

The Effect of Brexit on European Arrest Warrants

Petra Bárd

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Summary

Apropos of a preliminary reference sent by the Supreme Court of Ireland to the Court of Justice of the European Union on 12 March 2018, this Policy Insight addresses the question of whether surrenders of suspects and convicts to the UK under the European arrest warrant regime would be affected by Brexit. Should an EU citizen, who is suspected of a crime or has been sentenced for committing one, be surrendered to and sentenced in the UK, he or she would highly likely be detained beyond Brexit, which is to take place in March 2019. Therefore, the rights that a suspect or convict might enjoy as an EU citizen will no longer be justiciable as matters of European law. This might set a bar against future surrenders to the UK. On 11 February 2018, however, the UK prime minister insisted that the UK wants to remain part of the European extradition regime, irrespective of Brexit. At the same time, the UK does not wish to follow any of the models of EU and third-country cooperation in criminal justice, but wants to have new, dynamic arrangements designed, and has a long list of demands. This paper argues that during the negotiations the EU should insist on values shared between the EU and the member states – such as justiciable fundamental rights and the rule of law, with special regard for judicial independence – which are the foundations of mutual trust and mutual recognition, principles that form a cornerstone of EU criminal justice. The paper attempts to reconcile the seemingly contradictory (sometimes self-contradictory) demands of the UK and the EU when laying down the details of their special relationship in the area of criminal cooperation.

The EU law issue as formulated by the Supreme Court of Ireland

“There must be no one ... who is not by now aware that there may potentially be significant complications arising in a whole range of areas as a result of Brexit. This application concerns one such potential issue”¹ wrote Chief Justice Frank Clark for the Supreme Court of Ireland. The Irish court referred a question to the Court of Justice of the European Union (CJEU) asking whether surrenders of suspects to the UK under the European arrest warrant (EAW) regime would be affected by Brexit.

The original case concerns Mr Thomas Joseph O’Connor, a construction company director, who is subject to an EAW request from the UK in connection with a £5 million (approximately €5.6 million) tax fraud. Mr O’Connor was sentenced in January 2007 to a four-and-a-half-year prison sentence by the Blackfriars Crown Court in London. He was also being sought for the purpose

¹ Supreme Court of Ireland, *Minister for Justice v O’Connor* [2018] IESC 3, 1 February 2018, paragraph 1.1.

of conducting further criminal proceedings for absconding and breaching his bail in England. After he returned to Ireland, he was arrested under an EAW. The High Court affirmed surrender.² Mr O'Connor then appealed to the Supreme Court, which rendered its opinion on the case in two judgments on 1 February 2018 and 12 March 2018.³

The legal issue recognised by the Supreme Court of Ireland is the following: should Mr O'Connor, an EU citizen, be surrendered to and sentenced in the UK, he would highly likely be detained beyond March 2019, i.e. the time when the UK is a member of the EU.⁴ Therefore, the rights that Mr O'Connor might enjoy as an EU citizen, having been surrendered to another EU jurisdiction, will no longer be justiciable for him as matters of European law.

Mr O'Connor asserted that because of the above arguments, his surrender was no longer legally permissible. The minister for justice, in contrast, opposed referral, arguing that the appropriateness of surrender must be determined on the law as it stands at the time the decision on the EAW is rendered.

Referring to *CILFIT*,⁵ the Supreme Court concluded that there was a novel issue of European law arising in the case. Thus, the matter was not *acte clair*, and as a court of final appeal the Supreme Court had an obligation to refer the issue to the CJEU.

Considering the above, the Supreme Court asked the CJEU whether – in light of the UK having given notice under Art. 50 of the Treaty on European Union (TEU) to leave the EU and the uncertainties around Brexit – a requested state needs to *deny* surrenders to the UK (i) in all cases, (ii) in some of the cases, depending on the particular circumstances, or (iii) in no cases. Alternatively, should the court of a requested member state *postpone* the final decision on the execution of the EAW to await greater clarity about Brexit (i) in all cases, (ii) in some of the cases, depending on the particular circumstances, or (iii) or in no cases. Should the obligation be to deny or postpone some of the cases, the Supreme Court also asked for the criteria or considerations a court in the requested member state must assess.

