



Brexit Report No 3

EU Police and Criminal Justice Measures

Gerard Batten MEP/EFDD Group

Researched and written by Pavel Stroilov

Published 23rd June 2017

Introduction

This is the third report in a series monitoring and analysing Brexit. It considers the EU's Police and Criminal Justice legislation that has been adopted over the years and which is intended to create a harmonised system of EU criminal law which supersedes UK law.

These EU laws, such as the European Arrest Warrant, have undermined some of the most basic principles of English law - i.e. the protection of our citizens from arbitrary arrest and imprisonment. Centuries old, and hard won, protections are being swept away in pursuit of a harmonised EU system of criminal law.

This report describes the process whereby this process came about, describes the main legal instruments and legal institutions that make it possible, and lays out the pre-existing international legal conventions and instruments for mutual co-operation that can be reverted to when we leave the EU. These pre-existing international agreements enable the forces of law and order to do their jobs but they also protect our traditional freedoms under English law.

Gerard Batten MEP

Pavel Stroilov

EU Police and Criminal Justice Measures

research paper prepared for EFDD Group

Contents

Introduction

Chapter 1. The pre-Brexit position

1.1. EU's 'Area of Freedom, Security and Justice'

1.2. The legal position under the Lisbon Treaty

1.3. UK's opt ins

1.4. An overview of current and forthcoming PCJ measures applicable in the UK

Chapter 2. Mutual recognition

2.1. European Arrest Warrant

2.2. ECJ/CJEU jurisprudence on EAW

2.3. EAW case studies

2.4. European Supervision Order

2.5. European Confiscation Order

2.6. European Investigation Order

Chapter 3. Organisations and databases

3.1. Eurojust

3.2. Europol and Europol Information System

3.3. SIRENE and SIS II

3.4. Special Intervention Units

3.5. European Criminal Records Information System (ECRIS)

3.6. Passenger Name Record Directive

3.7. Prum database

Chapter 4. The non-EU alternatives

4.1. Council of Europe Convention on Extradition 1957

4.2. Other Council of Europe Conventions

4.3. Interpol databases

4.4. Bilateral and multilateral cooperation

Chapter 5. Conclusions and recommendations

5.1. Conclusions

5.2. Recommendations

Introduction

The purpose of this paper is to (a) analyse the existing and forthcoming EU ‘Police and Criminal Justice’ (PCJ) Measures applicable to the UK; (b) explore how these powers can be repatriated on UK withdrawal from the EU; and (c) how they can be replaced with pre-existing or new co-operative measures.

Chapter 1. The pre-Brexit position

1.1. EU’s ‘Area of Freedom, Security and Justice’

It is axiomatic that a single state, federal or otherwise, needs a single coherent system of criminal law and law enforcement. That aspect of the EU federalist project has been given considerable attention in the EU Treaties and legislation over the past quarter a century. To outline the main stages of its development in the EU’s legal history:

The oldest parts of EU’s criminal law and law enforcement system belong to **Schengen Convention 1990** and were, in theory, one of the features of the Schengen Area rather than the entire European Union.

Maastricht Treaty 1992 established Justice and Home Affairs (JHA) as one of the EU’s ‘three pillars’. The JHA pillar was originally organised on an ‘intergovernmental’ basis with a right of veto, as opposed to the more federalist approach in the first pillar (‘the European Communities’).

Treaty of Amsterdam 1999 (Article 1(5)) expressly enshrined as one of the EU’s objectives to “*maintain and develop the Union as an **area of freedom, security and justice**, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.*” (emphasis added). At the same time, the Treaty of Amsterdam transferred the areas of asylum, immigration and judicial cooperation in civil matters from the ‘third pillar’ to the ‘first pillar’ (with greater powers belonging to Brussels rather than national governments). The residual ‘third pillar’ was therefore renamed ‘Police and Judicial Cooperation in Criminal Matters’ (PJCC). Protocol 2 to the Treaty of Amsterdam also integrated the Schengen *acquis* (body of law), including the PJCC measures, into the general framework of the EU Treaty.

After the Treaty of Amsterdam, the European Council adopted the following five-year programmes:

- **Tampere Programme 1999** laid the foundations of EU's system of criminal law, including the so-called principle of '*mutual recognition*', which became the basis for European Arrest Warrant and other EU legal instruments. Indeed, the replacement of proper extradition with a new 'fast-track' system is directly envisaged in the programme. Greater powers were given to Europol. Eurojust and the European Police College (CEPOL) were established.
- **Hague Programme 2004** focused mainly on a common EU immigration and asylum system. In terms of criminal law system, it is dominated by the then fashionable theme of the '*prevention of terrorism*'. Like all other programmes, it envisaged significant increases of power for Europol and Eurojust.
- The **Stockholm Programme 2009** openly sets the objective of constructing a single EU system of criminal law. It was there that the blueprints were made for the European Investigation Order and the European Public Prosecutor. It was also the Stockholm Programme which envisaged the EU joining the European Convention of Human Rights, opening the way for a fusion of two different Euro-federalist legal projects: the EU and the Council of Europe system centered at the Strasbourg court.

Lisbon Treaty 2009 abolished the system of '*pillars*'. The right of veto was abolished altogether, and the centralisation of EU power, previously limited to 'the first pillar', was now extended to all other areas including 'Police and Criminal Justice' (PCJ). The relevant provisions fully came into force in 2014.

The system of five-year programmes was also (somewhat unexpectedly¹) abolished in practice, and no new programme was adopted in 2014 to replace Stockholm. The logics behind that is not entirely clear. It appears that the centralisation of EU powers in that area has, as far as European Council is concerned, removed the need for any transparency as to its strategic objectives. Presumably, that is because the removal of the right of veto has also destroyed

¹ There had been a lot of discussion and speculation, e.g. in academic articles and even in a report on that issue by the House of Lords EU Committee (Strategic guidelines for the EU's next Justice and Home Affairs programme: steady as she goes. 13th Report of Session 2013–14. HL Paper 173. Published 14 April 2014) as to what the 2014 programme should or would include.

democratic accountability for how it is exercised. The decisions can simply be presented to the public as an irresistible will of Brussels working in its own mysterious ways.

1.2. The legal position under the Lisbon Treaty

Following the Lisbon Treaty, the PCJ measures (as well as other JHA areas, namely immigration, asylum, and civil law) fall under **Title V of Part Three of the Treaty on Functioning of the European Union** (TFEU). The Lisbon Treaty has abolished the previous special status of PCJ measures within the framework of EU constitutional law, and made them subject to the usual EU powers (subject to a few limited exceptions, e.g. decision in relation to the European Public Prosecutor's Office):

- (a) PCJ legislation is introduced via the *ordinary legislative procedure* (qualified majority vote in the Council of Ministers and then an approval by the European Parliament);
- (b) The Court of Justice of the European Union (CJEU) in Luxembourg has full jurisdiction over PCJ measures;
- (c) The Commission has power to bring infringement proceedings against member-states.

