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The UK's Uneasy Participation in EU Police and Judicial Cooperation: The Road from Maastricht to Lisbon

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I. Introduction

Although the roots of police and judicial cooperation stretch back to 1976 and the Trevi Group,[1] it took until 1993 for cooperation in the field of criminal law to be formalised under the pillar structure. Whilst Member States recognised the need for police and judicial cooperation, they were hesitant to embrace the supranational machinery of the Community Pillar (the first pillar). The Second and Third Pillars gave the Member States an institutionalised forum in which to discuss these matters, without subjecting themselves to supranational controls. Mitsilegas describes a process of 'gradual, contested evolution of EU criminal law'[2] that eventually led to a transfer of competence from Member States to the Union level, culminating with the Lisbon Treaty in 2009.[3] This chapter maps the United Kingdom's (UK's) participation throughout the development of a police and judicial cooperation framework within the Union from its inception until the 2014 opt-out decision, made possible by the Lisbon Treaty. As will be seen, the UK has been at times the driving force and at others the opposing force in the development of police and judicial cooperation. It is, in part, the UK's uneasy participation in European Union (EU) criminal law that led to the development of a 'variable geometry'[4] that permitted states to have differing levels of association with the emerging Area of Freedom, Justice and Security (AFSJ).[5] This history both foreshadows Brexit

[1] TREVI was formally established following a resolution adopted by the EC Ministers of Justice and Home Affairs in 1976. It was not based on any formal Treaty provisions and operated outside the formal Community law framework. See V Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009) ch 4.

[2] Mitsilegas (n 1) 31.

[3] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007 [2007] OJ C306/01.

[4] For discussion of this concept, see B De Witte 'The future of variable geometry in a post-Brexit European Union' (2017) 24(2) *Maastricht Journal of European and Comparative Law* 153.

[5] A Enge, 'Opting in or opting out? The EU's variable geometry in the area of freedom, security and justice' in R Pereira et al (eds), *The Governance of Criminal Justice in the European Union* (Edward Elgar, 2020) 39.

and is necessary to understand the eventual relationship that emerges in the Trade and Cooperation Agreement.[6] The final section of the chapter maps the development of the external dimension to the AFSJ in police and judicial cooperation, and considers how this has further developed fertile ground from which the UK–EU relationship has emerged post-Brexit.

II. The Development of an Institutional Framework

Cooperation in criminal justice matters had long existed outside of the EU within the framework of the Council of Europe, but as new areas of transnational criminality developed, drivers towards cooperation within the Union increased.[7] The emergence of the EU internal market, resulting in the abolition of internal borders and facilitating free movement of goods, services, people and capital, provided a driver towards increased institutional cooperation.[8] The 1990 Schengen Implementing Convention included provisions primarily on immigration, asylum and border controls, but also on police cooperation.[9] This included the establishment of the Schengen Information System (SIS). The stated driver was that the increased freedoms granted to citizens and businesses had to be balanced by increasing the powers of states and their apparatus to detect, investigate and prosecute crime. This Schengen 'logic'[10] has driven the subsequent development of EU criminal law and can still be seen in the decisions of the Court of Justice of the European Union (CJEU) when interpreting the operation of the European Arrest Warrant (EAW).[11] It has also been argued, however, that the compensatory measures rationale[12] does not fully explain or justify the restrictiveness of the policies subsequently adopted, and that the driving force behind the AFSJ has been security.[13] Costello argues that 'the lie that this system is required by the internal free market movement is revealed in relation to the UK and Ireland's participation in a range of external border control measures without any commitment to the abolition of internal border controls'.[14]

[6] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2020] OJ L149/10.

[7] Mitsilegas (n 1).

[8] Treaty establishing the European Economic Community, 25 March 1957, 294 UNTS 3 (entry into force 1 January 1958), Art 3.

[9] The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L239/19.

[10] Mitsilegas (n 1) 7.

[11] For discussion, see S Alegre and M Leaf, 'Mutual Recognition in European Judicial Co-operation: A Step Too Far Too Soon? Case Study – The European Arrest Warrant' (2004) 10(2) *European Law Journal* 200.

[12] S Lavenex and W Wallace, 'Justice and Home Affairs: Towards a "European Public Order"?' in H Wallace et al (eds), *Policy-Making in the European Union*, 5th edn (Oxford University Press, 2005) 460.

