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# The Future of EU-UK Relations:

## Towards a Strong Partnership

# Executive summary

On 24th December 2020, the EU reached an agreement with the UK on the terms of their future cooperation after four years of intensive negotiation. Building a strong EU-UK partnership in a post-Brexit Europe is indeed in their interest. While the ambitious Trade and Cooperation Agreement was one crucial step in this direction, none of the parties will enjoy the same benefits as when the UK was a member of the EU, and it will remain important to understand the possible impact of the agreement in its current form on matters such as European Security, Migration, Trade or Energy Policy. Should the parties strive for a different type of cooperation in the future to strengthen their partnership approach, and how could this look like?

Our authors have explored these questions and analysed four policy areas in which the EU and the UK could strengthen their cooperation. The first chapter focuses on Competition Policy, more specifically antitrust, mergers and state aid. In the second chapter, possibilities for connecting the EU-UK Emission Trading Systems will be explored. Chapter three delves into the issue of External Migration Policy post-Brexit and looks at cooperation with third countries and external border control. The last chapter deals with Internal Security cooperation, with a focus on information sharing and cooperation with Europol.

Each chapter provides different policy options and final recommendations that the EU and the UK should consider if their relationship is to strengthen in the future.

# CONTENT

# Antitrust, Mergers and State Aid: post-Brexit Cooperation

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Competition policy has always been a key element of EU policy. Lower prices, better quality, more choice, and more innovation are the main reasons for states to implement competition rules. In addition, the achievement of the single market plays a fundamental role for EU competition regulation.

In recent years, competition regulation has received considerable political attention. From beer cartels to the regulation of international tech companies like Google, Amazon, facebook and Apple: regulators world-wide have to deal with an enormous number of cases. Moreover, two economic crises - the global financial crisis as well as the current pandemic related crisis – have prompted states to bail out companies. The European Commission was asked to assess these rescue measures under state aid rules.

The framework of European competition law consists of different pillars. First, the prohibition of anti-competitive agreements. Second, the prohibition of an abuse of dominance. Both pillars can be summarised under the term ‘antitrust’. Third, the EU Merger Regulation (EUMR). By assessing mergers and acquisitions of companies of a certain size, the regulator aims to prevent an increasing market concentration or even further, the rise of monopolies. Lastly, the provisions governing state aid. The European Commission assesses whether EU states distort competition within the single market by financially supporting national companies. What makes competition regulation in the EU rather complicated is that national competition laws exist parallel to EU laws. In some cases, EU and national law can apply at the same time, in other cases exist a one-stop-shop system.

The UK had been a Member State of the EU (and its predecessor) from 1973 to 2020. For all the 47 years of membership, it had been subject to European competition regulation. But since the end of the transition period on 31 December 2020 this will no longer be the case. The degree of implications of this differ from pillar to pillar. The EU can continue to investigate potential anti-competitive agreements and conduct of British companies under

the ‘effects doctrine’ and merger control will continue to cover UK based companies if the EU turnover thresholds are met. However, state aid provided by the UK government will no longer be subject to EU state aid rules.

The UK and the EU have repeatedly pointed out the joint interest in a close cooperation for investigations and merger control proceedings. However, UK officials have stressed the need for regulatory freedom, and both regulatory bodies, the European Commission and the British Competition and Markets Authority (CMA) are known for their regulatory ambitions. What that means was particularly visible in the negotiations on subsidy control. From 2021 onwards, the UK and the EU will have independent state aid control bodies.

How regulatory ambitions, political interests, and a joint interest in cooperation can be balanced, will be subject of this policy paper. We will conclude that the future cooperation in merger control and antitrust matters will require the creation of a coordination system between the EC and the CMA. On state aid matters, we recommend entering into sector-specific agreements to address the short comings of the Trade and Cooperation Agreement and avoid future problems on risk areas.

# Policy Analysis

## Introduction to EU competition policy and law

### EU's competition policy

Competition policy exists to protect competition in a free market economy. Competition *law* is the tool by which competition policy is implemented. There is widespread agreement that market regulation is needed but disagreement on the right level of regulation. As a consequence, the general objectives of competition law are widely debated. Some argue that the emphasis should be on economic efficiency and (consumer) welfare, others refer to the broad term 'fairness'. But competition laws may also be used to supplement and support social and other[1] public policies.[2]

In the EU, one of the purposes of competition law is to ensure that competition in the internal market is not distorted (Art. 3 (1)(g) TFEU). This objective is undebated. However, this does tell very little about EU's competition *policy*. Competition policy was included 1958 in the Treaty of Rome as a major instrument contributing to European economic integration. It was meant to compliment the free movement provisions since a free movement of, for example, goods is only then beneficiary if companies must follow certain European wide rules. This objective makes EU competition policy and law globally unique. Most scholars would probably agree that consumer welfare is the overarching goal of EU competition law, as it has also been advocated by the EC.[3] This has, however, been questioned by EU courts.[4] The ultimate answer to the question of objectives has not been given by the courts yet.

### Sources of EU competition law

When analysing the impact of Brexit on EU's competition policy, a look at the legal basis is crucial. In the EU, European and national competition rules coexist. That means that all EU Member States have introduced a competition law framework of domestic scope. At the same time, the EU has competition laws in place which apply to all EU Member States.

[1] The EU currently discusses environmental aspects in competition law.
[2] Witt, A., (2012). Public policy goals under EU competition law – now is the time to set the house in order. European Competition Journal, 8:3, p.443-471
[3] E.g., ABl. 2004 Nr. C 101/97 No 5.
[4] E.g., Case 6/72, Continental Can [1973] ECR 215, para. 26.

The main source of European competition law is the Treaty on the Functioning of the European Union (TFEU) with the central provisions being Art. 101, 102 and 106. It must be noted again that the rules as such do not contain any policy. However, they demonstrate the direction that the EU is taking in regulating markets. In addition to the TFEU, there is the EU Merger Control Regulation (EUMR), which modulates the system of EU-wide merger control.

## Enforcement

Competition law in the EU is enforced by both national competition authorities and the European Commission through the Directorate-General for Competition (DG COMP). The latter enforces exclusively EU competition law. The national authorities (e.g. the German *Bundeskartellamt*, the French *Autorité de la Concurrence* and until the end of the transition period the British Competition and Markets Authority) enforce both national and EU competition law since some EU rules apply parallel to domestic laws. In merger control there exists a one-stop-shop system, which allocates a clear jurisdiction between the DG Comp and the several national authorities.

## International cooperation

In a globalised economy, many companies are selling goods and services world-wide. Anti-competitive conduct can therefore affect several international markets simultaneously. One and the same agreement can be covered by US antitrust law and by EU competition law at the same time. This demonstrates the need for and the advantages of international cooperation. Naturally, this applies as well intra-EU.

The Commission has so far focussed on concluding (a) bilateral agreements/memoranda of understanding which mainly cover information sharing and the coordination of enforcement actions, as well as (b) the exchange of views with other competition authorities in multilateral organisations, such as the European Competition Network (ECN), the International Competition Network (ICN), the Organisation for Economic Co-operation and Development (OECD), and the World Trade Organization (WTO).[5]

[5] European Commission (2020). *Multilateral Cooperation on Competition Policy*. Available at: https://ec.europa.eu/competition/international/multilateral/.

# Antitrust

Antitrust covers, under the European understanding, anti-competitive agreements as well as the abuse of market dominance. Consumers benefit from competitive markets since competition between businesses leads to lower prices, better quality, more selection, and more innovation. The EU and its Member States have therefore introduced antitrust rules in order to ensure a competitive market environment. This form of market regulation is also necessary as companies have a strong economic incentive to collude or utilise their economic power at the expense of consumers.

## EU's Antitrust Rules

The two central antitrust provisions are Art. 101 and Art. 102 TFEU. First, Art. 101 prohibits agreements or concerted practises between two or more independent market actors which prevent, restrict or distort competition within the internal market. The type of agreement can span from so called hard-core restrictions such as price-fixing and market sharing to practises such as information sharing. Second, Art. 102 prohibits the abuse of a dominant position in a market. A dominant position is usually given when a company enjoys a high market share and can therefore act relatively independently of their competitors. Typical examples of conducts covered by Art. 102 are the charge of high prices, the artificial reduction of production capacities, or the application of dissimilar conditions to equivalent transactions.

## Implications of Brexit

### Continuities

To begin with, Brexit will not have a big impact on the enforcement of antitrust rules in the EU. The framework of EU antitrust law ensures that anti-competitive behaviour of UK-based companies will continue to be captured. Art. 101 and 102 cover anti-competitive behaviour independent from the place of registration of the involved companies. The central requirement for the application of the rules is that the conduct affects trade between Member States, hence the internal market. A British company which is part of a global cartel that covers EU countries will therefore continue to be subject to an investigation and potentially to fines imposed by the EC.

### Changes

There are, however, some implications arising out of Brexit. While the Commission will continue to have jurisdiction over cartels that have an effect on the internal market, it is likely that the same conduct also affects the British market in the future since companies will in many cases continue to see the UK as part of the European market. In these cases, the Commission and the CMA will carry out parallel investigations. This could, at least once the UK deviates from EU antitrust laws, in some cases lead to diverging decisions.

From an EU perspective, the greatest change is that the Commission will no longer be able to carry out dawn raids (on-site investigations) in the UK. The EC will also no longer be able to request assistance from the CMA in dawn raids in the UK. As a consequence, the EC will be referred to written requests to companies, making the collection of evidence much harder.

### Summary

In short, the impact of Brexit will affect antitrust law enforcement in the UK much more than in the EU. Nevertheless, the small implications and changes for EU competition law enforcement will require it to think about potential forms of cooperation between the EC and the CMA.

## Merger Control

A merger occurs where two or more formerly independent business entities unite. Companies which enjoy a high market share or have for other reasons a dominant market position, have a special responsibility to ensure competition. While economic growth is, in a free market economy, generally not considered anti-competitive behaviour that should be regulated, external company growth is seen much more critically. The most visible example is a company buying its only competitor, leading to a monopoly in the market. Therefore, competition authorities review mergers with regard to their effect on markets. This process is called merger control.

### EU Merger Control Policy

The EMCR applies to all concentrations with an EU dimension (Art. 1 ECMR). An EU dimension is given when the involved businesses' generated turnovers in the EU meet certain

thresholds. The thresholds are part of the one-stop shop system which allocates responsibility for merger control between the Member States and the EC, as well as limits the number of reviews to those transactions that may, based on the size of involved parties, deprive customers of their benefits of effective competition. The actual review of planned concentrations is carried out under the *SIEC test*. The EC prohibits a concentration if it would lead to a *significant impediment to effective competition*, thereby aiming to prevent the significant increase of firms' market power.

## Implications of Brexit

### Continuities

Similar to antitrust proceedings, the merger control framework will continue covering cases that fulfil the requirements of the EUMR independent from the place of registration of involved businesses. If the parties to the merger fulfil the thresholds, the EC will review the transaction and clear a merger only then if anti-competitive effects are excluded.

### Changes

The major change in merger control from 2021 onwards is that the one-stop-shop system will no longer apply. Mergers that satisfy both the UK and the EU turnover thresholds will be subject to two independent merger control proceedings. This parallel review can, at least in theory, lead to diverging decisions. For example, the EC could block a merger that the CMA cleared. While this is rather unrealistic, it demonstrates the need for increasing cooperation and communication between the CMA and the EC as well as for a joint competition policy.

