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## **EUROPEAN UNION'S AREA OF FREEDOM, SECURITY AND JUSTICE AFTER BREXIT: CONSEQUENCES AND FUTURE PROSPECTS**



**Abstract:** In June 2016 the citizens of the United Kingdom voted for leaving the European Union. The paper aims to explain the consequences in the Area of Freedom, Security and Justice (AFSJ), as well as to offer so future directions regarding the development of this area after the Brexit. The UK has concluded arrangements with the EU regarding the withdrawal of some measures in the AFSJ, especially criminal law and justice, as well as to choose in which measures to approach voluntarily (for example, the European Arrest Warrant). The paper additionally explains the situation in the AFSJ with the UK within the EU and the consequences following the activation of Article 50 of the Lisbon Treaty.



The consequences from Brexit in AFSJ are more of speculative nature and depend on the outcome of the exit negotiations. However, the UK will most probably review some of the existing arrangements, as some fall under the Council and in practice are less effective. In other areas, the UK could negotiate bilateral agreements with some of the EU member-states or the EU as whole. It is possible that without mutual recognition and confidence among EU member-states supporting, for example, the European Arrest Warrant, these arrangements to become more and more complicated. In the conclusion, some considerations are given regarding the range of cooperation between UK and EU in the AFSJ, which might exist after finishing the Article 50 procedure and the official UK exit from the EU. As it is not possible to assume which arrangements might be agreed between EU and UK, it is possible to put some summary as a guidance of the existing cooperation forms in the AFSJ between EU and UK.

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**Key words:** Brexit, freedom, security, justice, consequences, prospects.

**Introduction: uk's area of jha before the referendum**

**On the 23<sup>rd</sup> of June 2016, the majority of UK citizens voted for leaving the European Union.** The consequences of the referendum outcome, the repercussions after the notification is being delivered regarding article 50 of the Lisbon Treaty, and the EU's legislation in the Area of Freedom, Security and Justice are key elements of this paperwork.

Even before the referendum, the UK had special status regarding the ASFJ policies. The AFSJ, formerly the "the third pillar" or Justice and Home Affairs (JHA), primarily did not fall under the Community method. The cooperation in this area took the form of intergovernmental arrangements. The Maastricht Treaty established the area of JHA, covering areas such as external borders, asylum, immigration and police and judicial cooperation in civil and criminal matters; described as matters of common interest. These areas were not established in EU frame, but on intergovernmental basis.

Part of the JHA policies, namely external borders, asylum, immigration and judicial cooperation in civil matters were transferred in EU's legal frame with the adoption of the Amsterdam Treaty. However, according Article 1 of the "Protocol on the position of the United Kingdom and Ireland", adopted along with the Amsterdam Treaty, the UK did not take any participation regarding the adoption of EC measures in this area. Consequently, Council's measures on visas, asylum and immigration are not applied in the UK, unless they are explicitly accepted according Articles 3 and 4 of the Protocol. On the other side, the police and judicial cooperation in criminal matters remained in the frame of intergovernmental cooperation even after the adoption of the Amsterdam Treaty.

Special rules are applied for the Schengen acquis, which is incorporated in the EU's legal frame since 1999 through the Amsterdam Treaty. The regulations managing the police and judicial cooperation in criminal matters, along with the whole spectrum of cooperation remained intergovernmental. The other parts from the Schengen acquis, such as the rules regarding border controls, visas, etc., were incorporated in the supranational law. Regarding the entire Schengen acquis, with the entry of the Amsterdam Treaty in force, for UK a special arrangement existed, as pointed out in the Protocol integrating the Schengen acquis into the framework of the EU. According Article 4 of the Protocol, UK is not bound by the Schengen acquis, and "may at any time request to take part in some or all of the provisions of this acquis". After 2000 and according Council's Decision 2000/365/EC, UK applies the Schengen provisions regarding the police and judicial cooperation in criminal matters, cooperation on drug trafficking and the Schengen Information System (SIS). In the Council's Decision 2004/926 /EC, the Council decided that these Schengen acquis provisions, with the exception of those referring to the SIS, shall be put into effect for the UK.

