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**Study**

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**Consequences of Brexit for the realm of justice and home affairs**  
Scope for future EU cooperation with the United Kingdom

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Scope for future EU cooperation with the United Kingdom

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## 1. Background and issues

In the referendum of 23 June 2016, a majority of British voters opted for the United Kingdom to leave the European Union (EU).<sup>1</sup> The present study deals with the consequences of the referendum result, particularly with the repercussions of Britain giving notice under Article 50 of the Treaty on European Union (TEU) of its intention to withdraw from the European Union. The study focuses on Union legislation in the realm of justice and home affairs and, in particular, on police cooperation and judicial cooperation in criminal matters.

The study begins with a presentation of the legal position in the field of justice and home affairs up to the time of the referendum, with special emphasis on the participation of the United Kingdom in legal instruments relating to justice and home affairs (part 2). There follows an analysis of the situation since the referendum, with an initial examination of the question whether the referendum has already had implications for the position of the United Kingdom within the EU (part 3). The consequences of a notification of withdrawal under Article 50 TEU are then examined (part 4). The study concludes with a consideration of the scope for cooperation between the United Kingdom and the EU in the realm of justice and home affairs that would exist after the United Kingdom leaves the Union. Since it is not yet foreseeable what specific arrangements in this sphere will be agreed between the EU and the United Kingdom, it is only possible to provide a summary, by way of guidance, of existing forms of cooperation in this area between the EU and countries outside the Union, particularly Switzerland and Norway (part 5).

## 2. Position of the United Kingdom in the realm of justice and home affairs up to the time of the referendum

### 2.1. Development of the special status of the United Kingdom

Even before the referendum on British membership of the EU, the United Kingdom had a special status in the realm of justice and home affairs within the Union.

The field of justice and home affairs did not initially fall within the ambit of the European Community. Cooperation in that field took the form of intergovernmental arrangements such as the Schengen Agreement.<sup>2</sup> The Treaty of Maastricht brought justice and home affairs, covering such areas as external borders, asylum policy, judicial cooperation in civil and criminal matters and police cooperation, into primary European legislation and designated these areas as matters of common interest. They were not brought into the Community framework, however, but dealt with on an intergovernmental basis.<sup>3</sup>

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<sup>1</sup> See also Division PE 2, *EU-Sachstand Der Austritt des Vereinigten Königreichs aus der Europäischen Union – Nächste Schritte im Verfahren nach Artikel 50 EU-Vertrag*, PE document 168/2016, accessible at <http://eudoxap01.bundestag.btg:8080/eudox/dokumentinhalt?id=167082&latestVersion=true&type=5>.

<sup>2</sup> Böse, Martin, on Article 82 TFEU, in Schwarze, Jürgen (ed.), *EU-Kommentar*, third edition, 2012, paragraph 1.

<sup>3</sup> Cf. Article K.1 of Title VI of the Treaty on European Union, as amended by the Treaty of Maastricht, OJ C 191 of 29 July 1992, p. 1 (61), accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11992M/TXT&from=EN>.

Through the Treaty of Amsterdam, part of the realm of justice and home affairs, namely external borders, asylum policy, immigration law and judicial cooperation in civil matters, was brought into the legal framework of the Community.<sup>4</sup> However, pursuant to Article 1 of the Protocol on the position of the United Kingdom and Ireland,<sup>5</sup> which was drawn up together with the Treaty of Amsterdam, the United Kingdom – and Ireland too – did not take part in the adoption of Community measures in this domain. Accordingly, measures adopted by the Council on visas, asylum and immigration did not apply to those two countries unless they explicitly opted in under Article 3 or 4 of the said Protocol. The realm of police and judicial cooperation in criminal matters, on the other hand, remained an intergovernmental preserve even after the Treaty of Amsterdam had entered into force.

Special rules apply to the Schengen *acquis*, which was incorporated into the legal framework of the EU in 1999 by virtue of the Treaty of Amsterdam.<sup>6</sup> The prescriptions governing police and judicial cooperation in criminal matters from the Schengen *acquis*, along with the entire spectrum of such cooperation, remained intergovernmental. The other part of the Schengen *acquis*, that is to say the rules governing the abolition of internal border controls, entry, visas, etc.,<sup>7</sup> by contrast, was incorporated into supranational law by the Treaty of Amsterdam. With regard to the entire Schengen *acquis*, since the entry into force of the Treaty of Amsterdam a special arrangement has existed for the UK, as set out in the Protocol integrating the Schengen *acquis* into the framework of the European Union.<sup>8</sup> Under Article 4 of that Protocol, Ireland and the United Kingdom, which are not bound by the Schengen *acquis*, may at any time request that some or all of the provisions of this *acquis* apply to them too. Since 2000, the United Kingdom has been applying Schengen provisions on police cooperation, judicial cooperation in criminal matters, counter-narcotics cooperation and the Schengen Information System (SIS) under Council Decision 2000/365/EG.<sup>9,10</sup> In Decision 2004/926/EG,<sup>11</sup> the Council decided that these provisions of the Schengen *acquis*, with the exception of those concerning the SIS, were to be put into effect for the United Kingdom.

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<sup>4</sup> Böse, *op. cit.*, paragraph 1.

<sup>5</sup> Protocol on the position of the United Kingdom and Ireland, OJ C 340 of 10 November 1997, p. 99, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11997D/TXT&from=EN>.

<sup>6</sup> Zeder, Fritz, 'Britisches „pull-out“ aus der polizeilichen und justiziellen Zusammenarbeit in Strafsachen vor Lissabon: Splendid Isolation?', in *Europarecht*, 2013, p. 454; Meyer, Frank, introductory remarks on cooperation in criminal matters and police cooperation, in Groeben, Hans von der, Schwarze, Jürgen, and Hatje, Armin, *Europäisches Unionsrecht*, seventh edition, 2015, paragraph 12 (in German).

<sup>7</sup> Röben, Volker, on Article 67 TFEU, in Grabitz, Eberhard, Hilf, Meinhard, and Nettesheim, Martin, *Das Recht der EU*, 53<sup>rd</sup> supplement, May 2014, paragraphs 144 *et seq.*

<sup>8</sup> Protocol integrating the Schengen *acquis* into the framework of the European Union, OJ C 340 of 10 November 1997, p. 93, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11997D/TXT&from=EN>.

<sup>9</sup> Council Decision of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*, OJ L 131 of 1 June 2000, p. 43, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000D0365&qid=1470216308686&from=EN>.

<sup>10</sup> Röben, *op. cit.*, paragraph 150.



Not until the Treaty of Lisbon entered into force were police and judicial cooperation in criminal matters brought into the Community framework too.<sup>12</sup> At the same time, Protocol No 36 to the Treaty of Lisbon<sup>13</sup> gave the UK the option of withdrawing from all of the provisions on police and judicial cooperation in criminal matters to which it had previously signed up. Protocols 19 and 21 to the Treaty of Lisbon regulate the right of the UK to opt into new provisions forming part of the Schengen *acquis* and relating to justice and home affairs policy.

## 2.2. Present status of the United Kingdom as regards police cooperation and judicial cooperation in criminal matters

### 2.2.1. Application of rules adopted before the Treaty of Lisbon

Once the domain of police and judicial cooperation in criminal matters had also been integrated into the Community framework by the Treaty of Lisbon, the United Kingdom was entitled, under Article 10(4) of Protocol No 36, to withdraw from all of the legal acts in the field of police cooperation and judicial cooperation in criminal matters which had been adopted on an intergovernmental basis (block opt-out). Article 10(4) specifies that the United Kingdom may notify the Council that it does not recognise the powers of the European Commission and the Court of Justice of the European Union (ECJ) to enforce Union acts in the field of police cooperation and judicial cooperation in criminal matters by means of infringement proceedings. In the event of such notification by the UK, all of those acts will cease to apply to it from the date of expiry of a five-year transitional period.

The United Kingdom exercised this right and opted out of numerous legal acts in 2014.<sup>14</sup> Since the right of withdrawal covers all legal acts in the field of police cooperation and judicial cooperation in criminal matters and does not permit any distinctions to be made, Article 10(5) of Protocol No 36 entitles the United Kingdom to notify the Council thereafter of its wish to participate in acts which, under Article 10(4), have ceased to apply to it. The UK has exercised this option too, with the result that a total of 35 legal acts adopted before the Treaty of Lisbon, which are specified in Decisions 2014/857/EU<sup>15</sup> and

<sup>11</sup> Council Decision 2004/926/EC on the putting into effect of parts of the Schengen *acquis* by the United Kingdom of Great Britain and Northern Ireland, OJ L 395 of 31 December 2004, p. 70, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004D0926&qid=1470216531095&from=EN>.

<sup>12</sup> Bergmann, Jan, *Handlexikon der Europäischen Union*, fifth edition, 2015, entry on 'PJZS' (police and judicial cooperation in criminal matters).

<sup>13</sup> Protocol (No 36) on transitional provisions, OJ C 115 of 9 May 2008, p. 322, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2008:115:FULL&from=EN>.

<sup>14</sup> For details, see Zeder, Fritz, 'Justizielle Zusammenarbeit in Strafsachen nach dem Ende der Übergangsperiode: Normalität und Sonderfälle', in *Europarecht*, 2015, pp. 487-497, esp. pp. 490 *et seq.*

<sup>15</sup> Council Decision 2014/857/EU of 1 December 2014 concerning the notification of the United Kingdom of Great Britain and Northern Ireland of its wish to take part in some of the provisions of the Schengen *acquis* which are contained in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters and amending Decisions 2000/365/EC and 2004/926/EC, OJ L 345 of 1 December 2014, p. 1, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0857&qid=1470237389198&from=EN>.

2014/858/EU,<sup>16</sup> have continued to apply in the UK even after the block opt-out. These legal acts are listed in an annex to this study.

### 2.2.2. Application of rules adopted after the Treaty of Lisbon

The UK's option to opt for supranational legislation in individual cases in the field of justice and home affairs after the entry into force of the Treaty of Lisbon is enshrined in Protocols 19 and 21 to the Treaty of Lisbon.<sup>17</sup>

Under Article 1 of Protocol No 21, the United Kingdom and Ireland do not take part in the adoption by the Council of proposed measures under Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU), that is to say measures pertaining to the area of freedom, security and justice, in other words justice and home affairs. Under Article 3(1) of Protocol No 21, however, the United Kingdom or Ireland may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title V of Part Three of the TFEU, that it wishes to take part in the adoption and application of any such proposed measure, which the notifying state is then permitted to do (opt-in). Participation in the 'adoption and application' gives the UK the opportunity to play an active part in the legislative process if it declares its opt-in.<sup>18</sup> Article 4 of Protocol No 21 also permits the United Kingdom to accept a measure after it has been enacted within the EU framework, in other words to take part in the application only.

Protocol No 19 provides for a similar participation option for provisions forming part of the Schengen *acquis*. Article 4 of Protocol No 19 lays down that "*Ireland and the United Kingdom of Great Britain and Northern Ireland may at any time request to take part in some or all of the provisions of this acquis. The Council shall decide on the request with the unanimity of its members referred to in Article 1 and of the representative of the Government of the State concerned.*" In the framework of the Schengen arrangements, however, any rules that the United Kingdom decides to adopt must be adopted in the form in which they were framed by the European Union. In contrast to the scope offered by Protocol No 21, it is not possible to opt in while the legislative process is taking place, which means that the United Kingdom does not participate in that process.<sup>19</sup> The UK, moreover, by requesting that individual provisions forming part of the Schengen *acquis* apply to it, is bound, in principle, by the Schengen *acquis* in the chosen field

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<sup>16</sup> Council Decision 2014/858/EU of 1 December 2014 on the notification by the United Kingdom of Great Britain and Northern Ireland of its wish to participate in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon and which are not part of the Schengen *acquis*, OJ L 345 of 1 December 2014, p. 6, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0858&qid=1470237608923&from=EN>.

