



## ARTICLES

### TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – SECOND PART

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## THE IMPACT OF BREXIT ON EU CRIMINAL PROCEDURAL LAW: A NEW DAWN?

ANNEGRET ENGEL\*

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ABSTRACT: This *Article* provides an analysis of how the UK's withdrawal from the European Union is going to impact on EU criminal procedural laws. From the EU's perspective, the loss of a "critical" partner may lead to more harmonised cooperation between the remaining Member States and thus less intergovernmental features in this area in the long term. More crucially however, the future relationship between the EU and the UK poses certain difficulties as the procedural arrangements to be put in place cannot simply replicate the pre-Brexit status of the UK's membership. According to the Draft Agreement on the New Partnership with the UK, mechanisms such as the European Arrest Warrant are to be replaced by new "streamlined" procedures and other "simplified" arrangements for the exchange of information and cooperation. This raises questions as regards the possibility for monitoring the UK's compliance as well as the enforceability of any procedural guarantees given. In addition, the inherent danger of the UK's departure comes in the shape of a discontinuity of upholding similar values as those applied by the EU (e.g., fundamental rights) and thus a further drifting apart of both sides. Essentially, it is argued in this contribution that this constitutes the opposite of the relationship with other third countries, which is usually characterised with progressive alignment, and should therefore be approached with great caution from an EU perspective for the conclusion of the negotiations on the future relationship.

KEYWORDS: Brexit – draft agreement – criminal procedural law – differential integration – cooperation between Member States – fundamental rights standards.

\* Senior Lecturer in EU Law, Lund University (Sweden), [annegret.engel@jur.lu.se](mailto:annegret.engel@jur.lu.se).



## I. INTRODUCTION: THE STATE OF PLAY

The withdrawal of a Member State from the EU is unprecedented in its history. For the first time during the Union's existence, the Lisbon Treaty has provided for the possibility of voluntary termination of membership according to art. 50 TEU. The UK's referendum in June 2016 on its future in- or outside of the EU resulted in a marginal win for the Leave side. The process of withdrawal officially started with the triggering of art. 50 TEU in March 2017 after UK-internal quarrels in the quest for the correct constitutional competences and institutional involvement.<sup>1</sup> The negotiations for a withdrawal agreement have since been difficult, characterised by deadlocks, extensions, and even one preliminary ruling before the Court of Justice on the revocability of art. 50 TEU.<sup>2</sup> Eventually, the UK formally left the EU on 31 January 2020. The current transition period will last until 31 December 2020. Unlike the Withdrawal Agreement which stipulates the terms and conditions of the UK's departure,<sup>3</sup> the current negotiations for the future relationship between the EU and the UK now also include matters in criminal law cooperation.

As is clear from the to and fro in the Brexit negotiations, the future EU-UK relationship is a moving target and therefore capturing more than just a snapshot remains difficult. The negotiations between the EU and the UK are currently still on-going – despite various setbacks – with the aim to successfully conclude an agreement on the new partnership before the end of 2020. Basis for these negotiations forms a draft agreement from March 2020, which has however not yet reached consensus from the two sides.<sup>4</sup> Indeed, it is questionable whether such consensus will be possible in the time remaining for a conclusion of an agreement and before the end of the transition period. Nevertheless, this draft reveals the underlying issues in criminal law matters and the procedural requirements necessary for cooperation across the Channel, irrespective of an eventual adoption of this version, and shall therefore assist as reference point for the following discussion.

The focus of this *Article* will be on EU criminal procedural law and the impact Brexit will have in this area. As will be argued, the UK's withdrawal not only changes its own relationship with the EU, but may also affect the future cooperation between EU Member States themselves. As one of the policy areas characterised by variable geometry,<sup>5</sup> the area of freedom, security and justice has received much attention in academic literature,

<sup>1</sup> UK Supreme Court judgment of 24 January 2017 *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* (2017) [UKSC] 5. See also discussion in A Engel, 'The European Union and the Brexit Dilemma – A very British Problem?' (2019) *Nordic Journal of European Law* 24.

<sup>2</sup> Case C-621/18 *Wightman and Others* ECLI:EU:C:2018:999. For a short case analysis, see P Koutrakos, 'The European Court of Justice and the Politics of Brexit – the Wightman Judgment' (2019) *ELR* 1.

<sup>3</sup> European Council Agreement of 2019 on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

<sup>4</sup> Draft text of the Agreement of 18 March 2020 on the New Partnership with the United Kingdom.

<sup>5</sup> B De Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order', in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration* (Edward Elgar 2017) 9.

including the role of the UK during its EU membership. As such, the aim of this contribution is not to elaborate in great detail about all the peculiarities of EU criminal procedural law; this is already done elsewhere in this Special Issue. Instead, specific examples will be picked to illustrate the impact of the UK's withdrawal on the relationship with the European Union for criminal procedural law as well as the effect it has on the remaining Member States and on their relationship with each other.

