Future Partnership in EU-UK Cross-Border Civil Judicial Cooperation

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Abstract

In the past 40 years, the EU has established a very successful and effective civil judicial cooperation scheme that applies to reduce barriers caused by coexistence of different legal systems to smooth cross-border activities and transactions in the single market. This scheme would cease being effective between the UK and other EU Member States after Brexit. The UK government has proposed that the optimal option is to establish a special partnership with the EU to maintain the existing cooperation after Brexit, which is not ecoed by the EU. This article aims to explore the feasibility of establishing such a future partnership in civil judicial cooperation and to examine the existing models that may be followed by the UK. It suggests that neither the Denmark model nor the Lugano II model would work effectively and recommends a unique 'UK model' to establish the future UK-EU civil judicial cooperation partnership.

1. Introduction

On 29 March 2017, the UK Government invoked Article 50 of the Treaty on European Union (TEU), which would result in the UK leaving the EU on 29 March 2019. In order to maintain consistency and avoid the cliff-edge effect of Brexit on the UK law, which is largely influenced by the EU law, the UK Government has proposed the European Union (Withdrawal) Bill ('Great Repeal Bill').[1] Upon the Parliamentary approval, the Great Repeal Bill will become the Great Repeal Act to enter into effect on the day of exit. This Act will transpose the accumulated body of EU law, the *Acquis Communautaire*, into the UK law on the exit day.[2] This transposition approach, however, does not provide the expected certainty and consistency in the field of cross-border civil judicial cooperation, which concerns harmonised EU law in deciding jurisdiction, applicable law and enforcement of judgments in civil, commercial and family matters, and judicial and administrative assistance in cross-

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[1] Theresa May, 'Theresa May's Conservative Conference Speech on Brexit', Politics Home, 2 Oct 2016.

[2] HM Government, 'Legislating for the United Kingdom's Withdrawal From the European Union (White Paper)', March 2017.

border civil proceedings.[3] Many EU judicial cooperation rules are based on reciprocity between different Member States, which cannot be unilaterally maintained by the unilateral 'transposition' approach.[4]

Because of the inadequacy of the transposition approach, most commentators suggest the UK should enter into a special arrangement with EU to maintain the reciprocal obligations of both sides.[5] This approach is endorsed by the UK Government in its position paper published in August 2017 as the 'optimum outcome for both sides'.[6] However, the same intention has not been demonstrated in the EU position paper published in July 2017.[7] The disparity questions whether a future partnership approach is feasible in reality. In terms of a "hard Brexit", judicial cooperation between the UK and EU would terminate after the transition period, which may hamper future interaction between citizens and companies in both sides unless both the UK and EU join an alternative effective international framework covering all relevant fields, which do not currently exist.[8] Furthermore, although the UK position paper proposes this approach, it is very general and abstract and lacks details on how this special partnership is designed. This article aims to address these questions. It first provides a general overview of the current EU-UK civil judicial cooperation framework. Section 3 studies the official position papers published by the EU and UK respectively and explore the feasibility to establish future EU-UK partnership in civil judicial cooperation taking account of the practical and political reality. It concludes that maintaining healthy judicial cooperation would be mutually beneficial to both sides. Based on this conclusion, section 4 examines two existing models, i.e. the Denmark Model and Lugano II Model, and suggests that the best option for the UK is to establish a unique, unprecedented 'UK Model', which would be similar, but not identical, to the Lugano II Convention, which will convert the current EU law into a few international conventions to regulate the post-Brexit civil judicial cooperation between the UK and EU Member States.

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[3] House of Lords, Brexit: Justice for Families, Individuals and Businesses?', https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/134.pdf (accessed on 4 July 2017), paras 26-38.

[4] HM Government, 'The Repeal Bill: White Paper' (30 Mar 2017), para 3.3; J. Fitchen, 'The PIL Consequences of Brexit", (2017) 3 *NIPR* 411, 411-42.

[5] S. Masters, B. McRae, 'What does Brexit mean for the Business Regime?',(2016) 33 Journal of International Arbitration 483, 484. This opinion has also been provided by Prof Jonathan Harris QC in oral evidence to the House of Lords in'Brexit: Civil Justice Cooperation', 13 Dec 2016.

[6] HM Government, 'Providing a Cross-Border Civil Judicial Cooperation Framework: A Future Partnership Paper' ('Civil Judicial Cooperation Paper'), para 18.

[7] European Commission, 'Position Paper on Judicial Cooperation in Civil and Commercial Matters', TF50(2017)9/2, 12 July 2017.

[8] The Hague Conference on Private International Law has adopted a few international conventions covering similar areas. Ideally the UK will ratify more conventions as an independent state after Brexit, but international conventions are not advanced as the EU instruments and include more gaps and reservations.

2. EU Cross-Border Civil Judicial Cooperation: An Overview

EU aims to establish a single market to facilitate cross-border transactions and activities.[9] With the increasing integration, more EU citizens work, live and study in a Member State which is not their home and more businesses engage in cross-border commercial activities in other EU Member States. Due to the coexistence of 28 different judicial systems, individual and companies taking part in cross-border activities inevitably face the uncertainty as to which country's substantive law applies to their rights and obligations, which court is competent to hear potential disputes arising out of the cross-border relationship and to assist them to seek redress, and whether their rights awarded by the courts or tribunals of one Member State can be recognised and enforced in other Member States.

In order to provide certainty and establish a truly 'seamless' single market, the EU has adopted a large number of EU Regulations and directives providing harmonised rules to promote mutual trust and to facilitate effective cross-border civil judicial cooperation between Member States.[10] The current EU judicial cooperation framework covers a large number of matters, from civil and commercial matters,[11] to family and succession,[12] to insolvency,[13] and to relevant cross-border civil procedural rules.[14] The ultimate purpose is to facilitate the mutual trust and cooperation between courts of different Member States in cross-border proceedings, and to improve certainty of individuals to enforce their cross-border rights through the uniform jurisdiction and choice of law rules. Although the EU constitution gives the UK the right to opt out from the judicial cooperation legislation,[15] the

[9] The single market is said to be one of EU's 'major achievements' and 'best asset'. 'European Commission, 'Priority: Internal Market', https://ec.europa.eu/commission/priorities/internal-market_en (accessed on 31 Oct 2017).