<sup>17</sup> Protocol (No 19) to the Treaty of Lisbon on the Schengen *acquis* integrated into the framework of the European Union, OJ C 115 of 9 May 2008, p. 290, and Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, OJ C 115 of 9 May 2008, p. 295, both accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2008:115:FULL&from=EN>.

<sup>18</sup> Tekin, Funda, 'Opt-Outs, Opt-Ins, Opt-Arounds? Eine Analyse der Differenzierungsrealität im Raum der Freiheit, der Sicherheit und des Rechts', in *integration*, 2012, pp. 237-257, esp. p. 249.

<sup>19</sup> Tekin, *ibid.*, p. 251.

and, under Article 5(2) of Protocol No 19, must opt out explicitly if it no longer wishes to take part in a proposal or initiative within that field.<sup>20</sup>

Since the entry into force of the Treaty of Lisbon, it is not only entirely new rules in the realm of police cooperation or judicial cooperation in criminal matters that have been enacted. In many cases, earlier legal acts have been revised, and these new versions of the earlier instruments have been adopted. As these amendments and revisions constitute legal acts of the Union adopted after the Treaty of Lisbon, the old legal acts continue to apply to the United Kingdom in their amended or revised versions, despite the aforementioned block opt-out under Article 10(4) of Protocol No 36, provided that the UK has declared its wish to opt into these amended or revised legal acts. The Official Journal of the EU has published a summary list of these revised legal acts that continue to apply in the UK after the block opt-out.<sup>21</sup> This list is also included in the annex to the present study.

The UK Ministry of Justice has also published a summary on its website (last updated 8 April 2016) of all justice and home affairs (JHA) opt-in decisions and all Schengen-related decisions taken in the period from the entry into force of the Treaty of Lisbon on 1 December 2009 until 8 April 2016.<sup>22</sup> Based on this summary, the annex to this study provides a list of all adopted legal acts in the realms of police cooperation and judicial cooperation in criminal matters to which the United Kingdom has acceded since the entry into force of the Treaty of Lisbon or which apply in part because the UK is bound by particular elements of the act by virtue of its acceptance of parts of the Schengen *acquis* and has not declared an opt-out.

### 2.2.3. Summary of the body of applicable instruments in the fields of police cooperation and judicial cooperation in criminal matters

Before the Treaty of Lisbon entered into force, the United Kingdom had participated in intergovernmental police and judicial cooperation in criminal matters; since the entry into force of the Treaty, it has also opted into a large number of legal acts relating to criminal law which were based on new proposals.<sup>23</sup> The block opt-out of 2014, however, included about 100 legal acts from the realms of police cooperation and judicial cooperation in criminal matters in respect of which the UK has not subsequently declared an opt-

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<sup>20</sup> Peers, Steve, *EU Justice and Home Affairs Law*, third edition, 2011, p. 81.

<sup>21</sup> List of Union acts adopted before the entry into force of the Lisbon Treaty in the field of police cooperation and judicial cooperation in criminal matters which have been amended by an act applicable to the United Kingdom adopted after the entry into force of the Lisbon Treaty and which therefore remain applicable to the United Kingdom as amended or replaced, OJ C 430 of 1 December 2014, p. 23, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2014:430:FULL&from=EN>.

<sup>22</sup> Accessible at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/515125/2016-optin-webpage-update.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515125/2016-optin-webpage-update.pdf).

<sup>23</sup> Zeder, Fritz, 'Britisches „pull-out“ aus der polizeilichen und justiziellen Zusammenarbeit in Strafsachen vor Lissabon: Splendid Isolation?', in *Europarecht*, 2013, pp. 454-465, esp. p. 456).

in.<sup>24</sup> The main European legal acts that are no longer in force in the UK are those relating to substantive criminal law which predate the Treaty of Lisbon.<sup>25</sup>

#### 2.2.3.1. The body of law relating to police cooperation and judicial cooperation in criminal matters

The legal acts in the fields of police cooperation and judicial cooperation in criminal matters in which the UK still takes part at the present time, which are listed individually in the annex to this study, can essentially be divided into five categories: cooperation between Member State authorities, information exchange and data protection, specific criminal offences, European bodies and agencies and procedural harmonisation.

Cooperation between Member State authorities encompasses legal acts on customs cooperation and on cooperation between financial intelligence units and in the framework of joint investigation teams. This area also includes the legal acts on the mutual recognition of judgments, confiscation order, etc. Great importance also attaches to the European Arrest Warrant, which is intended to speed up and simplify extradition procedures between Member States.<sup>26</sup>

The European rules on information exchange and data protection have many facets. They cover the legal acts on information exchange between Member States, such as exchanges between prosecution authorities or the release of data from judicial records, but also the establishment of European databases such as Eurodac or the SIS. Other legal acts in this category contain rules on the processing of passenger name records or financial payment messaging data, which may be transmitted in some cases to non-EU countries such as the United States.

Criminal offences which are often committed across national borders or which entail cross-border prosecution are the subject of the third category of EU legal acts. There are, for example, specific rules for organised crime, child pornography, human-trafficking, illegal trade in firearms and attacks on information systems.

Other legal acts that also apply to the United Kingdom deal with the establishment and structure of EU agencies or bodies. In the realms of police cooperation and judicial cooperation in criminal matters, their subjects include the Eurojust and Europol agencies and the European Police College (CEPOL).

The last category of legal acts of the Union relating to police cooperation or judicial cooperation in criminal matters contains instruments on the organisation of criminal proceedings and governs particular procedural rights. This category includes, for example, legal acts on the standing of victims in criminal proceedings, on interpretation in criminal proceedings, on the European Investigation Order and on the European Protection Order.

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<sup>24</sup> Zeder, Fritz, 'Justizielle Zusammenarbeit in Strafsachen nach dem Ende der Übergangsperiode: Normalität und Sonderfälle', in *Europarecht*, 2015, pp. 487-497, esp. p. 493.

<sup>25</sup> *Ibid.*

<sup>26</sup> For a detailed treatment of the arrest warrant, see Burchard, Christoph, section 14 – extradition (in German), in Böse, Martin (ed.), *Europäisches Strafrecht mit polizeilicher Zusammenarbeit*, 2013, paragraph 7.

### 2.2.3.2. Special areas of police cooperation and judicial cooperation in criminal matters

The following presentation serves to provide a concluding summary on specific fields of law pertaining to police cooperation and judicial cooperation in criminal matters in which the participation of the United Kingdom is subject to special rules or is particularly variable.

#### 2.2.3.2.1. Special cases: Schengen

As outlined above,<sup>27</sup> the United Kingdom is not part of the Schengen system. It did, however, decide, back in 2000, to adopt certain parts of the Schengen *acquis* relating to police and judicial cooperation in criminal matters.<sup>28</sup> These provisions from the Schengen *acquis* that also apply to the UK include rules in the realm of police cooperation, judicial assistance in criminal matters and transfer of the execution of criminal judgments as well as on narcotic drugs, data protection and the Schengen Information System (SIS). Many of these rules from the Schengen Agreement<sup>29</sup> and the Convention implementing the Schengen Agreement<sup>30</sup> have now been supplemented, amended or superseded by EU legal acts.<sup>31</sup>

The United Kingdom is not a party to other EU legal acts based on the Schengen *acquis*.<sup>32</sup> Even its involvement in the Schengen Information System (SIS), for instance, is limited to information pertaining to police cooperation and judicial cooperation in criminal matters, such as alerts in respect of persons wanted for arrest for surrender or extradition purposes, alerts on missing persons, alerts on persons sought to assist with a judicial procedure, alerts on persons and objects for discreet checks or specific checks and alerts on objects for seizure or use as evidence in criminal proceedings, as well as supplementary information and additional data connected with those alerts.<sup>33</sup> Conversely, the United Kingdom has

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<sup>27</sup> See section 2.1 above.

<sup>28</sup> Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*, OJ L 131 of 1 June 2000, p. 43, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000D0365&qid=1470216308686&from=EN>.

<sup>29</sup> Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239 of 22 September 2000, p. 13, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A42000A0922\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A42000A0922(01)).

<sup>30</sup> Convention implementing the Schengen Agreement of 14 June 1985 [...], OJ L 239 of 22 September 2000, p. 19, accessible at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922\(02\):en:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):en:HTML).

<sup>31</sup> Peers, Steve, *The UK and the Schengen system*, dated 3 December 2015, accessible at <http://ukandeu.ac.uk/the-uk-and-the-schengen-system/>.

<sup>32</sup> Peers, Steve, *EU Justice and Home Affairs Law*, third edition, 2011, p. 80.

<sup>33</sup> Article 1(3) of Council Implementing Decision (EU) 2015/215 of 10 February 2015 on the putting into effect of the provisions of the Schengen *acquis* on data protection and on the provisional putting into effect of parts of the provisions of the Schengen *acquis* on the Schengen Information System for the United Kingdom of Great Britain and Northern Ireland, OJ L 36 of 12 February 2015, p. 8, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D0215&from=EN>.

no access to data, which are also stored in the SIS, on nationals of non-EU states on whom alerts have been issued concerning refusal of entry or residence.<sup>34</sup>

#### 2.2.3.2.2. Special cases: Prüm

The instruments known as the Prüm Decisions include provisions on European police cooperation. The focus is on exchanges of information such as dactyloscopic, DNA and vehicle registration data. There are also rules on operational cooperation, for example through joint operations in connection with cross-border events.<sup>35</sup>The United Kingdom was a party to Prüm decisions 2008/615/JHA<sup>36</sup> und 2008/616/JHA,<sup>37</sup>through which most of the provisions of the international Prüm Convention were transformed into Union law.<sup>38</sup>It withdrew from these decisions, however, as part of the block opt-out of 2014 and did not recognise them again until 2016.<sup>39</sup>

#### 2.2.3.2.3. Special cases: Europol

As part of its opt-in following the block opt-out of 2014, the United Kingdom readopted only one legal act relating to Europol, namely Decision 2009/371/JHA establishing Europol.<sup>40</sup> All other legal acts concerning Europol are covered by the opt-out.<sup>41</sup>The UK has not yet opted into the new Europol Regulation,

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<sup>34</sup> Ryan, Bernard, *The EU's Borders: Schengen, Frontex and the UK*, dated 19 May 2016, accessible at <https://www.freemovement.org.uk/brexit-and-borders-schengen-frontex-and-the-uk/>.

<sup>35</sup> For a detailed treatment of the Prüm concept, see Kugelmann, Dieter, section 17 – European police cooperation (in German), in Böse, Martin (ed.), *Europäisches Strafrecht mit polizeilicher Zusammenarbeit*, 2013, paragraphs 96 *et seq.*

<sup>36</sup> Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210 of 6 August 2008, p. 1, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008D0615&from=EN>.

<sup>37</sup> Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA [...], OJ L 210 of 6 August 2008, p. 12, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008D0616&from=EN>.

<sup>38</sup> House of Lords – European Union Committee, 5th Report of Session 2015-16 – The United Kingdom's participation in Prüm, accessible at <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/66/66.pdf>.

<sup>39</sup> Commission Decision (EU) 2016/809 of 20 May 2016 on the notification by the United Kingdom of Great Britain and Northern Ireland of its wish to participate in certain acts of the Union in the field of police cooperation adopted before the entry into force of the Treaty of Lisbon and which are not part of the Schengen *acquis*, OJ L 132 of 21 May 2016, p. 105, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D0809&from=EN>.

