

THE AREA OF FREEDOM, SECURITY AND JUSTICE: BREXIT DOES NOT MEAN BREXIT

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SUMMARY

The claim ‘Brexit means Brexit’ does not qualify for the Area of Freedom, Security and Justice. Resulting from a complex set of rules of differentiated integration the United Kingdom has never been a full insider or outsider of the AFSJ.

The basic line of argumentation that guides the analysis of this paper is two-fold:

First, in light of this differentiated integration, we expect Brexit to have mixed effects. Consequently, there are parts of the AFSJ, which would be less affected by Brexit than others. This makes the AFSJ distinct from other EU policy areas.

Second, political interests and structural obligations resulting from this differentiated pattern of ‘outsiderness’ will provide guidelines for Brexit negotiations in the AFSJ.

This paper highlights the fact that the AFSJ represents a policy area in which a Brexit scenario could resemble ‘old wine in new bottles’. In individual policies both sides would clearly win from ‘softer’ options of a Brexit. Three lessons from the analysis can be drawn in light of Brexit negotiations:

1. Past patterns of UK participation in AFSJ are necessary but not sufficient criteria for determining the scope and content of potential ‘soft Brexit’ options.
2. The AFSJ calls for a tailor-made Brexit as other models of associating countries to this policy area do not fully qualify as precedents.
3. A Brexit solution needs to account for the fact that the AFSJ represents one of the EU’s most dynamic policy areas.

TABLE OF CONTENTS

INTRODUCTION	3
1. The AFSJ: a policy area under pressure	4
1.1. Return to the nation-state and strained solidarity	5
1.2. Reforming cross-border cooperation	5
2. The UK's AFSJ participation—a rag rug?	6
2.1. Volatility in differentiated integration: it's the sovereignty, stupid	6
2.2. The UK pre-Brexit: in- or outsider?	6
2.3. Preliminary take-aways for a shopping-list for the best deal	9
3. In the AFSJ Brexit does not mean Brexit	10
3.1. EU nationals in the UK and vice versa: first things first	11
3.2. Border controls and CEAS—not much to lose	13
3.3. Police and judicial cooperation in criminal matters—much to lose or to gain?	14
4. Conclusion and lessons learned: How to shop for the best Brexit deal in the AFSJ	16
REFERENCES	17
ON THE SAME THEMES...	18

INTRODUCTION

The European Union (EU) is currently dealing with the unprecedented case of one of its member states aspiring to exit the Union. On 29 March 2017 the British Prime Minister, Theresa May, acted in accordance with the outcome of the referendum on the United Kingdom's (UK) EU membership of 23 June 2016 by triggering Article 50 of the Treaty on European Union (TEU). This means that all hopes that Brexit might not mean Brexit after all have been silenced, at least for the time being. At the same time, Brexit can mean different things, particularly in light of different policy areas of European integration.

The aim of this paper is to outline scenarios of different Brexit options by analysing and assessing the effects of the UK's exit on a specific policy area: the Area of Freedom, Security and Justice (AFSJ) including the Schengen area. This analysis is important for two main reasons: First, the AFSJ is one of the EU's most rapidly expanding policy areas touching upon the core values of freedom, security and justice. The UK's decision to leave the EU was taken just after the Union had been substantially challenged by the unprecedented inflow of migrants and asylum seekers in 2015—what has become known as the 'refugee crisis'. As a result, the EU member states strive for completing the Common European Asylum System (CEAS), strengthening external border controls and rethinking cooperation on counter terrorism and internal security measures. Second, the UK has always resembled an "awkward partner"¹ in terms of staying out of different integration projects of the EU. In the AFSJ this so-called 'opt-out' is coupled with the right to 'cherry pick' individual policy measures in which the UK can choose to participate. This allows the UK to "benefit from the best of both worlds"² driving its 'awkwardness' to the extremes.

More specifically, this paper aims at answering two questions that Brexit raises in this context. If the UK is not a full member of the AFSJ, will Brexit actually make any difference, and if so to what extent? What would be a possible leverage for negotiations on both sides in light of mutual interests of the UK and the EU?

The basic line of argumentation that guides the analysis is two-fold: First, in light of differentiated integration, we expect Brexit to have mixed effects, which makes the AFSJ distinct from other EU policy areas. The UK can be classified with reference to the scope of its participation ranging from "engaged outsider"³ to 'disengaged outsider'. Consequently, there are parts of the AFSJ, which would be less affected by Brexit than others. Second, political interests and structural obligations resulting from this differentiated pattern of 'outsiderness' will provide guidelines for Brexit negotiations in the AFSJ. We can identify policy areas in which we predict Brexit to:

1. represent a highly political issue which might eventually turn into a breaking point of negotiations: citizens' rights are currently preserved by the free movement and principle of non-discrimination. In case of Brexit, this issue will fall into the area of immigration law, which has not represented a policy of crucial mutual interest, so far. In fact, the UK can be labeled a 'disengaged outsider'. This transformation, however, will have a high impact on citizens living abroad and, therefore, this issue is highly political, should be negotiated first and the UK might have to get engaged after all.
2. cause little controversy: Border management and asylum policies are suspected to represent little to no stumbling blocks in negotiations. The UK represents an outsider regarding the former and an 'insider on its way out' regarding the latter. It seems as if stable forms of cooperation or non-cooperation between the EU and the UK have been established so far and both sides show little initiative to change this equilibrium substantially.
3. turn 'soft' as win-win solutions exist: the area of internal security including police and judicial cooperation in criminal matters represents the area in which vital mutual interests have determined the scope of British participation so far. In light of recent developments it is highly unlikely that this is going to change. Even more, continued participation of the UK—representing an 'engaged outsider'—will be beneficial for the EU and the UK alike.

This paper starts by contextualising Brexit within a policy area that has recently come under severe pressure. Based on the basic line of argumentation the paper will, in a second step, lay out the rag rug resulting from the complex opt-out/opt-in rules in Schengen and the AFSJ and highlight some preliminary observations. The third part will assess implications of a Brexit in each of the three areas. The paper concludes by drawing lessons in view of different Brexit scenarios and future EU-UK relationships.

1. George, Stephen. "Britain and the IGC." In *The Politics of European Treaty Reform. The 1996 Intergovernmental Conference and Beyond*, edited by Geoffrey Edwards and Alfred Pijpers, 100-118, here 100. London: Pinter, 1997.

2. Geddes, Andrew. "Getting the best of both worlds? Britain, the EU and migration policy." *International Affairs* 81 (2005): 723-740.

