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JUSTICE: BESPOKE BITS AND PIECES***

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BREXIT AND THE EU AREA OF FREEDOM, SECURITY AND JUSTICE: BESPOKE BITS AND PIECES

Deirdre Curtin*

Abstract

Differentiation today is a defining feature of the EU legal order. Member States have selectively participated in European policy areas previously exclusive to the nation state through opt-outs and, later, opt-ins. For the United Kingdom (UK) participation in certain measures in the Area of Freedom Security and Justice (AFSJ) is deemed “vital”. This chapter explores the existing opt-outs, specifically in the field of the AFSJ to elaborate possible paths of flexible integration for the future of the UK as a third country after Brexit. The fact is that the EU has already shown considerable flexibility and political willingness to provide pragmatic solutions for differentiation in AFSJ matters. However, it remains to be seen how much of that political willingness filters into the Brexit negotiations on AFSJ measures and that truly ‘bespoke’ arrangements will emerge of a different nature to those that already exist in scattered ‘bits and pieces’. The UK may moreover as a ‘stigmatised’ outsider be forced to ‘mimic’ EU rules and regulations in this area in the future without democratic participation in their content nor in ongoing debates on core issues before the Court of Justice.

Keywords: Brexit, UK, EU, differentiation, security cooperation.

1. Introduction

The history of European integration has for many decades been one of unity but at the same time one of differentiation. ‘The Many Faces of Differentiation’ was the title of a book published after the Treaty of Amsterdam in 1997,¹ consisting of an elaborate account of a whole panoply of existing flexible and differentiated arrangements in the EU among different Member States. Differentiation at that time took many legal forms, ranging from primary to secondary EU law and

* Professor of European Law, European University Institute. I would like to thank Nathalie Mc Nabb for excellent research assistance. This paper was originally presented at the conference “Law and Politics of Brexit” at Dublin City University, on 20-21 April 2017 and will appear in a revised form in Federico Fabbrini (ed), “The Law & Politics of Brexit” (Oxford University Press, 2017).

¹ B.de Witte, D.Hanf, E.Vos (eds.), (2001), Intersentia, Antwerpen.

soft law instruments, and from external agreements with third states to ‘internal’ agreements between the Member States themselves. Twenty years later, one would assume that the vista is very different. But is it? Differentiation is today a defining feature of the European Union polity, warts and all. The follow up book, by largely the same editors, bears the title: ‘Between Flexibility and Disintegration. The Trajectory of Differentiation in EU Law.’² Among legal scholars differentiation and flexibility was not originally perceived as a threat to European integration but rather as a tool to promote further integration by allowing a group of Member States to forge ahead with closer cooperation while leaving the door open for the remaining Member States to join later (for example the Schengen and Prüm Conventions).

The vista of disintegration has however always been there; as long ago as the Treaty of Maastricht in 1993 I labelled it a ‘Europe of Bits and Pieces.’³ Is differentiation a ‘negation of the idea of European integration’?⁴ The term disintegration inevitably takes on a different connotation in the light of the political realities of Brexit. The issue is not so much whether the many ‘faces’ of flexibility have over the years contributed to the fragility of the EU legal and political orders. As the EU has moved into areas that were previously exclusive to the nation state, such as criminal law and border control, a preference by some for ‘outsiderness’ over full membership have progressively come to the fore. For example, during the Lisbon Treaty negotiations the UK, Poland and the Czech Republic secured exemptions from the Charter of Fundamental Rights. Another example is the (very recent) Danish opt-out of Europol following a referendum on this specific issue. Political sociologists have challenged the claim that opt-outs lead to the marginalisation of certain Member States and contribute to European disintegration.⁵ This is particularly true for the existing British and Danish opt-outs from borders, asylum, migration and justice policies. The counterintuitive argument is in fact made that opt-outs and other differentiation processes may actually reinforce the integration process⁶. The coping strategies used by British and Danish officials reveal that the EU is partially created through the ‘stigmatization of transgressive states.’⁷

But what is the situation when those ‘transgressive states’ opt out (by referendum) in part (Europol –Denmark) and fully (the EU –the UK)? The object of this chapter is to explore the existing opt-outs specifically in the field of the EU Area of Freedom Security & Justice (AFSJ) in an attempt to elaborate some paths of flexible integration or involvement for the future for the UK in particular as

² B.de Witte, A.Ott, E.Vos, (eds.), (2017), Edward Elgar, at p.2.

³ D. Curtin, (1993), ‘The Constitutional Structure of the Union – A Europe of Bits and Pieces’, CML Rev. 30: 1, 17-69.

⁴ G.Verhofstadt, (2006), *The United States of Europe*, London, Federal Trust, at p. 214.

⁵ See, R.Adler-Nissen, (2014), *Opting Out of the European Union. Diplomacy, Sovereignty and European Integration*, Cambridge University Press, at p.3.

⁶ R.Adler-Nissen, *ibid*, at p.2.

⁷ *Ibid*, p.3.

a fully-fledged outsider post-Brexit. Can a full outsider opt back in in specific regards? By what mechanisms may that take place? Are there areas likely to fall under the political and legal radars?