[10] Article 65 of the TEC; Tampere Meeting 1999; Hague Programme 2004; Art 81(3) of the TFEU.

[11] Such as jurisdiction and enforcement of judgments in civil and commercial matters (Reg 1215/2012 (Brussels I Recast), [2012] OJ L 351/1); choice of law in contract (Reg 593/2008 (Rome I), [2008] OJ L177/6); choice of law in non-contractual obligations (Reg 864/2007 (Rome II), [2007] OJ L199/40).

[12] Such as jurisdiction and judgments in matrimonial matters and parental responsibility (Reg 2201/2003, [2003] OJ L338/1); private international law in maintenance (Reg 4/2009, [2009] OJ L7/1); applicable law in divorce (Reg 1259/2010, [2010] OJ L 343/10); private international law on succession (Reg 650/2012, [2012] OJ L 201/107).

[13] Reg 2015/848 on insolvency proceedings (Recast), [2015] OJ L 141/19.

[14] Such as service of procedure abroad (Reg 1393/2007, [2007] OJ L324/79); taking evidence abroad (Reg 1206/2001, [2001] OJ L174/1).For a complete list of the relevant EU law, see EU Position Paper, paragraph II: Material Scope.

[15] Protocol No 21 of the Treaty of Lisbon.

UK has opted in most of these EU legislations, except divorce proceedings [16] and succession.[17]

The EU civil judicial cooperation scheme has played an important role in promoting cross-border trade and transactions, as well as other activities between the UK and the EU. Most commentators suggest that the EU law on civil judicial cooperation works effectively and successfully in facilitating cross-border activities.[18] As the UK's largest trading partners, in 2016, 44% of UK exports went to the EU and 53% of all UK imports came from the EU.[19]In terms of employment, there were estimated 2.37 million people from other EU Member States (EU27) were employed in the UK between April and June 2017.[20]In terms of residence, around 6% of the population (3.6 million people) living in the UK in 2016 were EU27 citizens, and around 1.2 million UK citizens living in EU27.[21] The intensive trade, business and family connection between the EU and UK emphasises the importance of continuous civil judicial cooperation to provide certainty and to protect parties in cross-border transactions and other activities. Without any special arrangement, the current EU judicial cooperation scheme will cease being effective between the EU and the UK,[22] which will result in the loss of certainty for cross-border players in both the UK and the EU, and cause the difficulty to enforce the UK judgments in other EU Member States and vice versa.[23]

3. The Official Positions and Feasibility of Future Partnership in Civil Judicial Cooperation

[16]Reg 1259/2010.
[17]Reg 650/2012.
[18] See M Pfeiffer, "Legal Certainty and Predictability in International Succession Law", (2016) 12 Journal of Private International Law 566; M Danov and P Beaumont, "Measuring the Effectiveness of the EU Civil Justice Framework", (2015-16) XVII Yearbook of Private International Law 151; S.C. Symeonides, "Codification and Flexibility in Private International Law", in K.B. Brown and D.V. Snyder (eds), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law* (Springer, 2012) 167.
[19] ONS Statistical Bulletin, 'Balance of payments: Jan to Mar 2017', 30 June 2017, Tables B and C, https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/bulletins/balanceofpayments/jantomar2017 (accessed on 31 Oct 2017); cited in Matthew Ward, 'Statistics on UK-EU trade', House of Commons Briefing Paper No 7851, 17 Aug 2017, file://campus/home/home40/nzt5/Downloads/CBP-7851.pdf (accessed on 31 Oct 2017).
[20] H. Smith, 'Brexit: Number of EU citizens working in UK hits record high despite leave vote', *Independence*, 16 August 2017 11.08 BST, http://www.independent.co.uk/news/business/news/brexit-latest-eu-citizens-living-uk-record-high-applicants-european-union-a7896151.html (accessed on 31 Oct 2017).
[21] Note, 'EU citizens living in the UK', *Full Fact*, 19 Oct 2017, https://fullfact.org/immigration/eu-citizens-living-uk/ (accessed on 31 Oct 2017).
[22] A Dickinson, 'Back to the Future', (2016) 12 *Journal of Private International Law* 195; J. Fitchen, *supra* n.4, 423; S. Masters, B. McRae, 492.
[23] C. Fairbairn, 'Brexit: Civil Judicial Cooperation', file://campus/home/home40/nzt5/Downloads/CBP-8092.pdf (accessed on 31 Oct 2017).

3.1 EU Position Paper

In the summer 2017, both the European Commission and the UK Government have published their Position Papers. The EU position paper proposes that the current EU civil judicial cooperation law shall continue to apply after Brexit in five cases:[24](1) to decide the law applicable to contractual and non-contractual obligations for contracts concluded and events occurred before the withdrawal date; (2) to establish the competent court for proceedings brought before the withdrawal date; (3) to assess and enforce choice of court clauses concluded before the withdrawal date; (4) to enforce judgments rendered before the withdrawal date; (5) to govern judicial and administrative assistance of court proceedings for procedures and requests pending on the withdrawal date.[25] Although this Position Paper may not rule out the possibility for the EU to enter into a long-term civil judicial cooperation with the UK in the future, it is based on the presumption of separation. The EU aims to protect certainty and clarity to citizens and businesses on the immediate effects of Brexit.[26]From the practical point of view, if the events that give rise to the parties' rights and obligations occur before Brexit, the parties have reasonable expectation of their rights and obligations pursuant to the pre-Brexit EU law and that expectation should be protected to ensure certainty and consistency. From the theoretical perspective, the EU's position is close, but different, to the doctrine of 'acquired rights'. The concept of 'acquired rights 'is not present in the EU law. Art 1 of Protocol 1 of ECHR clearly protects 'possessions' of 'every natural or legal person'. [27] Furthermore, individual's 'acquired rights' is a recognised principle in international customary law, which protect 'private rights acquired under existing law' that would not be affected by the change of sovereignty.[28] However, international law usually limits the application of acquired rights to property rights. Although they include intangible property rights, such as certain contractual rights and judgment credit,[29] they may not be easily extended to all procedural certainty provided by EU private international law. The 'acquired rights' doctrine in international law may only be relied on to justify the continuity of EU law in enforcing judgments delivered before the withdrawal, but not other procedural

