

## **The European Union's Area of Freedom, Security and Justice without the United Kingdom – Legal and Practical Consequences of Brexit**

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The United Kingdom's participation in the European Union's Area of Freedom, Security and Justice (AFSJ), formally known as Justice and Home Affairs cooperation (JHA), was never an easy exercise. From the very beginning of the JHA cooperation, the United Kingdom had secured the option of staying out entirely, or alternatively to decide on a case by case basis whether to participate in the various measures and instruments adopted under the auspices of the AFSJ policies. Fragmented as it has become, the AFSJ still represents one of the most defining aspects of European integration: free movement with no internal borders and an area providing justice based on shared values, all directly accessible by European citizens. In addition, security cooperation at the European level has grown in order to enhance a common response to increasing threats. Against this backdrop, Brexit poses two fundamental questions: what will the future modalities between the EU and UK be after the UK actually leaves the EU, and how will the current jigsaw-like AFSJ emerge after the UK's departure? More broadly, a question mark also hangs over whether a more streamlined and less fragmented policy area will take shape or whether the path paved by the UK will merely act as a catalyst for further disintegration of the AFSJ, encouraging other Member States to seek individual treatment to the point where it will become the rule.

This paper will examine these two issues in detail as the United Kingdom begins to unbundle itself from AFSJ policies. To this end, the mosaic nature of the UK's participation in the AFSJ will be mapped out through an examination of the various AFSJ policies. Based on this, the modalities of potential EU-UK cooperation once the UK leaves the EU will be explored. An attempt will also be made to speculate how the coherence of the AFSJ will be affected by the UK's departure.

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## I Schengen and Borders

The Schengen regime was originally created in 1985 by only five of the then 12 Member States through international treaties outside the legal regime of the then European Communities.<sup>1</sup> Since the Schengen area's establishment, it has been the consistent position of the UK to stay out of the European border-free zone. This stance, which stems from the time of creating the Schengen area, sowed the first seeds of the special status that the UK subsequently secured for itself when justice and home affairs cooperation was pulled under the auspices of the European Union<sup>2</sup> and the Schengen regime was integrated to EU law.<sup>3</sup> The UK position of neither being a member of the Schengen regime nor participating in the EU's border cooperation policy was formalised by a Protocol agreed<sup>4</sup> on the eve of signing of the Treaty of Amsterdam, in what is Protocol 19 TFEU today. In essence, the Protocol lays down that the UK is in principle not covered by the Schengen *acquis*, or by the rules that 'build on' them; however the UK does have the option of requesting to take part in individual pieces of the *acquis*, subject to the following conditions; the Council of Ministers needs to approve the UK's request: and the UK also becomes bound to any subsequent measure adopted on the same field. Should the UK decide not to participate in a subsequent measure, it will cease to participate in the original, earlier piece to which it signed up. The Court of Justice of the European Union (CJEU) has added to this that the UK cannot participate in any Schengen measure that is closely linked to another Schengen measure in which the UK does not participate.<sup>5</sup>

In practice, the UK has requested and has been allowed to participate in a number of measures under the Schengen regime related to criminal and police cooperation<sup>6</sup> and, regarding these matters, it also enjoys access to the Schengen Information System.<sup>7</sup>

<sup>1</sup> *Agreement 14 June 1985 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, Convention implementing the Schengen Agreement of 14 June 1985 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 made on 19 June 1990.*

<sup>2</sup> See the third pillar as established by the *Treaty on the European Union 1992*.

<sup>3</sup> *Treaty of Amsterdam 1997*. 1999/435/EC: Council Decision of 20 May 1999 concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the *acquis* OJ L 176, 10.7.1999, p. 1–16, 1999/436/EC: Council Decision of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis* OJ L 176, 10.7.1999, p. 17–30.

<sup>4</sup> Protocol integrating the Schengen *acquis* into the framework of the European Union, Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland Protocol on the position of the United Kingdom and Ireland.

<sup>5</sup> Case C-77/05 *UK v Council* [2007] ECR I-11501.

<sup>6</sup> 2000/365/EC 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*.

<sup>7</sup> The UK does not have access to the SIS alerts related to immigration. The UK requested and was granted with access to the second generation of the SIS, the SIS II including biometric data.

The UK's involvement in Frontex operations, the EU agency for operational coordination at the external borders of the EU, has been an especially complex matter. When the Agency was conceived, the Schengen Member States refused the UK's request to opt in and participate. This also gave rise to court litigation, with the CJEU confirming the Council's position.<sup>8</sup> While the UK was not allowed to participate fully in the Agency's work, the Frontex Regulation nonetheless contains very specific provisions on how nevertheless to allow the UK to take part in operational cooperation at the external borders.<sup>9</sup> Indeed, as the annually published Frontex General Reports show, the UK frequently takes part in Frontex operations. In 2015, for example, the UK led one joint return operation and participated in ten out of the 22 joint operations organised under the auspices of Frontex.<sup>10</sup>

With the UK having remained outside the Schengen area since its creation, its departure from the EU will not bring any marked changes to the Schengen regime. However, the UK will cease to be bound by those individual Schengen measures to which it still decided to opt in, and in general it will lose the possibility to participate in any subsequent Schengen *acquis* the EU may adopt. Furthermore, the UK will not be able to participate in Frontex operations and will not have direct access to the SIS alerts related to police and judicial cooperation. If any further cooperation is desired regarding these specific matters, it will need to be based on separate international agreements between the EU and the UK specifically designed to that end. With regard to operational cooperation, technical inter-agency agreements may need to be negotiated and implemented additionally after Brexit. Continued access to the SIS, and storing personal data, however, will surely need to be based on a full-fledged international treaty respectively ratified by the contracting States involved. Naturally, the scope of such access, namely whether it will comprise criminal and policing-related data or go further to encompass immigration related data will be a sensitive negotiating item. Once Brexit takes effect, the time required to create the new legal basis for establishing a potential framework for working together outside the EU context will surely affect the level of cooperation and information exchange between the UK and EU Member States. Compared to the current regime of cooperation, any potential new framework could very well risk a decline in the intensity and effectiveness of this relationship.<sup>11</sup>

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<sup>8</sup> See case referred (n 5).

<sup>9</sup> EU Regulation 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union as amended by Regulation 1168/2011, Article 11 on facilitation on information exchange, Article 12 on the general commitment on facilitating operational cooperation and specifically the UK's involvement in joint return operations, Article 20(5) on UK participation in Frontex operations allowed by an absolute majority of the Frontex Management Board, Article 23(4) UK representative is present at the Frontex Management Board meetings, but has no right to vote.

<sup>10</sup> Frontex General Report 2015. [http://frontex.europa.eu/assets/About\\_Frontex/Governance\\_documents/Annual\\_report/2015/General\\_Report\\_2015.pdf](http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2015/General_Report_2015.pdf) but see the general reports on 2014, 2013 and 2012 to the same effect.