In exploring these issues, the chapter is structured as follows: section 2 considers the peculiar status of the UK in the AFSJ before Brexit and underlines how the UK government has specifically expressed its wish and intention to remain connected to several AFSJ measures after Brexit. Section 3 considers participation in Europol and the peculiar nature of the Danish ‘precedent’ as an assumed ‘third country’. Section 4 examines information exchange and the Prüm Decisions and section 5 looks at the European Arrest Warrant and joint investigation teams. In conclusion, section 6 asks the question whether Brexit finds in AFSJ a road back to the future and provides a few concluding reflections on the perspectives of further integration in this field by the EU 27.

2. The UK: Inside EU, Outside-Inside AFSJ

The UK has never been a full participant in the policy areas of the AFSJ. During the Treaty of Amsterdam negotiations in 1996, the UK acquired the right to opt out of various EU initiatives in the field of police and judicial cooperation.⁸ It never joined the Schengen Convention and maintained the right to opt out from the Schengen border control system, which enabled the UK to continue exercising controls at its borders.⁹ The Treaty of Lisbon in 2009 merged police and judicial cooperation in criminal matters into the main structure of the EU, making initiatives in this policy domain subject to qualified majority voting and the supranational institutions of the EU. The UK negotiated a block opt-out,¹⁰ giving it the option to opt out of pre-Lisbon police and criminal justice measures (around 100 measures) or whether to remain bound by them.¹¹ The UK exercised this block opt-out in 2014 but re-joined 35 measures, including participation in EU agencies such as

⁸ Jörg Monar, ‘The “Area of Freedom, Security and Justice”: “Schengen” Europe, Opt-Outs, Opt-Ins and Associates’, *Which Europe? The Politics of Differentiated Integration* (Palgrave Macmillan UK 2010); Ian Bond and others, ‘Europe After Brexit: Unleashed or Undone?’ (2016) <https://www.cer.org.uk/sites/default/files/pb_euafterBrexit_15april16.pdf>.

⁹ Monar, p. 276.

¹⁰ Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice [2010] OJ C-83/201; House of Lords, ‘Brexit: Future UK-EU Security and Police Cooperation’ (2016) paras 17–19 <<http://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/77.pdf>>.

¹¹ Protocol No 36 on Transitional Provisions concerning acts adopted on the Basis of Titles V and VI of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon [2008] OJ 115/322, Article 10; Research Section for European Affairs (German Bundestag), ‘Consequences of Brexit for the Realm of Justice and Home Affairs: Scope for Future EU Cooperation with the United Kingdom’ (2016) 11 <<http://www.statewatch.org/news/2016/oct/uk-brexit-german-bundstag-report.pdf>>.

Europol and Eurojust, later that year.¹² The block opt-out in 2014 is described as a ‘mini-Brexit’ by Baroness Prashar, a member of the European Union Committee of the House of Lords.¹³

During the scrutiny that took place in the House of Lords in the assessment of whether to rejoin the 35 measures in 2014 Baroness Prashar highlighted that the measures were ‘thoroughly assessed’, ‘judged to be in the national interest, and deemed “vital”’.¹⁴ Since the Treaty of Lisbon, the UK has opted to join a further 30 or more police and criminal justice measures, including the Passenger Name Record (PNR) Directive and the Prüm Decisions.¹⁵ The measures opted into have been ‘the subject of a positive decision and assessment’ and it is unlikely that those assessments will have ‘changed in the few intervening years’.¹⁶

As the UK exits the EU however, the measures on cooperation in police and criminal justice matter will in principle no longer apply and the measures previously deemed “vital” will no longer fall within the UK’s jurisdiction. The UK will therefore leave EU agencies such as Europol unless an agreement can be reached on the terms of future cooperation. One of the top four overarching objectives of the Brexit negotiations is after all “to keep our justice and security arrangements at least as strong as they are.”¹⁷ This is in the UK’s own interest as is acknowledged by UK law enforcement agencies. The EU tools and capabilities they would like to see retained or adequately replaced include Europol, Eurojust, the second generation Schengen Information System (SIS II), the European Arrest Warrant (EAW), the European Criminal Records Information System (ECRIS), the Prüm Decisions and PNR.¹⁸ The UK’s future relationship with Europol was identified as “a critical priority.”¹⁹ From a general perspective, membership of agencies is not strictly limited to EU Member States alone. The management boards of some agencies allow for the participation of industry groups and for observers from non-EU Member States.²⁰ But there are even more specific (Scandinavian) precedents for ‘third countries’ remaining within AFSJ agencies. In particular, the peculiar saga how Denmark was legally enabled to remain part of Europol in spite of the fact that a national referendum specifically decided it would not may provide some indications how elites can

¹² Sergio Carrera, Elspeth Guild and Ngo Chun Luk, ‘What Does Brexit Mean for the EU’s Area of Freedom, Security and Justice?’ (*Centre for European Policy Studies*, 2016) para 3 <<https://www.ceps.eu/publications/what-does-brexit-mean-eu's-area-freedom-security-and-justice>> accessed 25 January 2017.

