

# European internal security interests and Brexit. Legal and operational aspects of the post-Brexit cooperation model

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**Abstract:** *The impact of Brexit is strategic. Several governmental institutions must redefine and revise their relations with the European Union (EU); and consider some critical resolutions to avoid prejudicial fragmentation in the post-Brexit security co-operation model. Focusing on internal security and law-enforcement co-ordination with the EU, the paper argues that the EU's approach to future security partnerships reflects common concerns, such as the fight against terrorism and other types of trans-national organised crime. On the other hand, the United Kingdom (UK) will no longer be bound by the EU Charter of Fundamental Rights (CFR) after the Brexit transition period. This poses substantial challenges for the EU and the UK, concerning future agreements on judicial co-operation in cross-border policing and trans-national criminal investigations. From this perspective, it is vital to decide how the data exchange regime and operational collaboration between the British authorities and respective EU agencies are organised. It would be rational to expect that the UK will actively search for closer bilateral ties with several EU member states and potential new partners, to maintain its international position and cross-border security interests.*

**Keywords:** *EU, internal security, judicial co-operation, post-Brexit*

## Introduction

The UK's withdrawal from the EU marks the first time that a member state (MS) has decided to leave. The way in which post-Brexit co-operation will be conducted will have substantial consequences for both sides, affecting the integrity of European security. After all, Europe's vision about an economically and politically united continent, with all types of free movement for its citizens and business, has been the default since the birth of contemporary European integration through the Treaty of Rome in 1957. With the founding of the European Economic Community (EEC) on 1 January 1958 (Belgium, France, Italy, Luxembourg, the Netherlands and West Germany), integration started to incrementally spread across Western Europe. Great Britain (GB)<sup>2</sup> joined the group in 1973, after a period of political adversity and crises over the globalising economy.

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*Disclaimer:* The views and opinions expressed in this paper are those of the author and do not necessarily reflect the position of the ICDS. The author declares that there is no conflict of interest.

<sup>2</sup> Hereinafter the terms 'Great Britain' (GB) and 'United Kingdom' (UK) are used interchangeably as politically marking the *United Kingdom of Great Britain and Northern Ireland*. The author is aware that the name 'Great Britain' often extends to include surrounding islands forming part of England, Scotland and Wales.

During more than 40 years of EU membership, the UK was often seen as a less enthusiastic member of the union, requesting an opt-out from the *Schengen Acquis*<sup>3</sup>, not taking part in the single currency (euro) project and being averse to the Court of Justice of the European Union's (CJEU) jurisdiction. Such 'cherry-picking' of EU policies that suit national interests<sup>4</sup> and backwardness concerning major EU achievements gave rise to growing alienation about further integration from Britain's perspective. On the other hand, the UK actively supported the creation of the Passenger Name Record (PNR) data exchange system for air passengers as an important international measure in counter-terrorism (CT) co-operation.

After the Brexit referendum, several analysts and scholars urged an in-depth examination of its politico-economic consequences and challenges to the EU's future. This included the rise of Euroscepticism and populism with certain implications for the unity of the UK itself (see, among others, Birkinshaw & Biondi, 2016; Curtice, 2016; Farrell, 2016; Grob-Fitzgibbon, 2016; Hobolt, 2016; Kroll & Leuffen, 2016; Oliver, 2016). At the same time, as emphasised by Cilluffo and Cardash (2016), potential security effects of Brexit are just as important to highlight and research, especially in the context of future co-operation with the Schengen Area and the trans-national fight against serious organised crime. The post-Brexit co-operation model in the Area of Freedom, Security and Justice (AFSJ) is especially important for mutual interests if considering the protection of citizens' rights, and the need for operational continuity of judicial co-operation in cross-border policing and trans-national criminal matters.

