Judicial partners forever? Two challenges preventing a fast and effective future judicial cooperation

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There is a field in the negotiations where a Canada- or Australia-style deal is not sought after. Nevertheless, the debate surrounding it is legally and politically fascinating, and the absence of an agreement in this area would truly endanger our security. It is judicial (and police) cooperation – the 'internal security' part of the negotiations.

As our economies and societies remain intertwined, so will our families and criminals. Instead of enumerating instruments currently in force and looking for their appropriate alternatives, this chapter looks at two overarching prerequisites that condition the future EU-UK judicial cooperation as a whole: the protection of fundamental rights and the European Court of Justice's (ECJ) jurisdiction.

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What the future EU-UK judicial cooperation should look like…

The revised Political Declaration calls for a "comprehensive, close, balanced and reciprocal law enforcement and judicial cooperation in criminal matters" that could draw from

existing EU capabilities and existing forms of cooperation between the EU and non-EU Schengen countries.[1] It would entail finding that delicate balance between affirming the UK's non-EU membership while keeping our cooperation as efficient as possible – the "somewhere in between".[2]

On 18 March 2020, the European Commission tabled a generous draft agreement that suggests establishing fast and effective tools to replace the capabilities in force today (including a near copy of the European Arrest Warrant).[3] This shows that the EU is ready to offer an unprecedented degree of judicial and police cooperation to a third country. Nevertheless, the Union is now facing challenging UK red lines.[4]

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… and why it is (currently) out of reach

As the EU's lead negotiator Michel Barnier declared after each of the three first rounds of negotiations, judicial cooperation is one of the four areas for which there are significant differences.[5] Understanding the issues at stake necessitates taking a close look at two of the UK's red lines.

A third state's accession to international treaties that guarantee, in principle, the respect for fundamental rights does not imply the state's de facto respect for the same rights.

1. RESPECTING HUMAN RIGHTS IS ONE THING, SPECIFYING HOW IS ANOTHER[6]

The respect for fundamental rights – including data protection[7] – and the rule of law is a particularly essential prerequisite in the area of judicial (and police) cooperation. The reason is simple: any judge or relevant authority of a state must be able to trust that all judges or relevant authorities from the cooperating state respect fundamental rights strictly, including key procedural rights, in order to pass on sensitive information or allow those judges or authorities to take decisions that could affect its own nationals. More importantly, a member state which, for instance, surrenders an individual to a third country that does not respect human rights risks being sued for breaching human rights itself. The respect for human rights is, therefore, a key precondition for any form of judicial cooperation.[8]

Furthermore, to ensure close cooperation, abiding by the same body of rules is essential. It is important to choose a living document capable of evolving in the same manner for both Parties. Mobilising the European Convention on Human Rights

(ECHR) is an obvious solution, as both EU member states and the UK already adhere to it (and the EU is bound to respect it by virtue of the Charter and the general principles of EU law). Abiding by its framework rather than just its rights is crucial, as it ensures that the standards will remain synonymous over time.

However, the UK is against the agreement specifying how it should protect and enforce human rights and the rule of law.[9] It rejects any reference to a specific set of rules – a requirement that does not only concern this policy area –, especially the ECHR. Dominic Cummings, Prime Minister Boris Johnson's senior adviser, has repeatedly and ardently called for a referendum to denounce the latter.[10]

In the current troubled times, it is of utmost importance that the EU shows that it will not compromise on fundamental rights and the rule of law, no matter what it takes. Certainly, this is not a caprice; there are real concerns about how the UK's future protection of human rights will look.[11]

In fact, the EU should actually toughen its own red line in the area of judicial cooperation. The draft agreement nourishes an ambivalence that was already present in the revised Political Declaration and the EU negotiating directives of 25 February 2020;[12] a sort of double standard concerning the required threshold of protection of human rights.

On the one hand, under Part I ("Common provisions"), Title II ("Basis for cooperation") of the draft agreement, the *upholding* of democracy and the rule of law, and *respect* for human rights are considered "essential elements" of the agreement.[13] In this regard, the Parties should "reaffirm their respect for the Universal Declaration of Human Rights and the international human rights treaties to which they are parties, as well as their *continued commitment to respect* the European Convention on Human Rights and Protocols 1, 6 and 13 thereto."[14]