¹³ House of Lords, ‘Brexit: UK-EU Security (EUC Report)’ (2017) <[https://hansard.parliament.uk/lords/2017-02-07/debates/CEFE6A09-6ACD-44BA-8500-5104771A65DB/BrexitUK-EUSecurity\(EUCReport\)](https://hansard.parliament.uk/lords/2017-02-07/debates/CEFE6A09-6ACD-44BA-8500-5104771A65DB/BrexitUK-EUSecurity(EUCReport))>.

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ David Davis, HC Deb 10 October 2016 c55.

¹⁸ See further, House of Lords, ‘Brexit: future UK-EU security and police cooperation’, European Union Committee, 7th Report of Session 2016-17.

¹⁹ *Ibid.* para 68.

²⁰ Berthold Rittberger and Arndt Wonka, ‘EU Agencies’ in Jeremy Richardson and Sonia Mazey (eds), *European Union: Power and Policy-making* (4th edn, 2015) 235.

construct legal and pragmatic ways out of clear political dilemmas. Where there is a will it seems there may be well be a way, in particular in areas that are more under the political radar than others (e.g. police cooperation and information sharing).

3. Participation in Europol: an à la carte menu?

3.1 Europol and the UK: third country Norwegian fish

The European Police Office (Europol) dates back to the 1992 Maastricht Treaty, where it was given a limited mandate to combat drug trafficking.²¹ The first Europol Convention gave Europol a mandate to tackle all forms of serious international crime,²² was drafted in 1995 and entered into force in 1999 following ratification by all EU Member States.²³ Europol was therefore considered an intergovernmental organisation established by international law. Despite its substantial experience in law enforcement cooperation, Europol was only formally recognised as an EU agency in 2010²⁴ by virtue of Council Decision 2009/371/JHA.²⁵ Europol was recently reformed further in Regulation 2016/794, which enters into force on 1 May 2017, thereby replacing the Council Decision of 2009.²⁶

The UK has been a member of Europol since its creation in 1998 and included the 2009 Council Decision as one of the 35 measures that it re-joined following its block opt-out.²⁷ In November 2016, the UK announced that it will opt-in to the new Europol Regulation.²⁸ The government highlighted the timing of this opt-in in the context of Brexit by stating that whilst the UK is leaving the EU, ‘the reality of cross-border crime remains.’ The UK considers Europol to be a ‘valuable service to the UK and opting in would enable us to maintain our current access to the agency, until we leave the EU.’²⁹ The National Crime Agency (NCA) has listed a UK opt-in to the new Europol regulation as an ‘immediate priority’ and has classified membership of Europol or an alternative arrangement as their most important priority among all the AFSJ measures that the UK would be

²¹ David Brown, *The European Union, Counter Terrorism and Police Co-operation, 1992-2007* (Manchester University Press 2010) 122.

²² *Ibid.*

²³ Christian Kaunert, ‘Europol and EU Counterterrorism: International Security Actorness in the External Dimension’ (2010) 33 *Studies in Conflict & Terrorism* 652, 654.

²⁴ Alexandra De Moor and Gert Vermeulen, ‘The Europol Council Decision: A New Legal Basis for Europol’ (2010) 1 *New Journal of European Criminal Law* 178, 179.

²⁵ Council Decision 2009/371/JHA establishing the European Police Office (Europol) OJ L 121/37.

²⁶ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] L 135/51, Article 77(1).

²⁷ House of Lords, ‘Brexit: Future UK-EU Security and Police Cooperation’ 43.

²⁸ Home Office, ‘Parliament Notified of Europol Opt-in Intention’ (2016)

<<https://www.gov.uk/government/news/parliament-notified-of-europol-opt-in-intention>> accessed 3 March 2017.

²⁹ *ibid.*

posed to leave upon exiting the EU.³⁰ Whilst some EU agencies allow for non-EU Member States to enjoy a level of participation in the workings of the agency, which may be used as a precedent for future UK relations with Europol, these non-EU states do not always enjoy voting rights.³¹ For example, the new Europol Regulation states that the Management Board is to be composed of ‘one representative from each Member State and one representative of the Commission’. Each representative has a voting right.³² The Management Board can invite non-voting observers to its meetings.³³ Given that Europol merely allows EU Member States and the Commission to be represented in the management board, the UK must negotiate an agreement with Europol to remain connected and retain some form of influence. Europol may establish and maintain cooperative relations with third countries,³⁴ but the Council must publish a list of third states with which Europol may conclude such agreements.³⁵

Before any agreement can be concluded with the UK on its future cooperation with Europol, the Council must therefore first add the UK to the list of countries that Europol may conclude agreements with. Europol furthermore recognises two types of agreements with third parties, namely, strategic and operational agreements. Strategic agreements are ‘limited to the exchange of general intelligence whereas operational agreements allow for the exchange of data.’³⁶ For example, Norway signed a strategic agreement with Europol in 2001 thereby removing obstacles for the exchange of data. Norway’s position is limited in comparison with full membership. Norwegian police cannot search Europol’s database directly and must go through Europol’s operational centre to check for compliance with Europol rules before being granted access to the analysis forums.³⁷ According to Adler-Nissen, Norway ‘has failed to secure agreements with the EU on matters such as the transfer of sentenced prisoners and has yet to reach an agreement on common rules on documents in legal proceedings and evidence gathering.’³⁸ Hufnagel furthermore highlights that Norway’s agreement with Europol is conditioned on it being closely associated with law enforcement cooperation in the EU ‘through its association with the Schengen cooperation

³⁰ House of Lords, ‘Brexit: Future UK-EU Security and Police Cooperation’ 51.