First, a brief background with examples of differentiated integration shall provide an overview of the rather fragmented European landscape in this area. Second, the key differences in criminal procedural law after Brexit will be analysed as proposed by the Draft Agreement for the future relationship with the UK. As will be argued, these are an attempt to replicate the un-replicable due to the common desire for cross-border cooperation in the fight against international crime. However, it is also suggested, that this has to be met with realism about the post-Brexit truth of opposing directions of travel as reflected in the procedural guarantees incorporated in the Draft Agreement, particularly with regards to fundamental rights standards. This will be followed with a discussion on the potential for closer cooperation between the remaining EU Member States after the UK's withdrawal. Some concluding remarks will be provided in the final section.

## II. BACKGROUND: A EUROPEAN PATCHWORK

EU cooperation in criminal matters has long been characterised as intergovernmental and despite its integration by the Treaty of Lisbon, the former third pillar preserves some of its previous flexibility for Member States.<sup>6</sup> Such intergovernmental flexibility requires the additional application of general principles of trust<sup>7</sup> and mutual recognition,<sup>8</sup> without which cross-border cooperation in criminal matters would be less than efficient. While the provisions under the area of freedom, security and justice are now governed by shared competences according to art. 4(2)(j) TFEU, differential integration is mainly facilitated by special procedural arrangements in place for some of these legal bases in this area.<sup>9</sup>

Most notably, judicial cooperation in criminal matters allows for emergency brakes by one single Member State, thus suspending the ordinary legislative procedure for a measure it might otherwise have to comply with if adopted, but does not wish to partake in for reasons that it considers to affect fundamental aspects of its own criminal justice

<sup>6</sup> S Peers, 'Mission Accomplished? EU Justice and Home Affairs Law After the Treaty of Lisbon' (2011) CMLRev 661.

<sup>7</sup> See e.g. Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 191.

<sup>8</sup> J Öberg, 'Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure' (2020) EuConst 33.

<sup>9</sup> For an extensive discussion on the different competences under EU law, see A Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Springer 2018).

system.<sup>10</sup> Enhanced cooperation then enables some (at least nine) of the Member States to proceed with action for such a measure without the participation of the remaining countries if the latter wish to abstain.<sup>11</sup> As was claimed by J.C. Piris, enhanced cooperation essentially creates a “two-speed Europe” in those policy areas.<sup>12</sup> However, it could also be argued that the resulting flexibility achieves solidarity amongst Member States and enthusiasm for the European idea: some countries are simply better equipped to invest in certain initiatives at an early stage, while risking failure, and perhaps paving the way for others to join at a later stage.<sup>13</sup> Thus despite the fact that enhanced cooperation creates somewhat of a patchwork within EU criminal law, it does not in itself prevent further European integration; quite the contrary, it might arguably even support it.<sup>14</sup>

Another peculiarity is the option for opt-outs in relation to Title V of Part Three TFEU. For the UK and the Republic of Ireland, a flexible opt-out has been agreed, which allows them to initially abstain from any measures adopted in this area, but with a possibility to opt-in at a later stage.<sup>15</sup> In the case of Denmark, a permanent opt-out provides some more legal certainty, but still allows for the adoption of parallel international agreements in order to substitute any measure at EU level, thus leading to a somewhat similar result<sup>16</sup> Under these opt-outs, Denmark has also negotiated a special position in relation to the Schengen *acquis*, which the UK and Ireland have not opted-in at all for certain provisions.<sup>17</sup> In contrast, other non-EU countries have been able to join the Schengen area by signing association agreements,<sup>18</sup> while some EU Members are still waiting to join.<sup>19</sup> Similar variable geometry holds true for the Dublin asylum procedure.<sup>20</sup> Again, this is evidence of the rather fragmented European landscape in this area.<sup>21</sup>

<sup>10</sup> Arts 82(3) and 83(3) TFEU.

<sup>11</sup> *Ibid.* See also S Peers, ‘Enhanced Cooperation: the Cinderella of Differentiated Integration’, in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration* cit. 76.

<sup>12</sup> J.C. Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge University Press 2012).

<sup>13</sup> Art. 328(1) TFEU.

<sup>14</sup> See e.g., evidence provided in the Fourteenth Report of the Select Committee on European Scrutiny, ‘The “emergency brakes”’ [publications.parliament.uk](http://publications.parliament.uk).

<sup>15</sup> Protocol n. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice [2016].

<sup>16</sup> Protocol n. 22 on the position of Denmark [2012].

<sup>17</sup> Protocol n. 19 on the Schengen *Acquis* integrated into the Framework of the European Union [2012].