3. Adam, Ilke et al. "The UK in Justice and Home Affairs: the engaged outsider" IES Policy Brief 2. 2016.

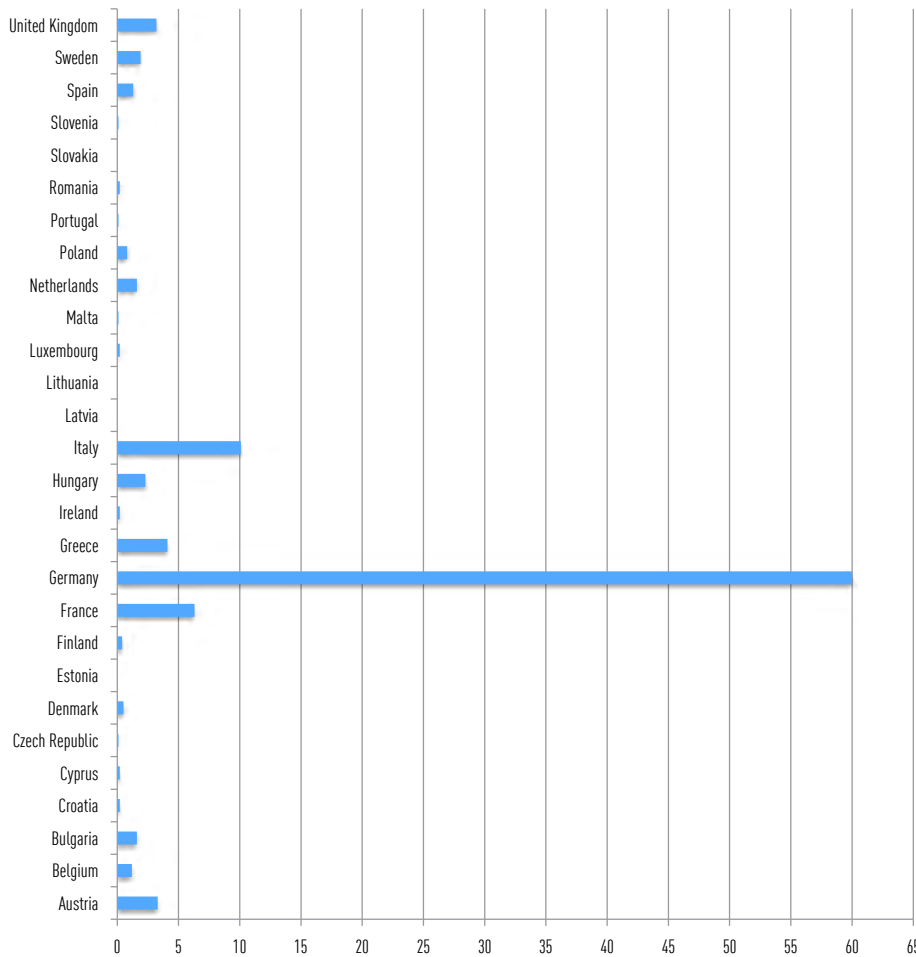
1. The AFSJ: a policy area under pressure

In recent years the AFSJ has been challenged by the massive inflow of refugees and a rise in the terrorist threat across the continent. This means that the UK took the decision to exit the EU in a period of time in which the delicate relation between freedom, security and justice in this policy area was severely strained and off-balance.

In 2015 an unprecedented number of 1.25 million first time asylum seekers were registered in the EU. Even though this figure has slightly decreased to a total of 1.2 million registrations in 2016, it is still almost doubling the total number of 2014.

For geographic reasons and the Dublin Regulation allocating the responsibility for the asylum procedure to the country in which the asylum seeker is registered in the EU for the first time, EU member states are affected by this massive inflow of migrants to different degrees (see Figure 1).

FIGURE 1 ▶ First time asylum seekers in 2016: share in EU total (%)



Source: Own diagram compiled based on Eurostat. *Asylum in the EU Member states, newsrelease, 46/2017, March 16, 2017.*

Since 2015, the terrorist threat has been spreading out across the EU. The UK has been one of the main targets of terrorist attacks in the EU, particularly in 2017. Since March the country has been hit by such acts almost on a monthly basis. However, it has not been the sole target country. While France and Belgium represent countries where attacks have repeatedly taken place, Germany, Sweden and only very recently Spain experienced singular attacks in the past 12 months. The dark figure is likely to be substantially higher, as this overview does not list the number of attacks that have been successfully prevented by security units.

This rising threat has re-energised the debate on whether the existing systems of data exchange between the EU member states were sufficient in order to allow for effective preventative action. Some of the terrorist attackers seemed indeed to have entered the EU and the Schengen area in disguise of Syrian refugees. Others like for example Salah Abdeslam, one of the terrorist attackers in Paris on 13 November 2015, or the wire puller of the London Bridge attacks on 3 June 2017, however, were holding nationalities of EU member states.

These rising challenges had two effects on the AFSJ and the UK symbolizing the EU member states' dilemma of balancing sovereignty-led veto reflexes, that are even reinforced by growing Eurosceptic trends in the population and party politics alike, against a functional efficiency drive—a so-called “problem-solving instinct”⁴:

1.1. Return to the nation-state and strained solidarity

The EU member states' first reaction to the ‘refugee crisis’ and the increased terrorist threat was to refocus on the provision of internal security as a core competence of the sovereign nation-state. This implied the re-introduction of (temporary) controls at internal as well as building of fences at external Schengen borders in 2015. The aim was to decide and control how many and what kind of persons were entering the country. This return to the nation-state driven by the sovereignty-led veto reflex severely undermined solidarity within the Schengen area.

In September 2015, an internal emergency mechanism for relocation of asylum-seekers from Italy and Greece could be adopted by the Council only at qualified majority, against the will of Slovakia, the Czech Republic, Romania and Hungary. Its implementation remains, hence, rather poor and different principles of ‘flexible’ or ‘effective’ solidarity have been debated ever since. The EU, nevertheless, was able to relieve the external pressure on the Schengen area by striking a deal with Turkey on migration and by closing the Balkan-route in spring 2016. But the migration routes have shifted to North Africa during the past year. This continues to put the refugees at risk—by April 2017 more than 1,000 people had died on their way from Libya to Italy⁵—and increased pressure on Italian authorities. In spite of these tragedies solidarity in the EU remains low with Italy's latest calls for support going by almost unheard so far⁶. Instead Austria is planning to send troops to its border with Italy in order to prevent refugees from crossing the (green) borders in the Alps⁷.

