



# Conditionality in defining the future cooperation in criminal matters between the United Kingdom and the European Union

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**Abstract** The United Kingdom ceased to be a Member State of the European Union on February 1st, 2020, and while the Withdrawal Agreement still applies and prolongs the possibility to rely on key EU instruments, the European Union and the United Kingdom are defining the modalities of their future cooperation in various areas, including in criminal matters. This article, written as the negotiations are progressing, aims to stress the strong conditionality that underpins the possible modalities of their future cooperation. It focusses particularly on the condition of an adequate level of data protection as an essential prerequisite for police cooperation, and the protection of procedural safeguards through a continuous adherence to the European Convention on Human Rights for judicial cooperation. It concludes in stressing the importance of trust in shaping future cooperation, in criminal matters and beyond.

**Keywords** Brexit · Crime prevention · Mutual trust · UK-EU future relationship · ECHR · Data protection

## 1 Introduction

On 26 June 2016, the referendum on the withdrawal from the EU resulted in the victory of the vote “Leave” and marked the beginning of a long process, whose final outcome is still to be determined. After more than 40 years of membership of the European Union, the United Kingdom opted in favour of withdrawing from this regional organisation, under the umbrella of which states developed new and original forms of cooperation in various policy fields. Many pages have already been written about

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the referendum, the notification of the UK's withdrawal under Article 50 TEU, or the negotiations and difficult ratification of the Withdrawal Agreement.<sup>1</sup> The withdrawal process reached one of its milestones on February 1st, 2020, when the United Kingdom ceased to be a Member State of the European Union, or to borrow the words of some British politicians, Brexit got done. This marked the opening of a new chapter with the beginning of the negotiations on the future relationship between the United Kingdom and the European Union. The present article intends to analyse the future of cooperation in criminal matters between the two parties. Addressing both the future of police and judicial cooperation, it will focus on the conditionality placed by both parties on their future modalities of cooperation. It aims at highlighting the challenges to be addressed by the end of 2020, in the hope of reaching an agreement that will preserve a satisfactory level of cooperation in this field.

However, before focussing on these issues, it is worth briefly reminding oneself of the state of play at the time of writing. The withdrawal of the United Kingdom from the EU on 1st February 2020 launched the transition period, during which parts of EU law continue to apply with limited changes. This is particularly noticeable in the field of cooperation in criminal matters. The United Kingdom retains the same access and competences as a Member State within the two key EU criminal justice agencies, Europol<sup>2</sup> and Eurojust.<sup>3</sup> Major EU criminal justice instruments, such as the European Arrest Warrant<sup>4</sup> or the European Investigation Order,<sup>5</sup> can still be used by national competent authorities to request the surrender of a person, or the collection of evidence. The Court of Justice of the EU had itself stressed that the mere perspective of the UK's withdrawal was not a sufficient ground to prevent the execution of European Arrest Warrants issued by the UK.<sup>6</sup> In this context, the EU and the UK initiated negotiations concerning the future of their cooperation in criminal matters. The latter is briefly touched upon the Political Declaration,<sup>7</sup> which was adopted simultaneously to the Withdrawal Agreement. Both parties supported a partnership providing “for comprehensive, close, balanced and reciprocal law enforcement and judicial cooperation in criminal matters” (para. 80), which should notably be “underpinned by long-standing commitments to the fundamental rights of individuals, including continued adherence and giving effect to the European Convention on Human Rights (ECHR), and adequate protection of personal data, (...) and to the transnational *ne bis in idem* principle and procedural rights” (para. 81). Further details were provided

<sup>1</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/7.

<sup>2</sup> Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) [2016] OJ L135/53.

<sup>3</sup> Regulation (EU) 2018/1727 on the European Union Agency for Criminal Justice Cooperation (Eurojust) [2018] OJ L295/138 (Eurojust Regulation).

<sup>4</sup> Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

<sup>5</sup> Directive 2014/41/EU of the European Parliament and the Council regarding the European Investigation Order in criminal matters [2014] OJ L130/1.

<sup>6</sup> CJEU, Case 327/18 PPU, *Minister for Justice and Equality v RO*, EU:C:2018:733.

<sup>7</sup> Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom [2020] OJ C34/12.

when both parties released documents detailing their positions, red-lines and expectations regarding the negotiations. The European Commission proposed and received a negotiating mandate from the Council of the EU,<sup>8</sup> and the EU's negotiation directives were soon complemented by a draft agreement.<sup>9</sup> The British government released similar documents, detailing its positions on key negotiation points<sup>10</sup> and proposing its own draft agreements.<sup>11</sup> Points of tensions could already be noticed at that stage, starting with the EU's preference for a single agreement, contrasting with the UK's preference for several sectorial agreements. Several rounds of negotiations, disrupted and re-scheduled due to the Covid-19 pandemic and its impact in Europe, took place between March and September 2020, without significant progress achieved. As we will further discuss below, one of the EU's main conditions for future cooperation in criminal matters, i.e. the continuous adherence to the European Convention on Human Rights, proved to be one of the sticking issues.<sup>12</sup> Pressure now mounts up on negotiation teams, since in June 2020 the British government decided against requesting an extension of the transition period, which will thus terminate on December 31st, 2020. The recent Internal Market Bill<sup>13</sup> rolling back certain provisions of the Northern Ireland Protocol further complicates the negotiations, and the perspective of an abrupt end in the application of EU law, including EU criminal law, looms back in the horizon, reminiscing the perspective of a cliff-edge scenario.

The present article will focus more particularly on the conditions the EU formulates to develop future cooperation in criminal matters, and their potential evolution throughout the negotiations. Such method, which could be summarised as conditionality, is not a novelty in the EU's external relations. The expression is most often used in connection to the conditionality applicable to third countries willing to join the European Union, which have to demonstrate inter alia their compliance with the Copenhagen criteria.<sup>14</sup> It also covers broader requirements linked to the protection of human rights as a pre-requisite for cooperating with the EU, and can be identified in fields as diverse as development cooperation or trade.<sup>15</sup> While bearing in mind the specificities of the future relationship between the UK and the EU, our analysis will seek to appraise the presence of conditionality in the current negotiations, and

<sup>8</sup>Annex to Council Decision, Directives for the negotiations of a new partnership with the UK (Brussels, 25 February 2020) 5870/20 ADD1 REV3.