<sup>18</sup> The four EFTA countries: Iceland, Liechtenstein, Norway, and Switzerland. Monaco, San Marino, and the Vatican City are *de facto* participating.

<sup>19</sup> Bulgaria, Croatia, Cyprus, and Romania.

<sup>20</sup> Regulation (EU) 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).

<sup>21</sup> See also A Engel, ‘Opting in or Opting out? The EU’s Variable Geometry in the Area of Freedom, Security and Justice’, in R Pereira, A Engel and S Miettinen (eds), *The Governance of Criminal Justice in the*

As for the cooperation with and participation in European agencies, such as Europol<sup>22</sup> and Eurojust,<sup>23</sup> a staggering of possible cooperation with partner countries can be observed, the extent of which depends on the country's membership in the EU and its participation in Schengen as opposed to those with mere strategic or operational agreements in place.<sup>24</sup> Such agreements vary depending on their scope with the country in question. In particular, this affects the possibility for direct access to databases under those agencies and the range of information which can be exchanged with the partner country and under which conditions. Similarly, the establishment of the European Public Prosecutor's Office (EPPO) with the help of the enhanced cooperation procedure manifests further divergence within the EU amongst participating and non-participating Member States.<sup>25</sup>

The above are examples of Member States' variable geometry under the area of freedom, security and justice. The bigger picture seems to draw a European patchwork of measures and initiatives for intergovernmental cooperation which allow for a national portfolio to be tailored towards a Member State's individual interests and needs. Particularly the UK has often been described as "cherry-picking" in this regard, which is evidenced by the various flexible opt-outs mentioned above, as well as for example its continued application of the transitional provisions after Lisbon according to Protocol 36.<sup>26</sup> The UK was thus referred to as the "awkward partner",<sup>27</sup> but others have also pointed out its contributions to further integration in this area, which is the case for example with the European Arrest Warrant as well as the principle of mutual recognition.<sup>28</sup> By making full use of the available flexibility in criminal matters and asserting its own interests at EU level, the UK has been a *critical* partner throughout its EU membership.

### III. BREXIT: REPLICATING THE UN-REPLICABLE

With the end of this rather ambiguous relationship between the EU and the UK, the latter not only withdraws from some of those undesirable policy areas which it had to comply with during the time of its membership, but also automatically is being removed from some of the key areas it has actively shaped and which are at the heart of its concerns for national

*European Union: Transnationalism, Localism and Public Participation in an Evolving Constitutional Order* (Edward Elgar 2020) 39.

<sup>22</sup> Decision 2009/371/JHA of the Council of 6 April 2009 establishing the European Police Office (Europol).

<sup>23</sup> Decision 2009/426/JHA of the Council of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.

<sup>24</sup> An overview of Europol's external partners and agreements can be found at 'Fostering cooperation among law enforcement and other partners around the world' EUROPOL [www.europol.europa.eu](http://www.europol.europa.eu); agreements concluded with Eurojust are available at [www.eurojust.europa.eu](http://www.eurojust.europa.eu).

<sup>25</sup> The role of EPPO is discussed in more detail elsewhere in this Special Issue.

<sup>26</sup> European Parliament, Committee on Civil Liberties, Justice and Home affairs on Protocol n. 36 to the Treaty of Lisbon on transitional provision: the position of the United Kingdom, [www.statewatch.org](http://www.statewatch.org).

<sup>27</sup> S George, *An Awkward Partner: Britain in the European Community* (Oxford University Press 1998).

<sup>28</sup> See e.g., V Mitsilegas, 'European Criminal Law After Brexit' (2017) CrimLF 219.

security. As has been argued, this may lead to the paradoxical situation that in order to continue enjoying similar security benefits after its withdrawal, the UK would have to provide more procedural guarantees than previously during its EU membership.<sup>29</sup> Of course, from an EU perspective there is a similarly strong interest in continuing cooperation with the UK in the fight against international crime and cross-border terrorism.

In the revised (non-binding) Political Declaration, both the EU and the UK declared their intentions for establishing “a broad, comprehensive and balanced security partnership” with “a view to Europe’s security and safety of their respective citizens”.<sup>30</sup> The Draft Agreement on the New Partnership with the UK covers the envisaged Security Partnership in Part Three. Thereunder, Title I on law enforcement and judicial cooperation in criminal matters includes provisions on exchanges of DNA, fingerprints and vehicle registration data (PRUM), transfer and processing of passenger name record data (PNR), cooperation on operational information, cooperation with Europol, cooperation with Eurojust, surrender, mutual assistance, exchange of information extracted from criminal records, and anti-money laundering and counter-terrorism financing. Further thematic cooperation under Title III deals with the fight against irregular migration, health security, and cyber-security.