Some voices from the British intelligence community also expressed their worries that abandoning the EU would have negative effects on its security (see Schindler, 2016). Specific security risks consist of some ongoing operational issues, such as swift information exchange and data protection, but also more wide-reaching questions about future law-enforcement and intelligence co-operation between the UK, EU and other relevant international security partners. The valuable expertise produced by the British internal security and law-enforcement agencies, as well as the UK's remarkable contribution to Europol's capabilities in cyberspace, Eurojust, European Arrest Warrant (EAW), and other EU Justice and Home Affairs (JHA) co-operation measures, have been vital parts of European CT policy and cross-border operational capabilities (Loik, 2019). Hence, the paper highlights the EU's internal security challenges around Brexit, and its estimated impact on some law-enforcement and judicial co-operation aspects

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<sup>3</sup> After the *Schengen Acquis* was integrated into EU law by the Treaty of Amsterdam (entered into force on 1 May 1999), the UK and Ireland obtained an opt-out from the treaty's section that incorporated the *Acquis* into EU legislation. Under a special protocol included, the UK and Ireland reserved the right to request participation in articles of the *Acquis* after approval by Schengen states. See Article 4 of Protocol No. 19 on the *Schengen Acquis* integrated into the framework of the European Union (OJ C 83), and the decision of the European Court of Justice (2007a, 2007b): Cases C-77/05 and C-137/05 United Kingdom vs Council.

<sup>4</sup> See Article 6 (a) of Protocol No. 21 annexed to the Treaty on the Functioning of the European Union (TFEU) on the position of the UK and Ireland in respect to the AFSJ. The UK has had the possibility of 'cherry-picking' (*opting in or opting out*) a range of EU judicial co-operation measures and chose to opt into around 30 measures; some relating to harmonisation and others about operational cross-border co-operation. Article 10 of Protocol No. 36 to the Treaty allowed the UK the option of a 'block opt-out' from all pre-Lisbon measures. In 2013, the UK notified the Council that it was going to exercise a block opt-out from the pre-Lisbon police and criminal justice co-operation measures, indicating that it would seek to re-join 35 of those same measures from 1 December 2014. Namely, the Lisbon Treaty communitarized the field of criminal justice co-operation from that date. The UK also opted into the Directive on the European Investigation Order in criminal matters, which entered into force on 22 May 2017 (see also Alegre et al., 2017, pp. 14-15).

in criminal matters, including cross-border policing and data protection issues.

### **Internal Security Challenges of Brexit for the EU**

#### *Functional Background*

One of the political triggers of the Brexit process was the most challenging contemporary migration crisis in the EU, characterised by the rapidly increasing number of asylum seekers with 431,000 applications in 2013, 627,000 in 2014, and around 1.3 million in both 2015 and 2016 (Eurostat, 2018). During the crisis, the EU also learned that several organised criminal networks were actively exploiting Europe's fragmented immigration policy in their 'business model'. The problem of illegal mass migration, including that of cross-border organised human trafficking, is far from being new to the EU, but increased pressure appeared to be a source of rising extremism and political polarisation. The irregular immigration issue was one of the most frequent arguments used before the Brexit referendum and will probably remain at the very top of the European political agenda in the coming years (see Peers, 2016). Among other challenges, the rising cross-border security concerns of irregular crossings are creating additional pressure for EU structural changes (see Bartolini, 2007) and revisions of its internal security co-operation system.

The processes of globalisation have empowered dangerous non-state actors, such as terrorist networks, which became significant global security actors (see Diez et al., 2006; Merlingen, 2012, p. 18). The spread of trans-national criminal networks transformed the international security arena, making it more diverse, diffuse, and unpredictable. Serious cross-border organised crime, turbulent immigration flows, the spread of radicalism, and smuggling of illegal commodities and human beings put extra pressure on governments to widen their trans-national intelligence and law-enforcement co-operation, and build strategic internal security communities (Peers, 2011, 2016; Gruszczak, 2017). Due to inter-related trans-national mobile security threats, reforms (and some new forms of international policing and trans-national internal security, and law-enforcement co-operation) have developed in recent decades (see, among others, Mitsilegas et al., 2003; Loik, 2016; Loik et al., 2016; Savage, 2007; Mabee, 2009; Kaunert, 2010; Kaunert & Léonard, 2010). Thus, the European Agenda on Security (European Commission, 2015, pp. 20–21) sets the aim to 'develop a genuine area of EU internal security' to be 'able to react to unexpected events, seize new opportunities and anticipate and adapt to future trends and security risks'.