[13] D Bigo, 'Border Regimes, Police Cooperation and Security in an Enlarged European Union' in J Zielonka (ed), *Europe Unbound: Enlarging and Reshaping the Boundaries of the European Union* (Routledge, 2003) 213.

[14] C Costello, 'Administrative Governance and the Europeanisation of Asylum and Immigration Policy' in H Hofmann and A Turk (eds), *EU Administrative Governance*. (Edward Elgar, 2006) 287, 289.

A major criticism of the Maastricht Treaty[15] was that, unlike foreign and security policy under the Second Pillar, the Third Pillar involved subjects that touched on fundamental human rights. It was therefore argued that the need for accountability in this policy field was much greater, requiring a full role for the European Parliament and review jurisdiction for the European Court of Justice. In the Treaty of Amsterdam, the Third Pillar areas of immigration, asylum, borders and civil law were 'communitarised', forming part of Title IV of the EC Treaty.[16] The Third Pillar was renamed 'provisions on police and judicial cooperation in criminal matters'.

The objective was to provide 'citizens with a high level of safety within the AFSJ by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combatting racism and xenophobia'.[17] The Treaty of Amsterdam provided express reference to the development of the Union as an 'Area of Freedom, Security and Justice'. This was accompanied by the incorporation of the Schengen acquis into Community/Union law. The Treaty also endorsed the principle of mutual recognition, which 'should become the cornerstone of judicial cooperation … in criminal matters within the Union'.[18]

III. The UK as a Driver Towards Cooperation

The late 1990s saw a shift to the principle of mutual recognition. Concern about the slow pace of integration post-Maastricht, coupled with Member States' wariness of EU harmonisation, served as a catalyst for this shift. It was the UK, during its Presidency in 1998, that first suggested that mutual recognition might be the way forward.[19] Jack Straw, then Home Secretary, argued for a situation 'where each Member State recognises the validity of decisions of courts from other Member States in criminal matters with a minimum of procedure and formality'.[20] It was not a new concept, having already been used to attain the internal market. This suggestion was endorsed by the European Council in the Tampere Programme, and by the Commission in 1999. Mutual recognition requires states to recognise other norms as equivalent to their own, but they accept because of the need to cooperate in the enforcement of another state's systems of law. It was seen as a 'shortcut' that avoided the 'more legally demanding and politically complicated method of harmonising criminal law systems'.[21] Mutual recognition was underpinned by the high level of trust that existed between Member States and was argued to be a 'panacea' for lack of convergence in domestic law.[22]

[15] Treaty on European Union (Consolidated Version) ('Treaty of Maastricht') [2002] OJ C325/5.

[16] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/01.

[17] Treaty of Maastricht (n 15) Art 29(1).

[18] According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, point 33.

[19] Cardiff European Council of 15–16 June 1998, para 39.

[20] Quoted by Mitsilegas (n 1) 116.

[21] L Marin, 'The European Arrest Warrant and Domestic Legal Orders. Tensions Between Mutual Recognition and Fundamental Rights: The Italian Case' (2008) 15(4) *Maastricht Journal of European and Comparative Law* 473, 475.

[22] ibid 483.

The Framework Decision on the EAW was the first judicial cooperation instrument to implement the principle of mutual recognition of judicial decisions in criminal matters.[23] European institutions, including the Court of Justice in these early years, were accused of viewing mutual recognition as requiring 'blind' trust as transplanted from the internal market.[24] Criticisms of this approach and the risks it posed to fundamental rights quickly followed.[25] Despite its early problems, and significant media criticism,[26] the UK embraced the use of the EAW and its impact was profound.[27] Sir Julian King, then European Commissioner responsible for security, estimated that the UK surrendered to other states a total of 8,000 wanted people and received 1,000 using the EAW between 2004 and 2017.[28] The UK also embraced using EU mechanisms, databases and institutions to their operational fullest. The UK was said to use Europol more than any other EU country.[29] For example, the UK was one of the biggest contributors to the Europol Information System and led on many European Multidisciplinary Platform Against Criminal Threats (EMPACT) projects.[30] Evidence to the Home Affairs Committee confirmed that the UK had, at the time, 160,000 alerts on the Schengen Information System II (SIS II) platform[31] and participated extensively in Joint Investigation Teams.[32]

The shift from a focus on military threats to a broader understanding of security hastened after the 9/11 attacks in 2001 in the USA, which led to stronger calls for a coordinated international response to terrorism in Europe.[33] Although political integration was always viewed with caution by the UK (as discussed in more detail section IV), from an operational perspective, cooperation was viewed as highly desirable.[34] The UK led, not only in driving mutual recognition, but also in the development of many EU tools and a broader model of intelligence-led policing:[35] UK law enforcement embraced

[23] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision (2002/584/JHA) [2002] OJ L 190.