³¹ Miroslava Scholten, *The Political Accountability of EU and US Independent Regulatory Agencies* (Koninklijke Brill 2014) 92.

³² Regulation (EU) 2016/794 Article 10(1).

³³ *Ibid*, Article 14(4).

³⁴ Council Decision 2009/371/JHA, Article 24.

³⁵ Council Decision 2009/371/JHA, Article 26(1).

³⁶ Europol, ‘Partners & Agreements’ <<https://www.europol.europa.eu/partners-agreements>> accessed 27 January 2017.

³⁷ Saskia Hufnagel, ‘“Third Party” Status in EU Policing and Security - Comparing the Position of Norway with the UK before and after the “Brexit”’ (2016) 3 *Nordisk politiforskning* 165, 175

<https://www.idunn.no/nordisk_politiforskning/2016/02/third_party_status_in_eupolicing_and_security_-_comparin>.

³⁸ Rebecca Adler-Nissen, ‘Through the EU’s Front and Back Doors: The Selective Danish and Norwegian Approaches in the Area of Freedom, Security and Justice’, *The Nordic Countries and the European Union: Still the Other European Community?* (Routledge 2015) 195.

mechanisms’ and as it is a member of the European Economic Area.³⁹ This is a crucial difference with the UK which has never been part of Schengen as such. A UK agreement with Europol will therefore be much more problematic if the UK moves toward a hard Brexit, with no participation in Schengen nor in the single market.⁴⁰ Of course it will always be an option –unlikely though it is– that the UK as a non EU member state joins the Schengen area in the future– a status that would then be shared with Iceland, Switzerland, Norway and Liechtenstein. There are however no non-Schengen states outside the EU with which the EU engages in anything comparable to its cooperation with Member States or Schengen states. There has of course never been an existing Member State that exited before so a further bespoke arrangement in specific regards cannot be ruled out – provided that there is no hard Brexit. In such circumstances it would be difficult to envisage or justify a cherry picking bespoke arrangement in AFSJ.

3.2 Europol and the UK: “third country” Danish smorgasboard

The possibility of a UK cooperation agreement with Europol being conditioned on continued cooperation in other EU policy areas such as the single market is not entirely unrealistic, particularly in view of recent discussions on Denmark’s future relationship with Europol. In a referendum that took place in December 2015, the Danish electorate rejected a proposal to transform the Danish opt-out system into an opt-in on EU matters on Justice and Home Affairs. The Danish public also voted to opt out of the new Europol Regulation and will no longer be considered a member of Europol as of 1 May 2017. To ensure future cooperation between Denmark and Europol, on 17 February 2017 the Council added Denmark to the list of ‘third States’ with which Europol may conclude agreements.⁴¹

As Denmark is the first EU member state to negotiate an agreement with Europol with the status as third party, the negotiations may very well set a precedent for the UK’s negotiations. The Commission has considered it ‘vital to provide for cooperation between Europol and Denmark on key matters’, particularly given that it is ‘one of the key contributors to the Europol database.’⁴² In a meeting of the European Parliament Committee on Civil Liberties, Justice and Home Affairs the Commission set out its position in the negotiations namely that the arrangements to be concluded will be ‘Denmark-specific and will not in any way equal full membership of Europol.’⁴³ The

³⁹ Hufnagel, *op.cit.* n. 37, 175.

⁴⁰ *ibid* 176.

⁴¹ Council Implementing Decision 2017/290 of 17 February 2017 amending Decision 2009/935/JHA as regards the list of third States and organisations with which Europol shall conclude agreements [2017] OJ L 42/17.

⁴² ‘LIBE Committee - Meeting 24/01/2017’ (2017) <[http://www.europarl.europa.eu/news/en/news-room/20170118IPR58664/committee-on-civil-liberties-justice-and-home-affairs-meeting-24012017-\(am\)](http://www.europarl.europa.eu/news/en/news-room/20170118IPR58664/committee-on-civil-liberties-justice-and-home-affairs-meeting-24012017-(am))>.

⁴³ *ibid*.