The gradual creation of a common European security space (European Commission, 2015, 2020) to effectively meet its shared functional challenges requires efforts to develop common standards and joint law-enforcement practices, in terms of legal systems' harmonisation, the integrity of security measures, and coherence of procedures and shared operational tools in cross-border policing. The developing harmonisation of criminal law and fight against terrorism as sharing of constitutional sovereignty aspects have been piecemeal, achieved from inter-governmental bases up to the EU's supranational level (see, among others, Anderson, 1989; Anderson et al., 1995; Walker, 2004; Mitsilegas, 2009; Herlin-Karnell, 2012; Murphy, 2012; Loik, 2016). In parallel, some critical debates regarding the 'sharing and pooling' of sovereignty and further deepening of the EU's security co-operation have been developed (see, among others, Bigo, 2008a, 2008b). Because (internal) security and law-enforcement powers

have been carefully guarded features of states' sovereignty in a realist perspective, further EU integration entangles with Olsen's (2002, p. 923) explanations about 'the territorial reach of a system of governance' and the 'degree to which Europe as a continent becomes a single political space'.

The developments described show that cross-border security concerns are trans-national and much more mobile than some decades ago. One of the areas where European security integration and its governance types (between the MS and supranational actors) is visible is the external dimension of EU JHA (see Balzacq, 2009; Bickerton et al., 2015). The instabilities in the EU's external dimension have pressed the need for more proactive and coherent co-operation between internal security, intelligence and law-enforcement agencies, both within the EU and beyond. As the European Commission (2015, p. 4; 2020, pp. 2-5) highlights, security threats are not confined by borders – EU internal security and global security are mutually dependent and highly interlinked. The EU's response must therefore be comprehensive, and based on a coherent set of actions combining the internal and external dimensions, to further reinforce links between the AFSJ/JHA domain and the Common Security and Defence Policy (CSDP).

Global and regional networks of terrorist cells have made trans-national intelligence gathering particularly important, and largely dependent on efficient international co-operation. Counter-terrorism has been a functional source of security co-operation and rule-of-law developments (see, among others, Jones, 2007; Wagstaff, 2014; English, 2015; Gruszczak, 2017), as well as harmonising achievements of criminal law (see Mitsilegas, 2009) and counter-terrorism law (see Murphy, 2012) among EU MS (see also Europol, 2017, pp. 57-58). Since the late 1940s, a special intelligence-sharing alliance including the UK, US, Canada, Australia and New Zealand has existed, called 'Five Eyes'<sup>5</sup>. It started with signals intelligence, spread across other intelligence disciplines during the Cold War, and continued with co-operation against terrorism, WMD proliferation and other trans-national security threats.

The UK membership in the EU's security arrangements has been also a gateway for 'Five Eyes' counterparts. It is still uncertain how this will develop after Brexit. Even if the UK's strength lies in its intermediary role rather than its independent capabilities (Alegre et al., 2017, p. 46), the trans-Atlantic 'bridge' that the UK offers to other EU MS should remain a valuable channel, to avoid fragmentation and guarantee co-ordinated CT activities.

#### *Reinforcement options for law-enforcement co-operation*

Strengthening law-enforcement co-operation in the EU is one of the main goals of the AFSJ policy area since the adoption of the Tampere Programme by the European Council in 1999 (Cornell, 2014, p. 147). Quite fragmented internal security and law-enforcement collaboration among EU MS led to the founding of a stronger legal basis by the Maastricht Treaty (Treaty on European Union – TEU), specifically, with its Title VI – Provisions on police and judicial co-operation in criminal matters. It functioned as an intergovernmental Third Pillar before the Lisbon Treaty entered into force from 1 December 2009, and the pillar structure was removed (the so-called *de-*

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<sup>5</sup> The 'Five Eyes' partner institutions are the UK Government Communications Headquarters (GCHQ), the US National Security Agency (NSA), Canada's Communications Security Establishment, Australia's Digital Signals Directorate and New Zealand's Government Communications Security Bureau.

*pillarization*)<sup>6</sup>.