[24] A Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal law: From a Presumption to (Room for) Rebuttal' (2019) 20 *German Law Journal* 468.

[25] E Guild (ed), *Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers, 2006).

[26] As an example, see S Chakrabarti, 'It's not just Eurosceptics who think the European arrest warrant is rotten' *The Guardian* (10 November 2015).

[27] L Mancano, 'You'll never work alone: A systemic assessment of the European Arrest Warrant and judicial independence' (2021) 58(3) *Common Market Law Review* 683; T Christou and K Weis, 'The European Arrest Warrant and Fundamental Rights' (2020) 1(1) *New Journal of European Criminal Law* 31.

[28] D Boffey, 'Brexit: UK may have to recognise ECJ court rulings to keep security cooperation' *The Guardian* (30 April 2017), cited by House of Lords European Union Select Committee, 'Brexit: Judicial oversight of the European Arrest Warrant', HL Paper 16 (27 July 2017).

[29] HM Government, 'The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues' (9 May 2016) para 1.16.

[30] House of Lords, *Select Committee on the European Union, Home Affairs Sub-Committee, Corrected oral evidence: Brexit: Future UK–EU Security and Policing Co-operation* (12 October 2016) Q19.

[31] ibid Q86.

[32] See evidence of A Saunders, House of Lords EU Committee, *Brexit: Future UK-EU Security Cooperation* (7th Report of Session 2016–17, HL Paper 77) paras 74 and 75.

[33] A Shepherd, 'EU counterterrorism, collective securitization, and the internal-external security nexus' (2021) 7(5) *Global Affairs* 733.

[34] V Mitsilegas and E Guild, 'Police and criminal justice co-operation after Brexit'.(2023) 30(11) *Journal of European Public Policy* 2519.

[35] V Mitsilegas, 'European criminal law after Brexit' (2017) 28(2) *Criminal Law Forum* 219.

participation in the EU architecture as vital to the security of the UK.[36] The inaugural Presidency of Eurojust was held by a UK prosecutor, Michael Kennedy, from 2002 to 2007, followed immediately by another UK prosecutor, Aled Williams, until 2012. The Directorship of Europol was held by UK civil servant Rob Wainright from 2009 until 2018 during a critical time of development, as it became a formal EU agency in 2010. Throughout this period, the ambitious Hague Programme was implemented. This foresaw law enforcement as being readily able to access and exchange evidence with colleagues around the Union.[37] This was continued through implementation of the Swedish Initiative, which introduced the 'Principle of Availability'.[38] The UK also led from 2001 onwards in the development of the Data Retention Directive.[39] During its Presidency of the European Council in 2005, using the political momentum that followed the 7/7 bombings, the Directive was pushed through. The UK Government was said to have used European momentum to secure the data retention regime that it wanted at home, where the domestic Parliament was resistant to far-reaching surveillance laws.[40] Its efforts were, however, in vain, as the CJEU shortly afterwards annulled the Directive in the *Digital Rights Ireland* judgment, holding that the Directive 'entailed an interference with the fundamental rights of practically the entire European population'.[41]

IV. The Lisbon Treaty – The Beginning of the End for UK Participation

The Lisbon Treaty, which came into force in December 2009, had a marked impact on the AFSJ. The previous three-pillar system was demolished and instead integrated into the main body of the Treaties under Title V of Part Three of the Treaty on the Functioning of the European Union as an area of shared competence revealing its centrality to EU policy.[42] The ordinary legislative procedure was now to be the norm – which meant an

[36] J Evans and J Sawers, 'The EU can't dictate to us on security but staying in it can keep us safer' *The Sunday Times* (8 May 2016).