Commission furthermore stated that the arrangement would be conditioned on Denmark's continued membership of the EU and the Schengen area, Denmark's full implementation of the Directive on cooperation in police matters, Danish acceptance of the jurisdiction of the European Court of Justice (ECJ) and its acceptance of the competence of the European Data Protection Supervisor.⁴⁴

Danish representatives have emphasised that while the government fully respects the result of the Danish referendum, the negative result is not to be considered as a rejection of the work carried out by Europol.⁴⁵ The Danish government fully supports continued close cooperation between law enforcement authorities and considers internal security of the Union to be a shared responsibility for all Member States.⁴⁶ The Agreement⁴⁷ on Operational and Strategic Cooperation between Denmark and Europol entered into force on 30 April 2017 after being approved by a Council Implementing Decision.⁴⁸ The Agreement emphasises the 'urgent problems arising from international crime' and the wish to ensure cooperation between Europol and Denmark. Article 8 of the Agreement allows a representative to be invited to the Europol Management Board and its subgroups as an observer but does not grant it the right to vote. The agreement explicitly recognises the jurisdiction of the ECJ in any decision of the European Data Protection Supervisor,⁴⁹ as well as on the validity or interpretation of the agreement.⁵⁰ The agreement is furthermore conditioned on an obligation for Denmark to remain bound by the Schengen acquis, whereby a breach will result in the termination of the Europol cooperation agreement.⁵¹ This condition was however strongly disputed by the Danish People's Party ('Dansk Folkeparti') as the party had been adamant on reintroducing border controls and exiting Schengen.⁵² Prior to the referendum, the Danish People's Party had promised voters that a 'no' vote would still ensure full membership of Europol yet an exit from Schengen. The new agreement certainly does not meet this promise.⁵³

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ 'Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and the European Police Office' (2017), <https://www.europol.europa.eu/publications-documents/agreement-operational-and-strategic-cooperation-between-kingdom-of-denmark-and-europol>

⁴⁸ <http://data.consilium.europa.eu/doc/document/ST-7281-2017-INIT/en/pdf>

⁴⁹ Article 18.

⁵⁰ Article 20.

⁵¹ Article 27(1).

⁵² Karoline Garulund Nøhr, 'Vælgerbedrag? Her Er Dansk Folkepartis Europol-Garantier' (*Politiken*, 2016) <Vælgerbedrag? Her er Dansk Folkepartis Europol-garantier> accessed 24 March 2017.

⁵³ Nadja Schou Lauridsen and Catharina Sørensen, 'Europol-Udkast Aflsører Nye Detaljer Om Dansk Særaftale' (*TænkeTanken*, 2017) 1 <http://thinkeuropa.dk/sites/default/files/notat_europol-udkast_afsloerer_nye_detaljer_om_dansk_saeraftale.pdf> accessed 24 March 2017.

In debates in the Danish Parliament ('Folketinget') the Ministry of Justice representative Søren Pape Poulsen highlighted that whilst the electorate had voted to leave Europol, cooperation in the field of cross-border crime and terrorism must continue. He expressed concern for the possibility of Denmark losing access to information collected by Europol and its databases such as the Europol Information System (EIS).⁵⁴ This concern was equally shared by Zenia Stampe of the Social Liberty Party ('Radikale Venstre'). She highlighted doubt on the perceived benefit of reintroducing border controls considering that authorities would be unable to search for foreign records on individuals stopped at the border as Denmark would no longer have access to this information via Europol.⁵⁵ The concern that Denmark may lose access to Europol information can be considered well-founded given that the Agreement excludes any provision on this matter. Following the Agreement, Denmark will lose the possibility to directly search in Europol databases following the principle of inter-operability. Denmark will however have the possibility to assign up to eight Danish-speaking staff to handle Danish requests,⁵⁶ and to input and retrieve data from Danish authorities in the Europol processing systems.⁵⁷ What this will mean in practice remains to be seen but it cannot be excluded that Denmark as a voluntary outsider regarding Europol may in practice and informally be granted more liberal access to relevant data, also from other Member States, than its legal position would warrant.

3.3 Europol and the UK: third country salt and vinegar

The agreement between Europol and Denmark may be a template for the UK after Brexit, but many of the conditions imposed on Denmark, alone or together, may prove problematic for the UK in future arrangements with Europol. As highlighted by the European Union Committee of the UK House of Lords, the accountability of Europol to EU institutions, including the ECJ, is considered a major obstacle in the UK. Lord Kirkhope noted that many perceive Brexit to be advantageous as the UK will no longer be subject to the ECJ 'and its competence and control over us.'⁵⁸ A condition for future arrangements with Europol subjecting the UK to the jurisdiction of the ECJ may prove problematic therefore. Nevertheless, the NCA claims that the UK should not look at precedent but should look at 'something more than that.'⁵⁹ What this will entail is unknown at this point in time. One thing is certain: since the Europol Regulation entered into force on 1 May 2017 future

⁵⁴ Søren Pape Poulsen, 'Møde Nr. 26. Om Konsekvenser Af Danmarks Udtrædelse Af Europol' (2016) <<http://www.ft.dk/samling/20161/forespoergsel/f5/beh1/forhandling.htm?startItem=4#nav>>.

⁵⁵ Zenia Stampe, 'Møde Nr. 26. Om Konsekvenser Af Danmarks Udtrædelse Af Europol.' <<http://www.ft.dk/samling/20161/forespoergsel/f5/beh1/forhandling.htm?startItem=6#nav>>.