However, the UK government has negotiated a system of 'opt outs' and 'opt ins', enshrined in two separate Protocols:

Protocol 21 to Treaty on the Functioning of the European Union is 'On the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice'. It provides for (a) UK's and Ireland's general opt out from Title V (Articles 1-2 of the Protocol) and (b) their right to opt into individual measures (whether PCJ or other JHA measures such as asylum, immigration or civil law) on a case by case basis.

Protocol 31 to Treaty on European Union contains 'transitional provisions' for the entry into force of the Lisbon Treaty. Some of its provisions would come into force only in 2014, including the new EU powers in relation to the 135 pre-Lisbon PCJ measures. Under Article 10(4) of the Protocol, the UK secured the right to a 'block opt out' from the 135 pre-Lisbon measures in 2014 but (under Article 10(5)), it could 'opt in' any of the individual 135 measures at any time afterwards.

1.3. UK's opt ins

In 2014, the UK government notified the European Council of its decision (a) to exercise the 'block opt out' of the 135 pre-Lisbon PCJ measures under Article 10(4) of Protocol 31, but (b) to 'opt in' 35 of them Article 10(5). The government sought to take political credit for 'repatriation of 100 policing powers' from the EU to the UK, in line with its then policy of 'renegotiation' of UK's status within the EU as opposed to a withdrawal. In reality, however, the 100 'repatriated' measures were of little or no significance. A large proportion of them were simply obsolete or duplicative legislation. By contrast, the 35 opt ins covered virtually every significant feature of the EU 'area of freedom, security and justice', such as the European Arrest Warrant and other 'mutual recognition' instruments, Europol, Eurojust, Schengen Information System and other EU police databases, etc. As the House of Commons Select Committee on Home Affairs noted at the time, the government proposal would "*not result in any repatriation of powers*" but rather might "*result in the net flow of powers in the opposite direction*".² The European Scrutiny Committee has reached the same conclusion.³

In addition (and partly in parallel) to the 35 'pre Lisbon opt ins', the government has opted into between 30 and 40 post-Lisbon PCJ measures.

1.4. An overview of current and forthcoming PCJ measures applicable in the UK

As a result of those developments, the 'EU law' covers the following significant matters (actual or forthcoming) in the area of police and criminal justice:

- 1) **'Mutual recognition' instruments**, which have replaced the international treaties on extradition and mutual legal assistance (MLA). The EU principles of 'mutual trust' and 'mutual recognition' require that a judicial or prosecutorial decision taken in any EU member-state should be enforced automatically in any

² HC Home Affairs Select Committee, 2013, 9th Report, *Pre-Lisbon Treaty EU Police and Criminal Justice Measures: the UK's opt-in decision*

³ HC European Scrutiny Committee, 1913, 21st Report, *The UK's block opt-out of pre-Lisbon criminal law and policing measures*.

other EU member-state. At present, the following instruments are in force, or due to come into force shortly:

- a) ***European Arrest Warrant (EAW)*** has replaced extradition with a system of an automatic ‘judicial surrender’.
- b) ***European Supervision Order (ESO)*** is the EU-wide version of bail. It can impose conditions such as a curfew, electronic tagging, living at a certain address, regular reporting to the police, etc. on those awaiting a trial in a different EU member-state.
- c) ***European Confiscation Order*** permits courts of EU member-states to freeze or confiscate suspects’ or convicts’ assets anywhere in the EU.
- d) ***European Investigation Order (EIO)*** is due to be transposed into UK law by no later than 22 May 2017. It will extend the principle of mutual recognition to any ‘investigative measures’, enabling foreign authorities to order (rather than simply request) such things as interrogation of witnesses, covert surveillance, interception of communications, monitoring of bank accounts, etc. (the list in the EU Directive is open-ended).

2) **Databases:**

- a) ***Europol Information System*** pools police intelligence information from across the EU.
- b) 2nd generation ***Schengen Information System (SIS II)*** is a database of individuals and objects of interest to EU law enforcement authorities. A hit on SIS-II operates as a European Arrest Warrant which must be executed without any further formality.
- c) ***European Criminal Records Information System (ECRIS)*** is an EU-wide database of criminal convictions.

- d) *Passenger Name Record Directive* obliges all travel companies to provide all data on every booking to border authorities, which is then pooled in a single EU-wide database.
- e) *Prüm Database* pools police data on fingerprints, DNA samples, and vehicle registration numbers. The UK government has joined the Prüm project in 2015 (having previously taken the credit for ‘opting out’ of it in 2014), and is now “confident that exchange will start to take place in 2017”.⁴

3) Organisations:

- a) *Eurojust* brings together small teams of magistrates, prosecutors and senior police officers from each member-state. It operates through 28 National Desks, which are available to answer enquiries from foreign colleagues in relation to serious crime affecting two or more EU member states, e.g. to advise on issuing European Arrest Warrants or requests for mutual legal assistance. In the EU, Eurojust is seen as a stepping stone to the office of the EU Public Prosecutor.
- b) *Europol* is the EU’s criminal intelligence agency. It is a secretive organisation, whose officers enjoy immunity from criminal prosecution or civil suit for anything they do in the course of their duties. The available information indicates that its work mainly focuses on running the Europol Information System (see above). The new Europol Regulation is coming into force in May 2017. The government has initially decided not to ‘opt in’, but has now changed its mind.⁵
- c) *SIRENE (Supplementary Information Request at the National Entry)* is the organisation running SIS-II database (see above).

⁴ Letter from Brandon Lewis MP, Minister of State for Policing and Fire Services, to Lord Boswell of Aynho, Chairman of the House of Lords European Union Select Committee, 19 October 2016: <http://www.parliament.uk/documents/lords-committees/eu-home-affairs-subcommittee/Implementationof-Prum-19-Oct.pdf>

⁵ Letter from Brandon Lewis MP, Minister of State for Policing and the Fire Service to Lord Boswell of Aynho, Chairman of the European Union Select Committee, House of Lords, 14 November 2016: <http://www.parliament.uk/documents/lords-committees/eu-home-affairs-subcommittee/Europol-Opt-in%20-14-nov-letter.pdf>

Chapter 2. 'Mutual recognition'

2.1. European Arrest Warrant

Under the Framework Decision, transposed into UK law by Part 1 of the Extradition Act 2003, the European Arrest Warrants (EAWs) have replaced the traditional extradition requests between the EU member-states. The very word '*extradition*' is no longer in use under the EAW regime: the new terms are '*judicial surrender*' or '*execution of the warrant*'. The governing principle is that of '*mutual recognition*'. A warrant issued by a designated authority in any EU member state must be 'executed' automatically in any other EU member state, where the court can only check that the form is filled correctly, but cannot ask any questions about the substance of the case (the warrant must contain a brief description of the accusations against the suspect, which has to be accepted uncritically). Most controversially:

