Law enforcement and judicial cooperation in criminal matters under the EU-UK Trade and Cooperation Agreement

SUMMARY

On 1 May 2021, the Trade and Cooperation Agreement (TCA) between the European Union (EU) and the United Kingdom (UK) entered into force, having been provisionally applied since 1 January 2021. One of the areas covered by the TCA, in its Part Three, is security cooperation between EU and UK law enforcement and judicial authorities in criminal matters. The 13 titles under Part Three contain extensive provisions aimed at enabling the continuation of information exchange, including personal data, between competent authorities in the UK and the EU Member States, as well as cooperation related to the surrender of wanted persons. Part Three also provides for close links with Europol and Eurojust, the EU’s agencies for, respectively, law enforcement and criminal justice cooperation, although limited by the UK’s third-country status. Rules on exchange of information related to criminal records, on mutual legal assistance, on freezing and confiscation of criminal property, as well as on fighting money laundering and terrorist financing, are also covered by Part Three of the TCA. A specific political mechanism will be relied on to settle disputes.

While enabling unprecedented cooperation between the EU and the UK as a third country, the TCA reduces the UK’s access to EU databases and marks a return to divergence, especially as the agreement excludes the jurisdiction of the EU Court of Justice. In addition, the disapplication of the mutual recognition principle and of the EU Charter of Fundamental Rights in relation to the UK brings the challenge of maintaining mutual trust in security cooperation to the fore. In this context, the conditionality linking suspension or termination of Part Three to UK respect of its commitments to fundamental rights, including under the European Convention on Human Rights, as well as in relation to personal data protection, has been welcomed by many.

IN THIS BRIEFING

- Introduction
- The TCA’s new framework for law enforcement and judicial cooperation in criminal matters
- Concluding remarks
Law enforcement and judicial cooperation in criminal matters under the EU-UK TCA

Introduction

On 24 December 2020, the European Union (EU) and the United Kingdom (UK) agreed the Trade and Cooperation Agreement (TCA), meant to frame their new relationship in the areas covered as of the end of the transition period established by the Withdrawal Agreement. The Parties signed the TCA on 30 December 2020 and applied it provisionally from 1 January 2021. The UK swiftly completed the procedures enabling it to ratify the agreement, however, following the EU’s request for a technical extension, provisional application was extended from the initial deadline of 28 February to 30 April 2021. The Parliament consented to the agreement on 27 April 2021 and the Council adopted the decision to conclude the TCA on 29 April. The TCA entered into force on 1 May 2021.

Security cooperation between law enforcement and judicial authorities in criminal matters is one of the areas covered by the TCA. During discussions over a framework for relations after Brexit, both the EU and the UK expressed their wish for a future partnership to combat organised crime and terrorism. However, the tension between the special status sought by the UK and the limits imposed by EU law and existing third-country models was evident from the start. However, after the UK’s withdrawal from the EU and during the transition period, when negotiations on the TCA began, the EU and UK positions on security cooperation have moved closer than initially expressed. The respective draft texts showed much convergence, although some points of contention persisted until the end of the talks, such as the UK’s continued adherence to the European Convention on Human Rights (ECHR) or direct UK access to databases constituted under EU law, such as the Schengen Information System (SIS II) and the European criminal records database (ECRIS).

The TCA’s new framework for law enforcement and judicial cooperation in criminal matters

The EU-UK agreement reached in December 2020 manages to maintain close links in the fight against terrorism and serious crime, although the exchange of information becomes less fluid. Part Three of the TCA contains extensive provisions on law enforcement and judicial cooperation in criminal matters, including a surrender mechanism replacing the European arrest warrant (EAW), data sharing (e.g. passenger name records, DNA, fingerprints and vehicle registration data), and cooperation with Europol and Eurojust – the EU’s agencies for police and, respectively, criminal justice cooperation. Nevertheless, the agreement reduces UK access to EU databases and information systems, and does not cover a number of areas that the UK would have liked to see included in its future cooperation with the EU (e.g. transfer of prisoners or on illegal migration). Part Three also contains provisions on its suspension and termination, as well as specific dispute settlement rules, which are outside the TCA’s general dispute settlement procedure and exclude a role for the Court of Justice of the EU (CJEU). The law enforcement and judicial cooperation in criminal matters part of the TCA contains 13 titles (see box). Cooperation related to health security and cyber-security are not covered by Part Three, but by Part Four of the TCA (thematic cooperation).