Moreover, Brexit has implications for intra-EU mergers as well. In the future, turnover that has been generated in the UK will no longer be relevant when assessing whether the merger control thresholds are met. This will most likely impact a number of transactions as the UK is a major economy and many companies generate a significant turnover there as well. This could therefore make a difference to the number of mergers reviewed by the EC. Whether the number of mergers proceedings before the EC will decrease remains to be seen. Overall, the number of mergers will be dependent on the economic circumstances, so it will be hard to study the direct implication.

Summary

The impact of Brexit on merger control will once again affect the UK much more than the EU. The CMA will have to deal with a significant increase in cases that would have previously been reviewed by the EC. The potentially high numbers of parallel review cases will make it necessary for the EC and the CMA to coordinate and communicate merger control proceedings. Since both can no longer rely on the ECN, new ways for and forms of cooperation must be developed.

## State aid

State aid in the EU is defined as any intervention by any Member State or through state resources that gives the recipient — whether a company or companies located in specific regions or industry sectors— an advantage on a selective basis that has or may distort the competition in the internal market and will likely affect trade between Member States[6].

Member States state aid spending capacity has increased in the last five years in the EU. Nevertheless, the UK has historically spent less than other Member States since 2013. In 2018, state aid spending in the UK was below the EU average in terms of GDP: 0.34% against 0.74%.[7] Most of the resources were targeted at four policy objectives: environmental protection, research and design (R&D), small and medium enterprises (SMEs) and culture.

### EU's state aid rules

The TFEU generally prohibits state aid equally across the EU unless it is justified by reasons of general economic development or the EU common interest[8]. Each measure -such as aid to promote the execution of an important project of common European interest or aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment- needs to be notified before its implementation to the European Commission and must undergo a preliminary examination and/or formal investigation procedure to evaluate if the state aid measure is justified and if it is compatible

[6] Articles 107 to 109 TFEU.
[7] European Commission (2019). State Aid Scoreboard 2019. *DG Competition*. Available at: https://ec.europa.eu/competition/state_aid/scoreboard/state_aid_scoreboard_2019.pdf.
[8] Article 107 TFEU.

with the internal market.

## Implications of Brexit

### Continuities

Since the end of the transition period, each block will have parallel state aid frameworks. The European Commission will continue to regulate state aid spent by Member States under the framework set out in the TFEU, while the CMA will be in charge to adopt and implement a domestic framework on state aid measures in the UK limited only by the principles set out in the Trade and Cooperation Agreement.

### Changes

With the UK leaving the EU, the Commission will no longer be able to review state aid spent by the UK and its impact on competition within the EU. From now on the UK and EU will be bound in its relationship by the WTO Agreement on Subsidies and Countervailing Measures -which disciplines the use of subsidies and regulates the actions countries can take to counter the effects of such subsidies- and the Trade and Cooperation Agreement.

On this matter, it is important to note that because of the importance to ensure the level playing field between competing companies and industries after Brexit, the EU had insisted the UK to adopt state aid measures similar to those from the European Commission to avoid a subsidy race.

The Agreement provides for two independent state aid regimes which are only broadly governed by common principles and, in contrast to the EU state aid rules, it does not appear to require notification prior to the implementation of a subsidy to the corresponding authority in the UK.

It does, however, require both parties to have a subsidy control system in place and maintain it in a way that ensures that the granting of subsidies respects the principles set out in the agreement. These broad principles aim at preventing negative effects on trade or investment between the Parties. For example, subsidies that pursue a specific public policy objective to remedy an identified market failure are accepted, while subsidies that are contingent upon the use of domestic or imported goods or services are prohibited. How these principles are

implemented is decided upon by each party when designing domestic laws.

The Agreement also contains a number of prohibited subsidies, transparency rules, rules on the role of domestic courts, and most importantly a consultations regime. The latter will allow each party to request an explanation of how the principles have been respected where a subsidy has been granted by the other party or there is clear evidence that the other party intends to grant a subsidy and that the granting of the subsidy has or could have a negative effect on trade or investment between the parties. In that way, a subsidy decision can come to the Trade Specialised Committee on the Level Playing Field for Open and Fair Competition and Sustainable which will then attempt to find a mutually satisfactory resolution.

Moreover, the UK and the EU have agreed on a reciprocal mechanism that allows either side to impose measures in cases where a granted subsidy is causing or is at risk of causing significant harm. These measures are subject to arbitration. In addition, a separate non-binding joint declaration was issued by both parties providing guidance on additional sectors which either side may take into consideration in their respective systems of subsidy control.

Summary

Although the UK makes less use of state aid than most members of the EU, the size and proximity of its economy presents a risk for the level playing field and hence for the EU internal market. Stakes were high for the UK as well, encouraging a subsidy race after Brexit might not prove beneficial since the EU will remain its largest trading partner. A compromise was therefore necessary on both sides.

While the UK's sovereignty is maintained, and the parties only agreed on broad common principles -instead of specific state aid rules as the EU intended since the beginning of the negotiations- the consultation mechanism as well as the counter-measure mechanisms governed could ensure that the two system align over time. However, the agreement leaves much uncertainty over the future of subsidy control. It will be interesting to see how the first disputes are settled between the parties. To avoid a number of disputes the parties should nevertheless focus on refining the current Trade Agreement or concluding new agreement(s) exclusively on state aid.

# Policy Options

## Antitrust

As described, Brexit will have only small implications and changes for EU competition law enforcement. However, it will require the EU and the UK to think about potential forms of cooperation between the two enforcement authorities, the EC and the CMA.

### Option 1: Trade and Cooperation Agreement and international frameworks as the basis for cooperation

Reaching an agreement on the matter of bilateral cooperation in antitrust matters is not an automatic mechanism. In fact, the EU has not engaged in concluding agreements with every third-country. As of January 2020, for example, no agreement exists with Argentina or New Zealand. If the EU and the UK decide not to conclude a bilateral agreement, it would not mean that a cooperation is not taking place at all. First, the Trade and Cooperation Agreement (TCA) contains competition provisions. Second, there are several international frameworks in place.

As of January 2020, the EU has concluded 43 general agreements that also contain competition provisions, the TCA with the UK being one of them. But beyond comprehensive (free-) trade agreements, competition provisions are also found as part of sector-specific agreements.[9] The effectiveness of competition provisions as part of a comprehensive general agreement is naturally connected to the scope of the respective agreement. As part of an overall trade agreement, included competition provisions can be broadly applicable and therefore effective. If included in a sector-specific agreement, their scope is rather limited. Furthermore, it is in the nature of general agreements that included competition provisions deal more with the notion of anti-competitive agreements, definitions and broad formulations as to cooperation. Detailed provisions are uncommon. This is also the case with the TCA.

The TCA dedicates an entire chapter[10] to competition policy. In Article 2.4 the parties

[9] E.g., Agreement between the European Community and the Swiss Confederation on Air Transport, 2020.
[10] Chapter 2.

recognise the importance of cooperation concerning the same or related conduct. It also stipulates that information may be exchanged. Further details on how this cooperation will look and how information will be exchanged are not included. For any cooperation to work in practise, however, a further agreement is needed. In fact, the two signatories acknowledged this and explicitly pointed out the possibility of concluding additional agreements on competition-related issues.[11]

In addition to the provisions contained in the TCA, the CMA, EC and Member State authorities will also cooperate as part of various international organisations: the ICN, the OECD, the United Nations Conference on Trade and Development (UNCTAD), and WTO. While the EU's efforts to include competition in WTO talks have proven to be unsuccessful, and the UNCTAD having a strong focus on assisting developing countries and adopting a Model Law, the OECD and the ICN are the more relevant frameworks for the EU and the UK to cooperate under. The membership in the OECD and even more in the ICN allows to engage with other competition authorities in an informal venue. Members can discuss recent developments and practical enforcement issues.

However, considering the strong connections between the CMA and EC, and the expected high number of parallel investigations and proceedings, the cooperation frameworks of the ICN and the OECD are not sufficient. The ICN cannot replace the ECN, as it had been used mainly by EU Member States and the Commission for the non-EU related exchange. Neither are the provisions in the TCA sufficient in light of the challenges that come with Brexit in the field of competition enforcement.

### Option 2: Dedicated Agreement

As it is rather unlikely that both sides will find it sufficient to cooperate only within the framework of the ICN and the OECD and rely on the provisions included in the TCA, the two sides could also conclude an agreement dedicated to cooperation on anti-competitive activities. Similar agreements exist with a number of countries, in particular with leading jurisdictions and major economies such as the United States, Switzerland, the Republic of

[11] European Commission (2020). Trade And Cooperation Agreement Between The European Union And The European Atomic Energy Community, Of The One Part, And The United Kingdom Of Great Britain And Northern Ireland, Of The Other Part. *Official Journal of the European Union*, Art. 2.4.4. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN

Korea, Japan, South Africa, India, China and Canada. Such an agreement can take different forms. The most common forms are the Memorandum of Understanding (MoU), agreements on cooperation, administrative agreements, and best practices.

In light of the challenges that arise out of Brexit, especially with regard to parallel investigations, a dedicated agreement can be very beneficial to both enforcers as it helps avoiding the possibility of conflicts between different authorities. It usually includes detailed provisions on mutual notifications, coordination of enforcement activities, information exchange, the use of information, and confidentiality (amongst others).[12]

### Option 3: ECN+

With the end of the transition period, the CMA is also leaving the European Competition Network (ECN), which includes the EC and EU Member State competition authorities. While the origin and function of the ECN does not allow a membership of the CMA, which would come with strong soft-powers, the EU could pay tribute to the special relationship between the UK and the EU, and the previous influence the CMA had within the ECN.

The EU could best do so by granting the CMA a special observer position, thereby constituting an ECN+. The advantages of such a solution are clear: The enforcing authorities would continue to work closely on proceedings and competition policy, thereby developing joint standards and enabling both enforcers and companies to have legal certainty. There are, however, also disadvantages. From a political point of view, the EU is most interested in establishing a level-playing-field. Granting the CMA a certain influence within the ECN is, at first sight, contrary to their general position that influence and market access come only together with common rules (and ECJ jurisdiction).

## Recommendation

In light of the special relationship between the UK and the EU, and the interconnectedness of their respective economies, competition laws and enforcement authorities, it is not sufficient to use the provisions contained in the TCA as the basis for future cooperation.

[12] European Union (2014). Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws. *Official Journal of the European Union*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22014A1203%2801%29

Rather, the two sides should enter negotiations on dedicated agreement on cooperation. It is strongly recommended that the EU opens the ECN for the CMA.

## Merger Control

As described, with the current one-stop-shop system no longer applying to a number of mergers involving parties from the UK or doing business in the UK, the UK and the EU are well advised to think about potential forms of EU/UK cooperation. The options largely align with these for antitrust.

### Option 1: Trade and Cooperation Agreement and international frameworks as the basis for cooperation

The EU already negotiated a general agreement containing competition provisions, the TCA. However, it contains only broad competition provisions. In Article 2.4 the parties recognise the importance of cooperation concerning the same or related transaction. It also stipulates that information may be exchanged. Further details as to the how this cooperation will look like and how information is exchanged are not included. For any cooperation to work in practise, however, a further agreement is needed. In fact, the two signatories acknowledged that and explicitly pointed out the possibility to conclude further agreements on competition-related issues.[13] Second, the respective competition authorities will also cooperate as part of the various international organisations already mentioned. However, considering the end of the one-stop-shop system and the expected high number of parallel merger proceedings, the existing cooperation frameworks are not even close to an equivalent to the current system.