<sup>9</sup>Commission UKTF, Draft text of the Agreement on the New Partnership with the United Kingdom, 18 March 2020 UKTF (2020) 14. See also Commission UKTF, Amended draft text of Title I Part III of the Agreement on the New Partnership with the United Kingdom and its Annexes LAW-1 to LAW.7, 14 August 2020, UKTF (2020) 18.

<sup>10</sup>HM Government, "The Future Relationship with the EU, The UK's Approach to Negotiations", (London, February 2020) CP 211.

<sup>11</sup>UK government, DRAFT Agreement on Law Enforcement and Judicial Cooperation in Criminal Matters, 19 May 2020.

<sup>12</sup>Michel Barnier, Remarks after the first EU-UK negotiation round, 5 March 2020, SPEECH/20/402.

<sup>13</sup>United Kingdom Internal Market Bill, presented on 9 September 2020, Bill 177 2020–2021.

<sup>14</sup>See e.g. Jelena Dzankić, Soeren Keil and Marko Kmezić, *The Europeanisation of the Western Balkans, A Failure of EU Conditionality* (Cham, Palgrave Macmillan, 2019).

<sup>15</sup>See e.g. Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford, Oxford University Press, 2005) or N. Hachez, "Essential elements' Clauses in EU Trade Agreements: Making Trade Work in a Way that Helps Human Rights?" (2015) 53 *Cuadernos europeos de Deusto* 81.

whether the United Kingdom is treated as an ordinary third country or as a specific partner. The first part will analyse such conditionality with regard to police cooperation, for which data protection appears to be a central issue (I.). The second part will then analyse conditionality with regard to judicial cooperation, where attention focusses notably on the continuous adherence to the European Convention of Human Rights and the procedural safeguards enshrined therein and in the case law of the European Court of Human Rights (II.).

## 2 Data Protection Conditionality for Future Police Cooperation

Police cooperation constitutes an essential part of the Area of Freedom, Security and Justice, and refers to the cooperation of national competent authorities, including police, customs and other specialised law enforcement services, in relation to the prevention, detection and investigation of criminal offences. This definition taken from Article 87 TFEU fails to unveil the various initiatives and mechanisms developed at EU level in order to support the cooperation between law enforcement authorities. Such cooperation is crucial within an area without internal borders controls and in which free movement of persons is ensured. In an era of globalisation, marked by the importance of transnational crime and the mobility of criminals, this need for cooperation extends beyond the borders of the EU.

A central element of police cooperation consists of the collection, storage, processing and exchange of relevant information, being strategic information about crime trends in specific countries, but also operational information about suspected criminals, witnesses, stolen objects, or resolved and unresolved criminal cases. Such exchange of information allowed the EU to establish a specialised agency, Europol, whose tasks include the support of exchange of information through the creation and management of a large information system, including personal data, the collection, processing and analysis of such information, or the operation of a secure communication network.<sup>16</sup> Its work is complemented by other instruments, such as the Swedish initiative,<sup>17</sup> providing for expedited direct exchanges of information between authorities, or the Prüm framework,<sup>18</sup> providing for the connection of national databases storing DNA profiles, fingerprints and data on vehicles and their owners. The EU has also supported the development of large databases facilitating direct exchange of information. The Schengen Information System aims specifically at supporting police cooperation, offering the possibility to enter and consult alerts on wanted or missing persons and objects. Law enforcement authorities also have the possibility to access

<sup>16</sup>Secure Information Exchange Network Application (SIENA).

<sup>17</sup>Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2006] OJ L386/89.

<sup>18</sup>Legal framework defined by Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L210/1; Prüm Implementing Decision 2008/616/JHA ([2008] OJ L 210/12) laying down the necessary technical provisions for the implementation of Decision 2008/615/JHA; and Decision 2009/905/JHA of 30 November 2009 on Accreditation of forensic service providers carrying out laboratory activities [2009] OJ L322/14.

other databases, such as the Visa Information System or Eurodac, which were established with an initial objective of supporting migration management within the EU. The EU also developed specific policy initiatives, such as the EU policy cycle against serious and organised crime, which aims at improving operational coordination and cooperation on specific forms of cross-border crimes, identified as priorities at EU level.

Before its withdrawal from the European Union, the UK had obtained a specific opt-out regime, allowing, under conditions, its participation “à la carte” in specific cooperation initiatives. As a way of example, the UK, which is not a member of the Schengen area, opted in favour of participating in the Schengen Information System,<sup>19</sup> but was denied the possibility to participate and use the Visa Information System and Eurodac.<sup>20</sup> This did not prevent it from participating actively in the work of the EU police cooperation agency, Europol, and the UK is reported as one of the highest contributors to Europol and its databases.<sup>21</sup> Its support in police cooperation was also evidenced in 2014, when in application of Protocol 36, the UK decided to opt-back-in to 35 EU criminal law instruments, including, for instance, the law enforcement part of the Schengen Information System or the Swedish Framework Decision.<sup>22</sup> Furthermore, even after it had notified its intention to withdraw from the EU, the UK engaged in continuous efforts to ensure that it could benefit from the implementation of the Prüm Decisions in its legal order.<sup>23</sup> As for the law applicable during the transition period, under the Withdrawal Agreement, the British authorities can continue to rely on most of these instruments and thus maintain their access to key EU databases and instruments.<sup>24</sup> The text also provides for the extension of the possibility to use Europol’s managed Secure Information Exchange Network Application (SIENA) for no more than a year after the end of the transition period.<sup>25</sup>

However, uncertainty remains concerning the forms, content and strength of the future of police cooperation between the UK, Europol and the EU Member States, once the transition period will terminate on 31 December 2020. The design of such future modalities is inextricably linked to the forms of cooperation already existing within the EU, and their openness towards the participation of third countries and the conditions imposed for such participation.

