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PEER REVIEWED ARTICLE

'Third Party' Status in EU Policing and Security

Comparing the Position of Norway with the UK before and after the 'Brexit'

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ABSTRACT

European Union (EU) police and justice cooperation is based on EU legal frameworks. Some of these frameworks have an important impact on EU policing practice both generally and on cooperation regimes with the United Kingdom (UK) in particular. The UK involvement in EU police and justice cooperation could therefore potentially be endangered by the 'Brexit' – the UK referendum decision to leave the European Union. This decision was announced on 24 June 2016. Even prior to the Brexit, the UK already chose not to accept the jurisdiction of the Court of Justice of the European Union and the enforcement powers of the Commission in relation to pre-Lisbon security measures under Article 10(4) of this Protocol. As an EU member, but not party to the EU Freedom, Security and Justice (FSJ) instruments, the UK had very limited options in participating in EU security measures, such as Europol, Eurojust or Joint Investigation Teams (JITs). A number of measures, including the three mentioned above, were therefore selected to be re-joined as they were considered crucial to UK security. With a Brexit and non-membership in the EU, but as signatory of EU FSJ instruments, the UK would be able to acquire 'third party' status to some of those measures. This is only the case, however, if the UK, similarly to Norway, is willing to (re-)adopt relevant instruments after exiting the EU. The UK is a medium-trust society. If the police were to be excluded from, for example, EU police agencies' information exchange, this trust could be further eroded. This article compares the participation of the UK in criminal justice cooperation in the EU before and after Brexit in comparison with Norway's participation in EU law enforcement. As Norway has long standing practice as a close third party and associate state of the EU, its experiences could be applied by the UK if the Brexit is put into practice. Furthermore, the article explores what the impact of the Brexit could be on the security situation in the UK, focusing in particular on JITs, the European Arrest Warrant (EAW), Europol and the Schengen Information System (SIS).

UNIVERSITETSFORLAGET

INTRODUCTION

UK involvement in EU police and justice cooperation has always been rather controversial. A prominent example of this is the non-participation of the UK in the Schengen Acquis, which, among others, includes regulations on policing and security. The UK only participates in some information-sharing aspects of the Schengen Agreement, like the Schengen Information System (SIS), since 2000, and exclusively within the context of law enforcement cooperation. As a result of the Brexit referendum on 23 June 2016, UK participation in the EU may be completely annulled. The Brexit was announced after a referendum on whether the UK should leave or stay within the EU. The electorate voted 52% in favour of leaving the EU. The political reasons for why the then Prime Minister David Cameron let the question of the Brexit be decided by referendum are complex. They are related on the one hand to lacking support for him within the Conservative Party, and on the other hand the need to counter Eurosceptic pressures by parties such as UKIP. The Brexit referendum was used finally as a tool to win the 2015 elections (Wright and Cooper, 2016).

Even prior to the Brexit decision, the UK had opted out of 133 EU security provisions under Lisbon Protocol 36. Article 10(4) of this Protocol provides that the UK may, at any time up to 31 May 2014, choose not to accept the jurisdiction of the Court of Justice of the European Union and the enforcement powers of the Commission in relation to pre-Lisbon measures. All policing and criminal justice instruments adopted under the former intergovernmental 'Third Pillar' that have not been amended, repealed or replaced since the entry into force of the Lisbon Treaty cease to apply to the UK after the opt-out. The third pillar of the EU, which was abolished by the Lisbon Treaty, governed justice and home affairs and included rules and the exercise of controls on crossing the Community's external borders; combating terrorism, serious crime, drug trafficking and international fraud; judicial cooperation in criminal and civil matters; creation of a European Police Office (Europol) with a system for exchanging information between national police forces; controlling illegal immigration and a common asylum policy (European Union, 2016). With the entry into force of the Lisbon Treaty, the major part of the Third Pillar instruments were communitarised, making most decisions relating to it subject to qualified majority instead of unanimity voting.