[24] European Commission, 'Position paper on Judicial Cooperation in Civil and Commercial Matters' ('EU Position Paper'), 12 July 2017, TF50(2017) 9/2-Commission to UK.
[25] EU Position Paper, *supra* n 24,para I.
[26]European Council, 'Guidelines following the United Kingdom's Notification under Article 50 TEU' ('EU Guidelines'), 29 April 2017, EUCO XT 20004/17, 4.
[27] ECHR, Protocol 1, Art 1(1).
[28]*German Settlers in Poland* (1923) PCIJ; *Miller v. Secretary of State for Exiting the EU* [2016] EWHC 2768 (Admin), para 18; *Goldenberg*, Award of 27.09.1928, (1928) II United Nations Reports of International Arbitral Awards, 903, 906; *Sapphire International Petroleum Ltd., c/NIOC* (Mar. 15, 1963).
[29] J. Sprankling, *International Property Law* (2014) section I.2.C(3). R. McBorquodale, J. Gauci, G. Waszkewitz, 'Brexit Transitional Arrangements and Public International Law', 12-13.

rights. The EU position may better relay on the EU general principle of legal certainty instead of 'acquired rights' of international law.[30]

However, if legal certainty is taken as the standard, as far as the parties have committed with reasonable expectation of the consequences under the pre-Brexit EU law, continuity should be provided. From this perspective, the EU has applied the 'legal certainty' standard too narrowly. For example, if the parties have concluded an exclusive jurisdiction clause choosing the English court, the EU believes that they have anticipated the current EU law to govern the validity of this clause. Under the current EU law, Article 31(2) of the Brussels I Recast suggests that if the choice of English court clause is formally and substantively valid,[31] the English court should take jurisdiction, and the court of other Member States, if also seised by one of the parties, should decline jurisdiction in favour of the English court.[32]Since the parties have chosen the English court pursuant to the current EU law, they have also acquired the right to sue and be sued in England and no other courts. However, the EU position paper only suggests that this jurisdiction clause should continue to be 'assessed' under the Brussels I Recast,[33]and does not suggest that the EU law should continue to protect the enforcement of this clause if the proceedings are commenced after Brexit. The EU does not justify its position, but it is likely the EU believes that enforcing the jurisdiction clause against *lis pendens* is a procedural right that will only be acquired after the proceedings are commenced. However, it is necessary to note that although the proceedings are not commenced, the choice of court agreement is a procedure-related agreement and has the effect of granting the parties' procedural rights and obligations, i.e. suing only in the chosen court. This right is vested even without the commencement of proceedings.

Furthermore, the EU Position Paper only applies the pre-Brexit EU law to enforce pre-Brexit judgments. It is justifiable because where a judgment is rendered before Brexit, it becomes a right that the judgment creditor has acquired under the current EU law and this right should be continuously enforceable under this law after Brexit. However, in two other circumstances, the parties have legitimate expectation to enforce the judgments under the current EU law even if judgments are made after Brexit. Firstly, where the parties start proceedings before Brexit, they would expect judgments to be enforced and circulated freely within the EU

[30] Case 74/74, *CNTA v Commission of the European Communities,* [1975] ECR 533. For the general discussion, see S. Douglas-Scott, 'What Happens to 'Acquired Rights' in the Event of a Brexit?', *U.K. Const. L. Blog* (16 May 2016), https://ukconstitutionallaw.org, (accessed on 1 Nov 2017).
[31] Art 25(1) of the Brussels I Recast.
[32] Art 31(2).
[33]Para I, point 3 of the EU Position.

Member States, including the UK, under the pre-Brexit EU law.[34] Since no one could predict how long it takes for a court to deliver judgments, whether judgments are made before or after Brexit is a total contingency, which should not affect the parties' reasonable expectation. Therefore, the parties could acquire the right of free movement of judgments even before the judgment is made, which, unfortunately, is not recognised in the EU Position Paper.[35] Secondly, if the parties, especially non-EU parties, have chosen the court of one of the EU Member States before Brexit, they have made this choice partially based on the understanding and expectation of the free movement of judgments within the Member States. No one could predict whether and when a dispute may arise, before or after Brexit. Commencing proceedings after Brexit should not affect the validity of this legitimate expectation. It is therefore argued that the parties also have legitimate expectation to have judgments made pursuant to a choice of court agreement concluded before Brexit enforced under the pre-Brexit EU law, even if the proceedings are commenced and judgments are made after Brexit.

3.2 UK Position Paper

The UK Government published its Position Paper one month later, which includes the response to the EU Position.[36] The UK position is more proactive and long-term oriented. It does not primarily address the transitional position for rights acquired before Brexit but seeks a one-off long term special arrangement with the EU that apply immediately upon Brexit.