<sup>11</sup> For a similar conclusion see B. Ryan (2016), 'The EU's Borders: Schengen, Frontex and the UK' *Free movement immigration blog*, Garden Court Chambers, London ([www.freemovement.org.uk/brexit-and-borders-schengen-frontex-and-the-uk/](http://www.freemovement.org.uk/brexit-and-borders-schengen-frontex-and-the-uk/)).

## II Asylum

The United Kingdom opted in to all the EU asylum law instruments which were adopted during the so-called first phase of the Common European Asylum System (CEAS), meaning that it was initially bound by the Qualification Directive, the Procedures Directive, the Reception Conditions Directive and the Dublin and Eurodac Regulations.<sup>12</sup> When these instruments were amended or recast during the second phase of the CEAS, the UK decided to opt in only to the Dublin and Eurodac Regulations, and to the new instrument establishing the EU asylum agency, which was called the European Asylum Support Office.<sup>13</sup> As a consequence of this, while most EU Member States repealed the first phase versions of Directives on Qualification, Procedures and Reception Conditions among themselves through the adoption of second phase instruments, the UK and Ireland remained bound by those first phase items. The question of whether the UK is still bound by an AFSJ instrument in which it participated originally but, on the eve of its amendment/recast, decided not participate in the new instrument replacing the original is an issue that neither the Treaties nor the Protocols address specifically. The special protocols providing for the UK's special status concern legislation stemming from and building on the Schengen acquis, as discussed above, judicial cooperation in criminal matters and police cooperation, are elaborated in detail below. This issue has not emerged in CJEU cases, either. Both in academic writing and in practice, the default position has been that the UK remains bound by the first phase asylum legislation *vis-à-vis* the other EU Member States, which could not only have repealed the first phase acquis among themselves but not in relation to the UK.<sup>14</sup>

After Brexit, neither the first phase nor the three second phase EU asylum law instruments will bind the UK. This will have two major repercussions. First, in relation to the first phase instruments – the Directives on Qualification, Procedures and Reception Conditions – the UK will cease to be under the obligation to ensure the heightened and additional forms of international protection, procedural rights and guarantees that these instruments afford to asylum-seekers. Unless the UK decides to keep its domestic refugee law in its current state,

<sup>12</sup> Respectively: Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L 304, 30.9.2004, p. 12). Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures for granting and withdrawing refugee status OJ L 326, 13.12.2005, p. 13). Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers OJ L 31, 6.2.2003, p. 18). Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 222, 5.9.2003, p. 3–23; 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, 15.12.2000, p. 1. and to Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention OJ L 62, 5.3.2002, p. 1.

<sup>13</sup> Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office OJ L 132, 29.5.2010, p. 11–28.

<sup>14</sup> See Steve Peers, *EU Justice and Home Affairs Law*, Vol I. (Oxford University Press 2016) pp. 32–33.

which is harmonised with the first phase legislation, all the added value that EU asylum law provided will be gone. The UK will obviously continue to be bound by the 1951 Geneva Convention Relating to the Status of Refugees. However, all the innovations and standards of EU asylum law, which purposefully went beyond the rights and protection afforded by the 1951 Geneva Convention, will not necessarily continue to apply in the UK. The following selected examples highlight how significant issues are at stake should the UK decide to eliminate the first phase EU asylum law from its domestic law.

EU asylum law created a new, additional form of international protection for those persons who do not qualify under the 1951 Geneva Convention's definition as refugees, called subsidiary protection. In order to be granted subsidiary protection rather than refugee status, it has to be shown that the person fled their own country where they faced serious harm (death penalty, torture and/or indiscriminate violence arising from an armed conflict).<sup>15</sup> If this subsidiary protection ceases to be available for asylum seekers, then the range of forms of protection provided for them will become narrower by falling back to the 1951 Geneva Convention's level, which provides protection only for those who have been persecuted on specifically mentioned grounds, hence qualify as refugees. The Qualifications Directive also introduced minimum standards regarding the rights to be granted to recognised refugees (employment, social benefit, education, housing), an area where the 1951 Geneva Convention merely provides options to the Contracting States. The Procedures Directive maps out in detail the procedural rights and guarantees to be afforded to asylum seekers in processing their claim, conducting personal interviews, and handling the asylum procedure, such as right to information, right to interpretation, the right to legal assistance and guarantees for unaccompanied minors. The 1951 Geneva Convention is largely silent on these procedural matters. To reiterate, any and all innovations of first phase EU asylum law will disappear unless the UK deliberately maintains its domestic legislation, which has been aligned with EU asylum law. Should that not be the case, the 1951 Geneva Convention, as complemented with the jurisprudence of the European Court of Human Rights,<sup>16</sup> will be the sole framework shared between the EU and the United Kingdom regarding asylum law. If the UK were to afford international protection in a more restricted way, one plausible result could be that asylum seekers would tend not to file their application in the UK but elsewhere in the EU.

The second imminent effect of Brexit on asylum law would, however, be more detrimental to the UK itself, as it would lose access to Eurodac data and cease to benefit from the Dublin system. In practical terms, this would mean that the UK would not be able to directly retrieve information from Eurodac containing the personal data, including fingerprints, of asylum seekers who have already filed an asylum application and have registered in an EU Member State. In the same vein, as the UK will not be able to transfer asylum-seekers back to those EU Member States

<sup>15</sup> See Article 15 of the 2004/83 Directive serious harm consists of death penalty or execution; or torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

<sup>16</sup> See the ECtHR's case law on the non-refoulement principle elevating human rights standards in refugee law under the auspices of the European Convention of Human Rights.

where the first application for asylum was made (or should have been made), the problem of how to filter dual or multiple applications will occur immediately. The UK will also not benefit from the European Asylum Support Office's (EASO) operational, research and other support.

One possible option to maintain access to Eurodac, to continue to benefit from the Dublin system and to keep operational contacts with the EASO would be to enter into international agreements after Brexit. All EEA countries (Norway, Iceland, Switzerland and Liechtenstein) have done so. Given its special status, Denmark also benefits from these EU instruments through international agreements.<sup>17</sup> It must be emphasised, however, that all these countries 'associated' themselves with EU asylum law and it was on that basis that subsequent agreements were entered into, and these allow access to Eurodac, Dublin transfers and EASO support. Association in this context means that Norway, Iceland and the other countries unilaterally accept all EU asylum laws that are adopted; should any specific EU asylum law not be recognised then the underlying international agreement is suspended, hence access to Eurodac, Dublin transfers and EASO support becomes unavailable. The issue naturally arises that, should the UK wish to benefit from the above EU asylum instruments, it must align itself to EU asylum law in general, from which it is about to depart. It is highly implausible that, without some association with EU asylum law, any such international agreement would be fostered from the EU's side, if for no other reason than it would set a precedent contrary to the practice followed so far in relation to the EEA countries.