With regard to EU agencies such as Europol and Eurojust, the UK was no longer able to participate, not even as a third party, while still an EU member state. A 'third party' with a view to EU agencies can only be a non-EU member state. Similarly, in relation to EU legislation enabling the establishment of Joint Investigation Teams, the UK could only be involved as a 'third party' if it were a non-EU member. A complete exit of the European Union and joining of legislation adopted in the area of Freedom, Security and Justice might therefore have more advantages for the UK than a complete opt-out. However, the UK decided to opt back into 35 measures. Twenty-nine measures, including Europol, Eurojust and Joint Investigation Teams were eventually re-joined to prevent the disadvantages of being an EU member state not party to coopera-

tion treaties. The situation after the opt-out therefore had limited impact on the cohesion of the EU Area of Freedom, Security and Justice, partly also because many of the EU security provisions do not have a direct impact on EU police and justice cooperation practice. The situation of the UK, should a Brexit be formally invoked under Article 50 of the Lisbon Treaty, is hence significantly more precarious than the situation after the opt-out/opt-in. As Norway has long standing practice as a close third party, its experiences could be very instructive for the UK after a complete Brexit.

If the UK left the EU, it could choose to join legislation in the area of Freedom, Security and Justice although the parameters of doing so would be prescribed by the Commission and the European Parliament. With a view to the Norwegian situation it becomes apparent that this non-EU member state applies more EU policing and internal security instruments than most other EU member states (e.g. the UK). It might follow that there are pressures on external EU partners that require a high level of compliance.

In comparison, Norway opted against the accession to the EU by referendum in both 1972 and 1994 (Pettersen, Jenssen & Listhaug, 1996, p. 258). There were a number of economic and political factors that contributed to this decision. Because of its geographical location on the northern periphery of Europe and the dominance of seaward and westward patterns of alliances, migration and trade, Norway has been geographically (and historically) separated from continental Europe. Only in 1905 did Norway win full sovereignty, which has led to a stronger sense of individual state sovereignty and holding on to political autonomy than can be observed in other European countries. Furthermore, an explanation for Norway's decision to stay out of the EU could be based on the political and social structure within Norway (ibid.). However, Norway is party to the European Economic Area since 1994 and is therefore part of the EU single market, although not being an EU member state. Considering the major differences between the UK and the Norwegian situations, but acknowledging the potential similarities as (current and future) non-EU member states with strong interests in EU security cooperation, this article shall investigate whether the Norwegian position could be an alternative for the UK after Brexit.

The article first focuses on the UK and the legal situation before the Brexit. It then discusses a number of EU policing and security provisions in more depth, considering their usefulness for EU and in particular UK policing, as well as the options to participate in these measures after Brexit. The article investigates in particular, whether EU cooperation strategies are crucial for police and justice cooperation with the UK or whether they can be replaced with other non-EU measures. The position of the UK after the Brexit is compared throughout with that of Norway as a third party to EU policing and security cooperation. The conclusion will discuss whether the UK could maintain its current position with regard to EU police cooperation after Brexit, or whether a potential third party status to EU policing and security instruments represents

a fundamental future regulatory gap. The latter could lead to the erosion of the UK as a medium-trust society (Kääriäinen, 2007), considering that police cooperation with the EU is crucial for UK security. By contrast, Norway is a high-trust society despite not being a member state of the European Union, possibly leading to the conclusion that the trust level in the UK could rise after Brexit. This would be dependent on whether the current medium-trust level in the UK was a consequence of the distrust in the EU and its influences on UK law and policies.

THE POSITION OF THE UK BEFORE THE BREXIT

The position of the UK with regard to participation in EU policing and security measures was already limited before the Brexit decision had been made. The integration of the Schengen Agreement into EU law by the Treaty of Amsterdam of 1 May 1999 went along with the UK opt-out from this process. The possibility to opt back into some parts of the Schengen Acquis was, however, retained and exercised with regard to rules mainly concerning EU criminal law and information exchange. One of many examples to illustrate the opposition of the UK to the development of common EU strategies in the area of criminal law is the Council Framework Decision on the Fight Against Organised Crime (Council of the European Union, 2006). Due to the major differences of the civil and common law systems prominent within the EU, and in particular the position of the UK during the negotiations, a single definition of 'organised crime' could not be agreed upon (Mitsilegas, 2001, pp. 565–568, 571–572). The resulting framework decision hence offered a relatively flexible definition. Consequently, the European Commission declared the framework decision failed, as it did not achieve the minimum degree of approximation (Council of the European Union, 2006). This outcome is particularly striking, considering that organised crime is one area of criminal law that has an undisputed impact on the transnational level and should therefore have been least difficult to harmonise.