<table>
<thead>
<tr>
<th>Titles covered by Part Three:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title I: General provisions</td>
</tr>
<tr>
<td>Title II: Exchanges of DNA, fingerprints and vehicle registration data (Prüm)</td>
</tr>
<tr>
<td>Title III: Transfer and processing of PNR data</td>
</tr>
<tr>
<td>Title IV: Cooperation on operational information</td>
</tr>
<tr>
<td>Title V: Cooperation with Europol</td>
</tr>
<tr>
<td>Title VI: Cooperation with Eurojust</td>
</tr>
<tr>
<td>Title VII: Surrender</td>
</tr>
<tr>
<td>Title VIII: Mutual assistance</td>
</tr>
<tr>
<td>Title IX: Exchange of criminal record information</td>
</tr>
<tr>
<td>Title X: Anti-money laundering and terrorist financing</td>
</tr>
<tr>
<td>Title XI: Freezing and confiscation</td>
</tr>
<tr>
<td>Title XII: Other provisions</td>
</tr>
<tr>
<td>Title XIII: Dispute settlement.</td>
</tr>
</tbody>
</table>

Source: Trade and Cooperation Agreement (TCA)
General provisions

The first title of Part Three refers to the objectives of law enforcement and criminal justice cooperation between the UK, on the one side, and the EU and its Member States, on the other: that is, the prevention, investigation, detection and prosecution of criminal offences, as well as the prevention and fight against money laundering and terrorism financing. The Title highlights the values underpinning this cooperation – the protection of human rights and fundamental freedoms and the commitment to 'high-level protection of personal data', defines certain terms, and addresses the situation where a Member State ceases to apply relevant measures under EU law.

Protection of human rights and fundamental freedoms

The TCA emphasises the Parties' long-standing commitment to the respect of human rights and fundamental freedoms, democracy and rule of law as a basis for their continued cooperation. This is specified both in Part Six of the TCA on dispute settlement and horizontal provisions and in the general provisions of Part Three. Part Six designates democracy, rule of law and human rights as essential elements of this cooperation. In particular, the TCA reaffirms the Parties' commitment to the international human rights treaties to which they are signatories. Any serious and substantial failure to fulfil related obligations may lead to suspension or termination of the TCA or any supplementary agreement (suspension/termination is not automatic). A mandatory 30-day delay allows the Partnership Council (the body governing the TCA) to hold discussions before measures are taken. Denunciation of the European Convention on Human Rights (ECHR) is not specifically mentioned and there is an obligation of proportionality. The threshold for suspension is high, as 'serious and substantial failure' is defined as failure whose 'gravity and nature would have to be of an exceptional sort that threatens peace and security or that has international repercussions'.

By contrast, Part Three of the TCA on security cooperation refers explicitly to the ECHR. It makes security cooperation between the EU and the UK conditional on respect of the ECHR (since the EU Charter of Fundamental Rights no longer applies to the UK), including on giving effect to the rights and freedoms in the ECHR domestically, given the UK's expressed intention to modify its human rights framework. The EU and its Member States also reaffirm their obligation to respect the EU Charter. The ECHR conditionality is expressed in Title XII (Other provisions) of Part Three, which includes the conditions of termination and suspension of law enforcement and criminal justice cooperation. Accordingly, denouncing the ECHR or its Protocols 1 (rights to peaceful enjoyment of property, to education and to free elections by secret ballot), 6 or 13 (both banning the death penalty) by the UK or a Member State can lead to 'fast-track' termination of Part Three, either on the date of the denunciation, or after 15 days if the party notifies the termination after that date. Part Three may in any case be terminated 9 months after a party's written notification by diplomatic channels, while the entire TCA may be terminated with 12 months' notice. For termination of Part Three due to denunciation of the ECHR, there is no obligation to consult, merely a requirement to discuss appropriate conclusion of the cooperation initiated under Part Three within the Specialised Committee on Law Enforcement and Judicial Cooperation (hereafter the Specialised Committee, which manages Part Three of the TCA).

In addition, police and judicial cooperation may be partially or entirely suspended with three months' notice, in cases of serious and systemic deficiencies regarding fundamental rights and rule of law (however, the TCA does not define such deficiencies, nor indicate a threshold). The party suspending cooperation must issue written notification specifying the deficiencies on which it bases the suspension. In response, the other party may suspend one or several titles of Part Three, also with three months' notice. The Partnership Council must seek solutions to the dispute, including through temporary adaptations to Part Three, or by agreeing joint interpretations of its provisions. The Specialised Committee is responsible for appropriate conclusion of the cooperation, including regarding the protection of personal data already transferred under the suspended titles. The suspension ends when the deficiencies have ceased to exist. Finally, Part Three includes specific
provisions on human rights regarding cooperation in certain areas: surrender, freezing and confiscation of criminal assets and cooperation with Europol.

Experts point out that the TCA adopts weaker conditionality than the initial EU position, whereby changes to UK domestic law implementing the ECHR would automatically lead to suspension of cooperation, while denunciation of the ECHR or its protocols would automatically terminate the cooperation. Moreover, they raise the question as to how the Partnership Council, a non-judicial body, can perform judicial interpretative functions regarding fundamental rights. Other commentators question how individuals can assert their rights, in face of violations committed in the application of the TCA, as the CJEU has no competence and domestic courts may not rule on violations committed by the other party’s authorities.