### Option 2: Dedicated Agreement

The two sides can also conclude an agreement dedicated to cooperation on merger control activities. In light of the challenges that arise out of Brexit, in particular with regards to parallel investigations, a dedicated agreement can be very beneficial to both enforcers as it helps avoiding the possibility of conflicts between different authorities. It usually includes

[13] European Commission (2020). Trade And Cooperation Agreement Between The European Union And The European Atomic Energy Community, Of The One Part, And The United Kingdom Of Great Britain And Northern Ireland, Of The Other Part. *Official Journal of the European Union*, Art. 2.4.4. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN

detailed provisions on mutual notifications, coordination of enforcement activities, information exchange, the use of information, and confidentiality (amongst others).[14]

### Option 3: ECN+

The EU could pay tribute to the special relationship between the UK and the EU, and the previous influence the CMA had within the ECN. It could best do so by granting the CMA a special observer position, thereby constituting an ECN+. The advantages of such a solution are clear: The enforcing authorities would continue to work closely on proceedings and competition policy, thereby developing joint standards and enabling both enforcers and companies to have legal certainty. There are, however, also disadvantages. From a political point og view, the EU is most interested in establishing a level-playing-field. Granting the CMA a certain influence within the ECN is, at first sight, contrary to their general position that influence and market access come only together with common rules (and ECJ jurisdiction).

## Recommendation

In light of the special relationship between the UK and the EU, the interconnectedness of their respective economies, competition laws and enforcement authorities, it is not sufficient to use the provisions contained in the TCA as the basis for future cooperation. To the contrary, the two sides should enter negotiations on a dedicated agreement on competition-related cooperation. It is strongly recommended that the EU opens the ECN for the CMA, thereby establishing an ECN+.

## State Aid

The settlement of state aid has turned out to be one of the most contentious challenges in the EU-UK negotiations. Both parties had opposite perspectives and political positions. The EU's position on this matter was that the current state aid rules are a core part of the level playing field between both blocks and, therefore, it should continue to be applicable in the

[14] European Union (2014). Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws. *Official Journal of the European Union*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22014A1203%2801%29

UK. Contrary to this position, the UK government has insisted since the beginning of the negotiations on maintaining its autonomy on subsidising its own enterprises as any other sovereign state.

The baseline for the future control of state aid between both blocks are the WTO Agreement on Subsidies and Countervailing Measures, as well as the state aid rules included in the Trade and Cooperation Agreement. On this matter it is important to note that under the current framework, subsidies related to the audio-visual sector or given to a single economic actor under 325,000 Special Drawing Rights (around $383,500 euros) are exempted from the state aid rules contained in the Agreement. Additionally, for the principles to be applied to subsidy control a "material effect" needs to arise in order for each party to start the dispute resolution mechanism under the Free Trade Agreement.

In the following, additional options to this baseline are explored, including a no further agreement scenario, taking into consideration the advantages and disadvantages each policy option presents for both parties and the likelihood it will be implemented in the future.

### Option 1: No further agreement scenario

The Free Trade Agreement signed by both parties at the end of 2020, departs significantly from the fundamental features of the EU system of state aid control. The UK succeeded in regaining its autonomy to define the precise rules on its state aid regime, while complying to specific principles set out in the agreement.

If no further agreement on state aid is reached between both blocks, any dispute that might arise in the future with the EU will be resolved by the mechanisms set out in the WTO Agreement on Subsidies and Countervailing Measures and the Free Trade Agreement, which include arbitration and local courts.

Since the UK has been relying on EU's institutions to regulate state aid issues until now, the next logical step for its government will be to create its own framework and assign an independent regulator to implement its own new measures within its territory. According to statements made by the UK parliament, the Competition and Markets Authority of the UK (the "CMA") will take over the European Commission's existing role of enforcing and

monitoring subsidies or aids provided by the government to its enterprises after the transition period.[15]

Advantages and disadvantages. For the UK, this option is advantageous in the sense that it will allow the government to regain full autonomy regarding state aid within its territory, while agreeing to specific obligations set out in the Trade Agreement. However, it will implicate the creation of a new regime and regulator and the use of public resources to reach its goal. To this date, no law on state aid or subsidy control has been approved by the parliament, rising doubts on how and if the government will be in a position to control subsidies within its territory any time soon.

It is important to note that the UK has historically been more rigorous on state aid measures and has spent less on state aid as a percentage of GDP than most other EU Member States. However, in diverse statements, the government has made clear its intentions to focus state support towards innovation in the technology sector[16]. This will represent a disadvantage for the EU and its technology companies in the international market and could possibly lead to unequal level playing field and disputes in the future. Under the new trade agreement, however, EU companies will be able to challenge state aid awarded to UK rival companies in the UK's national courts if they feel it does not comply with the principles set out in the deal. In turn, UK companies will have equivalent rights in the EU.

Given the size of the EU and the inclination of member states to use subsidies, a subsidy race in the technology sector might result in a disadvantage for the UK in the long run. However, because of its regained sovereignty on this matter, the UK is in a position to subsidise this and other sectors as long as it does not breach any of the obligations entered into under the WTO Agreement on Subsidies and Countervailing Measures or the rather unspecific Trade and Cooperation Agreement.

Given the previous negotiations it is the most likely scenario to be implemented.

[15] Ilze Jozepa (2020). Briefing Paper - UK subsidy policy: first steps. *House of Commons*. Available at: https://commonslibrary.parliament.uk/research-briefings/cbp-9025/
[16] *Ibid.*

### Option 2: Sector-Specific Agreements

In addition to the rules and principles set under the Trade and Cooperation Agreement, both blocks can sign specific agreements and establish stricter rules for certain sectors.

In this sense, the UK and the EU could agree to further limit subsidies in specific sectors which might become a problem area. As an example, UK's government has been vocal about providing state support for the technology industry in order to make it more competitive worldwide.[17] If the EU does not adopt further resolutions with the UK, its stricter state aid rules under the TFEU might limit its capacity to compete at the international level with the UK in the near future. Therefore, an analysis of the risk sectors or future problem areas is recommended for the EU along with pushing forward new agreements with the UK.

### Option 3: State Aid Agreement with Joint Control System

If the rules contained in the Free Trade Agreement are sensed as non-sufficient to avoid market failures between both parties, the EU and the UK could enhance the already existing Trade Agreement or sign a new one. If these is the case, the creation and implementation of a new joint and coordinated process with independent regulators on both sides to jointly resolve disputes on subsidies when they might have harmed trade or competition is recommended. This would imply the creation of a new and stricter framework than that under the current Free Trade Agreement.

Because of their shared history and the impact both blocks have in each others' economies, this could be the most beneficial solution the EU and the UK can reach in the near future. Under this policy option, the UK will retain its autonomy and enter into a new state aid system as a sovereign state with the EU. For the EU, this will provide some control over the subsidies given by UK's government to its companies and could provide certainty that the UK will not initiate a subsidy race in the near future that could negatively impact the level playing field of the EU and its member states, especially on the technology sector.

However, even in this scenario, it is unlikely that the EU will simply be able to replicate its state aid framework in the UK. Compromises by both blocks will need to be made in order

[17] Ilze Jozepa (2020). Briefing Paper - UK subsidy policy: first steps. *House of Commons*. Available at: https://commonslibrary.parliament.uk/research-briefings/cbp-9025/

to develop a joint system, and the creation of an independent and neutral panel of arbitrators for resolving mechanisms will be key for this policy option to succeed.

This scenario seems highly unlikely given the recent negotiations between both blocks. A compromise on this has not been proposed nor agreed by the UK nor the EU. However, because of the special relationship between the UK and the EU, it still remains a solution for the future.

## Recommendation

The key goal of the UK government regarding state aid was to retain its autonomy on the sources it can provide to its companies and industries after the transition period. This autonomy is now a reality. However, the current compromise comes with different weaknesses and disadvantages for both parties. The policy options exposed herein, other than the first regarding a no agreement scenario, allow for the EU to negotiate with the UK as a sovereign state and enter into agreements that protect the interests of both parties and improve the current agreement. For any of these policy options to succeed, however, compromises need to be made by both parties. Given that the previous negotiations almost failed, new negotiations will be unlikely in the short term.

# The Future of the EU-UK Emission Trading System

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Formerly known as 'the Dirty Man of Europe' (with reference to poor environmental policies), the United Kingdom ('UK') has progressively become one of the global leaders in the fight against climate change since the 1970s – by virtue of European Union ('EU') membership. Brexit, however, now risks affecting the EU's and UK's efforts to ensuring elevated environmental protection, due to the latter's strong opposition to continuing observing EU environmental rules. At the same time, the UK has declared its intention to pursue strong environmental objectives without weakening the EU's ambitious ones: this is evidenced, for instance, by the re-introduction of the so called non-regression clause[18] in the EU-UK Trade and Cooperation Agreement, after the clause had been initially eliminated from both the Withdrawal and the Environment Bill. Whether and to what extent this commitment will be upheld by the British Government will remain to be seen, especially in the energy field.

One main instrument threatened by the UK's departure from the EU is the EU Emission Trading System ('ETS'), the bloc's climate flagship policy, aiming at gradually reducing greenhouse gas ('GHG') emissions by pricing the carbon emitted by 45% of power plants and installations operating in its territory. Before Brexit took place, almost one thousand UK installations were covered by the System, accounting for one third of total emissions.

Since the UK has effectively established a standalone national system of this kind to replace the EU's, it becomes important to highlight that consequences for both the environment and the Country will likely be dire. For instance, concerns relating to the exclusion of waste-to-energy facilities from the UK ETS' subjective scope of application have been raised, as this would probably entail an increase in emissions due to decreased compliance costs for them. Furthermore, given the unlinked nature of the system (at least as the rules stand so far),

[18] European Commission (2020). Trade And Cooperation Agreement Between The European Union And The European Atomic Energy Community, Of The One Part, And The United Kingdom Of Great Britain And Northern Ireland, Of The Other Part. *Official Journal of the European Union*, Art. 7.2.2. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN

liquidity issues and price volatility might also negatively affect the British industries participating in the scheme.

The present policy paper intends to explain why it is important, then, that the two blocs "consider cooperation on carbon pricing by linking a United Kingdom national greenhouse gas emissions trading system with the Union's Emissions Trading System". This intention has been already affirmed in the both non-legally binding Political Declaration and the UK Energy White Paper, although in a rather vague way.

After presenting a policy analysis of different forms of collaboration between the EU and third Countries as far as the EU ETS is concerned (Section II), two well defined policy options for the post-Brexit EU-UK relationship will be presented (Section III), accompanied by an assessment of their feasibility and practical implementation. Section IV will conclude with a recommendation of the most desirable solution as identified by the co-authors.

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The Political Declaration and the Withdrawal Agreement have formed the basis of the negotiations between Brussels and London as far as the potential cooperation between them in the climate and energy field might look like in the post-Brexit reality, and specifically as far as their ETS are concerned. According to the recently published EU-UK Trade and Cooperation Agreement[19], while the two parties have committed to creating a level playing field for open and fair competition between them[20], more concrete terms on how this will be implemented in the ETS collaboration still lack. At the same time, the UK's intention of linking its national ETS to the EU ETS remains extremely vague, as the British Government declared to be 'in principle open' to do so, but has not decided on its 'preferred linking partners yet'[21].