The most interesting part certainly is the chapter on surrender, which is the post-Brexit equivalent of the European Arrest Warrant. In his speech at the EU Agency for Fundamental Rights on 19 June 2018, Michel Barnier made clear that the UK would not be able to continue participating in the European Arrest Warrant after becoming a non-Schengen third country. Instead, a new extradition scheme with “streamlined” procedures and “facilitated” processes was suggested.<sup>31</sup> Indeed, the new system proposes direct judicial cooperation between the institutions, bodies offices and agencies of the UK and EU Member States,<sup>32</sup> and the introduction of “a mechanism of surrender pursuant to an arrest warrant”,<sup>33</sup> however with significant differences to its equivalent between EU Member States only.

One of the main achievements of the European Arrest Warrant has been the application of the principle of mutual recognition in the enforcement of judicial decisions

<sup>29</sup> V Mitsilegas, ‘After Brexit: Reframing EU-UK Cooperation in Criminal Matters’ in R Pereira, A Engel and S Miettinen (eds), *The Governance of Criminal Justice in the European Union: Transnationalism, Localism and Public Participation in an Evolving Constitutional Order* cit. 17.

<sup>30</sup> Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom as agreed at negotiators’ level on 17 October 2019, to replace the one published in European Council Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019) cit. para. 78.

<sup>31</sup> European Commission, ‘Speech by Michel Barnier at the European Union Agency for Fundamental Rights’ (19 June 2018) [www.ec.europa.eu](http://www.ec.europa.eu).

<sup>32</sup> Draft Agreement on the New Partnership with the UK cit., art. LAW.GEN.1.

<sup>33</sup> *Ibid.* art. LAW.SURR.76.

under this mechanism.<sup>34</sup> In essence, this largely eliminates the so-called “double-criminality” verification, i.e. whether the alleged offence in the issuing State is also considered an offence in the executing State, in addition to the 32 *per-se* offences listed in art. 2(2) of the Council Framework Decision (2002/584/JHA).<sup>35</sup> While the same list can be found in the Draft Agreement on the New Partnership with the UK, the latter does not include a mention of the principle of mutual recognition, which means that any other offences shall be subject to the “double-criminality” verification.<sup>36</sup>

Furthermore, the proposed surrender mechanism leaves the option for a political offence exception in art. LAW.SURR.81. According to para. 2, a declaration can be made by the UK as well as the EU on behalf of its Member States that the execution of an arrest warrant for political offences may be refused in others than those listed circumstances.<sup>37</sup> No such option is available under the European Arrest Warrant. Similarly, art. LAW.SURR.82 provides for a possibility to declare refusal to surrender a State’s own nationals or that such surrender “will be authorised only under certain specified conditions”. In fact, Germany, Austria and Slovenia have made such a declaration of own-national exception according to art. 185(3) of the Withdrawal Agreement for the duration of the transition period already. This was previously prohibited by the concept of EU citizenship which does not permit such exceptions between Member States. With its withdrawal, the UK has evidently stepped outside the protection of this concept of EU citizenship and may therefore face additional hurdles in the operability and efficiency of the new surrender mechanism.<sup>38</sup>

When it comes to the exchange of information and intelligence of criminal activity, the UK has lost direct access to the data bases of European agencies, such as Europol

<sup>34</sup> Framework Decision 584/2002/JHA of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, art. 1(2). For a commentary, see e.g., V Mitsilegas, ‘The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU’ (2006) CMLRev 1277.

<sup>35</sup> *Ibid.* They include: participation in a criminal organisation; terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotic drugs and psychotropic substances; illicit trafficking in weapons, munitions and explosives; corruption; fraud; laundering proceeds of crime; counterfeiting currency; computer-related crime; environmental crime; facilitation of unauthorized entry and residence; murder and grievous bodily injury; illicit trade in human organs and tissue; kidnapping, illegal restraint and hostage-taking; racism and xenophobia; organised or armed robbery; illicit trafficking in cultural goods; swindling; racketeering and extortion; counterfeiting and piracy of products; forgery of administrative documents and trafficking therein; forgery of means of payment; illicit trafficking in hormonal substances and other growth promoters; illicit trafficking in nuclear or radioactive materials; trafficking in stolen vehicles; rape; arson; crimes within the jurisdiction of the International Criminal Court; unlawful seizure of aircraft/ships; sabotage.

<sup>36</sup> Draft Agreement on the New Partnership with the UK cit. art. LAW.SURR.78(2).

<sup>37</sup> Offences referred to in Council of Europe, European Convention ETS n. 90 on the Suppression of Terrorism of 27 January 1977, arts 1 and 2; offences of conspiracy or association; and in the Directive 541/2017/EU of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, arts 3-14.