With the Lisbon Treaty today into force, the police and judicial cooperation in criminal matters entered into the EU frame. At the same time, the Protocol No. 36 of the Lisbon Treaty gave the option for the UK to withdraw from any provisions previously joined regarding the police and judicial cooperation. Protocols No. 19 and 21 from the Lisbon Treaty regulates the UK's right to accept new provisions, thus forming the part of the Schengen acquis and related with the JHA policies.

### **UK's police and justice cooperation in criminal matters before and after the Lisbon treaty**

Once the area of police and judicial cooperation was integrated in the EU frame according the Lisbon Treaty, the UK was entitled, according Article 10 of the Protocol No. 36 to withdraw from any legal acts of police and judicial cooperation in criminal matters. Article 10 specifies that the UK may inform the Council that "with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon ... the powers of the Commission ... shall not be applicable and the powers of the Court of Justice of the European Union ..., shall remain the same". In case of such notification from the UK, "the transitional measure ... shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon".

The UK used this right and withdrew from more of the legal acts in 2014. Since the right of withdraw covers all legal acts in police and justice cooperation in criminal matters and do not allow any distinction being made, Article 10 of Protocol 36, also specifies that the UK "may ... notify the Council of its wish to participate in acts which have ceased to apply to it ...". UK also used this right and total of 35 legal acts adopted before the Lisbon Treaty, enumerated in Council's Decisions 2014/857/EU and 2014/858/EU, continued to apply in the UK.

UK's option to decide for supranational legislation in certain areas of JHA after the Lisbon Treaty is determined in Protocols No. 19 and 21 of the Lisbon Treaty.

According Article 1 of the Protocol No. 21: the UK and Ireland "shall not take part in the adoption by the Council of proposed measures pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union", which means on measures referring to the AFSJ. But, according Article 3 of Protocol No. 21, UK or Ireland "may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union, that it wishes to take part in the adoption and application of any such proposed measure, whereupon that State shall be entitled to do so". The participation in the adoption process and application gives the UK the possibility to play active role in the legislative process if decided to be part of. Article 4 of Protocol 21, also, specifies the possibility for the UK to accept a measure after it has been adopted.

Protocol No. 19 anticipates similar option for participation in provisions which are additional part of the Schengen *acquis*. Article 4 of Protocol No. 19 specifies that "Ireland and the United Kingdom of Great Britain and Northern Ireland may at any time request to take part in some or all of the provisions of this *acquis*. The Council shall decide on the request with the unanimity of its members referred to in Article 1 and of the representative of the Government of the State concerned." In the frame of Schengen arrangements, however, every act that UK decides to adopt, it must be accepted in the form they are framed in the EU. Contrary to the Protocol No. 21, it is not possible to enter while the legislative process is ongoing, meaning that UK do not participate in that process. Moreover, with the notification from the UK that individual provision as part of the Schengen *acquis* are applied and is bound to, according Article 5 of Protocol 19 it must explicitly notify the Council that it does not wish to take part in such a proposal or initiative.

After the Lisbon Treaty, it is not just about the new regulations adopted in the police and judicial cooperation in criminal matters. In many cases, previous legal acts have been revised, and adopted new versions of these previous instruments. As these revisions constituted

new legal acts according the Lisbon Treaty, the old legal act continue to apply in the UK in their amendment and supplement versions, besides the explicit refusal to participate according Article 10 of Protocol No. 36, which foresees the possibility for the UK to notify its wish to participate to these amendment and supplement legal acts.

Before entering in force of the Lisbon Treaty, the UK participated in the intergovernmental police and judicial cooperation in criminal matters, and after the Amsterdam Treaty, also, approached towards a large number of legal acts regarding the criminal law based on new proposals. However, the explicit withdraw from 2014 included around 100 legal acts in police and judicial cooperation in criminal matters and most of them refer to the substantive criminal law and adopted before the Lisbon Treaty.

Legal acts in police and judicial cooperation in criminal matters in which UK still participates, may be divided in five parts: cooperation among member-state's; information exchange and data protection; specific criminal offences; European bodies and agencies; and procedural approximation.