Personal data protection

In the general provisions of Part Three, the parties commit to ensure ‘a high level of protection of personal data’. In particular, their data protection regimes must comply with a non-exhaustive list of principles and safeguards. However, personal data cannot be exchanged on the basis of the TCA itself; the actual transfer mechanism will be governed by EU adequacy decisions (see box).

Personal data protection: European Commission adequacy decisions

Sharing of personal data between the EU and the UK in the field of law enforcement and criminal justice cooperation will rely on EU adequacy decisions – under the General Data Protection Regulation (GDPR) for Passenger Name Records (PNR) and anti-money-laundering provisions and under the EU Law Enforcement Data Protection Directive (LED) for the rest of Part Three. On 19 February 2021, after assessing the UK legal framework, the European Commission published two draft adequacy decisions, under the GDPR and the LED, finding that the UK ensures an adequate level of protection for personal data. If adopted, the decisions would apply for four years after their entry into force, unless extended by a further four years. They provide that the Commission may suspend, amend or repeal the decisions if the UK no longer ensures an adequate level of protection, or if the Commission is impedied from monitoring the situation in the UK. Pending the adoption of these decisions, a bridging period of four months, extendable by another two months (i.e. until 30 June 2021), or until the adequacy decisions enter into force (whichever is earlier), has been instated. During this time, the UK is not considered a third country for the purposes of data transfers, provided it does not modify its data protection legislation in place as of 31 December 2020.

In February 2021, the European Data Protection Supervisor (EDPS) adopted an opinion on the draft decisions. As regards law enforcement and criminal justice, the EDPS inter alia expressed regret that the TCA did not contain a categorisation of data subjects as set out in the LED, or more detailed and robust safeguards with regard to onward transfers; or the specific EU provisions on purpose limitation and accuracy, current relevance and storage time of data, in relation to the Prüm framework. The European Parliament called on the Commission not to adopt the decisions if EU law and case law are not fully respected. A further Parliament resolution on UK adequacy decisions reiterating this was adopted on 21 May 2021.

Similarly to the TCA’s human rights provisions, non-respect of the data protection safeguards may lead to the entire or partial suspension of cooperation under Part Three, which may be decided in the event of serious and systemic deficiencies as regards the protection of personal data, including when a relevant adequacy decision ceases to apply. However, there is no link between data protection and termination of cooperation (the general provisions on termination apply).

DNA, fingerprints and vehicle registration data (Prüm)

The Prüm decisions allow searches of national databases on vehicle registration, DNA and fingerprints between the EU Member States. In 2016, the UK asked to re-join measures related to Prüm. The UK has been able to exchange DNA data since June 2019 and fingerprint data since August 2020; it has not yet put in place the cooperation system for vehicle registration data.

Title II of Part Three allows cooperation based on the Prüm system to continue, by allowing the automated exchange of DNA, fingerprints and vehicle registration data through national contact
Law enforcement and judicial cooperation in criminal matters under the EU-UK TCA

points. The provisions are largely similar to the Prüm decisions. The Commission underlines there is no direct, real-time access to sensitive personal data with regard to DNA and fingerprint data, but only through a decentralised system that confirms a match (hit/no-hit). The requesting state is only informed whether the profile sought is available in the other states’ databases. If a match is confirmed, the supply of further personal data is governed by the national law of the state holding the data, including legal assistance rules. The TCA also obliges the UK and EU Member States to allow competent authorities of other states access to all categories of data available for search and comparison under the same conditions as those applicable to their domestic authorities. The procedural and technical details for the implementation of Title II are set in Annex 39. However, before any exchange of data can be carried out, the UK has to submit to an ex-ante evaluation. Based on the evaluation report (and possibly a pilot run for vehicle data), the EU will decide the date of when personal data may be sent to the UK. In the meantime, the UK may be supplied with personal data (DNA, fingerprints and related personal data) for nine months following the TCA’s entry into force, which the Specialised Committee can extend by a further nine months. Finally, as the EU is considering revising the Prüm framework, the TCA provides that if EU law on Prüm is amended substantially, consultations would aim to agree a formal amendment to Title II to reflect the changes. If no agreement is reached within nine months, the EU may suspend the title entirely or partially for nine months, extendable once for a further nine months. If no agreement is reached to amend the title after that period, the suspended provisions will cease to apply, unless the EU renounces amendment of the title, leading to the reinstatement of the suspended provisions.