<sup>38</sup> See also discussion in S Peers, ‘Extradition to non-EU Countries: The Limits Imposed by EU Citizenship’ (7 September 2016) EU Law Analysis [www.eulawanalysis.blogspot.com](http://www.eulawanalysis.blogspot.com).

and Eurojust, with its withdrawal. Nevertheless, cooperation with these agencies remains possible according to chapters five and six respectively under the law enforcement title in part three of the Draft Agreement, albeit in more limited form than during the time of the UK's membership within the EU. In particular, specific requests need to be made for the exchange of information, which are subsequently processed for those indicated purposes only and are subject to restrictions with regards to "onward transfer, erasure or destruction after a certain period of time".<sup>39</sup>

Outside of these agencies, cooperation on operational information between the competent law enforcement authorities of the UK and EU Member States is subject to requests<sup>40</sup> being made to exchange information and intelligence "for the purpose of conducting criminal investigations or criminal intelligence operations in the context of the detection, prevention or investigation or investigation of criminal offences."<sup>41</sup> Such requests would then be "limited to what is deemed relevant and necessary for the successful detection, prevention or investigation of the crime or criminal activity in question"<sup>42</sup> and information may even be withheld under certain circumstances, for example in the case of interests of national security.<sup>43</sup>

The Draft Agreement does not mention the possibility for access to the Schengen Information System. As a non-Schengen country, the UK has already had limited operability with regards to border control cooperation during the time of its EU membership. After Brexit and despite non-EU Member States being able to participate in the Schengen Information System as associate countries,<sup>44</sup> these are however all part of the Schengen area, which the UK has no intention to join.

The above demonstrates on the one hand, the clear intention from both sides to maintain as much cooperation as possible for the sake of achieving common goals in the fight against cross-border crime and the resulting necessity to ensure efficient law enforcement mechanisms beyond Brexit. On the other hand, it is also clear that a non-Schengen third country cannot be treated the same as an EU Member State.<sup>45</sup> As can be argued, the proposed "streamlined" procedures and "simplified" arrangements reflect a deep desire for continued future cooperation in an attempt to replicate the un-replicable pre-Brexit state. Realism about the UK's withdrawal however has had to acknowledge the sensitivity of cooperation in criminal matters with a third country and to take into account

<sup>39</sup> Draft text of the Agreement of 14 August 2020 on the New Partnership with the United Kingdom, art. LAW.EUROPOL.52(1) and art. LAW.EUROJUST.70(3) respectively.

<sup>40</sup> *Ibid.* art. LAW.OPIN.41.

<sup>41</sup> *Ibid.* art. LAW.OPIN.38(1).

<sup>42</sup> *Ibid.* art. LAW.OPIN.43(2).

<sup>43</sup> *Ibid.* art. LAW.OPIN.44.

<sup>44</sup> Switzerland, Norway, Liechtenstein, Iceland.

<sup>45</sup> Essentially, the UK has become a "rule-taker" with its withdrawal.



the potential for divergences in fundamental rights and other standards over time on both sides of the Channel.

#### IV. EU VERSUS UK: OPPOSING DIRECTIONS OF TRAVEL

The exchange of certain sensitive information between law enforcement authorities or even surrender of persons can indeed be a very controversial issue. The European Arrest Warrant itself has been challenged on various occasions, one Member State questioning the adequateness of human rights standards in another Member State.<sup>46</sup> So how can this possibly work with a now third country? Of course, the new arrest warrant is to be considered a “simplified” version of the European equivalent, as discussed above. Of course, the UK has been a Member State until recently and therefore currently still upholds the same very high standards of human rights as under EU law. And, of course, the EU also has agreements in place with other third countries regulating the surrender of criminals overseas under certain conditions.<sup>47</sup>

However, there is a significant difference between other third countries and the UK: the direction of travel. Third countries usually have to raise their standards in order to meet those of the EU, before they may decide for a continued alignment after an agreement is reached with a view to manifesting their relationship not only with EU Member States but also applying those high standards in their relations with other third countries. This concept of extraterritoriality of EU legislation and standards is the so-called “Brussels effect”.<sup>48</sup> However, the UK’s direction of travel is the opposite, as evidenced by the motives behind the withdrawal itself and, more specifically related to human rights standards, its firm rejection of a possible continuation of applying the Charter of Fundamental Rights under UK law.<sup>49</sup> As a result, further procedural guarantees are necessary. These can be found in international obligations the UK has entered into as an individual party, which thus remain unaffected by the UK’s withdrawal from the EU, as is the case with the European Convention on Human Rights.