The cooperation among member-state's authorities encompasses legal acts on customs cooperation and financial intelligence cooperation and joint investigation teams. These area, also, include legal acts for mutual recognition of judgments, confiscation orders, etc. Of great importance is, also, the European Arrest Warrant (EAW) intended to expedite and simplify the extradition procedure among member-states.

EU rules on information exchange and data protection has many aspects and cover legal acts among member-states, such as the exchanges among prosecutions or issuing data from court registers, but also the establishment of the European Database (Eurodac or SIS). Other legal acts contain rules for processing the passenger name records or financial transaction data, which may be transferred in some cases in non-EU states.

The criminal offences which mostly are executed through national borders or which anticipate cross-border prosecution are subject of the third part of EU legal acts. For example, there are specific rules for organized crime, child pornography, human trafficking, illegal arms trade and attack on information systems.

Other legal acts which are also applied in the UK refer to establishment and structure of EU agencies and bodies. Regarding police and judicial cooperation in criminal matters, these include agencies such as Eurojust, Europol and the European Police College.

The last part of EU legal acts regarding police and judicial cooperation in criminal matters contains instruments for organization of criminal procedure and special procedural rights. It includes, for example, legal acts for condition of victims in criminal proceedings, interpretation, European Investigation Order and European Protection Order.

As mentioned above, UK is not part of the Schengen system. However, in 2000 decided to adopt certain parts of the Schengen acquis regarding police and judicial cooperation in criminal matters. This provision of the Schengen acquis which applies to the UK includes rules on police cooperation, judicial assistance in criminal matters, transfer of execution criminal judgments, data protection and SIS. More of these Schengen rules and the Convention implementing the Schengen Agreement are now amended or complemented by EU acts. Also, UK is not part of other EU legal acts based on the Schengen acquis. Even its engagement in the SIS is limited on information referring to police and judicial cooperation in criminal matters; it has no access on data stored in SIS, for nationals from non-EU states.

Instruments known as the Prüm Decisions includes provisions for European police cooperation. The focus is put on the information exchange, DNA and vehicle registration data. Also, there are rules on operational cooperation regarding cross-border events. UK was part of the Prüm Decisions 2008/615/JHA and 2008/616/JHA, according which most of the provisions from the Prüm International Convention were transformed in the EU law. However, it withdrew from these decisions in 2014 and accepted back again in 2016.

As part of its choice to withdraw in 2014, UK again accepted those legal acts regarding Europol, namely the 2009/371/JHA Decision on establishing the Europol. UK is still not part of the new Europol regulation, which means that its future position in Europol remains unclear. According Article 4 of Protocol No. 21, it is possible for the UK to notify the Council and the Commission that it wishes to accept the measure. Whether UK will choose to use this option, it is under question whether the Decision 2009/371/JHA shall continue to apply.

According Article 75 of the new Europol Regulation 2016/794, Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA are replaced with the effect from 1<sup>st</sup> of May 2017, time when member-states shall be bound to the new regulation. If UK does not deliver its notification for the new regulation, it shall not be bound with the new instrument, meaning that the existing legal acts would not be replaced by the new instrument. In these conditions, it is questionable whether the old legal position shall continue to apply.

### **UK's status in jha legislation**

Besides the police and judicial cooperation in criminal matters, the AFSJ, also, includes the external borders, asylum, immigration and judicial cooperation in civil matters. In these areas, after the Amsterdam Treaty, UK was entitled to undertake individual decisions for or against participation in EU legal acts.

UK never acknowledged the Schengen acquis foundation, namely the abolition of border controls on the account of common internal borders was not part of the relevant provisions. However, UK has the option to apply certain parts of the Schengen acquis, subject to unanimous approval by the Council. This option is exercised in certain extent in the police and judicial cooperation in criminal matters.