- There is no requirement to present *prima facie* evidence against the accused, so as to satisfy the UK court that there is a case to answer.
- The UK government has no power to refuse extradition, no right to request additional information, and indeed no say on the matter. The foreign authorities which issue the warrants are effectively given the direct power over the liberty of British subjects on British soil.
- The warrants may be issued not only for suspects to stand a trial, but also for those already tried and convicted *in absentia* in a foreign court to serve their sentence.
- The principle of *dual criminality*, meaning that the allegation against the accused must amount to a criminal offence in the UK as well as in the member-state which requests extradition, has been abolished in relation to a list of 32 'offences', some of them defined in a strikingly vague way:
 1. *Participating in a criminal organisation*
 2. *Terrorism.*
 3. *Trafficking in human beings.*
 4. *The sexual exploitation of children and child pornography.*

5. *Illicit trafficking in narcotic drugs and psychotropic substances.*
6. *Illicit trafficking in weapons, munitions and explosives.*
7. *Corruption.*
8. *Fraud (including against the European Union's financial interests).*
9. *Laundering of the proceeds of crime.*
10. *Counterfeiting currency, including the euro.*
11. *Computer related crime.*
12. *Environmental crime.*
13. *Facilitation of unauthorised entry and residence.*
14. *Murder, grievous bodily harm.*
15. *Illicit trade in human organs and tissue.*
16. *Kidnapping, illegal restraint and hostage taking.*
17. *Racism and xenophobia.*
18. *Organised armed robbery.*
19. *Illicit trafficking in cultural goods, including antiques and works of art.*
20. *Swindling.*
21. *Racketeering and extortion.*
22. *Counterfeiting and piracy of products.*
23. *Forgery of administrative documents and trafficking therein.*
24. *Forgery of means of payment.*
25. *Illicit trafficking in hormonal substances and other growth promoters.*
26. *Illicit trafficking of nuclear or radioactive materials.*
27. *Trafficking in stolen vehicles.*
28. *Rape.*
29. *Arson.*
30. *Crimes within the jurisdiction of the International Criminal Tribunal.*
31. *Unlawful seizure of aircraft/ships.*
32. *Sabotage.*

2.2. ECJ/CJEU jurisprudence on EAW

The risks to civil liberties inherent in such a ‘streamlined’ system are fairly obvious. Moreover, the European Court has consistently emphasized in its binding case-law that the smooth operation of the EAW system should be given a priority over any safeguards of civil liberties enshrined in national law or international conventions.

In the case of *Radu* (C-396/11 – 29 January 2013), the ECJ held that a member-state (Romania) cannot reject a European Arrest Warrant because the suspect’s human rights would be at risk in the requesting member-state.

In the case of *Melloni* (C-399/11 - 26 February 2013), an Italian court issued a European Arrest Warrant against Mr. Melloni after sentencing him *in absentia* to 10 years imprisonment. In the circumstances where he would have no right to challenge the fairness of trial *in absentia* in an Italian court, the Spanish court considered that execution of the warrant would breach Mr. Melloni’s right to a fair trial as enshrined in Spanish Constitution. The case was referred to the ECJ.

The ECJ held that even the most fundamental principles of a national constitution have to give way to stated objectives of any EU directive or Framework Decision: “*by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (...), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law*” (para 59 of the judgement). If the Spanish court was “*allowed*” to refuse an EAW for the sake of a right to a fair trial, that would cast “*doubt on the uniformity of the standard of protection of fundamental rights*” across the EU, “*undermine the principles of mutual trust and recognition... and would, therefore, compromise the efficacy of [the] framework decision*” (para 63).

While the judgement is illustrative of the ECJ/CJEU’s general tendency to take the supremacy of EU law over national law to its extreme, this is of particular concern in such a sensitive area as police and criminal justice. As a matter of fact, there is no “*uniformity of standard of protection of fundamental rights*” across the EU. For example, Italian law permits to keep people in prison without trial for up to six years, conditions in some of Greek prisons are tantamount to torture, Lithuanian police often beats confessions out of suspects, and Slovakian courts are notoriously corrupt. Not only does the *Melloni* judgement demonstrate the constitutional expansionism of the ECJ. It also undermines the rule of law by placing a political

expedient above the right to a fair trial. A vital constitutional liberty has been overridden simply to avoid “*casting doubt*” over a factual assertion which is, at best, a product of wishful thinking.

2.3. EAW case studies

The operation of the EAW system in practice since its introduction in 2004 has in many cases caused further grave concerns over its effect on civil liberties. Some of the most notorious cases highlighting those concerns are summarised below.

The case of Farid Hilali was an unusual EAW in that, instead of putting the allegation against him in a few vague sentences, the Spanish court gave an 8-page summary of evidence. It alleged that Hilali was a friend of one Barakat Yarkas. The German police had found the Spanish phone number of Yarkas in the flat of one Said Bahaji. And the wedding photograph of Bahaji, in turn, showed that two of his guests looked very similar to two of the future 9/11 suicide pilots. Furthermore, intercepted phone calls between Hilali and his friend Yarkas were suspicious: thus, on 6th August 2001 Hilali allegedly said he was going to do something important within a month. This was sufficient for the British courts to rubber-stamp the order to surrender Hilali to Spain. However, while Hilali was fighting a hopeless battle of legal technicalities in the UK, Yarkas and 23 others were put on trial in Madrid. The Spanish Supreme Court eventually cleared Yarkas of a ‘conspiracy to commit terrorist killing’, since the prosecution conceded that the evidence against him was too vague, and in any event, the unlawful intercepts of phone calls were not admissible.

This, it seemed, would also ruin the case against Hilali (if there ever was one). The European Arrest Warrant made only one allegation against him: that his phone calls showed he was an ‘associate’ of Yarkas the terrorist. Now that Yarkas was cleared of terrorism, it became clear Hilali was not in any sense ‘accused of an extradition offence’. By that time, however, he had exhausted all appeals in the UK and was about to be extradited. However, he took advantage of an ancient common law remedy: any unlawful imprisonment, including one for extradition, can be challenged by applying for a writ of *habeas corpus*. The High Court found that the Spanish trial had destroyed any grounds for the accusation against Hilali, and granted the writ. The Spanish authorities then appealed to the House of Lords, where it was held that the words of Extradition Act deprived the suspect of his right to *habeas corpus*, and he therefore had to be extradited even in these circumstances. The appeal procedure spelt out in the Act was held

to be a sufficient substitute. This judgement ended a thousand years of history when the right to *habeas corpus* had been held absolute and sacred.

The case of Edmond Arapi. On 26th October 2004, a man called Marcello Miguel Espana Castillo was murdered in Genua. On that day, Edmond Arapi worked at a café in Staffordshire. However, he was soon charged, tried, and convicted in Italy for that murder – all without his knowledge. He first learnt about the charges and his conviction five years later, when he was arrested on an Italian EAW in 2009. He presented solid evidence of his *alibi* and that the Italian law did not even guarantee a re-trial after a conviction *in absentia*; nevertheless, the English magistrate ordered his extradition. It was only thanks to the efforts of the Fair Trials International, who persuaded the Italians to withdraw the warrant at the last moment, that he narrowly avoided serving 16 years in jail for a crime he evidently did not commit.