On the other hand, the application of Part III ("Security partnership"), Title I ("Law enforcement and judicial cooperation in criminal matters") is conditioned upon (i) the UK's continued *adherence* to the ECHR (and Protocols 1, 6 and 13 thereto); and (ii) the UK giving *continued effect* to these instruments under its domestic law.[15] The text continues by stating that Part III, Title I shall be *suspended* should the UK abrogate domestic law, giving effect to the abovementioned instruments; or make amendments to the effect of reducing the extent to which individuals can rely on them before domestic courts.[16] The same Title shall be *disapplied* should the UK denounce any of those instruments.[17] However, specific reasons for suspension or termination is something the UK does not want, either.[18]

This difference in formulating the standards – or rather the articulation between those formulations – encompasses real, uncomfortable risks.[19] The *adherence* to the ECHR entails the obligation to respect not only its content but also its framework, including the jurisdiction of the European Court of Human Rights (ECtHR). However, in the case of a breach, the probability of reaching the ECtHR is limited. As the ECJ recently recalled in a case concerning the Agreement on the surrender procedure between the EU and Norway and Iceland, a third state's accession to international treaties that guarantee, in principle, the respect for fundamental rights does not imply the state's de facto respect for the same rights.[20] Ironically, even as an EU member state, the UK was not formally bound to *continued adherence* to the ECHR as long as it respected its content.

What would happen in a situation in which UK authorities no longer apply or respect the rights contained in those instruments without making any denouncement, legislative amendment or abrogation? One could not even submit the issue to the arbitration tribunal foreseen by the draft agreement, as – despite having an extensive

jurisdiction way beyond trade issues – it does not have jurisdiction to rule over a breach of Part I, Title II.[21] Any dispute concerning these obligations could merely be discussed within the Partnership Council.[22] There would be two other options, but these are radical: (i) suspending any provision (amid any "appropriate measures") by activating Article 35 of Part V, Title III (thus the procedure for breaching "essential elements");[23] or (ii) terminating the entire agreement by activating the general termination clause in Article 8 of Part VI (which does not require any reason).[24]

One adequate alternative could be to condition the applicability of Part III, Title I to the *respect* for fundamental rights and the rule of law explicitly, including continued adherence to the ECHR and giving effect in domestic law to the latter. This should not preclude from keeping a stricter and specific regime of remedies in case of breach of this Title. The recent case law of the ECJ reminds us of the importance of striking the right formulation of obligations when it comes to protecting human rights in agreements with third states.[25] Failing to do so could place judges and other relevant authorities in delicate positions. Ultimately, the degree of the future EU-UK judicial cooperation will be proportionate to the UK's commitment to fundamental rights.

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2. BYE-BYE KIRCHBERG

It comes with no surprise that the UK does not want the ECJ to be assigned any role in resolving EU-UK disputes.[26] However, in the revised Political Declaration, the UK committed to respecting the integrity of the Union's legal order by committing to the rule that if a dispute raises a question of interpretation of a concept or provision of EU law, the arbitration tribunal *should* refer the question to the ECJ. The latter's ruling would be binding on the arbitration tribunal.[27] The draft agreement turned the "should" into a "shall",[28] exactly like in the Withdrawal Agreement (WA).

Again, this is not a caprice. As an arbitration tribunal established in an agreement between the EU and a third country operates outside of the EU judicial system, it should not enjoy any jurisdiction to interpret and apply rules of EU law other than the provisions of the agreement.[29] This is also the reason why the EU cannot accept the UK's demand to let a political body deal with disputes related to security provisions.[30] On top of not offering adequate safeguards, a political body is not allowed – under EU law – to refer a question to the ECJ. This is key to respecting the autonomy of the EU legal order.

When the UK says that the EU does not have the same imperative in other international agreements with third countries, this is true for some agreements that involve a lower degree of cooperation, but not all.[31] The depth of the envisaged agreement makes the involvement of concepts of EU law necessary, and therefore the ECJ, too.

Hence, this second divergence also has a direct impact on the achievable degree of judicial cooperation. As Ian Forrester, former British judge of the General Court of the CJEU, said in his farewell speech, "the process is [not] politically reversible in terms of public expectation."[32] As he emphasised, "cross-border cooperation in these fields [...] will involve procedures governed by EU law."[33]

There are three possibilities to break the gridlock: (i) the UK accepting the ECJ's (limited) jurisdiction; (ii) removing all references to EU law in the draft agreement; or (iii) keeping all provisions containing such references out of the scope of the dispute settlement mechanism. Obviously, the latter two options mean lower intensity of cooperation. The UK might be opting for the second option. Its government repeats that the alternative, "fast", "effective and reciprocal" instruments to the capabilities in place for judicial and police cooperation should draw on precedents from similar capabilities put in place between the EU and non-EU countries, rather than existing EU tools.[34]

Perspectives

These two red lines remind us that the judicial (and police) cooperation debate is also about sovereignty. The UK's attitude towards this field has long been complicated for precisely this reason. Although the UK does not want the future agreement to "constrain the autonomy of [its] legal system in any way",[35] it must make its mind up: cooperating also means constraining yourself. What is true for the executive and legislative branches is also valid for the judiciary: judicial cooperation requires mutual trust and the sharing of common rules.