⁵⁶ Lauridsen and Sørensen 1.

⁵⁷ Article 10(6) 'Draft Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and the European Police Office'.

⁵⁸ House of Lords, 'Brexit: Future UK-EU Security and Police Cooperation' 62.

⁵⁹ *ibid* 60.

agreements between Europol and third countries are formal ‘international agreements’ negotiated on the legal basis of Article 218 TFEU and entailing a veto power by the European Parliament. This is a quite different legal and political situation to that prevailing with Denmark when it was (with considerable haste) entered onto the list of third countries with which Europol could make agreements and the agreement made.

The UK government has been asked to provide clarity on the matter. In a meeting of 22 February 2017, the House of Commons European Scrutiny Committee specifically asked the government to clarify how any conditions imposed on Denmark in establishing new operational arrangements with Europol may affect the scope and content of any new post-Brexit agreement between the UK and Europol.⁶⁰ The House of Commons Justice Committee stressed moreover the importance of these negotiations given ‘the seriousness of the matter and the degree of mutual interest give weight to the suggestion that this aspect of negotiations be separated firmly from others.’⁶¹ The Justice Committee considers the security and safety the UK’s residents as ‘too precious to be left vulnerable to tactical bargaining.’⁶²

A further practical issue for negotiation concerns the actual time it may take for the UK to negotiate an agreement with Europol. The average negotiation time for operational agreements that allow for the exchange of data is around nine to twelve years.⁶³ The UK is unlikely to accept this lengthy period of negotiation, particularly as it has played such an ‘active role in the development of EU policy on police cooperation and access to data for law enforcement purposes.’⁶⁴ Academics have furthermore highlighted a practical issue in negotiations namely that EU Member States may not feel particularly inclined to offer flexibility in negotiations with the UK. It has been noted that ‘the UK’s cherry-picking in combination with the then announced plan to hold a UK referendum on EU membership –have pushed some other Member States patience to breaking point’.⁶⁵

⁶⁰ House of Commons European Scrutiny Committee, ‘Thirty-Second Report of Session 2016-17, Documents Considered by the Committee on 22 February 2017’ (2017) <<https://www.publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxx/71-xxx.pdf>> accessed 3 March 2017. (Response? Check)

⁶¹ House of Commons Justice Committee, ‘Implications of Brexit for the Justice System: Ninth Report of Session 2016-2017’ (2017) 11 <<https://www.publications.parliament.uk/pa/cm201617/cmselect/cmjust/750/750.pdf>>.

⁶² *ibid.*

⁶³ House of Lords, ‘Brexit: Future UK-EU Security and Police Cooperation’ 58.

⁶⁴ Carrera, Guild and Luk 4.

⁶⁵ Ilke Adam and others, ‘The UK in Justice and Home Affairs: The Engaged Outsider’ (*Institute for European Studies, Policy Brief Issue 2016/6*, 2016) <<http://www.ies.be/policy-brief/uk-justice-and-home-affairs-engaged-outsider>> accessed 25 January 2017.

4. Information Exchange and the Prüm Decisions: below the radar?

The Prüm Decisions date back to the 2005 Prüm Convention, which was signed by seven Member States as a means of achieving closer cooperation to combat terrorism, cross-border crime and illegal immigration more effectively. The Prüm Convention was an intergovernmental treaty adopted outside of the framework of the EU. Following a proposal from the German Presidency of the Council, Prüm was integrated into the EU legal framework by means of Council Decisions 2008/615/JHA and 2008/616/JHA ('Prüm Decisions'). The Prüm Decisions essentially set up information exchange mechanisms for DNA, fingerprint and vehicle registration data. The exchange mechanism for biometric data (DNA and fingerprint) operates on a 'hit/no-hit' basis, whereby a search is conducted with the result of whether the search is a match or not. The actual personal data is not exchanged and can only be provided following a separate follow-up request. The UK exercised its block-opt during the Treaty of Lisbon negotiations and did not include the Prüm Decisions in the opt-in that took place in 2004. The UK Government proposed to re-join the Prüm Decisions in 2015 however. This was accepted by the European Commission in May 2016. According to a letter sent in October 2016 by the Minister of State for Policing and Fire Services, Brandon Lewis, the UK was due to fully implement Prüm and begin exchanging information in 2017. In September 2016, the House of Lords Select Committee on the European Union considered the possibility of implementing Prüm following the Brexit referendum. Professor Steve Peers noted that a withdrawal agreement including the continuation of Prüm should be possible without all too many issues, given the recent assessment conducted for UK membership of Prüm and that Prüm is not inherently linked to Schengen membership.

Whilst it is clear that the UK government wishes to stay connected in police and security cooperation, the Secretary of State for Exiting the European Union David Davis appeared ambiguous on Prüm. In a recent debate at the House of Commons, he responded to a question for clarification on the Prüm framework and whether he could assure that personal data would no longer be subject to the ECJ. Mr. Davis responded by first clarifying what data can be exchanged under Prüm and followed by stating that the UK 'will be making new arrangements to keep terrorism, crime and so on under control.' The UK government has not yet provided clarification on these 'new arrangements' and whether the intention to remain connected therefore also extends to the Prüm framework.