The main purpose of the UK Position Paper is not to provide detailed suggestions on exact rules or techniques, but the general principles and the big picture on the way forward. Therefore, this Position Paper only includes the 'framework' instead of the suggested 'provisions'. The UK framework can be summaries in the four points below. Firstly, the UK will seek 'close and comprehensive arrangements' and 'a deep and special partnership' with the EU post-Brexit on civil judicial cooperation matters as a third country.[37] Secondly, the special partnership is possible in that it would provide confidence and continuity to citizens and businesses in both sides, which is the shared interest of the UK and EU, and it is based on

[34]Ch III of the Brussels I Recast.
[35]Para I, point 5 of the EU Position.
[36] HM Government, 'Providing cross-border civil judicial cooperation framework: a Future Partnership Paper' ('UK Position Paper').
[37]*Ibid.,* 9-11.

the intensive cooperation that has already been established under the current EU law.[38] Thirdly, this partnership is part of the UK's global strategy to enhance global wide civil judicial cooperation.[39] Fourthly, if the future partnership cannot be agreed, based on separation, the UK agrees the EU's smooth transition approach in principle by protecting the rights acquired before the withdrawal date but proposes the scope of protection should be expanded and the acquired procedural rights should be interpreted broadly.[40]

The UK Government, however, does not provide more details as to how, and following which path or model, the partnership can be formed. The only suggestion is that the UK has the intention to incorporate the current EU choice of law rules that does not rely on reciprocity, into its domestic law to provide a coherent legal framework.[41] It is because, firstly, these rules can be transposed into the UK law unilaterally without the EU's commitment. This will at least provide certainty to individuals in relation to their substantive rights in the cross-border events. This will reduce the work for the partnership negotiation, which could only focus on rules that rely on reciprocity, such as conflict of jurisdiction, judgment enforcement and judicial/administrative assistance.[42] Furthermore, transposition of choice of law could help establishing the partnership based on the similarity and coherent legal context.

3.3 Feasibility of Special Partnership Arrangements

The diversity between the EU and UK's positions increase uncertainty as to the potential result of the negotiation, but it does not rule out the possibility of the future arrangement on civil judicial cooperation. The EU Position Paper does not say anything about the future partnership with the UK. This does not mean that the EU definitely objects this option, but because this matter is outside of the EU's priorities for the current phase of negotiation. The EU 'phased' negotiation strategy means that the EU has established the negotiation items that deserve immediate attention to be negotiated first, which mainly include the protection of rights derived from the EU law.[43] Upon successful and satisfactory conclusion of phase one,

[38] *Ibid.*, 12-20.
[39] *Ibid.*, para 21-24.
[40] *Ibid.*, Annex 1.
[41] *Ibid*., para 19.
[42] In terms of jurisdiction, many jurisdiction rules are also unilaterally applicable without the needs for collaboration, but some rules depend on reciprocity, such as *lis pendens*(Arts 29 and 30, Brussels I Recast), and prorogation jurisdiction (Art 31(2), Brussels I Recast).
[43] EU Guidelines, para 8; Fitchen, *supra* n.4, 420.

the EU will move to phase two covering long-term trade partnership with the UK, which may likely include future judicial cooperation matters.[44] However, the phase two negotiation will be on the preparatory work only. It will not lead to a concluded treaty by the end of phase two, and the specific treaty negotiation will only start after the UK leaves the EU.[45] In other words, the EU may only start to negotiate the future judicial cooperation partnership after the UK becomes a third country, which may not provide the UK any privilege as an ex-Member State. Excluding judicial cooperation from the phase one negotiation has been criticised by private international lawyers. As judicial cooperation concerns the cross-border rights derived from the EU law, it is closely entangled with those substantive rights of EU citizens, and any negotiation on acquired citizens' rights cannot be comprehensive without addressing relevant private international law issue.[46] Nevertheless, as the EU has also confirmed in its negotiation strategy its wish to have the UK as a close partner in the future,[47] negotiation on the future partnership is expected to be commence anyway in phase two negotiation and after Brexit.

As a matter of principle, the future special arrangement on civil judicial cooperation is feasible. Firstly, the EU and UK share the common interest to preserve the existing certainty to protect not only their citizens but also economic growth. The share of UK imports by the EU remains stable between 50% and 58% between 1999 and 2016, and increase from 50% in 2011 to 53% in 2016. The UK had an overall trade deficit of £71 billion with the EU in 2016.[48] It would be EU's loss if the lack of judicial cooperation affects EU exports to the UK. EU has interests to protect certainty of the 3 million citizens who are currently residing in the UK and others who want to work, study and live in the UK in the future. Secondly, the UK's domestic law is largely influenced by the EU legislation, including some of its civil and commercial law, conflict of laws and cross-border procedural law. Many of these rules will be transposed into the UK domestic law upon Brexit which creates a coherent legal context for the easy establishment of judicial cooperation. Thirdly, judicial cooperation already exists between the UK and other EU Member States and the long history of cooperation forms the basis for the future cooperation.

Furthermore, without future judicial cooperation agreements, the traditional common law instrument anti-suit injunction would revive. This is the injunction restraining a party from

[44]EU Guidelines, sec. IV.
[45] EU Guidelines, para 5.
[46] Fitchen, *supra* n.4, 421.
[47] EU Guidelines, sec. I.1.
[48]ONS Statistical Bulletin, *supra* n.19.

suing in a foreign court, which is ruled by the CJEU incompatible with the EU jurisdiction scheme based on mutual trust between Member States.[49] The post-Brexit UK would be able to use anti-suit injunction restraining parties from suing in the courts of any EU Member States, either to protect the agreements to choose English courts or tribunals,[50] or because the EU proceedings vexatious or oppressive.[51]Although it does not directly target the court of a foreign country, jurisdiction of other EU Member States would be indirectly affected. This would also affect the coherent application of the EU jurisdiction rules because EU Member States take different attitudes towards anti-suit injunction issued by a third country.[52]

Thirdly, special arrangements on civil and commercial judicial cooperation are compatible with the Interlaken Principles, which suggests that EU's relationship with a third country should be based on "a balance of benefits and obligations" and the third country cannot choose which aspects of EU integration to join.[53] In other words, the UK cannot pick and choose. This principle cannot be simply interpreted as that the UK and EU cannot enter into agreements on any matters without taking the full membership obligations. It simply means while entering into agreements with third countries, the rights and obligations of both sides should be equivalent and reciprocal.[54] Judicial cooperation is supportive in nature, which does not directly generate trade deficits or surplus, customs or taxation. The EU actually has taken a flexible approach to judicial cooperation in that it allows Member States to opt-out of the internal judicial cooperation scheme[55] and it concludes similar judicial cooperation agreements with third countries.[56] The Interlaken Principles is thus not a fundamental barrier.