The EU's offer to the UK is unique, considering that the latter is now a third country, especially at a time when trust has somehow even diminished between judges within the EU.[36] The UK should ensure that it does not miss this opportunity. Otherwise, their judicial (and police) cooperation will decrease in efficiency, with all the consequences it entails. In addition, the UK digging in their heels and sticking to the two red lines would likely reduce the overall level of trust, slow down the negotiations[37] and eventually influence the level of political ambition of the entire agreement.

The risk of a 'no deal' scenario remains real, especially as the COVID-19 crisis has affected the timeline and quality of the negotiations considerably. It would mean falling back on heavy and lengthy judicial cooperation regimes, such as international agreements adopted within the framework of the Council of Europe, or the Hague Conference on Private International Law. At least there would be no gaping legal loopholes, which is reassuring per se – but those instruments are far from ensuring the fluid cooperation we experience today. The UK could become a safer place for EU criminals and, similarly, the UK would once again face its worst 'Costa del Crime'[38] nightmare.[39] In any scenario, the WA provides some 'transitional measures to the transitional measures' for ongoing judicial procedures and investigations. These will not simply stop in the absence of

a deal. Those WA provisions are particularly welcome considering that the COVID-19 pandemic delayed procedures in several European countries.

There are reasons to hope that the final text of the currently negotiated agreement will at least include some basic arrangements that go beyond the aforementioned fallback options. However, we might need to wait for another UK government for the cooperation to deepen. It is important to remember that not very long ago, a former British prime minister did a U-turn and was ready to commit to respecting the ECHR. This could happen once again.

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1. Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (2020), OJ C 34, 31.1.2020, pp.1-16, para.80 (hereinafter, Revised Political Declaration). At this stage, going beyond existing international conventions on civil judicial cooperation is out of the scope of the negotiations.

2. Barnier, Michel, Speech by Michel Barnier to the students at ESCP Europe: Cooperation in the Age of Brexit, Brussels, 26 February 2020a.

3. European Commission (2020), Draft text of the Agreement on the New Partnership with the United Kingdom, UKTF (2020) 14, Brussels.

4. UK Government (2020), "The Future Relationship with the EU: The UK's Approach to Negotiations", London.

5. Barnier, Michel, Negotiations with the UK: Michel Barnier, the European Commission's Chief Negotiator, sets out points of convergence and divergence following the first round of negotiations, European Commission, 5 March 2020b; Barnier, Michel, Press statement by Michel Barnier following the second round of future relationship negotiations with the United Kingdom, European Commission, 24 April 2020c; Barnier, Michel, Remarks by Michel Barnier following Round 3 of negotiations for a new partnership between the European Union and the United Kingdom, European Commission, 15 May 2020d.

6. This chapter was written before the fourth round of negotiations that took place on 2-5 June 2020. At the end of this round, Michel Barnier declared that negotiators had a "constructive discussion on the question of commitment to the European Convention on Human Rights, although important questions remain as to how to reflect this commitment in our agreement." See Barnier, Michel, Statement by Michel Barnier following Round 4 of negotiations for a new partnership between the EU and the UK, European Commission, 5 June 2020e.

7. On the significance of data protection in this field, see e.g. Gutiérrez Zarza, Ángeles (2015, ed.), *Exchange of Information and Data Protection in Cross-border Criminal Proceedings in Europe*, Berlin: Springer; Caruana, Mireille M. (2017), "The reform of the EU data protection framework in the context of the police and criminal justice sector:

harmonisation, scope, oversight and enforcement", *International Review of Law, Computers & Technology*, Volume 33, Issue 3, pp.249-270.

8. See e.g. Judgment of 25 July 2018, *LM*, C-216/18 PPU, EU:C:2018:586, para.36.

9. UK Government (2020), *op.cit.,* Pt.2, para.31.

10. For Dominic Cummings' opinion on the European Convention on Human Rights, see *Dominic Cummings's Blog*, "ECHR" (accessed 28 April 2020).