Even though Diagram 1 highlights that the UK is standing at the side-lines of the so-called ‘refugee crisis’, the EU and the UK alike instrumentalised it in the run-up to the UK's referendum on the EU. The United Kingdom Independence Party (UKIP) and particularly its leader, Nigel Farage, established a highly contested link between pictures of the refugee crisis on mainland Europe and immigration in the UK. This line of argumentation was as faulty as effective, because it fuelled one of the key concerns of the British population. On the other side of the channel, France threatened to suspend border controls at its end of the Eurotunnel, in case the UK should decide to leave the EU. In summer 2016 more than 7,000 migrants were living in the refugee camp in Calais. As a big proportion of them were aiming for entering the UK's labour market illegally, suspension of French border controls would have impacted on immigration in the UK. This threat, however, was not sufficient in order to counterbalance the promise of the Brexit campaign that only regaining control over the UK's borders—which the UK had actually never given up in the first place (see below)—could guarantee protection against immigration.

1.2. Reforming cross-border cooperation

”THE GROWING TERRORIST THREAT INCREASED THE EU MEMBER STATES' PROBLEM SOLVING INSTINCT.”

The growing terrorist threat increased the EU member states' problem solving instinct calling for more efficient trans-border cooperation. Based on the conviction that “[...] stronger Europe means more security for the people”⁸, the EPP, ECR and ALDE Groups in the European Parliament (EP) have, for example, just taken the initiative to set up a special committee on terrorism, which found an overwhelmingly majority⁹. Certain reforms of European

4. Hofmann, Andreas, and Wessels, Wolfgang. „Der Vertrag von Lissabon. Eine tragfähige und abschließende Antwort auf konstitutionelle Grundfragen?“ *Integration*, 01 (2008): 6.

5. Taylor, Adam. “Over 1,000 of migrants have died crossing the Mediterranean so far this year” *The Washington Post*, April 25, 2016.

6. At an informal meeting of the Justice and Home Affairs Ministers an (emergency) code of conduct for the EU's return policy with the intention to support Italy was discussed.

7. Rankini, Jennifer, and Giuffrida, Angela. “Austrian troops to stop migrants crossing border with Italy” *The Guardian*, July 4, 2017.

8. Weber, Manfred. “A stronger Europe means more security for the people” *EPP Group Press Release*, June 7, 2017.

9. EPP Group, Establishment of a special committee on terrorism overwhelmingly approved by the European Parliament, Press release..

Agencies have been concluded—such as Europol or the transformation of the European Agency for the Management of Operational Cooperation at the External Borders ‘FRONTEX’ into the European Border and Coast Guard—others like the Dublin IV Regulation remain on the agenda.

Additionally, in 2015 the EU up-dated its European Agenda on Security defining a strategy for establishing a Security Union. Interestingly enough, in July 2016 Julian King was appointed the new European Commissioner from the UK with the Security Union being his portfolio. This already highlights the relevance of security issues for the EU-UK relationship.

2. The UK’s AFSJ participation—a rag rug?

2.1. Volatility in differentiated integration: it’s the sovereignty, stupid

The dichotomy of the sovereignty-led veto reflex and the functional efficiency drive also finds its expression in a system of differentiated integration that is highly volatile.

Differentiation has become integration reality in the EU¹⁰. In spite of the broad variety of concepts, differentiated integration can generally be framed as “one group of EU member states not being subject to the same Union rules as others”¹¹. In terms of the European integration process this is often referred to as a tool for managing heterogeneity among the EU member states regarding the democratic and political will or the objective ability to move ahead. In this sense, it allows for action “in an effective manner while taking the diversity (of member states) into account”¹².

According to Schimmelfennig et. al. differentiated integration is likely in policy areas that witness simultaneous high levels of “interdependencies” and “politicisation”¹³. Differentiation in the AFSJ is therefore no surprise. On the one hand, policies in the AFSJ are closely interlinked and subjected to spill-over effects, because “*freedom* loses much of its meaning if it cannot be enjoyed in a *secure* environment and with the full backing of a system of *justice* in which all Union citizens and residents can have confidence”¹⁴. Thus, the abolition of internal borders created a strong functional need for cooperation and integration in other policy areas. On the other hand, internal security, asylum and judicial cooperation represent “high policies”¹⁵ and, therefore, touch upon the core sovereignty of a nation state.

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This basically explains why the UK, Ireland and Denmark oppose supranational policy-making and acknowledge the benefits of EU-wide cooperation in certain policies of the AFSJ at the same time. Thus, these three countries negotiated opt-outs from this policy area defined in protocols no. 19-21 and no. 36 annexed to the treaties. The UK and Ireland have been able to couple this opt-out with rules of how to opt-into certain policy measures on an ad-hoc basis. The system of differentiated integration established in the AFSJ is hence of a permeable nature.

2.2. The UK pre-Brexit: in- or outsider?

Three protocols annexed to the treaties define the opt-out and opt-in rights of the UK in the AFSJ on a case-by-case basis establishing different derogation regimes for different policy areas.

10. See among others Koenig, Nicole. “A differentiated view on differentiated integration” Policy Paper, Jacques Delors Institut-Berlin, July 23, 2015; Tekin, Funda. *Differentiated integration at work: The institutionalisation and implementation of opt-outs in the Area of Freedom, Security and Justice*. Baden-Baden: Nomos, 2012.

11. Tekin, Funda, and Wessels, Wolfgang. “Flexibility within the Lisbon Treaty: Trademark or Empty Promise?” *Episcope* 1 (2008): 25.

12. Bertoncini, Yves. “Differentiated Integration and the EU: A Variable Geometry Legitimacy.” *EU60 RE-Founding Europe. The Responsibility to Propose*. Istituto Affari Internazionali, 2017: 2.

13. Leuffen, Dirk, Rittberger, Berthold and Schimmelfennig, Frank. *Differentiated Integration. Explaining Variation in the European Union*. New York: Palgrave, 2015.

14. Commission of the European Communities. *Towards an Area of Freedom, Security and Justice, Communication from the Commission*. COM(1998) 459 final. Brussels, 14. July 1998. Emphasis added by the author of this study.

15. Lessing, Guido. “Police and Border Controls Cooperation at the EU Level: Dilemmas, Opportunities and Challenges of a Differentiated Approach.” *EU60 RE-Founding Europe. The Responsibility to Propose*. Istituto Affari Internazionali, 2017.

Participation in the area covered by the provisions of the Schengen acquis is possible only after the legislative procedure has been concluded and is conditional upon unanimous approval of the other EU Member states in the Council¹⁶.

Regarding the remaining provisions of the AFSJ Protocol No. 21 allows for an extended scope of volatility for two reasons. The opt-in only requires a simple, unilateral notification letter from the UK and, hence, is unconditional to a Council approval. Furthermore, the protocol extends the opt-in option to the legislative procedure prior to the final decision in the Council, thus granting the UK a potential voice.

