CHAPTER 1

European Criminal Law and Brexit

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Abstract

Brexit will not only affect the trade relations between the UK and the EU but also vast areas of criminal law and procedure influenced and largely formed by EU law. This is especially true in the area of police and judicial cooperation – take for example the European Arrest Warrant – where the UK has always actively participated in the drafting and implementation of the relevant legal instruments and the actual cooperation. The paper will inquire how Brexit will affect the future relationship between the UK and the EU in these areas.

The Brexit vote of 23 June 2016\(^1\) entails a lot of uncertainty with regard to the future relationship of the UK with the EU, not least in the field of criminal justice cooperation. With the adoption of the (Notification of Withdrawal) Bill\(^2\) and Prime Minister May’s actual triggering of Art. 50 Treaty of the European Union (‘TEU’) on 29 March 2017\(^3\) formal withdrawal negotiations have in the meantime started. This little essay will first describe the area concerned, i.e., European Criminal Law in the narrow sense (1), then we will look at the current relationship of the UK with the EU in the criminal justice area (2), and, last

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\(^1\) The turnout was 72.2%, 51.9% voted to leave and 48.1% to remain, cf <http://www.bbc.co.uk/news/politics/eu_referendum/results>, last accessed 21 November 2017.


but not least, sketch out possible options of the UK’s post-Brexit relationship with the EU in the criminal justice area (3).

The piece is dedicated to Wolfgang Schomburg who did not only have a formative influence of the case law of the ICTY where he served as the first German judge from November 2001 to November 2008 but also edited the perhaps most important German commentary on mutual assistance in criminal matters. In this commentary, European Criminal Law plays a prominent role. In addition, Schomburg was appointed honorary professor in Durham Law School, UK, in March 2009. For both reasons I am confident that this paper will find his interest.

1 EU Criminal Law and Justice (European Criminal Law in the Narrow Sense)

Taken at face value, the term ‘European criminal law’ refers to a genuinely supranational criminal law, that is, to provisions by which the citizens of the Union are directly confronted with the sovereign punitive force – the ius puniendi – of the Union as immediately applicable criminal law. However, genuine criminal law legislation by the Union is restricted to a few explicitly defined areas – above all, the protection of the Union’s financial interests. Only to this extent is it possible to speak of European criminal law in a true, supranational sense, and, arguably, of a European criminal law or justice system in a narrow sense, that is, a limited subject matter area where the Union itself is the sole creator of criminal law norms (albeit depending on the Member States with regard to their enforcement).

Otherwise, ‘European Criminal Law’ is a kind of umbrella term covering ‘all those norms and practices of criminal and criminal procedural law’ based on the law and activities of the EU (European law in the narrower sense) and the Council of Europe (European law in the wider sense), leading (or aiming to lead) to widespread harmonisation of national criminal (procedural)

6 See for such a limited concept of ‘system’ also P Asp, Procedural Criminal Law Cooperation of the EU (Stockholm: University of Stockholm 2016) 211–213 (with general considerations of the concept of ‘system’ at 207–208, 213).
7 On harmonisation and the related concepts ‘assimilation’, ‘standardisation’ and ‘approximation’, Ambos ... (n 5) Ch. 1 nn. 28.
law. While Brexit refers to the Union, having a supranational nature, there are no signs that the UK wants to leave the Council of Europe, a regional organisation of 47 States, although there has been quite severe criticism against the Council’s human rights system – part of the UK’s domestic law by way of the 1998 Human Rights Act – and against the UK-related case law of the European Court of Human Rights. At any rate, this is not (yet) relevant in the Brexit context.

The Union’s authority to legislate criminal law has to flow from its primary law, that is, the Lisbon Treaty (principle of conferral). The respective authorisation has to be explicit or at least possible to establish – with reasonable certainty – through interpretation. In this regard, Art. 5(2) TEU, replacing...
the earlier Art. 5(1) Treaty of the European Economic Community (‘TEEC’), envisages that the Union ‘shall act only within the limits of the competences conferred upon it by the Member States in the Treaties’. The precedence of Member State competence is confirmed by the principles of subsidiarity and proportionality.\textsuperscript{13} The former principle represents a legally binding and justiciable rule for the exercise of competences, forcing the Union to review the necessity and (higher) efficiency of its activities ex ante in order to be able to justify them ex post.\textsuperscript{14} The principle of proportionality entails that action taken on the basis of Union law against the Member States – corresponding to the relationship between state/citizen in national constitutional law – can only then appear legitimate if it is a suitable, necessary and appropriate means to achieving a Union aim;\textsuperscript{15} the measures taken by the Union may not go beyond the minimum intervention necessary to achieve the goal in question.\textsuperscript{16} If criminal law is understood correctly as the expression of a specific legal culture and history and thus of State sovereignty, then subsidiarity and proportionality become condensed in this area, forming an imperative to use criminal law in the most restrictive form possible in line with the general principle of ultima ratio (‘strafrechtsspezifisches Schonungsgebot’).\textsuperscript{17} For this reason alone, the ‘fundamental aspects’ of the criminal justice systems of the Member States represent an insurmountable hurdle for Union law\textsuperscript{18} and set the ‘emergency brake procedure’\textsuperscript{49} in motion.\textsuperscript{20}

\textsuperscript{13} Cf Art. 5(1), (3), and (4) TEEU; Art. 69 TFEU; cf also Draft Council conclusions (2009) 4; P Asp, EuCLR, 1 (2011) 44 ff; P Asp (n 6) 190–191; Zöller, in Baumeister et al., FS Schenke (Berlin: Duncker & Humblot 2011) 596–597; Safferling (n 8) § 9 mn. 58 ff; Turner, AmJCompL, 60 (2012) 562–563; Böse (n 8) 49–50.

\textsuperscript{14} Cf B Hecker (n 12) § 8 mn. 49; cf also A Klip (n 8) 37–38; Meyer (n 12) 352 ff. On the component of the principle of subsidiarity that protects freedoms, cf Kubiciel, ZIS, 5 (2010) 745; cf also Bernardi, RP, 27 (2011) 23 ff.