Therefore, according to the Draft Agreement on the New Partnership with the UK, law enforcement and judicial cooperation in criminal matters “shall be conditional upon the United Kingdom’s continued adherence to the European Convention on Human

<sup>46</sup> See e.g. Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198; and Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* ECLI:EU:C:2018:586. For a commentary on mutual trust between Member States in relation to the operation of the European Arrest Warrant, see V Mitsilegas, ‘Mutual Recognition, Mutual Trust and Fundamental Rights After Lisbon’ in V Mitsilegas, M Bergström and T Konstadinides (eds), *Research Handbook on EU Criminal Law* (Edward Elgar 2016) 148.

<sup>47</sup> E.g., with the US: Agreement of 19 July 2003 on extradition between the European Union and the United States of America 27 ff.

<sup>48</sup> A Bradford, ‘The Brussels Effect’ (2015) *Northwestern University Law Review* 1.

<sup>49</sup> United Kingdom Parliament, European Union (Withdrawal) Act of the of 26 June 2018, section 5(4).

Rights and Protocols 1, 6 and 13 thereto, as well as upon the United Kingdom giving continued effect to these instruments under its domestic law".<sup>50</sup> In particular, these instruments provide for essential judicial guarantees, such as the right to a fair trial, access to a lawyer, or the abolishment of the death penalty. An automatic termination of the agreed cooperation will become operative if the UK "abrogates the domestic law giving effect to the instruments in para. 1 or makes amendments thereto to the effect of reducing the extent to which individuals can rely on them before domestic courts"<sup>51</sup> or denounces those instruments in their entirety.<sup>52</sup>

Regarding the protection of personal data transferred to the UK, art. LAW.GEN.4 of the Draft Agreement on the New Partnership with the UK provides that the European Commission will check the adequacy of the level of protection according to art. 36 of the Directive (EU) 2016/680,<sup>53</sup> and according to art. 45 of the General Data Protection Regulation (EU) 2016/679<sup>54</sup> respectively. Both provisions provide for procedural safeguard mechanisms, in particular in case of violations of human rights or the rule of law in relation to the protection of personal data within the territory of the third country in question. In addition, the UK is required to "ensure that the domestic independent authority responsible for data protection has the power to supervise compliance with and enforcement of the data protection safeguards under this Title".<sup>55</sup>

From an outside perspective, the difficulty lies with monitoring UK compliance as a third country according to the various procedural guarantees given in the Draft Agreement. As could be argued, the UK's legal system which admits a more prominent role to case law – as opposed to most European civil law traditions – which can make the state of law hard to establish and could therefore cause problems when trying to monitor continuity in upholding the agreed human rights standards post-Brexit. Such concerns were raised in the case of *RO*, where a person who was subjected to a European Arrest Warrant claimed that he could suffer inhumane and degrading treatment after Brexit if being surrendered to the UK. This reasoning was rejected however by the Court stating that, even

<sup>50</sup> Draft text of the Agreement of 14 August 2020 on the New Partnership with the United Kingdom cit. art. LAW.OTHER.136(1).

<sup>51</sup> *Ibid.* art. LAW.OTHER.136(2).

<sup>52</sup> *Ibid.* art. LAW.OTHER.136(3).

<sup>53</sup> Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

<sup>54</sup> Regulation (EU) 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).

<sup>55</sup> Draft text of the Agreement of 14 August 2020 on the New Partnership with the United Kingdom cit. art. LAW.GEN.4(3).

with the UK's withdrawal, the suspect would still have recourse to the European Convention of Human Rights and, unless there was concrete evidence to the contrary, such an arrest warrant by a then still EU Member State would therefore have to be executed. The Court thus clarified that one cannot rely on the potential emergence of such circumstances in the future with the aim to avoiding surrender to UK authorities.<sup>56</sup>

With the UK's actual withdrawal however, there is now a greater risk for a slow but steady erosion of certain rights under UK domestic law, which could go unnoticed for a while. Therefore, the procedural guarantees provided for in the Draft Agreement between the EU and the UK are an attempt to adjust for a change in UK standards over time. Nevertheless, the Agreement can largely reflect the *status quo* only. As could be argued, the longer it takes to finally conclude an agreement, the more visible the differences between the two diverging paths – that of the EU and the UK – will become and the better it will reflect the post-Brexit conditions in the longer term. Time constraints, such as the end of the transition period, should therefore not be the guiding factor in the negotiations from an EU perspective.

In fact, there are still many hurdles for a successful conclusion of the negotiations as well as the ratification process. In particular the latter may prove problematic on both sides even if a compromise for a final agreement can be reached before the end of the transition period. On the one hand and despite the Tory's clear majority in the House of Commons after the most recent election in December 2019,<sup>57</sup> the deal would still face scrutiny in the UK Parliament and could even be rejected, as was the Withdrawal Agreement on several occasions.<sup>58</sup> On the other hand, the EU's shared competences would require ratification in and approval of all 27 EU Member States for a mixed international agreement,<sup>59</sup> a process which is rather complex, time-consuming and certainly not without its risks of failure.<sup>60</sup> Alternatively, separate agreements could be concluded based on the different types of competences, which would allow for a swifter ratification process for those competence areas not requiring the joint approval of all Member States.<sup>61</sup>

Finally, with currently no willingness to renew the transition period, particularly from the side of the UK, an "economic" hard Brexit at the end of this year is still very much a

<sup>56</sup> Case C-327/18 PPU *RO* ECLI:EU:C:2018:733.