Both sets of rules for the UK's case-by-case participation, however, define safeguarding principles for preventing incoherence within the Schengen and AFSJ acquis¹⁷.

Protocol No. 36 defines the third set of opt-out/opt-in rules applicable only to the UK which has become known as the so-called 'block opt-out'. This protocol defines a transitional period of five years after the entry into force of the Lisbon Treaty for the powers of the Court of Justice of the European Union (ECJ) to be applicable to the pre-Lisbon third pillar acquis, i.e. police and judicial cooperation in criminal matters. Article 10(5) of the protocol granted the UK the right to decide, six months before the expiration of this transitional period, whether it could accept this condition or whether it preferred the respective acquis of more than 100 legislative acts to cease to apply to the UK. In June 2014, the British government chose the latter and made use of the right to opt-back-into a selected set of policy measures by choosing 35 acts¹⁸.

Table 1 summarises these three sets of rules that constitute the volatility of differentiated integration in the AFSJ and that make the UK neither a full out- nor insider.

TABLE 1 ► Patterns of volatility in the AFSJ

	SCHENGEN ACQUIS	AFSJ	PRE-LISBON 3 RD PILLAR ¹⁹
Retroactive-opt-out	no	no	yes
Conditional opt-in	yes	no	no
Opt-into legislative procedure	no	yes	yes

Source: Own compilation.

The body of AFSJ legislation is broad. Since the entry into force of the Lisbon Treaty, the UK had to decide whether to opt-out of or -into 185 proposals for legislative acts or agreements²⁰. By the end of 2016 the UK was still undecided regarding six proposals but had decided to opt-out of 74 (40%) and into 105 (57%). This paper is highlighting the scope and patterns of the UK's pre-Brexit participation by considering the 'flagship' initiatives and measures within the policy areas of 1) Schengen, 2) regular and irregular migration, 3) asylum and 4) security, i.e. police and judicial cooperation in criminal matters.

2.2.1. Regarding the Schengen area, the UK can be considered almost a full but in parts unintended outsider

The Schengen acquis is the body of legislation that regulates the abolishment of internal and the strengthening of external border controls. The UK participates only in the measures relevant to police and criminal cooperation, the fight against drugs and the relevant parts of the Schengen Information System (SIS-II)—excluding immigration aspects²¹.

The block-opt-out of 2014 did not reduce the scope of the UK's participation in the Schengen area, because the British government selected the relevant articles from the Convention on the Implementation of the Schengen Acquis as well as five additional Council decisions to which they opted-back in.

16. Protocol No. 19 annexed to the Lisbon Treaty.

17. For more details see Tekin, Funda. *Differentiated integration at work: The institutionalisation and implementation of opt-outs in the Area of Freedom, Security and Justice*. Baden-Baden: Nomos, 2012.

18. Article 10 Protocol 36 and Council of the European Union, Notification of the United Kingdom under Article 10(5) of Protocol 36 to the EU Treaties, 15398/14, Brussels, 27 November 2014.

19. The pre-Lisbon acquis comprises legislative acts applying both to the Schengen area and the Area of Freedom, Security and Justice.

20. Home Office UK, Ministry of Justice. *JHA (Title V) opt-in and Schengen opt-out decisions taken between 1 December 2009 and the present*. 2016.

21. Council Decisions 2000/365/EC concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis, 29 May 2000, and 2004/926/EC on the putting into effect of parts of the Schengen acquis by the United Kingdom of Great Britain and Northern Ireland, 22 December 2004.

However, the scope of participation is limited because of access denials in policies and agencies related to common border management and regulations on third country nationals. The UK is not participating in FRONTEX. Cooperation with the UK, however, is facilitated through its involvement in joint return operations and participation in FRONTEX missions on a case-by-case basis. Additionally, British representatives can attend the management board without having the right to vote. Furthermore, the UK's request to participate in the standards for security features and biometrics in passports and travel documents issued by member states (Regulation EC No 2252/2004) and to get access to the Visa Information System (VIS, Regulation 2007/2004) was rejected by the Council in 2004, which the ECJ approved.

2.2.2. The UK represents an outsider with little to no engagement and a mixed scope of participation in immigration matters

In regular migration the UK participates only to a very limited extent in terms of both the number of legislative acts—way below 50%—as well as content. The UK chose some procedural measures but stayed out of all of the main legal instruments of the recent past including the Blue Card Directive, the Family Reunification Directive, the Directive on the status of third-country nationals who are long-term residents or the Students and Researchers Directive.

Although the UK's participation in irregular migration policies is also limited, there is a greater interest in European cooperation in this policy area. The pattern of British opt-outs and opt-ins focuses on participation in information exchanges (e.g. the so-called 'facilitation package') and abstaining from common standards and joint rules like Directive 2009/52/EC specifying sanctions and measures to be applied in Member states against employers of illegally resident third-country nationals. The UK, is also not part of the EU's Return Directive, but it has acceded some of the EU's readmission agreements. This reinforces our previous statement that the call of the Brexiteer-campaign in the run-up to the referendum for claiming back control over British borders was misleading, because the UK had never transferred respective competences to the European level.

2.2.3. The UK is actually withdrawing from the EU's asylum policy

The EU is aiming at establishing a sound CEAS. It consists of the Dublin Regulation on the responsibility for examining asylum applications, the Asylum Procedure Directive, the Reception Conditions Directive, the Qualification Directive and the EURODAC Regulation on the EU database of fingerprints of asylum seekers. By 2013, this set of legislative acts had been reformed by ways of a recast procedure.

Whereas the UK was a full insider regarding the initial body of this legislation, it has decided to stay outside of all recast acts, but the Dublin-Regulation (Dublin-III). The legal choice for reforming the CEAS through recasts instead of amendments of the regulations and directives established a peculiar and complex two-level legal system. The recast-acts replaced the former legislation for all EU member states. The UK's abstention from opting into the recasts, however, did not cancel the applicability of EU rules to the British asylum policy altogether. The UK remains bound by the first generation of CEAS legislation.

In 2016, the Commission launched a new round of reforms aiming to establish one legal framework for the CEAS. Additionally, another reform of the Dublin-Regulation (Dublin IV) is discussed in order to integrate relocation or compensation mechanisms²².

2.2.4. In the area of security in terms of police and judicial cooperation of criminal matters the UK seems to have the strongest interest compared to other policies of the AFSJ

As "engaged outsider"²³ it has, therefore, always taken a pro-active stance on such matters aiming to "stop foreign criminals from coming to Britain, deal with European fighters coming back from Syria, stop British criminals evading justice abroad, prevent foreign criminals evading justice by hiding [in the UK], and get foreign criminals out of [their] prisons"²⁴. Hence, the UK is participating in almost the full body of legislative acts including the European Arrest Warrant, the European Investigation Order and the Prüm-Decision on exchange of fingerprints, DNA and vehicle registration data.