The case of Garry Mann. To quote a report by the Fair Trials International⁶: ‘*Garry Mann, a 51-year-old former fireman from Kent, went to Portugal during the Euro 2004 football tournament. On 15 June 2004, while Garry was with friends in a bar in Albufeira, a riot took place in a nearby street. Garry was arrested along with other suspects some 4 hours after the alleged offences. He was tried and convicted, less than 48 hours after his arrest. He had no time to prepare his defence and standards of interpretation at the trial were grossly inadequate. The proceedings were interpreted by a hairdresser who was an acquaintance of the judge’s wife.*’ Mr. Mann was sentenced to two years’ imprisonment, but the Portuguese authorities offered him to be deported back to Britain instead. He agreed. Back in Britain, the police applied for a worldwide football banning order against Mr. Mann on the basis of his Portuguese conviction, but the English court refused to make the order and the grounds that he had not been given a fair trial in Portugal.

Five years later, in 2009, Mr. Mann was arrested on an EAW, as being wanted in Portugal to serve his outstanding sentence. Lord Justice Moses called the case a ‘serious injustice’ and an ‘embarrassment’, but found his hands were tied by the Extradition Act and he had no grounds to refuse extradition. So he sent Mr. Mann to a Portuguese prison, fully aware that the decision was unjust.

⁶ The European Arrest Warrant seven years on – the case for reform. FTI report. May 2011. Paras 52-57

The case of Deborah Dark. In 1989, Deborah Dark stood trial in France on drug-related charges, was acquitted, and returned home to the UK. She did not know that the French prosecutor appealed her acquittal, that the appeal was heard *in absentia* without anybody representing her, and that the appeal court then found her guilty and sentenced her to 6 years' imprisonment. Nor did she know that a French EAW was issued 17 years later, in 2007, for her to serve that sentence in France. In 2007 Mrs. Dark was arrested while on holiday in Turkey, and then released, without any explanation of what happened. In 2008, she was arrested in Spain while visiting her father and spent a month in Spanish prison. The Spanish court refused extradition for the passage of time. She returned to the UK – only to be arrested again on arrival to Gatwick. It was only in 2009 that the British court refused extradition for the passage of time, and the French EAW was finally withdrawn.

The case of Andrew Symeou was perhaps the most infamous. Greece issued an EAW against Mr. Symeou, a 19-year-old British student, on the charge of manslaughter of another British holidaymaker in a night-club. Mr. Symeou proved in English court that the Greek police had fabricated the evidence against him by mistreatment and intimidation of witnesses. The court accepted that as a matter of fact – but found it had no legal power to assess the evidence. Even though the EAW system could '*be a matter for legitimate debate or concern*', the court felt obliged to order extradition. Similarly, the court rejected Mr. Symeou's evidence about the prison conditions in Greece and that he risked torture and mistreatment. Because Greece was a member of the European Convention of Human Rights, the court had to assume that it would comply with its obligations. Mr. Symeou then spent almost a year in Greek prisons, including Korydallos, which is one of the most notorious prisons in the world with conditions practically tantamount to torture. Eventually, he was put on trial and acquitted for all the reasons he had raised in British court in the first place. By that time, Mr. Symeou and his family have suffered enormous moral and financial damage.

The case of 'Patrick Connor'. According to the report by Fair Trials International: "*Patrick Connor (not his real name) was just 18 when he went on holiday to Spain with two friends. While there, all three were arrested in connection with counterfeit euros. Patrick himself had no counterfeit currency on him or in his belongings when arrested and has no idea how the notes came to be on his two friends and in their rented apartment – in total, the police found 100 euros in two notes of 50. The boys were held in a cell for three nights. On the fourth day*

they appeared in court and had a hearing lasting less than an hour, at the end of which they were told they were free to leave but might receive a letter from the authorities later.

“They returned to the UK and heard no more about it until four years later when, as Patrick was studying in his room at university, officers from the Serious Organised Crime Agency arrested him on an EAW.

“Patrick was extradited to Spain and held on remand in a maximum security prison in Madrid. Other inmates told him he might be in prison for up to two years waiting for a trial. Under immense pressure and fearing for his future, he decided to plead guilty, even though several grounds of defence were available and he would have preferred to fight the case on home ground, on bail, and with a good lawyer he could communicate with in English. None of this was possible, and he ended up spending 9 weeks in prison before coming home to recommence his university career, his future blighted by a criminal record.”

The case of Julian Assange was particularly high-profile, and so there is no need to recite the basic facts in much detail. Mr. Assange was the founder of Wikileaks, and the Swedish EAW against him was issued near the peak of an international effort to suppress the Wikileaks project. That alone gave rise to suspicions that the ‘streamlined’ EAW procedure, devoid of the usual safeguards against arbitrary arrest and/or extradition, was being abused for political persecution. Further:

- The allegations against Mr. Assange were made by Swedish political activists who had been in consensual sexual relationships with him, some considerable time after the event;
- The Swedish law gives a very wide definition of ‘rape’, and it has been persuasively argued that the allegations against Mr. Assange would not have amounted to a criminal offence under UK law. The EAW procedure allowed to bypass this difficulty, since the requirement of ‘dual criminality’ in relation to anything described as ‘rape’ had been abolished.
- The Swedish criminal procedure allows the trial on charges of ‘rape’, and other charges of sexual nature, to take place behind closed doors.

After the UK courts have upheld the ‘execution’ of the EAW, Mr. Assange has successfully claimed asylum in Ecuador and has stayed in Ecuador’s embassy in London for a number of years now. In 2015, the UK Working Group on Arbitrary Detention concluded that Mr. Assange’s situation effectively amounted to his ‘arbitrary detention’ by the Swedish and UK authorities.⁷

The case of Ashya King is an example of the abuse of an EAW system by the UK’s own authorities against UK’s citizens. In 2014 Ashya King, a 4-year-old boy suffering from brain tumor, was taken by his parents from a UK hospital over a disagreement with doctors over his treatment. The parents wanted their son be treated with proton therapy, which they felt was less harmful than conventional radiotherapy. Proton therapy is not available in NHS, but is available in a number of other EU member-states. The parents therefore took Ashya out of hospital and travelled to Spain. The UK police issued an EAW alleging ‘child neglect’, and the parents were arrested in Spain. They were held in Spanish prison for over 24 hours until the warrant was withdrawn due to public outcry.

The case of Alexander Adamescu. Alexander Adamescu, who lives in London with his family, is the son of Dan Adamescu, a Romanian millionaire businessman and the proprietor of one of the largest opposition newspapers, *Romania Libera*. In 2015, the Romanian government launched a massive investigation into the alleged corruption related to Dan Adamescu’s business empire, which is widely believed to be politically-motivated. In May 2016, Dan Adamescu was sentenced to four years and four months imprisonment for alleged bribery of judges. His trial and conviction were widely criticized as unfair. In January 2017, he died in prison of blood poisoning. Many, including the Romanian ex-President Traian Basescu, have criticized the authorities for causing his death by failing to release him from jail on medical grounds.