\textsuperscript{15} Generally on a specific model of ‘legal reserve’ (in the sense of réserve legal or Gesetzesvorbehalt) for the EU Muñoz de Morales R., EuCLR, 2 (2012) 252–253, 274–275 (advocating a model based on discursive deliberation [input legitimacy] and accountability [output legitimacy] to be achieved by a transparent, participative and rational legislative process; unfortunately, the paper is written in poor English).

\textsuperscript{16} B Hecker (n 12) § 8 mn. 52 ff; cf also A Klip (n 8) 38, 176 ff; in greater detail, P Asp (n 8) 188 ff.

\textsuperscript{17} On this, cf K Ambos (n 5), Ch. 3 mn. 37 ff. On the particular demands with regard to subsidiarity in this context, cf also A Klip (n 8) 40.

\textsuperscript{18} For a similar view of this matter, cf A Klip (n 8) 178–180; for a principled approach Silva Sánchez, RP, 13 (2004) 138 ff.

\textsuperscript{19} Arts. 82(3), 83(3) TFEU.

\textsuperscript{20} On this, cf K Ambos (n 5) Ch. 3 mn. 5 ff and 11–12.
While European criminal law in the narrow sense is no comprehensive, self-contained European criminal law or justice system of its own,\(^{21}\) there is a system of sorts, that is, ‘some sort’ of an *umbrella-like* system that ‘connects’ the specific areas (which we may call ‘micro systems’, e.g. the harmonised criminal law, the mutual recognition instruments, the human rights system)\(^{22}\) and which may, on the operational level, be more aptly characterized as a ‘Verbund’ (compound network / aggregate association) of the different entities and organs in charge of the investigation and prosecution of transnational crimes.\(^{23}\) Insofar the European criminal justice institutions, especially Europol and Eurojust, play an increasingly important, albeit hidden and intransparent, role in the shaping of European criminal justice policy in practice.\(^{24}\) At any rate, no independent, new (supranational) European criminal law is created beyond the Union's (limited) competence in the area of financial crime; rather, as a rule, national criminal law (either existing laws or those yet to be created) is influenced by European law.

Strictly speaking, we are dealing with *Europeanised* criminal law, which is why any comparison with federal legislation such as that of the USA is necessarily flawed.\(^{25}\) Besides the (limited) supranational criminal law regarding the

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\(^{21}\) For the relevant arguments against cf P Asp (n 6) 209–211.

\(^{22}\) Cf P Asp (n 8) 216–217.

\(^{23}\) For a ground-breaking analysis cf F Meyer, in Herzog et al., *gs Weßlau* (Berlin: Duncker & Humbolt 2016) 194 ff (understanding the concept of ‘Verbund’, originating in European administrative law [196–198], in a descriptive-analytical and at the same time critical sense [198] and applying it to the area of European criminal prosecution [the ‘EU- Strafverfolgungsverbund’, 199] by way of a functional and impact-oriented approach [‘funktions- und wirkungssorientierte Herangehensweise’, 200], thereby distinguishing between three sorts of ‘Verbände’ (compound networks): one regarding execution/enforcement [‘Vollstreckung- und Substitutionsverbund’], characterised by mutual recognition and the increasing overlapping of criminal procedure and legal assistance (201–202), another one regarding collection and storage of information/data [‘Informationsverbund’, 202–204] and a third one regarding investigation/prosecution *stricto sensu* [‘Ver bundverfolgung im engeren Sinne’, 204–210], at 201–210).

\(^{24}\) F Meyer (n 23) 204 ff (identifying a ‘surprising’ transformation and an increasing influence of the said EU criminal justice agencies [207] with critical implications democratic accountability and rights protection [210–214]).

protection of the financial interests mentioned above we can distinguish three forms of Europeanisation of criminal law: through the implementation of treaties and other normative guidelines of the Council of Europe,\textsuperscript{26} through the principle of mutual recognition (thereto in a moment) and through forms and techniques of influence that are specific to European law.\textsuperscript{27} In substance, the Europeanisation of the Member States’ criminal law occurs mainly through the harmonisation of substantive and procedural law and through legislative acts on the mutual recognition of decisions in criminal law. Previously, the regulation of Member State cooperation in criminal law was only possible on an intergovernmental basis in the area of the Third Pillar of Police and Judicial Cooperation in Criminal Matters (‘PJCCM’).\textsuperscript{28} Through the communitisation of the Third Pillar by the Lisbon Treaty, the regulation of PJCCM now occurs in the area of freedom, security and justice at Union level,\textsuperscript{29} which enables the European Council to define ‘strategic guidelines’.\textsuperscript{30} The normative Europeanisation goes hand in hand with and is complemented by an institutionalisation entailing the creation of different European criminal justice institutions already referred to above.

Distinguishing between substantive and procedural law\textsuperscript{31} one can further say that in the former there is the option of harmonising legislation through

\begin{itemize}
\item \textsuperscript{26} See K Ambos (n 5) Ch. 2 mn. 25.
\item \textsuperscript{27} See on the latter K Ambos (n 5) Ch. 2 mn. 29.
\item \textsuperscript{28} Cf thereon Ambos (n 5) Ch. 4 mn. 1 ff.
\item \textsuperscript{29} Art. 67 tfeu. On the EU’s aims in this area, cf Sieber, ZStW, 121 (2009) 3 ff. For a critical view on the relationship between those three components in European security policy, cf Kaiafa-Ghandi, EuCLR, 1 (2011) 10. For a linguistic-judicial perspective Tiberi, in Ruggieri Criminal Proceedings, Languages and the European Union (Berlin, Heidelberg: Springer 2014) 9 ff; Spiezia, in Ruggieri (n 29) 23 ff (stressing both the importance of several languages for the Union’s identity but also the ensuing problems for cooperation).
\item \textsuperscript{31} For a detailed treatment see K Ambos (n 5) Ch. 3 vs Ch. 4.
\end{itemize}
passing of minimum requirements defining criminal offences and sanctions in areas of ‘particularly serious crime’ with a cross-border dimension (so-called ‘eurocrimes’).32 In the field of procedural law, judicial cooperation is based on the principle of mutual recognition.33 This means that ‘judgments and judicial decisions’34 made in one Member State also have to be recognised in another Member State, that is, ultimately, these decisions have to be directly enforceable and actually enforced in all Member States.35 Of course, mutual recognition in turn presupposes mutual trust which cannot be imposed by legislative fiat but is premised upon mutual respect, rights observance and common values.36