[37] 'Communication from the Commission to the Council and the European Parliament of 10 May 2005 – The Hague Programme: ten priorities for the next five year The Partnership for European Renewal in the Field of Freedom, Security and Justice' COM(2005) 184 final, [2005] OJ C236.

[38] Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2006] OJ L386/89.

[39] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54.

[40] LawFare, 'The history of DRIPA 2014 – data retention in the UK' (19 August 2021). Also see V Mitsilegas, 'The privatisation of surveillance in the digital age' in V Mitsilegas and N Vavoula (eds), *Surveillance and privacy in the digital age. European, transatlantic and global perspectives* (Hart Publishing, 2021) 104.

[41] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, ECLI:EU:C:2014:238, para 53.

[42] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Consolidated version of the Treaty on European Union Consolidated version of the Treaty on the Functioning of the European Union Protocols Annexes to the Treaty on the Functioning of the European Union Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 Tables of equivalences [2016] OJ C 202/1.

end to Framework Decisions, replaced by Directives and Regulations within the competency of the CJEU. Member States could now refer a question of law to the Court under the preliminary rulings process. The Commission was empowered to bring enforcement proceedings if a state did not implement a measure or did so incorrectly.

These constitutional changes compounded fears that ever-increasing integration would undermine British sovereignty. In response to this, in 1997, the UK secured EU agreement to the right to choose whether to participate in any new EU legislation covering asylum and judicial cooperation in civil matters. In 2007, this right to 'opt in' was extended to cooperation in policing and criminal justice. During the negotiation, the UK had also insisted on inserting Article 10 of Protocol 36 to the EU Treaties. This permitted the UK Government a five-year 'grace' period to decide whether to be bound by the police and criminal justice and mutual recognition measures, which were adopted before the Treaty of Lisbon entered into force. By May 2014, the UK had to decide on whether to stay 'in' the Justice and Home Affairs (JHA) measures or to exercise its right to opt out. In the background, there was a growing swell of Conservative Euroscepticism, which resulted, amongst other things, in the UK's passing of the European Union Act 2011 that stated any expansion of EU powers would require a UK referendum.

Although the opt-out was negotiated by the Labour Government, it was a Conservative Government that had to decide whether to make use of it. The then Prime Minister, David Cameron, was said to be under pressure to 'repatriate criminal justice', and it was rumoured that this opt-out might be offered as a less troublesome alternative to those calling for a referendum on 'pulling out of Europe'.[43] Of primary concern for the Conservative Government was the risk that the jurisdiction of the CJEU might result in 'judicial activism', which could undermine the UK's common law systems and result in loss of national control. The House of Lords European Union Committee, however, found no evidence to support these concerns.[44] The Government also stated that the opt-in negotiation should be used to secure reform to the EAW, which had been heavily criticised. The issue of the UK's opt-in, and the EAW in particular, had become increasingly politicised. In several commentaries in the media, 'the EAW was seen as emblematic of arguments about the EU more generally, divisions with the Conservative Party and the rising popularity of UKIP'.[45] It was clear that mutual recognition, supposedly the answer to avoiding harmonisation, still had significant repercussions for UK criminal justice. Wieczorek has argued that the EU had emerged inevitably as a 'primary policy actor' over time, and could be seen pursuing a normative agenda in areas in which Member States were capable of acting on their own.[46]

On 24 July 2013, the UK notified the Council that it would make use of the blank opt-out option. This amounted to over 130 measures, although not all were still actively

[43] A Hinarejos, J Spencer and S Peers, 'Opting Out of EU Criminal Law – What is Actually Involved?' *University of Cambridge Faculty of Law Research Paper No 25/2012*.

[44] House of Lords European Union Committee, *EU Police and Criminal Justice Measures: The UK's 2014 Opt-out Decision* (13th Report of Session 2012–13, HL Paper 159) para 89.

[45] House of Lords, 'The European Arrest Warrant Opt-in'. Select Committee on Extradition law' (1st report of Session 2014–15, HL Paper 63) para 9.