22. See also Enderlein, Henrik, and Koenig, Nicole. „Towards Dublin IV: Sharing Norms, Responsibility and Costs” Policy Paper 169. Jacques Delors Institut Berlin. 2016.

23. Adam, Ilke et.al. "The UK in Justice and Home Affairs: the engaged outsider" IES Policy Brief 2. 2016.

24. House of Lords, European Union Committee. *Brexit: future UK-EU security and police cooperation. 7th Report of Session 2016-17.* December 6, 2016: 2.

Additionally, the UK currently benefits from the systems that the EU has set up for guaranteeing and facilitating information exchange between its member states such as the Schengen Information System as far as it concerns police and judicial cooperation in criminal matters (SIS-II), the European Criminal Records Information System (ECRIS), the Passenger Name Record (PNR) as well as data-sharing within the European Police Office (Europol).

Finally, the UK is also full member of the EU's agencies within this policy area including Europol and the European Union's Judicial Cooperation Unit (Eurojust) and has framed the set-up of the European Public Prosecutor's Office (EPPO). Just a little more than two years ago, the UK reconfirmed its vital interests in these measures, information-exchange-systems and agencies by including them in the list of the 35 measures from the pre-Lisbon acquis that the UK decided to exclude from the block-opt-out at the end of 2014. The decision to remain part of the reformed Europol has been taken as recently as May 2017.

2.3. Preliminary take-aways for a shopping-list for the best deal

In light of the UK's scope of participation in the AFSJ we can establish a clear pattern of out- and insidership of the UK representing the

- 'engaged outsider'²⁵ in police and judicial cooperation in criminal matters,
- 'insider on its way out' in the CEAS,
- 'partly unintended outsider' in the Schengen area and
- 'disengaged outsider' in immigration matters.

This pattern of different degrees and scope of participation in the AFSJ results from the volatility of differentiated integration and distinguishes the AFSJ from the other EU policy areas in light of a potential Brexit. It allows us to draw preliminary conclusions regarding interest structures and hence how to shop for the best Brexit-deal in the AFSJ.

FIGURE 2 ► Brexit: Shopping for the best deal?



Illustration: Cinthya Nataly Haas-Arana

25. This term is also used by Adam, Ilke et.al. as indicated in footnotes 3 and 23.

Throughout the past decades including the very recent years the UK has filled its shopping cart with AFSJ policies based on “a positive decision and assessment”²⁶. This leads to the conclusion that the scope of its participation in the AFSJ is already representing the best of British interests, pre- as well as post-Brexit.

The converse argument could be that the pattern of the UK’s participation is also giving information about those policies in which the EU is having an interest in cooperation with the UK. This is, of course, a stronger argument regarding the Schengen acquis than the other AFSJ matters, because the UK’s participation is conditional upon unanimous approval by the Council only concerning the former.

The following three observations on the practical implications in the AFSJ in light of a Brexit shall therefore guide the further analysis in this paper:

1. The right to cherry-pick individual policies within the AFSJ represents a privilege for the UK that it is about to give up.
2. Different interests in individual policies of the AFSJ are reflected in the pattern of the UK’s participation and, therefore, Brexit will have mixed effects. The main point of contention in structural terms will be the question of the role of the ECJ in future EU-UK relations in the AFSJ. We can identify security cooperation as the main area of interest convergence between the EU and the UK.
3. As a consequence of Brexit the UK will lose its influence to frame AFSJ policies, standards and agencies altogether. In the long term this will imply that even if the UK was able to safeguard participation in some policy measures as an EU-outsider, it could face the dilemma of being obliged to implement standards and rules that do not find British approval as the acquis will progress in the future.

3. In the AFSJ Brexit does not mean Brexit

” THE BREXIT NEGOTIATIONS ON THE AFSJ WILL RESEMBLE A DRAMA IN THREE ACTS.”

Now that Article 50 TEU has been triggered, we have entered a “drama in three acts”²⁷ in terms of the different negotiation phases. If negotiations proceed strictly in line with the treaty provisions the first two years will deal with the withdrawal, exclusively. It is only in the second phase when the future relations between the EU27 and the UK should be brought to the table. Finally, the EU27 will need to deal with “the rest”, i.e. the reconfiguration of the EU treaties²⁸. The mixed effects of Brexit on the AFSJ can be structured in light of this ‘drama’.

British citizens living abroad and EU citizens living in the UK will become third country nationals as soon as the first act has been concluded. Therefore, immigration coupled with citizens’ rights—although currently not a major interest for the EU or the disengaged outsider ‘UK’—is considered to become a dealmaker or -breaker. Hence, general conditions should feature already in the negotiations on the withdrawal, and this as early as possible²⁹.

Regarding the Schengen acquis that is not dealing with police and judicial cooperation in criminal matters as well as the CEAS neither the EU nor the UK seem to stand to lose much, since the UK is currently not an active member. These issues could thus be well postponed to the second phase when the EU27 will negotiate its future relationship with the UK.

26. Theresa May quoted in House of Lords, European Union Committee. *Brexit: future UK-EU security and police cooperation. 7th Report of Session 2016-17*. December 6, 2016: 6.

27. Kreilinger, Valentin. “Brexit: Negotiation Phases and Scenarios of a Drama in Three Acts” Policy Paper NO.182, Jacques Delors Institut—Berlin, January 25, 2017.

28. Ibid.

29. See also European Council, *Guidelines following the United Kingdom’s notification under Article 50 TEU*. Special meeting of the European Council (Art. 50) (29 April 2017)—Guidelines, Brussels, April 29, 2017.

The relevance of security matters already became evident when Theresa May triggered Article 50. In her letter to Donald Tusk she included reference to the EU's potential loss of capability to defend "itself from security threats"³⁰ in case of a Brexit. The EU and particularly the EP felt "blackmailed" and immediately criticised the British Prime Minister for establishing a link between security matters and Brexit in terms of a trade-off³¹. Thus, all security-relevant cooperation can also wait for the second phase of negotiations, but will represent main bargaining chips for framing the future relationship as both sides stand to lose from a complete Brexit.

3.1. EU nationals in the UK and vice versa: first things first

3.1.1. What is at stake?

As soon as the UK exits the EU, it will become a third country and respective citizens living abroad will be considered third-country nationals. Regarding the effects of Brexit we need to distinguish between those EU/UK citizens already living abroad and those that might plan to settle in the UK or EU respectively after the UK has exited the EU.