Subsequent developments under the Treaty on the Functioning of the European Union (TFEU) could be generally characterised as: (i) shifts of competences towards widening and deepening criminal law harmonisation; (ii) enhanced options to establish common measures for trans-national and cross-border operational co-operation; and (iii) increased importance of EU-level law-enforcement co-ordination and supranational governance in AFSJ/JHA matters (see, among others, Eckes & Konstantinides, 2011; Kaunert & Léonard, 2013; Bergström & Cornell, 2014; Loik & Smith, 2015; Loik, 2016). In retrospect, several important common law-enforcement measures – such as the EAW, Joint Investigation Teams (JIT), or the establishment of Europol, Eurojust and other EU JHA agencies, as well as the European Public Prosecutor’s Office (EPPO) for enhanced judicial co-operation – have been established to enable better-co-ordinated and coherent judicial co-operation between authorised bodies in the EU.

Deepening internal security and law-enforcement co-operation took further amendments into the TFEU, of which Article 87 states that: (i) the Union shall establish police co-operation involving all the member states’ competent authorities, including police, customs, and other specialised law-enforcement services concerning the prevention, detection and investigation of criminal offenses; and for that purpose (ii) the European Parliament and the Council, acting under the ordinary legislative procedure, may establish measures concerning (a) the collection, storage, processing, analysis and exchange of relevant information; (b) support for the training of staff, and co-operation on the exchange of staff, on equipment and research into crime-detection; (c) common investigative techniques about the detection of serious forms of organised crime.

By these and other amendments in Title V (TFEU), the AFSJ/JHA is a competence domain shared between the EU and its MS (see Article 4(2) j, TFEU), where principles of direct effect and supremacy of EU law in commonly-taken measures should be respected. In parallel, the principles of subsidiarity and proportionality, mutual recognition and reciprocity when the EU exercises its powers are guaranteed by the Treaty. Operationally, among other measures, the important task is to enhance the exchange of information between the law-enforcement bodies in the framework of the European Information Exchange Model – EIXM (European Commission, 2012) to properly implement common internal security and law-enforcement decisions taken in the AFSJ/JHA. Hence, to guarantee the effectiveness of EU-wide fight against cross-border organised crime and terrorism, the co-operative measures should improve first and foremost the: (i) exchange of information, including intelligence-sharing between the MS’s competent authorities and with relevant EU agencies; and (ii) increase the inter-operability by coherence and up-to-date consolidation of JHA information-exchange systems with high standards and quality of data protection.

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<sup>6</sup> By the Maastricht Treaty (TEU, Article 2), the goal of the JHA became ‘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 concerning external border controls, asylum, immigration, and the prevention and combating of crime.’ By the Amsterdam Treaty, part of the provisions concerning the co-operation on JHA was transferred to Community law and only provisions on the topics of *police co-operation and judicial co-operation on criminal matters* remained under Title VI of the TEU. A new title ‘Visas, asylum, immigration and other policies related to the free movement of persons’ (Articles 61–69) was created under the First Pillar.

*The EU's terms for a future internal security partnership with the UK*

European Council Guidelines (Article 50)<sup>7</sup> of 23 March 2018 emphasise that 'Council restates the Union's determination to have as close as possible a partnership with the UK in the future. Such a partnership should cover trade and economic co-operation as well as other areas, in particular the fight against terrorism and international crime, as well as security, defence and foreign policy' (Clause 3). The European Council (ibid) also emphasises (see Clause 7) that 'the Union will preserve its autonomy as regards its decision-making, which excludes participation of the United Kingdom as a third-country in the Union Institutions and participation in the decision-making of the Union bodies, offices and agencies. The role of the Court of Justice of the European Union will also be fully respected'.

Concerning law-enforcement and judicial co-operation in criminal matters, the European Council (2018) also declares that this 'should constitute an important element of the future EU-UK relationship in the light of the geographic proximity and shared threats faced by the Union and the UK, taking into account that the UK will be a *third country* outside Schengen'. Hence, the future partnership should cover effective exchanges of information, support for operational co-operation between law-enforcement authorities, and judicial co-operation in criminal matters, from the EU's position.