The Supreme Court requested the CJEU to determine the answers in an expedited procedure.⁶ About 20 Irish cases will be affected by the CJEU's decision, which will also apply to the surrender of citizens from other EU member states.⁷

² High Court of Ireland, *Minister for Justice and Equality v O'Connor* [2017] IEHC 518, 25 July 2017.

³ Supreme Court of Ireland, *Minister for Justice v O'Connor* [2018] IESC 3, 1 February 2018. The Supreme Court further clarified the questions to be referred to the CJEU on 13 February 2018 and finally passed a judgment with all the questions referred to the CJEU: *Minister for Justice v O'Connor* [2018] IESC 19, 12 March 2018.

⁴ The UK – by means of a letter from the prime minister – gave notification on 29 March 2017 under Art. 50 of the Treaty on European Union to the President of the European Council about its intention to leave the EU. The expected date of withdrawal is thus 29 March 2019.

⁵ ECJ, Case 283/81 Srl *CILFIT* and *Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415.

⁶ Art. 105(1) of the Court's Rules of Procedure.

⁷ See Carolan (2018).

Assessing the effect of Brexit on EAWs

Mutual recognition

Mutual recognition in EU criminal law was adopted as a second-best option as a result of member countries' unwillingness to harmonise their criminal legislation. Accordingly, the judicial decisions of one member state need to be automatically acknowledged by all member states. However different the member states' substantive and procedural rules may be, if a judgment is rendered in full compliance with a member state's laws, it has to be recognised by all other member states as well.

The Framework Decision on the European Arrest Warrant is perhaps the most prominent example of mutual recognition-based instruments in the area of EU criminal law. Extradition between member states is simplified, and diverted from the traditional diplomatic level to a dialogue between the member states' judiciaries. It abandons the requirement of double criminality for a number of crime groups, and makes the surrender of a member state's own citizens mandatory in certain cases. Surrender can only be denied on the basis of a limited number of pre-established grounds. As a general rule, executing member states are obliged to depart from their traditional right and responsibility to assess the issuing countries' legal systems, including their fundamental rights protection mechanisms.

According to traditional standards developed by the European Court of Human Rights (ECtHR) extradition was barred where there was a threat of it resulting in a "flagrant breach of the European Convention on Human Rights, without an effective remedy in the requesting State".⁸ In contrast, the Framework Decision on the EAW⁹ does not allow for such a meticulous scrutiny and obliges member states to trust each other's judiciaries and legal systems. Surrender on the basis of human rights considerations may only be halted if a member state seriously and persistently breaches the values common to the EU and its member states, which are set out in Art. 2 TEU, and is sanctioned by the Council pursuant to Art. 7 TEU.¹⁰ Alternatively, according

⁸ See ECtHR, *Soering v UK*, Application no. 14038/88, 7 July 1989, barring extradition if extradition threatens to result in a flagrant breach of the European Convention on Human Rights, without an effective remedy in the requesting state.

⁹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002.

¹⁰ See the Framework Decision on the EAW, recital 10:

The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.

Please note that the old Art. 7(1–2) corresponds to Art. 7(2–3) TEU, i.e. the sanctioning arm of Art. 7 is meant here. One could also argue that the drafters meant to refer to Art. 7 as such, which was amended in the meantime and a preventive arm was added – and accordingly the latter should also be read into Recital 10. Ultimately, it will be up to the CJEU to interpret in order to bring clarity to this matter.

to recent case law by the CJEU, if the requested judicial authority finds the general fundamental rights situation in an issuing country problematic, and establishes the potential risks of human rights violations in the individual case, the surrender can also be postponed.¹¹

End of mutual trust for formal reasons: The time element

Mutual trust, i.e. the obligation on states to have confidence in each other's legal systems, is a legal creation, a so-called presumption applicable vis-à-vis member states as long as they are member states. Since the effect of a surrender extends beyond the actual transfer of the suspect or the convict, the underlying trust also has to cover future points in time, including when a sentence in the transferred person's case is likely to be passed, and if he or she is found guilty, when a sanction is imposed and enforced. Mutual trust therefore has to cover both the procedure to be conducted in the issuing state (i.e. it is to be presumed that member states have an impartial judiciary and all suspects will be granted a fair trial) and the possible criminal sanctions, including prison conditions. Consequently, if a country ceases to be an EU member state or is likely to be seceding from the EU by the time a criminal decision is passed or a sanction is enforced, the presumption on which the EAW is based can no longer apply at the time of surrender either, and the procedure on transfer should be halted.

