sup>82</sup> Article LAW.EUROJUST.75: Working arrangement of 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

<sup>83</sup> House of Lords European Union Committee, 2016. “Brexit: Future UK-EU Security and Police Cooperation, House of Lords European Union Committee.” HL Paper 77, para 92.

NPCC of the UK assessed its drop out of SIS II by noting that even though the UK still have access to the alerts that it considers crucial and essential by the system of Interpol, the loss its access to SIS II will put huge impact on its capability.<sup>84</sup>

The relating rules clearly state that the data of SIS II shall not be produced or provided to non-member states. It is also reconfirmed by the EU. Given the fact that there are no precedents of a third state participation in SIS II, a temporary expedient for the UK and the EU is to use other means of information exchange such as Passenger Name Record, which deals with the information provided by airlines, and Prüm, a cross-border database of DNA and fingerprints. These measures differ from SIS II in terms of their objectives and functions, they cannot be the perfect substitutes. As these are insufficient, the only way for the UK to have access to the system will be having a unique tailored agreement with the EU. In this instance, how much efforts the UK put into the negotiations of a special agreement with the EU will affect its availability to SIS II by establishing unprecedented deal.

#### **4) European Arrest Warrant**

In consequence of Brexit, the UK had lost all of its roles it used to have in EAW. To continue cooperation through EAW, which is opened only to the EU members and has no precedents of third country's participation outside EU or

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<sup>84</sup> <https://www.theguardian.com/politics/2020/dec/25/pms-brex-it-deal-makes-uk-safer-riti-patel-insists>

Schengen area, the UK should decide to terminate it or negotiate a separate arrangement. The latter is a more satisfactory option when seeing the intentions and wills of both Parties.<sup>85</sup> With the EU-UK Trade and Cooperation Agreement, the UK confirmed that the two Parties will have similar cooperation on extraditions to that between the EU and Norway and Iceland<sup>86</sup> with extra standards of appropriate safeguards to protect the rights of individuals similar to or even more than those in EAW.<sup>87</sup> However, given the UK's position as non-EU as well as non-Schengen country, it is not clear whether the two Parties can come up with an agreement that satisfy both.

When it decides not to have a special agreement like those of Norway or Iceland, cooperation in extradition matters on the basis of 1957 Council of Europe Convention on Extradition could be an option for the UK and the EU. However, reverting to the former Convention means going back to inefficiency in terms of time and procedures.<sup>88</sup> The NCA had also raised concerns on its leave from EAW

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<sup>85</sup> In the Political Declaration, it is stated that *“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>86</sup> Norway and Iceland are the two non-EU but Schengen countries that have extradition treaties with the EU which guarantee key benefits of the EAW including strict limitation of time and execution procedures of warrants.

<sup>87</sup> <https://www.bloomberg.com/news/articles/2020-12-24/in-bullet-points-the-key-terms-of-the-brex-it-deal>

<sup>88</sup> National Crime Agency of UK mentioned that *“without the EAW, extraditions will become more complicated and costly, take longer and be more likely to be refused. There is the added risk of existing Member States putting UK requests to the bottom of the pile while they continue to use the EAW with other Member States.”*

which might pose a huge protection risk.<sup>89</sup> Although the future cooperation in extradition between the two Parties is still uncertain after Brexit, it seems to be quite clear that both Parties will try to avoid their cooperation on extradition going back to the past where it was done by the outdated Convention on Extradition.

## **VI. Conclusion**

In the light of European peace and security and the safety of Europeans, it is undeniable that the EU and the UK must build a new, forward-moving and comprehensive partnership in criminal cooperation. It must take into account the lowered borders, geographical proximity and evolving crimes, including serious transnational and complex ones and newly introduced ones such as cyber-attacks. To deal with progressively evolving crimes, the UK's ability and efforts to continue participation in criminal cooperation measures after Brexit have never been more important.

As reviewed and analyzed above, the EU and the UK had been active in negotiating the future relationship on criminal cooperation as it is their shared interests and common goal that cannot be given up. Even though they had gone through countless negotiations and persuasions, and eventually came up with a compromised declaration to continue cooperation in general, the details still remain

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<sup>89</sup> House of Commons Justice Committee. 2017. "Implications of Brexit for the justice system." Ninth Report of Session 2016-17.

uncertain at the time of concluding this thesis.