If a judicial cooperation partnership is to be established, the area where disagreement may likely to arise is the role of the CJEU. The UK's position on the role of CJEU has altered gradually, from no jurisdiction at all,[57] to no direct jurisdiction.[58] The indirect jurisdiction of

[49] Case C-159/02 *Turner v Grovit* [2004] ECR I-3565; C-185/07 *Allianz SpA v West Tankers* [2009] ECR I-00663.
[50]*AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2012] 1 WLR 920; *The Angelic Grace* [1995] 1 Lloyd's Rep. 87.
[51]*Societe Nationale Industrielle Aerospatiale (SNIA) v Lee Kui Jak* [1987] AC 871; *Airbus Industrie GIE v Patel* [1999] 1 AC 119.
[52] Some Member States would enforce anti-suit injunction. See the French case, *Cass. Civ. 1re, 14 Oct 2009, No. 08-16.369 et 09-16.549*. Others, such as Germany, would refuse to enforce.
[53] The Interlaken Principles were declared by De Clerq in 1987 on the signing of agreements between the EC and EFTA. D Phinnemore, "The Nordic countries and the EEA", in L Miles (ed), *The European Union and the Nordic Countries* (Roughtledge, 1996) 32, 51.
[54] Phinnemore, ibid.
[55] Denmark, Ireland and UK opt out of the area of freedom, security and justice. UK and Ireland may opt in on a case-to-case basis. See sec. 4.1 below.
[56] Such as the Lugano Convention and Lugano II. See sec. 4.2 below.
[57] *Supra* n 1.

CJEU is only allowed in interpreting legal provisions substantively based on EU law and concepts.[59] The UK recognised the importance to keep consistent interpretation of those concepts between EU and third countries and within the EU, and accepted that if the partnership agreement includes terms identical in substance to EU law, those concepts can be interpreted in line with CJEU interpretation pro-agreement, and 'account is to be taken of CJEU decisions' post-agreement.[60] This is consistent with the EU position. The UK also recognises that there are precedents where an agreement between the EU and a third country utilise the EU concept and a binding interpretation of those rules is necessary, the parties may jointly refer the request to the CJEU for a binding interpretation.[61] The UK does not state whether it would or would not adopt the same approach presented in the precedent, but it is likely compromise can be made.

However, enforcement of the UK-EU partnership agreement is different. The future partnership agreement is an international treaty not EU law. Its enforcement and interpretation is thus subject to international law principles and by an independent third body. CJEU, as the court of the EU, will not be competent to resolve disputes between the EU and a non-Member State.[62] Since the EU does not prepare for the negotiation of future partnership at this stage, it does not provide any position on the enforcement judiciary body of the future partnership agreement. Nevertheless, the EU has considered the enforcement of the Withdrawal Agreement,[63] and the position demonstrated there could be relied on safety to deduce the likely EU position for enforcement of the future civil cooperation agreement with the UK. The EU mentions that due respect should be paid to 'the Union's autonomy and its legal order, including the role of the Court of Justice of the European Union as regards in particular the interpretation and application of Union law.'[64] However, EU does not insist on the supremacy of CJEU over the UK. The EU, instead, suggests 'institutional arrangements' for the supervisions and enforcement of the Withdrawal Agreement, which means the

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[58] HM Government, White Paper, *supra* n 2.
[59] HM Government, "Enforcement and Dispute Resolution: A Future Partnership Paper", paras 46, 55-58.
[60] *ibid.*,para 46.
[61] *ibid.*,paras 55-58.
[62] *Ibid.*, para 15.
[63] European Commission, 'Essential Principles on Governance', 28 June 2017, https://ec.europa.eu/commission/sites/beta-political/files/essential_principles_governance.pdf (accessed on 15 Nov 2017).
[64] *Ibid.*, para 1.

establishment of a 'joint committee'.[65] This is consistent with the UK's position. The difference between the UK and EU on the role of CJEU, therefore, is not incompatible.

4. Future Partnership on Judicial Cooperation: Denmark, Lugano or UK Model

After concluding the post-Brexit partnership for civil judicial cooperation is feasible, it is necessary to consider how this partnership arrangement should be designed. In general, EU has formed civil judicial cooperation partnership with states which are not members of the EU judicial cooperation scheme. These partnerships can be categorised into two models, i.e. the Denmark model and Lugano II model. This section analyses theoretical and practical prospects of these models and their application to the UK post-Brexit.

4.1 Denmark Model

Although Denmark is an EU Member State, it has exemption in relation to EU law on justice and home affairs. Denmark is not bound by EU law on civil judicial cooperation, including EU legislation, international agreements concluded by EU, and CJEU decisions interpreting provisions, pursuant to Title V of Part Three of TFEU.[66] However, Denmark has participated in the EU jurisdiction and judgments Regulation on civil and commercial matters ('Brussels I Regulation')[67] and its successor ('Brussels I Recast')[68] through special arrangements with the EU.

Taking the Brussels I Regulation as an example, which provided EU harmonised rules on deciding court jurisdiction in hearing cross-border civil and commercial disputes and on reciprocal enforcement of civil judgements between Member States before the Brussels I Recast took over in 2015. When the Brussels I Regulation was adopted in 2001 and entered into force on 1 March 2002, Denmark was not a Member State of this Regulation and the harmonised EU rules could not benefit citizens conducting cross-border activities between Denmark and other EU Member States. In 2005, Denmark submitted a notification of intention to participate. Based on the notification, EU and Denmark entered into the

[65] *Ibid.*, sec. II, para 1.
[66] Art 1 and 2 of Annex, Protocol 22.
[67] Reg (EC) 44/2001 [2001] OJ L 12/1.
[68] Reg (EU) 1215/2012 [2012] OJ L 351/1.