Transfer and processing of PNR data

In 2016, the EU set up a Passenger Name Records (PNR) system, in which the UK took part, allowing Passenger Information Units (PIU) in each Member State to share airline passenger data with law enforcement authorities across the EU. Title III of Part Three provides for continued UK access to PNR data for flights departing from the EU, and vice-versa, subject to safeguards on use and storage of the data. Besides the TCA provisions, data transfers depend on an EU adequacy decision. The TCA provisions largely reflect those of the EU PNR Directive and take into account the 2017 CJEU opinion on the EU-Canada PNR agreement. In particular, the UK may process PNR data from the EU strictly for the purpose of preventing, detecting, investigating or prosecuting terrorist offences or serious crime. Exceptions may be made only when necessary to protect the vital interests of a person (risk of death or serious injury; a significant public health risk), or on a case-by-case basis, if a court needs the PNR data in criminal proceedings related to terrorism or serious crime. Title III also establishes police and judicial cooperation with regard to PNR, by requiring the UK to share analysis of PNR files, in specific cases, with Europol, Eurojust and Member States’ PIUs; at their request, the UK must share PNR data, the results of their processing and related analytical information. EU Member States’ PIUs have the same obligations in relation to the competent UK authority. Moreover, the UK is bound to safeguards, in particular: non-discrimination; prohibition of processing special categories of personal data; ensuring data security and integrity; notifying passengers about the purpose of collecting and using PNR data; ensuring the automated processing of PNR data is made according to set criteria. The title also sets conditions for the use of PNR data, including as regards disclosure to other UK domestic authorities or to third countries.

Furthermore, the UK must not retain PNR data for more than five years; in any case, the UK is obliged to depersonalise the data (i.e. remove information that would identify the person) no later than six months after the transfer. The UK must delete the PNR data of passengers after their departure from the country, unless it considers retention necessary on the basis of a risk assessment. In this regard, an independent administrative authority in the UK will assess the UK’s approach to PNR data retention annually. PNR data may also be retained until actions such as investigations, judicial proceedings or prosecution are completed. The TCA includes a temporary derogation of one year for the UK to make necessary technical adjustments for the deletion of PNR files upon passengers’ departure from the state (i.e. transforming its PNR systems operating under EU law). The UK must report to the Specialised Committee after nine months and, if the technical issues persist, the
Partnership Council may then extend the interim period by another year. This period must cease after three years. The UK may suspend cooperation under the PNR title with one month’s notice if it considers refusal by the Partnership Council to grant the extension as unjustified.

Finally, PNR cooperation may be suspended, after notification by one party, followed by six months of consultation. If consultations produce no solutions, either party may suspend the title for another six months, extendable once by agreement of the parties. The provisions of the title cease to apply after this period, unless the party having made the notification decides to withdraw it.

The EDPS has raised some concerns about this title, particularly as regards the three-year interim period for the deletion of PNR data. Moreover, some Member States expressed concern about the use of PNR for the purpose of ‘a significant public health risk’, as the EU directive prohibits sharing data for health reasons. The Commission replied that there was no contradiction with the directive, as the provision applies only to the UK (not between Member States) in exceptional circumstances and that the CJEU has already accepted the exceptional use of PNR for such purposes.

Cooperation on operational information

Title IV of Part Three provides for cooperation on operational information, if not covered by other titles. Accordingly, the competent UK and EU Member State authorities may exchange information, on the basis of their domestic legislation and competences, for the purposes of: the prevention, investigation, detection or prosecution of criminal offences; the execution of criminal penalties; safeguarding against, and preventing, threats to public safety; and preventing and combating money laundering and the financing of terrorism. Information may be provided on request or spontaneously, according to national rules. The providing state must consent to its use as evidence in judicial proceedings, and may impose conditions. Information may be exchanged through any appropriate communication channel, including Europol’s secure communication system (SIENA).

Finally, Title IV does not prejudice the conclusion of bilateral agreements between the UK and Member States, in compliance with EU law.

It should be underlined that, under the TCA, the UK loses direct access to the Schengen Information System (SIS II) and the Europol Information System (see next section). Allowing for real-time exchange of alerts and information between Member States’ competent authorities, SIS II provides information on missing persons, persons wanted for arrest, third-country nationals without the right to enter or stay in the Schengen Area, and missing objects. Despite the importance of SIS II to the UK (in 2019, the UK police checked the system 603 million times), the EU cannot legally grant UK access to SIS II as a non-Schengen third country. For UK law enforcement, the Interpol databases replace SIS II. Optimal cooperation between the UK and Member States will depend on the latter introducing alerts twice, in SIS II and the Interpol system, and making Interpol information available to Member State authorities. In this sense, bilateral agreements could facilitate future information exchange.

Cooperation with Europol and Eurojust

The TCA provides for continued cooperation between the UK and the two EU agencies, Europol (law enforcement) and Eurojust (criminal justice), on a third-country model. The UK may send liaison officers (Europol) and a liaison prosecutor (Eurojust), while data transfers must comply with the respective regulations’ provisions on sharing data with a third country.