End of mutual trust for substantive reasons: Mutual trust must not mean blind trust

The reason behind mutual trust is that all member states are bound by the EU Treaties, including the provision on EU values, such as the rule of law and fundamental rights; also, they all need to comply with the Charter of Fundamental Rights (hereinafter: Charter) and a series of secondary laws. Acknowledging that mutual trust must not mean blind trust, the EU's legislative institutions adopted several directives on procedural rights upon the authorisation of Art. 82(2) of the Treaty on the Functioning of the European Union. The European Investigation Order¹² provides that execution may be refused if there are substantial grounds to believe that execution would result in violations of fundamental rights. In addition, member states have to comply with data protection rules beyond the Charter. Among these are Directive 2016/680 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, and Directive 2016/681 on the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. Should the UK leave the EU and not be bound by the above laws, the reasons behind mutual trust do not hold.

¹¹ Judgment of the Court (Grand Chamber) of 5 April 2016 in Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, Requests for a preliminary ruling from the Hanseatisches Oberlandesgericht in Bremen. For a detailed assessment of the case, see van Ballegooij and Bárd (2016), pp. 439–64.

¹² Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014.

Of course, one cannot take it for granted that a member state fully complies with foundational values all the time. But vis-à-vis non-complying member states there are EU mechanisms to undo the damage to the rights of the individuals. However underused, an Art. 7 procedure may be conducted, individual rights enshrined in the Charter are justiciable, and due process directives are binding on the member states and are enforceable. After the entry into force of the Lisbon Treaty and once the transitional period of five years expired, the CJEU has since had full jurisdiction in EU criminal justice. All these options are missing in relation to non-member states.

Possible future scenarios

Possible EU demands

An agreement extending the scope of the EAW to third countries would not be without precedent. The most obvious example is the 2006 “Convention on the surrender procedure between the European Union on the one hand, and the Republic of Iceland and the Kingdom of Norway on the other” (hereinafter: EUIN Convention), which extended the jurisdiction of the Framework Decision on the EAW to Iceland and Norway.¹³

The EUIN Convention only refers to a limited number of instruments – the European Convention on Human Rights (ECHR), the absolute prohibitions of the death penalty, torture or other inhuman or degrading treatment or punishment, and the 1981 Council of Europe Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data – as the foundations of mutual confidence. The question thus arises: Are there good reasons to ask for more from the UK – other than making Brexit as painful as possible to teach a lesson to other member states or to the political forces toying with the idea of secession from the EU?

Before answering this question, it is worth recalling that the EUIN was adopted 12 years ago, years before the entry into force of the Lisbon Treaty. The legal landscape of fundamental rights, including their protection by the Charter, procedural guarantees and mutual trust-based instruments look very different today. EU criminal justice is most probably going to look very different 12 years from now. It is impossible to pick and choose certain elements of EU law that the UK likes and carve them in stone, disregarding the ever-evolving nature of this field. In order to maintain trust between the two entities, the Charter and procedural guarantees should be binding also on the UK. The latter are more detailed and could incorporate higher standards than the ECHR; therefore, the UK’s continued membership in the Council of Europe is

¹³ Council Decision 2006/697/EC of 27 June 2006 on the signing of the 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, OJ L 292, 21.10.2006.

insufficient. Recurring fantasies about withdrawing from the ECHR – and these at the highest possible government level¹⁴ – only make the UK’s adherence to the Charter more urgent.