Denmark-EU Agreement to apply the Brussels I Regulation to civil and commercial judicial cooperation between Denmark and other Member States.[69]

Under the Denmark Model, the reciprocal obligations between Denmark and the EU are regulated by international law, instead of EU law. It suggests that, in principle, the post-Brexit UK may be able to follow the same path by entering into a bilateral international agreement with the EU to systematically extend the effect of EU judicial cooperation law to the UK.[70] Furthermore, this model provides some flexibility and autonomy to both sides. Denmark is not eligible to take part in amendment of the EU law,[71] but at the same time Denmark is not automatically bound by any future amendments without express commitment.[72] In the meantime, the EU is open to the application of Denmark to join its judicial cooperation scheme at any time, but also reserves power to examine whether conditions are fulfilled to ensure integrity of this EU scheme is not affected by the participation of non-members.[73]

However, a close scrutiny suggests that this model does not work well for a third country, like the post-Brexit UK. Firstly, although Denmark has the flexibility to decide whether to adopt the amendments, Denmark is actually in a take-it-or-leave-it position once amendments are made. Denmark has to notify the Commission of its decision at the time, or within 30 days, of adoption of the amendments by the EU.[74] If Denmark decides not to implement the amendments or fails to notify the Commission within the time frame, the Agreement that extends the effect of the previous EU law, the Brussels I Regulation, would terminate between the EU and Denmark.[75] In other words, if the EU has made the decision to amend the EU judicial cooperation legislation, Denmark has no right to contribute, express its view or shape the amendments and has to choose to adopt the amendments to keep the existing judicial cooperation relationship with other EU Member States. There is no possibility for Denmark to keep judicial cooperation with other EU Member States based on the precedent Regulation prior to amendments. Firstly, the EU amendment usually means that the old law is

[69] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2005] OJ L 299/62.
[70] However, a detailed analysis suggests Denmark's obligation under this EU-Denmark Agreement is different from ordinary international law situation. See discussion below.
[71] Art 3(1) of the EU-Denmark Agreement.
[72] Art 3(2), ibid. After Brussels I Recast was adopted to replace the Brussels I Regulation in 2012, Denmark made the notification to opt in the new Regulation. See Denmark-EU Agreement on the Brussels I Recast, [2013] OJ L 79/4.
[73] Art 331(1) of TFEU.
[74] Art 3(2) of the EU-Denmark Agreement.
[75] Art 3(7)(a) and (b) of the Agreement.

'repealed', instead of simply being 'replaced'.[76] A repealed Regulation would not be able to resume its effects between Denmark and other EU Member States. Secondly, the EU aims to preserve continuous application of EU law within Member States. Applying two versions of the EU law between EU Member States may affect uniformity, coherence and consistency of the implementation of EU law.

Besides, Denmark is an EU Member State. While proposing to negotiate a special arrangement with Denmark, the European Commission considered it necessary to apply the uniform rules within the Community.[77] The Commission also emphasises:

> 'Such a solution would have to be of an exceptional nature and apply for a transitional period only, the participation of Denmark in the Community regime would have to be fully in the interests of the Community and its citizens and the requirements imposed on Denmark would have to be identical to those imposed on all Member States, so as to ensure that rules with the same content are applied in Denmark and in other Member States.'[78]

This statement shows that an inherent and underlying condition for the Commission to enter into an international agreement to extend the Brussels I Regulation to Denmark is the uniformity and interest of the Community, where Member States have the shared value, interest, duty and obligations. Denmark is an integral part of EU and EU has interest to achieve uniform application and interpretation of EU judicial cooperation law in all EU Member States, including Denmark.[79] The requirement of uniformity based on the Union of integration and shared value can hardly be found in the relationship between the EU and a third country.[80]

Furthermore, the EU-Denmark agreement restricts Denmark's competence to enter into judicial cooperation treaties with third countries. Denmark is prevented from entering into international agreements which may affect the scope of the Brussels I Regulation unless Denmark and the EU have reached an agreement and satisfactory arrangements have been

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[76] Art 80 of the Brussels I Recast.
[77] European Commission, 'Proposal for a Council Decision concerning the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 44/2001 on jurisdiction and recognitions and enforcement of judgments in civil and commercial matters', COM(2005) 145 final, 2005/0055 (CNS), 2.
[78] Proposal, *ibid.*,2.
[79] Art 1(2) of the EU-Denmark Agreement. Also, Proposal, *supra* n.75, Annex, rec. 5.
[80] M Requejo, 'Brexit and PIL, Over and Over', http://conflictoflaws.net/2017/brexit-and-pil-over-and-over/, (last accessed 7 Oct 2017).

made with regard to the relationship between this Agreement and the international agreement in question.[81] This condition would not be accepted by the UK, which aims to regain its legislative competence after Brexit.[82]