In 2009, the entry into force of the Lisbon Treaty and the related increase in powers of the Court of Justice of the European Union and the Commission prompted the UK to stand back from a number of instruments adopted in the area of Freedom Security and Justice. On 15 October 2012, the UK government announced the likely opt-out of all 133 pre Lisbon police and criminal justice measures adopted prior to 1 December 2009 under Protocol 36 to the TFEU (House of Lords, 2013, 7, citing HC Debate, 15 October 2012, cols 34–35). However, it was at the same time declared that it would seek to re-join a number of measures.

Measures affected by the UK opt-out included the exchange of information (including Schengen Information System), the criminal offences co-operation (e.g. Euro counterfeiting; money laundering), judicial co-operation, borders and travel documents, co-operation in respect of illegal drugs, agreements with

third countries on classified information, anti-terrorist co-operation, Europol, EU financial interests [i.e. anti-corruption measures], extradition and the European Arrest Warrant, fighting organised crime, child sexual exploitation/pornography, Eurojust, human trafficking, the European Evidence Warrant, customs co-operation and a number of other measures that shall not be specified here.

The opt-out and opt-in decisions were made official by the Home Secretary on 9 July 2013. On 30 November 2014, the UK opted out of all 133 measures. Hence all former policing and criminal justice instruments adopted under the former intergovernmental 'Third Pillar' that had not been amended, repealed or replaced since the entry into force of the Lisbon Treaty (1 December 2009) ceased to apply to the UK. Ireland and Denmark equally opted out of these measures. The UK could not opt out selectively in relation to some measures according to the protocol. Measures considered crucial had to be re-joined individually. Under Article 10(5) of the Protocol, the UK applied to the Council to re-join 35 of the 133 former Third Pillar measures. The Command Paper 8671 (HM Government, 2013) consequently set out a list of 35 measures the government would seek to re-join (Article 10(5) of Protocol 36). In doing so, the UK accepted the enforcement powers of the Commission and the jurisdiction of the Court of Justice of the European Union (CJEU) in relation to these measures. On 1 December 2014, the UK exercised the opt-in with regard to 29 measures (European Union, 2014).[1]

The question that arises now, after several in-depth assessments by the UK government as to which measures are crucial for UK security, is whether the Brexit and therefore a definite annulment of these measures would be detrimental to UK (or even EU) security. On 1 November 2012, the House of Lords Select Committee issued a call for evidence setting out a number of questions upon which it would welcome views with regard to the opt-out (House of Lords, 2012, pp. 1–2). The questions aimed to establish which Justice and Home Affairs measures were necessary for UK security and what the consequences of an opt-out could be. These questions remain of significance for the Brexit situation, although, as stated above, the possibilities after a Brexit could

1. Measures that the UK re-joined include the Council Decision to combat online child pornography; the European Arrest Warrant (EAW); the Council Framework Decision on the application of the principle of mutual recognition to confiscation orders; the Framework Decision on mutual recognition of financial penalties; the Framework Decision on taking account of convictions in other member states in the course of new criminal proceedings; the Joint Action establishing an organised crime evaluation mechanism; the Council Decision concerning security of international football matches; Council Act drawing up the Convention on mutual assistance and cooperation between customs administrations; the Council Decision concerning the Customs Information System; the Joint Action setting up a European Image Archiving System (FADO); the Council Decision on arrangements between MS financial intelligence units (FIUs) in exchanging information; the Swedish Initiative; the European Supervision Order; Europol; Eurojust; the Framework Decision on Joint Investigation Teams (JITs); the European Judicial Network and the Exchange of criminal records/European Criminal Records Information System (ECRIS).

be even more varied than after the opt-out. Written and oral evidence sought by the Committee included UK prosecutors, EU officials, Europol, the Bar Association, Parliamentarians, Eurojust, police agencies, academics and others. The report was issued on 23 April 2013. The inquiry was reopened in July 2013 and a supplementary report was published on 31 October 2013. Both reports were then debated in the House of Lords on 23 January 2014. With a view to the 35 measures that were identified as crucial for UK security, the report gave substantial support. Considering the very critical history of the UK towards EU measures, the outstanding support by UK practitioners in the reports was unexpected.