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<sup>17</sup> 2006/167/EC: Council Decision of 21 February 2006 on the conclusion of a Protocol 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 (Text with EEA relevance); OJ L 57, 28.2.2006, p. 15–15; 2009/487/EC: Council Decision of 24 October 2008 on the conclusion of a Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein 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 OJ L 161, 24.6.2009, p. 6–7; 2006/188/EC: Council Decision of 21 February 2006 on the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national and Council Regulation (EC) No 2725/2000 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the *Dublin Convention* OJ L 66, 8.3.2006, p. 37–37; Council Decision of 7 March 2011 on the conclusion of a Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein 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 OJ L 160, 18.6.2011, p. 37–38; Council Decision of 7 March 2011 on the conclusion of a Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein 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 OJ L 160, 18.6.2011, p. 37–38; 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, 12.4.2014, p. 3–8; Arrangement between the European Union and the Principality of Liechtenstein on the modalities of its participation in the European Asylum Support Office OJ L 170, 11.6.2014, p. 50–57; Arrangement between the European Union and the Republic of Iceland on the modalities of its participation in the European Asylum Support Office OJ L 106, 9.4.2014, p. 2–3.

### III Legal Migration

The UK has largely stayed out of the instruments through which the EU has sought to facilitate the legal migration of third country nationals to the EU, and is therefore absent from the Directives on the status of long term residents, on the entry and stay of seasonal workers, researchers, students, highly skilled workers, and the corresponding single procedure to reside and work in the EU.<sup>18</sup> The instruments to which the UK did opt in are few, such as the Regulation on uniform residents permit and social security coordination, and Decisions on information exchange on migration policy and the Migration Network.<sup>19</sup> The loss of these instruments will not leave a significant vacuum when the UK leaves the EU.

### IV Irregular Migration

The UK has similarly abstained from participating in the bulk of the EU legislation tackling irregular migration. In this vein, the UK is not bound by the so-called Returns Directive, aligning EU Member States' legislation on expulsion and deportation procedures and laying down common minimum standards regarding those procedures.<sup>20</sup> Nor does the UK take part in the Sanctions Directive, which provides administrative and criminal sanctions to those who employ illegally staying third country nationals,<sup>21</sup> the Directive on defining the facilitation of

<sup>18</sup> Respectively: Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L 16, 23.1.2004, p. 44–53; Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing OJ L 132, 21.5.2016, p. 21–57; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers OJ L 94, 28.3.2014, p. 375–390; Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State; OJ L 343, 23.12.2011, p. 1–9; Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment OJ L 155, 18.6.2009, p. 17–29; Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research OJ L 289, 3.11.2005, p. 15–22; Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service OJ L 375, 23.12.2004, p. 12–18.

<sup>19</sup> Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals OJ L 157, 15.6.2002, p. 1–72; Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality OJ L 124, 20.5.2003, p. 1–3; 2008/381/EC: Council Decision of 14 May 2008 establishing a European Migration Network OJ L 131, 21.5.2008, p. 7–12.

<sup>20</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348, 24.12.2008.

<sup>21</sup> Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals OJ L 168, 30.6.2009, p. 24–32.

unauthorised entry<sup>22</sup> and the Directive on assistance in cases for the purposes of removal by air;<sup>23</sup> the list could only go on. As such, Brexit will not bring much change with respect to irregular migration as the UK has already distanced itself from this regulatory field of the EU. There is however one specific area, which may cause some headache after Brexit. The EU has concluded a number of readmission agreements with third countries to take back their nationals whose presence in the EU is found to be unauthorised. Some of these agreements go even further and ensure that the third country not only takes back its own nationals but also any other person who holds a visa for that third country or who has transited, resided or has been present in that country.<sup>24</sup> The UK has participated in most of these treaties, although it does not apply the agreements with Turkey, Azerbaijan, Armenia and Cape Verde in practice.<sup>25</sup> After Brexit, all these agreements will need to be renounced from the side of the UK but, more importantly, new, it will be necessary to conclude bilateral readmission agreements. The difficulty with such agreements, however, is how to offer a bargaining chip for the third country to actually undertake the obligation of taking back their own nationals and other persons, which the UK now has to secure alone.

## V Judicial Cooperation in Criminal Matters

Up until the Treaty of Lisbon, the UK was fully engaged with the other EU Member States regarding measures related to judicial cooperation in criminal matters, becoming bound by the growing body of substantive and procedural EU criminal law unanimously adopted in the Council. The Treaty of Lisbon ended the intergovernmental nature of judicial cooperation in criminal matters and introduced the Community method to this area as well. In parallel with this, the UK's involvement in this area also significantly changed.

Protocol 21<sup>26</sup> to the Treaty of Lisbon brought a distinct change to the UK position by introducing the opt-out regime, akin to the one applicable to judicial cooperation in civil matters. The Protocol brought with it the following changes. First of all, the UK, together with Ireland,<sup>27</sup> became an opt-out country by default, meaning that in principle these States do not

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<sup>22</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence OJ L 328, 5.12.2002.

<sup>23</sup> Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air OJ L 321, 6.12.2003, p. 26–31.

<sup>24</sup> Over the last ten years, the EU has concluded 17 readmission agreements with Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, FYROM, Bosnia & Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey and Cape Verde respectively.

<sup>25</sup> Peers (n 14) pp. 453.

<sup>26</sup> Protocol 21 on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom Security and Justice.

<sup>27</sup> Ireland has no opt-out regarding to anti-terrorist sanction see Article 9 of Protocol 21. The UK has also made a declaration of the same effect; see Declaration 65 attached to the Final Act of the Intergovernmental Conference which adopted the *Treaty of Lisbon*.



subscribe to the EU criminal law *acquis* that has been developed after the entry into force of the Treaty of Lisbon unless they unilaterally wished to opt in to individual measures. With regard to the latter, an opt-in notice is to be given within three months after the initial proposal is made, or alternatively at any time after the measure is adopted. In practice, the UK has by and large opted in to half of the measures adopted in the field of EU criminal law following the entry into force of the Lisbon Treaty,<sup>28</sup> at times even after initial concerns regarding a given proposal.<sup>29</sup> The UK has notably been absent from the Children's rights in criminal proceedings Directive, the Presumption of innocence Directive, the Confiscation Directive and the Right to access to a lawyer Directive,<sup>30</sup> although absence from some more recent instruments could also be attributable to the upcoming referendum.

Even so, the second new feature with regard to the UK's position after the entry into force of the Treaty of Lisbon, introduced by Protocol 36 on transitional provisions attached to the Treaty of Lisbon, is more striking than the mere extension of the opt-out regime to the field of criminal law, with the possibility to opt in to individual measures. According to this Protocol, it became possible for the UK to invoke a block opt-out, i.e. to disentangle itself from all pre-Lisbon EU criminal law in one go and to inform the Council later that it still wishes to accept certain individual measures. The block opt-out did not encompass the *acquis* which were amended during the transitional period of five years after the entry into force of the Treaty of

<sup>28</sup> Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA OJ L 151, 21.5.2014, p. 1–8; Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters OJ L 130, 1.5.2014, p. 1–36; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order OJ L 338, 21.12.2011, p. 2–18; Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; OJ L 280, 26.10.2010, p. 1–7; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; OJ L 142, 1.6.2012, p. 1–10. Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA OJ L 218, 14.8.2013, p. 8–14.