32 Art. 83(1) TFEU.
34 Art. 82(1) TFEU.
36 On mutual trust and rights observance as basis for mutual recognition Mitsilegas (n 35) 125 ff (explaining a lack of trust with ‘moral distance’ [at 129, 151] and concluding that ‘[T]his deification of mutual trust … poses, however, significant challenges on the effective protection of fundamental rights, which seems to be subordinated to the requirement to respect presumed and uncritically accepted trust.’ [at 151]); Ronsfeld, Rechtshilfe, Anerkennung und Vertrauen (2015) 211 ff (217 ff) (listing a joint reference system, mutual sympathy and coordination, transparency and integrity as trust-founding measures); on the relationship between mutual recognition and trust also Ostropolski, NJECL, 6 (2015) 167; on trust resulting from harmonisation P Asp (n 6) 54; on the indicators for mutual trust P Albers, in Albers et al., Evaluation Framework (2013) 315; Böse, in Albers et al., Evaluation Framework (2013) 357–361; on the weakening of mutual trust by rights violations, BVerfG, No. 2 BvR 2735/14, Decision (15 December 2015), in NJW, 69 (2016), 1149,
Perhaps, the lack of this trust is one of the main reasons for the limited mutual recognition in judicial practice.\textsuperscript{37}

Apart from the (traditional) \textit{EU law} stricto sensu, that is the primary law of the Treaties (\textit{TEU} and Treaty of the Functioning of the \textit{EU [TFEU]}) including annexes and protocols, the secondary instruments (regulations, directives, decisions, recommendations/opinions)\textsuperscript{38} and several unwritten principles\textsuperscript{39}, there is the so-called \textit{Schengen acquis} as a further important source for European criminal law. It consists of the first Schengen agreement on the gradual abolition of border checks of 14 June 1985 (Schengen I),\textsuperscript{40} the Convention Implementing the Schengen Agreement (\textit{CISA}, Schengen II, including the Schengen Information System (\textquote{SIS\textquotemark{)}}) of 19 June 1990,\textsuperscript{41} possible accession protocols and other legal acts.\textsuperscript{42} The \textit{CISA} was incorporated into Union law with the Amsterdam Treaty of 1997,\textsuperscript{43} through which the \textit{CJEU} gained jurisdiction over

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\item \textsuperscript{37} For a discussion with further references cf K Ambos (n 5) Ch. 1 mn. 26–27.
\item \textsuperscript{38} Art. 288 \textit{TFEU}.
\item \textsuperscript{39} See thereto and generally on the sources K Ambos (n 5) Ch. 1 mn. 30–33.
\item \textsuperscript{42} Cf Gless, in Schomburg et al. (n 4) 1637–1638; C Safferling (n 8) § 12 mn. 71; for a good overview of all changes G Huybrechts, \textit{ERA Forum}, 16 (2015) 380 ff (with a table on 403 ff); summarising also E de Capitani \textit{ERA Forum}, 15 (2014) 107–109 (with a very positive assessment focusing on the border regime, 101, 117–118 and \textquote{passim\textquotemark{)}}.
\item \textsuperscript{43} Protocol (No 2) Integrating the Schengen \textit{Acquis} into the Framework of the European Union (1997), \textit{OJEC} C 340 of 10 November 1997, 93 = \textit{OJEU} C 321E of 29 December 2006, 191–195; cf also Council Decision of 20 May 1999 (1999/435/EC) 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, \textit{OJEC} L 176, 10 July 1999, 1–16; Council Decision of 20 May 1999 (1999/436/EC) determining, in conformity with the relevant provisions of the Treaty establishing the
the interpretation of the Schengen Convention.44 Through the above mentioned 'communitisation' of the Third Pillar, the Court's jurisdiction results from Arts. 267, 67 TFEU.45 Protocol 19 to the Lisbon Treaty46 upholds this legal situation. According to this Protocol, the Schengen acquis now applies to 30 States, namely 26 EU States47 and four non-EU States (Iceland, Liechtenstein, Norway and Switzerland).48 The CISA consists of eight titles and 142 articles.

44 Art. 35(1) TFEU, earlier version.
45 Generally on the Court's jurisdiction see Art. 19(3) TFEU.
47 Pursuant to Art. 2 in conjunction with Art. 1 Protocol 19 (n. 46) these States are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovenia, Slovakia, Spain, Sweden, the Czech Republic and the Netherlands. Although Denmark has opted out regarding the free movement of persons (cf Protocol (No 5) on the Position of Denmark (1997), OJEU C 321 E of 29 December 2006, 201–202 [to the Amsterdam Treaty] and Protocol (No 22) on the Position of Denmark, OJEU C 326 of 26 October 2012, 299–303 [to the Lisbon Treaty]), (unamended) Schengen acquis measures adopted before the Amsterdam Treaty are still binding and applicable upon it (Art. 3 Protocol (No 2) Integrating the Schengen Acquis into the Framework of the European Union (1997), OJEC C 340 of 10 November 1997, 93 = OJEU C 321E of 29 December 2006, 191–195); it can opt into measures which build upon the Schengen acquis (Art 3 Protocol 19, n. 46, in conjunction with Art. 4 Protocol 22 to the Lisbon Treaty).
48 These States are associated members: For Iceland and Norway see Art. 6 Protocol 19 (n 46); see also Council Decision 2000/777/EC (11.2.2000) applying the Schengen acquis to the countries of the Nordic Passport Union (Denmark, Finland, Iceland, Norway, Sweden). For Liechtenstein see Protocol between the European Union, 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 Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, OJEU L 160 of 18 June 2011, 21, and the associated Council decision of 13 December 2011, on the full application of the provisions of the Schengen acquis in the Principality of Liechtenstein (2011/842/EU), OJEU L 334 of 16 December 2011, 27–28. For Switzerland see Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, OJEU L 53 of 27 February 2008, 52–59 and the Final Act of 26 October 2004, OJEU L 53 of 27 February 2008, 71–73. On these third, non-EU States
Regulations particularly relevance to police and judicial cooperation are to be found in Title III (‘Police and Security’), particularly in Chapters 1 to 5.\textsuperscript{49} From a fundamental rights perspective, the prohibition of double jeopardy legally enshrined in Art. 54 CISA\textsuperscript{50} is of particular significance.\textsuperscript{51}