11. Beyond declarations made by some British politicians, see e.g. the recent European Court of Human Rights case in which the Police Service of Northern Ireland's regime of indefinitely retaining the DNA profiles, fingerprints and photographs of suspected or convicted criminals was deemed to constitute "a disproportionate interference with the applicant's right to respect for private life" (*Gaughran v. the United Kingdom*, no. 45245/15, 13 February 2020, ECHR 2020); or the European Court of Justice case in which an Irish court hesitated to execute a European Arrest Warrant issued by a British court in 2018 (Judgment of 19 September 2018, *Minister for Justice and Equality v RO*, C-327/18 PPU, EU:C:2018:733). For an analysis of the consequences of the UK ceasing to be bound by the EU Charter, see Dawson, Joanna, "How might Brexit affect human rights in the UK?", *House of Commons Library*, 17 December 2019.

12. Annex to Council Decision (EU, Euratom) 2020/266 of 25 February 2020 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement (2020), OJ L 58, 27.2.2020, Brussels, pp.53-54.

13. European Commission (2020), *op.cit.*, Art.COMPROV.4(1) and COMPROV.12.

14. *Ibid.*, Art.COMPROV.4(1) (emphasis added).

15. *Ibid.*, Art.LAW.OTHER.136(1).

16. *Ibid.*, Art.LAW.OTHER.136(2). The suspension (in part or in whole) of Part III, Title I of the draft agreement is also foreseen in the case of adequacy decisions concerning data protection being repealed, suspended or declared invalid (see Art.LAW.OTHER.136(5-6)).

17. *Ibid.*, Art.LAW.OTHER.136(3).

18. UK Government (2020), *op.cit.*, Pt.2, para.33.

19. Despite its apparent goal, Art.LAW.GEN.3 of the draft agreement does not avoid these risks. This provision says that "[n]othing in this Title [Part III, Title I] shall have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in the European Convention on Human Rights, or, in case of the Union and its Member States, in the Charter of Fundamental Rights." This does not affect the wording of the subsequent provisions.

20. Judgment of 2 April 2020, *Ruska Federacija v I.N.*, C-897/19 PPU, EU:C:2020:262, para.65.

21. European Commission (2020), *op.cit.*, Art. INST.9(2)(a).

22. *Ibid.*, Art.INST.9(3).

23. *Ibid.*, Art.INST.35.

24. *Ibid.*, Art.FINPROV.8.

25. See e.g. Judgment of 2 April 2020, *Ruska Federacija v I.N.*, *op.cit.*

26. UK Government (2020), *op.cit.*, Pt.2, para.30.

27. Revised Political Declaration (2020), *op.cit.*, para.131.

28. European Commission (2020), *op.cit.*, Art.INST.16(1).

29. See Opinion 1/17 of the Court of 30 April 2019 (CETA), EU:C:2019:341, para.120-136.

30. As a reminder, the UK wants the EU-UK security partnership to be the subject of a separate agreement "with its own appropriate and proportionate governance mechanism." See UK Government (2020), *op.cit.*, Pt.2, para.30, 39 and 45.

31. See e.g. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261, 30.8.2014, pp.4-743, Art.267; Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161, 29.5.2014, pp.3-2137, Art.322; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ L 260, 30.8.2014, pp.4-738, Art.403.

32. Forrester, Ian, A Valediction, Forbidding Mourning, Luxembourg, 06 February 2020, p.2.

33. *Ibid.*, p.5.

34. UK Government (2020), *op.cit.*, Pt.2, para.27-53.

35. *Ibid.*, para.30.

36. See e.g. Judgment of 25 July 2018, *LM*, *op.cit.*; and similar and subsequent cases.

37. The EU insisted repeatedly that it and the UK negotiate and advance in all areas in parallel. See e.g. Barnier (2020c), *op.cit.*; Barnier (2020d), *op.cit.*; Barnier (2020e), *op.cit.*

38. The 'Costa del Crime' is a "a humorous name for the Costa del Sol in Spain, which some people in the UK think of as a place where successful British criminals go to live." *Longman Dictionary of Contemporary English*, "Costa del Crime, the" (accessed 18 May 2020). The expression first appeared in the 1980s when numerous British criminals hid in Spain to benefit the lack of a well-established surrender agreement in place between Spain and the UK.

39. For a short overview of the consequences of a 'no deal' scenario, see European Commission (2019), A 'No-Deal' Brexit: Police and Judicial Cooperation.