<sup>29</sup> See for example Commission Decision of 14 October 2011 on the request by the United Kingdom to accept Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA extending the territorial scope of the Directive to the United Kingdom held a year after its initial adoption.

<sup>30</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings OJ L 132, 21.5.2016, p. 1–20; Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings; OJ L 65, 11.3.2016, p. 1–11; Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union; OJ L 127, 29.4.2014, p. 39–50; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty OJ L 294, 6.11.2013, p. 1–12.

Lisbon, and those instruments which the UK opted into after the entry of the Treaty of Lisbon. The timeframe for invoking the block opt-out was the end of the transitional period, which expired on 1 December 2014. The UK did avail itself of this possibility and notified the Council of its intention to opt out of the EU criminal law *acquis* adopted before the Treaty of Lisbon, despite the fact that all these items were adopted with unanimity at the time in the Council, including the British vote.<sup>31</sup> With the same move, the UK also informed the Council of its intention to re-opt in to some 35 pre-Lisbon instruments, including policing related ones (see below),<sup>32</sup> and was authorised by the Commission and the Council to do so.<sup>33</sup> The instruments to which the UK decided to opt back into included the European Arrest Warrant, participation in Europol and Eurojust and exchange of criminal records, which were the biggest concerns for the other EU Member States at the time.

In sum, despite the strong opt-out regime introduced by Protocols 21 and 36 and invoked in practice, the UK continued to be part of the most important aspects of EU judicial cooperation in criminal matters, namely participation in most of the mutual recognition instruments, chiefly the European Arrest Warrant (see the discussion below), selected pieces of EU procedural guarantees and substantive criminal law, participation in the criminal cooperation agencies and networks and maintaining information exchange.

Once Brexit becomes a reality, the landscape will be profoundly different, with the quality and intensity of criminal cooperation in all likelihood falling back to the level of where it was prior to the nineties, at best. This bleak scenario will be illustrated in detail below, in the context of four specific areas of EU judicial cooperation: judicial cooperation instruments based on the mutual recognition principle; EU procedural guarantees of suspected and accused persons; EU substantive criminal law; and Eurojust.

## 1 Mutual Recognition Instruments, European Arrest Warrant

The most affected area will probably be the judicial cooperation instruments based on the so-called mutual recognition principle. Mutual recognition, seen as a marked departure from the classical mutual legal assistance-based criminal cooperation, was probably the EU's most distinct contribution to judicial cooperation between EU Member States' authorities. Based on

<sup>31</sup> UK notification according to Article 10(4) of Protocol 36 to TEU and TFEU ST 12750/13 Brussels, 26 July 2013.

<sup>32</sup> Notification of the United Kingdom under Article 10(5) of Protocol 36 to the EU Treaties 15398/14 27 November 2015.

<sup>33</sup> See the respective Commission and Council decision authorising the UK to opt back to the listed measures 2014/857/EU Council Decision 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; 2014/858/EU Commission Decision 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*.

the mutual recognition principle, direct exchange between the competent authorities, with no involvement of the executive branch, has become the norm. Judicial acts of another EU Member State authority are recognised and enforced as if they were domestic in nature and the double criminality principle is set aside in respect of 32 listed offences.<sup>34</sup> Grounds for the refusal of recognition and enforcement of a judicial act of another EU MS authority have been severely curtailed; limited to a handful of instances involving the *ne bis in idem* principle, territoriality and amnesty.

The flagship instrument of EU judicial cooperation based on the mutual recognition principle is undoubtedly the European Arrest Warrant (EAW), which created a very effective and much simplified extradition and surrender procedure.

The EAW, however, also proved to be the most problematic mutual recognition instrument. The proportionality of its use, the lack of fundamental rights guarantees and especially the absence of fundamental rights-based grounds for refusal remain recurring issues of concern in its application and interpretation.<sup>35</sup> Over time, EU procedural rights legislation, the recent case law of the Court of Justice of the European Union and, and more generally, the EU Charter of Fundamental Rights placing EU criminal law in a fundamental rights context since the Treaty of Lisbon entered into force have improved the application of the EAW. And while the EAW has featured in the tabloid headlines of the British press many times,<sup>36</sup> it nonetheless proved important enough to opt back into when London's choice was made on what to keep and what to abandon from the pre-Lisbon criminal law *acquis*.<sup>37</sup>

Without mutual recognition in place after Brexit, extradition between the UK and EU Member States will become significantly lengthier and more complex, with the fall-back legal instrument being the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957, which the EAW was meant to replace entirely. As with most other EU mutual recognition instruments, the EAW also relies on instruments adopted previously under the auspices of the Council of Europe (CoE) and contains a so-called disapplication clause, which provides that EU Member States discontinue applying the CoE Extradition Convention among themselves, and only apply the Convention *vis-à-vis* non-EU states.<sup>38</sup> Once Brexit takes place, the discontinuation clause of the EAW will no longer apply to the UK and the 1957 Extradition Convention will reanimate for EU UK extradition matters as

<sup>34</sup> The first list of the criminal offences not being subject to the double criminality rule was created by the European Arrest Warrant, and remained a standard ever since. The list itself is not unproblematic as it does not define the offences but merely enlists them see also C-303/05 *Advocaten voor de Wereld* VZW/ECLI:EU:C:2007:261 where the CJUE has not shared these concerns.

<sup>35</sup> C-404/15 and C-659/15 PPU *Aranyossi and Căldăraru* ECLI:EU:C:2016:198.

<sup>36</sup> E.g. <http://www.dailymail.co.uk/news/article-2058212/British-woman-thrown-cell-European-Arrest-Warrant-crime-boyfriend-allegedly-committed-15-years-ago.html>.

<sup>37</sup> <http://www.dailymail.co.uk/news/article-2808591/Britain-haven-Europe-s-rapists-murderers-child-molesters-without-EU-arrest-warrant-Tories-warn.html>.

<sup>38</sup> Article 31 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

the UK will then be regarded as a third country. The 1957 Extradition Convention applies the double criminality principle, allows the non-extradition of nationals, allows a political offence exception (albeit curtailed by subsequent protocols), has no time limits and creates an obligation for the requested State to extradite under public international law, which is admittedly less cumbersome than EU law. The less strict regime of extradition will also make it easier to avoid extradition for those EU Member States' citizens who stay in the UK and are subject to an extradition request from an EU Member State. This is not particularly good news for a country which, up until now, has received a comparatively high number of requests from EU Member States (with 95% of the persons requested and extradited to the other EU Member States not being British citizens) whereas the UK itself has made significantly fewer requests to other EU Member States.<sup>39</sup>

If an extradition regime stricter than that of the 1957 Extradition Convention is sought then that will necessitate the conclusion of an EU-UK agreement on this matter. The EU has already concluded extradition agreements with non-EU countries, such as with Norway and Iceland,<sup>40</sup> and with the United States<sup>41</sup>. A common feature of these agreements is that, despite their bilateral nature, they create a much looser legal framework than the EAW, chiefly that the possibility to deny the extradition of nationals is maintained.