2 The UK’s Special Status vis-à-vis the EU Criminal Justice System

During the pre-Brexit campaign the UK’s very special relationship with the EU in the criminal justice area was hardly ever mentioned in public debates\textsuperscript{52} except in some specialist academic fora.\textsuperscript{53} Yet, it is important to acknowledge that the UK never fully embraced the Union’s attempts to bring Member States closer together in the criminal justice area, especially as regards forms of cooperation which may infringe upon British sovereignty.\textsuperscript{54} In general terms, it is worthwhile to recall that David Cameron’s Brexit referendum was by no means the first UK referendum on the EU. In fact, the 1974 Labour government renegotiated the terms of the UK’s accession to the then European Economic

\textsuperscript{49} For more detail, cf K Ambos (n 5) Ch. 4 nn. 5.

\textsuperscript{50} On the difficult relationship with Art. 50 of the Charter of the Fundamental Rights of the European Union (CFREU) cf K Ambos (n 5) Ch. 2 mn. 165 ff.

\textsuperscript{51} For a detailed analysis cf K Ambos (n 5) Ch. 2 mn. 161 ff.

\textsuperscript{52} Crit. also House of Lords, EU Home Affairs Sub-Committee, Future UK-EU Security and Policing Cooperation, HL Paper 77, 16 December 2016, 5 (‘… this subject did not attract a commensurate level of attention in the referendum campaign, from either side’).

\textsuperscript{53} Thus, this author participated for example in an event organized by the European Criminal Law Association (UK), cf <http://www.eucriminallaw.com/> last visited 21 November 2017.

\textsuperscript{54} See e.g. see also Walker, GLJ, 17 (2016) 126 (‘With its opt-outs from the Euro and Schengen, and also from some wider aspects of criminal justice and immigration policy under the Area of Freedom, Security and Justice, the UK was already a major beneficiary – probably the major beneficiary – of the EU’s variable geometry even before it cut a new “customised membership” deal in February that would have allowed exemption even from the founding Treaty commitment to “ever closer Union.”’). For a historical account cf House of Lords (n 52) 7–9.
Community (EEC) in 1973 and put the new agreement to a referendum on 5 June 1975 where it was endorsed.55

Concerning the above mentioned Schengen acquis, the UK (and Ireland) negotiated special regimes: It opted out of the policies regarding visas, asylum, immigration and others related to the free movement of persons (Title IV of Part Three TEC),56 including with regard to the measures necessary to progressively establish the internal market pursuant to Art. 14 TEC.57 As to the Schengen acquis the UK (and Ireland) reserved the right to decide on a case-by-case basis whether to participate in certain measures.58 According to Art. 4 of Protocol 19 to the Lisbon Treaty the UK (and Ireland) ‘may at any time request to take part in some or all provisions’ with the (unanimous) approval of the Council; at the same time, they are entitled to opt out within three months.59

Under the Lisbon Treaty the UK negotiated, (again) together with Ireland, a separate Protocol (21),60 which gave it, on the one hand, the right to fully abstain from any future measures in the area of Freedom, Security and Justice, and, on the other hand, allowed it to selectively opt-in regarding individual measures.61 This, in fact, amounted to a reintroduction of the veto – actually abolished by the Lisbon qualified majority voting – through the backdoor.

58 Art. 4 Protocol 2 (n 43).
In addition, Protocol 36\(^{62}\) gave the UK – as the only Member State\(^{63}\) – a full opt-out option from all (135) police and criminal justice measures adopted under the pre-Lisbon ‘third pillar’ with effect from 1 December 2014\(^{64}\) unless they have been amended (‘lisbonised’).\(^{65}\) As to the envisaged European Public Prosecutor Office (EPPO), the UK already made clear at the outset that it will not participate in this project unless there is a national referendum in favour (‘referendum lock’).\(^{66}\) The UK would then have had the possibility of a subsequent selective opt-in.\(^{67}\) On 24 July 2013, the UK made use of the opt-out and the 135 acts ceased to apply to it on 1 December 2014.\(^{68}\) Nevertheless, the most relevant acts have still been applicable to the UK since, on the one hand, the opt-out does not apply to the amended (‘lisbonised’) and the new (post-Lisbon) acts\(^{69}\) and, on the other hand, the UK opted back in into thirty-five (‘magic’) measures, including some of the most important ones for

\(^{62}\) Protocol (No. 36) on Transitional Provisions, OJEU C 326 of 26 October 2012, 326.

\(^{63}\) Protocol 36 (n 62) applies only to the UK. Interestingly, Ireland, this time, did not express any concerns regarding the extended powers of the Commission and the ECJ regarding PJCCM; cf de Busser, ERA Forum, 16 (2015) 286.