Europol

Title V of Part Three details the arrangements for UK cooperation with Europol, which covers, in substantive terms, the list of crimes within Europol’s competence and related criminal offences. The forms of crime listed in Annex I to the Europol Regulation are copied into Annex 41 of the TCA. Should the EU change the list of crimes under Europol’s mandate, the Specialised Committee may amend the annex. The scope of cooperation covers exchange of personal data, as well as exchange of specialist knowledge; general situation reports; results of strategic analysis; information on
Law enforcement and judicial cooperation in criminal matters under the EU-UK TCA

criminal investigation procedures and on crime prevention methods; participation in training activities; advice and support in criminal investigations, and operational cooperation.

The UK lost its Europol membership when it left the EU in 2020, and therefore no longer takes part in the agency's management. As of 1 January 2021, the UK also lost access to the Europol Information System (EIS), directly accessible to Member States alone, and to the Analysis Work Files database, allowing searches of data included in analysis projects. However, use of Europol's secure communication line, SIENA, remains possible. Just like other third countries, the UK must designate a national contact point, acting as the main link between Europol and UK competent authorities. Moreover, UK liaison officers are posted to Europol headquarters (and vice-versa), and may be invited, together with representatives of the competent UK authorities, to Europol operational meetings. In addition, the title addresses means for the exchange of information, including personal data (depending on an EU adequacy decision). It includes provisions on purpose limitation; restrictions on access to and further use of personal data; prohibition of certain transfers of personal data (of victims of crime, witnesses and persons under 18 years), unless strictly necessary and proportionate in individual cases; and liability for unauthorised/incorrect processing.

Europol and the UK will require to conclude further working and administrative arrangements to implement the title, which should define the number, tasks, rights and obligations of the UK liaison officers at Europol; measures to ensure the security of information exchange, including establishing a secure communication line; and procedures for exchanging classified and sensitive non-classified information. Based on a Europol Management Board decision, the arrangements may also include: participation of UK representatives as observers in specific meetings of Europol Heads of Unit; associating the UK in operational analysis projects; and consultations between Europol and UK national contact point representatives on policy issues and matters of common interest.

While the UK lost access to Europol's databases and decision-making fora, cooperation is unlikely to encounter obstacles. In the words of a UK police representative, in the first weeks of application of the TCA, there was 'no deterioration in the volume, speed, quantity or quality of the intelligence' the UK shares through Europol. Some experts believe future working and administrative arrangements may provide much leeway in giving the UK broad access to Europol resources currently limited to EU Member States and risk impacting existing data exchange and information systems in the EU by adding a specific UK-related system. They also point to the legislative proposal to amend Europol's mandate, which could potentially 'facilitate the UK's access to EU data systems'.

**Eurojust**

Title VI of Part Three enables continued cooperation between Eurojust and the UK on the third-country model, for the purpose of combatting the forms of serious crime and related criminal offences under Eurojust competences (listed in Annex I of the Eurojust Regulation and replicated in Annex 42 to the TCA). The scope of cooperation covers the tasks in Article 2 ('to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime which Eurojust is competent to deal with ...') and Article 54 (requests for judicial cooperation to and from third countries) of the Eurojust regulation, as well as those mentioned in the TCA.

The UK no longer has a National Member taking part in the agency's decision-making structures. Instead, the UK may second a liaison prosecutor to Eurojust, assisted by up to five assistants (other third countries may send one assistant). Eurojust may in turn post a Liaison Magistrate to the UK. The UK must also designate at least one national contact point among its competent authorities to Eurojust, including one acting as UK Domestic Correspondent for Terrorism Matters. The UK liaison prosecutor and assistants, as well as representatives of UK competent authorities may be invited to Eurojust meetings on strategic matters, or may take part in operational meetings if the National Members concerned agree. Title VI also provides for the exchange of data (non-personal and personal) between Eurojust and the UK competent authorities. Personal data must only be exchanged (based on the EU adequacy decision) for the purpose of combatting serious crime.
covered by the agency's mandate or for specific purposes and subject to restrictions on access and
use, as indicated by the transferring authority. Onward transfers of information to third countries
are forbidden, unless the authority providing the data consents and appropriate safeguards are
ensured. Finally, other titles in Part Three refer to the agency's role in supporting EU-UK cooperation.
For example, PNR data may be shared with Eurojust; the agency may give advice upon request from
Member States' judicial authorities in cases of competing EAWs and arrest warrants; or, in urgent
cases, requests for mutual assistance or spontaneous information may be sent via the agency. To
implement the title, Eurojust and the UK must conclude working and administrative arrangements.
Just as with Europol, some experts point to these arrangements as having the potential to expand
the UK's relationship with Eurojust, under the direction of the Specialised Committee.