<sup>57</sup> A Busquets Guàrdia and E Casalicchio, 'UK election 2019: How Britain voted. A Breakdown of the UK Election Result in Maps and Charts' (13 December 2019) Politico [www.politico.eu](http://www.politico.eu).

<sup>58</sup> A Gürhan Kartal, 'UK Parliament Rejects EU Withdrawal Deal for 3rd Time' (29 March 2019) AA [www.aa.com.tr](http://www.aa.com.tr).

<sup>59</sup> Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore (EUSFTA)* ECLI:EU:C:2017:376. See also case comment by M Cremona, 'Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017. ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore' (2018) *EuConst* 231.

<sup>60</sup> As was the case with the failed Transatlantic Trade and Investment Partnership (TTIP) with the US.

<sup>61</sup> See e.g. Opinion 3/15 *Marrakesh Treaty* ECLI:EU:C:2017:114.

possibility.<sup>62</sup> Until an agreement is reached, a suggested fall-back option could be the mechanisms provided for by the Council of Europe in this area.<sup>63</sup> Nevertheless, the currently “diametrically opposed positions” between the UK and the EU Member States with regards to human rights standards could worsen over time which in turn may even lead to endangering the peace process at the Irish border and the Good Friday Agreement.<sup>64</sup>

## V. EU-27: A NEW DAWN FOR CRIMINAL LAW COOPERATION?

Irrespective of the outcome of the current negotiations for an agreement with the UK, it is suggested that Brexit will also have a significant impact on the cooperation between the remaining EU Member States themselves. After the loss of a critical partner, as was suggested above, some reflections will be apt in order to determine what lessons can be learned. Should there be more harmonisation, even in sensitive policy areas, such as criminal law cooperation? Or should there be more flexibility to accommodate the more and more divergent national interests in an ever-enlarged Union, i.e. less harmonisation? And how to uphold enthusiasm for the European idea and to ensure the promotion of its core values across the EU?

For example, when it comes to cooperation for the exchange of information, an updated version of the Schengen Information System has been approved and is currently being implemented step-by-step with the aim to be fully operational by the end of 2021. This includes more extensive cooperation between the relevant law enforcement authorities, in particular in relation to sharing of information, biometrics, counter-terrorism, vulnerable persons, irregular migration, and enhanced access for EU agencies.<sup>65</sup> As could be argued, countries such as Ireland or even Cyprus could very well be inclined to join the Schengen area for the purpose of being able to participate in the enhanced features

<sup>62</sup> European Commission, ‘Press Statement by Michel Barnier Following the Second Round of Future Relationship Negotiations with the United Kingdom’ (20 April 2020) [www.ec.europa.eu](http://www.ec.europa.eu).

<sup>63</sup> C Brière, ‘Brexit and its Consequences for Cooperation in Criminal Matters’ (3 February 2020) *European Law Blog* [www.europeanlawblog.eu](http://www.europeanlawblog.eu). Further alternative solutions for the European Arrest Warrant can be found in C MacPartholàn, ‘Arresting Developments: The Post-Brexit Future of European Arrest Warrants’ (2020) *The Journal of Criminal Law* 124.

<sup>64</sup> N O’Meara, ‘Extradition Through the Lens of Brexit: The UK, Ireland, and Future Extradition Prospects’ (2020) *Irish Journal of European Law* 47.

<sup>65</sup> Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals; Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) 1987/2006; and Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU.

the system will have to offer – and without the UK as an ally in keeping them company under a special status outside of the Schengen area.

In his speech calling for a “European renaissance”, the French President Emmanuel Macron advocated for a more united Europe, stronger on the outside and more harmonised internally, suggesting a revised Schengen area with stringent (external) border controls and one common asylum policy under the control of a European asylum office.<sup>66</sup> Indeed, such criticism and suggestions for reform have already been voiced since the migration crisis in 2015 which was followed by an immediate resurrection of EU internal border controls in some Member States.<sup>67</sup> However, as can be seen with the most recent Covid-19 crisis, such behaviour appears to be a natural reflex of quite a few national governments in situations of external threats. While this was condemned by even the Commission President Ursula von der Leyen,<sup>68</sup> most border controls in the heart of Europe remain in operation until the finishing of this *Article*.<sup>69</sup> This demonstrates a clear lack of solidarity and a failure of intergovernmental cooperation in times of crises.