<sup>40</sup> Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), OJ L 121 of 15 May 2009, p. 37, accessible at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:121:0037:0066:en:PDF>.

<sup>41</sup> House of Commons – Home Affairs Committee, Ninth Report of Session 2013-14 – Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision, paragraph 44, accessible at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/615/61502.htm>.

which means that its future position on Europol is unclear.<sup>42</sup> Under Article 4 of Protocol No 21 to the Treaty of Lisbon, it is possible in principle for the UK to notify the Council and the Commission that it wishes to participate in a legal act even after its adoption in the Union framework. Should the UK choose not to exercise this option, it is questionable whether Decision 2009/371/JHA would still apply to it.

Under Article 75(1) of the new Europol Regulation (Regulation (EU) No 2016/794),<sup>43</sup> Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA are replaced with effect from 1 May 2017 for the Member States bound by the new Regulation. Unless the UK gives notice of its intention to apply the new Regulation, it will not be bound by the new instrument, that is to say the existing legal acts will not be replaced by the new Regulation. In these circumstances, it is questionable whether the old legal position would continue to apply.<sup>44</sup> The Home Affairs Committee of the UK House of Commons seems to assume that the UK will withdraw from Europol if it does not adopt the new Europol Regulation. In its report, the Committee states that, "*If the UK withdrew from Europol, whether as a result of not opting into the current Council Decisions, or the subsequent new Regulation, one option would be for it to maintain a role using the model currently used for Frontex [...]*".<sup>45</sup> What seems to make an exit likely is the wording of the second subparagraph of Article 75(1) of the new Europol Regulation, which reads, "*Therefore, Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA are repealed with effect from 1 May 2017*". On the other hand, the wording of the first subparagraph of Article 75(1) to the effect that the old legal acts concerning Europol are replaced for the Member States bound by the new Regulation suggests that these old acts are not replaced for the other Member States, in other words those that are not bound by the new Regulation, and so can still be applied.<sup>46</sup> Another argument for the continuing application of Decision 2009/371/JHA to the United Kingdom could be based on the use of the word 'therefore' in the second subparagraph of Article 75(1), meaning that the old decisions will be repealed on account of their having been replaced by the new Regulation.

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<sup>42</sup> Peers, Steve, Statewatch analysis – *The UK opt in to pre-Lisbon EU criminal law*, accessible at <http://www.statewatch.org/analyses/no-250-uk-opt-in.pdf>.

<sup>43</sup> Regulation (EU) No 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, OJ L 153 of 24 May 2016, p. 35, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0794&from=EN>.

<sup>44</sup> On this question, see Peers, Steve, Statewatch analysis – *The UK opt in to pre-Lisbon EU criminal law*, accessible at <http://www.statewatch.org/analyses/no-250-uk-opt-in.pdf>.

<sup>45</sup> House of Commons – Home Affairs Committee, Ninth Report of Session 2013-14 – Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision, paragraph 47, accessible at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/615/61502.htm>.

<sup>46</sup> This question is addressed in another context by Peers, in 'Mission accomplished? EU justice and home affairs law after the Treaty of Lisbon', in *Common Market Law Review*, Vol. 48 (2011), pp. 661-693, esp. p. 691.



### 2.3. Present status of the United Kingdom in other fields of justice and home-affairs legislation

Besides police cooperation and judicial cooperation in criminal matters, the field of justice and home affairs in the EU also includes the external borders, asylum policy, immigration policy and judicial cooperation in civil matters. In these domains too, the United Kingdom has been entitled, since the entry into force of the Treaty of Amsterdam, to take individual decisions for or against participation in legal acts of the European Union.

#### 2.3.1. External borders and Frontex

The United Kingdom has never recognised the cornerstone of the Schengen *acquis*, namely the abolition of national border controls at common internal frontiers, and has not been party to the relevant provisions.<sup>47</sup> It does, however, have the option to apply particular parts of the Schengen *acquis*, subject to the unanimous approval of the Council. It has exercised this option to some extent in the realms of police cooperation and judicial cooperation in criminal matters.

As regards other parts of the Schengen *acquis*, by contrast, participation by the United Kingdom has been precluded. The UK and Ireland, for example, have been prohibited from taking part in Regulation (EC) No 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States, in Regulation (EC) No 2007/2004 establishing Frontex and in Decision 2008/633/JHA concerning access for consultation of the Visa Information System (VIS) by the other Member States, which, under Protocol No 19, must approve in the Council a UK opt-in to any part of the Schengen *acquis*.<sup>48</sup> The European Court of Justice found this to be legitimate, holding in the case of the Frontex Regulation, for example, that the Regulation represented a measure developing provisions of the Schengen *acquis* in an area which the United Kingdom did not accept and that the Council had therefore been right to refuse to authorise the UK to take part in the adoption of the Frontex Regulation.<sup>49</sup> In academic literature the case law of the ECJ has led to the assessment that judges were quick to see measures relating to border controls as developments of the Schengen *acquis* and that the scope for the United Kingdom to opt into these measures is therefore subject to Protocol No 19.<sup>50</sup> The right of the United Kingdom to opt into the Schengen *acquis* under Protocol No 19 differs from its opt-in right under Protocol No 21, because opting into a measure on the basis of Article 4(2) is conditional upon the unanimous approval of the Council. According to Article 3(1) of Protocol No 21, on the other hand, an opt-in based on the latter Protocol requires only notification by the UK that it wishes to take part in the adoption and application of a particular measure.

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<sup>47</sup> Protocol integrating the Schengen *acquis* into the framework of the European Union, OJ C 340 of 10 November 1997, p. 93, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11997D/TXT&from=EN>.

<sup>48</sup> Tekin, Funda, 'Opt-Outs, Opt-Ins, Opt-Arounds? Eine Analyse der Differenzierungsrealität im Raum der Freiheit, der Sicherheit und des Rechts', in *integration*, 2012, pp. 237-257, esp. p. 251.

<sup>49</sup> ECJ judgment of 18 December 2007 in Case C-77/05 *United Kingdom v Council*, [2007], ECLI:EU:C:2007:803, points 70-71 and 85-86.

<sup>50</sup> Weiss, Wolfgang, and Satzger, Helmut, on Article 67 TFEU (in German), in Streinz, Rudolf, *EUV/AEUV*, second edition, 2012, paragraph 51.



The rules governing cooperation between the United Kingdom and Frontex have been laid down by the Frontex Regulation<sup>51</sup> itself. Under Article 12(1) of the Frontex Regulation, the Agency is to facilitate operational cooperation of the Member States with Ireland and the United Kingdom in matters covered by its activities and to the extent required for the fulfilment of its tasks. According to Article 12(2) of the Regulation, the support to be provided by the Agency includes the organisation of joint return operations of Member States in which Ireland or the United Kingdom, or both, also participate. Should Ireland and/or the United Kingdom request to participate in any of the Agency's activities, Article 20(5) prescribes that the Frontex Management Board is to decide whether to accede to the request. To this end, the Board examines whether the participation of the requesting state would contribute to the execution of the relevant measure. The decision also sets the financial contribution to be made by Ireland and/or the UK to the measure to which the participation request relates. In practice, the UK frequently takes part in Frontex operations.<sup>52</sup> Pursuant to Article 23(4) of the Frontex Regulation, Ireland and the United Kingdom are invited to attend the meetings of the Management Board.

### 2.3.2. Asylum law

In matters relating to the Common European Asylum System, the United Kingdom adopted the legal acts developing the Schengen *acquis* which are regarded collectively as the first phase of European asylum legislation; these include the Dublin Regulation (Regulation (EC) No 343/2003), the Qualification Directive (Directive 2004/83/EC), the Procedures Directive (Directive 2004/83/EC) and the Reception Conditions Directive (2003/9/EC). Between 1999 and 2004, the United Kingdom took part in all EU legal acts concerning asylum.<sup>53</sup> In the second phase, however, when these legal acts were recast, it decided against participation.<sup>54</sup> Only in respect of the new Dublin III Regulation (Regulation (EU) No 604/2013)<sup>55</sup> has the United Kingdom given notice of a wish to participate in the adoption and application of any of the recast legal acts. In academic literature the view is expressed that the old legal acts, in other words the first-

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<sup>51</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349 of 25 November 2004, p. 1, consolidated version accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02004R2007-20140717&from=EN>.

<sup>52</sup> Ryan, Bernard, *The EU's Borders: Schengen, Frontex and the UK*, dated 19 May 2016, accessible at <https://www.freemovement.org.uk/brexit-and-borders-schengen-frontex-and-the-uk/>.

<sup>53</sup> Geddes, Andrew, 'Getting the best of both worlds? Britain, the EU and migration policy', in *International Affairs* Vol. 81 (2005), pp. 723-740, esp. p. 734.

<sup>54</sup> Costello, Cathryn, and Hancox, Emily, *Policy Primer – The UK, the Common European Asylum System and EU Immigration Law*, dated 2 May 2014, accessible at [http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/UK\\_EU\\_Asylum\\_Law\\_0.pdf](http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/UK_EU_Asylum_Law_0.pdf).

<sup>55</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180 of 29 June 2013, p. 31, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=en>.

generation Qualification, Procedures and Reception Conditions Directives still apply to the United Kingdom because they have not been replaced by the new acts.<sup>56</sup>

### 2.3.3. Immigration law

The United Kingdom has decided against opting into many measures relating to immigration.<sup>57</sup> For example, neither Directive 2009/50/EC, known as the Blue Card Directive, nor the Family Reunification Directive (Directive 2003/86/EC) nor Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents applies to the United Kingdom. The UK has, on the other hand, opted to participate in legal acts that serve to combat and prevent illegal immigration, such as Directive 2001/51/EC, which harmonises financial penalties for carriers transporting foreign nationals illegally into the territory of Member States.

The United Kingdom has not adopted Directive 2008/115/EC – the Return Directive – which means that no part of this Directive is binding on or applicable in the UK. The United Kingdom has, on the other hand, acceded to some of the readmission agreements that the EU has concluded with various states,<sup>58</sup> such as the Readmission Agreement with Pakistan<sup>59</sup>, but not to the Readmission Agreement with Turkey.<sup>60</sup>

### 2.3.4. Judicial cooperation in civil matters

When the Treaty of Amsterdam was concluded, the United Kingdom and Ireland declared their intention to take part, in general, in the adoption of legal acts concerning judicial cooperation in civil matters.<sup>61</sup> At first the two states did actually opt into all EU legal acts relating to judicial cooperation in civil matters.<sup>62</sup>

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<sup>56</sup> Guild, Elspeth, *The UK Referendum on the EU and the Common European Asylum System*, dated 29 April 2016, accessible at <https://www.freemovement.org.uk/brexit-and-the-common-european-asylum-system/>; Costello and Hancox, *op. cit.*; Peers, Steve, *EU Justice and Home Affairs Law*, third edition, 2011, pp. 83 *et seq.*

<sup>57</sup> On this point, see Costello and Hancox, *op. cit.*; Carrera, Sergio, Guild, Elspeth, and Luk, Ngo Chun, *What does Brexit mean for the EU's Area of Freedom, Security and Justice?*, CEPS commentary dated 11 July 2016, accessible at <https://www.ceps.eu/publications/what-does-brexit-mean-eu%E2%80%99s-area-freedom-security-and-justice>.

<sup>58</sup> Costello and Hancox, *op. cit.*; Geddes, *op. cit.*, p. 735.

<sup>59</sup> Council Decision 2010/649/EU of 7 October 2010 on the conclusion of the Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation, OJ L 287 of 4 November 2010, p. 50, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010D0649&from=EN>.

<sup>60</sup> Council Decision 2014/252/EC of 14 April 2014 on the conclusion of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, OJ L 134 of 7 May 2014, p. 1, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0252&from=EN>.

