

Introduction

1. My contribution to this panel on the legal implications of Brexit will be to discuss two paradoxes: the general paradox of the UK's position after Brexit and the paradox with regard to the protection of human rights of our clients.
2. In the end, the conclusion will be that Brexit has a positive effect on the protection of human rights of individuals whose extradition is requested, but only in the sense that the defence has more opportunities to address human rights issues. If that turns out to be correct, these individuals will not be in a significantly better situation regarding human rights but will only be subject to lengthier procedures – without a significantly different outcome.
3. To get to this conclusion, first the general paradox will be discussed: that is the paradox of the UK having to comply with more EU law after Brexit than before. Second, the current human rights protection in the UK will be discussed, followed by the procedural opportunities Brexit will lead to. I will conclude with the mentioned human rights paradox.

General paradox

4. If the UK wishes to continue participating in EU criminal law instruments and mechanisms, or to develop equivalent mechanisms of co-operation, the UK will have to comply with more EU regulations as a non-EU country than under the current status as a Member State.
5. First of all, whatever the shape and content of the future EU–UK partnership, the EU is likely to be careful in handling the negotiations with the UK. Excessive concessions to the latter may upset other EU partners. Although the UK will be a key partner of the EU, it is also true that it will be only one partner.
6. Second of all, the principle of mutual trust will cease to apply in the future EU–UK partnership. Mutual trust is based on the presumption that each Member State ensures a high level of protection of fundamental rights and rule of law standards. Participation in EU mutual recognition instruments (e.g. the EAW and the European Investigation Order) is based among other things on this principle of mutual trust. This applies only to EU Member States. So far, no third countries have joined EU mutual recognition instruments. There is no reason to expect a different approach for the UK after Brexit.
7. Thirdly, the current status of the UK within the EU is largely determined by Protocol No. 21 to the Lisbon Treaty. This Protocol extended the right of the UK not to participate in EU law, including criminal law measures. The UK Government decides on its participation in post-Lisbon measures on a case-by-case basis.
8. As most of you probably know, the EAW Framework Decision had already been implemented in the UK by the Extradition Act of 2003. But after Protocol No. 21 the UK has a mixed record regarding participation in EU criminal law.
9. As most of you also know, the UK has participated in Directive 2014/41 on the European Investigation Order (EIO). The UK has also opted into two directives on the rights of suspects and defendants in criminal proceedings:
 - a. Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings;
 - b. Directive 2012/13/EU on the right to information in criminal proceedings.

10. However, the UK has not participated in the other three measures:
 - a. Directive 2013/ 48 on the right of access to a lawyer;
 - b. Directive 2016/ 343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings;
 - c. Directive 2016/ 1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.
11. The legal basis for Directive 2013/ 48 (right of access to a lawyer) is Article 82(2) of the Treaty on the Functioning of the European Union, which grants competence to the EU to legislate on aspects of criminal procedure where necessary to facilitate the operation of the principle of mutual recognition. Directive 2013/ 48 seems thus to be inseparable from the operation of mutual recognition in criminal matters, including the use of the EAW. Nonetheless, in the current situation the UK has the opportunity to pick and choose which elements of EU law they wish to implement and opted out of the Directive on the right of access to a lawyer.
12. After Brexit, a paradoxical situation is therefore likely to emerge. Brexit is likely to put the UK in the position of having to accept more EU law than it presently does as an EU Member State.

Current human rights situation

13. This becomes an even more paradoxical situation when one takes into account that the UK's domestic law already complies substantively with the EU-law. The non-participation of the UK in the mentioned human rights measures is in itself remarkable (or paradoxical) given the fact that the Directive on the right of access to a lawyer introduces minimum standards, which would arguably have led to minimum – if any – legislative changes in the UK. There seems to be a consensus that the UK criminal justice system already complies with the guarantees set out in the Directive and in other EU legislation on regarding the protection of fundamental rights in the criminal procedure.
14. There is no reason to expect this to change. On the contrary. The UK is after all party to the European Convention of Human Rights (ECHR), and there is no reason to assume that the UK will denounce the ECHR. Respect for the benchmarks set forth in the ECHR is essential to maintain trust and sustain EU–UK cooperation after Brexit. Any departure from these principles by either of the parties could lead to the freezing and potential termination of cooperation.
15. Furthermore, the UK has already gone further than the EAW Framework Decision in the protection of human rights. The EAW Framework Decision does not include a ground for refusal to execute an EAW based on human rights considerations whereas Section 21 of the Extradition Act imposes on the judge the duty to decide whether the person's extradition would be compatible with the ECHR.¹
16. In 2016 the CJEU has confirmed in the Aranyosi and Căldăraru ruling that execution of EAWs may be postponed, and eventually refused, on human rights grounds.² 'Mutual trust' does not mean 'blind trust': human rights compliance must be queried and ascertained on the basis of concrete evidence.
17. The UK has also treated non-compliance with proportionality as a ground for refusal to execute an EAW. "In the EU, the prevailing view has thus far been for proportionality to be dealt with in the issuing and not in the executing Member State, but Section 21A of the Extradition Act 2003 provides for an exhaustive list of matters to be considered by the judge when ruling on proportionality."³

¹ Criminal Justice and Police Cooperation between the EU and the UK after Brexit, Report of a CEPS and QMUL Task Force, August 2018, p. 52.