The jurisprudence of the CJEU is equally important. It is impossible to interpret the EAW regime without it.¹⁵ Most recently, just a few weeks after the question of the effect of Brexit on EAWs was raised before the Irish Supreme Court, another Irish court, namely the High Court referred another vital case to the CJEU. According to the High Court, “the rule of law in Poland has been systematically damaged by the cumulative impact of all the legislative changes that have taken place over the last two years” and thus mutual trust between Ireland and Poland ceases to exist.¹⁶ Should the Court of Justice agree, this will further refine the concept of mutual trust, as national courts might have to look into whether judicial independence has been systematically compromised in the issuing state, and not take it for granted.

The EUIN captures a moment in time when the principle of mutual recognition at the heart of EU criminal law meant that judicial decisions taken in one member state should automatically be accepted across the Union.¹⁷ In the meantime, it has been acknowledged that member states’ violations of foundational EU values will have fatal consequences for mutual recognition and the whole of the EU criminal justice system. Once the values of Art. 2 TEU are repeatedly violated in plain sight by the national authorities of a member state, the essential presumptions behind the core of EU criminal law no longer hold. Respect for the rule of law and a robust fundamental rights mechanism are essential for effective cross-border judicial cooperation in criminal matters.¹⁸ EU lawmakers and the EU judiciary have both responded to these

¹⁴ See Asthana and Mason (2016).

¹⁵ See for example, Cases C-303/05, *Advocaten voor de Wereld*, Judgment of 3 May 2007; C-261/09, *Mantello*, Judgment of 16 November 2010; C-396/11, *Radu*, Judgment of 29 January 2013; C-399/11, *Melloni*, Judgment of 26 February 2013; C-168/13 PPU, *Jeremy F.*, Judgment of 30 May 2013; C-237/15 PPU, *Lanigan*, Judgment of 16 July 2015; C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, Judgment of 5 April 2016; or C-182/15, *Petruhhin*, Judgment of 6 September 2016.

¹⁶ High Court of Ireland, *Minister for Justice and Equality v Celmer* [2018] Record Nos. 2013 EXT 295, 2014 EXT 8, EXT 291, 12 March 2018.

¹⁷ Wouter van Ballegooij (2015, p. 354) argues that this is solely the Commission’s view:

The Member States have on the other hand been divided between approaches to mutual recognition akin to home State control, limited home State control and tacit or even overt rejection of mutual recognition on a national level, which is reflected in the hybrid nature of the legislation in the area in which mutual recognition and exceptions based on national sovereignty continue to co-exist.

¹⁸ See the Commission’s “Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law”, COM(2017) 835 final, 2017/0360 (APP), Brussels, 20.12.2017, paragraph 180 (2-3). See also the “Opening remarks of First Vice-President Frans Timmermans, Readout of the European Commission discussion on the Rule of Law in Poland”, Brussels, 20 December 2017:

Respect for the rule of law is a prerequisite for ... the mutual trust which is the corner stone of cooperation between Member States in the Justice and Home affairs areas. If you put an end [to], or limit, the separation of powers, you break down the rule of law. And that means breaking down the smooth functioning of the Union as a whole.

challenges. Minimum harmonisation of some aspects of criminal law, with special regard to procedural guarantees and judicial tests overwriting the automaticity of mutual trust,¹⁹ remedy the problem, and permit mutual recognition-based instruments to survive. To be consistent and to capture the progress in the past decade, the EUIN should also be renegotiated. But a new agreement would certainly have to incorporate the developments of EU law that remedy the original problems of automatic recognition of member states' judgments.

The UK's wish list

The UK desperately wants to be part of the EAW regime irrespective of Brexit, as recently voiced by the prime minister.²⁰ Still, the UK has some other demands, some of which seem at first sight to be mutually exclusive. In a future partnership paper on security, law enforcement and criminal justice, the UK government stressed its desire to "build a new, deep and special partnership with the European Union" and to maintain and strengthen a close collaboration in the criminal justice area even after the UK's withdrawal from the EU.²¹ At the same time, the UK government does not wish to follow any of the models of EU and third-country cooperation. Instead, it wants the EU to "design new, dynamic arrangements as part of the future partnership, ... that [go] beyond the existing, often ad hoc arrangements for EU third-country relationships in this area".²² The UK sees trade agreements with non-EU countries as the example to be followed.²³ It also plans to remain in EU-wide criminal law databases, continue practical operational cooperation and remain in agencies, such as Europol and Eurojust. Yet the UK does not wish to conclude individual agreements in the various subfields of criminal justice, as other third countries and the EU has, rejecting such "tool-by-tool solutions"²⁴ leading to a "piecemeal approach".²⁵ That seems to preclude the possibility of an EUIN-type of agreement. Instead, the UK government is lobbying for "a comprehensive framework for future security, law enforcement and criminal justice cooperation between the UK and the EU".²⁶ The main pillars of the new comprehensive model in the UK government's view have to be the following:

- i) operational capabilities being maintained between the UK and the EU and its member states;

¹⁹ See *Aranyosi*, op. cit. and *Celmer*, op. cit.

²⁰ See Shipman (2018).

²¹ UK Government, "Security, law enforcement and criminal justice: A future partnership paper", 18 September 2017 (<https://www.gov.uk/government/publications/security-law-enforcement-and-criminal-justice-a-future-partnership-paper>), pp. 1–2. For an assessment, see Baker (2018).

²² Id. at 2–3, paragraph 4.

²³ Id. at 2–3, 16.

²⁴ Id. at 13, paragraph 37.

²⁵ Id. at 13, paragraph 35.

²⁶ Id. at 14, paragraph 38.

- ii) a high standard of data protection and human rights (but there is no mention of the Charter or procedural guarantees);
- iii) versatility and dynamism to respond to the ever-changing threat environment;
- iv) an ongoing dialogue in which law enforcement and criminal justice challenges and priorities can be shared and tackled jointly; and
- v) a dispute resolution forum.²⁷

With regard to the latter point, the UK government has made clear that it will not accept the jurisdiction of the CJEU beyond Brexit.²⁸ It has also underlined that neither agreements with third countries in relation to trade nor the Schengen association agreements involve the direct jurisdiction of the CJEU in the non-EU countries, and it has suggested that a similar path be followed in an EU–UK partnership agreement covering the area of criminal justice.²⁹

Can the EU–UK treaty reconcile seemingly incompatible demands?

The question emerges of whether it is possible to have a special deal concluded between the EU and the UK considering their respective demands and ‘red lines’. The EU is insisting on a robust mechanism for fundamental rights protection with the CJEU as a final arbiter and the UK wishes to engage in a ‘deep and special partnership’ and reach ‘comprehensive arrangements’ (or any, even a single EUIN-type of an agreement for that matter), without the CJEU.

The UK is unlikely to turn into an autocratic regime and engage in serious violations of human rights the next day after Brexit. But the hope that a well-established democracy will not be fundamentally damaged or is unlikely to experience “rule of law backsliding”,³⁰ is an insufficient reason to re-establish the legal presumption of mutual trust vis-à-vis the UK once EU human rights standards are no longer binding on it. One should also be reminded of the fact that there are systemic problems even today. The UK notoriously failed to comply with ECtHR decisions and deprived all prisoners, irrespective of the gravity of the crimes they had committed, of their voting rights.³¹ The most recent findings paper by HM Inspectorate of Prisons makes one

²⁷ Id. at 14, paragraph 39.

²⁸ UK Government, “Enforcement and dispute resolution: A future partnership paper”, 23 August 2017 (<https://www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper>). See also Hogarth (2017, p. 46): “It would be difficult for one of the EU’s own institutions to be neutral in a dispute between the EU and a third party. Such a wide-ranging role for the court in settling disputes over an external agreement would also be unprecedented.”

²⁹ UK Government, “Security, law enforcement and criminal justice” (2017), op. cit. at 13–14, paragraph 37.

³⁰ At least it would not reach the degree of backsliding in younger democracies of the EU. For a thorough analysis, see Pech and Scheppele (2017), pp. 1–45.

³¹ ECtHR, *Hirst v United Kingdom*, Application no. 74025/01, 8 July 2003; *Hirst v United Kingdom (No. 2)*, Application no. 74025/01, 6 October 2005; *Greens and M.T. v the United Kingdom*, Application nos 60041/08 & 60054/08, 23 November 2010; *Firth and Others v the United Kingdom*, Application no. 47784/0912 and nine

wonder whether it is indeed the UK in 2017 that the report describes rather than some other, less fortunate place.³² Such flaws in criminal justice could jeopardise EU cooperation in penal matters even today. The paranoid logic of constitutional law suggests that those who hold power are likely to abuse it at some point, so all branches of government need to be limited. Along these lines a robust fundamental rights regime has to accompany mutual trust-based instruments – whether the UK is in or outside the European Union. In contrast to the UK demands listed in the EU (Withdrawal) Bill,³³ no concessions on the Charter and procedural guarantees can be made.