III. THE POSITION OF THE UK AFTER THE BREXIT

While the UK situation was already significantly different from that of other member states before the Brexit, becoming a non-EU member state is an even greater source of concern. The UK is one of the few common law systems in the EU. The latter has the effect that the UK benefits greatly from EU level policing and security provisions providing a level playing field between different criminal law systems. Also, EU agencies, such as Europol and Eurojust, which coordinate, support and mediate between the different criminal procedural systems, might no longer be available to facilitate police and justice cooperation between the UK and other member states. While the Brexit was determined by the electorate, the trust of the people in the police as a state institution could nevertheless be diminished if the police were no longer able to participate in EU security instruments. This could lead to a lowering of the position of the UK as a medium-trust society. However, the trust in the EU as an institution could be so low that exiting it was more important to citizens than the potential risks to security. Trust in UK policing would then not be negatively affected and may even rise to a high-trust level, similar to Norway.

To illustrate more concretely the potential consequences of the Brexit, some EU measures in the area of police and judicial cooperation shall now be discussed in greater depth. Measures concerning EU policing and criminal justice cooperation that apply to the UK after the 2014 opt-out include EU criminal law, mutual recognition in criminal matters, approximation of criminal procedure, exchange of police and judicial information and EU agencies. Considering EU criminal law, there would be no possibility for the UK to participate in such measures after Brexit, unless it acceded, similarly to Norway, to the relevant EU treaties. With regard to mutual recognition in criminal matters, the UK could retain this cooperation option under the Council of Europe (CoE) Conventions, such as the 1959 Mutual Legal Assistance Convention (Council of Europe, 1959). This convention is not as precise and does not provide the same extent of possibilities in relation to operational cooperation as the subsequent EU initiatives, such as the Schengen Convention. However, the UK could use it as a starting position for the development of more specific agreements with member states. Cooperation under the CoE Conventions would nevertheless

be more problematic and patchy than under EU instruments. In the area of mutual recognition of criminal judgements, for example, not all EU member states have ratified the Council of Europe Conventions and the recognition of pre-trial supervision decisions is not even subject to CoE Conventions. Mutual recognition of criminal judgements and substantive EU criminal law will not be discussed in greater depth in this article. The assessment will focus on operational EU policing and criminal justice instruments, in particular the EAW, exchange of police and judicial information through the Schengen Information System, the EU agency Europol and operational police cooperation through joint investigation teams.

If the UK was barred from participation in EU policing and security instruments, it could reconsider bilateral and multilateral treaties and agreements with preferred partner countries. It could also use alternative regional and international instruments, such as the Council of Europe Conventions on Mutual Legal Assistance and Extradition as well as regional and international police cooperation mechanisms such as the Cross-Channel Intelligence Conference or Interpol to compensate for the lack of EU measures. However, both international and regional cooperation mechanisms would probably not be able to substitute for the more specific EU level legislation establishing very close cooperation and in particular access to a number of security and policing databases, such as the Schengen Information System and Europol. If EU cooperation strategies could not be replaced with other non-EU measures, it could be concluded that the position of Norway as a third party to most EU security measures by treaty accession is advantageous. This might mean, however, that the UK would have to join more measures than it was party to before Brexit.

a. Joint Investigation Teams (JIT)

A measure that is of relevance in police cooperation practice in the UK are JITs. Considering in particular that the UK has a number of quasi-permanent JITs with other countries, this measure has been useful to both the UK and cooperating countries in the past. Generally, JITs have been increasingly used since their introduction in 2002 (Hufnagel, 2013, p. 215). Compared to the number of all cross-border criminal investigations in the EU, they were initially not extensively applied between 2004 and 2009 (40 JITs) (Block, 2011, p. 158). However, numbers have been rising significantly since 2009. In 2014, Eurojust alone already supported 122 JITs, and funded 67 JITs, which is not counting bilateral and multilateral JITs not seeking Eurojust support (Eurojust Annual Report, 2014). If the UK were to lose the possibility of participating in JITs, it would have to rely more on the less flexible measure of parallel investigations. The following assessment analyses the benefits of JITs and whether they could be replicated by any similar non-EU measure.