As part of the same ‘investigation’, Romania has issued an EAW against his son Alexander. He was arrested a few days after filing an international arbitration claim in International Centre for Settlement of Investment Disputes against allegedly corrupt individuals in the Romanian government over alleged attempts to undermine his father’s business. The case is ongoing before British courts, where Mr. Adamescu Jr. argues that the EAW is politically motivated.

⁷ UN WGAD statement of 4 December 2015:
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17012&LangID=E>

In the meantime, he claimed that Romanian agents have attempted to kidnap his wife from London.

Daily Telegraph quotes a “high level report by a senior figure in British intelligence” as stating: *“There can be little doubt that Alexander Adamescu is being pursued because he is Dan Adamescu’s son, and the prosecution has been predicated on the desire to ‘decapitate’ the Adamescu family’s holdings and their influence.”*⁸

It remains to be seen whether Mr. Adamescu’s defence is given a fair hearing in English courts. However, given the constraints of the EAW system, his very ability to argue his case is extremely limited.

2.4. European Supervision Order⁹ (ESO)

The ESO is the EU-wide version of bail, designed for those awaiting trial in a different member-state from their own. A European Supervision Order obliges the UK courts and police to enforce its conditions on the subject, such as:

- living at a certain address;
- observing a curfew;
- electronic tagging (if permitted by the national law in similar circumstances)
- regular reporting to the police;
- limitations on entering certain places;
- obligation to avoid contacts with certain people.

⁸ <http://www.telegraph.co.uk/news/2016/12/13/european-arrest-warrant-targeting-innocent-british-resident/>

⁹ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions of supervision measures as an alternative to provisional detention

A European Supervision Order may be issued by a judicial or non-judicial authority designated by each member-state. The principle of ‘dual criminality’ is abolished in relation to the list of vaguely described ‘offences’, similar to that in the EAW Framework Decision.

The EU legislation on ESO was in force since October 2009, but was not transposed into the national UK law until the Tory government’s review of the pre-Lisbon PCJ measures in 2014 (see above). The ESO was among the 35 measures the government opted in. It has now been transposed into UK law by The Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014.

2.5. European Confiscation Order¹⁰

The Framework Decision extends the principle of mutual recognition to the orders to freeze or confiscate assets deemed to be ‘proceeds of crime’. An order by a ‘competent authority’ designated by a member state (not necessarily a ‘judicial authority’) is sufficient to freeze or confiscate any assets in the UK without any detailed scrutiny by UK courts. The principle of ‘dual criminality’ is abolished in relation to the list of vaguely described ‘offences’, similar to that in the EAW Framework Decision.

Like in the case of ESO, the EU legislation on ECO was not transposed into the national UK law until the Tory government’s review of the pre-Lisbon PCJ measures in 2014 (see above). The ECO was among the 35 measures the government opted in. It has now been transposed into UK law by The Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014.

2.6. European Investigation Order

European Investigation Order (EIO), due to be transposed into UK law by 22nd May 2017, will extend the principle of mutual recognition to any ‘investigative measures’, enabling foreign authorities to order (rather than simply request) such things as interrogation of witnesses, covert surveillance, interception of communications, monitoring of bank accounts, etc. The list in the EU Directive is open-ended. Like the EAW has replaced the traditional

¹⁰ Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders

extradition, the EIO is intended to replace what had been known as ‘mutual legal assistance’. There is a strong body of expert opinion which sees even greater threats to civil liberties than in the case of EAW.

It deserves to be mentioned that the EU’s first attempt to introduce the principle of a mutual recognition into the field previously occupied by MLA was the European Evidence Warrant (EEW), introduced in 2009. However, the EEW Framework Decision had to be negotiated and agreed under the unanimity procedure, and therefore concerns over civil liberties made the negotiations long and difficult. Eventually, the application of EEWs was limited to demands for pre-existing, clearly identified objects or documents, and subjected to various and complex legal safeguards. That turned out to be less effective than the traditional MLA. In practice, the investigators completely ignored the innovation and continued to request the old-style assistance instead. Not a single EEW was ever issued; the whole project proved an absolute failure.

The EIO is intended as a second attempt at the same experiment, preserving and extending the principle of mutual recognition, but dispensing with most of the safeguards of liberty. The 2010 initiative of Belgium, Bulgaria, Estonia, Spain, Austria, Slovenia and Sweden expressly argues it would be easier to push the EIO through than it had been with the EEW, since the Lisbon treaty has abolished the members’ right of veto “*and, as a consequence, it will be more difficult for one single Member State to impose exceptions*” based on civil liberties concerns.¹¹

Astonishingly, neither the EU nor the UK government made no attempt to argue a political case for such a dramatic and dangerous change. Rather, the political tactics was simply to downplay its significance.

One of the first actions of Theresa May as the Home Secretary was to ‘opt in’ the future European Investigation Order in 2010. She told the House of Commons: “*the EIO is not some new arrangement that will suddenly require extra police resources. Rather, it simplifies and codifies the processes that already exist*”. She further claimed that “*the EIO will simply put [mutual legal assistance] on the timetable and simplify the processes.*” This was echoed by Baroness Neville-Jones in the Lords, who claimed that apart from setting clear deadlines, “*in other respects, the EIO does not change the present regime*”. She then claimed that, under the

¹¹ P. 34

EIO, “*Foreign police may request the assistance of British police. They may not instruct*” and that the EIO was not more than ‘*mutual legal assistance between national legal regimes*’.

This can only be described as inaccurate and misleading. The EIO is plainly a radically new instrument, and the legal opinion unanimously agrees about this. While mutual legal assistance is voluntary and can be refused, any European Investigation Order is a binding demand and has to be executed without question.

There will be very few grounds on which the UK can refuse to execute an EIO. The investigation can be used for very broad ‘fishing expeditions’. Like with other mutual recognition instruments, the requirement of ‘dual criminality’ is abolished.

The deadline for the transposition of EIO in UK law is now near (22 May 2017), and the government has confirmed on several recent occasions that it intends to transpose it (despite the Referendum vote for Brexit).

Chapter 3. Organisations and databases

3.1. Eurojust

Eurojust brings together the so-called ‘*College*’ of 27 prosecutors, magistrates or police officers, one from each member-state. Each National Member is accompanied by a relatively small team of Deputies, Assistants, and Seconded National Experts. At least one of them for each member-state is legally obliged to be ‘on call’ 24 hours a day, 7 days a week.

Each National Member has the legal powers to order arrests, searches, seizures, interrogations, surveillance, freezing or monitoring of bank accounts, confiscations, electronic tagging, etc. in his own country – on an EU instrument such as a European Arrest Warrant, or even without such an instrument¹². Further, each member has access to his country’s databases of criminal record, registers of arrested person, investigation registers, DNA registers and “other registers of his Member State where he deems this information necessary for him to be able to fulfil his tasks”¹³.