<sup>61</sup> Lenzing, Katja, on Article 81 TFEU (in German), in Groeben, Hans von der, Schwarze, Jürgen, and Hatje, Armin, *Europäisches Unionsrecht*, seventh edition, 2015, paragraph 20.

<sup>62</sup> Stumpf, Cordula, on Article 81 TFEU (in German), in Schwarze, Jürgen (ed.), *EU-Kommentar*, third edition, 2012, paragraph 5.

In 2005, the United Kingdom had reservations about the proposed Rome I Regulation. The British opt-in was not declared until after the negotiations, when an acceptable outcome for the UK had been achieved.<sup>63</sup> Similarly, in the case of the Maintenance Regulation (Regulation (EC) No 4/2009), the UK did not give notice of its participation in the application of the legal act until it had been adopted.<sup>64</sup> The Succession Regulation (Regulation (EU) No 650/2012) does not apply in the United Kingdom, nor does the UK or Ireland participate in the legal acts of the EU relating to maintenance and divorce.<sup>65</sup>

### 3. Position of the United Kingdom since the referendum

The United Kingdom EU membership referendum of 23 June 2016 did not relate to specific issues in the realm of justice and home affairs but the general question whether the United Kingdom should remain in the European Union. This referendum is not legally binding on the constitutional organs of the United Kingdom.<sup>66</sup> The referendum itself does not change the status of the UK in EU law as a member of the Union.<sup>67</sup> Such change cannot come about until the United Kingdom has notified the EU of its wish to begin withdrawal negotiations under Article 50 TEU or has actually withdrawn.<sup>68</sup> It has not yet given any such notice.

### 4. Position of the United Kingdom after a notification under Article 50 TEU

Even after the United Kingdom had notified its intention to withdraw from the European Union in accordance with the first sentence of Article 50(2) TEU, the UK would remain a member of the EU until the date of entry into force of a withdrawal agreement or, in the absence of such agreement, two years after the date of notification. Under Article 50(3) TEU, Union legislation would cease to apply to the UK from the date of entry into force of the withdrawal agreement or two years after the notification date unless

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<sup>63</sup> Peers, Steve, *EU Justice and Home Affairs Law*, third edition, 2011, pp. 76-77.

<sup>64</sup> Recital 3 of Commission Implementing Regulation (EU) No 2015/228 of 17 February 2015 replacing Annexes I to VII to Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 49 of 20 February 2015, p. 1, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0228&from=EN>.

<sup>65</sup> Stumpf, *op. cit.*, paragraph 5.

<sup>66</sup> This is the prevalent opinion; see, for example Douglas-Scott, Sionaid, *Brexit, the Referendum and the UK Parliament: Some Questions about Sovereignty*, U.K. Constitutional Law Blog, dated 28 June 2016, accessible at <https://ukconstitutionallaw.org/2016/06/28/sionaidh-douglas-scott-brexit-the-referendum-and-the-uk-parliament-some-questions-about-sovereignty/>; Elliott, Mark, *Brexit – Legally and constitutionally, what now?*, Public Law for Everyone, dated 24 June 2016, accessible at <https://publiclawforeveryone.com/2016/06/24/brexit-legally-and-constitutionally-what-now/>.

<sup>67</sup> Accordingly, in legal terms the referendum has not altered the situation that obtained in the United Kingdom before the referendum. The political situation looks rather different, with the UK having already waived its right to the presidency of the Council in 2017, for example, and the British member of the Commission, Jonathan Hill, having resigned from his post.

<sup>68</sup> On this point, see, for example, Mayer, Franz, *Zwei Jahre sind nicht immer gleich zwei Jahre: wann beginnt der Brexit-Countdown?* Verfassungsblog – on Matters Constitutional, dated 26 June 2016, accessible at <http://verfassungsblog.de/franz-mayer-brexit-countdown/>.

the time limit for the withdrawal negotiations were extended. It follows that the United Kingdom, after notifying its intention, will remain a member of the EU in the first instance and will remain subject to the provisions of EU law.<sup>69</sup>The situation after the notification, in other words, will not differ from the situation in the aftermath of the referendum. No changes to EU law in general, or to EU justice and home-affairs legislation in particular, will initially result from the notification.

Nevertheless, once the notice has been given, the imminent exit from the EU will raise practical issues, which are outlined below. It must be pointed out that the following comments, in the absence of legal precedents, do not constitute a conclusive assessment of the legal position but merely legal appraisals, drawn from academic literature, of specific scenarios.

#### 4.1. Application of Union law by the United Kingdom

As a member of the EU, the United Kingdom will remain bound by the law of the Union after notifying its intention to withdraw under Article 50 TEU until its actual exit. In academic literature, however, legal scholars have been discussing whether the UK courts will apply EU law after the date of notification or whether they might begin to disregard the law of the Union.<sup>70</sup>Brexit supporters have also been discussing whether the United Kingdom could use national legislation to repeal Union law.<sup>71</sup>As explained above, the obligation of the United Kingdom to transpose and apply the law of the Union during the exit negotiations is that of a Member State of the EU. In principle, therefore, the domestic courts must apply Union legislation, and the UK Parliament is not empowered to repeal it.

#### 4.2. Participation in EU legislation

##### 4.2.1. Justice and home-affairs legislation

Under Article 1 of Protocol No 21, the United Kingdom does not take part in the adoption of measures relating to the area of freedom, security and justice, which encompasses the field of justice and home affairs, unless it gives notice, pursuant to Article 3 of Protocol No 21, that it wishes to take part. Once the

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<sup>69</sup> This was the gist of the Joint Statement made by the Presidents of the European Parliament, the European Council, the Council and the European Commission on 24 June 2016, accessible at [http://europa.eu/rapid/press-release\\_STATEMENT-16-2329\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-16-2329_en.htm).

<sup>70</sup> On this point, see Lienen, Christina, *Brexit and the Domestic Judiciary: Some Preliminary Thoughts on the Aftermath of Triggering Article 50*, UK Constitutional Law Blog dated 21 July 2016, accessible at <https://ukconstitutionallaw.org/2016/07/21/christina-lienen-brexit-and-the-domestic-judiciary-some-preliminary-thoughts-on-the-aftermath-of-triggering-article-50/>.

<sup>71</sup> For this to happen, the UK would have to repeal the European Communities Act (ECA) 1972, which governs the applicability of Union legislation in the domestic law of the United Kingdom. A petition with more than 31,000 signatories, for example, is calling for the immediate repeal of the ECA to trigger Brexit (<https://petition.parliament.uk/petitions/125333>). Suggestions have been posted on the homepage of a Brexit campaign as to how the application of EU law could be changed even before the official withdrawal ([http://www.voteleavetakecontrol.org/after\\_we\\_vote\\_leave\\_we\\_will\\_act\\_quickly\\_to\\_protect\\_national\\_security\\_and\\_save\\_money](http://www.voteleavetakecontrol.org/after_we_vote_leave_we_will_act_quickly_to_protect_national_security_and_save_money)).

United Kingdom notifies its intention to withdraw from the Union, it is hardly likely to declare any such opt-ins. Without such a declaration, the vote of the UK cannot affect an otherwise unanimous decision.<sup>72</sup>

If measures which are binding on the UK on the basis of an opt-in are amended, the amendment is not binding on the UK unless it makes another notification under Article 3(1) of Protocol No 21, of its intention to opt in.<sup>73</sup> In principle, the Council, acting on a proposal from the Commission, may, under Article 4a(2) of Protocol No 21, urge the UK to recognise an amendment to a measure as binding if the non-participation of the UK in the amended version of the measure would make the measure inoperable. In future, the Commission might refrain from making such proposals in view of the imminent withdrawal.

#### 4.2.2. Legislation relating to the Schengen *acquis*

The special features of legislation relating to the Schengen *acquis* for the United Kingdom are regulated in Protocol No 19 to the Treaty of Lisbon. In this sphere of Union legislation it must likewise be assumed that the United Kingdom will no longer wish to participate in the legislative process, for example in the Council working groups, once it has notified the European Council in accordance with Article 50 TEU of its intention to withdraw from the Union.

#### 4.2.3. Interim conclusion

After giving notice of its intention to withdraw from the EU, the United Kingdom might exercise its opt-out rights, particularly with regard to Schengen and to justice and home affairs, to refrain from or cease participating in legislative processes. It is impossible to gauge, however, whether this will happen and, if it does, to what extent these rights will be exercised.

#### 4.3. Participation in the work of agencies

Until its withdrawal, the United Kingdom will remain a member of the EU; as such, it is involved in the work of the EU agencies in the realm of justice and home affairs to which it signed up by exercising its opt-in right.

It is possible, however, that a new Director of Europol will be elected even before the United Kingdom leaves the Union. The term of office of British Director Rob Wainwright ends in 2017, and the new Director will then be elected under the rules of the new Europol Regulation. According to the civil-service monthly newspaper *Behörden Spiegel*, it is considered unlikely that Wainwright or any other Briton will be appointed.<sup>74</sup>

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<sup>72</sup> Article 3(1), second subparagraph, of Protocol No 21.

<sup>73</sup> Article 4a(1) of Protocol No 21.

<sup>74</sup> [http://www.behörden-spiegel.de/icc/Internet/nav/1f7/broker.jsp?uCon=8b546576-d25b-5517-77ad-4277b988f2ee&uTem=aaaaaaaa-aaaa-aaaa-bbbb-000000000003&uMen=1f75009d-e07d-f011-4e64-494f59a5fb42&ic\\_print=true](http://www.behörden-spiegel.de/icc/Internet/nav/1f7/broker.jsp?uCon=8b546576-d25b-5517-77ad-4277b988f2ee&uTem=aaaaaaaa-aaaa-aaaa-bbbb-000000000003&uMen=1f75009d-e07d-f011-4e64-494f59a5fb42&ic_print=true).

## 5. Models of EU cooperation with non-member states

The following chapter examines existing models of cooperation with ‘third countries’ (non-EU states) in the field of justice and home affairs.<sup>75</sup> It should be emphasised that the presentation of potential models does not imply any assessment as to whether and to what extent these models are considered to be likely scenarios for the United Kingdom. In the exit negotiations, the UK is expected to reach agreements with the EU on future cooperation.<sup>76</sup> The objectives of the United Kingdom in this respect are still unclear.

### 5.1. Legal framework for EU cooperation with non-EU states

The area of justice and home affairs is regulated in Articles 67 *et seq.* of the Treaty on the Functioning of the European Union (TFEU) under the heading *Area of freedom, security and justice*. Those articles contain provisions on border controls, asylum, immigration, judicial cooperation in civil matters and in criminal matters and police cooperation. The rules set out in Articles 67 *et seq.* TFEU are regarded as EU law for Member States only, while exemptions currently exist for individual Member States, namely Denmark, Ireland and the United Kingdom.

The relations of the EU with non-EU states, such as Switzerland, Norway or Turkey, cannot be governed by Union legislation, and so international agreements have to be concluded between such states and the EU.

In the realm of justice and home affairs, there are two particularly important areas in which agreements are concluded between the EU and external states. These are the Schengen *acquis* and the Dublin asylum procedure. The Schengen *acquis* covers the abolition of border controls and accompanying compensatory measures.<sup>77</sup> Examples of cooperation in these areas are exchanges of information between the police authorities of Member States and the pursuit of a common policy on a short-term visa, the Schengen visa, which is valid for three months, as well as close cooperation between consular authorities, for example in combating document forgery, enhanced judicial assistance in criminal matters and close cooperation between prosecuting authorities in cases with foreign connections. The Dublin procedure regulates jurisdiction for the examination of asylum applications. Cooperation between the EU and external states also takes place in the sphere of judicial cooperation in civil matters. Norway, for example, is a party to the Lugano Convention,<sup>78</sup> which, in tandem with Regulation (EC) No 44/2001, lays down rules governing

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<sup>75</sup> On the models for future economic relations between the EU and the United Kingdom, see also the EU overview *Ökonomische Aspekte eines EU-Austritts der Vereinigten Königreichs (Brexit)* of 27 June 2016, produced by Division PE 2 of the Bundestag Administration, pp. 6-7.