Finally, although the EU-Denmark arrangement is an international treaty, instead of EU law, it is drafted in a manner that re-emphasises the rules and principles of the EU. CJEU is designated as the interpretation, enforcement and dispute resolution body of this Agreement. Firstly, the CJEU has direct jurisdiction to interpret the provisions of the Brussels I Regulation annexed to the EU-Denmark Agreement.[83] Denmark must request the CJEU to give a ruling on interpretation of this agreement under the same circumstances the Council, Commission or a court of a Member State can do in respect of the EU law implemented in this Agreement.[84] If Denmark refers the case for CJEU interpretation, the ruling will be binding.[85] The direct jurisdiction may cause difficulty to the UK, which consider the CJEU direct jurisdiction a red line and one important consequence of Brexit is to take back judicial supremacy of the UK judiciary.[86] Secondly, the CJEU also has direct jurisdiction to interpret not only the EU law subject to the international treaty, i.e. Brussels I in the EU-Denmark Agreement, but also the international treaty itself. The EU-Denmark Agreement requires the Danish court to refer cases to the CJEU in questions on validity or interpretation of this Agreement.[87] This model will cause more difficulty to the UK, because it subjects the UK to the direct jurisdiction of CJEU not only in interpreting the EU law, but also the international convention between the EU and the UK.[88] Thirdly, the EU-Denmark Agreement also designates the CJEU dispute resolution and enforcement body of this international agreement. Article 7(1) provides that the European Commission could bring cases against Denmark concerning non-compliance with any obligation under this agreement, while Article 7(2) continues to require Denmark to complain to the European Commission as to the non-compliance by a Member State. This rule is based on the fact that Denmark is a Member State of the EU, and the dispute resolution between Denmark and the European Commission/other Member States should be the same as dispute resolution between EU

[81] Art 5(2), EU-Denmark Agreement.
[82] HM Government, "White Paper", *supra* n 2.
[83] Art 6(1), EU-Denmark Agreement.
[84] Art 6(1).
[85] Art 6(3). Proposal,*supra* n.75, rec. 11 and 13.
[86]*Enforcement and Dispute Resolution*, *supra* n.57. para 1.
[87]Art 6(1).
[88] See discussion in *supra* sec. 3(3).

institutions and Member States established by the TFEU.[89] The same dispute resolution is inappropriate to any third country. It has been suggested by the UK that an international agreement between the UK and EU should treat both sides contracting parties of the equal footing,[90] enforcement of this international treaty is not subject to EU law, but international law,[91] and disputes between the parties on non-compliance should be addressed by an independent third body instead of the domestic court of any party.[92]

Since the Denmark Model directly expands the effect of an EU instruments, it focuses on the Union interest to have EU law applied coherently within the Union and the EU emphasise the CJEU's role in interpretation and application of the EU law.[93] It is not an appropriate model to build the future judicial cooperation between the EU and the post-Brexit UK.

4.2 Lugano II Model

A different partnership model that practically extends the effect of the EU law to third countries without committing the third countries to the EU law and EU judiciary scheme is the Lugano II Model. In 2007, the EU entered into an international convention with Norway, Switzerland and Iceland on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (Lugano II).[94] This Convention is an international convention version of the EU Brussels I Regulation. The difference between it and EU-Denmark Agreement is that the latter directly gives the Brussels I Regulation the effect over a non-member of this Regulation, Denmark. The Lugano II uses the international convention to regulate judicial cooperation in jurisdiction and enforcement of judgments between EU Member States and the three EFTA countries, without extending the implementation of EU law. But since the provisions of the Lugano II simply mirror those of the Brussels I Regulation, the practical consequence is to extend the same harmonised and reciprocal rules to the three non-Member States.

It may be argued that the original purpose of the Lugano II is to strengthen legal and economic cooperation between Contracting States based on the established links between

[89] Art 258-260, TFEU. A. Gil Lbanez, *The Administrative Supervision and Enforcement of EC Law* (Oxford: Hart, 1999); M. Mendez, *The Legal Effects of EU Agreements* (OUP, 2013).
[90] *Enforcement and Dispute Resolution*, *supra* n.57, para 15-16.
[91] *Ibid.*,para 15.
[92] *Ibid.*, para 29.
[93] European Commission, 'Essential Principles on Governance', *supra* n 61, para 1.
[94] [2007] OJ L 339/3.

them sanctioned by the EU and EFTA.[95] However, Article 70 of Lugano II suggests that being a member of the EU or EFTA is not compulsory for joining the Lugano II Convention.[96] The third country that wishes to join the Lugano II should follow the formal application procedure, make declarations on service of procedure and provide Depository of extra information, including its judicial system, internal law on civil procedure and enforcement of judgments and its private international law.[97] These conditions are not onerous to fulfil.

Since Lugano II is not an EU instrument, it does not include special requirements for direct jurisdiction of CJEU in interpretation of this Convention. Although it is recognised that Lugano II has the substantive link with Brussels I and other conventions in this family, and holds a historic link with European Economic Community, Lugano II only requires the courts of Contracting States to 'pay due account' to principles laid down by the CJEU in interpreting relevant rules and concepts.[98] It also does not provide the European Commission the power to supervise and manage the Convention, and a Standing Committee is established to consult the application of some articles, consider accession of new parties, accept new authentic language versions, and consult on revision and amendments.[99] It does not include provisions on dispute resolution on non-compliance with the Convention.

Finally, Lugano II does not restrict Contracting Parties' power to enter into international treaties on jurisdiction and judgments recognition with third countries.[100] The only restriction is prohibiting Contracting Parties from assuming an obligation towards a third country not to recognise judgments rendered in another Contracting State of this Convention,[101] which will fundamentally hamper the purpose of this Convention.

Given advantages mentioned above, joining the Lugano II may be a more realistic option for the UK. However, it is necessary to consider four potential problems with the Lugano II model. Firstly, accession of a third country requires the unanimous consent of all Contracting States.[102] It is unclear, first of all, who should be counted as the 'Contracting States', the EU as one Contracting State, or the 27 EU Member States. Secondly, it may not be very easy to acquire unanimous support from 27 EU Member States. Some Member States have seen

[95] Lugano II, Preamble.
[96] Art 70(1)(c).
[97] Art 72(1).
[98] Art 1, Protocol 2.
[99] Art 4, Protocol 2.
[100] Art 67(1).
[101] Art 68(2).
[102] Art 72(3).

opportunities in Brexit and have announced the plan to establish English-speaking courts to replace London and become the new dispute resolution centre within the EU.[103] To these countries, excluding the UK from future partnership in civil judicial cooperation may benefit their litigation market. From this perspective, treating the EU as one Contracting State is easier for the UK, because the collective interest of EU may override the interest of individual Member States, and it is for the better interest of the EU to maintain the reciprocal relationship with the UK in the future.[104] Interpreting the EU as one Contracting Party is likely the correct interpretation, because the EU has reserved the exclusive external competence on civil judicial cooperation.[105] Where the Hague Child Abduction Convention accepted new Contracting State, the EU took the exclusive competence to give consent.[106] The EU has also announced in its negotiation guidelines that it would act as one unit and no Member States should act individually in negotiating with the UK,[107] which would include giving consent to the UK's accession to the Lugano II Convention.