¹² Articles 9c and 9d of the Eurojust Decision; however these powers are subject to national law

¹³ Article 9(3)

Eurojust therefore represents an unprecedented concentration of judicial, prosecutorial, and police power in Europe. The amount of the collective power of the College is something unheard of in the UK legal system.

In practice, most of Eurojust work at present is much more modest. It consists in answering queries from member-states on cases involving a complex international dimension, or forwarding such queries to colleagues in another member-state who are able to assist. In that respect, Eurojust is believed to be of some utility to UK law enforcement agencies.

However, Eurojust is seen in the EU as a stepping stone towards the European Public Prosecutor's Office (EPPO). The UK government has announced it intends to opt out of EPPO but at the same time has opted into Eurojust. It is not clear at present how exactly the two organisations will be connected at the EU level, and in any case, how the UK's opt in Eurojust and opt out of EPPO can be reconciled.

3.2. Europol and Europol Information System

While sometimes referred to as 'EU police force', in fact Europol is a **criminal intelligence agency**, modeling itself on US FBI or UK National Criminal Intelligence Service. At the same time, there are concerns that it has every potential to develop into a secret police. Its operations have been notoriously opaque.

Europol's staff enjoys immunity from prosecution or civil lawsuits in relation to everything they do in the course of their duties, and all other 'privileges and immunities' as EU "officials and other servants" under Chapter V of Protocol 7 to the Treaties. This is subject to a technical exception, whereby if a Europol officer takes part in a Joint Investigative Team between member-states, his actions as a member of JIT are not covered by Protocol 7¹⁴.

There is a **Europol National Unit** in each member-state. Each national unit seconds a liaison officer to Europol HQ in the Hague.

¹⁴ See Regulation (Euratom, ECSC, EEC) No 549/69 of the Council of 25 March 1969 determining the categories of officials and other servants of the European Communities to whom the provisions of Article 12, the second paragraph of Article 13 and Article 14 of the Protocol on the Privileges and Immunities of the Communities apply (OJ L 74, 27.3.1969, p. 1).; referred to in Recital 16 of the Preamble to the new Europol Regulation.

In substance, the work of Europol is organised around so-called **Europol Information System**, a massive database of criminal intelligence. The access to the Europol Information System is usually described as being of substantial benefit to UK police in its operations.

Since its foundation as the Europol Drugs Unit in 1992, Europol's remit has been steadily widening; since 2010, it has power to investigate any organised crime, terrorism, and a further list of 24 very broadly defined categories of illegal activity. The new Europol Regulation, due to come into force on 1 May 2017¹⁵, has further expanded the list, which now reads as follows (Annex I to the Regulation):

- *terrorism,*
- *organised crime,*
- *drug trafficking,*
- *money-laundering activities,*
- *crime connected with nuclear and radioactive substances,*
- *immigrant smuggling,*
- *trafficking in human beings,*
- *motor vehicle crime,*
- *murder and grievous bodily injury,*
- *illicit trade in human organs and tissue,*
- *kidnapping, illegal restraint and hostage-taking,*
- *racism and xenophobia,*
- *robbery and aggravated theft,*
- *illicit trafficking in cultural goods, including antiquities and works of art,*
- *swindling and fraud,*
- *crime against the financial interests of the Union,*
- *insider dealing and financial market manipulation,*
- *racketeering and extortion,*
- *counterfeiting and product piracy,*
- *forgery of administrative documents and trafficking therein,*
- *forgery of money and means of payment,*
- *computer crime,*
- *corruption,*

¹⁵ 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) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA

- *illicit trafficking in arms, ammunition and explosives,*
- *illicit trafficking in endangered animal species,*
- *illicit trafficking in endangered plant species and varieties,*
- *environmental crime, including ship-source pollution,*
- *illicit trafficking in hormonal substances and other growth promoters,*
- *sexual abuse and sexual exploitation, including child abuse material and solicitation of children for sexual purposes,*
- *genocide, crimes against humanity and war crimes.*

On top of that list, Article 3(2) of the Regulation empowers Europol to deal with the “related criminal offences”, defined as follows:

- (a) *criminal offences committed in order to procure the means of perpetrating acts in respect of which Europol is competent;*
- (b) *criminal offences committed in order to facilitate or perpetrate acts in respect of which Europol is competent;*
- (c) *criminal offences committed in order to ensure the impunity of those committing acts in respect of which Europol is competent.*

While the operations of Europol have been rather opaque (which is partly natural given its criminal intelligence functions), the information which did come to light gives rise to legitimate civil liberties concerns. Thus, an EU Council document dated 16 April 2010 instructs Europol to build a database on *‘the processes of radicalisation in the EU’* in order to *‘generate lists of those involved in radicalising/recruiting or transmitting radicalising messages and to take appropriate steps’*.¹⁶ Concerns have been voiced that this project was effectively aimed at political persecution, and amounted to spying on political activists whom Europol arbitrarily deems to be too ‘radical’.

Having initially indicated its intention not to opt into the new Europol Regulation in 2014, the government has now changed its mind: see the Home Office explanatory memorandum dated 14 November 2016.¹⁷

¹⁶ <http://register.consilium.europa.eu/pdf/en/10/st08/st08570.en10.pdf>

¹⁷ http://europeanmemoranda.cabinetoffice.gov.uk/files/2016/11/EM_Europol_Opt_in.pdf

3.3. SIRENE and SIS II

As mentioned above, a significant part of the EU's PCJ measures belong to the so-called *Schengen acquis* and are supplementary to the principal part of Schengen agreement.

The UK has opted into the **second generation Schengen Information System (SIS II)** as part of the 2014 decision under Protocol 36. It became operational in the UK on 13 April 2015. All police officers have access to it.

SIS II can be roughly described as a database of mutual recognition instruments. Most significantly, an alert placed on the SIS II database is legally binding as a European Arrest Warrant sent to all EU member-states (Article 26). That obviously means a considerable increase in the number of EAWs being issued and executed. Since the UK joined the system in 2015, the overall number of arrests and extraditions under EAWs has grown by an estimated 25%.¹⁸

The Regulation also permits using SIS-II to place alerts for “discreet checks or specific checks”, objects of evidence, or covert surveillance. Those alerts are roughly analogous to European Investigation Orders.

SIS II is run by SIRENE (‘Supplementary Information Request at the National Entry), a little known but powerful organization with a central office and national bureaus in each member-state. In practice that means a number of SIRENE officers attached to a respective national authority - the equivalents of UK's National Crime Agency. In that, it is analogous at Europol. Moreover, SIRENE has actual executive powers in some countries, although not in the UK. For example, SIRENE officers can escort prisoners who are being surrendered under a European Arrest Warrant.

One Czech SIRENE jokingly told the author that his organisation was “top secret”. In reality, he added, about 30 per cent of the staff at the International Department of Czech Republic's Criminal Police Investigation Service are SIRENE officers, the others working for the Interpol

¹⁸ The evidence of Stephen Rodhouse, Deputy Assistant Commissioner of Metropolitan Police, to the House of Lords EU Home Affairs sub-committee, 12 October 2016

or Europol. However, SIRENE bureau does about 60 per cent of all work. He believed the situation was similar in analogous agencies in other EU member-states.