<sup>76</sup> Thiele, Alexander, ‘Der Austritt aus der EU – Hintergründe und rechtliche Rahmenbedingungen eines „Brexit“’, in *Europarecht*, 2016, pp. 281-303, esp. pp.299-300.

<sup>77</sup> Röben, Volker, on Article 67 TFEU, in Grabitz, Eberhard, Hilf, Meinhard, and Nettesheim, Martin, *Das Recht der EU*, 53rd supplement, May 2014, paragraph 145.

<sup>78</sup> Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339 of 21 December 2007, p. 3, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2007.339.01.0001.01.ENG&toc=OJ:L:2007:339:TOC#L\\_2007339EN.01000301](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2007.339.01.0001.01.ENG&toc=OJ:L:2007:339:TOC#L_2007339EN.01000301).



jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The present study will not go into any further detail regarding cooperation in civil matters.

The focus in the following paragraphs will be on the Union's relations with Norway<sup>79</sup> and Switzerland as examples of models used by the EU for its cooperation with external states, since these particular countries have concluded agreements with the EU on cooperation in the field of justice and home affairs.

## 5.2. Relations with Norway

Compared with EU cooperation with Switzerland, cooperation between the EU and Norway is based on a relatively small number of formal agreements. The main agreements relating to justice and home affairs are listed below.

Two agreements regulate Norway's association with the implementation, application and development of the Schengen *acquis*<sup>80</sup> and with the application of the Dublin procedure in the field of asylum law.<sup>81</sup> For areas not covered by the Schengen *acquis*, additional agreements have had to be negotiated,<sup>82</sup> such as the agreement between the EU and Norway on the Prüm Decisions. When new EU agencies have been created, Norway has also concluded agreements on cooperation with them, examples being the arrangements on participation in the work of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)<sup>83</sup> in the Schengen

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<sup>79</sup> In most cases, the EU-Norway agreements referred to here also apply to Iceland.

<sup>80</sup> Agreement of 18 May 1999 concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*, OJ L 176 of 10 July 1999, p. 36, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.1999.176.01.0036.01.ENG&toc=OJ:L:1999:176:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1999.176.01.0036.01.ENG&toc=OJ:L:1999:176:TOC).

<sup>81</sup> Agreement of 19 January 2001 between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway, OJ L 93 of 3 April 2001, p. 40, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2001.093.01.0040.01.ENG&toc=OJ:L:2001:093:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2001.093.01.0040.01.ENG&toc=OJ:L:2001:093:TOC).

<sup>82</sup> Windwehr, Jana, *Außenseiter oder Wegweiser? – Norwegen und die Schweiz im europäischen Integrationsprozess*, 2011, pp. 158-159.

<sup>83</sup> Arrangement of 1 February 2007 between the European Community and the Republic of Iceland and the Kingdom of Norway on the modalities of the participation by those States in the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 188 of 20 July 2007, p. 19, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2007.188.01.0017.01.ENG&toc=OJ:L:2007:188:TOC#L\\_2007188DE.01001901](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2007.188.01.0017.01.ENG&toc=OJ:L:2007:188:TOC#L_2007188DE.01001901).

domain and of the European Asylum Support Office (EASO).<sup>84</sup>Norway has concluded agreements directly with Eurojust and Europol.<sup>85</sup>

#### 5.2.1. Agreement on Norway's association with the implementation, application and development of the Schengen *acquis*

The Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis* takes account of the fact that the Schengen Agreement was originally an international agreement and is now part of the law of the European Union.<sup>86</sup>

##### 5.2.1.1. Transposition of Union legislation into Norwegian law

Under Article 2(1) of the Schengen Association Agreement with Iceland and Norway, Norway must transpose and apply the provisions listed in Annex A to the Agreement. Annex A provides precise details as to which parts of the Schengen Agreement of 1985, the Convention of 1990 implementing the Schengen Agreement and the legal acts derived from those instruments must be transposed and applied. Norway is thus under an obligation to adopt the international contractual rules of the Schengen agreements. Article 2(2) of the Association Agreement requires Norway to adopt the legal acts relating to the Schengen agreements which are listed in Annex B. This means that Norway is also bound to adopt the Schengen *acquis* as enshrined in the law of the European Union.

If the EU adopts amendments in the areas covered by Article 2(1) and (2) of the Association Agreement, Article 2(3) stipulates that Norway must accept, transpose and apply those amendments. Under Article 8(2)(a) of the Agreement, the Council is to notify Norway immediately of the adoption of any new acts or measures. Norway then decides whether to accept their content and to transform them into its internal legal order. If Norway does not accept such amendments, Article 8(4) specifies that the Agreement will be considered terminated in respect of Norway within a fixed period of time. Similarly, if the Norwegian courts and the European Court of Justice should differ in their interpretations of the Agreement and if the Mixed Committee,<sup>87</sup> meeting at the level of ministers, cannot find a solution, the Agreement is terminated pursuant to the second subparagraph of Article 11(3).

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<sup>84</sup> Arrangement between the European Union and the Kingdom of Norway on the modalities of its participation in the European Asylum Support Office, OJ L 109 of 12 April 2014, p. 3, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22014A0412\(01\)&qid=1470729398605&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22014A0412(01)&qid=1470729398605&from=EN).

<sup>85</sup> Agreement of 24 December 2001 between the Kingdom of Norway and the European Police Office, accessible at <https://www.europol.europa.eu/content/agreement-between-kingdom-norway-and-european-police-office>; Agreement of 28 April 2005 between the Kingdom of Norway and Eurojust, accessible at <http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/agreements/Agreement%20Eurojust-Norway%20%282005%29/Eurojust-Norway-2005-04-28-EN.pdf>.

<sup>86</sup> Cf. the second and fifth recitals of the Schengen Association Agreement with Iceland and Norway.

<sup>87</sup> See point 5.2.1.2 below.



This means that Norway, on concluding the Schengen Association Agreement with the EU, incurred an obligation not only to adopt existing legislation but also to transpose and apply new Union legislation adopted after the conclusion of the Agreement. Even the case law of the ECJ must be observed, since the Agreement will otherwise be regarded as terminated. From a legal point of view, Norway is not bound by new EU legislation in international law until it has notified its acceptance of the acts in question.<sup>88</sup> Under Article 16, moreover, the Agreement may be denounced by any party at any time.

The substance of the Schengen *acquis* covered by the Association Agreement is very extensive and can scarcely be compared with the limited body of Schengen rules adopted by the United Kingdom. Norway is bound by the Schengen Agreement of 1985 with no exemptions. All of the main elements of the Implementing Convention of 1990 have to be adopted. Significant exemptions exist with regard to the asylum system, but that system is regulated through the Dublin procedure. Minor exemptions apply in the realm of border controls, for example, in respect of narcotic drugs. In addition, under the terms of Article 60 of the Convention Implementing the Schengen Agreement, application of the European Convention on Extradition is not part of the Schengen *acquis* for Norway.

#### 5.2.1.2. Cooperation in the Mixed Committee

The Schengen Association Agreement with Iceland and Norway established a Mixed Committee. This comprises the members of the Council of the European Union as well as representatives of Norway, Iceland and the European Commission.<sup>89</sup> Under Article 4(2) and (4) of the Agreement, Norwegian representatives may make suggestions and representations on planned legal acts of the EU. Under Article 6 of the Agreement, the Commission is to seek advice from Norwegian experts when drafting new legislation in the same way as it seeks the advice of experts from the Member States. The first sentence of Article 8(1) of the Agreement, however, excludes Norway from voting on the adoption of new EU legislation.<sup>90</sup>

#### 5.2.1.3. Cooperation in Frontex

Since the Frontex Regulation constitutes a development of the Schengen *acquis*, recital 23 of the Frontex Regulation states that Norway is to be represented on the Management Board of Frontex. The EU and Norway have concluded an Arrangement containing provisions to this effect.<sup>91</sup> Under Article 1(2) of this Arrangement, Norway has the right to vote when the Administrative Board decides on particular matters, such as specific activities to be carried out at Norway's external border or in its vicinity. Norway

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<sup>88</sup> Article 8(3) of the Schengen Association Agreement with Iceland and Norway.

<sup>89</sup> *Ibid.*, Article 3(1).

<sup>90</sup> Cf., for example, Piris, Jean-Claude, *If the UK votes to leave : the seven alternatives to EU membership*, Centre for European Reform, London, January 2016, p. 6, accessible at [http://www.cer.org.uk/sites/default/files/pb\\_piris\\_brexit\\_12jan16.pdf](http://www.cer.org.uk/sites/default/files/pb_piris_brexit_12jan16.pdf).

<sup>91</sup> Arrangement of 1 February 2007 between the European Community and the Republic of Iceland and the Kingdom of Norway on the modalities of the participation by those States in the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 188 of 20 July 2007, p. 19, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2007.188.01.0017.01.ENG&toc=OJ:L:2007:188:TOC#L\\_2007188EN.01001901](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2007.188.01.0017.01.ENG&toc=OJ:L:2007:188:TOC#L_2007188EN.01001901).

even has a right to veto such activities.<sup>92</sup> In other matters Norway has straightforward voting rights, but it cannot vote on matters in areas that are not listed.

#### 5.2.2. Agreement concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum (Norwegian/Icelandic Dublin Application Agreement)

In the view of the parties to the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway, the Agreement was necessitated by the abolition of borders resulting from the Schengen rules.<sup>93</sup> As in the case of the agreement on the Schengen *acquis*, consideration had to be given in this Agreement to the fact that provisions of international treaty law, in the form of the Dublin Convention of 1990<sup>94</sup> had been integrated into the law of the Union.

##### 5.2.2.1. Transposition of Union legislation into Norwegian law

In Article 1(1) of the Norwegian/Icelandic Dublin Application Agreement, Norway undertakes to implement and apply the provisions of the Dublin Convention, with the exception of Articles 16 to 22, as well as the legal acts listed in the Annex to the Agreement which have been adopted by the committee established by Article 18 of the Dublin Convention. Under Article 4(1) and (2) of the Agreement, Norway also applies new legal acts adopted by the said committee. In addition, Norway must accept new legal acts of the EU adopted in accordance with Article 2(1) and (3) of the Agreement, taken in conjunction with Article 4, that form part of the Dublin legislation as well as the decisions adopted by the Committee. This is the basis on which Norway adopted the current Dublin III Regulation,<sup>95</sup> which replaces the Dublin Convention. If Norway is unable or unwilling to implement a legal act adopted by the EU or the Committee, Article 4(6) of the Agreement of 19 January 2001 on the establishment of asylum jurisdiction (the Norwegian/Icelandic Dublin Application Agreement) stipulates that the Agreement will be considered suspended. If the Joint Committee<sup>96</sup> cannot find a way to resolve the problem, the Agreement will be considered terminated under Article 4(7) after a fixed period has elapsed. In the event of a substantial difference between the case law of the ECJ and that of the Norwegian courts, the Agreement will be considered

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<sup>92</sup> Under the second sentence of Article 1(2)(a) of the Arrangement, these activities are subject to the approval of the Norwegian representative.