The EU ETS is the world's first international system of this kind and has been operating for

[19] European Commission (2020). Trade And Cooperation Agreement Between The European Union And The European Atomic Energy Community, Of The One Part, And The United Kingdom Of Great Britain And Northern Ireland, Of The Other Part. *Official Journal of the European Union.* Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN

[20] *Ibid.* Art. 7.2.

[21] UK Government (2020). *Energy White Paper, Powering our Net-Zero Future*.

fifteen years. Thanks to its progressive extension in scope and cap reduction, it has proven successful in contributing to the emissions cut objective and in overcoming the challenges that have arisen – also thanks to UK contribution.

Establishing a partnership between the two blocs' systems would be extremely advantageous for both the UK and the EU for many reasons. First, if the two systems were linked, liquidity would be ensured, while volatility issues would be prevented. Second, competitiveness of installations would be safeguarded, since the two systems would keep operating under the same carbon price. Lastly, establishing a standalone UK ETS system would be very expensive and lengthy – in other words, a non-viable near-term solution. Despite this last consideration, the UK Government has nevertheless set up a legislative body of law establishing and regulating its domestic emission trading system, with the recent coming into force of the Greenhouse Gas Emissions Trading Scheme Order 2020. The law, however, still presents some gaps, leaving room for uncertainty.

Overall, continued collaboration in this domain would help both sides keep up with their efforts towards achieving international climate goals, while pursuing them individually would not be as desirable. Therefore, the linkage between the systems might constitute a recommendable option. Indeed, the EU ETS is already linked with other third Countries' ETS, making them potential models for cooperation. Furthermore, there is political will to do so since UK officials have often announced the intention of establishing a partnership of this type with the EU, and the EU is also pushing in this direction.

## Policy Analysis

The EU ETS is a long-standing mechanism whose functioning is characterised by different trading phases reviewed and adapted throughout time to progressively achieve the EU's climate goal. Currently, the EU ETS completed its Phase III, which started in 2013 and is about to finish in December 2020, and entered its Phase IV on January 1, 2021. Each of the phases have been marked by amendments to the original Directive 2003/87/EC[22], through the setting of a tighter cap, an extension in scope, and enhancement of the share of allowances that is auctioned. Phase III differed from the previous two, as one EU-wide cap replaced all the national caps, and auctioning became the default method for allocating allowances[23]. Phase IV has maintained these features, while also advancing the cap reduction efforts in order to achieve the ambitious EU environmental objectives in a more rapid way[24].

When referring to collaboration between the UK and the EU in the climate field, it is worth mentioning that the UK used to employ - and, as will be explained further on, will still rely on after the abandonment of the EU ETS - an auction platform to trade allowances, named ICE Futures Europe, central for the functioning of the European energy market. This platform, disciplined by European Commission Regulation 1031/2010[25], worked in the same manner as the main European platform – the European Energy Exchange AG ("EEX") platform: EU Allowances (EUAs) were auctioned on the ICE platform on behalf of the UK Government, and operators within the European Economic Area or the UK participated. Apart from this peculiarity, there was no difference between the UK and other Member States with respect to the EU ETS' functioning: each $CO_2$ emitting installation covered by the system could trade EUAs, and had to register, monitor, and verify their emissions while operating in a manner consistent with the ETS.

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[22] European Parliament & Council of the European Union (2018). Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814. *Official Journal of the European Union*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0410

[23] European Commission (2015), EU Emission Trading System (EU ETS). *European Commission Climate Action*. Available at: https://ec.europa.eu/clima/sites/clima/files/factsheet_ets_en.pdf.

[24] European Commission (2020), *EU Emission Trading System (EU ETS)*. *European Commission Climate Action*. Available at: https://ec.europa.eu/clima/policies/ets_en

[25] European Commission (2010). Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community. *Official Journal of the European Union*. Available at: https://eur-lex.europa.eu/eli/reg/2010/1031/oj

The UK has left the EU ETS on 31 December 2020, ending the framework of cooperation with the EU in the climate field. In June 2020, the UK Government has committed to replacing the EU ETS in Great Britain with a carbon pricing model based on a national UK Emissions Trading Scheme, with features identical to the EU's carbon market. The Energy White Paper published in December 2020 confirmed this intention on the part of the British Government.

The existence of two parallel ETS carbon markets implies the possibility of a new framework for collaboration under the model of the EU and Switzerland. Nevertheless, the linking process between the EU and Switzerland has proven time-consuming and complex, from a legal perspective and from the perspective of the impacts the linkage has on external factors like electricity coupling.

As Phase IV of the EU ETS already started, and as EU law no longer applies to the UK, it is crucial to understand what scenarios may materialise in the short and long term, and assess the extent to which each of them might affect the EU ETS. The future of cooperation in the field of climate action is likely to be influenced not only by formal collaboration enshrined in law between the EU ETS and the UK ETS, but also by physical constraints created through the current climate policies, such as the interconnections of the electricity grids and the shared environmental resources. Great Britain has had a higher non-ETS carbon price than the EU in the electricity sector since 2013, when the UK Government introduced the Carbon Price Support tax. In turn, this discrepancy caused electricity suppliers to import more electricity from the EU, increasing the independence of the two energy systems. While this is only a part of the interrelation created by decades of a shared climate regime, it is fundamental for approaching potential scenarios describing the future of collaboration. Given that historical trends in the pricing of carbon have tended to influence electricity markets for a long-period, it is expected that the UK's electricity sector will remain affected by previous high carbon prices, long after Brexit.

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In the next section, we employ a scenario analysis intended at examining how cooperation

between the UK and the EU might look in the case no agreement regarding the ETS is reached after Brexit. Given the high degree of uncertainty still lingering despite the conclusion of a Trade and Cooperation Agreement, we divide the possibilities in two separate scenarios, one analysing the direct implications of a lack of an agreement on ETS, while the other one explains analytically how cooperation might look like, as well as the rationale behind such cooperation.

## Implications of no agreement on ETS being reached after Brexit

In the case in which the EU and the UK will not reach any sort of agreement in this field of environmental action, there is a systemic threat towards both the functioning of the EU ETS, as well as towards any other national carbon markets that the UK or any other European country might design.

It is worth noting that while the continued existence of the EU ETS is not under question, the effectiveness and efficiency of EU's carbon markets might suffer if the UK is no longer part of it. The development of a parallel, national system of carbon taxation in the UK not linked with the EU ETS might result in significant administrative barriers for industries, especially in the case of interconnected sectors such as electricity generation or aviation. Literature on the topics of clean energy and climate action has shown that administrative barriers are already the most important challenge for companies, so the perspective in which these obstacles are enhanced is a rather bleak one.

The no-deal scenario is thus best described by the political decision not to introduce coherence between the two systems, but to allow them to function in parallel, possibly leading to another price-collapse in the case of the EU ETS after the collapse associated with the financial crisis of 2008. Given that the new national British ETS has incorporated an independent price floor, two markets will function simultaneously, allowing for emitters operating under both jurisdictions to strategically choose the optimal way of emitting greenhouse-gases, leading to a slowdown of the greenhouse gases reduction pace. Without specific legislative action that discourages the gaming of the system, setting up a healthy system of incentives, the functioning of both carbon markets will be affected. This happens because of the heterogeneity of European economies, which combined with the administration of the EU ETS at a national level, guarantees that transnational polluters will

be able to obtain polluting allowances in a strategic manner on the secondary markets.

Another downfall with not having an agreement between the EU and the UK is related to the electricity markets and the structure of energy generation. Given the physical interconnection between the two entities, the price discrepancy between their respective carbon markets might lead to a decrease in the deployment of new renewable energy sources. Current developments from the side of the UK confirm the hypotheses that different prices might coexist if an agreement is not reached. Historical trends show that lower carbon prices in the EU than in the UK have led to significant spikes in imports of electricity from the EU, regardless of the energy source from which the energy was produced. While this is primarily a challenge for the British government, it's also crucial for the EU that such a scenario is not reached now that no agreement has been negotiated, given that it might increase the value of electricity produced from fossil fuels, prolonging the feasibility of such energy sources.

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The next section discusses the importance of continued cooperation, using the results of the previously described scenario analysis in order to look at the implications of the current negotiations. A case for continued cooperation is discussed, analysing both how a worst-case scenario could be avoided, as well as how a realistic trajectory towards a best-case scenario could be envisioned.

### Continued Cooperation Preconditions

As mentioned, political cooperation between the EU and the UK in the climate and energy field will not automatically end because of Brexit, and ensuring continued collaboration within the EU ETS is one crucial part of the future partnership. However, in order to avoid the dramatic outcomes of a potential worst-case scenario, the two parts need to envision a pragmatic approach towards any future forms of partnership, punctuating the importance of salvaging existing institutions that benefit both sides. The avoidance of the worst-case scenario is also reasonable for both Parties from a cost-effectiveness perspective, as the costs of redesigning two distinct carbon markets might be significantly higher than the political costs of cooperation in the climate and energy sector. Even if the UK has prepared the new internal carbon market, validation, verification and implementation will most likely be

timely and costly.

Ensuring continued collaboration would enhance the long-term efficiency and positive effects on the EU ETS, and allow the two blocs to successfully pursue their international climate obligations. A desire for "an ambitious, wide-ranging and balanced economic partnership"[26] has indeed been expressed by the two Parties in the Political Declaration – provided that this "is in the mutual interest of both" - a wish that also became clear with the last-minute Trade and Cooperation Agreement a few days before the end of the Transition Period. When it comes to the ETS in particular, the Declaration clearly states: "The Parties should consider cooperation on carbon pricing by linking a United Kingdom national greenhouse gas emissions trading system with the Union's Emissions Trading System". In a similar vein, the UK Energy White Paper confirms this possibility of 'in principle' linking its national system with the EU one.

Despite the fact that both the Political Declaration and the Energy White Paper lack any legally binding nature, it is evident that the UK would benefit from continued collaboration in the field of environmental protection, especially given the size and scope of the EU ETS. However, in order to discern the policy option available for the European Union at this stage, it is crucial to have an analytical understanding of the preconditions necessary for the attainment of any form of partnership, as well as the factors influencing this potential cooperation.

Firstly, the attainment of a potential partnership could be facilitated by existing experience of linking the EU ETS with an external system, as well as by the legal provisions allowing third parties to enter the carbon market designed by the European Union.

Secondly, from a legal perspective, a third country can be part – to a greater or lesser extent – to the EU ETS provided that some legislative and technical measures are put in place. The EU ETS Norwegian model, for instance, is characterised by a total merger of Norway's ETS and the EU's. The precondition for collaboration in this case is a series of legal agreements whereby EEA countries are included in the System's functioning and need to comply with

[26] European Commission (2019). Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom. *Official Journal of the European Union*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2019:384I:FULL&from=EN

EU rules in this regard despite a lack of involvement in the decision-making process that leads to the system's amendments.

Thirdly, any potential partnership is contingent upon both sides agreeing on a system of linking the carbon markets; legally, emissions trading linking is defined by a mutual legally binding agreement setting out the rules and conditions to which the UK must comply in order to keep participating in the ETS operations with EU partners. Among the conditions, it is essential to ensure that the two systems are compatible.