According to current EU legislation a JIT is set up '*for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team*'.[2]

The purpose of a JIT is hence to jointly investigate a criminal case; the teams are bi- or multinational, likely operating from one location, possibly multi-disciplinary, and are set up for a single investigation within an agreed time frame (Schalken & Pronk, 2002, p. 71). JITs are based on the 2000 EU Mutual Legal Assistance Convention. The 2000 Convention introduced in Article 13 a cooperation provision on JITs; harmonised the use of covert policing techniques, such as controlled deliveries (Article 12); undercover operatives (Article 14); and the interception of telecommunications (Article 18) (see also Article 73 of the Schengen Convention of 1990, n. 3). Under the 2000 Convention, JITs have been employed since 2004 in the investigation of crimes with a cross-border aspect in the EU; the first was established between France and Spain in September 2004 (Block, 2012, p. 98).

The aim of introducing JITS in Article 13 of the 2000 Mutual Assistance Convention was to create a more efficient mechanism compared to parallel investigations. Parallel investigations are commonly based on the 1959 Council of Europe Convention, as specified in bilateral and multilateral agreements under, for example, Articles 39 and 40 of the Schengen Convention. Parallel investigations are conducted through exchange of International Letters Of Request (ILOR), which establish a legal basis for the direct and immediate exchange of intelligence and determine the possible preliminary measures necessary in the course of the investigation. The difficulty of this set-up is that if measures not foreseen in the initial request become necessary, additional ILORs have to be issued (Block, 2011, p. 152). This can take up valuable time during an investigation.

Within individual (bilateral and multilateral) investigation partnerships, JITs can be used in various ways. The implementation of the 2000 Convention provisions and the 2002 Framework Decision on JITs (Council Framework Decision of 13 June 2002 on Joint Investigation Teams, (2002) OJ L 86/1) differ significantly between member states (European Commission, 2005), despite the setting up of a model agreement (Council of the European Union, 2003). While standardisation of working procedures between member states has not been achieved (Block, 2011; van Daele, Spapens & Fijnaut, 2008), these instruments are potentially adaptable to different regional contexts. Were the UK not to join the legislation as a third party after Brexit, it would certainly lose access to a measure that is significantly simplifying operational cross-border policing. More importantly, the UK is one of the main beneficiaries of European mechanisms facilitating cooperation in criminal justice. JITs and in particular the support they experience through prosecutors based at Eurojust, have become an important tool for the UK and cooperating states. The Netherlands, for example, have a standing JIT with the UK on passport fraud (Hufnagel, 2016). Eurojust supports this team in particular with regard to the gath-

2. Article 13 of the Council Act of 29 May 2000, establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197 (12 July 2000).

ering of evidence that needs to be compatible in both legal systems. Seeing that the UK is one of the few common law systems within mainly civil law systems in the EU, it benefits greatly from this special EU legal (and financial, as Eurojust can also provide financial support to JITs) attention (ibid.).

Under Art. 1 section 1 of the *Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union* (Official Journal L 026 , 29/01/2004 P. 0003 – 0009), Norway can participate in JITs under Art. 13 of the 2000 Convention. It is interesting to note that the possibilities of establishing JITs is equally given (and with very similar wording) under Art. 20 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 8 November 2001). It might therefore be sufficient for the UK to be a party to the CoE Convention to benefit from JITs.