At the same time, strong safeguards will need to be established to ensure full respect for fundamental rights, effective enforcement and dispute settlement mechanisms (see Clause 13, i). Also, 'as a pre-requisite for the exchange of information in the framework of such co-operation a Security of Information Agreement would have to be put in place' (Clause 13, ii), and 'in the light of the importance of data flows in several components of the future relationship, it should include rules on data. As regards personal data (see Clause 14), protection should be governed by the Union's rules on adequacy to ensure a level of protection essentially equivalent to that of the EU.

### **Operational Implications**

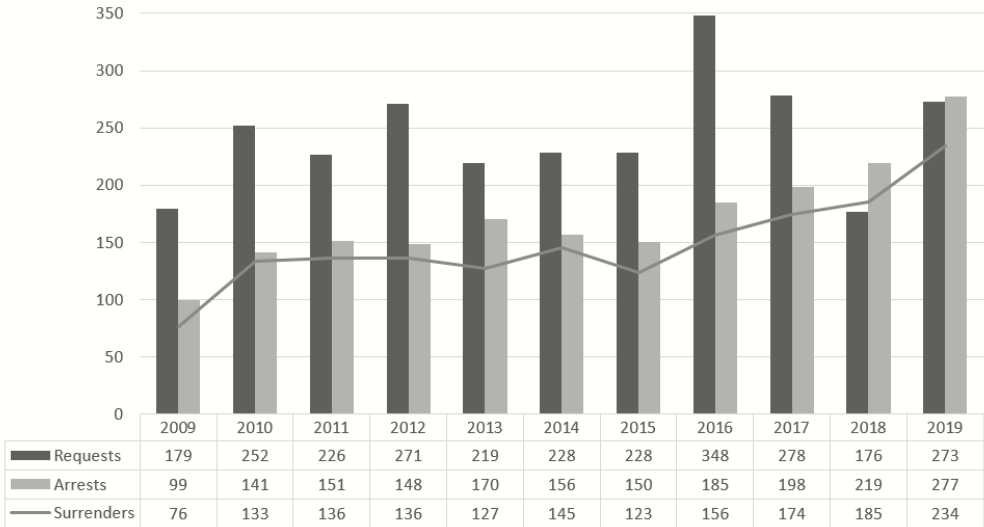
Despite several shifts of competencies agreed by Treaty amendments up to the TFEU (see, among others, Piris, 2010; Genschel & Jachtenfuchs, 2013; Schütze, 2015), and a series of EU-level strategic initiatives by European security strategies (from 2003 onwards), the MS have the primary responsibility to ensure their internal security and law-enforcement in the EU. Common measures taken at supranational level should thus focus on issues with trans-national value if the EU would like to avoid far-reaching institutional experiments in the democratic organisation (see Olsen, 2010) and fall-back compliances beyond the nation-state governance mode (see Zürn & Joerges, 2005) after Brexit. On the other hand, one consequence of Brexit would almost certainly be that the EU's instruments to facilitate and enhance cross-border policing, law-enforcement co-operation between prosecution bodies and criminal courts would cease to function in the UK's jurisdiction (Spencer, 2016, p. 194). Such a scenario would lead to a significant step back for international policing and cross-border law-enforcement options without adequate terms in the post-Brexit co-operation model.

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<sup>7</sup> The Article 50 process was triggered in March 2017. An agreement for the UK's withdrawal had to conclude by the end of March 2019. According to Article 50(3), the deadline could be postponed by the unanimous decision of the European Council and the UK.

More specifically, Brexit will have operational-level impacts on a wide range of AFS/JHA areas. The UK has been an active participant in the European Judicial Network (EJN) and Eurojust, which allow law-enforcement authorities from EU MS to co-ordinate cross-border judicial co-operation more effectively. The UK has also been one of the main beneficiaries of JIT and participates in EU measures on security data exchange, as the Schengen Information System (SIS)<sup>8</sup>, the EU Passenger Name Record (PNR) and the European Criminal Records Information Systems (ECRIS). Several mutual recognition instruments will need transitional provisions foreseen by the post-Brexit co-operation model, to ensure operational continuity with the UK. These include measures like EAW implementation, which affords important mutual operational value (see comparatively Charts 1 and 2). The model should also enact post-Brexit provisions of the European Investigation Order (EIO), the European Protection Order (EPO), as well as the recognition of financial penalties, confiscation orders and supervision measures.