3.4. Special Intervention Units

Another piece of EU legislation¹⁹ the UK opted into as part of the 201 decision provides for setting up ‘special intervention units’ in each member-state and assistance they may provide at the request of another member-state in case of a vaguely defined ‘*crisis*’. The assistance may take the form of sharing expertise, equipment, or “*carrying out actions on the territory of that Member State, using weapons if so required*”. The civil liberties risks are obvious, especially since the interpretation of that legislation is ultimately within the CJEU jurisdiction. On the face of it, the legislation seems to permit, for example, for a government to request an intervention of a foreign police (or even armed troops) to control civil unrest.

3.5. European Criminal Records Information System (ECRIS)

ECRIS is a relatively straightforward EU-wide database of criminal convictions. When a Member State convicts a national of another Member State, it is obliged to inform that country through ECRIS. Member States are also required to respond to requests for previous convictions for criminal proceedings. The EU legislation permits using that information not only in the sentencing decisions of criminal courts, but also for other purposes, such as employment vetting or immigration controls.

3.6. Passenger Name Record Directive

The Directive obliges all travel companies to provide all data on every booking to border authorities, which is then pooled in a single EU-wide database. That includes all the data contained in the machine-readable zone of a travel document, such as the name of the passenger, their date of birth, nationality and passport number.

¹⁹ Council Decision 2008/617/JHA of 23 June 2008 on the improvement of cooperation between the special intervention units of the Member States of the European Union in crisis situations

3.7. Prüm database

The database pools police data on fingerprints, DNA samples, and vehicle registration numbers from across the EU. The UK government has joined the Prüm project in 2015²⁰ (having previously taken the credit for ‘opting out’ of it in 2014), and is now “confident that exchange will start to take place in 2017”.

Chapter 4. The non-EU alternatives

It is obvious that having access to EU PCJ measures has a degree of utility for law enforcement in the UK, and a number of UK law enforcement professionals have made that point in the British debates on that issue. However, that debate has been somewhat misleading in that it is assumed that the EU PCJ measures are unique and their abolition would leave the UK law enforcement authorities in a vacuum.

This is manifestly not so. The EU PCJ system was not created in a vacuum and therefore will not leave the UK in a vacuum. There are adequate non-EU mechanisms of international cooperation in fighting crime, which have worked satisfactorily prior to the EU’s innovations, and still work in UK’s relations with countries outside the EU. Whatever is valuable in the EU system largely duplicates Interpol, the Council of Europe Conventions on extradition and mutual legal assistance, and/or direct bilateral cooperation between law enforcement agencies.

4.1. Council of Europe Convention on Extradition 1957

In the event of withdrawal from the **European Arrest Warrant (EAW)**, the UK will ‘fall back’ on the more traditional extradition system under the **Council of Europe Convention on Extradition 1957**. Unlike the EAW, the Convention includes several important safeguards against possible abuses of the system:

²⁰ HM Government, *Prüm Business and Implementation Case*, Cm 9149, November 2015: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480129/prum_business_and_implementation_case.pdf

- The so-called principle of ‘dual criminality’ prohibits to extradite people for an ‘offence’ which is not criminal under British law. The principle was largely abolished in the EAW system as explained above; however, ‘dual criminality’ principle remains fully enshrined in Article 2 of the Council of Europe Convention.
- Article 13 of the Convention permits the recipient of an extradition request to seek ‘supplementary information’ before making a decision to extradite. How much information is required shall be determined by national law. This opens the door to restoring the requirement of *prima facie* case against the accused being submitted to British court along with the extradition request. Put another way, if the British court finds there is no case to answer, extradition may be refused.²¹
- While EAWs are executed automatically by courts (whose role is reduced to little more than checking that the form is filled correctly), extradition requests are made via diplomatic channels, and cannot be executed without a formal approval by the Home Secretary.
- Unlike the EAW system, the Council of Europe Convention permits the state to refuse to extradite its own citizens if its national law prohibits that.

In practical terms, while issuing an EAW means no more than filling a simple form, making a proper extradition request under the Convention means submitting a file of evidence. That creates no real difficulty for our own extradition requests, since it is anyway the practice of British prosecutors only to request extradition when they are trial-ready.

In terms of national legislation, the return to the old system of extradition shall not be problematic either. The Parliament would simply repeal the Extradition Act 2003, and revert back to Extradition Act 1989.

A simple amendment may further be made to restore the *prima facie* case requirement to extradition requests from Council of Europe member-states.

²¹ Unlike Andorra, Denmark, Iceland, Israel, Malta and Norway, the UK failed to make a reservation retaining the *prima facie* case requirement in our law at the time of joining the Convention. However, if the requirement is now re-introduced in the national law, it will be consistent with Article 13 of the Convention.

4.2. Other Council of Europe Conventions

The same is broadly true of other ‘mutual recognition’ instruments. With one exception, each of the other ‘mutual recognition’ instruments covers the same ground as a corresponding Council of Europe convention. The following table summarises the ‘fall back’ mechanisms which would remain available to UK’s law enforcement authorities in the event of an unconditional, unmitigated withdrawal from the EU:

EU measure	‘Fall back’ non-EU measure
European Arrest Warrant	Council of Europe Convention on Extradition (1957)
European Investigation Order	Council of Europe Convention on Mutual Assistance in Criminal Matters (1959)
European Confiscation Order	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (1990)
European Supervision Order	Bail conditions imposed by national courts prior to extradition
Prisoners Transfer Directive	Council of Europe Convention on the transfer of sentenced persons (1983)

There is admittedly no analogy to **European Supervision Order (ESO)** in the Council of Europe system of conventions. However, ESOs are only necessary as a supplement to the EAW system. If a suspect is extradited under an EAW long before the prosecutors are trial-ready, ESO allows to send them back to the UK subject to certain bail conditions instead of keeping them in pre-trial detention in a foreign prison (in some EU countries, such as Italy, pre-trial detention in relation to certain offences may be extended for up to six years).

An abolition of the EAW would inevitably mean a return to the more traditional extradition system, which (a) is based on extradition taking place for the purpose of the trial, rather than an investigation, and therefore leave no space for lengthy pre-trial detention in the requesting state and therefore (b) relied on the recipient state to impose bail conditions on the subject until the extradition is ordered. Especially if the *prima facie* case requirement is re-introduced, suspects can be arrested in the UK, released on bail by British court if appropriate, but only extradited to stand trial or to serve a sentence. There shall be no lengthy period between the extradition and the trial when the suspect must be either detained or bailed.

4.3. Interpol databases

From the point of view of practical law enforcement, by far the most significant advantage from membership in EU policing organisations such as Europol and SIRNE consists in having the access to their law enforcement databases, considered in detail above. From the police point of view, of course it is desirable to have access to as many databases as possible. It would no doubt help the police to have the fullest possible information on all police records, identity documents, passenger data, DNA, fingerprints, vehicle registration numbers, and criminal intelligence which exist in the world.