Surrender

Title VII of Part Three institutes a new mechanism for surrender between the EU and the UK that
replaces, in relation to the UK, the 2002 Framework Decision on the European arrest warrant
(EAW FD); the 1957 Council of Europe (CoE) Convention on Extradition and its Additional Protocol;
and the 1977 CoE Convention on the Suppression of Terrorism (as far as extradition is concerned).
The EAW FD still applies to persons arrested before 31 December 2020, as well as the EU directives
on the right to interpretation and translation and on the right to information. For persons subject to
an EAW but not yet arrested, the TCA applies, without the need to issue a new arrest warrant.

The new surrender mechanism is also based on an arrest warrant, broadly replicating the EU EAW,
and mirrors the EU Surrender Agreement with Iceland and Norway, but with elements reflecting the
UK's status as a non-Schengen third country. The surrender mechanism remains mostly a judicial
rather than a political process (judges, public prosecutors or courts issue and execute the warrants),
while the strict time limits, the content and the form of the arrest warrant mirror those of the EAW
and the Iceland/Norway Agreement. In the same way as an EAW, an arrest warrant under the TCA
may be issued for acts punishable by the law of the issuing state by a custodial sentence or a
detention order for a maximum period of at least 12 months. The TCA also provides for limited
grounds for non-execution (including all the EAW FD's mandatory grounds for non-execution:
amnesty, ne bis in idem or double criminality, and age). However, the TCA surrender mechanism
includes additional grounds, such as fundamental rights and proportionality. It contains provisions
on the rights of individuals (to legal assistance, to information on the content of the arrest warrant,
and to interpretation), granted in accordance with domestic law. 8 In some cases, the issuing state
may be asked for additional guarantees (e.g. if the executing authority believes there is a real risk to
the fundamental rights of the requested person). The proportionality principle, introduced at the
UK's request, requires that surrender be necessary and proportionate, taking account of the
requested person's rights and victims' interests, the seriousness of the offence and the objective to
avoid long pre-trial detentions (see Joint Political Declaration on Title VII). The executing authority
may request additional information if it has concerns about the proportionality of the surrender.

Moreover, similarly to the Iceland/Norway Agreement, the TCA introduces a political offence
exception, as well as a nationality exception. For any of these exceptions to apply, the UK or the
EU, on behalf of its Member States, must notify the Specialised Committee. They may also notify that
the political offence exception will not apply in relation to terrorist offences. Reciprocity may apply.
States not surrendering their nationals must consider instituting proceedings themselves in relation
to the subject of the arrest warrant. Title VII also subjects surrender to double criminality as a
general rule (i.e. the acts contained in the arrest warrant must be an offence under the law of the
executing state); on the basis of reciprocity, this requirement may be abolished for 32 offences (the
same as in the EAW FD) by notifying the Specialised Committee.
Title VII further details the procedures for the issuance and execution of the arrest warrants, including time limits, surrender in case of multiple arrest warrants, and expenses. Altogether, the provisions point to the willingness to ensure continuity and are unprecedented with regard to a non-EU and non-Schengen third country. Nevertheless, one major obstacle to cooperation is the UK’s loss of access to SIS II, including to real-time alerts on arrests and extradition. As reliance on the Interpol databases is not expected to be sufficient, the impact of such loss may need to be assessed.

Mutual legal assistance in criminal matters (MLA)

The TCA’s MLA provisions supplement the 1959 CoE European Convention on Mutual Legal Assistance in Criminal Matters and its additional protocols, but also include provisions from the European Investigation Order (EIO) Directive. The latter still applies to MLA requests received by 31 December 2020. Among others, Title VIII on MLA sets out the conditions for issuing an MLA request: the requested measure must be necessary and proportionate and be available under the same conditions in a similar domestic case in the requested state (the state to which the request is made). There is the possibility to have recourse to a different investigative measure if the one requested is not available in the requested state. However, the TCA includes a list of measures that must always be available. In terms of grounds for refusal, the TCA adds ne bis in idem to the optional grounds in the CoE Convention (i.e. political offence or fiscal offence; or in case of likely prejudice to sovereignty, security, public order, or the essential interests of the state). The TCA also provides for continued UK participation in joint investigation teams (JITs). It does not mention the legal basis for JITs between Member States and the UK, but it mandates that EU law governs the relationship between EU Member States within the JIT. Procedurally, the competent authorities are those notified by states to the CoE; the EU has notified the European Public Prosecutor’s Office (EPPO), as the TCA also includes cooperation with EU bodies. As there is no standardised MLA form, this issue remains to be addressed by the Specialised Committee. Besides the channels for transmission set out in the CoE Convention, the UK may transmit requests directly to the competent authorities of the Member States, if this is allowed in their declarations to the CoE Convention.

In urgent matters, MLA requests may be addressed through Europol or Eurojust. Finally, certain time limits are the same as under the EIO Directive; however, the TCA allows 45 days to decide on executing a request, instead of 30 days under the EIO.