Currently there are about 1.2 million British people residing in another EU member state and estimated 3.3 million people from other EU member states living in the UK³². Before Brexit, they are benefitting from the free movement within the EU. After Brexit, they as well as newly arriving citizens from abroad will qualify as immigrants.

With regard to the current expats the main concern is the preservation of their rights such as access to health care, education and pensions. For UK citizens the possibility of being treated differently by each individual EU member state post-Brexit on visa issues for example adds to the insecurity. Against this backdrop, mutual interests of the EU and the UK can be considered high and citizens' rights, although not too controversial, can be considered a highly politicised issue.

3.1.2. What are the main points of conflict?

This means that it will not be an easy question to answer. The principle of reciprocity and the question of whether the jurisdiction of the ECJ or the national courts should be applicable post-Brexit currently complicate negotiations.

3.1.3. What is the UK position and EU position?

In light of the principle of reciprocity and the principle of "equal treatment amongst EU27 citizens and equal treatment of EU27 citizens as compared to the UK"³³ a clear definition of the persons to be covered, their respective rights to be protected as well as the courts responsible for settling disputes is required. The EU's respective demands root in the legislation on free movement within the EU and coordination of social security systems³⁴. The British Prime Minister Theresa May presented the UK's concept on "safeguarding the position of EU citizens living in the UK and UK nationals living in the EU" on 26 June 2017³⁵.

Both concepts define a period of five years of continuous residence in the UK or EU respectively as condition to qualify for permanent residence. The UK however, envisages specifying a cut-off date anytime between the day when Article 50 TEU was officially triggered and the day of the UK's withdrawal from the EU. Only residents who arrived in the UK prior to that date would be considered automatically eligible for the so-called "UK settled status".

30. Letter from Prime Minister, Theresa May, to the President of the European Council, Donald Tusk, triggering Article 50, March 29, 2017.

31. "Don't blackmail us over security, EU warns May" *The Guardian*, March 30, 2017.

32. Migration Watch UK. "The British in Europe—and Vice Versa" March 23, 2016.

33. Council of the European Union. ANNEX to Council decision (EU, Euratom) 2017/... authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union, Brussels, May 22, 2017: 8.

34. Ibid.

35. HM Government. *The United Kingdom's Exit from the European Union. Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU, presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty*, June 2017.

The EU demands to set this cut-off date no earlier than the date of the withdrawal agreement, in order to avoid any discrimination regarding the access to residency rights between the EU citizens residing in the UK pre-Brexit³⁶.

Regarding equal rights and treatments several uncertainties and controversies persist. Whether students, for example, who have the right to finish their studies in the UK would also be allowed to stay on for their professional career remains an open question. Even more controversial is the question of family reunification for couples getting married after the UK's exit from the EU. The UK's law, contrary to EU law of free movement, does not grant automatic right of family reunification but defines an income threshold. Thus, equal treatment of EU27 citizens compared to UK citizens is not guaranteed.

” THE MAIN POINT OF CONTENTION ARE THE COMPETENCES OF THE COURTS. ”

While those questions can be fine-tuned during the upcoming negotiations the main point of contention is the competences of the courts. The positions of the EU and the UK alike are firm and contrary. The EU demands the maintenance of the ECJ's jurisdiction for all disputes in relation to citizens' rights matters to which the UK strongly opposes. The British government perceives the new arrangements on citizens' rights to be enshrined in UK law and therefore to be enforceable through their judicial system. Jurisdiction of the ECJ is hence not acceptable.

Another core objection of the British government with far-reaching consequences concerns the free movement of persons and workers after the UK's withdrawal from the EU. This means that EU citizens will have to apply for permission to stay under immigration law applicable to third-country nationals. New rules might be in place but still remain to be defined³⁷. If the rights of free movement are lifted, UK citizens will also be subjected to immigration law for third-country nationals in the EU and its member states. While this would allow the UK to keep its promise to protect the British labour market and welfare system, access of British nationals to the EU's labour market will be limited in return.

Respective rules are complex but the main effect will be that the anti-discrimination principle of the EU will not apply to UK citizens anymore. Additionally, students and researchers will not enjoy equal treatment compared to EU nationals in terms of tuition fees or permission to work³⁸.

Finally, Brexit would have effects on cross-border movements between the EU member states and the UK such as visa, expulsion or asylum policies. Generally no visa would be required for a stay of 90 days within a period of 180 days, but each member state would have the right to individually decide on any visa requirements. The EU's Return Directive providing common standards and procedures for returning non-EU nationals staying illegally on their territory and declaring re-entry bans would apply also to UK nationals. They would, however, become eligible for seeking asylum in the EU.

3.1.4. What next?

The point that both sides agree on is the necessity to settle the question of citizens' rights as early as possible—in any case before the termination of the Article 50 TEU procedure. In the case of the (worst-case) scenario of a so-called 'dirty Brexit', i.e. no withdrawal agreement at the end of the two-year period after the Article 50 TEU procedure has been triggered, the rights of the EU citizens in the UK vice versa will have to be clarified. The following three observations should guide the ways ahead:

1. Reconsideration of ECJ competences: The political demands regarding the main point of contention in terms of which court will be applicable for jurisdiction have been made clear. The EU and the UK alike will

36. See also European Parliament. *Negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union*, European Parliament Resolution (2017/2593(RSP)). Brussels, April 5, 2017.

37. HM Government. *The United Kingdom's Exit from the European Union. Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU*, presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, June 2017.

38. See Guild, Elsbeth et. al. "After a hard BREXIT: British citizens and residence in the EU" Brexit Briefings. ILPA. November 9, 2016.

be well advised, however, to reconsider their position in light of a thorough legal assessment in how far direct jurisdiction of the ECJ will be possible and necessary.

2. Firm stance on the principle of reciprocity: The ‘UK settled status’ should be equal to the rights under free movement of the EU, because British citizens in the EU cannot lay claim to more rights under EU law than EU citizens who stay on in the UK enjoy under British law.

3. No concessions on immigration matters: Once the UK has withdrawn from the EU and wishes to abolish the principle of free movement of persons there will be no need to renegotiate any immigration laws, because the UK cannot ask for preferential treatment over other third-countries.

3.2. Border controls and CEAS—not much to lose

3.2.1. What is at stake?

As the UK is not part of the Schengen area, it has never given up control over its borders. *Vis-à-vis* the other EU member states this control has been taken seriously and implemented effectively. Since 2010, over 6,500 individuals from the EU and the EEA have been denied entry into the UK³⁹. At the same time, the UK does not have access to immigration alerts within the Schengen Information System. Furthermore, the UK has not been integrated into FRONTEX. And yet, the UK has frequently and actively contributed to FRONTEX operations as an associated country. In 2015, it was involved in five air, one land and three sea operations of which it hosted one operation at land⁴⁰.