The EU’s position on the matter can be identified through the analysis of two documents. Firstly, the negotiating directives adopted by the Council late February on the basis of the proposal of the European Commission are of relevance, which indicate the mandate the Member States attributed to the EU negotiation team led by Mr

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<sup>19</sup> A possibility provided for Art. 4 Protocol 19 on the Schengen acquis integrated into the framework of the EU attached to the Treaty of Lisbon [2008] OJ C115/290.

<sup>20</sup> Case 482/08 *United Kingdom vs Council (Visa Information System)* EU:C:2010:631, paras 47–48. See also Case 77/05 *United Kingdom vs Council (Frontex)* EU:C:2007:803, paras 61–62.

<sup>21</sup> V. Mitsilegas, EU Criminal Law after Brexit, *Criminal Law Forum* (2017) 28, 240.

<sup>22</sup> A. Weyembergh, Consequences of Brexit for European Union Criminal Law, *New Journal of European Criminal Law* 8 (2017) 3, 293.

<sup>23</sup> For an account of such efforts, see N. Vavoula, *Police Information Exchange, The future developments regarding Prüm and the API Directive*, Study for the European Parliament (2020) PE 658.542, 37–38.

<sup>24</sup> Withdrawal Agreement ([2019] OJ C384I/1), Article 63 § 1.

<sup>25</sup> *Ibid.*, Article 63 (2).

Michel Barnier. Secondly, a draft text of the Agreement on the New Partnership with the United Kingdom is a valuable source, especially its Title I Part III which deals with law enforcement and judicial cooperation in criminal matters. The draft text was initially released in March and amended in September 2020.<sup>26</sup> Conditionality is strongly present and future law enforcement cooperation depends on a high level of data protection. The latter is indicated in the negotiating directives as one of the two bases for cooperation,<sup>27</sup> and as a necessary condition for cooperation.<sup>28</sup> The EU spells very clearly that the level of ambition “will be dependent on the level of protection of personal data ensured in the United Kingdom”.<sup>29</sup> This condition would be deemed to be satisfied if the Commission adopts an adequacy decision, if applicable conditions are met. However, the partnership should also provide for the suspension of cooperation if the adequacy decision is repealed or suspended by the Commission or declared invalid by the Court of Justice of the EU.<sup>30</sup> The procedure and standards to be complied with in order to obtain such an adequacy decision are provided for in Article 36 of the Law Enforcement Directive,<sup>31</sup> a *lex specialis* governing the transfer of personal data to law enforcement authorities located in third countries or to an international organisation. This Article requires that the third country in question “ensures an adequate level of protection” that the Commission may assess taking into account the respect for the rule of law and fundamental rights, the existence and effective functioning of one or more supervisory authorities and the international commitments the country has entered into.<sup>32</sup> This requirement extends to the conclusion of a cooperation agreement with Europol.<sup>33</sup> The exact strength of this requirement is at the moment difficult to measure as no adequacy decision has yet been adopted on the basis of that provision,<sup>34</sup> but as argued by authors, the case-law of the Court of Justice on other types of transfer of personal data can be of relevance. The Court has indeed had several occasions to forge an autonomous definition of the so-called “standard of essential equivalence”,<sup>35</sup> under which a third country is required “in fact to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that

<sup>26</sup> Amended draft text of Title I Part III of the Agreement on the New Partnership with the United Kingdom and its Annexes LAW-1 to LAW.7, 14 August 2020 UKTF (2020) 18.

<sup>27</sup> Para. 13.

<sup>28</sup> *Ibid.*, para. 118.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</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 [2016] OJ L119/89.

<sup>32</sup> Directive (EU) 2016/680, Article 36 (1) & (2).

<sup>33</sup> Regulation (EU) 2016/794, Article 25 (1).

<sup>34</sup> L. Drechsler, “Comparing Law Enforcement Directive and General Data Protection Regulation Adequacy: One Standard Two Systems” in *Global Privacy Law Review* 1 (2020) 2, 94.

<sup>35</sup> Such standard was first defined in the case *Schrems I* (case C-362/14, Judgment of 6 October 2015, EU:C:2015:650), and it has also been repeated in Opinion 1/15 on the PNR agreement between the EU and Canada (Opinion of 26 July 2017, EU:C:2017:592).

guaranteed within the European Union”.<sup>36</sup> The Court has further examined the compliance of various arrangements and agreements foreseeing the transfer of personal data to third countries with such standard, and judges have on several occasions refused to consider the level of protection granted by the third country concerned as being equivalent to the level ensured within the EU. The signature of the Agreement on the exchange of Passenger Name Records with Canada was for instance blocked on that account,<sup>37</sup> and led to the renegotiation of the agreement. Most importantly, the Court invalidated twice the adequacy decisions concerning the level of protection applicable in the United States of America and underlying the EU-US transfer of data.<sup>38</sup> This strict approach pursued by the CJEU may in turn impact the level of scrutiny of the European Commission, which is competent to conduct, in line with the Law Enforcement Directive, a regular monitoring of the level of data protection in countries benefitting from an adequacy decision.<sup>39</sup> In that capacity, the Commission can eventually decide to repeal, amend or suspend of its own motion its adequacy decision.<sup>40</sup> In this context, it is not surprising that the EU inserted a specific provision foreseeing the suspension of police cooperation with the UK in case the Commission repeals or suspends the UK’s future adequacy decision, or if the CJEU declares it invalid. Whereas previous agreements organising the transfer of personal data for crime prevention purposes, such as the EU-US Umbrella Agreement, do not foresee precisely the grounds for suspension,<sup>41</sup> the inclusion of such a suspension clause may mostly reflect the latest developments in EU law and place an emphasis on the requirement of an adequate level of data protection.