[46] I Wieczorek, 'The emerging role of the EU as a primary normative actor in the EU Area of Criminal Justice' (2021) 27(4-6) *European Law Journal* 378.

used. The UK began to negotiate back in to 35 measures, which it considered were in the 'national interest', by the end of 2013.[47] The process depended on whether the measure was a Schengen or non-Schengen measure. For Schengen measures, whether the UK could re-participate was decided by a unanimous vote of the European Council.[48] For non-Schengen measures, the decision lay with the Commission. If the UK was unhappy with the Commission's decision, it could be referred to the Council and decided by Qualifying Majority Vote. Initially, some Member States said that the UK would have to opt back in to more measures, but in the end the UK was allowed to take the cherry-picking approach it wished.[49]

The operational imperative for continued participation in EU criminal law was clearly articulated. Theresa May, as Home Secretary, declared that EU measures were vital to 'stop foreign criminals coming to Britain, deal with European fighters coming back from Syria, stop British criminals evading justice abroad, prevent foreign criminals evading justice by hiding here, and get foreign criminals out of our prisons'.[50] The House of Lords European Union Committee argued that the Government's decision not to rejoin a number of measures, including the European Judicial Network and implementing measures relating to Europol, risked substantive and reputation damage.[51] McCartney highlighted that the degree of parliamentary involvement in the opt-out and opt-in decisions also resulted in significant debate around transparency and accountability.[52] The UK Government held a debate in Parliament on the 35 opt-in measures only once it had already concluded negotiations with the EU institutions and Member States. Theresa May defended this position, stating it would be 'a poor negotiating strategy to reveal one's hand in public while a deal is still being done'.[53] In the end, by opting out and then successfully opting in to the most important measures, the UK was able to reconcile the 'sovereignty-effectiveness paradox'.[54] It could say it had maintained sovereignty by opting out of the whole of the EU pre-Lisbon acquis, but that it had also taken on board operational concerns of practitioners and ensured national security was not compromised by participating in key measures.

The EU also now had explicit competence over criminal procedure on condition that it was necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. This was an unwelcome reverberation of mutual recognition from the UK's perspective.

[47] Foreign and Commonwealth Office, *Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union* (Cm 8671, 2013).

[48] ibid for discussion of the operation of Art 10(5) of Protocol 36.

[49] C McCartney, 'Opting in and Opting Out: Doing the Hokey Cokey with EU Policing and Judicial Cooperation' (2013) 77(6) *The Journal of Criminal Law* 543.

[50] House of Lords (n 30) 2.

[51] House of Lords, *Follow-up report on EU police and criminal justice measures: The UK's 2014 opt-out decision* (European Union Committee, 5th Report of Session 2013–14, HL Paper 69).

[52] European Scrutiny Committee, *The UK's opt-out of pre-Lisbon criminal law and policing measures*, 21st report (7 November 2013). Also see comments by B Cash, HC Deb 7 April 2014, vol 579, col 26, 'It is not just a question of whether Parliament is given the opportunity to deliberate before decisions are taken behind closed doors, but a question of whether Parliament is, in effect, being asked to rubber stamp something that has already been decided in negotiations behind those closed doors. The problem is one of the matter therefore being hidden from the searching gaze of the public and Parliament itself.'

[53] HC Deb 7 April 2014, vol 579, col 27.

[54] Mitsilegas and Guild (n 34).

It was argued that without approximation of procedural rights, human rights were subordinated to the efficiency of mutual recognition. The AFSJ is marked by its direct impact on individual rights. Whilst most other areas of the EU acquis provide rights to individuals, the EU's increasing competence in criminal justice provided power to the state.

The second concession negotiated by the UK was Protocol 21 to the Lisbon Treaty.[55] The latter provided the UK and Ireland with the right to opt in to subsequent provisions in the AFSJ, which included criminal law measures. The UK Government could now decide measure by measure what it would opt in to. The UK took a variable approach to whether it would opt in to post-Lisbon measures. Surprisingly, the UK participated in the European Investigation Order (EIO).[56] This is an example of operational imperatives outweighing Euro-scepticism. The Home Secretary gave evidence that 'When I looked at this issue of the European Investigation Order, there was one thing driving my thinking, which was a desire to ensure that we could give the police the powers that they need to catch criminals.'[57] The decision to opt in to the EIO was a 'recognition of the functional necessity of being "in the system" of EU-wide cooperation, which superseded political sovereignty concerns'.[58]