The situation is very similar with regard to a number of other mutual recognition instruments which the UK retained from the *acquis* prior to the Treaty of Lisbon or opted into post-Lisbon. With regard to those EU mutual recognition instruments which contain a disapplication clause, the disappplied international treaty (in most instances a Council of Europe convention), will be revived and become applicable between the EU Member States and the United Kingdom, since the latter, post-Brexit, will be considered a third country. This, for example, will be the fate of the European Investigation Order. In its place, the 1959 European Convention on Mutual Assistance in Criminal Matters and its Protocols (1959 MLA) will be applicable again. This Convention is based on mutual legal assistance and lacks the intensity and compelling nature of the EU mutual recognition instruments, stating no deadlines for fulfilling requests and containing no provisions for real time investigating measures, just to mention but a couple of the drawbacks of the 1959 MLA Convention as compared to the European Investigation Order.<sup>42</sup> In practice, the drawbacks of the 1959 MLA Convention might be overcome, thanks to the very close working relationships between the UK competent authorities

<sup>39</sup> In 2015 alone, the UK received approx. 12 000 EAW requests, arrested some 2000 and surrendered 1000 persons to other EU Member States while it made approx. 220 requests and received 150 arrested and 120 surrendered persons. Wanted from the UK: European Arrest Warrant statistics 2009 - May 2016 (Calendar Year) Wanted by the UK: European Arrest Warrant statistics 2009 – May 2016 (Calendar Year) See <http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-by-the-uk-european-arrest-warrant-statistics>.

<sup>40</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, 21.10.2006, p. 1–1.

<sup>41</sup> *Agreement on extradition between the European Union and the United States of America* OJ L 181, 19.7.2003, p. 27–33.

<sup>42</sup> Article 34. Directive 2014/41/EU of the European Parliament and the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

and those of the EU Member States, which have been established under the EU regime. This may breathe new life into the otherwise flexible arrangements provided by the 1959 MLA Convention and will perhaps enable a degree of cooperation that is comparable to the one departed from. The other option is of course to conclude a self-standing EU-UK mutual legal assistance agreement, as the EU has already done with the USA<sup>43</sup> and Japan<sup>44</sup>.

In the same vein the same can be said of the Framework Decision on Confiscation Orders,<sup>45</sup> the Framework Decision on Taking account of Convictions,<sup>46</sup> and the Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences.<sup>47</sup> In all these cases, the Council of Europe Conventions will revive and provide a fall back option. It has to be pointed out, however, that, as international treaties, the problem posed by non-ratification and reservation by either the UK or some other EU Member State may further hinder cooperation, not to mention the lack of any centralised enforcement mechanism, which is the norm regarding international agreements.

There are quite a few EU mutual legal instruments, however, which do not build on a Council of Europe or other convention and which could readily serve as a fall back option after Brexit. This, for example, is the case regarding the Framework Decision on the Mutual Recognition of Financial Penalties<sup>48</sup> and the Framework Decision on mutual recognition to decisions on supervision measures as an alternative to provisional detention,<sup>49</sup> which the UK judicial authorities will no longer be able to benefit from (e.g. financial penalties issued being directly recognised and enforced by another EU Member State).

In essence, saying goodbye to the EU mutual recognition instruments will have a significant impact on judicial cooperation in criminal matters between the EU and the UK when it comes to extradition and requesting legal assistance. Particularly with regard to extradition, the current

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<sup>43</sup> *Agreement on mutual legal assistance between the European Union and the United States of America* OJ L 181, 19.7.2003, p. 34–42.

<sup>44</sup> *Agreement between the European Union and Japan on mutual legal assistance in criminal matters* OJ L 39, 12.2.2010, p. 19–35.

<sup>45</sup> Council of Europe Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime see Article 21 Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

<sup>46</sup> *The European Convention of 28 May 1970 on the International Validity of Criminal Judgments* see Article 4 Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

<sup>47</sup> *The European Convention on the International Validity of Criminal Judgments of 28 May 1970, The European Convention on the transfer of sentenced persons of 21 March 1983 and the Additional Protocol thereto* of 18 December 1997. See Article 26 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

<sup>48</sup> Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

<sup>49</sup> Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

level and intensity of surrender and extradition procedures ensured by the EAW may necessitate the conclusion of a new agreement between the EU and the UK in order to go beyond the fall-back 1957 CoE Extradition Convention and maintain the effectiveness of cooperation now enjoyed inside the EU.<sup>50</sup>

## 2 Procedural Rights and Victim Protection

Since mutual recognition instruments provide only very few grounds for EU Member States to refuse to recognise and enforce the judicial order of the other Member State, it is always essential that procedural guarantees available for suspected and accused persons are ensured at the same level throughout the EU. This requirement triggered a series of EU legislation, harmonising various aspects of procedural rights in the course of criminal procedures, with the shared aim of going beyond the protection provided by the rights and liberties guaranteed by the European Convention of Human Rights (ECHR) as interpreted by the European Court of Human Rights. After Brexit, the UK will need to decide whether to maintain its domestic legislation, which is already harmonised with EU procedural guarantees, namely regarding absentia trials,<sup>51</sup> the right to interpretation and translation<sup>52</sup> and the right to information<sup>53</sup>, or to discard it. The latter would mean that while UK citizens facing criminal prosecution in EU Member States will benefit from a higher level of procedural guarantees harmonised at the EU level, EU citizens tried in the UK will have recourse to the protection level afforded by UK domestic law, subject to the obligations set by the ECHR only. Furthermore, the EU victim protection instruments,<sup>54</sup> to which the UK opted into, will also cease to apply after Brexit, and the forms of protection will only be shared on the basis of UN and CoE conventions, unless the UK decides that despite leaving the EU it maintains the previously harmonised domestic legislation.<sup>55</sup>

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<sup>50</sup> See also Peers EU Referendum Brief 5: How would Brexit impact the UK's involvement in EU policing and criminal law? <http://eulawanalysis.blogspot.be/search?updated-max=2016-06-21T11:34:00-07:00&max-results=7&start=15&by-date=false>.

<sup>51</sup> Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

<sup>52</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

<sup>53</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

<sup>54</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order OJ L 338, 21.12.2011, p. 2–18.

<sup>55</sup> *United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* adopted on 18 December 1979, the CEDAW Committee's recommendations and decisions, *United Nations Convention on the Rights of the Child adopted on 20 November 1989* and the *Council of Europe Convention on preventing and combating violence against women and domestic violence adopted on 7 April 2011*.

### 3 EU Substantive Criminal Law

In exercising its block opt-out from EU criminal law, the UK has already untangled itself from most of the EU's substantive criminal law legislation. The instruments to which it opted into after the Treaty of Lisbon are the Child Pornography Directive,<sup>56</sup> the Directive on Trafficking in Human Beings,<sup>57</sup> the Cybercrime Directive<sup>58</sup> and the Directive on Counterfeiting of Means of Payment.<sup>59</sup> Apart from the Directive on Counterfeiting, the other three mentioned instruments build on international conventions,<sup>60</sup> which will continue to serve as a shared framework after Brexit.