The UK’s position is partially in line with the conditionality expressed by the EU. In its approach to the negotiations, the UK government pinpoints the importance attached by both parties to safeguarding high standards of data protection and announces its intention to seek to obtain an adequacy decision under the Law Enforcement Directive.<sup>42</sup> On that point, the Minister of State for Security, James Brokenshire, has indicated on the occasion of an hearing at the House of Lords that the UK is the first country to undergo the procedure to obtain an adequacy decision under the Law Enforcement Directive, and expressed no doubt about the UK being “data-adequate by the point of exit”.<sup>43</sup> Such a statement shall be nuanced in light of the case-law of the CJEU regarding the compatibility of UK domestic law, especially regarding the collection and processing of data, with EU law. The importance of this

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<sup>36</sup>See Case *Schrems I*, *ibid.*, para. 73.

<sup>37</sup>See Opinion 1/15 (n 36) para. 134, 141 and 232.

<sup>38</sup>See Case *Schrems I* (n 36) para. 97–98 and case *Schrems II*, case C-311/18, Judgment of 16 July 2020, EU:C:2020:559, para 181.

<sup>39</sup>Law Enforcement Directive, Preamble, para. 69.

<sup>40</sup>Law Enforcement Directive, Article 35 (5).

<sup>41</sup>Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences [2016] OJ L336/3, Art. 26.

<sup>42</sup>UK government, *The Future Relationship with the EU, The UK’s Approach to Negotiations*, February 2020, CP211, para. 31 and 60.

<sup>43</sup>UK House of Lords, Corrected oral Evidence on Progress of UK-EU future relationship negotiations, 16 June 2020, written transcript, p. 8 and 9.

case law is not undermined by the fact that it concerns the compliance (or rather the lack of compliance) of British law with the Directive on privacy and electronic communications,<sup>44</sup> and not the Law Enforcement Directive. The Court indeed reviewed the compatibility of domestic legislation concerning the collection of data by service providers and its transfer of data to authorities, elements which would be relevant for obtaining an adequacy decision under the Law Enforcement Directive. Two cases can be reported. Firstly, in the *Watson* case, the CJEU had found that domestic legislation providing for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication was incompatible with EU law.<sup>45</sup> Secondly, the CJEU had another opportunity in the *Privacy International* case to pronounce itself on the acquisition and use by the UK's Security and Intelligence Agencies of bulk communication data. On 5 October 2020, the judges, as the Advocate General Sánchez-Bordona before,<sup>46</sup> considered British domestic legislation contrary to EU law.<sup>47</sup> Such review is not isolated and the Court, before which several privacy groups brought cases, was also called to review French and Belgian legal frameworks.<sup>48</sup> However, the Court's decision has a very different impact in the context of the negotiations of the future relations between the UK and the EU. As pinpointed by Peers and Mitsilegas before the Commons' Committee on the Future Relationship with the EU, in such context it may difficult for the Commission "to find adequacy if there are serious concerns about mass surveillance".<sup>49</sup>

It might thus be opportune to consider what could happen if the level of data protection in the UK's legal order is not considered adequate or not fully assessed by the end of the transition period. Already in June 2020, the Minister of State for Security referred to alternative legal mechanisms to continue to transfer data, such as maximising the use of Interpol, or using bilateral channels, as well as other multilateral mechanisms outside EU structures, including for counterterrorism co-operation.<sup>50</sup> The increased reliance on Interpol has been particularly emphasised, among UK authorities and their partners as a potential alternative to the Schengen Information System. The latter has indeed been limitedly opened to the participation of third countries and only those participating in the Schengen Area have been granted full access. The EU negotiating directives are silent on the matter, stressing the UK's future status of a non-Schengen third country, and political and rather firm legal obstacles might

<sup>44</sup>Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (*Directive on privacy and electronic communications*) [2002] OJ L201/37.

<sup>45</sup>ECJ, Joined cases C-203/15 and C-698/15, judgment of 21 December 2016 (GC), *Tele2 Sverige AB ao*, EU:C:2016:970.

<sup>46</sup>See in that direction Opinion of Advocate General Campos Sánchez-Bordona, delivered on 15 January 2020, Case C-623/17, *Privacy International*, EU:C:2020:5.

<sup>47</sup>CJEU, Case C-623/17, Judgment of 6 October 2020 (GC), *Privacy International*, EU:C:2020:790.

<sup>48</sup>CJEU, Joined cases C-511/18, C-512/18 and C-520/18, Judgment of 6 October 2020 (GC), *La Quadrature du Net a. o.*, EU:C:2020:791.

<sup>49</sup>UK House of Commons, Committee on the Future Relationship with the EU, *Oral evidence: Progress of the negotiations*, HC 203, 14 July 2020, Q563 and Q564.

<sup>50</sup>UK House of Lords (n 44).



prevent the UK's participation in SIS.<sup>51</sup> Similarly, the existing forms of cooperation between Europol and third countries do not allow for direct access to some of its key tools, which would imply a decrease in the intensity of exchange of information (unless the UK manages to obtain a specific arrangement). Therefore, Interpol appears as a very attractive alternative for the exchange of information, and its main tool for the exchange of alerts about persons (Interpol's notices) has benefited from an increased attention, even before the UK's withdrawal from the EU. In practice, British authorities have been engaged in "back-record converting", which consists in converting current SIS alerts in to Interpol notices, an operation done manually.<sup>52</sup> However, practitioners and academics alike have stressed the limits of such an alternative. Interpol databases are not automatically linked to the police national computer, and police officers have to upload information and define additional parameters of access before sharing it. This contrast with the quick-time and spontaneous exchange via SIS, resulting from the link between national police databases and SIS through which the data entered in the national police computer is automatically transferred to SIS and double checked.<sup>53</sup> National authorities of EU Member States may not check the Interpol database as automatically as they check SIS, and they may not upload some information on Interpol's database themselves.<sup>54</sup> The exchange of information will thus most certainly be slowed down, so as operational cooperation resulting from the identification of links between cases or the location of a suspect in another state.

