



ECLAN

Brexit and the EU area of criminal justice

Brussels, 25-26 April 2019

Réseau académique
de droit pénal européen

Eclan

European Criminal Law
Academic Network

<http://www.eclan.eu.org>

Differentiated participation in EU criminal justice actors

**Prof. dr. sc. Zlata Đurđević
University of Zagreb**



Winston Churchill, 1942.: “United States of Europe”

- ...I trust that the European family may act unitedly as one under a Council of Europe... I look forward to a United States of Europe ... barriers minimised ... unrestricted travel
- Indeed it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time....



UK participation in EU criminal justice actors

- **European enforcement agencies and Information systems and databases**
- **3 solutions/models:**
 - **third party arrangements / model**
 - Third party arrangements
 - Schengen country model
 - Denmark's model
 - **full participation**
 - **a bespoke agreement**

EUROPOL

- membership – only EU MS
- external arrangements:
 - Operational agreements
 - 20 states – operational partners – candidate countries, Schengen countries, Turkey, Ukraine, USA, Canada
 - - exchange of personal and classified data
 - Strategic agreements
 - Working agreements
 - - Japan, Israel



Strategic agreements

- exchange of general intelligence and strategic and technical information
- no operational tactical intelligence sharing
- no access to or exchange of personal data
- low level of trust
- China, Russia, Turkey, United Arab Emirates and agencies (OLAF, European Commission, European Central Bank, CEPOL, UN Office on Drugs and Crime – UNODC, etc)

Third country model

- no regular / national members
- liaisons officers
- access SIENA (Secure Information Exchange Network Application) – Europol's messaging facility
- excluded from the Europol Management Board
- cannot lead operational projects, to join - unanimous agreement of all MS
- no direct access to the Europol IS, MS even from the field (airport terminals)



Schengen country model: Norway and Island

- exchange of strategic and operational information
- liaisons officer
- direct access to databases, not from field
- invited to meetings

Denmark's model

- referendum in 2015 – opt-out of EU criminal justice and police cooperation measures
- access Europol data through a 24-hour contact point, without delay in information exchange
- no direct access from the field
- no full place on the Management Board, observer status, invited to meetings, no right of vote
- MS + Schengen country + CJEU

Europol Regulation

- **2 possibilities:**
 - a) the EU concludes an international agreement with a third country at 218 TFEU (no bilateral partnerships),
 - b) the Commission makes a data adequacy decision
- **the CJEU jurisdiction over and arbitration relating to a Europol agreement**
- **European Data Protecting Supervisor to oversees the processing of personal data by Europol and refer a matter to the CJEU**

Other instruments

- **Eurojust**

- Norway, Switzerland, Iceland, Liechtenstein, Moldova, Montenegro, Norden Macedonia, the US, Ukraine
- no National members outside EU, liason prosecutor.

- **Databasis: SIS II, ECRIS, Prüm, PNR**

- only EU MS and Schengen countries

- **EAW, other MR instruments**

UK position: Brexit

- maintain the UK's existing policing and security capabilities, keep the status quo, to work as in the past
- third country model and Denmark's model – diminution in UK's security capacity
- unique position, a bespoke relationship
- Europol - full membership
 - direct access to the EUROPOL databasis
 - ability to lead joint operations
 - a seat on the Europol management Board, a formal say in the strategic priorities and direction of the agency
 - capacity to lead cross-border operations
- no substitute for the criminal intelligence and data gained from the UK's access to EU databases

UK - ECJ

- the UK will no longer be subject to direct jurisdiction of the CJEU after Brexit
- when participating in the EU agencies the UK will respect the remit of the CJEU
- a future **security treaty**: respectful of the sovereignty of both the UK and the EU's legal orders, independent dispute resolution

Reality check

- **Preconditions for the EU UK partnership:**
 - ECHR, ECJ and protection of personal data
- **Adequacy decision**
 - the Directive on data protection in Law Enforcement
 - EC decides: rule of law, HR, data protection
- **CJEU**
 - 2010 no access to the UK to the Schengen-related VIS
 - Petruhin, 2016 – extradition – FR in EU acquis
 - Schrems, 2015 – essentially equivalent of system 3rd country to the EU
 - Watson, 2016 – UK law on data retention not adequate protec.
 - RO, 2018 – mutual trust and MR continues until withdrawal



The UK-EU Withdrawal Agreement

- **transitional / implementation period**
- **UK participates in the EU Criminal justice instruments**
 - **- the jurisdiction of the CJEU during that time**
- **UK excluded from EU bodies/agencies meetings (Art.7)**
- **no access to data base (Art.8)**
- **UK is excluded from the ECRIS after transition**
- **access to the SIENA one year after transition**
- **EUROJUST – complete ongoing procedures**
- **infringement procedure, CJEU – 4 y after transition**
- **EAW –refusal ground for own nationals**



Thank you for your attention!



**Brexit and the
EU Area of
Criminal Justice**