<sup>93</sup> This view is reflected in Article 7 of the Schengen Association Agreement and in recitals 1 and 2 of the Agreement of 19 January 2001 on the establishment of asylum jurisdiction.

<sup>94</sup> Convention of 15 June 1990 determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, OJ C 254 of 19 August 1997, p. 1, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41997A0819\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41997A0819(01)&from=EN).

<sup>95</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180 of 29 March 2013, p. 31, accessible at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32013R0604>.

<sup>96</sup> See point 5.2.2.2 below.

terminated under Article 7(2) unless a solution is found by the Joint Committee. Under Article 15, moreover, the Agreement may be denounced by any party at any time.

The Agreement makes specific reference to the Data Protection Directive<sup>97</sup> and the Eurodac Regulation.<sup>98</sup> Under Article 1(3) of the Agreement, the provisions of the EU Data Protection Directive must be implemented and applied, *mutatis mutandis*, by Norway when it applies the Agreement. In addition, Article 1(5) of the Agreement specifies that the Agreement will apply to the Eurodac Regulation.

Norway has no voting rights when new legal acts of the EU are adopted. Under Article 2(2) to (4) of the Agreement, however, it may take part, through the Joint Committee, in deliberations during the legislative process.

#### 5.2.2.2. Cooperation in the Joint Committee

The Norwegian/Icelandic Dublin Application Agreement establishes a Joint Committee, which, under Article 3(1), consists of representatives of the Contracting Parties. Article 2(5) of the Agreement authorises the representatives of Norway to make suggestions and representations on legislative proposals of the EU. Pursuant to Article 2(1), (6) and (7), when new legal provisions are being drafted, the same consideration is to be given to the views of experts from Norway as is given to the views of experts from Member States.

#### 5.2.2.3. Cooperation in EASO

The European Asylum Support Office (EASO) was established by Regulation (EU) No 439/2010.<sup>99</sup> Under Article 49(1) of that Regulation, Norway, as an associate country for the purposes of the Dublin Convention, is to participate in EASO as an observer. Accordingly, Article 2 of an Arrangement between the EU

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<sup>97</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23 November 1995, p. 31, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31995L0046&from=EN>. This Directive was repealed by Regulation (EU) No 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119 of 4 May 2016, p. 1, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R0679>.

<sup>98</sup> Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316 of 15 December 2000, p. 1, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000R2725>. This Regulation was repealed by Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 [...] (recast), OJ L 180 of 29 June 2013, p. 1, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0603>.

<sup>99</sup> Regulation (EU) No 439/2010 of the European Parliament and of the Council establishing a European Asylum Support Office, OJ L 132 of 29 May 2010, p. 11, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010R0439&from=EN>.

and Norway regarding EASO<sup>100</sup> lays down that Norway is to be represented on the Management Board of the Support Office as an observer without the right to vote.

### 5.2.3. Norway's two agreements with Europol and Eurojust

Europol and Eurojust are two major EU agencies in the spheres of police cooperation and judicial cooperation in criminal matters. Europol has its legal basis in Article 88 TFEU, and its purpose is police cooperation. Eurojust is based on Article 85 TFEU and is dedicated to judicial cooperation in criminal matters. As EU agencies, they are legally independent<sup>101</sup> and can therefore conclude their own agreements with Norway.

The purpose of the agreements with Europol and Eurojust is to enhance the cooperation between Norway and those agencies,<sup>102</sup> particularly in terms of the exchange of information.<sup>103</sup> Great importance also attaches to data security, given the fact that the protection of personal data is one of the fundamental rights enshrined in EU law. In the Europol Agreement with Norway, the level of data security required by Article 25 of the Europol Convention concluded by the EU Member States in 1995 is set as the protection standard. Norway must ensure that its data security matches that standard.<sup>104</sup> The later agreement between Norway and Eurojust requires Norway to guarantee a level of protection at least equivalent to that prescribed by the Council of Europe Convention of 28 January 1981<sup>105</sup> and subsequent amendments thereto.<sup>106</sup> Norway is also bound to adhere to the principles and rules set out in Council Decision 2002/187/JHA setting up Eurojust.<sup>107</sup> By adopting these rules, Norway is submitting to European legal standards for the protection of data security so that it can participate in exchanges of data.

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<sup>100</sup> Arrangement between the European Union and the Kingdom of Norway on the modalities of its participation in the European Asylum Support Office, OJ L 109 of 12 April 2014, p. 3, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22014A0412\(01\)&qid=1470729398605&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22014A0412(01)&qid=1470729398605&from=EN).

<sup>101</sup> Calliess, Christian, on Article 13 TEU (in German) in Calliess, Christian, and Ruffert, Matthias, *EUV/AEUV*, fifth edition, 2016, paragraph 38; see also Commission Communication COM(2002) 718 final, p. 3, accessible at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0718:FIN:EN:PDF>.

<sup>102</sup> Article 2 of the Agreement between the Kingdom of Norway and Eurojust and Article 2 of the Agreement between the Kingdom of Norway and the European Police Office.

<sup>103</sup> Cf. Article 3 of the Agreement between the Kingdom of Norway and Eurojust and Article 4 of the Agreement between the Kingdom of Norway and the European Police Office.

<sup>104</sup> Article 9(3) of the Agreement between the Kingdom of Norway and the European Police Office.

<sup>105</sup> Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, accessible at <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/rms/0900001680078b38>.

<sup>106</sup> Article 12(1) of the Agreement between the Kingdom of Norway and Eurojust.

<sup>107</sup> Articles 12(2), 13(2), 14, 15 and 16 of the Agreement between the Kingdom of Norway and Eurojust.

Besides data security, the two agreements also provide for cooperation through liaison officers. Norway has one liaison prosecutor at Eurojust and one liaison officer at Europol.<sup>108</sup> In accordance with Article 15 of its agreement with Norway, Europol also has a liaison officer stationed with the competent Norwegian authorities. Disputes relating to the agreements are settled by an arbitration tribunal.<sup>109</sup> Both agreements provide for three months' notice of termination.<sup>110</sup>

#### 5.2.4. Specific cooperation in the realms of police cooperation and judicial cooperation in criminal matters

##### 5.2.4.1. Participation in SIS II

Norway has access to the second-generation Schengen Information System (SIS II).<sup>111</sup> This access derives from the fact that the SIS is part of the Schengen *acquis*,<sup>112</sup> in which Norway participates.

##### 5.2.4.2. European Criminal Records Information System

The Member States of the EU take part in ECRIS, the European Criminal Records Information System, which gives them access to information on convictions recorded against their own nationals in other Member States.<sup>113</sup> Norway does not have access to this system and therefore has to rely on the European

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<sup>108</sup> Article 5 of the Agreement between the Kingdom of Norway and Eurojust and Article 14 of the Agreement between the Kingdom of Norway and the European Police Office.

<sup>109</sup> Article 18 of the Agreement between the Kingdom of Norway and Eurojust and Article 17 of the Agreement between the Kingdom of Norway and the European Police Office.

<sup>110</sup> Article 19(1) of the Agreement between the Kingdom of Norway and Eurojust and Article 18(1) of the Agreement between the Kingdom of Norway and the European Police Office.

<sup>111</sup> Cf. Council Decision 2001/886/JHA of 6 December 2001 on the development of the second-generation Schengen Information System (SIS II), OJ L 328 of 13 December 2001, p. 1, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001D0886>.

<sup>112</sup> Article 1(G) of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis*, OJ L 176 of 10 July 1999, p. 1, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1470928914417&uri=CELEX:31999D0437>.

<sup>113</sup> Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States, OJ L 93 of 7 April 2009, p. 23, accessible at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:093:0023:0032:EN:PDF>.

Convention on Mutual Assistance in Criminal Matters.<sup>114</sup>This line of approach is more time-consuming and expensive than the ECRIS procedure.<sup>115</sup>

#### 5.2.4.3. Participation in the Prüm Decisions

Norway and the EU have already negotiated an agreement on Norwegian application of certain provisions of the Prüm Decisions.<sup>116</sup>The second recital of the Agreement emphasises the need for the Schengen states to cooperate closely in the fight against crime.

#### 5.2.4.4. Agreement on surrender procedure

In the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between EU Member States and Iceland and Norway,<sup>117</sup>the contracting parties regulate the surrender of persons for the purpose of prosecution or execution of sentence. The Agreement makes provision for a uniform arrest warrant and a simplified extradition procedure. In particular, Article 20 of the Agreement lays down time limits for the execution of arrest warrants. This Agreement would be an equivalent to the European Arrest Warrant, albeit with some exceptions and exemptions options.<sup>118</sup>At the time of writing – 9 May 2016 – it has not yet entered into force.<sup>119</sup>

### 5.3. Relations with Switzerland

Since signing a free-trade agreement with the EEC in 1972, Switzerland has formed, step by step, an increasingly close-woven network of agreements with the EU; these agreements now number more

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<sup>114</sup> European Convention of 20 April 1959 on Mutual Assistance in Criminal Matter, Federal Law Gazette 1964 II, p. 1386.

<sup>115</sup> Cabinet Office, *The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues*, paragraph 1.33, accessible at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/521926/The\\_UK\\_s\\_cooperation\\_with\\_the\\_EU\\_on\\_justice\\_and\\_home\\_affairs\\_and\\_on\\_foreign\\_policy\\_and\\_security\\_issues.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521926/The_UK_s_cooperation_with_the_EU_on_justice_and_home_affairs_and_on_foreign_policy_and_security_issues.pdf).

<sup>116</sup> For the text of the Agreement, see Council Decision 2011/95/EU of 21 September 2009 on the signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the European Union and Iceland and Norway on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, and Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA [...] and the Annex thereto, OJ L 353 of 31 December 2009, p. 3, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009D1023&from=EN>.

<sup>117</sup> Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, OJ L 292 of 21 October 2006, p. 2, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2006.292.01.0001.01.ENG&toc=OJ:L:2006:292:TOC#L\\_2006292EN.01000201](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2006.292.01.0001.01.ENG&toc=OJ:L:2006:292:TOC#L_2006292EN.01000201).

<sup>118</sup> Brodowski, Dominik, 'Strafrechtsrelevante Entwicklungen in der Europäischen Union – ein Überblick', in *ZIS - Zeitschrift für Internationale Strafrechtsdogmatik/Review of International Criminal Law Doctrine*, 2016, pp. 106-120, esp. p. 119.

<sup>119</sup> Cabinet Office, *op. cit.*, paragraph 1.12.



than 120.<sup>120</sup> The following paragraphs of this study are confined to a discussion of the agreements with the greatest impact in the field of justice and home affairs.

The nine agreements concluded between the EU and Switzerland in 2004, known collectively as Bilateral Agreements Package II, include two agreements associating Switzerland with the Schengen *acquis* and its development – the Swiss Schengen Association Agreement<sup>121</sup> and the EC-Swiss agreement on the establishment of asylum jurisdiction (Swiss Dublin Application Agreement).<sup>122</sup>

Like Norway, Switzerland has also concluded Arrangements with the EU relating to Frontex<sup>123</sup> and EASO.<sup>124</sup> It has concluded agreements directly with Eurojust and Europol.<sup>125</sup>

### 5.3.1. Agreement on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*

The Swiss Schengen Association Agreement takes account of the fact that the Schengen rules are part of the law of the European Union and that Switzerland, like Norway, is not an EU member; accordingly, similar rules should apply to both Norway and Switzerland.<sup>126</sup>

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<sup>120</sup> A list of Switzerland's agreements with the EU which were in force on 1 January 2016 is accessible (in German only) on the website of the Federal Department of Foreign Affairs at [https://www.eda.admin.ch/content/dam/dea/de/documents/publikationen\\_dea/accords-liste\\_de.pdf](https://www.eda.admin.ch/content/dam/dea/de/documents/publikationen_dea/accords-liste_de.pdf) (last accessed 2 August 2016).

