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Brexit and the Area of Freedom, Security and Justice

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Chapter 5- Sectoral Views on Brexit and Future UK-EU Relations

Having discussed the current internal security relationship between the EU and the UK, the consequences of Brexit for both actors, the emerging negotiation positions, and the political and legal challenges to future cooperation, the following three chapters offer a diverse range of detailed accounts on the different challenges ahead, authored by some of the main academics in the field.

The first chapter of sectoral views focuses on Brexit and the future relations between the UK and the EU. In the opening contribution, Fichera summarises the potential impact of Brexit on the future development of the EU's Area of Freedom, Security and Justice, as well as the consequences for the UK on the basis of its future decreased participation in police and judicial cooperation, and on migration, asylum, and borders legislation. Ripoll-Servent discusses these consequences further by showing the UK's deep involvement in the AFSJ through multiple instruments, institutions, and agencies, and by alerting us to the loss of expertise that these platforms will experience as a result of Brexit. She also underlines that Brexit could lead to growing differentiation and complexity in the AFSJ, rather than harmonisation. Mortera-Martinez provides a realistic view of the limitations of a potential EU-UK security agreement and how these might impact on the future UK-EU relationship. She does this by analysing the negotiation preferences of both parties, as well as the policy options on the table, looking specifically at extradition, access to law enforcement databases and partnerships with EU agencies. The final contribution in this chapter, by Fahey, reflects upon transatlantic relations and how they inform future UK-EU relations, specifically in regards to external/internal security, the exposure of a lack of transparency in transatlantic relations, the possibility for the UK to replicate EU-US agreements, the importing of international norms, and the UK becoming a rule-taker within the transition period set out in the Withdrawal Agreement.

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Massimo Fichera

The Area of Freedom, Security and Justice (AFSJ) is a complex set of policies and legislation including key areas of cooperation, such as data protection, exchange of information and criminal justice. The participation of the UK in the AFSJ has always been characterised by a high degree of complexity. It should be borne in mind that, following the end of the transitional period pursuant to Protocol 36 of the Treaty of Lisbon, the provisions of what was once the Third Pillar ceased to apply to the UK, as of 1 December 2014. However, the UK has confirmed the applicability of 35 measures, mostly in the field of mutual recognition in criminal matters and legislation on Europol and Eurojust. Once Brexit has officially begun, even this piecemeal approach might be changed and this might add further complexity to the relationship between the UK and the EU.

The consequences of Brexit on the development of the AFSJ may be of different nature and concern both the EU and the UK.

Concerning the EU, on the one hand, Brexit might increase the level of differentiated integration, especially in the field of police and judicial cooperation and immigration and asylum. Not only the coherence of AFSJ, but also the principle of legal certainty may be affected, in so far as the UK would participate in mutual recognition measures, as it has done so far, but not in measures on the protection of the procedural rights of the defence (e.g. participating in the Framework Decision on the EAW, but not in the Directive on Access to a Lawyer). On the other hand, deeper integration in the EU might be facilitated in some areas of police and judicial cooperation and immigration and asylum, e.g. in terms of a move away from mutual recognition towards harmonisation of substantive criminal law or the strengthening of the European Public Prosecutor Office, and a move away from a resettlement towards a relocation approach in the field of immigration and asylum. At the same time, the effectiveness and level of cooperation between EU agencies and bodies might also be affected: for example, as regards data collection and retention. One important aspect could be the fate of data and information that have already been exchanged, or the question of how the rulings of the Court of Justice of the European Union in the AFSJ should be

treated starting from the date of Brexit. Moreover, it is important to bear in mind that AFSJ, free movement and citizenship rules are strictly connected, so that the negotiations concerning the latter field inevitably affect the former. For example, one issue could be how the "past conduct" of citizens who might be expelled from the country on grounds of public policy or public security might be judged if it covers events both preceding and following Brexit.

Concerning the UK, following Brexit, future governments risk being excluded from several components of the network of judicial and police cooperation, such as the exchange of criminal records and the establishment of joint investigation teams. In addition, the effectiveness of the activities of UK investigation and prosecution authorities might be undermined and the UK might end up being affected by measures in the field of AFSJ without being directly capable of participating in the development of AFSJ. The EU will also lose the UK's expertise and input in AFSJ policy-making.

Finally, the UK currently only participates in part of the immigration, asylum and borders legislation, as regards the Common European Asylum System, the Dublin Regulation and a few directives on minimum standards for the asylum system. As a result of Brexit, there is a danger that, first of all, the above standards will no longer be respected; and, second, that exchange of information is compromised. The same is true of Eurodac, a biometric database including fingerprints of asylum seekers and irregular migrants.

The UK government seems to be at least in part aware of the shortcomings associated with Brexit. As indicated in the HM Government Technical Note on Security, Law Enforcement and Criminal Justice (May 2018), "a piecemeal approach to future cooperation, drawing on precedents for EU agreements with third countries on individual measures (e.g. Europol) or functions (e.g. extradition) would result in a limited patchwork of cooperation falling well short of current capabilities and not deliver our shared objectives" (p. 1). Hence the proposal of a more comprehensive UK-EU Internal Security Treaty, possibly negotiated on the basis of Article 218 TFEU. Cooperation would be promoted via three pillars: internal security, external security and wider cooperation. However, it is not yet entirely clear what areas this

new Treaty would cover and in what it would be different from existing arrangements between the UK and the EU.

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