The third inevitable problem is delay. Contracting Parties have up to 12 months to give consent after the notification by the Depositary.[108] After receiving all the consents, the Convention will enter into force on the first day of the third month following the deposit of the instrument of accession.[109] The UK cannot apply to accede while being an EU Member State and the process could only starts after the exit day, which will cause inevitable gap in time if the Lugano II model is followed.

The fourth unsatisfactory factor is the quality. The Lugano II is based on provisions of Brussels I, which is updated by Brussels I Recast where some important amendments have been made. For example, it resolves the long-debated issue on the proper relationship between *lis pendens* and choice of court agreements and provides that the chosen court in an exclusive jurisdiction clause has priority over the court first seised by the party to hear their disputes, providing desirable protection to party autonomy;[110] it abolishes *exequatur* and streamlined the judgment enforcement procedure; [111]it provides discretion to Member States to stay jurisdiction if the court of a third country has already been seised to hear the same or

[103]Such as Belgium, Germany, Netherlands and France.
[104] See discussion in s.2 and 3(3) above.
[105] F Pocar (ed), *The External Competence of the European Union and Private International Law* (CEDAM, 2007); B Van Vooren, R.A. Wessel, *EU External Relations Law* (CUP, 2014) 507-508.
[106]Case Opinion 1/13, Opinion pursuant to Article 218(11) TFEU.
[107]EU Guidelines, sec.I, para 2.
[108] Art 72(3).
[109] Art 72(4).
[110] Case C-116/02 *Gasser GmbH v MISAT Srl* [2003] I-14693.
[111] Art 39.

related disputes to prevent concurrent proceedings;[112] and it clarifies the relationship between arbitration and the Brussels I Recast.[113] These benefits and improvements will be lost in the Lugano II model.

The final problem is its scope. The Lugano II only covers jurisdiction and judgments in civil and commercial matters. Even if the UK joined the Lugano II, gaps still exist in judicial cooperation in other fields, such as family matters, insolvency and judicial/administrative assistance.

4.3 Recommendation: The UK Model

According to the UK position paper, the UK is seeking to establish 'a deep and special partnership' with the EU.[114] Unfortunately, nothing has been said as to what this model would look like. Consider whether elements of the existing models can be learnt to shape this UK model. Firstly, the Denmark Model is specifically designed to deal with a special situation of an EU Member State. It is inconsistent with the UK's needs after Brexit and it is incompatible with the cooperation between the EU and a third country.[115] It would not be an appropriate option and it would not produce very useful elements that the UK Model can borrow. The Lugano II model, however, could form an example for the UK model to follow. In general, the UK and EU could conclude the international conventions, the provisions of which are based on the provisions of the current EU law. These conventions will have the functioning to maintain the existing cooperation between the EU and the UK, which will provide certainty and consistency. At the same time, these conventions will no longer subject the UK to the EU law and governance. The interpretation, enforcement and dispute resolution of the convention would follow the Lugano II in that the CJEU would not have direct jurisdiction in interpreting the partnership convention but the CJEU decisions on the rules and concepts substantively similar to the EU legislation would be taken into account by the courts of Contracting Parties. Supervision, enforcement and dispute resolution should be dedicated to an independent third body, such as a joint or standing committee with representatives from both sides.

The UK government has suggested that it may consider transposing EU choice of law rules that do not rely on reciprocity into its domestic law to create a coherent legal background to

[112] Arts 33 and 34.
[113] Recital 12.
[114] UK Position Paper,para 18 and 10.
[115] See sec. 4.1 above.

simplify negotiation for the future partnership.[116] It is thus likely that the UK model will primarily focus on jurisdiction and reciprocal rules. Although some jurisdiction rules can be applied unilaterally, transposing jurisdiction rules may cause problems because there are reciprocal provisions on jurisdiction, such as *lis pendens* and the rules enforcing choice of court agreement. Furthermore, although the EU law requests no review of jurisdiction when enforcing judgments delivered by the courts of another Member State, exception is given to special jurisdiction provisions, such as protective jurisdiction for consumers, employed and insured, and exclusive jurisdiction.[117] Excluding jurisdiction from the cooperation agreement may cause difficulties on negotiating enforcement of judgments in relation to these special cases.

5 Conclusion

The EU law on civil judicial cooperation effectively smoothes the barriers for cross-border activities caused by the existence of multiple judicial systems. Maintaining the current level of judicial cooperation between the UK and other EU Member States after Brexit would continue to provide certainty to citizens and companies engaged in cross-border activities in the mutual interest of both sides. Regardless of the difference in the EU and UK's position papers on the future judicial cooperation after Brexit, this article suggests that establishing a long-term partnership on civil judicial cooperation post-Brexit is not only necessary but also feasible. While establishing this future partnership, adopting the Denmark model is inappropriate for third countries and it is impractical for the UK to directly join the existing convention with the EU. The UK should seek to enter into a few judicial cooperation conventions with the EU, constituting substantively the same provisions in the current EU law, covering jurisdiction and judgments in civil and commercial matters, matrimonial matters and parental responsibility, maintenance and insolvency, and judicial assistance in taking evidence and service of procedure abroad. At the same time, the UK would transpose EU choice of law into its domestic law to make the process easier.

[116] UK Position Paper, para 19.
[117] Art 45(1)(e) of the Brussels I Recast.