### Barriers

In the specific UK-EU case, the fact that the UK already has a mandatory system has to be welcomed by supporters of enhanced cooperation. However, the announced level of ambition will likely be different from the ETS' because the UK intends to set a cap 5% lower than the EU's in recognition of the Country's net zero emission ambitions[27]. Also, since a linkage between the two systems is less inclusive than a complete merger, one system's auctioning procedures might not be immediately available to the participation of the other's installations, and consequently tighter, more careful negotiations might be needed.

Addressing this latter issue is crucial to preserve the EU ETS' effectiveness, because UK operators have been major players within the System in the past five years in terms of number and value of transactions[28], and excluding them from the market might bring negative consequences. Without them, the EU ETS market would become tighter, with an increase in carbon price in the next phase, followed by a significant decrease in Phase V, "since by that time aviation has become a significant share of emissions, of which the UK has a disproportionate share"[29]. Nevertheless, this would still avoid the intricacies of the worst-case scenario, as it would only lead to increases in policy complexity, which could at least theoretically be solved through continued institutional cooperation. While continued collaboration might seem like an unreasonable objective given the stale relationship displayed by the Parties, confirmed also by the fact that the UK Government has not decided

[27] UK Government (2020). *The future of UK carbon pricing* (Department for Business, Energy & Industrial Strategy, The Scottish Government, Welsh Government, and Department of Agriculture, Environment and Rural Affairs (Northern Ireland)).
[28] Brown, M., and Steel, B., (2019). "Get Brexit Done" - the Impact of Brexit on EU ETS Carbon Prices. *AFRY*. Available at: https://afry.com/en/newsroom/news/get-brexit-done-impact-brexit-eu-ets-carbon-prices
[29] *Ibid.*

yet on their preferred linking partners[30], the reality is the physical connections between sectors such as electricity generation will guarantee its existence.

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To conclude, from an analytical standpoint it is essential to understand that the relationship between the EU and the UK in the field of environmental action is not fixed at this stage. Given the importance of linking the systems (for the environmental, administrative, and economic reasons mentioned above), the lack thereof in the agreement, and the desire stated by officials to do it in the future, it is important to understand the potential scenarios and options that would benefit the parties in the future. As such, the next section develops a series of policy options from the perspective of the European Union, following potential scenarios of cooperation.

[30] UK Government (2020), *Energy White Paper, Powering our Net-Zero Future*.

## Policy Options

In order to draft recommendations regarding the future relationship between the EU and the UK in the field of climate action, we need to understand how the potential cooperation looks like. The previous section stated that two different models of collaboration between the two parties can be identified as far as the EU Emission Trading System is concerned, and either of them arguably has the potential to represent the best-case scenario in the post-Brexit relationships, provided that some legislative and technical measures are put in place.

The first option is that the two sovereign entities link their carbon markets through a model similar to the one recently established between the EU and Switzerland. In the alternative, a complete merger of the UK domestic system and the EU ETS could be put in place, replicating the so-called Norwegian or Icelandic model.

We start this section by briefly describing the potential alternatives, and subsequently proceed with the development of arguments relating to the structure, content, and viability of the implementation of either of the models in the concrete post-Brexit relation.

### The Norwegian model

In 2008 the EU ETS Directive 2003/87/EC was incorporated into the European Economic Area (EEA) Agreement, sealing the accession of Iceland, Liechtenstein, and Norway into the EU ETS after the finalisation of each EEA State's domestic approval procedure.

Most commonly known as the Norwegian model, this form of ETS cooperation between the Union and third Countries currently consists in a total merger of the participating States' domestic ETS, being more far-reaching than cooperation under a linking agreement in many respects.

EEA Countries designed their own systems so that they were compatible with the EU ETS, making the merger immediately viable. Compatibility means that the systems are mandatory, have an absolute cap, and the monitoring, reporting and verification framework is stringent and robust. The systems also need to have the same sectoral scope, and this explains why EEA States widened their national legislation to comply with EU Law.

In this regard, it is important to highlight the fact that joining the EU ETS in this manner entails third Countries' acceptance of EU legislation in the climate and energy area, without simultaneously having the power to intervene in the decision-making process to amend this body of law.

Compliance oversight is carried out by the national competent authority as identified by EU rules, while jurisdictional control is in the hands of the Court of Justice of the EU (CJEU) for EU member States, and of the Court of Justice of the European Free Trade Association States (EFTA Court) for EEA States.

The full harmonisation of EU legislation provided for in the EEA Agreement also established that EUAs are the type of allowances employed in each market, and which are auctioned in the EU ETS common auction platform. Additionally, there exists only one Union Registry, operating EU and EEA accounts, and the EU cap covers the installations of the 27 member States plus those in the EEA territory.

### The Swiss model

The Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems (hereinafter 'Linking Agreement') was signed in Bern on 23 November 2017. It was approved by the Swiss Parliament on 22 March 2019 and was ratified by Switzerland and the EU in December 2019, entering into force on 1 January 2020.

The Agreement regulates the interconnectedness of the EU and Swiss registries and the mutual recognition of the other system's allowances. By virtue of this interconnectedness, anyone obliged to participate in the Swiss or EU ETS can alternatively use emission allowances from either scheme to cover the relevant greenhouse gas emissions and ensure compliance. In addition, as a result of the linking, aviation and fossil-thermal power plants will be integrated into the Swiss ETS, in line with the system in the EU. Participants in one ETS will be entitled to apply for admission to the auctions of emission allowances in the other.

The mutual recognition of emission allowances from the two ETSs is noteworthy, because

each of the two types of permits has its own legal basis. Switzerland will therefore not adopt EU law, rather maintaining its sovereign power to discipline and operate its domestic ETS. This is an important distinction with regard to the Norwegian model, whereby EEA States must adopt EU legislation in the energy and climate field as a result of the ETS merger, without having the power to participate in the decision-making process regarding its amendments.

On the contrary, the Linking Agreement provides that the competent authority responsible to administer, amend, and monitor the correct implementation of the rules governing the linkage between the two ETS is the Joint Committee, made of representatives of both the EU and Switzerland.

Following a similar reasoning, another relevant feature of this Agreement concerns disputes settlement. In this case, the jurisdiction over questions relating to the interpretation or application of the Agreement does not belong to the CJEU or the EFTA Court, but is rather entrusted to the Joint Committee, which will strive to resolve the disputes in the first stance. Should it not be successful, the dispute will be eventually referred to the Permanent Court of Arbitration upon one of the parties' request.

### Policy options

This concise overview of two existing different models of cooperation in the energy and climate domain between EU and non-EU States is a useful starting point for discussing how the potential EU-UK future relationship might look like after the end of the Transition Period on 31 December 2020.

As it will be explained in the following paragraphs, the two alternative collaboration schemes both present strengths as well as weaknesses as far as their translation to the post-Brexit scenario is concerned.

### Opportunities and challenges of the Norwegian model

If the UK and the EU decided to pursue a merger of this type, London would be required to design and regulate its domestic ETS so as to ensure compatibility with the European system. In concrete terms, this would mean that the UK System must be mandatory, have an absolute

cap covering the same sectors as the EU ETS, and apply the same carbon pricing. Moreover, UK operators would directly join the Union Registry, open accounts therein, and employ EUAs in the transactions with other participants. While some of these elements already feature the national ETS adopted by the British Government, some others pose serious threats to the feasibility of reaching such an agreement.

Among the factors that make the Norwegian model a feasible form of collaboration between London and Brussels are the obligatory nature of the designed UK system, its absolute cap – although expected to be 5% tighter than the EU ETS' during its Phase IV – and an identical scope of application. Contributing to the viability is also the fact that the two parties' operators already have a long-standing relationship within the EU ETS. The role of the CJEU would also not be problematic since this type of agreement entrusts the EFTA Court – and not the CJEU – with the power to adjudicate over interpretation and application issues presented by EFTA States.

On the other side of the spectrum is a list of legal and political constraints hampering its practical implementation. First, the preliminary condition to be fulfilled would be that the UK joined the EEA, adding to the EU-UK negotiations difficulty as more partners would be involved in the discussions. But even if that were to be swiftly agreed, a second type of political constraint would follow. Indeed, becoming part of the EEA has a twofold implication: not only the acceptance and adoption of EU climate and energy Law on the UK part, but also the accession to the Internal Market and observance of the four fundamental freedoms underlying it. This is problematic when assessing the feasibility of the Norwegian model of cooperation, due to the British Government's firm reluctance to remain subject to the EU *acquis*. Quite the contrary, the very core of Brexit's programme is to 'get back control' over the Country's sovereign power to legislate, without any supranational imposition outside of its control.

### Feasibility

Considering all of these elements makes a swift actualisation of the agreement extremely lengthy, primarily because the UK would need to become a EEA State. While Norway, Iceland and Liechtenstein would in principle not object to the UK becoming a new member, possible disagreements would come from the British Government itself, because of its

reluctance to accept all of the four Internal Market Freedoms, and the level-playing field provision. As a matter of fact, it remains to be seen how the UK Government's 'commitment to ensure a level playing field'[31] also in the energy sector - as enshrined in the EU-UK Trade and Cooperation Agreement recently finalised - will be concretely spelled out given the frequently-stated unwillingness of the British Government to respect this clause.

These considerations add to the impracticability of applying the Norwegian model to the post-Brexit case, although they would not make it impossible *tout court*.

### Benefits and common interests

The EU would benefit from the UK's continued participation in the scheme by its highly active players on the market, not only in terms of transaction numbers, but also because UK operators have been playing a major role as mediators in trading operations between other States.

This would ensure that the ETS capacity and effectiveness are preserved, because a high number of participants entails liquidity availability, price stability, and, more in general, an effective trajectory to the realisation of the International Climate Goals to which both the EU and the UK are committed.

On the UK side, the benefit would be legal certainty for its operators, who would keep trading with EU and EEA partners on the same regulatory foundations as before Brexit. Additionally, participation in the EU ETS would avoid liquidity shortages, guarantee stable carbon prices, and a huge number of trading partners with which to exchange credits and allowances.

Overall, they would both profit from participating in the biggest emission allowances market globally, thus remaining on track to establish a global carbon market and to achieve their Paris Agreement objective.

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[31] European Commission (2020). *Trade And Cooperation Agreement Between The European Union And The European Atomic Energy Community, Of The One Part, And The United Kingdom Of Great Britain And Northern Ireland, Of The Other Part*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN

## Opportunities and challenges of the Swiss model

If replicated to the post-Brexit relationship, some preliminary conditions would need to feature the UK ETS legislation, before the British system could be linked to the EU ETS. Specifically, there needs to be an overlapping between each system's sectoral scopes of application, meaning that the harmful gases and installations covered must be the same; the British ETS shall also be mandatory and have a cap identical to the EU's. Having preliminarily satisfied these requirements, the Agreement that would link the EU and the UK ETS would need to feature some basic elements to guarantee their technical compatibility, although it would not be as comprehensive as a total ETS merger.

First, a connection between the UK Registry with the Union's one should be established, followed by a mutual recognition of each other's emission permits. Second, the inter-exchangeability would in turn enable the operators trading within either scheme to alternatively surrender the EUAs or UK allowances to ensure compliance. Third, the ETS Agreement would need to provide for the admission of participants in the auctions taking place in both systems.