### 4 Eurojust

The UK has participated in the work of Eurojust, the judicial cooperation unit of the EU, ever since its establishment and, after exercising the block opt-out, it re-opted in to all the instruments providing the legal framework under which the Unit operates.<sup>61</sup> In fact, the UK has been actively involved in cooperation under the auspices of Eurojust, and in 2015 alone it requested cooperation in 87 out of all the approximately 2000 cases that Eurojust administered. In the same period, other EU Member States requested the UK to take action in 243 cases.<sup>62</sup> Out of the total number of 274 coordination meetings held in 2015,<sup>63</sup> the UK organised 28 and

<sup>56</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA OJ L 335, 17.12.2011, p. 1–14.

<sup>57</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA OJ L 101, 15.4.2011, p. 1–11.

<sup>58</sup> Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA OJ L 218, 14.8.2013, p. 8–14.

<sup>59</sup> Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA OJ L 151, 21.5.2014, p. 1–8.

<sup>60</sup> In the case of the *Cybercrime Directive the Budapest Convention (Council of Europe Convention on Cybercrime 2001)*, *Child Pornography Directive Lanzarote Convention (Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse 2007)*, *Trafficking in Human Beings Palermo Convention (United Nations Convention against Transnational Organized Crime and the Protocols There to 2000)*.

<sup>61</sup> Decision 2002/187/JHA on setting up Eurojust, as amended by Council Decision 2003/659/JHA, and Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust, commonly referred as Eurojust Decision.

<sup>62</sup> 72 bilateral (between two EU MSs) and 15 multilateral (more than two EU MSs) cases see *Eurojust Annual Report 2015*, p. 11.

<sup>63</sup> Coordination meeting are attended by judicial and law enforcement personnel and are designed to facilitate the exchange of information, identify and implement means and methods to support the execution of MLA requests and coercive measures (e.g. search warrants and arrest warrants), coordinate ongoing investigations and prosecutions, and detect, prevent or solve conflicts of jurisdiction, *ne bis in idem* related issues and other legal and evidential problems.

participated in 69.<sup>64</sup> Out of the 13 coordination centres,<sup>65</sup> allowing for real time information exchange and simultaneous execution of operations, the UK participated in 7 and organised 1.<sup>66</sup> If the UK still wishes to cooperate with Eurojust after Brexit, this will need to be based on a separate agreement<sup>67</sup> so as to allow information exchange and the secondment of liaison officers/magistrates. The degree and intensity of cooperation will largely depend on the terms of such an agreement. The agreement between Eurojust and the United States, for example, allows for very close cooperation between the judicial authorities, but even there, participation in strategic meetings needs the approval of the Member States concerned and cooperation is request-based.<sup>68</sup>

Summarising the above, the UK's departure from the EU will mutually impact the UK and the EU Member States when it comes to judicial cooperation in criminal matters. Since the legal framework of cooperation and information exchange will largely disappear, the impact will likely be negative on both sides. Maintaining the current efficiency of extradition secured by the EAW will be a matter of prime concern and a separate agreement will likely be necessary. Other mutual recognition items will be replaced by international treaties at best, or simply vanish after Brexit, again calling for the adoption of new agreements. Cooperation with Eurojust will certainly need an underlying agreement. Procedural guarantees will be based on the protection level afforded by the ECHR, unless the UK unilaterally decides to maintain domestic legislation to that effect. To re-establish cooperation through new international treaties and other instruments will take time to conclude and will bring with them a transition period of uncertainty that risks the degradation of the quality and intensity of cooperation that has existed heretofore.

## VI Judicial Cooperation in Civil Matters

Judicial cooperation in civil matters also emerged as an area of common interest under the Justice and Home Affairs cooperation envisaged by the Treaty of the European Union. As opposed to criminal cooperation, cooperation in civil matters was already placed under the Community method by the Treaty of Amsterdam, and qualified majority voting has subsequently become the rule.<sup>69</sup> From the outset, the United Kingdom has enjoyed an opt-out related

<sup>64</sup> *Eurojust Annual Report 2015*. p. 15.

<sup>65</sup> Eurojust's coordination centres facilitate the exchange of information among judicial authorities in real time and enable direct support towards the coordinated, simultaneous execution of, *inter alia*, arrest warrants, searches and seizures in different countries.

<sup>66</sup> *Eurojust Annual Report 2015*. p. 17.

<sup>67</sup> Article 26a of the Eurojust Decision.

<sup>68</sup> *Article 7 Agreement between Eurojust and the United States of America* (2006).

<sup>69</sup> The Treaty of Amsterdam inserted a new Title IIIa on Visa, Asylum, Immigration and other Policies related to the Free Movement of Persons to the then EC Treaty, where Article 73o TEC provided that for a transitional period of 5 years the Council shall act unanimously on a proposal from the Commission and only consult the European Parliament. After the expiry of the transitional period however the Council shall take a decision to transit to the co-decision procedure with qualified majority vote when acting under the above title.



to the instruments adopted in the field of judicial cooperation in civil matters. Despite the general opt-out position and the recurring arguments related to the difficulties in alleviating the differences between the civil law tradition and common law, the UK did opt in to a number of instruments of judicial cooperation in civil matters. These included the those facilitating the free circulation of judgments in the area of civil and commercial matters, including legislation related to the recognition and enforcement of judgments,<sup>70</sup> instruments enhancing cross-border recovery of claims and enforcement of judgments,<sup>71</sup> and instruments related to insolvency,<sup>72</sup> service of documents,<sup>73</sup> and taking of evidence.<sup>74</sup> All these instruments are designed to enhance the efficiency of cross-border litigation and to ensure that judgments are recognised and enforced by the courts of other EU Member States. Since most of the above legal acts have been in force for quite some time, there is ample data available to demonstrate their positive effects. All reports evaluating the above instruments show the clear reduction in the length of procedures and the amount of expenses and the benefits of easily available documentation and evidence. Legal certainty has been also improved to a great extent, given the assurance that judgments will be recognised and enforced in the other EU Member States.<sup>75</sup> In addition to this, in the field of civil procedure, the overall effect of the mutual recognition principle was the abolition of the so-called *exequatur* procedure (an interim decision of the enforceability of the underlying foreign judgment). Abandoning this largely formal interim phase proved to significantly shorten proceedings and also make them less expensive.

After Brexit, these instruments will no longer be available to either the UK authorities or natural and legal persons. This will mean that their added value of efficiency, direct judicial communication and, last but not least, the mutual recognition regime whereby judicial acts are

<sup>70</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

<sup>71</sup> Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims; REGULATION (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure; Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

<sup>72</sup> Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

<sup>73</sup> Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000.