Controversially the UK did not opt into several defence procedural rights instruments. The suite of measures formed a 'roadmap' of rights designed to address concerns that mutual recognition and mutual trust were undermining fundamental rights.[59] As an alternative, the UK tabled a non-legally binding resolution, which was eventually rejected.[60] Whilst the UK opted in to the first measures on the rights of suspects and defendants in criminal procedure, it did not participate in others. These included, for example, the Directive on the right to access to a lawyer.[61] This approach led to criticisms that the UK's participation followed an 'à la carte' model, which had the potential to 'de-legitimise' police and judicial cooperation.[62] The primary driver for non-participation was not that the instruments would result in unwanted domestic change, but that they would be open to the interpretation of their terms in the CJEU.[63] The UK's strategy was to opt in post-adoption only if the measure in its final form was

[55] Consolidated version of the Treaty on the Functioning of the European Union PROTOCOL (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area Of Freedom, Security and Justice [2016] OJ C202/295.

[56] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L130/1.

[57] House of Commons European Scrutiny Committee, *The European Investigation Order and Parliamentary Scrutiny of Opt-in Decisions, Oral Evidence* (6 July 2011, HC 1416) Q1.

[58] Mitsilegas and Guild (n 34).

[59] A Tinsley, 'Protecting Criminal Defence Rights through EU Law: Opportunities and Challenges' (2013) 4(4) *New Journal of European Criminal Law* 461.

[60] House of Lords European Union Committee, *Breaking the Deadlock: what future for EU procedural rights?* (2nd Report of Session 2006-07, HL Paper 20) paras 21–24.

[61] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1. Also see D Giannoulopoulos, 'Fair trial rights in the UK post Brexit: Out with the charter and EU law, in with the ECHR?' (2016) 7(4) *New Journal of European Criminal Law* 389.

[62] Mitsilegas (n 1) 56.

[63] Mitsilegas and Guild (n 34).

considered acceptable. This was clear in the late adoption of the Directive on trafficking in human beings,[64] where Damian Green stated the UK had opted in once it was 'absolutely sure that the text would not change during those negotiations in a way that would be detrimental to the integrity of the UK's criminal justice system'.[65]

Protocol 21 was negotiated partly because of the grave concerns the UK had about the EU's plans to develop a European Public Prosecutors Office (EPPO). The body would be responsible for the investigation and prosecuting of crimes against the financial interest of the EU. In the end, the UK would not need Protocol 21 to opt out of the EPPO. Article 86 TFEU introduced an exception to the ordinary decision-making procedure when it proposed the establishment of the EPPO. Eurosceptics viewed the EPPO, first set out in the Corpus Juris Project in 1997, with alarm. Exceptionally, the UK Government was so concerned that it introduced a requirement for a referendum into UK law before the UK could specifically participate in the EPPO, via the European Union Act 2011.[66] Spencer argues that the EPPO was rejected 'not on the basis of what the proposal actually contains, but a conception of it that bears no relation to what was actually proposed; a distorted version propagated by the Eurosceptic press and then internalised by the Conservative party'.[67] Mainstream newspapers ran with headlines such as 'Alarm over Euro-wide justice plan' and 'Freedom's flame flickers'.[68] The People's Pledge was a political campaign aiming to bring about a referendum on the UK's membership of the EU. It argued in a blog that the EPPO would be the end of 'Britain's most ancient and hallowed liberties', adding 'Could there be a better reason to vote for withdrawal from the EU?'[69]

V. The Development of the EU's External Dimension in Police and Judicial Cooperation

The rapid development of internal EU action in criminal matters has been accompanied by a strong emphasis on external action, particularly since the entry into force of the Treaty of Amsterdam.[70] To fully understand the relationship negotiated between the UK and EU on the UK's exit from the Union, it is important to consider how the EU has cultivated its external relationships and the way it has developed as an actor on the

[64] Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, [2011] OJ L101/1.

[65] HC Deb 9 May 2011, vol 527, col 977.

[66] European Union Act 2011, s 6(5)(c). For further comment, see J Spencer, 'The UK and EU criminal law: Should we be leading, following or abstaining?' in V Mitsilegas, P Alldridge and P Cheliotis (eds), *Globalisation, Criminal Law and Criminal Justice. Theoretical, comparative and transnational perspectives* (Hart Publishing, 2015).

[67] J Spencer, 'Who's Afraid of the Big, Bad European Public Prosecutor?' (2011) 14 *Cambridge Yearbook of European Legal Studies* 363.