The final element of the deal would consist in the appointment of an independent body with jurisdiction over disputes settlement. In the same vein as in the Swiss Agreement, a Joint Committee made of Representatives of both sides could be established to intervene in the first stance, while the power to adopt the final decision could be assigned to the Permanent Court of Arbitration.

### Feasibility

It is important to highlight that the fact that the UK would have regulatory power to keep its current domestic ETS design, and subsequently link it to the EU ETS, would make this type of cooperation considerably feasible on a political level. Likewise, since the power to settle disputes concerning the Linking Agreement rules would be attributed to a Joint Committee and the Permanent Court of Arbitration *in lieu* of the CJEU, the likelihood of achieving an Agreement of the Swiss type is enhanced, considering that the UK Government has already advanced this proposition in a Briefing Paper concerning future relationships. However, it remains to be seen whether the EU would accept such terms, hence potentially extending the time required to reach consensus.

At the same, in order to assess the practicability of the Agreement, some issues concerning its elements deserve careful consideration. In fact, divergent opinions as to the value of the cap and the presence of a level-playing field provision risk putting the negotiations to a halt, because London intends to set a cap which is 5% lower than the EU ETS, and appears all but inclined to insert a provision ensuring that UK and EU installations play by the same rules while avoiding anti-competitive practices – whilst Brussels consider these a red line. In fact, without such a clause, the competitiveness of EU industries covered by the System would be compromised, and carbon leakage issues might arise. This possibility is further confirmed by the fact that the UK's commitment to ensuring a level playing field in matters related to energy - as expressed in the EU-UK trade and Cooperation Agreement - lacks any legally binding nature, hence not yet offering the certainty that British industries will fairly compete with the European ones.

On the other hand, agreeing on having matching scopes of application is extremely likely, given that the two parties have already reached a consensus in this regard, and the same can be said as far as the similarity of the monitoring, registering, and verification framework is concerned.

In light of these considerations, it becomes apparent that delays in reaching a Linking Agreement might arise. Possible disagreements pertain to important preconditions for linking, such as the maximum amount of emissions allowed, and the level-playing field provision. Even before that, it must be noted that the UK has not completely finalised its national ETS legislation, with clarity over what type of trading documentations or when auctions of allowances will take place still lacking, or even what the approach to progressively regulating the cap will be. Nonetheless, the majority of provisions have already been sketched out, hence making the feasibility of agreeing on a linkage likely on a practical level.

### Benefits and common interests

Advantages of having a linkage between the EU and the UK are essentially similar to the ones flowing from a Norwegian scheme-type. The EU would maintain relationships with a strong partner, and consequently remain on the right trajectory towards the realisation of the

Paris goals. Continued collaboration under these terms would also benefit the UK, not only by virtue of regulatory certainty and price stability, but also because of the chance to finally disentangle itself from the legislative and jurisdictional power of the EU.

## Concluding remarks

Environmental protection has become one of the most important fields of action for every sovereign entity in the recent years. The European Union prides itself as being at the forefront of combating climate change, through overarching policies that serve both as instruments for controlling internal carbon emissions, as well as models for other countries and international organisations. Nevertheless, the United Kingdom's choice to leave the European Union will play a pivotal role in the upcoming years, as the UK is one of the largest polluters in the European area, due to its population size and economic activity. While Brexit will leave its mark on all strands of environmental policy, the largest pressure will now reside over the EU ETS, the Union's most important climate policy.

Our analysis shows that while the EU ETS would function even in the absence of any form of partnership between the EU and UK, there are several reasons to believe that both parties would be negatively affected by the lack of cooperation. Therefore, we have analysed some pathways that the two parties could take in order to link their internal carbon markets without affecting their effectiveness and efficiency. Our analysis points out that from a legal and economic perspective, multiple scenarios appear to be feasible, meaning that the decision will be, ultimately, political in nature.

## Recommendation

While there are multiple scenarios through which the EU and the UK could reach an agreement partnering in the environmental sector, some options appear to be more reasonable than others given the existing legal and economic constraints. Some scenarios appear to be impossible in the very near future, such as the EU and the UK designing a full-fledged Norwegian-type agreement for linking their carbon markets — improbable due to the obligation of both parties to be part of the EEA.

However, all the existing methods of linking the EU internal carbon market to external national carbon markets show that in practice, mechanisms can be found given enough resources to design narrowly-tailored administrative facilities for both sides. As such, our proposal is not to immediately replicate any of the existing models, but to design one appropriate for the given situation, a type of partnership that could enter into force in the short run and be improved based on the entire system's feedback over the years.

The first step towards constructing this partnership, from the perspective of the EU, would be conducting a comprehensive assessment of the sectors covered by the ETS, from the perspective of the UK's involvement. A priority should be reviewing industrial relations, both in order to potentially design technical assistance guidelines for any future market linking, as well as to avoid carbon leakage. Sectors whose form of activity is a consequence of the ETS, such as electricity generation or constructions, should also be assessed. At the end of this review, the EU would possess information about any type of vulnerability for the ETS.

The second step would be a negotiation based on avoiding these vulnerabilities. While this type of engagement might appear sub-optimal, as it targets not systemic improvements, but also avoiding harms, it would allow the UK to also further its interest, increasing the probability of reaching an accord in the short-term.

The third step would be to design a system that is simple from an administrative perspective and that can be improved along the way, focussing not so much on avoiding any un-linked sub-sectors in the two carbon markets, but on designing proper administrative procedures and rules for enforcement. In general, when establishing new cap-and-trade systems,

compliance is one of the most important challenges.

The last step would be to agree upon a review-process. If the first steps were all about ensuring that some type of linking is put in place in the short-term, this part would allow the system to evolve based on internal feedback from the actors involved. Also, this step is crucial for the EU, as it would allow all its member States (through national companies and operators covered by the ETS) to have a say on the way the UK impacts their national climate ambitions.

## Conclusion

Environmental action represents possibly the most important policy sector for both the EU and the UK. For both parties, establishing and maintaining effective and efficient carbon markets is crucial in combating climate change. Nevertheless, Brexit has created the challenge of how to ensure a functional partnership between the EU and the UK, a partnership that could ultimately result in a linking of their respective carbon markets. The plan outlined in the last section proposes a reasonable scenario, trying to portray the most realising manner of cooperation, also in light of the recently agreed EU-UK Trade and Cooperation Agreement. As such, we deduce that avoiding bureaucracy, building on existing models and improving along the way are the key terms that the two entities should try to accommodate.

# EU-UK Cooperation on External Migration Policy Post-Brexit

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Immigration concerns represented a driving factor in the vote for Brexit.[32] Brexiteers claimed that, by joining Europe, the UK lost control over the number of migrants moving to their country. With the powerful slogan "Take Back Control", they leveraged an anti-immigrant sentiment widespread among nationals.[33] Politicians, together with citizens, built up the narrative that Britain has been invaded by illegal immigrants, asylum seekers from war-torn countries, and migrant workers from East Europe, especially Poland.[34]

Migration has always been a critical topic for the UK, and the country has always been reluctant to fully integrate into European migration policies. Since the beginning, the UK has wanted to remain in control of its borders and limit the free movement of people and goods entering its territory. Therefore, it opted out of the Schengen Agreement along with Ireland back in 1995 and has been implementing controls at its border ever since. However, opting out of the Schengen Agreement only allowed the UK to effectively control its borders regarding non-EU citizens. Indeed, it was bound by EU law to allow the entrance of EU citizens within its country. This is changing with Brexit. After the transition period, the UK will regain full national sovereignty on its borders and implement a new immigration points-based system applicable to all people, independently of their country of origin. Under this new framework, EU and non-EU citizens will be treated equally when entering UK's territory.[35]

Due to this firm stance of the UK on its sovereignty and its clear intentions to proceed with the establishment of this new immigration system, it is highly unlikely that the UK will be willing to

[32] Bulman, M. (2017). Brexit: People voted to leave EU because they feared immigration, major survey finds. *The Independent*. Available at: https://www.independent.co.uk/news/uk/home-news/brexit-latest-news-leave-eu-immigration-main-reason-european-union-survey-a7811651.html.

[33] Adam, K. & Booth, W. (2018). Immigration worries drove the Brexit vote. Then attitudes changed. *The Washington Post*. Available at: https://www.washingtonpost.com/world/europe/immigration-worries-drove-the-brexit-vote-then-attitudes-changed/2018/11/16/c216b6a2-bcdb-11e8-8243-f3ae9c99658a_story.html.

[34] Garavoglia, M. (2016). What Brexit means for migration policy. *Brookings*. Available at: https://www.brookings.edu/blog/order-from-chaos/2016/09/26/what-brexit-means-for-migration-policy/.

[35] UK Government (2020). *The UK's points-based immigration system: an introduction for employers*. Available at: https://www.gov.uk/government/publications/the-uks-points-based-immigration-system-policy-statement/the-uks-points-based-immigration-system-policy-statement

cooperate with the European Union for managing intra-EU migration flows after the transition period. By contrast, more room for future EU-UK cooperation can be found in external migration policies, on which the present research will focus on. Indeed, in this policy field, both parties could be negatively affected by Brexit, unless an agreement between the parties is reached. EU would lose a key partner to address the root causes of migration to its Member States, and the UK would need to implement a new system to maintain control of its external borders. The specific interests of both blocks regarding external migration will be outlined more in detail in the policy analysis section.

On this matter, it is important to note that the interest to cooperate in external migration management has been clearly stated by both parties. The will of the UK and EU to continue to cooperate to address the challenges of migration have been externalized in the UK's white book on "The Future Relationship Between the United Kingdom and the European Union"[36] and in the "Political Declaration setting out the Framework for the Future Relationship Between the European Union and the United Kingdom"[37] of the European Commission. Specifically, the UK government has expressed its interest to continue to cooperate with Frontex and Europol to strengthen the EU's external borders and combat organized immigration crime, as well as to remain being a member of the Dublin system and have access to the EURODAC. The terms of this cooperation, however, were not clearly set out in the Joint Political Declaration on Asylum and Returns[38] nor Withdrawal Agreement and to this date the draft for an "Agreement Between the United Kingdom and Northern Ireland and the European Union on the Readmission of Persons Residing without Authorization"[39] has not been agreed to by the countries involved.

[36] HM Government. (2018). *The Future Relationship Between the United Kingdom and the European Union.* Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786626/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf.

[37] European Commission. (2019). *Political Declaration Setting out the Framework for the Future Relationship Between the European Union and the United Kingdom*. Available at: https://ec.europa.eu/commission/sites/beta-political/files/revised_political_declaration.pdf.

[38] Official Journal of the European Union (2020). *Declarations referred to in the Council Decision on the signing on behalf of the Union, and on a provisional application of the Trade and Cooperation Agreement and of the Agreement concerning security procedures for exchanging and protecting classified information.* Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.444.01.1475.01.ENG&toc=OJ%3AL%3A2020%3A444%3ATOC

[39] UK Government (2020). *Draft Working Text for an Agreement Between the United Kingdom and Northern Ireland and the European Union on the Readmission of Persons Residing without Authorization*. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886021/DRAFT_Agreement_on_the_readmission_of_people_residing_without_authorisation.pdf.