Regarding other parts of the Schengen acquis, UK's participation was excluded. For example, UK and Ireland were both disabled of taking participation in the adoption of the Regulation 2252/2004 on standards for security features and biometrics in passports and travel documents issued by member-states, in Regulation 2007/2004 establishing Frontex and in Decision 2008/633/JHA concerning access to for consultation of the Visa Information System, which according Protocol No. 19, must be approved by the Council. CJEU confirmed this as legitimate, holding to the Frontex Regulation; that the Regulation presents measures for development of the Schengen acquis in an area which UK did not accepted and that the Council, therefore, has the right to entitle UK to participate in the adoption of the Frontex Regulation. UK's right to enter the Schengen acquis according Protocol 19 differs of its right to accept according Protocol 21, because accepting measures based on Article 4 is conditioned by unanimous approval by the Council. On the other side, according Article 3 of Protocol No. 21, the acceptance based on this Protocol seeks only notification from the UK of its wish to participate in the adoption and application of concrete measure.

Rules regarding UK and Frontex cooperation are introduced in the Regulation itself. According to Article 12 of the Regulation "the Agency shall facilitate operational cooperation of the Member States with Ireland and the United Kingdom in matters covered by its activities and to the extent required for the fulfilment of its tasks ... Support to be provided by the Agency ... shall cover the organisation of joint return operations of member-states in which Ireland or the United Kingdom, or both, also participate". Whether UK or Ireland seeks to participate in some of the Frontex activities, Article 20 stipulates that it is up to the Managerial Board to decide. In practice, UK participate in Frontex operations and according to Article 23, UK and Ireland are invited to participate in Managerial Board meetings.

On issues of the Common European Asylum System (CEAS), UK adopted legal acts for development of the Schengen acquis considered as collective in the first phase of the European asylum legislation: Dublin Regulation 343/2003, Qualification Directive 2004/83/EC, Directive on Procedure 2004/83/EC and the Directive on Conditions 2003/9/EC. Between 1999 and 2004, UK took participation in all legal acts regarding asylum. Still, in the second phase, when these acts were modified, it decided not to participate. Only for the new Dublin III Regulation 604/2013, UK delivered its notification to participate in the adoption and implementation of every modified legal act. This indicates that old legal acts, those from the first phase, still apply in UK, as they are not replaced by new legal acts.

UK decided not to participate in measures referring to immigration. For example, UK does not apply the Blue Card Directive 2009/50/EC, neither the Directive 2003/86/EC and Directive 2003/109/EC regarding the status of third nationals. On the other side, the UK accepted to participate in legal acts for combating illegal immigration, such as the Directive 2001/51/EC, which harmonizes the financial penalties for illegal transfer of foreign nationals in EU territory. UK did not accept the readmission Directive 2008/115/EC, but on the other side, accepted some readmission agreements concluded by the EU, such as the Readmission Agreement with Pakistan, but not the readmission agreement with Turkey.

After the Amsterdam Treaty, UK and Ireland expressed their intention to participate in adoption of legal acts regarding judicial cooperation in civil matters. But in 2005, UK had reserves about the proposed Rome I Regulation and the acceptance was not announced until the end of negotiations, when acceptable outcome for UK was achieved. Similarly, in the case of Maintenance Regulation No 4/2009, UK gave no notification of its participation in applying the legal act until its adoption. The Succession Regulation No 650/2012 is not applicable in the UK, neither UK participate in EU legal acts regarding maintenance and divorce.

### **UK's position after the referendum**

UK's membership referendum from June 2016 does not refer to special issues of the JHA area, but on the general issue whether UK should remain in the EU. The referendum by itself does not change the UK's status in the EU law as a member-state. Such change could happen only after the UK's notification to the EU that it wishes to begin the withdrawal negotiations according to Article 50 of the Lisbon Treaty.

Even after UK's notification of withdrawal according to the first sentence of Article 50, paragraphs 2 and 3 of the TEU, UK shall remain EU member-state and the EU law shall cease to apply in the UK from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification, unless the European Council, in agreement with the UK, unanimously decides to extend this period. It follows that the UK, after its notification, in first

instance, shall remain EU member-state and subject to the EU law. In other words, the situation after the notification shall not differ from the situation after the referendum. Still, since the notification is being delivered, the inevitable exit from the EU shall raise several practical questions.