<sup>121</sup> Agreement of 26 October 2004 between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, accessible at <http://data.consilium.europa.eu/doc/document/ST-13054-2004-INIT/en/pdf>.

<sup>122</sup> Agreement of 26 October 2004 between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, OJ L 53 of 27 February 2008, p. 5, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22008A0227\(01\)&rid=11](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22008A0227(01)&rid=11).

<sup>123</sup> Arrangement between the European Community, of the one part, and the Swiss Confederation and the Principality of Liechtenstein, of the other part, on the modalities of the participation by those States in the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 243 of 16 September 2010, p. 4, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22010A0916\(01\)&qid=1470730704641&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22010A0916(01)&qid=1470730704641&from=EN).

<sup>124</sup> Arrangement between the European Union and the Swiss Confederation on the modalities of its participation in the European Asylum Support Office, OJ L 65 of 11 March 2016, p. 22, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22016A0311\(01\)&qid=1470728977422&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22016A0311(01)&qid=1470728977422&from=EN).

<sup>125</sup> Agreement of 27 November 2008 between Eurojust and Switzerland, accessible at [http://www.eurojust.europa.eu/doclibrary/eurojust-framework/agreements/agreement%20between%20eurojust%20and%20switzerland%20\(2008\)/eurojust-switzerland-2008-11-27-en.pdf](http://www.eurojust.europa.eu/doclibrary/eurojust-framework/agreements/agreement%20between%20eurojust%20and%20switzerland%20(2008)/eurojust-switzerland-2008-11-27-en.pdf); Agreement of 24 September 2004 between the Swiss Confederation and the European Police Office, accessible at <https://www.europol.europa.eu/content/page/external-cooperation-31>.

<sup>126</sup> Cf. the fifth, sixth and seventh recitals of the Swiss Schengen Association Agreement.

#### 5.3.1.1. Transposition of Union legislation into Swiss law

The rules governing the transposition of the Schengen *acquis* into Swiss law are comparable with those in the agreement between the EU and Norway. Under Article 2(1) of the Swiss Schengen Association Agreement, Switzerland adopts the international contractual rules of the Schengen agreements. Article 2(2) of the Association Agreement requires Switzerland to adopt the legal acts relating to the Schengen agreements that came into force before the date of the Association Agreement, and in Article 2(3) Switzerland undertakes to accept and apply new legal acts of the EU developing the Schengen *acquis*.

Under Article 7(2)(a) of the Association Agreement, the Council is to notify Switzerland immediately of the adoption of any new acts or measures. Switzerland then decides whether to accept their content and to transform them into its internal legal order. If Switzerland declines to transpose the new provisions, however, Article 7(4) specifies that the Agreement will be considered terminated within a fixed period of time. Article 10(4) stipulates that even divergent interpretations of the Agreement by the Swiss courts and the European Court of Justice will result, after a specified period, in the termination of the Agreement unless the Mixed Committee<sup>127</sup> finds a solution. Under Article 17, moreover, the Agreement may be denounced by either party, subject to six months' notice of termination. The bottom line is that, with regard to the transposition of Union legislation forming part of the Schengen *acquis*, Switzerland – just like Norway – is effectively bound to implement the relevant EU provisions.

The substance of the Schengen *acquis* covered by the Swiss Schengen Association Agreement essentially corresponds to that of the Association Agreement with Iceland and Norway. Switzerland is likewise bound by the Schengen Agreement of 1985 with no exemptions. The same exemptions from provisions of the Schengen Implementing Convention of 1990 apply to Switzerland as to Norway. The only differences relate to the referencing procedure in parts 2 and 3 of Annex A to each of the Association Agreements. Since Switzerland concluded its Association Agreement at a later date than Norway, the definition of the Schengen *acquis* that applies to Switzerland entails more references to legal acts of the Union than to decisions adopted by the Executive Committee under the Implementing Convention. For example, according to Annex A, Part 2, of the Swiss Schengen Association Agreement, the Decision on the development of SIS II is part of the Schengen *acquis*, whereas Norway participates in the SIS by virtue of Annex A, Part 2, to the Association Agreement with Iceland and Norway.

#### 5.3.1.2. Cooperation in the Mixed Committee

The Swiss Schengen Association Agreement also establishes a Mixed Committee. Under Article 3(1) of the Agreement, the Committee comprises representatives of the Swiss Government, the Council of the European Union and the European Commission. Contracting Parties. Article 4(2) and (4) of the Agreement authorises the representatives of Switzerland to make suggestions and representations on legislative proposals of the EU. Pursuant to Article 6, when new legal provisions are being drafted, the same consideration is to be given to the views of experts from Switzerland as is given to the views of experts from Member States. The first sentence of Article 7(1) of the Agreement, however, excludes Switzerland from voting on the adoption of new EU legislation.

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<sup>127</sup> See point 5.3.1.2 below.



The structure of this cooperation matches that of Norway's cooperation with the EU. In some cases the same provisions appear with identical article numbers in both of the Association Agreements.

### 5.3.1.3. Cooperation in Frontex

Switzerland's cooperation with Frontex is conducted in the same way as Norway's. Switzerland has the same limited voting rights on the Management Board as well as the same right to veto measures on its own external borders.<sup>128</sup>

### 5.3.2. Agreement concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum (Swiss Dublin Application Agreement)

In the view of the parties to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, the Agreement is linked to the Schengen legislation.<sup>129</sup>As in the case of the Swiss Schengen Association Agreement, the same status is accorded to Switzerland by the Swiss Dublin Application Agreement as is enjoyed by Norway.<sup>130</sup>

#### 5.3.2.1. Transposition of Union legislation into Swiss law

In Article 1(1) of the Swiss Dublin Application Agreement, Switzerland undertakes to implement and apply the Dublin Convention, the Eurodac Regulation and their respective implementing Regulations. Under Article 1(3) of the Agreement, Switzerland must also accept, implement and apply acts and measures amending or building upon these Regulations. Article 1(4) stipulates that, in implementing the Agreement, Switzerland must implement and apply the EU Data Protection Directive.

According to Article 4(1) of the Agreement, Switzerland must apply legal acts of the EU which were adopted after the conclusion of the Agreement, otherwise the Agreement is considered to be suspended.<sup>131</sup>If, in the opinion of the Joint Committee,<sup>132</sup> the problem triggering such suspension has not

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<sup>128</sup> Article 1(2) of the Arrangement between the European Community, of the one part, and the Swiss Confederation and the Principality of Liechtenstein, of the other part, on the modalities of the participation by those States in the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 243 of 16 September 2010, p. 4, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22010A0916\(01\)&qid=1470730704641&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22010A0916(01)&qid=1470730704641&from=EN).

<sup>129</sup> This view is reflected in Article 7 of the Schengen Association Agreement and in recitals 1 and 2 of the Agreement of 19 January 2001 on the establishment of asylum jurisdiction.

<sup>130</sup> Convention of 15 June 1990 determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, OJ C 254 of 19 August 1997, p. 1, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41997A0819\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41997A0819(01)&from=EN).

<sup>131</sup> Article 4(6) of the Swiss Dublin Application Agreement.

<sup>132</sup> See point 5.3.2.2 below.

been resolved, the Agreement is regarded as terminated after a specified fixed period.<sup>133</sup>The same applies, pursuant to Article 7(3), in the event of divergent case law or judicial interpretation of the Agreement. As in the case of Norway, as in the Swiss Schengen Association Agreement, in other words, there is a rolling obligation to adopt new provisions, which also extends to new case law established by the Court of Justice of the European Union. Under Article 16(1), moreover, the Agreement may be denounced by either party at any time, subject to six months' notice of termination.

#### 5.3.2.2. Cooperation in the Joint Committee

The Swiss Dublin Application Agreement establishes a Joint Committee, comprising representatives of the Contracting Parties. Article 2 of the Agreement authorises the representatives of Switzerland to make suggestions and representations on legislative proposals of the EU. Pursuant to Article 2(6) and (7), when new legal provisions are being drafted, the same consideration is to be given to the views of experts from Norway as is given to the views of experts from Member States.

#### 5.3.2.3. Cooperation in EASO

Under Article 49(1) of Regulation (EU) No 439/2010 establishing a European Asylum Support Office, Switzerland, as an associate country for the purposes of the Dublin Convention, is to participate in EASO as an observer. Accordingly, Article 2 of an Arrangement between the EU and Switzerland regarding EASO lays down that Switzerland is to be represented on the Management Board of the Support Office as an observer without the right to vote.<sup>134</sup>

#### 5.3.3. Switzerland's two agreements with Europol and Eurojust

The agreement with Europol enables Switzerland to exchange with the EU strategic and operational information, such as risk analyses and case-related intelligence obtained in the course of operations.<sup>135</sup>The Agreement also contains provisions on data protection and on the processing of exchanged data. Cooperation under this Agreement covers terrorism, trafficking in nuclear and radioactive substances, smuggling of illegal immigrants, human-trafficking, motor-vehicle crime, forgery of money and other means of payment and laundering the proceeds of these crimes. The Agreement allows Switzerland to send liaison officers to Europol.

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<sup>133</sup> Article 4(7) of the Swiss Dublin Application Agreement.

<sup>134</sup> Arrangement between the European Union and the Swiss Confederation on the modalities of its participation in the European Asylum Support Office, OJ L 65 of 11 March 2016, p. 22, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22016A0311\(01\)&qid=1470728977422&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22016A0311(01)&qid=1470728977422&from=EN).

<sup>135</sup> Article 2 of the Agreement of 24 September 2004 between the Swiss Confederation and the European Police Office, accessible at <https://www.europol.europa.eu/content/page/external-cooperation-31>.

Through its agreement with Eurojust,<sup>136</sup> Switzerland cooperates with Eurojust in all of that Agency's areas of responsibility. The main areas are combating drug trafficking, illegal trade in nuclear substances, human-trafficking, terrorism and its funding, counterfeiting and laundering of money, child pornography, corruption, fraud, environmental crime and cybercrime. The main form of cooperation is the exchange of information, but the cooperative structure also makes provision for the secondment of a liaison prosecutor as well as financial and manpower contributions.

Switzerland's agreements with Eurojust and Europol operate on a similar pattern to Norway's agreements with the two agencies. In particular, the main emphasis is on the exchange of information, there are liaison officers, an arbitration tribunal settles disputes, and both parties are free to terminate an agreement unilaterally.

#### 5.3.4. Link between the EU-Switzerland agreements

The Swiss Schengen Association Agreement and the Swiss Dublin Application Agreement are linked together by a guillotine clause. Under Article 17 of the Schengen Association Agreement and Article 14 of the Dublin Application Agreement, the termination or non-application of one agreement implies the termination or non-application of the other. In addition, the agreements with Switzerland also prescribe that agreements be concluded on the same subject matter with Iceland, Norway and, where appropriate, Denmark.<sup>137</sup>

#### 5.4. Relations with non-EU countries that are not Schengen states

There are no non-Schengen states outside the EU with which the Union engages in anything comparable to its cooperation with Member or Schengen States. There are, however, cooperation agreements between the Europol, Eurojust and Frontex agencies and such external countries.