EUROPEAN ARREST WARRANT

A highly contested EU criminal justice instrument, for the UK in particular, is the European Arrest Warrant (EAW). Despite substantial criticism towards the instrument (McCartney, 2013, pp. 551–552), the EAW was described in the UK practitioner evidence gathered for the 2014 opt-out decision as *"the most important of all measures*", "*the success story of all the Framework Decisions*" and even *"an extremely effective policing measure […] to remove it would represent a huge step backwards*" as well as an "*invaluable tool*" (House of Lords, 2013). The purpose of the EAW most generally is to accelerate the extradition process between EU member states. A major concern of the UK, but also of other member states party to the EAW, was proportionality. Warrants can and have in the past been issued for very trivial cases (McCartney, 2013, pp. 551–552). This is a particular problem in extradition cases with countries that operate under the principle of legality, and hence where the prosecutor has no discretion whether to prosecute even minor infringements (Chalmers, 2013, p. 223).

Other concerns relate to the use of the EAW for charges not considered criminal acts in the UK (double criminality). Since the criminal laws of all member states are not uniform or even harmonised, their differences leave significant variations in substantive criminal law provisions and penalties. However, the EAW also contains many safeguards to protect fundamental rights. Some authors have claimed that the UK wanted to opt out of the EAW to be able to reform it. However, a reform while not being a member of this legal framework seems obsolete. The UK had far more chances of reforming the shortcomings of the EAW while being a part of it (ibid., p. 225).

Before the introduction of the EAW, the UK cooperated with other nation states using specific, individually negotiated, bilateral agreements on extradition. Most of the bilateral agreements with what are today EU member states were established in the 1840s. Apart from the specific bilateral legislation, the UK, since the middle of the twentieth century, applies the Council of Europe Convention of 1957. Many of the established principles in the 1957 Convention can be found in more specific form in the EAW, although the latter requires generally a far greater ceding of sovereignty. For example, under Article 2 of the 2002 Council Framework Decision on the European Arrest Warrant, the double criminality requirement was abolished. Also, there is no more exception on the non-extradition of nationals.

After leaving the EU, the UK would be excluded from the operations of the EAW. In the case of Norway, it took years to negotiate the 2006 *Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway.* The Agreement has still not entered into force at the time of writing. It also does not give the same options as the EAW. For example, under Art. 7, a state 'may make a declaration to the effect that nationals will not be surrendered or that surrender will be authorised only under certain specified conditions'. However, the double criminality rule is waived similarly to the European Arrest Warrant.

A bilateral agreement with the EU would be a possible alternative to the EAW if the UK exited the EU. However, in the meantime, and it needs to be considered that negotiating these agreements can take a very long time (see Norway), the safeguards that apply to extradition under the EAW would not exist anymore. If abolished, the EU Court of Justice would have no power to review extradition decisions with a view to human rights infringements. Also, some EU member states would have issues accepting UK arrest warrants depending on their implementing legislation. In general, extradition times (currently one month) would be much longer if, e.g. the CoE Convention regime on extradition would be reapplied to bridge the time gap towards a special agreement. The UK would hence be clearly disadvantaged with regard to extradition after the Brexit.

EUROPOL

Unlike the Schengen Convention, the Europol Convention (and since 2010 the Europol Decision; now replaced by the 2016 Europol Regulation) does not only provide a legal framework for certain forms of police cooperation, but sets up an EU agency that can be involved in the support and coordination of JITs and may suggest to national police forces the initiation of cross-border investigations. Although the mandate and powers of Europol have been and are still subject to debates amongst member states, in particular in relation to possible enforcement powers (Mitsilegas, 2009, pp. 165–166), the agency is

by now an integral part of the EU architecture on police and law enforcement cooperation. The Europol mandate was subsequently expanded according to the 'Danish Protocol', OJ C 2 of 6 January 2004 (at 3) to include the initiation of investigations and participation in JITs and by the Europol Decision 2010.

Objectives of Europol are the facilitation and fast access to information on persons suspected of having committed a criminal offence within the territory of Europol competence (Articles 2+3 Europol Convention). Under the 2nd and 3rd Protocol to the Convention (Art. 6 Europol Decision) Europol can participate in JITs. Under Art. 7, Europol can request a member state to initiate investigations.