In fact, some Member States have actively violated the rule of law in recent years, which has rendered mutual trust more challenging as the basis for criminal law cooperation between countries. For example in the case of Poland, which was subject to an infringement procedure according to art. 7 TEU with regards to its amendments on the ordinary courts law,<sup>70</sup> Irish courts responded by suspending a European Arrest Warrant due to fundamental rights concerns.<sup>71</sup> As has been suggested, it is vital for the European institutions to first acknowledge this trust gap between Member States in order to then be able to adequately reform the current system of criminal law cooperation.<sup>72</sup> If anything, maybe Brexit could be seen as a wake-up call to solve such internal problems before they escalate and prevent further undermining of fundamental rights standards in the EU.

Faced with this multitude of internal and external challenges, it is perhaps unsurprising that further European integration in the form of harmonisation might not seem feasible or even desirable at this point. Of course, this is not to suggest that flexibility itself is necessarily a mere negative side-effect on the one-way road to complete harmonisation of Member States’ laws. Variable geometry is indeed a useful tool for intergovernmental cooperation under more sensitive policy areas, which also reflects the diversity of legal traditions in the EU. As could be argued, Brexit did not happen because of too much

<sup>66</sup> Speech by Emmanuel Macron, ‘For European Renewal’ (4 March 2019) [www.elysee.fr](http://www.elysee.fr).

<sup>67</sup> See e.g. T Etzold and R Bossong, ‘The Future of Schengen: Internal Border Controls as a Growing Challenge to the EU and the Nordics’ (2018) Stiftung Wissenschaft und Politik [www.swp-berlin.org](http://www.swp-berlin.org).

<sup>68</sup> Speech by President von der Leyen at the European Parliament Plenary on the European coordinated response to the Covid-19 outbreak (26 March 2020) [www.ec.europa.eu](http://www.ec.europa.eu).

<sup>69</sup> Beginning of May 2020.

<sup>70</sup> Case C-192/18 *Commission v Poland (Independence of ordinary courts)* ECLI:EU:C:2019:924.

<sup>71</sup> Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of justice)* cit.

<sup>72</sup> C Mortera-Martinez, ‘Catch me if you Can: The European Arrest Warrant and the End of Mutual Trust’ (2019) Centre for European Reform [www.cer.eu](http://www.cer.eu).

flexibility, but rather despite of it. However, considering the importance of cross-border cooperation for tackling the rise in international crime and cross-border terrorism, some core Member States may engage in and promote further European integration in criminal matters, which may in fact lead to a growing gap with those further outside the core,<sup>73</sup> for the prophecy of a “two-speed Europe” to become absolute reality.<sup>74</sup>

## VI. CONCLUDING REMARKS

As can be concluded from the above discussion, Brexit will have an impact on EU criminal procedural laws, both on the remaining EU-27 as well as on the future relationship between the EU and the UK. The Draft Agreement is evidence of common goals in the fight against international crime and cross-border terrorism, but also exposes the shortcomings of the withdrawal from EU membership in addition to being a non-Schengen country. The previously enjoyed benefits, despite the various concessions and opt-outs, are now no longer available to the UK.

The new “streamlined” procedures are nevertheless an attempt to replicate the pre-Brexit state as much as possible in order to ensure a continuation in the cooperation with the UK. It is also evident however that the UK’s withdrawal could indeed be seen as a literal turning point for the country, resulting in a totally opposite direction of travel for the application of human rights standards for example. As has been suggested, the negotiated agreement can only reflect the *status quo* rather than being able to adjust to the development in the UK over time, despite the inclusion of procedural guarantees in the agreement.

For the remaining EU Member States and 70 years after the Schuman Declaration in 1950, a new vision for Europe is needed more than ever in order to rebuild trust and ensure solidarity in intergovernmental cooperation. This is particularly the case in the area of criminal law cooperation which faces several internal and external challenges at once. In its unique way, the difficulties in the cooperation with the UK have now moved from internal to external, since Brexit happened in January 2020.

It is hoped that the UK’s withdrawal can be seen at least as an opportunity if not a wake-up call to introduce much needed reform in this area. However, as has been argued above, complete harmonisation of Member States’ approaches may not necessarily be the best solution here. Instead, a possible differentiation between core and non-core Member States might prove useful for more effective cooperation mechanisms available in the fight against international crime and cross-border terrorism. While this may add to the current options of differential integration, thus increasing flexibility, it would in turn also guarantee legal certainty and be able to rebuild trust in the long term.

<sup>73</sup> See also discussion in B De Witte, ‘An Undivided Union? Differentiated Integration in post-Brexit Times’ (2018) CMLRev 227.

<sup>74</sup> JC Piris, *The Future of Europe: Towards a Two-Speed EU?* cit.