\(^{64}\) Art. 10 (4) Protocol 36 (n 62) (allowing the UK not to accept the extended powers of the Commission and the CJEU as well as stipulating that acts re police/justice cooperation in criminal matters, ‘shall cease to apply’); see also Council of the EU, ‘UK notification according to Article 10 (4) of Protocol No 36 to TFEU and TFEU’, 12750/13, Brussels, 26 July 2013; House of Commons (n 59) 5. On the relevant instruments included, see JR Spencer Archbold Rev, issue 7 (2012) 7–9; criticizing the UK’s opt-out JR Spencer, Archbold Rev, issue 8 (2013) 6–7; crit. on the UK’s pick-and-choose approach as incompatible with a consistent approach to EU law V Mitsilegas CLR, 63 (2016), 522–526 (discussing the EAW, confiscation measures and fraud).

\(^{65}\) Protocol 36 (n 62), Art. 10 (4) in fine with (2) (the former excluding the application of the opt-out to ‘the amended acts which are applicable to the UK as referred to in paragraph 2’).


\(^{67}\) Protocol 36 (n 62), Art. 10 (5) (allowing the UK to ‘notify the Council of its wish to participate in acts which have ceased to apply’ pursuant to the previous opt-out). This selective (re-)opt-in will need the authorisation of the Commission or Council, i.e., the UK may only request re-admission but has no right to be readmitted; see also JR Spencer Archbold Rev, issue 7 (2012), 6; crit. of Prot. 36, Fletcher, in Mitsilegas, Bergström, and Konstadiniides (n 61) 79 ff.


\(^{69}\) Protocol 36 (n 62) Art. 10 (4) last clause in conjunction with Art. 10 (2).
police and criminal justice cooperation,\textsuperscript{70} including the respective jurisdiction of the CJEU.\textsuperscript{71} Thus, in sum, the whole opt-out-opt-in-exercise turned out to be largely ‘a purely paper one’ and as ‘gesture politics’ with the practical consequences amounting to ‘nil’,\textsuperscript{72} although, of course, the UK’s selective approach to a supranational legal system like the EU constitutes a challenge to the coherence of the whole system.\textsuperscript{73} The said 35 measures as such have been described as ‘part of a very complex network of arrangements, agreements, understandings and controls’ which could not be dismantled without affecting the structure as a whole and at the same time all individual measures.\textsuperscript{74} At any rate, the Government then committed to publish annual reports in the ‘form of an updated document describing JHA opt-in and Schengen opt-out decisions taken between 1 December 2009 and the present.’\textsuperscript{75}

Similarly, the UK always struggled to accept the jurisdiction of the ECJ (now CJEU). When, under the Amsterdam treaty, its jurisdiction was expanded to

\textsuperscript{70} The measures, in total 35, are listed in HM Government (n 68) at 8–12 (e.g. EAW, ECRIS, Europol, Eurojust, ESO, Naples II, JITS, cooperation in international crimes via contact points, execution of orders regarding freezing property or evidence, mutual recognition of financial penalties, confiscation orders, criminal judgments entailing deprivation of liberty and supervision measures, exchange of information and intelligence, cooperation regarding asset recovery, Schengen, SIS II, Art. 54 CISA). See also HM Government, Decision pursuant to Article 10(5) of Protocol 36 to the Treaty on the Functioning of the European Union, July 2014 Cm 8897, available at www.gov.uk/government/publications, last accessed 6 March 2017.


\textsuperscript{72} Cf J R Spencer Archbold Rev, issue 8 (2013) 9. In a similar vein Yvette Cooper, Shadow Home Secretary, commented on Cameron’s claim to have ‘clawed back 100 powers from Brussels’: ‘We have the power not to do a whole series of things we plan to carry on doing anyway, the power not to follow guidance we already follow, the power not to take action we already take, the power not to meet standards we already meet, the power not to do things that everyone else has already stopped doing and the power not to do a whole series of things we want to do anyway’. (Hansard, House of Commons, 7 April 2015, Column 363).

\textsuperscript{73} For a fundamental critique, especially with regard to the negative impact on rights protection, cf V Mitsilegas, (n 35) 49–50, 180–181, 266.

\textsuperscript{74} Cf House of Lords (n 52) 38 (quoting Lord Kirkhope).

\textsuperscript{75} House of Commons (n 59) 7.
the second and third pillar, the UK did not submit the declaration necessary to consent to this jurisdictional expansion. Under the Lisbon treaty, the UK first opted out of the CJEU’s jurisdiction with regard to police and criminal justice measures but then joined again with regard to the above mentioned 35 measures.

3 Post-Brexit Options

3.1 The Starting Point

Given this anyway highly selective acceptance of EU criminal justice by the UK, Brexit will only have limited consequences for the future cooperation between the Union of the 27 and the UK. In fact, the criminal justice measures which the UK decided to join (by an opt-in), in particular the 35 ‘magic’ ones re-joined in July 2013, indicate where the UK’s core interest in the criminal justice area lies. In terms of the negotiations, these measures constitute the starting point of the UK’s negotiating position given that its continuing participation in these measures, one way or the other, ‘will remain in the UK’s national interest post-Brexit.’ Indeed, then Home Secretary Theresa made clear at the time that the UK pursues its core security interests with the opt-in into these measures since ‘bilateral agreements would simply not work as effectively and our cooperation would suffer …’ Later she insisted that these measures ‘make a positive difference in fighting crime and preventing terrorism.’ In a recent House of Commons report it is stated that ‘[T]he reasons for opting into these

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76 Cf Art. 46 TEU (Amsterdam version).
77 Cf Art. 35(2) TEU Amsterdam (declaration to accept jurisdiction).
79 (n 70).
80 House of Lords (n 52) 6.
measures were well rehearsed at the time, and the decision was subject to scrutiny by several parliamentary Committees.\textsuperscript{83}