As an EU member-state, UK shall remain obliged to the EU law after the notification of its intention to withdraw from the EU membership according Article 50 of the TEU. Question arises whether UK courts should apply EU law after the notification or they might start to disregard the EU law or, even worse, to annul the EU law? In principle, domestic courts must apply the EU law, and the UK parliament is not authorized to recall it.

According Article 1 of Protocol 21, UK does not participate in adoption of AFSJ measures; unless according Article 3 it delivers notification that it wish to participate. Since the notification it is difficult to notify for additional approaches. Without such declaration, UK's voice shall not influence differently on the unanimous decision.

If measures bound and based on acceptance by the UK are being changed, those changes are not bound for the UK unless new notification is being delivered according Article 3 of Protocol No. 21 that it wish to accept such changes. In principle, the Council, acting on Commission's proposal and according Article 4 of Protocol No. 21, may persuade the UK to accept measures if the non-UK's participation in the amendment version will make it non-operative. In future, the UK may restrain from such proposals regarding the inevitable withdraw.

Special legislative characteristics for the UK regarding Schengen *acquis* are regulated with Protocol No. 19 of the Lisbon Treaty. In this sphere EU's legislation, also, must predict that the UK shall no longer wish to participate in the legislative process, for example, in Council's working groups, since the European Council is notified according Article 50 of the Lisbon Treaty.

After the notification, UK might apply its rights to withdraw from EU's legislation, especially regarding Schengen and JHA, or to restrain or cease its participation in the legislation process. Still, it is impossible to assess whether this will happen and, if happens, the extent these rights are realized.

Until withdraw occurs, UK shall remain EU member-state, and such included in agencies in JHA area. However, it is possible that the new Europol Director to be elected after UK leaves the EU. The mandate of the current Director, British Rob Wainwright ends in 2017, and the new Director shall be elected according the new Europol Regulation.

## CONCLUSION

*In the period between the referendum and withdraw from the EU, UK's legal position would not be different from the one before the referendum, although some practical aspects of its cooperation with the EU might change of political reasons. When UK leaves the EU, it will end the existing cooperation based on the EU law.*

*Whether UK after it leaves the EU should consider of concluding arrangements such as those concluded by Norway or Switzerland in order to maintain exchange of information with police authorities and to continue to participate in the EAW system, different problematic areas for the UK might occur. Instead of having voting rights as a member-state, UK, in the best case scenario, shall have the right of consultation and an observer. In the same time, UK might be obliged with an agreement to adopt new EU legal acts. The choice which for the UK at this moment is open to step in or step out from JHA measures might no longer exist.*



**Another problem for the UK is that it shall not be a member-state or Schengen state. Indeed, UK has no intention to sign the Schengen system. Still, joining the Schengen system from Norway and Switzerland facilitate the maintaining of close relations with the EU.**

**UK's participation in the second generation of SIS II shall end when UK leaves the EU, if transitional arrangements are not concluded. At the moment, other states might not use the SIS II if do not transfer or apply the Schengen acquis. Since the participation of non-EU states in SIS II depends on their participation in the Schengen, it seems difficult to integrate the UK in the SIS II without signing to Schengen.**

**To participate in information exchange, UK should, for example, negotiate its own agreement for data transfer with Europol or Eurojust. Apart from the time needed for such negotiations, UK might also face with difficulties not to be able to conduct direct search, for example in the Europol's information system, but to seek such information directly from Europol. Access to other database shall be under influence of similar problems. Access to Eurodac fingerprint database is opened only for member-states.**

**It is possible for non-EU states to conclude agreements with EU agencies and to participate in certain extent. However, generally speaking, these states have no seats in managerial boards of such agencies. Agencies personnel are subject to the Staff Regulations of officials of the European Communities or to the Conditions of employment of other servants of the European Communities. Article 28 of the Staff Regulation affirms that an official might be appointed only under the condition of being a national of EU member-state. In cases of officials and other personnel, appointment authorities might renounce from national needs. It is still not confirmed whether the UK's officials will continue to be employed in the EU after leaving the Union.**

**Recenzent  
Prof.Dr. Irina Chudoska**

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