As an intermediary conclusion, it appears that conditionality requiring an adequate level of data protection presents a potential challenge to the definition of the future of police cooperation between the UK and the EU. On several aspects, UK domestic legislation and practice has been found in violation of EU law,<sup>55</sup> and this may delay the adoption of an adequacy decision. The possibility of onwards transfers to third countries, such as the United States with whom the UK has concluded an executive agreement under the US Cloud Act, is also a matter of concern.<sup>56</sup> These elements do not, however, mean the end of operational police cooperation. There is a strong operational pressure both in the UK and in the EU to maintain ongoing exchange of information. Liaison officers to and from the UK and the EU Member States, and to and from Europol, can more easily be deployed and will participate in maintaining a certain level of cooperation. Yet recourse to alternative mechanisms might be required to continue the exchange of information, and such alternatives include for instance Interpol databases, bilateral frameworks, or looser frameworks devoted to certain forms

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<sup>51</sup>UK House of Commons, Committee on the Future Relationship with the EU, *Oral evidence: Progress of the negotiations*, HC 203, 14 July 2020, Q568, Answer by S. Peers.

<sup>52</sup>UK House of Commons, Home Affairs Committee, *Oral evidence: Home Office Preparations for Brexit*, HC 2612, 4 September 2019, Q2, Answer by DAC Richard Martin.

<sup>53</sup>UK House of Commons (n 50) Q567 &.

<sup>54</sup>UK House of Commons (n 50) Q549.

<sup>55</sup>In addition of the cases Watson and Tele2 Sverige previously mentioned, see also the concerns expressed by the European Parliament regarding the exchange of fingerprints with the UK via Prüm and its rejection of the Council implementing decision in May 2020 (European Parliament legislative resolution of 13 May 2020 on the draft Council implementing decision on the launch of automated data exchange with regard to dactyloscopic data in the United Kingdom, P9\_TA(2020)0068 and the explanatory statement, A9-0100/2020).

<sup>56</sup>N. Vavoula (n 24) 41.

of crimes and involving broader groups of authorities. This may unfortunately undermine the possibilities for judicial review and lower the level of protection for the rights of persons whose data is exchanged.

### 3 Human Rights Conditionality in judicial cooperation

Judicial cooperation in criminal matters is a connected yet different form of cooperation in criminal matters. Traditionally intervening at a later stage of the criminal proceedings, this form of cooperation concerns judicial authorities, being prosecutors and/or judges, seeking to collect evidence with the objective of presenting a case before the trial judge. As the stakes are higher for the suspects and accused persons concerned, specific guarantees are attached to cross-border cooperation in that field. The EU has developed unique forms of cooperation based on mutual trust and the principle of mutual recognition, that have sped up and facilitated cooperation in the matter, correcting some of the limits identified in traditional mechanisms of extradition and mutual legal assistance. As a way of example, the European Arrest Warrant Framework Decision<sup>57</sup> has been repeatedly referred to as a success story, since it accelerated considerably the time period for the surrender of a suspect or convicted person. Similarly, the European Investigation Order Directive<sup>58</sup> has been acknowledged as facilitating the collection of evidence in another state. These advanced forms of cooperation have been accompanied by an (limited) approximation of procedural criminal laws, with the adoption of minimum EU rules safeguarding a minimum level of protection for the rights of suspects and accused persons, notably on the basis of the standards resulting from the abundant case-law of the ECHR on the matter. These instruments are also complemented by measures facilitating the recognition of supervision measures, or the transfer of prisoners in order to maximise their social reintegration.<sup>59</sup> The EU finally established a specialised network, the European Judicial Network,<sup>60</sup> and a specialised agency Eurojust, mandated to assist national authorities in cases involving two or more Member States or presenting complex legal questions.<sup>61</sup> In this field of judicial cooperation in criminal matters, the UK played a key role in forging the principle of mutual recognition and contributed to the successes of certain instruments and Eurojust,<sup>62</sup> while being more reserved

<sup>57</sup>Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L190/1.

<sup>58</sup>Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L130/1.

<sup>59</sup>See e.g. I. Creta and I. Wiczorek, “Les individus en tant que bénéficiaires indirects de la solidarité interétatique? Etude des normes européennes sur le transfèrement de délinquants” in R. Coman, A. Weyembergh and L. Fromont, *Les solidarités européennes: entre enjeux, tensions et reconfigurations* (Bruxelles, Larcier: 2019) 85–115.

<sup>60</sup>Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network [2008] OJ L348/130.

<sup>61</sup>Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust) [2018] OJ L295/138.

<sup>62</sup>V. Mitsilegas (n 22) 240.

about deepened integration in specific areas. The UK refused, for instance, to opt in to most of the procedural rights' directives, and it did not opt-back into many of the instruments adopted prior to the entry into force of the Lisbon Treaty.<sup>63</sup> This did not prevent it from being an essential partner, explaining, why as in the field of police cooperation, the UK and the EU are both interested in maintaining a close level of judicial cooperation.

The EU announced a series of conditions, both general and specific, to be respected for developing future cooperation in criminal matters. In the field of judicial cooperation, a general requirement, namely the UK's continued commitment to the ECHR, takes particular significance. Common minimum standards of procedural rights in criminal proceedings are essential to cross-border cooperation in this field, as they guarantee the rights of the persons suspected or accused and thus ensure the fairness of criminal proceedings. Within the EU, these minimum standards are enshrined in a series of Directives on procedural rights,<sup>64</sup> adopted on the basis of Article 83 TFEU, and envisaged as a key contribution to the implementation of the principle of mutual recognition, the cornerstone of judicial cooperation.<sup>65</sup> These EU standards acknowledged how the ECHR and the case law of the European Court of Human Rights constitute the common basis for the protection of procedural rights, and the adoption of specific instruments was primarily seeking to reinforce their full implementation and eventually raise existing standards.<sup>66</sup> In such a context, it is worth analysing in detail how the commitment to the ECHR may condition future judicial cooperation between the EU and the UK.