As regards the jurisdiction of the ECJ, the UK government has explicitly rejected its continued jurisdiction in a future relationship and has highlighted 'taking control of our own laws' as a top priority in the negotiations. The UK government wants to 'bring an end to the jurisdiction of the

Court of Justice of the European Union.’ It is unlikely therefore that the UK government will accept an international agreement with the EU on Prüm which subjects it to the jurisdiction of the ECJ. In the government’s review of Prüm in 2015, it looked to the precedent set by Denmark with its agreements in this field and noted that ‘all agreements concluded to date require Denmark to submit to [ECJ] jurisdiction for both interpretation and to ensure compliance.’ The Commission and Council considered ECJ jurisdiction as a ‘red line’ during the negotiations with Denmark.’ It is hard to see how the issue of ECJ jurisdiction can be ring-fenced in any way nor indeed, from the perspective of the EU 27 and their citizens, why it should be.

5. Cooperation in “Law and Order”: a Spider’s Web

On 19 September 2001, just a week after the 9/11 terrorist attacks, the Commission submitted a proposal for a European Arrest Warrant (EAW) as a means of making it easier for justice to be administered across borders between Member States. The Council Framework Decision on the EAW officially entered into force in January 2004, providing a legal basis for the extradition of individuals between EU Member States. The extradition of individuals is based on the principle of mutual recognition of judicial decisions. The results of a decision taken in another EU Member State are thereby accepted as equivalent to decisions taken in one’s own State. The principle of mutual recognition allows for smooth coordination amongst Member States, rather than lengthy and complicated litigation procedures within the various national criminal systems. The UK implemented the EAW in 2003 and re-joined the measures in December 2014 after having exercised its block opt-out during the Treaty of Lisbon negotiations. The UK government has considered whether to retain the EAW following its exit from the EU. It considered reverting to the 1957 Council of Europe Convention on Extradition (which was the basis of EU legislation prior to the EAW Framework Decision) but the extradition times under the Convention have been criticised as being ‘slower’ and ‘potentially undermining public safety’.

As Secretary of State for the Home Department, Theresa May joined a House of Commons debate in 2014 on whether to re-join the EAW. Mrs. May highlighted that the UK had to decide whether to accept the jurisdiction of the ECJ ‘so that our law enforcement agencies can continue to use those powers to fight crime and keep us safe’ or whether to ‘reject those measures and accept the risk to public protection that that involves.’ She characterised this as ‘a vote about law and order, not a vote about Europe’ and encouraged the re-joining of the smaller package of measures, which included the EAW. She argued that, whilst the ‘ECJ should not have the final say over matters such as substantive criminal law’, the government ‘must act in the national interest to keep the British

public safe' and transpose the 'measures in the national interest' into national law, including the EAW.

The question whether to accept the ECJ jurisdiction is particularly important in the current Brexit context. As mentioned also with regard to the Prum Decision, it is uncertain whether an agreement between the UK and the EU on future cooperation in terms of the EAW would include a condition subjecting the UK to the ECJ. A possible precedent is the bilateral agreement concluded with Iceland and Norway on the surrender procedure between Member States of the EU and Iceland and Norway where disputes are resolved through a 'meeting of representatives of the governments' rather than through recourse to the ECJ. The bilateral agreement states that the contracting parties shall consider 'the development of the case law of the Court of Justice' as well as the development of the case law in Iceland and Norway to achieve uniform application and interpretation of the Agreement. In this way the case law of the ECJ may play a role in the interpretation of provisions. The practicalities of this influence is unclear as yet, particularly considering that the Norway/Iceland agreement has not yet entered into force.

The UK government may moreover consider the nationality exception as problematic. The nationality exception in the Norway/Iceland Agreement provides that the execution of an arrest warrant may be refused on the ground that the person in question is a national of the executing state. The government has also questioned whether the UK will be able to secure a similar agreement outside the EU and outside Schengen given that both Norway and Iceland are members of the Schengen area.

The Council Framework Decision on Joint Investigation Teams (JIT's) was adopted on the same day as the Council Framework Decision on the EAW. The Framework Decision was a response to the slow process of ratification of the 2000 Convention on Mutual Assistance in Criminal Matters. The Framework Decision will cease to apply once the Convention has been ratified by all Member States and officially enters into force. JIT's are set up to carry out criminal investigations in one or more of the Member States that set up the team. The competent authorities of two or more Member States negotiate a mutual agreement on the JIT's, which are set up for a specific purpose and a limited period. The House of Lords EU Committee was optimistic on the possibilities for the UK to continue participating in JIT's from outside the EU. It considered that the UK could benefit from an arrangement similar to that of Norway, Iceland and Switzerland. In hearing witnesses before the EU committee, Mr. David Armond (the National Police Chiefs' Council) furthermore characterised JIT's as mechanisms 'to enable not only EU Member States but other interested parties to join in an initiative.' Hufnagel furthermore highlights that Article 13 of the 2000 Convention paves the way

for Norway to participate in JIT's and that therefore Article 8 of the Council of Europe Second Protocol to the European Convention on Mutual Assistance in Criminal Matters, which is very similar in its wording, may be a sufficient legal basis for the UK to participate in JIT's.