The government is still of the view that criminal justice cooperation with the EU is of fundamental importance for the UK’s overall security structure. The Secretary of State for Exiting the EU stressed that a strong cooperation in the criminal justice area should be one of the top overarching objectives in the negotiations.\textsuperscript{84} In a White Paper the cooperation in the fight against crime and terrorism is listed as one of the 12 principles guiding the exit negotiations.\textsuperscript{85} Similarly, in the House of Lords’ view the UK ‘benefits greatly from close and interdependent police and security cooperation with EU institutions and member states’.\textsuperscript{86} In her letter triggering Art. 50 TEU PM May reaffirmed once more the UK’s continuing interest – apart from close economic cooperation – in a bold security cooperation with the EU.\textsuperscript{87} As top priorities for UK law enforcement agencies in the future cooperation with the EU the just mentioned House of Lords’ report lists Europol, Eurojust, SIS II, the European Arrest Warrant (EAW), the European Criminal Records Information System (ECRIS), the Prüm Decisions (cross border cooperation)\textsuperscript{88} and the Passenger Name Records (PNR)\textsuperscript{89} showing a clear preference for data-access and -sharing;\textsuperscript{90} the list largely corresponds to the 35 measures re-joined in July 2013.\textsuperscript{91}

\textsuperscript{83} House of Commons (n 59) 6.
\textsuperscript{84} HC Deb, 12 October 2016, col 328; conc. House of Lords (n 52) 2, 5, 12–13, 42.
\textsuperscript{86} House of Lords (n 52) 5.
\textsuperscript{87} (n 3).
\textsuperscript{89} House of Lords (n 52) 2, 10, 27–28.
\textsuperscript{90} See also House of Lords (n 52) 25–33, 44–45.
\textsuperscript{91} See (n 70). The Prüm decisions have been re-joined by the UK in May 2016, cf Commission Decision (EU) 2016/809, 20 May 2016 on the notification by the United Kingdom of Great Britain and Northern Ireland of its wish to participate in certain acts of the Union in the field of police cooperation adopted before the entry into force of the Treaty of Lisbon and which are not part of the Schengen acquis, OJ L 132/105 (21 May 2016).
The Government believes that it has a strong negotiating position, being ‘uniquely placed to develop and sustain a mutually beneficial model of cooperation ... from outside the Union’, to get ‘the best deal ... to cooperate in the fight against crime and terrorism’ and to ‘seek a strong and close future relationship with the EU, with a focus on operational and practical cross-border cooperation.’ In fact, the UK is still participating in all the mentioned 35 measures and recently also opted in into the new 2016 Europol Regulation. Thus, it is clear that the question is not whether but how the UK could most effectively participate in EU criminal justice cooperation after having left the EU.

3.2 Possible Agreements

As to possible treaty relations between the UK and the EU criminal justice area one may distinguish between the institutional level, represented especially by Europol and Eurojust, and secondary acts (mainly the previous framework decisions). Apart from that, the UK could also – following in particular the Swiss approach – autonomously adapt its national law to EU developments, thereby facilitating cooperation with EU Member States.

3.2.1 Institutional Level

As to the institutional level, it is perfectly possible to have bilateral cooperation agreements as in fact other States do. Of course, the bilateral agreement

92 HM Government (n 85) 61–62.
93 Cf House of Commons (n 59) 8–13.
95 On the Swiss model (‘autonomer Nachvollzug’) in this regard cf Meyer, CLF, 28 (2017), 275, at 281; see also on Norway cf Suominen, CLF, 28 (2017), 251, at 252, 265 ff.
96 For agreements with the agencies see also V Mitsilegas CLR, 63 (2016), 533–534; House of Commons (n 59) 16.
97 Europol has several ‘operational agreements’ with third States (e.g. Australia, Canada, Colombia, Liechtenstein, Norway, Switzerland and the USA) and also a few ‘strategic agreements’ (Bosnia and Herzegovina, Russia, Turkey, Ukraine), cf <https://www.europol.europa.eu/partners-agreements>. Eurojust has several agreements with third States (e.g. Liechtenstein, Norway, Switzerland, Ukraine and the USA) and organisations, cf <http://eurojust.europa.eu/about/Partners/Pages/third-states.aspx>, both last visited. On Norway
approach has its limits as we will see below. At any rate, UK security agencies and official have always stressed that ongoing tight cooperation with these two agencies is a number one priority.\textsuperscript{98} The UK uses Europol more than any other country\textsuperscript{99} and participates in most Joint Investigation Teams (JITs).\textsuperscript{100}

3.2.2 Secondary Acts

As to the participation in secondary (mutual recognition) acts, the UK may also conclude agreements on specific areas of criminal justice cooperation such as the post Prüm framework and the EAW – whose importance for the UK is beyond any controversy\textsuperscript{101} – following earlier practice.\textsuperscript{102} Yet, being not

\textsuperscript{98} Cf House of Lords (n 52) 17, 22; House of Commons (n 59) 18, 21 (quoting Europol Director Rob Wainwright and the National Crime Agency re Europol and DPP Director Alison Saunders re Eurojust).

\textsuperscript{99} HM Government, The UK’s cooperation with the EU on justice and home affairs, and on foreign policy and security issues, Background Note, without date, para. 1.16, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521926/The_UK’s_cooperation_with_the_EU_on_justice_and_home_affairs_and_on_for

\textsuperscript{100} Cf House of Lords (n 52) 22 (where this is discussed in relation to Eurojust). JITs may be set up by Eurojust (Art. 6(1)(a)(iv) and 7(1)(a)(iv) Council Decision 2009/426/JHA of 16 December 2008, OJ L 138 of 4 June 2009, 14) or Europol (Art. 4(1)(d), 5(5) Europol Regulation 2016 (n 94). The original legal basis of EU law was Art. 13 of the EU Mutual Assistance Convention (OJEU C 197 of 12 July 2000, 1) and Framework Decision 2002/465/JHA; within the Council of Europe it is also provided for by Art. 20 Add.Prot. II to the European Convention on Mutual Assistance in Criminal Matters of 8 Nov. 2001. JITs are also provided for in Art. 19 UN Convention Against Transnational Organized Crime (Palermo Convention) of 15 November 2000 and Art. 49 UN Convention Against Corruption of 31 October 2003.