The UK also shows general interest in the EU’s asylum policy, which the member states have developed in order to compensate for the abolition of controls at their internal common borders. But currently, the UK is bound by different legislation than the EU27 as explained above. Ireland’s scope of participation in the CEAS resembles the UK’s, because it shares a Common Travel Area with the UK and benefits from the same opt-out/opt-in rules in the AFSJ as the UK. Hence, the EU26 and the UK—and Ireland—are already operating on different sets of legislation regarding asylum policy.

This highlights that neither regarding border controls nor the CEAS there is much at stake in case of a Brexit.

3.2.2. What are the points of conflict and the UK and EU positions?

Nevertheless one should take the following observations into consideration.

The UK and Ireland are determined to maintain their Common Travel Area. Furthermore, both countries do not participate in the Schengen area. Consequently, the status of the border between Northern Ireland and the Republic of Ireland will most likely remain open.⁴¹ Nevertheless, this border question represents a controversial issue once the principle of free movement of workers would be abolished (see above).

The UK has always had an interest in extending its access to SIS-II beyond the information concerning policing and judicial cooperation. So far this interest has remained almost unnoticed by the Schengen member states. Only the New Settlement for the UK in the EU negotiated by the British Prime Minister at the time, David Cameron, envisaged strengthening the exchange of information in order to enhance the powers to refuse entry at the borders⁴². In case of a Brexit the UK’s leverage for negotiating a similar scope of extended access however would be diminished.

39. Cabinet Office, Government UK. *The UK’s cooperation with the EU on justice and home affairs, and on foreign policy and security issues*. Background Note, May 9, 2016: 2.

40. FRONTEX. *General Report 2015*. The European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union, Warsaw.

41. See also HM Government. Northern Ireland and Ireland. Position Paper, August 2017.

42. European Council. *Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union*. EUCO 4/16, Brussels, February 2, 2016.

In terms of FRONTEX, the framework for the UK's participation in operations will persist. The regulation on FRONTEX contains numerous references to agreements with third countries as well as provisions on how to structure and facilitate this kind of cooperation. Currently there are 17 agreements with third countries and two with regional organisations⁴³.

As the next round of reforms of the CEAS was launched in 2016 in reaction to the so-called 'refugee crisis', the UK's withdrawal would facilitate such plans. Additionally, to its abstention from participating in the recasts of the CEAS directives and regulations of 2013 the UK also decided to opt-out of the latest reform plans for the Dublin Regulation (Dublin IV). The British government opposes the quota-based distribution schemes and the financial compensation measures proposed by the Commission. Thus, a Brexit would almost re-establish legal coherence and clarity for reforming the CEAS, as all EU member states except for Ireland would be bound by the same legislation.

3.2.3. What next?

” IN TERMS OF BORDER CONTROLS AND THE CEAS EVEN A 'HARD BREXIT' WOULD NOT CHANGE MUCH.”

In terms of border controls and the CEAS even a 'hard Brexit' would not change much since the UK has been an outsider or an insider on its way out. Furthermore, options of flexible forms of participation also with third countries already exist where necessary, e.g. Frontex. Consequently, there is also only little to negotiate for regarding different 'soft Brexit' options. The other EU member states have already accepted respective British opt-outs and hence there is only little leverage for insisting on any sort of extension of the UK's participation—for example in the CEAS—in the future. However, if the UK should show interest in the EU's asylum policy after Brexit, the EU should demand the UK's commitment to the full set of reformed legislation within the CEAS. Referring to the picture displayed in Figure 2, the UK should be required to push the entire asylum policy back into its shopping-cart for AFSJ participation.

3.3. Police and judicial cooperation in criminal matters—much to lose or to gain?

3.3.1. What is at stake?

The UK and the EU alike have benefitted from British participation in police and judicial cooperation in criminal matters. In spite of the difficulties in setting up the European Arrest Warrant, this tool, for example, has been highly valuable. Before 2004, the UK extradited less than 60 individuals annually. After that and under the framework of the European Arrest Warrant it has extradited about 7,000 individuals to other EU member states while they extradited 1000 individuals to the UK⁴⁴. The European Arrest Warrant has not only increased the numbers of successful extradition but also the speed of the procedure. Nowadays, extraditions can be processed within weeks. An example is Hussain Osman who was the mastermind behind a failed bombing attack in London in 2007 and was extradited from Italy to the UK only 56 days later. Before the European Arrest Warrant such procedures could well last a couple of years⁴⁵.

The UK's participation in the EU's agencies of police and judicial cooperation in criminal matters, Eurojust and Europol, have also facilitated the fight against cross-border crime. The UK has always been a particularly active member state. It has participated in over 30 Joint Investigation Teams, which makes it the biggest user of these cross-border initiatives. There are numerous examples of simultaneous arrests with British officials coordinated through and facilitated by the information exchange of Europol.

The UK is the second largest contributor in Europe to the Europol Information System and is using about 40% of the capacity of the Secure Information Exchange Network Application (SIENA)⁴⁶. The UK's strong involve-

43. Jones, Chris. "Briefing. Frontex: cooperation with non-EU states" Statewatch. March 2017.

44. Cabinet Office, Government UK. *The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues*. Background Note, May 9, 2016: 3.

45. Ibid. p. 3.

46. House of Lords, European Union Committee. *Brexit: future UK-EU security and police cooperation*. 7th Report of Session 2016-17. December 6, 2016: 20.

ment in the EU's policing activities is also reflected in structural terms as the Executive Director of Europol, Rob Wainwright, is a British national. His term, however, is due to end in 2017. Although the UK opted into the reforms of Europol in May 2017 it is rather unlikely that it will be prolonged.

There are also numerous examples of how the EU and the UK have mutually benefitted from other joint policing measures and information exchanges such as the Prüm measures, the Passenger Name Records or the European Criminal Records Information System. The latest most prominent example of the effectiveness of Prüm was the identification of Salah Abdeslam as one of the terrorist attackers from November 2015 in Paris through the exchange of DNA and fingerprint Data between the French and Belgian authorities.

The functional need for cooperation in light of cross-border criminality and threats neutralises the UK's privileged right of cherry-picking the scope of its participation in police and judicial cooperation in criminal matters. It represents an actively engaged partner that is risking to have the door shut in its face after Brexit.

3.3.2. What are points of conflicts and the UK and EU positions?

Negotiations on EU-UK relations in police and justice cooperation in criminal matters have not yet officially started. Nevertheless, crucial questions resulting from a potential Brexit relate to

- whether the UK will be able to continue participation as third-country and if so to what extent,
- what effect would the loss of its seat at the decision-making table have and
- what would the role of the ECJ look like.