The importance of the ECHR was already agreed upon in the Political Declaration, in which the UK and the EU stressed how future arrangements in criminal matters should also be underpinned by continued adherence and giving effect to the ECHR.<sup>67</sup> These elements were thus without surprise taken further in the documents preparing the negotiations of the future relationship. However, the EU increased its requirements, and gave much more substance and weight to the UK's continued commitment to the ECHR. Firstly, the Negotiating Directives indicated that such commitment forms part of the core values and rights to be expressed in the five binding political clauses,<sup>68</sup> and referred again to it when providing details about the future security partnership providing for close law enforcement and judicial cooperation in criminal matters. The EU institutions and Member States stressed that the future agreement should provide for automatic termination of cooperation if the UK were to renounce the ECHR, and for automatic suspension if the UK were to abrogate do-

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<sup>63</sup> A. Weyembergh (n 23) 286–289.

<sup>64</sup> For an analysis of the Directives, see C. Riehle and A. Clozel, "10 years after the roadmap: procedural rights in criminal proceedings in the EU today" *ERA Forum* (2020) pp. 321–325.

<sup>65</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] *OJ C*295/1.

<sup>66</sup> *Ibid.*, para. 2.

<sup>67</sup> Political declaration (n 8) para. 83.

<sup>68</sup> Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement, Council doc. 5870/20 Add1 Rev3, 25 February 2020, para. 12.

mestic law giving effect to the ECHR.<sup>69</sup> Such provisions were linked to the impact it would have on the possibility for individuals to invoke the rights under the ECHR before British courts. The EU negotiators further included these elements in the draft agreement on the new partnership with the UK, including in the revised chapters on cooperation in criminal matters.<sup>70</sup> This requirement to commit to continued adherence to the ECHR, and the automatic suspension and termination of cooperation in criminal matters should it cease, quickly appeared as one of the sticking points. Indeed, the position taken by the British government was rather an opposite one. In its paper on the UK's approach to negotiations, the UK government agreed upon cooperation in criminal matters being underpinned by the importance attached by both partners to safeguarding human rights and the rule of law. However, it also specified that the agreement "should not specify how the UK or the EU Member States should protect and enforce human rights and the rule of law within their own autonomous legal systems."<sup>71</sup> Similarly, whereas the government supported the inclusion of clauses providing for the suspension and termination of the agreement, the agreement "should not specify the reasons for invoking any suspension or termination mechanism".<sup>72</sup> Right after the first round of negotiations in March 2020, Michel Barnier, the EU chief negotiator, indicated that the UK informed them that it will not formally commit to continue applying the ECHR, which would have immediate and practical consequences, with less ambitious forms of cooperation remaining possible on the basis of international agreements.<sup>73</sup> The issue continued to stick out as one of the points of contention, the EU institutions appearing to stand firm on their formalisation of the UK's commitment. The European Parliament, which will have to consent to the conclusion of the future relationship agreement(s), took the position in June 2020 that if the UK does not explicitly commit to enforce the ECHR and does not accept the role of the CJEU, no agreement on judicial and police cooperation will be possible.<sup>74</sup>

The EU's insistence on a continuous commitment of the UK to the ECHR is not clearly stated, but it can be understood as resulting from various factors, which will be examined successively. Firstly, the EU's views may result from the ambiguous narrative of the UK Conservative Party, regarding the possibility to withdraw from the European Convention of Human Rights and/or repeal the Human Rights Act.<sup>75</sup> This Act is a crucial instrument, which gives effect to the ECHR and the case law of the European Court of Human Rights in the UK domestic legal order. The ambiguity may result from the wording used in key documents published by the UK

<sup>69</sup>Ibid., para. 118.

<sup>70</sup>European Commission, Task Force for Relations with the UK, Amended draft text of Title I Part III of the Agreement on the New Partnership with the UK and its Annexes, UKTF (2020) 18, 14 August 2020, Art. LAW.OTHER.136 Suspension and disaplication, para. 1 to 3.

<sup>71</sup>UK government, *The Future Relationship with the EU* (n 43) para. 31.

<sup>72</sup>Ibid., para. 32–33.

<sup>73</sup>European Commission, Negotiations with the UK: Michel Barnier sets out points of convergence and divergence following the first round of negotiations, 5 March 2020, SPEECH/20/402.

<sup>74</sup>European Parliament, Recommendation of 18 June 2020 on the negotiations for a new partnership with the UK (2020/2023(INI)), P9\_TA-PROV(2020)0152, para. 82.

<sup>75</sup>Human Rights Act, 1998 (c 42).

Conservative Party, currently in power. The Manifestos it published reflect a mutation in its discourse about the ECHR and the Human Rights Act. Whereas in 2015, the party's manifesto contained blunt but clear statements regarding the party's intention to scrap the Human Rights Act and curtail the role of the ECHR,<sup>76</sup> the wording evolved in favour of staying temporarily in the ECHR until Brexit was concluded and to remain signatories to the ECHR for the duration of the next Parliament.<sup>77</sup> The latest manifesto adopted prior the general elections of December 2019 is silent about the ECHR, and merely mentions the intention to update the Human Rights Act.<sup>78</sup> Yet, as analysed by some authors, these electoral documents echo deeper discussions and ambitions, notably to replace the Human Rights Act by a British Bill of Rights, which shall allow for an autonomous mechanism of protection.<sup>79</sup> These electoral claims also find echo in legislative proposals limiting the reach of the ECHR. This is notably the case with the Overseas Operation (Service Personnel and Veterans) Bill, pending adoption, which would limit prosecution and civil proceedings against military personnel, as well as to enable the UK government to derogate from the ECHR during combat operations.<sup>80</sup>

Secondly, some authors have argued that the origins of the EU's insistence could be traced back to the CJEU's judgment in the *RO* case,<sup>81</sup> which concerned the execution of European Arrest Warrants prior to the UK's withdrawal from the EU. The CJEU stressed in that judgment that the UK's adherence to the ECHR is in no way linked to its being a member of the EU and its decision to withdraw from the EU has no effect on its obligation to respect the provisions of the ECHR.<sup>82</sup> For the CJEU, this continued application of the ECHR and the incorporation of the substantive content of those rights in national law formed a presumption that the rights of surrendered persons would be preserved, even after the country's withdrawal from the EU. It is only if there is concrete evidence to the contrary that judicial authorities of a Member State could refuse to execute a European Arrest Warrant.<sup>83</sup> This case law, conditioning the application of EU rules on criminal law cooperation to human rights protection, could have rendered a clause on ECHR-adherence necessary for future EU-UK cooperation,<sup>84</sup> the ECHR functioning as a partial external substitute guaranteeing the

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<sup>76</sup>UK Conservative Party, Manifesto 2015, p. 58.