a Schengen member, the UK would hardly get the privileged access of Norway and Iceland (being Schengen members), regarding the EAW and information sharing (Prüm, SIS II).\textsuperscript{103} ECRIS access is even so far only given to EU Member States.\textsuperscript{104} Only the PNR allows explicitly for bilateral agreements between the EU and third States, as for example the EU-Canada agreement shows.\textsuperscript{105} Practitioners and security experts have especially stressed the importance of SIS II – joined by the UK in April 2015\textsuperscript{106} – in tracking suspects and enforcing EAWs and other mutual recognition measures.\textsuperscript{107} It is not least for this reason that the UK would have to negotiate an association agreement regarding the Schengen Acquis along the lines of the ones of the four non-Member States Iceland, Liechtenstein, Norway and Switzerland.\textsuperscript{108} Looking beyond surrender of persons the UK must agree some form of cooperation in general investigative measures modelled after the European Investigation Order.\textsuperscript{109} Of course, if UK-EU 27 agreements are not feasible, the UK may conclude bilateral agreements with individual Member States.\textsuperscript{110} The setback of such an approach is that it would multiply the number of agreements – adding to the ones with the EU or one of its agencies various State to State agreements – which makes the handling ever more difficult.\textsuperscript{111}

\textsuperscript{103} Cf House of Lords (n 52) 30–31, 35–36; House of Commons (n 59) 23, 25–26; on the importance of the ECRIS and the PNR in particular House of Lords (n 52) 26–28.

\textsuperscript{104} Cf House of Lords (n 52) 31.

\textsuperscript{105} The new agreement was signed on 25 June 2014 (12657/1/13 REV 1) but challenged before the CJEU (which declared it incompatible with Art. 7, 8, 21 and Art. 52(1) of the Charter of Fundamental Rights, cf. Opinion (Grand Chamber) of 26 July 2017, \textless http://curia.europa.eu/juris/document/document.jsf?text=fluggastdaten&docid=193216&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=277410#ctx1>, last visited 20 November 2017). See also House of Lords (n 52) 31.

\textsuperscript{106} House of Lords (n 52) 25 (pointing out that between April 2015 and 31 March 2016 6,400 alerts issued by other countries received hits in the UK).

\textsuperscript{107} Cf House of Lords (n 52) 25–26 (quoting the NCA considering SIS II ‘an absolute game changer for the UK’); House of Commons (n 59) 22, 25 (quoting, at 22, the DPP, inter alia stating: ‘That helps us because, when we issue a European arrest warrant, we do not just issue it to a particular country; it can go to all 27’).

\textsuperscript{108} (n 48).

\textsuperscript{109} Directive 2014/41/EU, OJ EU L 130, 1 May 2014, 1; thereto K Ambos, (n 5), Ch. 4 mn. 88 ff. On the UK’s position cf House of Lords (n 52) 40.

\textsuperscript{110} Thereto also V Mitsilegas CLR, 63 (2016), 534; House of Commons (n 59) 16.

\textsuperscript{111} Crit. insofar with regard to the approx. 120 bilateral EU-Switzerland agreements Meyer, \textit{CLF}, 28 (2017), 289 ff.
3.2.3 New Forms of Cooperation

One should also note that, given the UK’s special status and importance in the Union’s criminal justice and security architecture, some unprecedented ‘alternative arrangements’\textsuperscript{112} may be possible. There is a mutual interest of both the EU and the UK to have the closest criminal justice cooperation possible since both sides benefit from this cooperation and the UK has certainly more to offer than just any third country.\textsuperscript{113} At any rate, it is difficult to conceive that negotiations on all these options can be finished within two years (as envisaged by Art. 50 TEU).\textsuperscript{114} More importantly, even if the current situation would be fully replaced by new agreements or ‘alternative arrangements’, cooperation would still not be the same as from within the EU. In other words, alternative approaches, as for example demonstrated by Switzerland,\textsuperscript{115} have their limits. As rightly argued by Mitsilegas none of the post-Brexit options will be ‘capable of providing to the UK a level of co-operation which is equivalent to the current level of co-operation as a member of the EU ...’\textsuperscript{116} In a similar vein, the already mentioned House of Commons report finds that ‘it appears unlikely that any of these options would provide an equivalent level of co-operation as that currently enjoyed by the UK.’\textsuperscript{117} The House of Lords even sees ‘a real risk that any new arrangements the Government and EU-27 put in place by way of replacement when the UK leaves the EU will be sub-optimal relative to present arrangements, leaving the people of the UK less safe.’\textsuperscript{118}

3.2.4 Consequences

Indeed, both on a political and operational level the UK will be worse off after Brexit. On the political level it will have no more influence on the development of EU law in this area; on the operational level, UK requests from outside the EU would not have the same priority as from within and mutual recognition

\textsuperscript{112} House of Commons (n 59) 3.

\textsuperscript{113} This point has been repeatedly made by UK officials and experts, see e.g. House of Lords (n 52) 31–32, 33.

\textsuperscript{114} See also House of Lords (n 52) 2 (‘many years to negotiate’), 23, 24 (time to negotiate Eurojust agreement), 38 (length to negotiate EAW agreement). The Norway-EU agreement (n 102) has still not entered into force, cf Suominen, CLF, 28 (2017), 259.

\textsuperscript{115} Cf Meyer, CLF, 28 (2017), 289 ff. (concluding that ‘the bilateral approach provides no viable institutional framework to cope with the demands of significantly increased cooperation. It no longer fits the level of actual cooperation and intertwinement. It is ill-prepared to foster a dynamic and cooperative evolution of common standards’).

\textsuperscript{116} V Mitsilegas CLR, 63 (2016), 534.

\textsuperscript{117} House of Commons (n 59) 16.