By looking at the contents of the negotiations between both Parties up to date, the agreements settled during the Brexit negotiations and compositions and roles of the four measures reviewed in the thesis, it was found out that the two Parties have been and will negotiate for positive results and avoid retreat from the advanced level of cooperation. Furthermore, according to the UK's loss of its membership in all four measures, the two Parties need to discuss and continue their relationship from a new start line.

Even though the UK had forfeited from all four measures of Europol, Eurojust, SIS II and EAW, it would have to take different ways and approaches to negotiate the future relationship in each measure of criminal cooperation with each institution. In Europol and Eurojust, where third countries can relatively cooperate easily, it is likely that they will be able to establish stable relationships faster by referring to existing precedents. The UK will focus on special rights granted by the EU based on existing means. On the other hand, in the case of SIS II and EAW, where there are no precedents of third country participation, the two Parties will face a challenge when negotiating new forms of relationship. Their efforts for cooperation will not cease. The UK will seek for new ways that no other country had tried or achieved. It may progress with a new form of cooperation. However, it may also face a significant step back, especially for the UK.

What is certain is that from January 1, 2021, the EU-UK criminal cooperation

totally changed compared to its former relationship. Furthermore, the UK, being outside the EU and Schengen zone, will not have the same level of authorities over EU tools facilitating police cooperation, judicial cooperation, data exchange and extradition. Losing accesses or having different approaches to these measures will result in challenges in terms of the efficiency and effectiveness of the UK's ability in criminal affairs.

The field of criminal cooperation can only be developed based on solid relationship, sacrifice and mutual trust. Also, this area is established on common standards, rules and decisions, communal implementation and supervision, and shared understandings on human rights. Furthermore, mutual trust and reciprocity on their respective criminal cooperation systems between the Member States have been essential to its functioning. As it was hard to achieve, it is even harder to collapse.

It is believed that the UK would need to build continuing trust and tight relationship with the EU by showing its commitments and devotion to maintain the similar level of cooperation in security and criminal justice. The EU would also suggest various proposals to allow the UK to cooperate as well as seek ways to ensure peace and security throughout Europe. Otherwise, it will be difficult for the UK to step further from current uncertain and unresolved status of relationship in criminal cooperation with the EU, which might lead to the exemption of the UK from EU's criminal cooperation.

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Annex to the Council Decision 2020/266 authorising the opening of the negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement

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## 국문초록

### 브렉시트와 유럽연합의 형사사법공조

조규현

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영국은 지난 2016년 실시된 브렉시트 국민투표 결과에 따라 2020년 1월 31일 유럽연합으로부터 탈퇴하였다. 영국은 유럽연합의 출범 당시부터 유럽연합에 대해서는 비우호적인 태도를 견지하였고, 가입 후에도 유럽연합 정책에 전폭적인 지지를 보내지 않았다는 점에서 영국의 탈퇴는 어느 정도 예상되었던 사항이다. 브렉시트의 전환기간 동안 양 당사자들간의 치열한 거쳐 영국은 유럽연합으로부터 완전히 탈퇴하였고, 제3국으로서 유럽연합과 새로운 관계를 갖게 되었다. 그러나 그들의 미래 관계 중 일부에 대해서만 추상적인 합의가 이루어졌다는 점에서 완벽한 협력 관계가 형성된 것은 아니다. 합의가 이루어진 부분들 중 경찰 및 형사사법공조를 포함하는 안보 협력은 그 대표적인 예이다.

본 연구는 영국의 브렉시트가 유럽연합의 형사사법 협력관계에 미칠 영향에 대해 고찰한다. 구체적으로는 영국과 유럽연합의 각 입장 검토 및 분야별 세부 협력제도들에 대한 분석 통해 유럽연합의 형사

사법공조 시스템이 추후 어떻게 변화할 것인지, 각 당사자들은 어떠한 입장 또는 전략을 취할 것인지 예측하고자 한다.

**주요어:** 브렉시트, 유럽연합, 형사사법공조, 형사협력, 유럽연합-영국 관계

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