## Policy Analysis

The EU approach to external migration is based on cooperation with third countries. On one side, the EU cooperates with neighbouring countries with the aim of externalising migration and border management. To externalise means, in border practices, to transfer the control of EU borders to foreign countries. The final outcome sought is to limit migratory flows to Europe by stopping migrants before they reach the EU's physical borders. On the other, it partners with sending and transit countries, especially from the Global south, to find agreements in the areas of returns and readmissions to send back irregular migrants who reached Europe, and to address the root causes of migration.[40]

This analysis will focus on the two aspects of EU's external migration framework. The first one is the cooperation with third countries. The objective is to find agreements in the areas of return and readmission, fight against irregular migration and address, in this way, the root causes of the migratory flow to Europe. The second aspect is external border control, with the aim of managing the flow of asylum seekers approaching Europe and limiting irregular entries in the European territory. For each of the two aspects, the shared and opposite interests of both blocks have been studied.

## Cooperation with third countries

### A) The Global Approach on Migration and Mobility

The Global Approach on Migration and Mobility (GAMM) represents the current overarching framework of the EU external migration policy, and it defines how the EU conducts its policy dialogues and cooperation with third countries.[41] The GAMM is based on four equally important pillars: (i) organising and facilitating legal migration mobility, (ii) preventing and reducing irregular migration and trafficking in human beings, (iii) promoting international protection and enhancing the external dimension of asylum policy, and (iv) maximising the development impact of migration and mobility.[42] It is envisioned to be a general approach and method, which can be applied globally with

[40] Carrera *et al.* (2019). *The external dimensions of EU migration and asylum policies in times of crisis*. Available at: https://www.ceps.eu/wp-content/uploads/2019/07/9781788972475-Constitutionalising-the-External-Dimensions-of-EU-Migration-Policies-in-Times-of-Crisis-The-external-dimensions-of-EU-migration-and-asylum-policies-in-times-of-crisis.pdf.

[41] European Commission. *Global Approach to Migration and Mobility*. Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en.

[42] European Commission. *Global Approach to Migration and Mobility*. Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en.

any relevant non-EU country. The main priority is given to EU Neighbourhood, notably the Southern Mediterranean[43] and the Eastern Partnerships[44]. However, under this framework, migratory routes and countries of origin and transit are given a special focus too because of their strategic interests to the EU.

The GAMM is implemented through a spectrum of tools and two types of partnership frameworks. Among the tools, there are legal and political instruments, operational support and capacity building as well as programme and project support made available to third countries and other stakeholders, as civil society and international organisations.[45]

The two main partnership frameworks are the Mobility Partnership (MP) and the Common Agenda on Migration and Mobility (CAMM). They both offer a political framework for comprehensive, enhanced and tailor-made dialogue and cooperation with partner countries. MP is envisioned to be the principal framework for cooperation in the area of migration and mobility between the EU and its partners. It should address the shared interests of both the partner country and the EU, and it should cover all four pillars of the GAMM in a balanced way. By contrast, the CAMM is an alternative framework, which can be proposed if both parties are willing to establish some form of cooperation, but they are not ready to enter in a set of obligations and commitments. Under this framework, the two parties agree on common recommendations, targets, and commitments within the four pillars of the GAMM, but they do not proceed in negotiating visa facilitation and readmission agreements. Moreover, if the two parties are willing to, a CAMM can be transformed, on a later stage, into a MP through the negotiation of those agreements.

Currently, the EU has Mobility partnerships signed with Cape Verde, the Republic of Moldova, Georgia, Armenia, Morocco, Azerbaijan, Tunisia, Jordan and Belarus and two common agendas on migration and mobility with Ethiopia and Nigeria.

### B) Development and Migration Funds

Both the EU and the UK represent the largest donors of development assistance in the world and mutually benefit from their already built network to address the migration challenges and causes affecting Europe. In recent years, the EU and the UK have focused on providing aid to origin and

[43] Morocco, Algeria, Tunisia, Libya and Egypt.
[44] Ukraine, Belarus, Moldova, Georgia, Armenia and Azerbaijan.
[45] European Commission (2020). *Global Approach to Migration and Mobility*. Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en.

transit countries[46], especially in the areas of good governance, infrastructure, economic development and rural development, as a strategy to decrease migration flows to the EU. The UK government provides resources to the EU Trust Fund for Africa; the Conflict, Stability and Security Fund to address the complex situation in Libya[47]; and the EU Trust Fund in Response to the Syrian Crisis.

Further, the UK has also actively contributed to migration funds. In fact, its government supported the Asylum, Migration and Integration Fund for the period 2014-2020, which aimed at providing resources for asylum, legal migration and integration, returns and solidarity. However, because of Brexit, UK will not continue to contribute for the renewed Asylum, Migration and Integration Fund[48], part of the Multiannual Financial Framework for 2021-2027.

## C) A shared interest?

### EU's interest: funding

For the EU, the continued engagement of the UK on these matters is important. Having the UK as an ally and supporter gives the EU a higher leverage while pushing forward cooperation with third countries for the development of further MP and CAMM agreements. Further, if no agreement is reached between both blocks on this matter, the EU will lose a key partner to promote and push forward development strategies in origin countries to address the root causes of migration and, in this way, decrease the incentive to migrate to the Union. In fact, the UK has historical ties with several countries, which belong today to the Commonwealth[49]. Even if those countries are independent and sovereign, they have shared goals – like development, democracy and peace –, and the UK may have a preferred channel of communication with them through the existing intergovernmental organisations of the Commonwealth. Thus, it could be beneficial for the EU to have the support of the UK when trying to establish partnerships with them. Lastly, without an

[46] Mason R. (2015). Fallon: UK aid budget should be used to discourage mass migration from Africa. *The Guardian.* Available at: https://www.theguardian.com/politics/2015/jun/21/michael-fallon-uk-aid-budget-discourage-mass-migration-africa.

[47] UK Government. (2019). *Government Response to the First Report of Session 2019 of the Foreign Affairs Committee, Responding to irregular migration: A diplomatic route (HC 107)*. Available at: https://publications.parliament.uk/pa/cm5801/cmselect/cmfaff/670/67002.htm.

[48] European Programme for Integration and Migration (2020). *Multiannual Financial Framework 2021-2027: an opportunity to enhance the integration of migrants, refugees and asylum seekers in Greece*. Available at: http://tdh-europe.org/files/files/EU%20Funding%20%26%20Integration%20brief_Greece%28EN%29%281%29.pdf.

[49] List of countries belonging to the Commonwealth: Antigua and Barbuda, Australia, Bangladesh, Barbados, Belize, Botswana, Brunei, Cameroon, Canada, Dominica, Fiji, The Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Malta, Mauritius, Mozambique, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, Republic of Cyprus, Rwanda, Samoa, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, Swaziland, The Bahamas, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom, United Republic of Tanzania, Vanuatu, Zambia, Zimbabwe.

agreement on cooperation on external migration matters at the EU level, the union will lose UK's financial support in many key funds, leaving Member States with less resources to control migration flows to the Union.

### UK's interest: readmission agreements

As the transition period has ended, the UK is no longer bound by the GAMM framework and will be able to implement its own external migration policies. It will lose, however, the agreements entered into by the EU and the third countries under the GAMM framework. More specifically, those to which the UK has signed: (i) the mobility partnerships with Georgia, Morocco and Tunisia, and (ii) the common agendas on migration and mobility signed by the EU for all the state members.

Besides, until the end of the transition period, the UK benefitted from the readmission agreements signed by the EU with third countries under the GAMM framework to return irregular migrants from its territory to their countries of origin. To this date, the EU has entered into readmission agreements with the following countries: Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, Macedonia, Bosnia and Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey and Cape Verde. In the absence of an agreement on external migration between the parties, all these agreements or obligations negotiated by the EU will cease to apply for the UK.[50] This will impact negatively, and even significantly, the UK migration flow and the government's capacity of returning immigrants to their countries of origin.

On this matter, it is important to note that, although the UK may still rely on the customary international law principle that a state is bound to accept the return of its own nationals from another state, this might not be desirable when the country of origin is not a safe country to return to. Moreover, this presumes cooperation from the third countries concerned regarding the implementation of measures to return nationals to their country of origin, which is not always the case. The third country may, for example, not provide the necessary travel documents, making the return of its nationals irregularly staying in the UK impossible in practice.[51]

Furthermore, customary international law does not allow for the return of other nationals or stateless persons to a third country different from that of their nationality, which is instead allowed under readmission agreements.[52] Notwithstanding this, the UK may still create its own readmission

[50] European Parliament. (2018). *The implications of the United Kingdom's withdrawal from the European Union on readmission cooperation*. Available at: https://op.europa.eu/en/publication-detail/-/publication/c30f3cee-15f0-11e8-9253-01aa75ed71a1.
[51] *Ibid.*
[52] *Ibid.*

agreements with third countries. However, it is evident that, when alone, it would have a lower ability to leverage and exercise influence over third countries compared to the European Union as a block.[53] From these aspects emerges a clear interest of the UK to cooperate with the EU in this matter.

# External Border Control

## A) Operational support

The Schengen Border Code provides EU States and Schengen Associated Countries with a single set of common rules that govern external border control. This is in the interest not only of the Member States located at the external border but all members of the European Union and Schengen Area. It serves to control illegal migration and trafficking of human beings, while preventing any threat to the Member State's internal security.

Member States are obliged to deploy appropriate staff and resources in sufficient numbers to carry out external border control, ensuring an efficient, high and uniform level of control. Additionally, Member States have the obligation to assist each other and maintain close and constant cooperation with a view to the effective implementation of border control. For this purpose, Member States benefit from operational support and capacity building provided by EU agencies as FRONTEX, the European Border and Cost Guard Agency; EASO, the European Asylum Support Office; and EUROPOL, the European Police Office. For instance, FRONTEX assists EU Member States in external border management, contributes to the prevention and identification of cross-border criminal activities, and assists Member States in forced returns of migrants that were not granted asylum to their countries of origin.[54] Furthermore, on the returns area, Frontex helps EU Member States and Schengen Associated Countries return people to third countries who have exhausted all legal avenues to legitimize their stay within the EU. The agency provides technical and operational assistance in the organization and coordination of return operations, assists in determining the identity of returnees, and cooperates with Member States and non-EU countries as well as other stakeholders involved in return management.

All EU Member States and Schengen Associated Countries have to make investments to protect their external borders in the interest of the entire area. For some states, mostly those located at the external borders, like France, Greece, Spain and Italy, these investments can be higher due to particular migratory pressures. The EU External Borders Fund aims to establish financial solidarity between Schengen countries by supporting those countries for which the implementation of the common

[53] *Ibid.*

[54] FRONTEX. *Origin and tasks*. Available at: https://frontex.europa.eu/about-frontex/origin-tasks/.

standards for control of the EU's external borders represents a heavy burden.