The most sensitive issue seems to be the dispute resolution mechanism. Is it possible to entrust a forum, which is not the CJEU, with the interpretation of the agreements between the EU and the UK, without risking the fragmentation of the EU legal system? It is probably possible with some creativity. The minimum prerequisite for such a court is that it has effective jurisdiction to decide matters, that it can grant effective legal protection and that its judgments are binding and enforceable. Acknowledging that the CJEU without a UK judge will be a foreign court for the UK, one option could be to have a panel or a section of the CJEU that includes a UK judge. Such a ‘Court of Justice for a European Criminal Justice Area’ would be entrusted with deciding on EU criminal law matters.

When setting up such a forum, due regard needs to be paid to Opinion 1/91, where the European Court of Justice (ECJ) assessed the draft Agreement creating a European Economic Area (EEA) and proposing an EEA court. The EEA court would have consisted of five ECJ justices on the one hand and as a general rule, three justices from the countries of the European Free Trade Association, or two plus two justices in competition cases on the other. In Opinion 1/91, however, the ECJ held that the proposed system of judicial supervision created a danger for the

others, 12 August 2014; *McHugh and Others v The United Kingdom*, Application no. 51987/08 and 1,014 others, 10 February 2015; *Millbank and Others v The United Kingdom*, Application no. 44473/14 and 21 others, 30 June 2016.

³² See HM Inspectorate of Prisons, “Life in prison: Living conditions”, London, October 2017 (<https://www.justiceinspectorates.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2017/10/Findings-paper-Living-conditions-FINAL-.pdf>):

We have found that in local prisons 31% of prisoners report being locked in their cells for at least 22 hours a day, rising to 37% at young adult prisons (holding prisoners aged 18–21). We found large numbers of prisoners at some jails who were locked up for more than 22 hours a day, or throughout the working day. ... [P]oor conditions are exacerbated by overcrowding. ... [I]n 2016/17 nearly 21,000 prisoners out of some 85,000 in total were held, by their own definition, in overcrowded conditions. This proportion rises in local prisons to over 15,000 of the 31,800 held in such establishments – or 48%. (Cells) often have an unscreened or inadequately screened lavatory, frequently without a lid, or sometimes with a makeshift lid made of cardboard, pillowcases or food trays. In these same cells, prisoners are frequently required to eat all their meals – in what are obviously insanitary, unhygienic and degrading conditions. ... [I]n only around half of our prisons are prisoners able to get cleaning materials for their cells every week, and ventilation of too many cells is poor.

³³ Art. 5(4) of the Bill to repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU.

autonomy of the Community legal order, and was incompatible with the Treaties. One of the main objections concerned the participation of ECJ justices in the EEA court's deliberations. Since Community law and the EEA Agreement have diverging objectives, but some provisions are duplicated in both legal regimes, the ECJ justices sitting on the EEA court would be in an awkward situation: they would have to interpret the same sounding provisions, but through the lenses of different approaches, methods and concepts. The ECJ suggested that it would be very difficult if not impossible for these justices to do this exercise and evaluate the very same texts appearing in two distinct legal regimes fundamentally differently, and approach the same problems "avec une pleine indépendance d'esprit", i.e. with completely open minds.³⁴

In light of the above reasoning, the whole EU judicial system would need to be restructured so that a 'Court of Justice for a European Criminal Justice Area' uniformly adjudicated both intra-EU cases and cases with third countries involved. Preferably, it would include not only a UK judge, but also judges from other jurisdictions to which mutual recognition-based laws are extended. Such a forum could also have a special status in the UK's court system.