[68] House of Lords Select Committee on the European Communities, *Prosecuting Fraud on the Communities' Finances: The Corpus Juris* (9th Report of Session 1998-99, HL Paper 62).

[69] Cited in Spencer (n 61). Website no longer active.

[70] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/1. See for further discussion V Mitsilegas, 'The External Dimension of EU Action in Criminal Matters' (2007) 12(4) *European Foreign Affairs Review* 457.

international stage. Strengthening borders within the AFSJ is perceived as one of the most obvious ways for the EU to deliver on its mandate to provide a 'high level of security', to be achieved through measures in the field of police and judicial cooperation.[71] The shock of 9/11 brought another paradigm shift when terrorism was recognised as a key threat requiring 'better coordination between EU external action and JHA policies'.[72] This was followed in 2005 by the creation of Frontex, which has since rapidly grown. The expansions of the EU in 2004 and 2007 also required increased efforts to foster reform and increase capacity prior to accession. Attempts to foster judicial reforms in Central and Eastern European countries have resulted in a successful programme of 'policy transfer' through development of transnational networks that 'socialise judicial staff'.[73] For example, the EUROMED project aims to enhance capacity of the Southern Partner Countries to fight serious and organised crime and to strengthen strategic cooperation between national law enforcement authorities.[74] Such projects are not limited to the EU's immediate borders. For instance, the EU contributed to the anti-terrorism programmes of the Jakarta Centre for Law Enforcement and in supporting law enforcement and intelligence cooperation to fight cocaine trafficking from Latin America.[75] The 2005 external AFSJ strategy acknowledges the growing importance of the external dimension, recognising that 'internal and external aspects of EU security are intrinsically linked'.[76] In shaping the fight against crime in other states, the EU has incrementally consolidated its role as a 'global crime fighter'.[77]

From the early 2000s, the EU also launched itself as an international actor capable of negotiating agreements with third countries on behalf of Member States. The first to be agreed were the EU–US agreements on extradition and mutual legal assistance.[78] These were followed by several negotiated Passenger Name Record (PNR) agreements with the US, Canada and Australia, to deal with conflict-of-laws issues arising after legislative changes were brought in following 9/11 to improve security. These agreements have been highly controversial and resulted in multiple challenges through the CJEU.[79] Throughout this period the EU was criticised for allowing its own standards to be compromised in order to achieve its broader political aims of cooperation.

[71] J Monar, 'The Integration of Police and Judicial Cooperation in Criminal Matters into EU external Relations. Achievements and Problems' in C Fijnaut and J Ouwerkerk (eds), *The Future of Police and Judicial Cooperation in the EU* (Brill, 2010) 49.

[72] Council of the European Union, *European Security Strategy – A Secure Europe in a Better World* (Brussels, 8 December 2003) 15895/03: 15.

[73] D Piana, 'Unpacking Policy Transfer, Discovering Actors: The French Model of Judicial Education Between Enlargement and Judicial Cooperation in the EU' (2007) 5 *French Politics* 33.

[74] European Commission, *EURO-MED Partnership*, Regional Strategy Paper 2002–2006 (Brussels, 2002) 33–35.

[75] Monar (n 66).

[76] Communication from the Commission, 'A Strategy for the External Dimension the area of Freedom, Security and Justice' COM(2005) 491.

[77] A Russo and E Stambol, 'The external dimension of the EU's fight against transnational crime; Transferring political rationalities of crime control' (2022) 48(2) *Review of International Studies* 326.

[78] Council Decision 2003/516/EC of 6 June 2003 concerning the signature of the Agreements between the EU and the USA on extradition and mutual legal assistance in criminal matters [2003] OJ L181/25; V Mitsilegas, 'The New EU-US Co-operation on Extradition, Mutual Legal Assistance and the Exchange of Police Data' (2003) 8(4) *European Foreign Affairs Review* 515.

[79] E De Capitani, 'Passenger name records (PNR) data: How the EU is promoting (virtual) security by actually limiting Passengers' fundamental rights' (2003) 29(1-2) *European law Journal* 212.