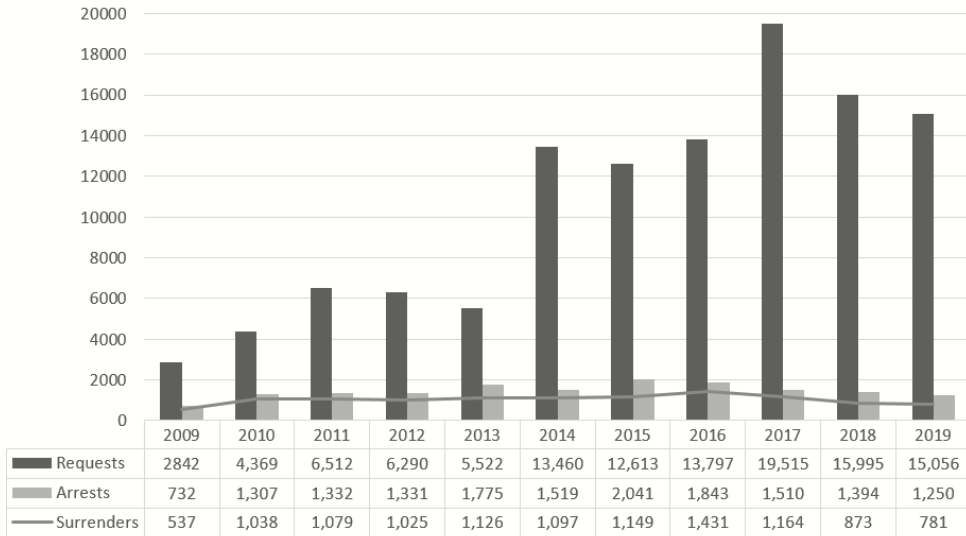
Chart 1. EAW - Wanted by the UK (2009-19)



Data Source: National Crime Agency. European Arrest Warrant Statistics 2009–19.

<sup>8</sup> Member states are using the SIS increasingly intensively. There are more than 75,000 alerts in the system for discreet or some specific checks at border crossings, which was a 300 per cent increase compared to June 2013, for example. The system was used for around three billion searches in 2015 by MS authorities, which is approximately a 50 per cent increase compared to 2014 (see European Commission, 2015; Implementation of the European Agenda on Security, 2016). Further co-operative development steps should focus on special innovative functionalities of the SIS concerning foreign terrorist fighters, just like identifying the return of irregular migrants, the use of biometric identification options, and new alerts for wanted persons by automated fingerprint search. There are also challenges to guaranteeing integrated use of European Dactyloscopy (EURODAC) data and decisions about asylum seekers, combined with the Visa Information System (VIS) and Entry/Exit options for more co-ordinated management of irregular migration (and to guarantee a higher level of border protection).

Chart 2. EAW - Wanted from the UK (2009-19)



Data Source: National Crime Agency. European Arrest Warrant Statistics 2009–19.

The UK has made a significant contribution to the development of Europol and is one of the biggest beneficiaries of European police co-operation, participating in about 40 per cent of cases. On withdrawing from the EU, the UK lost its vote in Europol matters, as well as in other EU agencies, and needs to conclude special co-operation agreements. The same applies to future participation in other forms of EU judicial co-operation instruments, such as Eurojust’s cross-border serious organised crime investigation files, of which 15–20 per cent have links with the UK (Loik, 2019). Given the steady increase in the number of files co-ordinated by Eurojust, one can assume that motivation for some co-operation will continue on both sides, including possible involvement in JITs and participating in ECRIS within agreed functionalities.

The proper information exchange model for post-Brexit operational continuity is one of the central tasks that need to be resolved by the agreement. More specifically, Article 276 (TFEU) states that, in exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the AFSJ, the CJEU shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of MS, or the exercise of the responsibilities incumbent upon the MS about the maintenance of law and order and the safeguarding of internal security. After the *de jure* Brexit, the supervision competences of the CJEU will be a grave legal issue because the CJEU (Article 263, TFEU) shall review the legality of acts of bodies, offices, or agencies of the Union intended to produce legal effects vis-à-vis third parties.