In light of the individual measures, information exchange systems and agencies there are certain precedents that can provide information for answering these questions.

**” NOTHING WOULD
OBSTRUCT THE
UK'S CONTINUED
PARTICIPATION IN FORM
OF AN ASSOCIATED
THIRD-COUNTRY.”**

There is the possibility for third-countries to conclude bilateral extradition agreements with the EU. Norway and Iceland have done so, but both countries are part of the Schengen area which the UK is not. The same applies to replacement agreements for continued participation in the Prüm cooperation. Additionally, third-countries are already involved in Eurojust and Europol. Thus, nothing would obstruct the UK's continued participation in form of an associated third-country.

The question rather relates to the scope of its access to the relevant information systems. The UK would lose direct and automatic access to the Europol information system and SIENA being obliged to ask Europol for the relevant data exchange. Denmark's arrangement for association to Europol that necessitated from the reform of this agency under the provisions of the Lisbon Treaty in spring 2017 sets a very recent precedent. It foresees the need for Denmark to process individual requests from Danish security services for access to the databases. However, the fact that Denmark is a rather a small country with a more limited scope of information and data exchange needs to be taken into account when assessing the potentials of striking a mutually beneficial deal with the UK.

The exchange of data requires a common framework for data protection. If the UK continues to participate as an associated third country, it will lose its influence over future EU decisions on data protection standards. This contrasts with the Brexiters' aim of taking back control. Another main point of contention will be the question of ECJ competences, once again. Compared to the question of the compatibility of immigration law, there is a more direct link to the ECJ's jurisdiction in case of policing and criminal cooperation matters. The UK would participate in common cooperation frameworks of the EU implementing parts of the acquis. Therefore, the ECJ's jurisdiction would have to apply.

3.3.3. What next?

The security dimension is the area in which both sides stand to lose most from a 'hard Brexit' and would gain from 'softer' options. The EU's leverage in the negotiations is limited by its own interest in British intelligence

services and judicial cooperation, but security cooperation still represents a bargaining-chip. The UK risks losing more if it were fully denied access to the area of policing and judicial cooperation among 27 member states. These two Brexit options can be framed as follows:

1. Old wine in new bottles: The UK could remain the engaged outsider in security matters even in case of a Brexit. The current pattern of EU-UK cooperation can represent the blueprint for this 'soft Brexit' solution. It is highly unlikely that the UK will be willing to participate in more policies than covered by the current commitment. There is no need to cancel longstanding and so far successfully established cooperation with mutual benefits from the EU's side. The main condition would be the acceptance of the direct ECJ jurisdiction in the respective areas. This might represent a smaller stumbling block than in case of the citizens' rights question: with the block-opt-out decision the UK has already defined the scope of policy measures in which it accepts ECJ jurisdiction in this policy area. There is only little reason why this should change in the future. Additionally, the UK would lose its active say in the EU's legislation and management boards of the EU's agencies. Nevertheless, this can be considered a win-win solution.

2. Showing the UK the door: The fall-back scenario would always be a full withdrawal of the UK from the EU's police and judicial cooperation in criminal matters. Such a scenario would require the definition of transitional periods in order to allow for sufficient time to disentangle the UK from the AFSJ. This would represent the lose-lose solution as both sides would lose a partner fighting cross-border threats and challenges.

4. Conclusion and lessons learned: How to shop for the best Brexit deal in the AFSJ

Brexit will make a difference in the AFSJ that would negatively affect the UK as well as the EU27. Of course, the UK stands to lose more than the EU. It would give up on its privilege to pick-and-choose its scope of participation and risks being excluded from policies in which it has vital interests. A 'hard Brexit'—full withdrawal of the UK from the AFSJ—would be a worst-case scenario also in this highly differentiated policy area. So what are the 'soft Brexit' options?

The basic line of argumentation of this paper combined the UK's patterns of insider- and outsidership and political interests of the EU and the UK. Drawing from the respective analysis the following three lessons should be taken into consideration when the EU and the UK shop for the best Brexit deal in AFSJ matters:

4.1. Past patterns of UK participation in AFSJ are necessary but not sufficient criteria

Looking at the scope of the UK's integration in the AFSJ, one can conclude that it is already more an outsider than an insider. However, to deduce that the pattern of insider- and outsidership presents us with a perfect template for 'soft Brexit' options would be premature and misleading: Brexit can impact on the political relevance of individual policy areas. Immigration policy, that has been of little relevance so far, because the UK represented a 'disengaged outsider', has already turned into a vital question because a Brexit would transfer citizens' rights issues into the immigration realm. The challenge is how to grant similar rights and access under immigration laws to uphold the principle of reciprocity.

4.2. Tailor-made Brexit required in the AFSJ

It will make a difference whether the UK participates in AFSJ matters as a EU member state with opt-out rights or as a third-country with association rights. There is no blue print that could provide the framework of a 'soft Brexit'. Hence, a tailor-made approach with the following cornerstones will be required:

- First, existing association frameworks for third countries such as the "European Economic Area Model" of Iceland, Norway and Liechtenstein or the "Swiss Model" do not represent perfect matches for the UK's

incomplete withdrawal from the AFSJ. These countries are Schengen signatory states and they accept the free movement of persons and workers.

- Second, the UK's future participation in the AFSJ should focus on those policy areas in which a full Brexit would represent a lose-lose situation, i.e. internal security. Policies such as asylum would qualify for a 'soft Brexit' but only on terms of full participation of the UK.
- Third, the institutional framework will be crucial. As associated country, the UK will have to accept losing its seat at the decision-making table. At the same time the EU demands applicability of the ECJ in order to guarantee the full implementation of EU standards and rules also in an 'outsider'-UK. This represents one of the main points of contention and will require further careful legal analysis.

4.3. Dynamic Brexit solution required within a fixed framework

The AFSJ represents one of the EU's most dynamic policy areas. Thus, 'soft Brexit' options cannot represent a fixed point but will have to move along with the evolution of the respective AFSJ acquis. The UK's demand to gain back control over national politics will consequently be questioned. Regardless of the form and scope of 'soft Brexit' options, a solution cannot entail a continued British 'cherry picking' right. Thus, the UK, just like all other associated countries, should be required to implement the future AFSJ acquis having been cut-off its right to participate in the respective decision-making and to benefit from the best of both worlds by having the freedom of choice.

By conclusion we can state: The UK is not leaving Europe. More importantly it cannot fully withdraw from the Area of Freedom Security and Justice and its externalities. The UK could and should remain an essential partner in 'l'Europe qui protège'—even if its status changes to that of an associated outsider.

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