The Europol information exchange strategy consists of two different mechanisms, the Europol database and the liaison officer network. Europol has furthermore 'products', such as the European Criminal Intelligence Model (ECIM) and the (Serious and) Organised Crime Threat Assessment ((S)OCTA). While these 'products' largely stem from the UK, the UK would not be able to participate in their further development. Equally, the EU would not be able to benefit from the UK input anymore.

Europol is increasingly important in EU police information and intelligence exchange. Following Brexit, participation as a third country would be possible under a strategic and an operational agreement with the UK as a third country, similar to the one with Norway, which also implies the possibility for operational information exchange. The UK could hence still benefit from the exchange of sensitive intelligence that is not subject to Interpol cooperation and would be able to participate in the liaison officer network at Europol as a non-member state.

The Norwegian situation with regard to Europol is that under the Agreement between the Kingdom of Norway and the European Police Office (28 June 2001), Norway has developed a 'dynamic co-operation' with the agency. The Council of the European Union gave Europol the authorisation to enter into negotiations on a cooperation agreement with Norway on 27 March 2000, and concluded on 15 March 2001 that there were no obstacles to include the transmission of personal data from Europol to Norway. However, Norwegian police may not search the Europol database directly, for example. Also, its access to analysis forums is limited and all information flow between Norway and Europol has to go through Europol's operational centre to check information for compliance with Europol rules (Ugelvik, 2014, p. 168).

It follows from the Agreement that Norway was already closely associated with the law enforcement co-operation of the European Union Member States through its association with the Schengen co-operation mechanisms and is a party to the Agreement on the European Economic Area. These were conditions mentioned in the preamble of the Europol Agreement with Norway. Furthermore, it was considered that Norway is already closely associated with the

Nordic European Union Member States through the Nordic law enforcement cooperation giving them a special status in EU police and judicial cooperation.

The latter would not apply to the UK. The closest neighbourhood relationship the UK maintains is the Cross-Channel Intelligence Conference between the UK, France, Belgium and the Netherlands. This cooperation was established through an MoU and complemented by a number of related special agreements and protocols, such as the Sangatte Protocol regulating cooperation in the Eurotunnel region (Hufnagel, 2013, pp. 44–47). Norway is, other than the UK, furthermore associated with the Schengen cooperation mechanisms and a party to the Agreement on the European Economic Area (EEA). Not being as closely related to the EU as Norway could be problematic for the UK's participation in Europol. However, the US has a strategic and technical agreement with Europol without being a Schengen or EEA member. Lack of such status should hence not prevent the UK from participating as a third party in Europol.

SCHENGEN INFORMATION SYSTEM

In the times of the European Community and today within the EU context, the Schengen Agreement of 1985, and the following 1990 Convention Implementing the Schengen Agreement of 14 June 1985 (Schengen Convention, 1990), provided a legislative framework for cross-border law enforcement between the European states that signed on to them. France, Germany, Belgium, the Netherlands and Luxemburg were the first EU member states to abolish their common borders. The Schengen Convention is a broad legal framework that provides considerable scope and latitude for police initiatives. Amongst other measures, it established the Schengen Information System (SIS), and the possibility of cross-border surveillance (Article 40) and pursuit (Article 41). Title III of the Schengen Convention deals with police and security, and more particularly, Chapter 1 (Articles 39–47) deals with police cooperation.

The UK is not fully part of SIS I, but envisaged to participate in SIS II for an estimated cost of £39 million. The SIS operates on a 'hit/'no hit' one-to-one basis, which would be improved by the SIS II to a one-to-many basis of information exchange. Immigration data, data on persons wanted for extradition (within Schengen), on missing persons, on wanted persons (witnesses, defendants, convicted offenders), on persons and vehicles placed under covert surveillance, on persons and vehicles subject to specific checks, and on objects sought for seizure or use in criminal proceedings, can and will be exchanged, and the sensitivity of the information and data protection issues are obvious. Member states decide individually which agency has access to the database and judicial authorities; Europol and Eurojust have access to data since 2004. Since 9 April 2013, SIS II is operational, includes biometrics and can link data (e.g. between vehicles and wanted persons).