Experts believe the TCA’s MLA provisions leave many questions unanswered. In particular, the TCA does not replicate certain successes of the EIO, such as the obligation to provide legal remedies 'at
least equal to those available in a domestic case against the investigative measure concerned'. The TCA does not include a similar provision, although the general obligation to respect the ECHR and other human rights instruments is deemed to apply. In addition, the UK’s third-country status and the lack of a standardised form may impact effectiveness and render the time limits unrealistic.

Exchange of information on criminal records

Title IX enables the continued exchange of information extracted from criminal records between the UK and EU Member States; its provisions supplement the relevant articles in the CoE MLA Convention and Protocols and largely correspond to the EU ECRIS decisions and will take precedence over the MLA provisions in the TCA. Accordingly, central authorities are obliged to inform each other of convictions handed down against nationals of other states, at least once per month (‘as soon as possible’ in the ECRIS decisions), while requests must be replied to within 20 working days (10 days in EU law). The TCA does not provide for the exchange of criminal records information on third-country nationals. Although the UK lost access to the European Criminal Records System (ECRIS), the TCA states that exchanges will take place ‘electronically in accordance with the technical and procedural specifications’ laid down in Annex 44. In practice, as Member States continue to use ECRIS to cooperate with the UK, the UK will build its own infrastructure (UKRIS), compatible with ECRIS. The title also details the conditions for processing personal data, in line with the ECRIS Framework Decision 2009/315/JHA. While some are concerned that sharing of criminal records data will be slower under the TCA, others do not envisage a reduction in timescales.

Anti-money-laundering and counter-terrorism financing

Title X of Part Three provides for continued cooperation in the area of preventing and combatting money laundering and terrorist financing (AML/CFT). The parties commit to support international efforts, to exchange the relevant information and to maintain a comprehensive AML/CFT regime, taking the Financial Action Task Force (FATF) recommendations into account. Nevertheless, the TCA aims to ensure cooperation goes beyond FATF standards. It also reflects advances in EU law, with the successive AML Directives and other related instruments. Specific provisions aim to guarantee the transparency of beneficial ownership, for legal entities and for ‘legal arrangements’ (trusts and fiduciaries). Each party must ensure that legal entities/arrangements on its territory maintain adequate, accurate and up-to-date information about beneficial owners; that a central register is established and accessible to competent authorities; and that effective sanctions are available for failure to observe the requirements. However, the TCA does not set out mechanisms for information-sharing in this area. Lacking a specific mechanism, information may be exchanged under other titles (e.g. cooperation on operational information), or under existing multilateral/bilateral agreements. Irrespectively, cooperation between the EU Member States’ Financial Information Units (FIUs) and the UK FIU is likely to be impacted, especially in light of the EU’s current implementation of the AML Directives, as well as other planned EU initiatives (e.g. interconnection of beneficial ownership registers, and setting up an improved coordination mechanism between the EU FIUs.). It is uncertain whether the UK would maintain access to the various EU mechanisms.

Freezing and confiscation

Title XI on freezing and confiscation of criminal assets and proceeds is a self-standing title, replacing the relevant CoE Conventions and EU law instruments as regards the UK (such as Regulation 2018/1805 on the mutual recognition of freezing and confiscation orders). It aims at the widest possible extent of cooperation between the UK and the EU Member States for the purposes of investigations and proceedings aimed at freezing property with a view to confiscation, and investigations and proceedings aimed at confiscation in the framework of criminal proceedings. As cooperation with EU bodies is planned, the EU has notified the EPPO. Member States must comply with requests for confiscation or for investigative assistance and provisional measures (freezing) with a view to confiscation. The investigative assistance and freezing measures are carried out in accordance with the requested state’s national law and the principle of necessity and
Law enforcement and judicial cooperation in criminal matters under the EU-UK TCA

proportionality. Requests to identify, trace, freeze or seize proceeds must be given the same priority as domestic requests. The TCA envisages an obligation for the requested state to take freezing measures if the requesting state institutes a criminal investigation or proceedings, or an investigation or proceedings in view of confiscation. Confiscation requests must be executed following a court order from the requesting state; otherwise, the requested state must submit the request to its competent authorities in order to obtain a confiscation order. States may cooperate ‘to the widest extent possible’ in relation to requests for confiscation outside the framework of criminal proceedings (civil or administrative), under specific conditions. The TCA includes a deadline of 96 hours, in case of urgency, for executing a freezing request where it is believed the property will be immediately removed or destroyed, while the decision to execute a confiscation order is to be taken within 45 days after receipt of the request.