<sup>74</sup> Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

<sup>75</sup> Report on the application of Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) COM(2013) 858 final Assessment of the socio-economic impacts of the policy options for the future of the European Small Claims Regulation 2013, Report on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings COM(2012) 743 final, Study on the application of Articles 3(1)(C) and 3, and Articles 17 and 18 of the Council Regulation (EC) NO 1206/2001 of 28 May 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters – just to name a few out of the many evaluations see [http://ec.europa.eu/justice/civil/document/index\\_en.htm](http://ec.europa.eu/justice/civil/document/index_en.htm).

in principle recognised – unless there are public policy objections – will be gone. In some cases – for example to the service of documents and choice of court agreements – cooperation will be possible on the basis of international conventions mostly adopted under the auspices of the Hague Conference on Private International Law.<sup>76</sup> These however operate on the mutual assistance principle with the involvement of central authorities and contain significantly fewer obligations for state parties. However, for EU instruments facilitating the enforcement and enforceability of judgments – the European Enforcement Order, European Order for Payment and European Small Claims Procedure – these are all based on the principle of mutual recognition and there will simply be no underlying instrument. This will clearly be to the disadvantage of the parties to cross-border civil procedures.

There is one particular instrument in the area of EU judicial cooperation in civil matters, related to family matters, to which the UK did opt in, known as the Brussels II bis Regulation.<sup>77</sup> This instrument deals with matters related to the recognition and enforcement of matrimonial matters, parental responsibility and civil law aspects of child abduction. With respect to parental responsibility and child abduction matters, the Regulation builds heavily on the 1980 and 1996 Hague Conventions.<sup>78</sup> However, it takes the ideas of the two instruments much further through the introduction of the mutual recognition principle, shortened procedural deadlines, direct communication between the competent authorities and making the refusal to transfer the child much more difficult for the requested authority. These advances of the Regulation will be lost when Brexit takes place and cooperation will be undertaken solely under the rules of the old Hague Conventions. Similarly, the recognition and enforcement of judgments related to matrimonial matters will share the same fate, with old international agreements<sup>79</sup> replacing the Regulation.

It needs to be added, however, that in the area of judicial cooperation in civil matters there is a specific ‘custom’ of transforming the adopted EU acquis to international agreements. Denmark has been an opt-out country (with no possibility to opt in to individual EU measures) ever since the EU began to pursue judicial cooperation in civil matters, yet it has availed itself of a number of EU legal acts adopted in this field through international agreements.<sup>80</sup> These

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<sup>76</sup> E.g. *1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in civil or Commercial Matters*; *2005 Convention on Choice of Court Agreements*; *1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)*.

<sup>77</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

<sup>78</sup> Respectively *the Hague Convention of 1980 on the Civil Aspects of International Child Abduction* and *the Hague Convention of 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children*.

<sup>79</sup> *The Luxembourg Convention of 1967 on the Recognition of Decisions Relating to the Validity of Marriages; the Hague Convention of 1970 on the Recognition of Divorces and Legal Separations*.

<sup>80</sup> See *the 2005 and 2008 Agreements between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil and commercial matters*, also *the 2005, 2009 and 2014 Agreements between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters*.

international agreements simply replicate the underlying EU act, and include a so-called guillotine clause, meaning that the agreement is terminated should the EU amend the underlying legislative act which Denmark does not wish to accept. The adoption of such agreements has always been a very smooth exercise, not only because the state party was an EU Member State, but also because these agreements repeat verbatim the EU legal act they mimic, with no possibility to add or deduct anything from the original EU act.

Adopting Denmark-type agreements may serve as a model after Brexit, should the UK still wish to benefit from the advantages of EU judicial cooperation in civil matters. One advantage of this approach would be that instruments already known and used would remain applicable, though their legal nature would certainly change if they became international treaties instead of EU Regulations. The other clear advantage would be that, through keeping the content of the foreseen agreements identical to the underlying EU regulations, the negotiation time would be immensely reduced and so both parties and the judicial authorities could continue to benefit from such instruments with only a brief hiatus. By contrast, should alteration to the underlying EU law be required by the UK, this could lead to lengthy negotiations, during which there will be fewer and less developed legal instruments available upon which to base cooperation.

It needs to be underlined as well that, in the area of judicial cooperation in civil matters, it is not only the vested interest of public authorities in cooperating in a timely and efficient manner that is at stake. Thousands of ordinary natural and legal persons are affected daily by EU judicial cooperation instruments, on both the UK's and the EU's side. Their interest in continuing to benefit from the advantages of a common area of justice will need to be taken into account when it comes to designing the future instruments of cooperation.

## VII Police Cooperation

Police cooperation has been the single field within Justice and Home Affairs in which the UK has participated without hesitation and was in fact a key player in shaping it. Legislative instruments adopted in this field have largely targeted areas of information exchange between law enforcement authorities and the gradual establishment and strengthening of Europol, the European Union Agency for Law Enforcement Cooperation. Before the Treaty of Lisbon, police cooperation had two distinct legal bases, one originating in the Schengen Agreement, and especially the Convention Implementing the Schengen Agreement producing the so-called Schengen *acquis*; and the other found in Title VI on Police and judicial cooperation in criminal matters of the former Treaty of the European Union as modified by the Treaty of Amsterdam. These two distinct legal bases had the following consequences for the UK's participation in police cooperation prior to Lisbon.

With regard to police cooperation emerging in the framework of the Schengen *acquis*, the Schengen Protocol<sup>81</sup> was applicable to the UK. As discussed above, according to this Protocol,

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<sup>81</sup> See (n 4).

the UK could request its participation in an individual measure which was subject to the Council's approval. It was, however, not possible for the UK to participate in a measure, even of a police cooperation nature, which was built on a portion of the Schengen *acquis* to which the UK had not acceded originally. This was the case with regard to law enforcement access to the Visa Information System. The UK had wished to participate in this mechanism but, because it did not participate in the underlying Visa Regulation, its request to do so was refused by the Council and later by the CJEU.<sup>82</sup> In 2000 the UK requested to opt in to a great number of criminal and police cooperation measures adopted under the Schengen regime.<sup>83</sup> This opt-in meant that the UK was also to participate in future measures adopted based on these instruments. In effect, the UK has applied this part of the Schengen *acquis* since 2005, along with the SIS, to which it acceded in 2015. In fact, up until the block opt-out in 2013 (discussed below) the UK participated in all police cooperation available under the Schengen *acquis*, apart from that related to hot pursuit by police officers.

The UK fully took part in the third pillar cooperation under Title VI of the TEU, which is the second tenet of EU police cooperation based on Title VI of the TEU. This changed dramatically with the entry into force of the Treaty of Lisbon, which introduced the opt-out regime to police cooperation and the block opt-out from pre-Lisbon measures, in the same manner as in judicial cooperation in criminal matters. In practice, this meant that with regard to the post-Lisbon instruments the UK still opted<sup>84</sup> in to the Passenger Names Record Directive<sup>84</sup> and the Regulation providing access for law enforcement authorities to Eurodac.<sup>85</sup> The UK has been notably absent from the new Europol Regulation, despite Europol having a British Executive Director,<sup>86</sup> and the European Police College, this irrespective of the fact that the UK had been its main training facility.<sup>87</sup> After the block opt-out was exercised, the UK still re-opted

<sup>82</sup> C-2482/08 *UK v Council* [2010] ECR I-10413.