<sup>77</sup>UK Conservative Party, Manifesto 2017, p. 37.

<sup>78</sup>UK Conservative Party, Manifesto 2019, p. 48.

<sup>79</sup>D. Giannouloupolous, "The Eurosceptic right and (our) human rights: the threat to the Human Rights Act and the European Convention on Human Rights is alive and well" *European Human Rights Law Review* (2020) 3, 225–242.

<sup>80</sup>B. Shiner and T. Chowdhury, "The Overseas Operation (Service Personnel and Veterans) Bill and Impunity of the British State", UK Constitutional Law Blog, 22 September 2020.

<sup>81</sup>CJEU (n 7).

<sup>82</sup>Ibid., para. 52.

<sup>83</sup>Ibid., para. 61.

<sup>84</sup>See S. Peers, Analysis 5 of the revised Brexit withdrawal agreement: the political declaration on the EU/UK future relationship, EU Law Analysis, 29 October 2019, or N. Coghlan, The UK/EU partnership and human rights: battlelines and paradoxes, European Law Blog, 10 February 2020.

respect for fundamental rights.<sup>85</sup> The importance of such commitment may further be linked to the decision of the British government<sup>86</sup> to specifically and unambiguously exclude the EU Charter of Fundamental Rights from the body of retained EU law.<sup>87</sup> Finally, continued adherence to the ECHR is further emphasised as a consequence of the limited human rights guarantees<sup>88</sup> provided for in the Council of Europe's conventions on judicial cooperation,<sup>89</sup> which are envisaged as a basis and/or back-up for future UK-EU judicial cooperation, including in case of a no-deal scenario.<sup>90</sup> As a way of example, the European Convention on Extradition and its four Additional Protocols contain limited details on the protection of the rights of requested persons, except in respect of provisions on the principle of *non bis in idem*,<sup>91</sup> judgments *in absentia*,<sup>92</sup> and the obligation to inform the person.<sup>93</sup>

Thirdly, other authors have argued that the EU's insistence may be based on the fact that the current negotiations with the UK concern an agreement whose scope would be far more extensive and comprehensive than agreements previously concluded with third countries.<sup>94</sup> This element may cut short the argument according to which the EU is imposing much stricter conditions on the UK than it imposed on other third countries. It is true that a commitment to continued adherence to the ECHR is not a condition always imposed on all third countries with whom the EU cooperates in criminal matters. It is notably the case for some agreements concluded with third countries providing for the most advanced forms of cooperation, which do not contain such express commitment to the ECHR. They contain, nevertheless, references to this fundamental instrument, clearly constituting an underpinning framework for more advanced cooperation. This is notably evidenced with the agreements the EU concluded with Iceland and Norway. The Convention on surrender procedures,<sup>95</sup> which provides for a regime close to the European Arrest Warrant, only refers incidentally to the ECHR. The preamble stresses that the agreement respects fundamental

<sup>85</sup>L. Moxham and O. Garner, Will the UK uphold its commitment to human rights?, LSE Brexit Blog, 30 June 2020.

<sup>86</sup>House of Commons, *The status of "retained EU law"*, Briefing Paper number 08375, 30 July 2019, pp. 37–39.

<sup>87</sup>The concept refers to the body of law that replicate several different sources of EU law as domestic equivalents, thus leading to their implementation past the date of the UK's withdrawal from the EU and past the end of the transition period.

<sup>88</sup>G. Wilson quoted in House of Lords, EU Committee, Brexit: the proposed UK-EU security treaty, 2018, HL Paper 164, para. 143.

<sup>89</sup>See e.g. European Convention on Mutual Assistance in Criminal Matters, 1959, ETS 30.

<sup>90</sup>See the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019, No 742, Part. 14, and its explanatory memorandum, para 2.3, 2.9 and 2.10.

<sup>91</sup>Council of Europe, European Convention on Extradition, 1957, ETS 24, Article 9.

<sup>92</sup>Council of Europe, Second Additional Protocol to the European Convention on Extradition, 1978, ETS 98, Chap. 3.

<sup>93</sup>Council of Europe, Third Additional Protocol to the European Convention on Extradition, 2010, ETS 209, Art. 3.

<sup>94</sup>L. Moxham and O. Garner (n 85).

<sup>95</sup>Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway [2006] OJ L292/1.

rights and in particular the ECHR, and a provision clarifies that the agreement shall not have the effect of modifying the obligation to respect rights and legal principles as enshrined in the ECHR or in Article 6 TEU.<sup>96</sup> Similarly, the treaty, through which certain provisions of the EU Convention on Mutual Assistance in Criminal Matters applies to their cooperation with EU Member States,<sup>97</sup> refers to the ECHR in its preamble, stressing that mutual assistance is provided in compliance with the individual rights and principles of the ECHR.<sup>98</sup>

The argument of differential treatment imposed on the UK is further undermined by the fact that adherence to the ECHR is a clear condition that underpins cooperation in criminal matters with neighbouring third countries, such as those engaged in pre-accession negotiations. In past accession procedures, the Commission expected candidate countries to correct the shortcomings identified in their criminal justice systems.<sup>99</sup> It continues today to condition further progress in the accession process to full respect of the ECHR and the case law of the Strasbourg Court.<sup>100</sup> It is also worth to stress that although the EU is not yet a member of the ECHR, the negotiations for its accession to the Convention, interrupted after the Opinion 2/13, have recently resumed, with the hope that in the near future the EU would also be bound by the ECHR.<sup>101</sup>

