



UK-EU Security Cooperation
post Implementation
Completion (IPC)

A VIEW FROM LONDON

A prelude...the reluctant participant

* The UK secured a general opt-out to the ASFJ (inc. JHA) and the Schengen *acquis*.

* On 01/12/2014, the UK opted into six Schengen measures (inc. SIS II)¹ and 29 non-Schengen measures,² *inter alia* JITs (2002/465/JHA) the EAW (2002/584/JHA & 2009/299/JHA), confiscation (2006/583/JHA), financial penalties (2005/214/JHA), sentence transfer (2008/909/JHA), criminal record exchange & ECRIS (2009/315 & 316/JHA), Eurobail (2009/829/JHA) and participation in EUROPOL (2000/614/JHA & 2009/371, 936 & 938/JHA) and EUROJUST (2002/187/JHA & 2009/426/JHA).

* The UK only opted into one defence rights directive (Directive 2010/64/EU).³

* After 2014, the UK opted into specific mechanisms like the EIO (Directive 2014/41/EU) and PRUM (2008/615/JHA).

The TCA...a mish-mash of mechanisms

Part III TCA creates various vehicles for co-operation. It isn't neat since the process involves an uncoupling:

1. *Bespoke bilateral mechanisms*: Exchange of DNA, fingerprints and vehicle data (Title II); Exchange of PNR (Title III); Surrender (Title VII); Exchange of criminal record information (Title IX); Freezing and confiscation (Title XI). *Surrender and freezing/confiscation are the most complete titles and are similar to existing EU legislation.*
2. *Cooperation with/participate in EU institutions*: EUROPOL (Title V); EUROJUST (Title VI).
3. *Adds ons*: mutual legal assistance (Title VIII) – 1959 COE Convention and Protocols; includes participation in JITs and spontaneous exchange of operational information (Title IV).¹

On IPC...the UK lost access to EU databases...

* UK lost access to SIS II,¹ EURODAC² etc. SIS II was plugged into the UK's police national computer. It was accessed some 603 million times in 2019.³ On IPC, UK deleted 40,000 SIS II alerts from Police National Computer (PNC).⁴ Big “political” defeat for UK Government in negotiations.

* Drop in arrests on (E)AWs. Pre-IPC, approx. 120 arrests per month; now approx. 80 per month.⁵ The UK has invested in its IT infrastructure and created a national extradition unit (NEU) which sits in the Metropolitan Police. More proactive “manhunts” than before, however.

* UK now regularly executes provisional arrests on INTERPOL Diffusion (Red) Notices and then seeks that the issuing State issues an TCA AW.⁶ Provisional arrests on US/Swiss INTERPOL Diffusion (Red) Notices have increased substantially.⁷

* The UK's competent authority (the NCA) instructed ***not*** to recognise EAWs issued *post* IPC but, instead, to invite issuing judicial authority to issue a separate TCA AW. This has led to people being released in the interim.

Surrender *from* the UK...largely business as normal

* Major difference is requirement for double criminality for all conduct (Article 599 TCA).¹ In practice, this causes difficulty with some fraud offences and synthetic drugs.

* Principle of proportionality (Article 597 and political declaration² – damp squib – UK already operated a proportionality check in accusation cases.³ No change in approach (see *mutatis mutandis* **Badea v Romania** [2022] EWHC 1025 (Admin)⁴).

* Consideration given to the immigration consequences of Brexit. Complex jurisprudence and greater nexus between areas of law (**Merticariu v Romania** [2022] EWHC 1507 (Admin); **Gurksis v Latvia** [2022] EWHC 1305 (Admin) **Pierkarski v Poland** [2022] EWHC 1088 (Admin)⁵). *Note: the UK has reverted to COE Convention on Transfer of Sentenced Persons 1983 and Protocols.*⁶ *Transfer (generally) not available for non-nationals and those without indefinite leave to remain .*

* Still S-L-O-W: 4 months for surrender hearing; approx. 6-9 months on appeal. This is despite the fact that time limits are the same (Article 615 TCA).

Surrender *to* the UK...a big difference

* 10 EU states have enacted nationality bar: Croatia, Finland, France, Germany, Greece, Latvia, Poland, Slovakia, Slovenia and Sweden. 2 States require consent of own nationals (Austria, Czechia).¹

* Difficult to obtain data on surrender refusals since (i) UK might not send AW to executing State in anticipation of bar;** or (ii) the executing State might not arrest an own national in the first place; or (iii) if arrested, there might *not* be a court order refusing surrender. For the surrender of non-nationals, amongst MS/EEA countries, consider **Petruhhin** (C-182/15) [ECLI:EU:2016:630]. This **is** applicable to UK.

* Article 603(3) TCA, which requires an executing State to consider prosecution its own national, is wishy-washy: what exact obligation does it place on executing States? Unlikely to create a directly effective right (see Article 5(1) TCA).

* Difficulties in transferring evidence from UK given: (i) the difference between disclosure v open file; (ii) approach to taking evidence from vulnerable witnesses, children and complainants in sexual cases and (iii) special regime for protected witnesses. **Also**: the UK never participated in any mechanism to transfer criminal proceedings² and has always extradited own nationals.

Trouble on the horizon...

* Cooperation subject to the UK's participation in the ECHR (Article 524) and maintenance of an adequate data security regime (Article 525).

* Article 691 terminates cooperation if the UK denounces the ECHR or Protocol 1, 6, 13 thereto.

* Article 692 suspends cooperation where a Party does not receive a data adequacy decision from the other (i.e. under Article 45 of Regulation (EU) 2016/680).

* The Government has proposed a Bill of Rights¹ which would *inter alia* untether the UK to Strasbourg jurisprudence and establish legal & evidential presumptions at odds with the substance of specific rights (e.g., Article 3 & 8) but without formally leaving the Convention or abolishing the right of individual petition (Article 34).

* The Government wishes to “reform” the Data Protection Act 2018.²

Keeping up with Brussels

- * ASFJ is a dynamic area of Union action.
- * DG JUST has various legislative proposals (Regulation on the digitalisation of judicial cooperation in criminal matters etc;¹ a pending amendment to FD EAW).² The UK will have to keep pace otherwise all its mechanisms will be stuck in time.
- * Where necessary, the UK should “lobby” DG JUST/MS to amend EU legislation to permit third countries access to EU databases etc. (SIS II).



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