Also, the institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the CJEU (Article 266, TFEU). Hence, from the Treaty bases, the legal implication for the EU regarding personal data protection is that an information exchange agreement should be governed by EU regulations to



ensure a level of data protection equivalent to the EU's own. It should be noted that, concerning data exchange and channels used, the UK and US have often taken different approaches than many other EU MS (see Alegre et al., 2017, p. 48). Particularly strong is the case of information exchanges in policing and intelligence co-operation.

Hence, eligible terms should be fixed for the post-Brexit internal security operational continuity model. The questionable approach would be to agree on the post-Brexit information exchange model under provisions relating to the CFSP since, according to TFEU Article 275, the CJEU shall not have jurisdiction concerning acts adopted based on those provisions. Brexit reduced the UK's influence on EU internal security co-operation, which has more disadvantages than advantages (Loik, 2019). An alternatively positive aspect from the EU's point of view could be that Brexit may allow other EU MS to move forward quicker with some enhanced co-operation initiatives, like the full launch of EPPO.

### **Conclusions**

Regardless of the permanent terrorist threat, the envelope of counter-terrorism and fight against other forms of trans-national organised crime was not a solid enough argument to save the UK's membership in the EU, with its variety of co-operative options in internal security and cross-border law-enforcement. This may be due to public confidence that Britain's main security institutions – the Security Service (MI5), the Secret Intelligence Service (MI6) and the Government Communications Headquarters (GCHQ) – are capable enough and will continue their professional co-operation with agencies worldwide, in order to preserve the UK's national security interests after the conclusion of Brexit.

Despite British confidence, and assuming that intelligence and law-enforcement co-operation is still largely a bilateral matter, it would be short-sighted to think that the decision to 'leave' will not have any complex impacts on British security and *vice versa*. Brexit means that the UK will no longer have a decision-making vote in the EU's judicial co-operation institutions, agencies and co-operation mechanisms.

The difficulties in building a suitable post-Brexit co-operation model arise from the EU's legal developments in AFSJ. Since the abandonment of former pillar structure, the legal framework of the EU AFSJ/JHA domain has been further transformed and the creation of co-operative measures has developed towards a more supranational shift of competencies. Existing EU legal instruments create a framework for the exchange of information and data protection, co-operation, and joint operational activities between MS authorities and EU bodies, substantially distinctive of those applying to third-countries. The foregoing framework is the structural basis that limits the EU's position to negotiate the post-Brexit judicial co-operation model.

In parallel, EU strategic guidelines and, first of all, operational challenges, call for functional continuity and an interoperable post-Brexit security co-operation model with the UK. The EU's approach to a post-Brexit security partnership reflects common concerns, such as the fight against terrorism and the spread of cross-border organised crime. Due to operational interest in continued enhanced co-operation with the UK in internal security and cross-border law-enforcement after Brexit, separate agreements with the UK as a third-country will need to be processed in mutual operational interest.

The EU's terms of the Withdrawal Agreement reflected the UK's reluctance to agree to supranational oversight by the CJEU regarding fundamental rights and

protection of personal data in EU law. Namely, the UK will no longer be bound by the EU CFR after the final Brexit stage, which poses substantial challenges for both sides concerning future agreements on judicial co-operation in cross-border policing and criminal justice matters. The main puzzle is that both sides are interested in efficient cross-border law-enforcement co-operation, which supports operational continuity in response to trans-national security threats. But the EU holds the firm position that EU data protection law, under the oversight of the CJEU, needs to be respected.

At the same time, tight functional inter-dependency in cross-border security co-operation – especially on CT and corresponding intelligence sharing – is a particularly bold argument to achieve operational continuity, and build further co-operation bridges between the UK and EU. In sum, the British and EU's JHA authorities will be more limited in the exchange of intelligence and developing common standards, as well as in participating in JITs and cross-border operations with their EU counterparts after the de jure Brexit takes place. It would be sensible to estimate that the UK will request closer bilateral co-operation ties with its traditional and potential new partners in the security domain.

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