These elements may explain why the question of an explicit reference to the ECHR in the future agreement between the EU and the UK remained a sticking point of the negotiations. However, in early October 2020, there seem to be signs of positive developments, cautiously addressed by Michel Barnier and David Frost, the UK's chief negotiator, during the ninth round of negotiations. The former mentioned positive developments on the respect of fundamental rights and individual freedoms, which are a pre-condition for future cooperation in criminal matters,<sup>102</sup> while the latter briefly evoked that progress has been possible on a law enforcement agreement.<sup>103</sup> Although no publicly available document has been published, newspapers have referred to a possible compromise under which the future agreement would include a commitment by the UK government not to materially alter the spirit of the Human Rights Act, and a provision allowing either party to suspend or terminate the agreement if there were

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<sup>96</sup>Ibid., Preamble, para. 11 and Article 1 (3).

<sup>97</sup>Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto [2004] OJ L26/3.

<sup>98</sup>Preamble, para. 3.

<sup>99</sup>R. Janse, "Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement" in *International Journal of Constitutional Law* (2019) 17:1, pp. 57–58.

<sup>100</sup>See e.g. European Commission, 2020 Communication on EU enlargement policy, COM(2020) 660 final, 6 October 2020.

<sup>101</sup>See e.g. The EU's accession to the European Convention on Human Rights: Joint statement on behalf of the Council of Europe and the European Commission, 29 September 2020.

<sup>102</sup>European Commission, Statement by Michel Barnier following round 9 of negotiations, 2 October 2020, STATEMENT/20/1817.

<sup>103</sup>Lord Frost statement after round 9 of the negotiations, 2 October 2020.

serious concerns about the protection of fundamental rights and the rule of law.<sup>104</sup> The latter element responds to one of the redlines identified by the UK's government, and it also reflects the concerns already expressed by other third countries regarding the respect for the rule of law within the EU.<sup>105</sup>

## 4 Conclusion

The future cooperation in criminal matters between the EU and the UK remains yet unclear at the time of concluding our analysis. The present contribution sought to highlight the conditionality placed by the EU on two core pre-requisites: a high level of data protection and a continued commitment to uphold the ECHR. These elements are in line with a vision of cooperation in criminal matters as part of an “ecosystem” based on common rules and safeguards, which constitute the basis of trust between partners. The EU area of criminal justice, with its common EU standards, shared decisions, joint supervision and implementation and a common Court of Justice,<sup>106</sup> is based on such rationale, and the mutual trust between EU Member States about their respective criminal justice systems is essential to its functioning. The opt-outs and derogatory regimes applicable to the United Kingdom while it was still a Member State of the EU introduced a variable geometry in such an ecosystem, yet it did not substantially alter its capacity to cooperate with other EU Member States. At present, as the UK has withdrawn from the EU and become a third country, the current negotiations shall seek to achieve a unique compromise, allowing the UK to benefit from a close cooperation with the EU Member States and agencies. The modalities on which their future cooperation will be based depend on a series of conditions, which aim to offer common and reciprocal guarantees that the protection of the rights of individuals is ensured. These will in turn be instrumental in maintaining the trust between the UK, the EU and its Member States. In this context, close attention shall be paid to elements that may undermine such a new form of mutual trust.

From the perspective of the UK, this may imply closely monitoring the attenuations to the principle of mutual recognition identified by the CJEU, relating notably to the systemic and generalised deficiencies of some Member States which undermine the level of protection of the independence of the judiciary.<sup>107</sup> These elements will, without doubt and regardless of the content of the agreement eventually concluded, impact the willingness of British judicial authorities to execute requests issued by

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<sup>104</sup>B. Boffey, “Boris Johnson set for compromise on Human Rights Act – EU sources”, *The Guardian*, 7 October 2020.

<sup>105</sup>See e.g. Report of the Commission services on the second round of negotiations in view of an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters, 6 November 2019, Council Doc. No 13713/19, 8 November 2019, p. 5.

<sup>106</sup>See speech by Michel Barnier at the EU Fundamental Rights Agency, 19 June 2018, SPEECH/18/4213.

<sup>107</sup>See in particular the pending case before the CJEU concerning the possibility to refuse to execute all European Arrest Warrants issued by Polish judicial authorities (CJEU), Case C-354/20: Request for a preliminary ruling from the Rechtbank Amsterdam (Netherlands) lodged on 31 July 2020 – European arrest warrant issued against L [2020] OJ C320/11.



Member States considered as breaching rule of law requirements. From the perspective of the European Union, the commitment of the UK to uphold the agreement(s) it may conclude with the EU and the commitments therein shall be crucial. In this regard, the introduction of the Internal Market Bill which would allow UK authorities to disregard certain provisions of the Protocol on Northern Ireland is to be followed closely. If adopted, the text would constitute a particularly concerning precedent. In addition to potentially violating specific provisions of the Protocol,<sup>108</sup> the Bill would undermine the credibility of the UK as an international partner, and potentially result in a breach of trust. In such circumstances, the UK may face the challenge of being required to comply with higher standards and accept stricter compliance mechanisms. These elements may prejudice the conclusion of an agreement between the EU and the UK, which would impact their cooperation in criminal matters. Their cooperation may not cease, since fallback options exist, being recourses to Interpol, to the Council of Europe's conventions in criminal matters, to bilateral agreements with Member States or to specific mechanisms. Their cooperation may however suffer a significant step back, which would be prejudicial, not only for criminal justice practitioners, but also for the persons suspected and accused in cross-border criminal proceedings.

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<sup>108</sup>See European Commission, Withdrawal Agreement: European Commission sends letter of formal notice to the UK for breach of its obligations, 1 October 2020, IP/20/1798.