Norway has been a signatory to the Schengen Convention since 1 January 2001 (Ugelvik, 2014, p. 125). It could be claimed that Norway's involvement in the Schengen process was more integrated as a non-member state to the EU than that of the UK as an EU member state (ibid., pp. 125–130). However, the UK could, like Norway, after the Brexit decide to become a Schengen signatory. As immigration concerns under the Schengen regime appear to be the primary reason for the Brexit, this will politically not be feasible. The disconnection from the SIS could lead to major disadvantages for UK law enforcement and this system could not be replicated by non-EU measures.

CONCLUSIONS

A factor that could significantly distinguish Norway and the UK is that Norway opted to be a member of the European Economic Area (EEA), which gives the right to, against a fee, participate in the European Single Market. Whether the UK would equally opt to remain a member of the EEA is unclear. The European Single Market facilitates not only the free movement of goods, but also the free movement of people, which seems to have been one of the major UK criticisms of the EU and consequently trigger for the Brexit. However, part of the reasoning why Norway was given special status with regard to EU security instruments was its membership in the EEA. Should the UK opt to not remain a party to the EEA, it might not receive any of the benefits Norway is currently receiving. Of course, it would also not bear the membership costs.

With a view to Joint Investigation Teams (JITs), even without being a party to the 2000 EU Mutual Legal Assistance Convention, there is still a possibility of parallel investigations for the UK. Cooperation could continue under the CoE Convention on Mutual Legal Assistance. As the practitioner evidence gathered for the opt-out reports in 2013 confirms, British practitioners consider JITs crucial for cooperation within the EU after 10 years of using them as a cooperation tool (House of Lords, 2013). It would hence be in the interest of the UK to maintain this practice under either the EU or the CoE Convention.

The European Arrest Warrant was also considered an important instrument for cooperation by UK and other EU practitioners (House of Lords, 2013). If it were abolished in the UK, only bilateral and Council of Europe legislation could be applied. This would mean considerable efforts to establish bilateral legislation or the re-introduction of an old system. The UK could, however, aim to establish a separate extradition agreement with the EU, similar to Norway. However, unlike Norway, the UK is not involved in the Nordic Arrest Warrant cooperation. Establishing a legal agreement containing the same requirements as the EU-Norway cooperation might hence be more lengthy and complicated.

The UK could still cooperate through Europol as 'third state' after Brexit. It could share strategic and personal data through the agency and benefit from the European Liaison Officer Network based at Europol, similarly to Norway. However, access to data and searches are restricted for third parties despite accession to the Europol Decision. The agreement between Europol and Norway also points out that Norway has a special status in EU security due to its long-standing cooperation with EU member states, the Nordic cooperation scheme and its membership in the EEA. The UK might not have some of these qualities depending on how the Brexit is executed, which could make the negotiation of a similar agreement at least more lengthy and cumbersome.

The Schengen Information System II is also considered crucial by British police practitioners (House of Lords, 2013) and there is no possibility of replicating this for the UK after Brexit, if the Schengen Convention were not fully joined. Considering that part of the reason for the Brexit decision was the aversion to the Schengen regime, a membership within SISII after a completed Brexit is highly unlikely.

With a view to the UK as a medium-trust society, it becomes apparent that in particular for the EAW and the Schengen Information System there exist no valuable substitutes to EU cooperation. Trust of the people in the police could be significantly lowered by this consequence of the Brexit for UK security. Whether this levels out the lack of trust in the EU cannot be determined here, but it would be an important argument in future UK parliamentary debates on this topic. It is in any case unlikely that the Brexit will lead to a rise in trust levels in the UK.

Lastly, the question remains whether after Brexit the UK would have to re-join all EU legal instruments in the field of policing and criminal justice cooperation, which were joined by Norway. This is very likely not the case. Norway, prominently because of its geographical location, seems to have been under far more pressure to comply with EU security measures than the UK was and is. Having a border with Russia and direct borders to EU member states pushed Norway into substantial participation in the Freedom, Security and Justice framework. The UK as an island without an external EU border might therefore remain more selective in what they would wish to join as a third party to the EU. However, the remit of accession depends on the negotiations between the UK and the EU after the opt-out is declared and the EU might prove to be a difficult negotiator.

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