Rules were created for Europol and Eurojust which authorise them to conclude data-exchange agreements with non-EU countries that do not participate in the Schengen system.<sup>138</sup> The prerequisite for exchanging personal data is that the recipient external country must ensure an adequate level of data pro-

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<sup>136</sup> Agreement of 27 November 2008 between Eurojust and Switzerland, accessible at [http://www.eurojust.europa.eu/doclibrary/eurojust-framework/agreements/agreement%20between%20eurojust%20and%20switzerland%20\(2008\)/eurojust-switzerland-2008-11-27-en.pdf](http://www.eurojust.europa.eu/doclibrary/eurojust-framework/agreements/agreement%20between%20eurojust%20and%20switzerland%20(2008)/eurojust-switzerland-2008-11-27-en.pdf)

<sup>137</sup> Cf. Article 17 of the Swiss Schengen Association Agreement and Article 14 of the Swiss Dublin Application Agreement.

<sup>138</sup> Article 23 of Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol) and Article 26a of Council Decision 2002/187/JHA setting up Eurojust [...], as amended by Council Decision 2009/426/JHA [...]. A list of the non-EU states with which Europol has concluded agreements can be found at <https://www.europol.europa.eu/content/page/external-cooperation-31>. A list of the non-EU states with which Eurojust has concluded agreements can be found at <http://www.eurojust.europa.eu/about/legal-framework/Pages/eurojust-legal-framework.aspx#partners>.

tection.<sup>139</sup>In the case of Eurojust, Article 26a(3) of Council Decision 2002/187/JHA setting up Eurojust stipulates that the existence of an adequate level of data security in a non-EU country may be confirmed either by a specific assessment or on the basis of that country being subject to the Council of Europe Convention of 28 January 1981.<sup>140</sup>In the case of Europol, besides having the adequacy of its level of data security confirmed, the country in question must be entered in a list adopted by the Council.<sup>141</sup>

Frontex is another EU agency that has concluded agreements with non-EU states.<sup>142</sup>These agreements, however, do not permit any exchange of personal data.<sup>143</sup>

A comparison between the agreements that Europol has concluded with Norway and with other non-EU countries such as Albania and Australia reveals differences. If the Europol agreements with Norway and Albania<sup>144</sup>are compared, it emerges, for example, that there is divergent scope for exchanges of personal data. If a request for information contains no indication of its purpose and reason, Europol cannot forward personal data to Albania.<sup>145</sup> Under the agreement with Norway, by contrast, personal data may be exchanged without a specific request. The provisions on information exchange in Australia's agreement with Europol,<sup>146</sup>on the other hand, resemble those in the Norwegian agreement more closely than those in the Albanian agreement. While the Albania-Europol agreement, like its Norwegian counterpart, provides for a liaison officer, the Australia-Europol agreement merely envisages the secondment of a liaison officer on the basis of a possible future agreement.

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<sup>139</sup> Article 5(4) and Article 9(4)(b) of Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information, OJ L 325 of 11 December 2009, p. 6, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009D0934>, and Article 26a(2) and (3) of Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust[...], as amended by Council Decision 2009/426/JHA [...], OJ L 63 of 6 March 2002, p. 1, consolidated version accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02002D0187-20090604&from=EN>.

<sup>140</sup> Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, Federal Law Gazette 1985 II, p. 538.

<sup>141</sup> Council Decision 2009/935/JHA of 30 November 2009 determining the list of third States and organisations with which Europol shall conclude agreements, OJ L 325 of 11 December 2009, p. 12, consolidated version accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02009D0935-20140514&from=EN>.

<sup>142</sup> A list of its working arrangements can be found at <http://frontex.europa.eu/partners/third-countries/>.

<sup>143</sup> Cf., for example, paragraph 4(B) of the Working Arrangement of 28 April 2009 Establishing Cooperation Between The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the United States Department of Homeland Security, accessible at [http://frontex.europa.eu/assets/Partners/Third\\_countries/WA\\_with\\_US.pdf](http://frontex.europa.eu/assets/Partners/Third_countries/WA_with_US.pdf).

<sup>144</sup> Agreement of 9 December 2013 on Operational and Strategic Co-operation between the Republic of Albania and the European Police Office, accessible at <https://www.europol.europa.eu/content/page/external-cooperation-31>.

<sup>145</sup> Article 11(2) of the Agreement on Operational and Strategic Co-operation between the Republic of Albania and the European Police Office.

<sup>146</sup> Agreement of 20 February 2007 on Operational and Strategic Cooperation between Australia and the European Police Office, accessible at <https://www.europol.europa.eu/content/page/external-cooperation-31>.

## 5.5. Interim conclusion

The two main agreements in the sphere of justice and home affairs, namely the agreement on the Schengen *acquis* and the agreement on the Dublin procedure, are each almost identical in content for Norway and Switzerland. That, indeed, is the declared aim of the EU, as expressed in the recitals of the agreements. These are rolling agreements, which means that Norway and Switzerland must keep transposing new EU legislation to avoid jeopardising the continued existence of the agreements. Although the two countries can express their opinions in the course of the EU legislative process, they have no voting rights in that process.

It is a characteristic feature of rolling agreements that there is no certainty when the agreement is signed regarding the extent to which the contracting party's domestic law will have to be harmonised with EU legislation. How the substance of the legal acts that will have to be transposed by virtue of the agreement is to be framed is determined in detail by only one party – the EU – and the only restriction is sectoral in nature, in that the obligation is confined to the parts of the *acquis* covered by the agreement.

One difference between the Norwegian and Swiss models in the realm of justice and home affairs is that there is no guillotine clause in the Norwegian agreements whereby the termination of one agreement triggers the automatic and simultaneous termination of various other agreements. Even in the Norwegian case, however, the EU is at liberty to respond to Norway's termination of one agreement by terminating the other itself.

In EU agencies too, both countries have either no vote on the Management Board, as in the case of EASO, or limited voting rights, as in the case of Frontex. Where the EU and the two states have agreed to exchange data, there is a need for data protection, which is to be satisfied by means of an obligation involving the adoption and implementation of European data-protection provisions.

Cooperation between the EU and external non-Schengen countries is limited to individual areas of activity and is specifically negotiated in each case. When engaging in such cooperation, the EU must always ensure that its legal principles, such as those relating to data protection, are not infringed; this it does by writing safeguards into particular agreements or by assessing the legal system of the partner country. These agreements also highlight the extent to which non-EU states are at a disadvantage when negotiating agreements such as those with Europol. Another disadvantage is that there is often no direct access to databases, the only available option being a request to the agency in question, which then carries out the search. Countries outside the EU, moreover, have no rights of co-decision, and the status of any liaison officer who may be appointed must also be negotiated separately.<sup>147</sup>

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<sup>147</sup> On this point, cf. Cabinet Office, *The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues*, paragraph 1.17, accessible at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/521926/The\\_UK\\_s\\_cooperation\\_with\\_the\\_EU\\_on\\_justice\\_and\\_home\\_affairs\\_and\\_on\\_foreign\\_policy\\_and\\_security\\_issues.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521926/The_UK_s_cooperation_with_the_EU_on_justice_and_home_affairs_and_on_foreign_policy_and_security_issues.pdf).

## 6. Conclusion

In the period between the referendum and the withdrawal of the United Kingdom from the EU, the legal position of the UK will be no different from what it was before the referendum, even though the practical aspects of its cooperation with the EU might change for political reasons. When the United Kingdom withdrew from the EU, the existing cooperation on the basis of EU law would end.

### 6.1. Adoption of EU law

Should the United Kingdom, having withdrawn from the EU, consider concluding similar agreements with the EU to those concluded by Switzerland or Norway, in order to maintain the exchange of information between police authorities and to continue participating in the European Arrest Warrant system, various problem areas for the UK can be discerned. Instead of having voting rights as a Member State, which it has now, the United Kingdom would, at best, have consultation rights and an observer role.<sup>148</sup> At the same time, the United Kingdom, like Switzerland and Norway, could be bound by treaty law to adopt new legal acts of the European Union, on the basis of an agreement to that effect. The choice that is currently open to the UK to opt in or out of measures in the field of justice and home affairs might no longer be possible.

Another problem would arise from the fact that the United Kingdom would neither be an EU member nor a Schengen state in the future. The UK, indeed, had no plans to sign up to the Schengen system.<sup>149</sup> Yet the accession of Switzerland and Norway to the Schengen system has made it easier for them to maintain close ties with the EU. It was in view of Norway's Schengen membership, for example, that the Council of the European Union put forward the idea of concluding an agreement on surrender procedure with Norway.<sup>150</sup>

### 6.2. Access to databases

The participation of the United Kingdom in the second-generation Schengen Information System (SIS II), which it currently owes to its membership of the EU, would be ended by the British exit unless transitional arrangements were agreed. At the present time, other states cannot use SIS II unless they transpose and apply the Schengen *acquis*. Since non-EU countries' participation in SIS II currently depends on

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<sup>148</sup> Delivet, Philippe, 'British referendum: what impact on justice and home affairs?', *European Issue* No 397 of 21 June 2016, accessible at <http://www.robert-schuman.eu/en/european-issues/0397-british-referendum-what-impact-on-justice-and-home-affairs>.

<sup>149</sup> Cabinet Office, *op. cit.*, paragraph 1.5.

<sup>150</sup> Proposal for a Council Decision on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, COM(2009) 705 final, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009PC0705&from=EN>. As indicated above, however, Norway is still not participating in this system because the Agreement has yet to enter into force.

their Schengen membership, it would seem difficult to integrate the United Kingdom into SIS II without its having at least signed up to Schengen.<sup>151</sup>

To participate in the exchange of data, the United Kingdom would have to negotiate its own agreements on data transfer with Europol and Eurojust, for example. Apart from the time that would be required for such negotiations, the UK might also be faced with the inconvenience of no longer being able to conduct direct searches, for instance in the Europol Information System, but would have to make information requests through Europol.<sup>152</sup>

Access to other databases would be affected by similar problems. Access to the Eurodac database for fingerprint data is only open at the present time to Member States or Dublin States such as Norway. Access to this database might depend on becoming a Dublin State, but that is something the UK is unlikely to do.

### 6.3. Participation in the work of agencies and staffing issues

It is possible for states that are not EU members to conclude agreements with EU agencies and so to take part to a certain extent in the work of those agencies.<sup>153</sup> These states, however, generally do not have seats on the Management Board of the relevant agency.<sup>154</sup>

Staff of the EU agencies are subject to the Staff Regulations of officials of the European Communities or to the Conditions of employment of other servants of the European Communities.<sup>155</sup> Article 28(a) of the Staff Regulations that an official may be appointed only on condition that he is a national of one of the Member States of the Communities and enjoys his full rights as a citizen.<sup>156</sup> In the case of both officials and other staff, the appointing authority may waive the nationality requirement. It has not yet been clarified whether British officials will continue to be employed by the EU following the withdrawal of the United Kingdom.<sup>157</sup> On the basis of the provisions of the Staff Regulations and the Conditions of employ-

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<sup>151</sup> Cf. Cabinet Office, *op. cit.*, paragraph 1.12.

<sup>152</sup> *Ibid.*, paragraph 1.17.

<sup>153</sup> See section 5.4 above.

<sup>154</sup> Cabinet Office, *op. cit.*, paragraph 1.17.

<sup>155</sup> Kilb, Wolfgang, 'Europäische Agenturen und ihr Personal – die großen Unbekannten?', in *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)*, 2006, pp. 268-273, esp. p. 272.

<sup>156</sup> Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ 45 of 14 June 1962, p. 1385, consolidated version accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01962R0031-20160101&qid=1471253031868&from=EN>.

<sup>157</sup> 'Und plötzlich ist die Existenz in Gefahr', article in *Handelsblatt*, 17 July 2016, accessible at <http://www.handelsblatt.com/politik/international/brexit-bedroht-britische-beamte-und-ploetzlich-ist-die-existenz-in-gefahr/13882880.html>.

ment , however, it is quite possible, on account of the nationality criterion, that no more British nationals will be recruited by the EU after the UK exit.

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