As for the grounds for refusal, ne bis in idem may apply to requests regarding all types of cooperation under Title XI. Double criminality does not apply, however, to the obligation to assist in identifying and tracing assets and to spontaneous information-sharing, unless coercive measures are envisaged. Moreover, states may notify that double criminality does not apply, based on reciprocity, in relation to the 32 offences listed in Title VII (Surrender), punishable by a custodial sentence or detention order for a maximum period of at least 3 years. Requests may also be refused for lapse of time; if the national law of the requested state does not provide confiscation for the type of offence included in the request; if confiscation is not enforceable in the requesting state or still subject to ordinary means of appeal; if confiscation is based on a decision rendered in absentia, when there is reason to believe that the rights of defence were not respected. Title XI also details what happens to the confiscated property and who bears the costs for executing the requests; victims have priority for compensation and restitution. Standardised forms are included in Annex 46. Finally, each state must ensure that persons affected by freezing/confiscation measures have effective legal remedies to preserve their rights; the substantive reasons for an order cannot be contested before the courts of the requested state.

Experts conclude that Title XI marks a return to MLA and divergence, as states may adopt different approaches to recognising and enforcing confiscation orders, while the provisions on legal remedies seem weak and may negatively affect persons targeted by the measures.

Other provisions

In addition to the rules on the suspension and termination of Part Three, Title XII contains the list and conditions related to notifications by the parties. It also provides for the joint review and evaluation of Part Three, either at the time of the review of the entire TCA (five years after entry into force, then every five years thereafter) or at the request of either party if jointly agreed.

Dispute settlement

There is a specific dispute settlement mechanism for this part of the agreement. It excludes a role for the CJEU. In case of dispute, the parties will hold consultations among themselves or within the Specialised Committee or the Partnership Council. If no mutually agreed solution is found within a certain timeframe, the party that considers the other in serious breach of an obligation may suspend cooperation under the respective title, after written notification. In response, the other party may suspend all the remaining titles, after notification, with three months’ notice. The Specialised Committee must take measures to conclude the cooperation appropriately. If the breach no longer exists, the parties must reinstate the suspended titles.

Concluding remarks

The TCA enables unprecedentedly close law enforcement and criminal justice cooperation with the UK as a third country, however, the divergence expected after Brexit will still occur. In particular, mechanisms based on mutual recognition are replaced by mutual legal assistance, while the UK’s loss of access to EU databases will most likely negatively impact other areas of police cooperation and
information exchange, for example, surrender. Moreover, lack of CJEU jurisdiction over the TCA does
not mean less CJEU case-law influence, especially as regards EAW and personal data protection, which
will continue to shape judicial approaches. Finally, besides losing influence over the development
of Europol and Eurojust, the UK may need to act to rebuild the trust of EU Member States.

MAIN REFERENCE

Eurojust, Judicial cooperation in criminal matters between the European Union and the United Kingdom
from 1 January 2021, January 2021.

ENDNOTES

1 Through the European Union (Future Relationship) Act 2020, granted royal assent on 30 December 2020.
2 Decision No 1/2021 of the Partnership Council extended provisional application of the TCA until 30 April 2021.
3 e.g. data processing in accordance with the principles of data minimisation, purpose limitation, accuracy and storage
   limitation; granting individuals’ enforceable rights of access, rectification and erasure, as well as rights to administrative
   and judicial redress; allowing onward transfers to third countries only under appropriate conditions and safeguards.
4 On EU-UK commercial data flows after 1 January 2021, see H. Mildebrath, EU-UK private-sector data flows after Brexit:
   Settling on adequacy, EPRS In-depth Analysis, European Parliament, April 2021.
5 The Convention on the stepping-up of cross-border cooperation, particularly in combating terrorism, cross-border
   crime and illegal migration (Prüm Convention) was agreed by seven European countries on 27 May 2005. In June 2008,
   parts of the Convention were transformed into EU law through Council Decision 2008/615/JHA. At the same time, the
   Council adopted Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA.
6 EU-UK Declarations, 24 December 2020
7 The TCA states that the parties will consider incorporating ‘any new processes and technical developments which might
   assist’ with the objective of swift data exchange, ‘while taking account of the fact that the UK is not a Member State’.
8 Since these rights are subject to domestic law, the House of Lords expressed concerns that the TCA does not confer any
   rights on individuals to be directly invoked in UK courts and asked for clarifications on extradition under the TCA.
9 e.g. proportionality principle, possible recourse to an alternative investigative measure if the requested measure does
   not exist in the executing state, the ne bis in idem principle as ground for refusal, time limits for executing an MLA
   request.
10 Some Member States intend to change their reservations to allow direct transmission of requests to and from the UK.
11 Council Framework Decision 2009/315/JHA on the exchange of criminal record information between Member States and
12 The 1990 CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the
   ‘international chapters’ of the 2005 CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds
   from Crime and the Financing of Terrorism.
13 Requests received before 31 December 2020 are treated according to the 2003 Framework Decision on freezing orders,
   the 2006 Framework Decision on confiscation orders or the EIO for investigative assistance requests. In December 2020,
   with the UK already a third country, Regulation (EU) 2018/1805 replaced the two Framework Decisions.
14 Belgium, Ireland, Greece, Spain, France, Italy, Latvia, Lithuania, Austria, Poland and Portugal made this notification.

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