The EU in these negotiations, on its own admission, opted for a more moderate and cooperative approach.[80] The EU has also been involved in the development of transnational law through participation in international treaties.[81] For example, in 2006 the EU reached an agreement with the International Criminal Court on cooperation and assistance.[82] The EU also acceded to multiple UN instruments such as the UN Protocol to Prevent, Supress and Punish Trafficking in Persons in 2004 and in 2005 the UN Convention against Corruption.[83] It has been a key actor in UN Security Council matters and in other international institutions, such as the Financial Action Task Force, leading to what is described as the 'global production of norms in criminal matters'.[84] This can be seen most recently during the negotiation of the Second Protocol to the Budapest Convention, where the EU sought to shape the treaty to ensure compatibility with EU law.[85]

VI. Conclusion

From intergovernmental cooperation, EU criminal law has grown to an established policy field at the core of the European project. The AFSJ plays an important role in ensuring the safety of people across Europe but has had contested impacts on fundamental rights. As a policy field, it has been one of the most difficult to develop. All Member States have battled with the contradictory pressures to address rising cross-border crime through removing barriers to cooperation whilst maintaining sovereignty and control over their own national criminal law and procedures.[86] The development of the AFSJ has required concessions some states have been more easily able to make than others.

Tensions between sovereignty and operational need have been particularly present in the UK's cooperation in the field. As we have seen, the UK has at time been the driver towards further integration, particularly on matters of practical cooperation, but also deeply mistrusting of losing sovereignty in the criminal sphere. The EU responded

[80] Communication from the Commission to the Council and the Parliament, 'Transfer of Air Passenger Name Record (PNR) Data: A Global EU Approach, COM (2003) 826 final, 5.

[81] According to Arts 18 and 37 TEU, the Presidency represents the EU as far as Title VI matters are concerned, and may express the position of the EU in international organisations and at international conferences. By virtue of Arts 19 and 37, Member States are also under an obligation to coordinate their actions within international organisations and at international conferences and to defend the common positions adopted under Title VI TEU.

[82] Council Decision 2006/313/CFSP of 10 April 2006 concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance [2006] OJ L115/49; Council Decision 2009/426/JHA of 16 December 2008 [2009] OJ L138/27.

[83] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (entered into force 15 November 2000) 2237 UNTS 319; United Nations Convention Against Corruption (entered into force 14 December 2005) 2349 UNTS vol 41.

[84] V Mitsilegas, 'The European Union and the Globalisation of Criminal Law' (2010) 12 *Cambridge Yearbook of European Legal Studies* 337.

[85] Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence 2022 (CETS No 224).

[86] H Wallace, W Wallace and M Pollack (eds), *Policy-Making in the European Union*, 5th edn (Oxford University Press, 2005).

flexibly, allowing the UK to participate on a case-by-case basis post Lisbon, despite criticisms that this could undermine the legitimacy and coherence of the AFSJ. There is doubt over whether the UK's pick-and-choose approach would have been sustainable in the long term.[87] The UK trod a cautious path, mediating between the clear operational need for cooperation, voiced by senior practitioners and academics through parliamentary committees and the Eurosceptic backbenchers and popular press who 'systematically misinformed' the British public about the risks posed by integration in the field.[88] This led to the 'opt-in-opt-out' saga, described by Yvette Cooper, then Shadow Home Secretary, as a 'massive game of hokey-cokey'.[89] The EPPO project and fears of a path towards a fully centralised European prosecutor, for example, were well articulated to the British public and undoubtedly contributed to the 2016 referendum and its outcome. This history also explains why, despite its ultimate exit from the Union, the UK continued to have a clear focus on preserving operational and practical cross-border cooperation to the greatest extent possible.[90]

At the same time, police and criminal justice in the AFSJ has developed a strong external dimension, leading to the EU's emergence as an important actor on the international stage. Institutions such as Europol have embraced third-party cooperation as the EU developed its strategy to export its own police and judicial standards, with success. The response of the CJEU to external agreements in the field of police and judicial cooperation because of data protection and fundamental rights concerns has curtailed or slowed the Commission's aspirations, but has also provided a justification for the further exporting of EU standards within international agreements. The EU's increased willingness to extend operational cooperation to third states has provided fertile ground for cooperation with the UK. On the other hand, as will be seen throughout this volume, it means that UK action is, and will continue to be, dictated by the need to ensure alignment with EU data protection legislation and fundamental rights.

[87] Mitsilegas (n 1) 56.
[88] Spencer (n 61).
[89] HC Deb 15 July 2013, vol 566 (36), col 791.
[90] House of Lords (n 27).