\textsuperscript{118} House of Lords (n 52) 13, also 42.
would in fact be replaced or fall back to traditional mutual assistance.\footnote{119} As to Europol, the UK’s status would depend on the nature of the agreement (only strategic or also operational);\footnote{120} even in the latter case the UK would not have the same access to the Europol databases, would not sit on the agency’s management board\footnote{121} and could only send liaison officers to Europol Headquarters if agreed by the management board.\footnote{122} The UK would also lose its seat in the recently created Joint Parliamentary Scrutiny Group overseeing Europol’s work since it is composed of members of the national parliaments and the European Parliament.\footnote{123} As to Eurojust, the UK would no longer participate in the On-Call Coordination\footnote{124} and would not have access to its case management system enabling cross checking of cases.\footnote{125} Also, it is not clear how an UK liaison prosecutor, pursuant to a bilateral agreement, would link up with Eurojust, especially whether s/he would be able to participate in transnational coordination in the same way as prosecutors from EU Member States.\footnote{126} In both cases, it would be difficult to get around the jurisdiction of the CJEU so disliked by the UK.\footnote{127} The continuing participation in JITS could be ensured by a bilateral agreement\footnote{128} or through participation in relevant multilateral treaties.\footnote{129} An EAW-like surrender procedure would require, as already pointed out

\begin{footnotes}
\footnote{119}{House of Commons (n 59) 16, 21–22; on the loss of political and strategic influence see also House of Lords (n 52) 10 (with quotes of security officials) 13, 23.}
\footnote{120}{See on this distinction already (n 97) and the discussion re the UK in House of Lords (n 52) 17–18.}
\footnote{121}{On its composition see Art. 10 Europol Regulation 2016 (n 94) (representatives of MS and Commission).}
\footnote{122}{Cf Art. 8 Europol Regulation 2016 (n 94) (liaison officers to be sent by MS). See also House of Commons (n 59) 17–20, 26 (quoting, at 19, S. Peers and drawing a comparison with Denmark having opted out of all post-Lisbon measures and therefore not participating in the new Europol Regulation).}
\footnote{123}{Cf Art. 51 Europol Regulation 2016 (n 94); see also House of Commons (n 59) 19–20.}
\footnote{124}{Art. 52 (2) Eurojust Decision 2008 (n 100).}
\footnote{125}{Cf. Art. 16 Eurojust Decision 2008 (n 100); see also House of Commons (n 59) 21.}
\footnote{126}{Cf Art. 2 Eurojust Decision 2008 (n 100) (national members come from MS and only those participate in coordination/investigation activities); for a discussion House of Lords (n 52) 23 (especially quoting the DPP).}
\footnote{127}{Cf re Europol House of Lords (n 52) 19.}
\footnote{128}{See e.g. Art. 20(1) of the Swiss-German Police treaty of 27 April 1999, available (in German, French and Italian) at <https://www.admin.ch/opc/de/classified-compilation/19995927/index.html>, last visited 21 November 2017; but see Meyer, CLF, 28 (2017), 292 for the problems of Switzerland in this regard; generally also House of Lords (n 52) 24.}
\footnote{129}{The UK is already a party, on the CoE level, to the AP 11 to the European Conv. on Mutual Assistance in Criminal Matters and, on an international level, to both the Palermo Con-}
above, a Norway/Island-like agreement which in turn would require Schengen membership; otherwise, the UK would fall back on the burdensome 1957 Council of Europe Extradition Convention.\textsuperscript{130} Even if the UK reached a Norway/Island-like agreement, it would have to get rid of the nationality exception (contained therein in Article 6) which would be hard to swallow for some of the EU Member States which have, like Germany, a prohibition to extradite nationals.\textsuperscript{131}

Also, one must not overlook that any post-EU cooperation does not – contrary to the clearly expressed interest by the UK aiming at ‘bespoke’ adjudication arrangements\textsuperscript{132} – entail ‘complete independence from EU law’\textsuperscript{133} since this law will still be applicable by way of the EU and its Member States (as the UK’s partners). Thus, any agreement between the UK and the EU would have to be interpreted by the CJEU.\textsuperscript{134} While this interpretation would not be directly binding on the UK (being no longer an EU member), it would indirectly affect it via the respective agreement (as interpreted by the CJEU). Similarly, a dispute resolution mechanism would have to be established which may involve the CJEU (whose jurisdiction has never been fully embraced by the UK).\textsuperscript{135}

4 Conclusion

The UK’s special status vis-à-vis the EU criminal justice area and its great influence in shaping and developing this area\textsuperscript{136} may justify the Government’s confidence in getting a special deal and achieving tailor made solutions which

\textsuperscript{130} For a critique rightly House of Lords (n 52) 36–38.

\textsuperscript{131} The exception introduced in clause 2 of Art. 16(2) GG only refers to EU Member States and International Tribunals. For similar prohibitions see Ambos (n 5) Ch. 4 mn. 55.

\textsuperscript{132} Cf House of Lords (n 52) 11 (quoting the government’s position that laws are to be made in Westminster, not in Brussels, and that those laws would be interpreted by British courts, not the CJEU) 13, 42.

\textsuperscript{133} House of Commons (n 59) 16.

\textsuperscript{134} Cf Art. 218 TFEU on agreements with third countries and the Court’s competence in para. 11 regarding the compatibility of such agreements with the EU Treaties. See also House of Lords (n 52) 11–12.

\textsuperscript{135} See also House of Commons (n 59) 16–17.

\textsuperscript{136} See also Valsamis Mitsilegas, ‘European Criminal Law After Brexit’ (2017) 28 Criminal Law Forum 299, at 246 ff. (stressing the UK’s contribution to EU criminal law on four levels: operational, strategic, legislation, implementation).
reconcile the UK’s sovereignty and public security interests. Yet, the UK’s selective approach to criminal justice, characterized by a mixture of opt-out, opt-in and neither/nor decisions, will make negotiations more complex than with a ‘normal’ Member State and may also generate resistance among certain Member States which never felt at ease with the UK’s privileged treatment by the EU. At any rate, as we have seen, there are possible options on the table which may bring the UK as close as possible to the EU in terms of police and criminal justice cooperation if both parties have sufficient political will and are prepared to think out of the box taking recourse to unprecedented arrangements.