However, access to those databases comes at a price. Firstly, UK police authorities have to share sensitive information they have gathered on British citizens and others with foreign police authorities, some of which are not very trustworthy. Nobody would be particularly surprised if some corrupt East European cops sometimes sell access to those databases to criminal gangs. Secondly, as the EU continues its mutation into a police state, it will require more and more information to be gathered on citizens. It should be for the UK Parliament to strike the right balance between police efficiency and the liberty of the subject. If that power is once again ceded to the EU, what is the point of our withdrawal?

In the event of an unconditional withdrawal from the EU, UK law enforcement authorities will continue to have 24/7 access to a number of Interpol databases which are largely analogous to the EU ones. That will include:

- **Interpol Criminal Information System**, which contains international alerts for fugitives, suspected criminals, persons linked to or of interest in an ongoing criminal

investigation, persons and entities subject to UN Security Council Sanctions, potential threats, missing persons and dead bodies; including personal data and police records of persons subject to such alerts.

- **Automatic fingerprint identification system (AFIS).**
- A database of **DNA profiles** from offenders, crime scenes, missing persons and unidentified bodies.
- A database of **Stolen and Lost Travel Documents (SLTD)**;
- A database of **Stolen Administrative Documents (SAD)**;
- **Edison (Electronic Documentation and Information System on Investigation Networks)**, which provides examples of genuine travel documents, in order to help identify fakes. It contains images, descriptions and security features of genuine travel and identity documents issued by countries and international organizations.
- The **Digital Interpol Alert Library – Document (Dial-Doc)**, which allows countries to share at global level alerts produced nationally on newly detected forms of document counterfeiting;
- Respective databases of **stolen motor vehicles, vessels, and works of art,**
- **The International Child Sexual Exploitation image database**, which uses sophisticated image comparison software to make connections between victims, abusers and places.
- Interpol **Illicit Arms Records and Tracing Management System (iARMS)**, which facilitates information exchange and cooperation between law enforcement agencies on firearm-related crime, and allows them to trace a firearm from the point of manufacture or of legal importation into a country, through the lines of supply to the last known point of possession.
- **Project Geiger database**, used to collate and analyse information on illicit trafficking and other unauthorized activities involving radiological and nuclear materials.

- **The maritime piracy database**, which stores intelligence related to cases of piracy and armed robbery at sea.

4.4. Bilateral and multilateral cooperation

In practical terms, it is possible to have access to EU databases without formally negotiating it with the EU or giving it the access to our own databases. All we need is just one liaison officer in the relevant police authority in just one EU member-state which already has access. At present, our partners in the ‘Five Eyes’ intelligence-sharing alliance between the UK, USA, Canada, Australia and New Zealand sometimes use the UK as a ‘proxy’ to access EU databases.²² All the UK needs to do is find another proxy within the EU to do the same, not necessarily on a formal basis.

The same point is *a fortiori* true in relation to the more flexible elements of international cooperation, such as the exchange of liaison officers. Apart from the access to databases, the benefits of UK membership in Europol and SIRENE consist in the networking between senior law enforcement officers which helps data-sharing and coordination of their cross-border operations. In that sense, those organisations duplicate **Interpol**. The law enforcement agencies can cooperate via Interpol or bilaterally, within the limits imposed on them by national law, without the need for supra-national legislation. Indeed, arguably such cooperation would benefit more from flexibility than from legal regulation.

Chapter 5. Conclusions and recommendations

5.1. Conclusions

There is an obvious public interest in international cooperation in combating crime, and the UK’s participation in PCJ measures was originally motivated by hopes that the EU legislation would help to facilitate that. In reality, the EU measures have been ineffective in this respect. Indeed, practice has shown that the EU pursues quite different goals in this area, namely

²² According to the evidence given by the National Crime Agency to the House of Lords EU Select Committee. See its 7th report of Session 2016-2017, *Brexit: future UK-EU security and police cooperation*, HL Paper 77, P.p. 10-11.

establishing its own systems of criminal justice and law enforcement which would gradually absorb or replace national systems. Those emerging EU-wide systems have proven to be fundamentally incompatible with the British legal system. The inevitable result is a mounting constitutional crisis, where we see most fundamental civil liberties being superseded and ousted by EU innovations, and the very rule of law in the UK called into question.

The justification of a comprehensive EU-wide system of law enforcement is that the EU-wide free movement of people means, among other things, free movement of criminals and favourable conditions for cross-border crime. That will cease to apply to the UK after Brexit, which will render this degree of integration of law enforcement systems unnecessary.

Any system of law enforcement has to balance the efficiency of policing against safeguarding the liberty of the subject. Few law enforcement professionals will refuse to have more information or more powers. However, if their natural tendency is followed uncritically, liberty of the subject is gravely undermined. Even a succinct list of EU's law enforcement laws, described neutrally, makes it clear that the EU has become too much of a police state. A closer analysis and specific cases support that conclusion. Brexit gives the UK an opportunity to restore the balance.

5.2. Recommendations

The UK has to make a strategic choice between (a) seeking to negotiate a form of post-Brexit participation in the EU's 'area of freedom, security and justice' as part of its negotiations under Article 50 and (b) an unconditional withdrawal from it, reliance on the existing non-EU mechanisms in the medium term, and possibly a more fundamental reform of its international policing cooperation arrangements in the longer term. It is submitted that the analysis above makes it clear that (b) has overwhelming advantages.

The conditions are now favourable for an easy 'divorce' from the EU PCJ system, in that the UK participation in several significant measures will simply lapse if the government does nothing in the next few months:

- Unless the UK positively opts into the new Europol Regulation, its membership in Europol will lapse on 1 May 2017.

- European Investigation Order will not apply to the UK unless the government take positive steps to transpose it into UK law by 22 May 2017.
- Prum database is not yet operational in the UK, and the government can simply stop working to implement it.

As regards the EAW (which remains, for the moment, the most problematic aspect of the EU PCJ system), the structure of the Extradition Act 2003 enables the government to suspend its operation promptly and without primary legislation. The Home Secretary would only need to re-designate EU member-states from ‘Category 1’ to ‘Category 2’ under Extradition Act 2003 (using her powers under sections 1 and 69 thereof).

Otherwise, the participation in EU PCJ measures should cease as a result of the UK’s withdrawal from the Treaties on the international plane and the repeal of the EEC Act 1972 (the so-called Great Repeal Bill) on the domestic plane.

It is not recommended that the UK should seek any form of post-Brexit participation in PCJ measures as part of its withdrawal agreement.

It is not recommended to include any ‘saving’ provisions in the Great Repeal Bill to preserve any of the PCJ legislation as part of the domestic law. Even though it is currently envisaged that the Bill would ‘repatriate’ the entire *acquis communautaire* into UK domestic law, it is recommended that at the very least, the PCJ measures should be exempted from the ‘repatriation’ provisions of the Bill.

Pavel Stoilov