<sup>83</sup> 2000/365/EC: 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*.

<sup>84</sup> Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences on serious crime OJ L 119, 4.5.2016, p. 132–149.

<sup>85</sup> 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 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice OJ L 180, 29.6.2013, p. 1–30.

<sup>86</sup> Regulation 2016/794/EU of 11 May 2016 of the European Parliament and the Council 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 135, 24.5.2016, p. 53–114.

<sup>87</sup> Regulation (EU) 2015/2219 of the European Parliament and of the Council of 25 November 2015 on the European Union Agency for Law Enforcement Training (CEPOL) and replacing and repealing Council Decision 2005/681/JH OJ L 319, 4.12.2015.

in to the majority of the police cooperation instruments adopted prior to the entry into force of the Treaty of Lisbon. This included access to the SIS in relation to persons subject to a EAW or an international arrest warrant, stolen objects, terrorist suspects under surveillance, and the Customs Information System mostly used for tracking down drug traffickers., as well as the so-called Prüm Decisions, allowing access to other EU Member States' fingerprint, DNA and licence plate police databases, ECRIS, the access to and exchange of criminal records, the Joint Investigation Teams decision facilitating the formation of European investigation teams and finally participation in Europol.

What will be the immediate impact of Brexit regarding police cooperation? There will simply be no access to EU level (SIS, CIS and Eurodac) and national (criminal records, fingerprint, DNA, license plates) databases, nor to the Europol Analytical Work Files, containing sensitive police intelligence, unless agreements (either in the form of full-fledged international treaties or operational understandings) are agreed. Even so, such agreements will not provide UK law enforcement authorities with direct access but would only provide the possibility for the UK to request and later receive information. It has to be underlined that non-EU States, such as Norway and Iceland, were granted access to the SIS and to the databases dealt with by the Prüm Decisions upon fully integrating to the Schengen Area. At this moment, it is doubtful that this would be the intention of the UK since it has never fully participated in the Schengen system, even as an EU Member State.

The situation regarding criminal records is even bleaker, as the EU has so far not concluded any agreement with a non-EU state allowing it access to ECRIS, of which the UK is currently one of the biggest users.<sup>88</sup>

With regard to the exchange of Passenger Names Records and combating terrorist financing, the situation is somewhat better, as the EU has signed agreements with non-EU states, for example the Agreements on PNR signed with the US, Canada and Australia and the agreement on tracking terrorist financing signed with the US.

A particular difficulty of all such agreements is that they contain measures regarding the transfer of personal data and hence not only do full-fledged international treaties need to be concluded but these agreed instruments will have to pass the scrutiny of the European Parliament and that of the Court of Justice of the European Union. The conclusion of international agreements containing the transfer of personal data agreements has not been easy exercises in the past: neither the Parliament nor the Court had any scruples in striking down an already concluded agreement, even when the other party was the United States.<sup>89</sup>

<sup>88</sup> Exchanging information on criminal convictions, <http://www.publications.parliament.uk/pa/cm201516/cmselect/cmeuleg/342-xxiii/34213.htm>.

<sup>89</sup> See how the European Parliament refused to give green light to *SWIFT Agreement between the EU and the US on transferring banking data in 2010* <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100209IPR68674> and recently the CJEU judgment invalidating the Commission's 'Safe Harbour' Decision to allow the Commission's 'Safe Harbour' decision which allows transfers of personal data to the USA, C-362/14 *Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650.

## VIII Conclusion

The above discussion shows that Brexit will have different consequences on EU-UK cooperation depending on which of the various policy fields is being considered under the broader Area of Freedom Security and Justice umbrella. In some areas, such as border control/management, or legal and irregular migration, hardly any change will be felt, either on the UK's or on the EU's side. International protection will be affected both in scope and content unless the UK keeps its EU harmonized refugee legislation, still the cooperation instruments – such as the Dublin transfers – will not be available anymore. In other areas, however, such as judicial cooperation in criminal matters or police cooperation, the effects of the loss of the current legal framework will be very significant and immediately felt. Extradition, legal assistance and access to databases, for example to Eurodac, SIS, fingerprint and DNA databases and to criminal records, just to name a few, will all be curtailed as there will be no – or at best fewer fully-fledged – instruments that can be invoked readily. In the area of judicial cooperation in civil matters, authorities, citizens and legal entities will all realise that judgements resulting from cross-border litigation will no longer be mutually recognised and enforceable and instruments to secure the enforceability of foreign judgments will not be available either.

Throughout the above discussion, the adoption of new international agreements was pointed out on numerous occasions as a likely possibility for creating a new legal basis for cooperation after the UK leaves the EU. It must be underscored, however, that negotiating any such agreements, especially those which involve access to databases containing personal data, will take a long time. In terms of timing, the most fortunate solution would be to conclude the drafting of the desired agreements by the eve of the UK's departure. That said, such ambitious timing will probably be very difficult to achieve and the period of uncertainty that will emerge up until such instruments are actually adopted and ratified jeopardises cooperation. For the UK, this means that instruments that were previously available will no longer be 'on the books' and their replacement(s) will not yet have been concluded. For the EU, the conclusion of a new web of instruments with the UK in the field of AFSJ will create a number of problems. First, the negotiations with the UK will form a massive part of the agenda of both the Commission and the Council, taking considerable time away from dealing with intra-EU matters. Second, in areas where no international agreements have been concluded with third countries before, competence issues between the EU and its Member States may arise when the Commission's negotiating mandate is fine-tuned in the Council. Third, regarding those policies of ASFJ where the EU has already concluded international agreements with third countries, the EU must be very cautious in providing avenues for access and participation to the UK that are in line with existing practices. The alternative would be an exceptionalist approach, where cooperation with the UK is based on more advantageous terms than other countries, namely the Schengen member States EFTA states, could only hope for.

The other question is how Brexit will affect the shaping of the ASFJ and whether it foreshadows further disintegration or if the tide will turn and a more streamlined and less fragmented policy area will emerge. Clearly the special opt-out status of the UK already provided a prelude to its complete departure from the AFSJ. The opt-out status, however, has not become

a desired status for other Member States so far. To the contrary, Governments of opt-out Member States have actually secured the avenues to become fully associated with this field on their own initiative, insofar as there was support from their electorate. Ireland and Denmark have both launched referenda on this matter, with no success however. Having said that, maintaining the current pattern of cooperation, as a minimum programme, will be only possible if the EU remains able to deliver the objectives pursued by the AFSJ. At the height of the current 'migration crisis' and challenges to internal security, that puts an additional responsibility on the EU. Unless the EU remains able to convince public opinion that AFSJ cooperation is to the benefit to the general public in all EU Member States, sentiments will only grow that it is possible to stay out, and the UK's departure will serve a model for this.