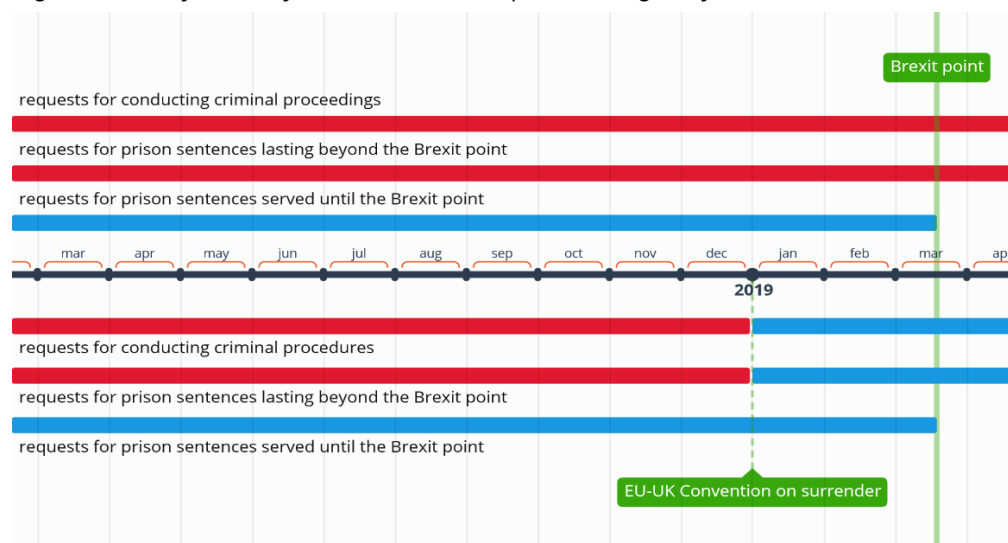
Conclusions

Since the presumption of trust that should cover the criminal proceeding and sanctions as a result of the surrender do not hold beyond the Brexit point, surrender procedures resulting either in procedures that are likely to go beyond March 2019 or in sanctions enforced beyond that date must be halted. An EAW can be issued if the suspect has been charged with a criminal offence carrying a maximum sentence of minimum 12 months' imprisonment, or if a convict is to serve at least 4 months in prison. Given that EAW cases do not cover petty crimes, but are typically more complex ones,³⁵ in practice requests for conducting criminal procedures in the UK cannot be complied with any more, and only for those prison sentences not exceeding a year. (See Figure 1, upper half of the timeline.)

³⁴ ECJ, Opinion 1/91, 14 December 1991, paragraphs 51–52. For a detailed analysis, see Brandtner (1992).

³⁵ The question emerges of whether an executing state may request the UK to pass a criminal judgment by the end of March 2019, but this is not conceivable. First, there is no such guarantee mentioned by the Framework Decision on the EAW; second, an accelerated procedure may contradict procedural rights; and third, even if a decision were rendered in a year, it may potentially entail sanctions that go beyond the Brexit point.

Figure 1. The future of UK surrender requests in light of Brexit



For the future, the EU and the UK might conclude agreements to make EU standards on the rule of law, human rights and more specifically procedural guarantees apply to surrender proceedings. But for the time being the legal details around Brexit are unclear. As the Supreme Court of Ireland noted, “it is well known that the possibility of a transitional arrangement has been the subject of some discussion ... What effect any or all of those measures may have on the EAW regime can be little more than a matter of speculation at this stage.”³⁶ Until the matter is settled, traditional extradition is an option, with its more burdensome and slower proceedings via diplomatic channels and the heightened scrutiny on fundamental rights protection.

Once the UK acknowledges the EU’s fundamental rights regime as binding, however, negotiations could start with regard to the comprehensive involvement of the UK in EU criminal cooperation. Possibly a court separate from the Court of Justice, with a UK judge sitting on the panel, would decide matters of EU criminal justice relevance. (See Figure 1, lower half of the timeline.) Should one take the UK’s wishes into account and design solutions so as not to jeopardise the autonomy of EU law at the same time, the question emerges of whether in substance such an arrangement would look like Brexit in the end, or more like Bremain.

³⁶ Supreme Court of Ireland, *Minister for Justice v O'Connor*, op. cit., paragraph 5.5.

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