² CJEU 5 April 2016, C-404/ 15 and C-659/ 15 PPU, ECLI:EU:C:2016:198.

³ Criminal Justice and Police Cooperation between the EU and the UK after Brexit, Report of a CEPS and QMUL Task Force, August 2018, p. 53.

18. “The UK – which has been pioneering in introducing human rights safeguards in the EAW – will therefore leave the system at the very time when EU institutions appear to have begun to take these human rights considerations seriously.”⁴
19. In brief, the future EU–UK cooperation will depend on the willingness of the UK to comply with crucial EU law standards and EU human rights and values, but the continued participation of the UK in the ECHR seems a given fact and the UK already complies with EU human rights and values, and probably more.
20. This answers the question whether there will be a significant change in the protection of human rights for individuals whose extradition is requested.
21. Will there be a significant change in the protection of human rights? Probably not.
22. However, it raises the question whether a significant change will emerge in the possibilities for criminal defence lawyers to address issues regarding human rights.
23. Will there be more opportunity to argue that the compliance to EU human rights standards has to be scrutinized? Probably.

Procedural opportunities

24. This can be argued from a procedural point of view and from a substantive point of view.
25. As for the procedure, a lack of binding powers of the CJEU in respect of dispute resolution does not mean that the UK will not be affected by the case law of the CJEU. On the contrary. The CJEU will remain competent to ultimately and authoritatively interpret EU law.
26. First, the Court will be entrusted with the review of the legality of any EU act concerning future EU relationships with the UK. Second, upon request of national courts of EU Member States, the CJEU can interpret any EU–UK agreement after its entry into force. Third, national judges could refer a preliminary question to the CJEU even in the absence of any future EU–UK agreement in some instances. Any EU–UK relationship will remain under the scrutiny of the CJEU from the EU side and the CJEU’s case law will continue to have a significant impact on the UK and on its future cooperation with the EU.
27. As for the substantive point of view, after Brexit, in theory the defence may claim that extradited persons may be subjected to inhuman or degrading treatment in the UK, and that therefore extradition to the UK should be refused.
28. Presently, the principle of mutual trust makes it challenging to engage European courts in terms of human rights and fair trial. This might change after Brexit.
29. In *Petruhin*⁵, the CJEU has indeed concluded that, when a Member State receives a request from a third state seeking the extradition of a national of another Member State, that first Member State must verify that the extradited person would not be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.⁶
30. In the recent *R.O.* case, the Irish Court had requested the CJEU to rule on whether EAWs coming from the UK should continue to be executed, when the surrendered person was likely to

⁴ *Ib.*

⁵ CJEU 6 September 2016, C-182/15, ECLI:EU:C:2016:630.

⁶ Criminal Justice and Police Cooperation between the EU and the UK after Brexit, Report of a CEPS and QMUL Task Force, August 2018, p. 59.

serve (part of) his or her sentence in UK prisons after Brexit. The Court of Justice found: “*Article 50 TEU must be interpreted as meaning that mere notification by a Member State of its intention to withdraw from the European Union in accordance with that article does not have the consequence that, in the event that that Member State issues a European arrest warrant with respect to an individual, the executing Member State must refuse to execute that European arrest warrant or postpone its execution (...). In the absence of substantial grounds to believe that the person who is the subject of that European arrest warrant is at risk of being deprived of [human] rights (...), following the withdrawal from the European Union of the issuing Member State, the executing Member State cannot refuse to execute that European arrest warrant while the issuing Member State remains a member of the European Union.*”⁷

31. In the end, this decision leaves completely open what the decision would be after Brexit.
32. After Brexit, domestic courts could have more opportunities to scrutinize human rights issues in relation to EU extradition requests. In any case, the defence will have far more opportunities to raise human rights issues that the UK courts will have to deal with.

Human rights paradox

33. This leads to the second paradox. Because of these procedural opportunities after the departure from the system of mutual trust, one could argue that Brexit might have positive effects on the protection of human rights of individuals whose extradition is requested by EU countries.
34. However, as UK courts have long been considering human rights issues, as the legal system in the UK can be seen as fully compliant to the benchmarks set out in the ECHR, and as this system is independent of the EU-Directives (because of the pick-and-choose system of opting in and out of EU-Directives on human rights), the result might very well be that there will be no substantive grounds for scrutinizing these human rights issues when the UK would issue extradition requests.
35. Following that argument, Brexit will have little impact on the actual protection of human rights of individuals whose extradition is requested. This leads to the second paradox.
36. This situation could substantially prolong the duration of future extradition proceedings but will not influence the outcome. In that case the protection of the human rights that our clients are entitled to, might not be enhanced after Brexit, and is more dependent on our way of handling extradition cases than on anything else.

Literature and publications (a. o.):

- Criminal Justice and Police Cooperation between the EU and the UK after Brexit, Report of a CEPS and QMUL Task Force, August 2018.
- Valsamis Mitsilegas, European Criminal Law after Brexit, *Criminal Law Forum* (2017) 28:219–250.
- Vaughne Miller, Brexit questions in national and EU courts, Briefing Paper, Number 8415, 24 September 2019.

⁷ CJEU 19 September 2018, C-327/18 PPU, ECLI:EU:C:2018:733.