The potential practicalities are legion. Would the UK for example withdraw from JIT's immediately, particularly the ones that it leads? Or would the cooperation simply be extended "under the radar"? Given the levels of secrecy involved in this kind of cooperation the latter is certainly a strong possibility. A careful eye will be need to be kept by the UK on the often invisible way that bits of the 35 police and criminal justice measures that the UK re-joined in 2014 fit together. This "spiders web" is highly interconnected. If even some of the more minor things are dismantled the risk is that other bits that are actually much more central will be affected.

6. The UK and the AFSJ: Bespoke Bits and Pieces?

In 2014, after extensive empirical research Adler-Nissen concluded that "the management of the British and Danish opt-outs highlights the strength of European integration and the difficulty of maintaining national sovereignty in the EU." Less than three years later two referendums have caused some tectonic shifts that belie that optimistic reading, at least from the perspective of European integration and its doxa of 'ever closer Union.' At the same time, Adler-Nissans conclusions remain potentially valid for the future of the EU 27 given that it will inevitably include large dosages – and many faces– of differentiation across (sensitive) policy areas.

The proof of the specific Danish Europol 'pudding' will be in the future 'eating'. Given the voluntary and non temporary nature of the structural opt-out fom Europol it is hard to see how Danish officials will in practice manage quite as efficiently and effectively as they did to date the 'stigma' of their formal non-participation. The highly pragmatic solution adopted –at the very last moment before the new Europol Regulation enters into force on 1 May 2017– of being added in an unprecedented fashion as a Member State, to the list of 'third countries' with which Europol may conclude agreements, bears witness to the desire of the EU to find a solution that could enable some ongoing cooperation and access to databases, even if visibly at least not the same as full participation in Europol. But we should recall that that fundamental political willingness to engage in these kinds of legal and temporal gymnastics was for a 'full' Member State and not for a genuine 'third country' which is what the UK is about to become.

The likelihood of considerable ‘bits and pieces’ looms large in particular as the UK struggles to maintain already existing levels and choices of cooperation. The reason may not only be the security and well being of the citizens and residents of the UK but also the considerable sunk costs incurred by the UK in setting up the existing arrangements (e.g. on implementing the Prüm decisions) as well as the likely costs of replicating capabilities outside the EU (e.g. on the EAW or a Europol type agency or database). The content of these bits and pieces matters for the unity of the EU legal order of the 27, especially if pragmatic diplomatic solutions are reached which remove important areas of citizens –and non-citizens- rights and interests from the authority and jurisdiction of the ECJ. It matters too for the UK and the transparency and accountability of UK-EU security and police cooperation in the future. The UK clearly faces the future in a different position to its past one. It will move from being an engaged insider which, even in areas where it enjoyed formal opt-outs in AFSJ, operated in practice as a leader –“a leading protagonist in driving and shaping the nature and direction of cooperation on police and security matters under the auspices of the European Union” – to a disempowered outsider. The vista even beckons of the UK having to formally prove ‘adequacy’ arrangements prior to any data sharing agreements just like any other third country –a bitter pill indeed for the UK given the manner in which its own personal data protection for law enforcement purposes preceded –and provided a model for- that of the EU itself.

Moving forward to AFSJ for the EU 27 we are likely to see more of the same in my view in terms of actual integration and policy. The leadership role of the UK has undoubtedly been very instrumental in helping design the very foundations of AFSJ as well as constructing some very important pillars (for example on data retention and recent EU rules on PNR). But emancipation is nigh for the EU 27. There is no reason to believe that we will see anything but further intensification of the role and powers of the Agencies in this field and their steering ‘management’ of national administrations and actors on the ground. Information-sharing and in particular the further development of the principle of inter-operability across the supranational–national divide will gain ever more importance and accrued practical content. The role of the ECJ will be more and more pivotal in ensuring the balance with fundamental rights and the issue of access to justice for individuals will remain as challenged and difficult as it is today.

The UK as a stigmatised outsider will almost inevitably in the future be forced to ‘mimic’ rules and regulations without any democratic participation in their content nor in ongoing and at times fundamental debates on core issues before the ECJ. Mimicry of bits and pieces of AFSJ and continued application of the interpretation by the ECJ is it seems the bespoke Brexit antidote in this field at any rate. The AFSJ is a space to be closely watched as the negotiations unfold - both in law

and in actual and ongoing practices which at times will be well below the political radar. In particular in the area of personal data processing – given its ubiquitous and unobserved nature in practice- it must be doubted whether custom-made, complex legal solutions will ever be implemented on the ground by data ‘cops’. More than third country status in all its existent permutations may be required post-Brexit in order to avoid the impossible - the surgical severing of what is today “an integral part of a living and functioning system”. Otherwise it may be an artery that is severed, cutting off a much needed relationship with a previously healthy and even essential part of the EU itself.