Although the UK has been excluded from full membership in FRONTEX on the grounds that it does not participate in the Schengen agreement and does not provide resources for the operation of the agency nor the External Border Fund, it has actively participated in some of its operations. In 2015, during the migration crisis, it participated in more than six FRONTEX operations and organized a joint return to Albania.[55] Furthermore, the UK has actively engaged in border management by participating in Operation Sophia back in 2017 and training the Search and Rescue teams in the Mediterranean. Lastly, the UK has participated in diverse operations jointly with EUROPOL to tackle migrant smugglers, like operation Muga and operation Versteck in 2018.[56]

### B) The Dublin System and EURODAC

Through the Dublin III Regulation, Member States have clear procedures regulating the criteria and mechanisms for determining which EU Member State is responsible for examining an asylum claim made in the EU. This system envisions several hierarchical criteria provided to the Member State responsible for an asylum application, the most frequent being irregular entry. Under this criterion, the Member State through which the asylum-seeker first entered the EU becomes responsible for examining his/her asylum claim. Therefore, if the asylum-seeker is found on the territory of another EU Member State, this person becomes eligible to be transferred to the country responsible for its asylum application. To identify migrants found illegally on the territory of a Member State, an EU database system, known as EURODAC, is used. This database collects identity details, as well as fingerprints of asylum applicants. By cross-checking a person's fingerprints against the Eurodac database, Dublin Member States can ascertain whether a person has already irregularly entered or made an asylum application in another participating state and, if so, return the person to such Member State.

The UK is a strong supporter of the Dublin system, as this provides significant benefits to the country. The government has expressed in numerous occasions their interest in replicate this system out of the EU and have tried to negotiate – unsuccessfully – an agreement on the readmission of people residing without authorization in the UK to Member States of the EU.[57] As from the end of the

[55] House of Lords. (2017). *Leaving the European Union: Frontex and UK Border Security Cooperation within Europe*, LIF 2017/0039. Available at: http://researchbriefings.files.parliament.uk/documents/LIF-2017-0039/LIF-2017-0039.pdf.

[56] European Union Agency for Law Enforcement Cooperation. (2019). *European Migrant Smuggling Centre: 3rd annual activity report-2018*. Available at: https://www.europol.europa.eu/publications-documents/emsc-3rd-annual-activity-report-%E2%80%93-2018.

transition period the UK government lost access to the EURODAC system and is currently unable to identify migrants who entered its territory through the EU.

## C) Border Management

Not being a member of the Schengen Area, the UK has long benefited from outsourced border controls to other EU Member States. The operations of juxtaposed border controls with France and Belgium has been essential to control these migration flows from the EU to the UK. On February 2003, the Le Touquet Treaty established juxtaposed controls between the UK and France at the maritime border. Furthermore, as a consequence of the migration crisis in 2015, both countries signed a new treaty at the Sandhurst summit on January 2018, with the aim of reinforcing cooperation for the coordinated management of their shared border.[58] This treaty enhanced the joint efforts to increase security at the border in France and strengthened the shared commitments on processing international protection applications, managing migratory flows, fighting against people trafficking and organized crime, and implementing removal measures, in compliance with international obligations on human rights protection. Additionally, in 2004, a tripartite agreement signed by the UK, France and Belgium introduced pre-boarding immigration controls on departures from the Brussels Eurostar station to the UK.

However, these agreements were entered into by countries while being members of the EU and were facilitated by their tie to the EU framework.[59] If not further agreement with the EU is reached on this matter, the bilateral agreements the UK enters into with Member States will be limited by local jurisdiction on external migration under the current framework. In this sense, Member States won't be able to compromise to make use or enter into readmission and return agreement without the approval of the EU, nor use Frontex or other operational agencies to control the border if the EU's institutions oppose.

## D) A shared interest?

EU's interest: operational support and tackling migrant smugglers organizations

Although the UK has not been a member of the Schengen Area, and therefore did not provide

[57] UK Government (2020). *Draft Working Text for an Agreement Between the United Kingdom and Northern Ireland and the European Union on the Readmission of Persons Residing without Authorization*. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886021/DRAFT_Agreement_on_the_readmission_of_people_residing_without_authorisation.pdf.

[58] French Embassy in London. (2020). *Paris stresses importance of cooperation with UK after Brexit transition period*. Available at: https://uk.ambafrance.org/Brexit-Paris-stresses-importance-of-continued-asylum-and-migration-cooperation.

[59] UK Parliament (2019). Brexit Implications (Chapter 3), *Brexit: refugee protection and asylum policy*. Available at: https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/428/42806.htm.

resources for FRONTEX nor the EU External Borders Fund, it has supported Member States and the Schengen Associated Countries in diverse operations to reduce illegal migration reaching its country. In this sense, the UK remains a key partner for EU institutions in charge of border control and it is in the Union's best interest to retain this cooperation in the future.

Moreover, UK's withdrawal from the EU will result in a new external border for the EU. This might create a new challenge on external migration matters, even though in a less significant manner. The exit of the UK from the EU's migration policies and regulation could incentivize illegal migrants currently residing in the UK to migrate to the EU, if the conditions for asylum are perceived to be more achievable within any of the Member States in contrast to the UK. Joint cooperation to control the external border of both blocks remains key to disincentivize reverse migration flow coming from the UK to any of its Member States after the transition period.

### UK's interest: juxtaposed border controls, operational control and relocation of illegal migrants

For the UK it is of key interest that juxtaposed border controls remain in place after Brexit, especially with France, in order to reduce illegal immigration flows into its territory. The support and endorsement of the EU on this matter could be relevant for UK's government and, therefore, cooperation on external border management can be expected. In line with the aforementioned, the UK has expressed its interest to continue to provide operational support to FRONTEX and EUROPOL to strengthen external borders and combat organized immigration crime in its white book on "The Future Relationship Between the United Kingdom and the European Union".

Finally, the UK has a strong interest in replicating the Dublin system outside of the EU to be able to identify and return people to other EU Member States. Enforcing the principle that those in need of protection should claim asylum in the first safe country they reach is particularly important for a country as the UK, as irregular migrants who want to reach its territory usually go through other EU countries. Since the end of the transition period, the UK is bound by international law only and is obliged to accept and process all asylum applications of irregular immigrants arriving at its territory, even from those whose asylum application have previously been denied by another EU Member State.

The British Government has already declared its intention to replicate the Dublin system outside the

block and expressed its interest in cooperating with the EU to have continued access to EURODAC.[60] Further, it proposed treaties on readmission to return all third country nationals and stateless persons who enter its territory without the right paperwork to the EU country they had travelled through to reach British shores. From this it follows that there is a clear interest on behalf of the UK to cooperate with the EU on external border control matters. As a consequence, the EU detains a higher leverage on this matter to negotiate with the UK.

## Conclusion

From the above it follows that both blocks have shared interests regarding external migration, especially in decreasing illegal immigration flows through the control of external border and addressing the root causes of migration. The EU, however, seems to have a higher leverage to reach an agreement with the UK in the future, since it has limit the access of the government to the EURODAC data base and refuse future cooperation under the Dublin System. A "no agreement" scenario on this regard, other than the Joint Political Declaration issued on December 31, 2020, could contrast UK's interests and increase the migration flow to its country in the future.

[60] House of Commons. (2020). *Brexit: The end of the Dublin III Regulation in the UK*, House of Commons Library, Briefing Paper, Number 9031. Available at: https://commonslibrary.parliament.uk/research-briefings/cbp-9031/.

# Policy Options

## Introduction

Norway, Liechtenstein, Iceland and Switzerland, even if they are not EU members, they cooperate with the EU in its external migration policies, as they are part of the Schengen area ("Schengen associated countries"). Thus, in general, they participate in the cooperation with third countries for the creation of readmission agreements and visa facilitations. Furthermore, they fund and benefit from the operational support of the European Agency FRONTEX. Then, they are subject to the Dublin regulations and, as a consequence, they have access to the EURODAC database. However, their cooperation in those areas constitutes a natural and, almost, automatic consequence of the decision of being part of the Schengen Area. Therefore, it is a substantially different situation with respect to the UK, which opted out of the Schengen area. Therefore, it is difficult to apply any component from such agreements in the case of the EU-UK partnership.

From the analysis, however, shared interests from both the EU and the UK have been identified. This provides scope for new forms of cooperation regarding external migration for both blocks. In the following sections the policy options identified for each aspect – cooperation with third countries (I) and external border control (II) – are developed.

## Cooperation with third countries

On one side, for the EU, the continued engagement of the UK on cooperation with third countries is important. Having the UK as an ally and supporter gives the EU a higher leverage while pushing forward cooperation with third countries, especially the ones belonging to the Commonwealth, for the development of further partnerships. On the other side, the UK has a strong interest in remaining part of the readmission agreement it has signed as an EU member with third countries, as it would become more difficult for the UK to send back migrants to their countries of origin otherwise.

Proposing to the UK to remain part of the GAMM framework is not a feasible solution for multiple reasons. Firstly, this policy option is complex to implement, as all the agreements with third countries should be rectified, and not all partnering countries might agree with this. Secondly, the UK might not be willing to remain part of the system, as it explicitly stated that it disagrees with the policy approach used by the EU in the field of migration. Thirdly, the UK might not be interested in being part to all the partnerships, but only to those that directly or indirectly have an impact on the migration flow entering its territory. Indeed, readmission agreements are given by third countries in exchange to visa facilitations. The UK, thus, might not be interested in giving visa facilitations to countries from which they do not face migration. However, it might be interested in just being included in the

agreements of the EU with those third countries from which most of the migrants reaching the UK territory come from.

Considering all these aspects, it might be more feasible to propose the following agreement to the UK. Firstly, for the partnerships with third countries already signed, the UK may selectively negotiate with the EU the agreements to which it wants to remain part now the transition period is overafter the transition period. For future agreements, the UK could choose arbitrarily in which agreements it would like to participate, contributing to the negotiations with its leverage. However, in exchange for this favorable solution, it would be obliged to favor the establishment of a dialogue, and consequent negotiations, with those third countries that belong to the Commonwealth and, at the same time, are of strategic interest to the EU. Indeed, the UK has a higher leverage on them compared to the EU, and therefore could gain considerable advantage from the collaboration with the UK.

By contrast, in the area of development and migration funding, the interest in cooperating lies mostly, if not entirely, with the EU. Indeed, if no agreement is reached between both blocks, the Union will lose a key partner to promote development strategies and provide financial support to origin countries, with the aim of addressing the root causes of migration and, in this way, decreasing the incentive to migrate to the Union.

The EU may propose to the UK to keep providing the same quota to the Trust Funds and, thus, continue to contribute to the development strategies aimed at addressing the root causes of migration. In exchange, the EU will give the UK a wider scope for making its own proposals, so that it would be able to bring forward its policy goals together with the ones of the EU, as they might differ.

It is clear that, given the unbalance of interests between the blocks on this matter, it would be necessary to combine this agreement with other compromises, mostly favoring the UK.

### External Border Management

Now the transition period has ended, it is no in the interest of the EU's institutions to provide tools, resources or even operational support to activities at the external border that could control illegal migration aiming to reach the UK. The EU's mandate is solely to provide service to its members and, in certain areas, to those countries who are not members of the Union but do participate in the Schengen Area. Therefore, strategies and agreements entered into in the future will not take UK's migration challenges and needs into consideration.

On this matter, there is a clear unbalance between the interests of the two parties, as the UK has a

higher interest in cooperating compared to that of the EU. However, a joint conduction of the external migration policies between the UK and the EU can help both blocks to have a united front when struggling with their common issues regarding external migration.

For achieving this united front, the EU may recommend that the UK enters into an agreement for pursuing juxtaposed border control along the channel not at the country level, as it has done in the past with France and Belgium, but at the European Union level. Juxtaposed border control represents an important aspect to reduce illegal immigration flows entering the UK's territory and endorsing these bilateral agreements at the EU level can provide additional benefits for both blocks, such as the use of EU institutions like Frontex or Europol to control de borders and return illegal migrants to their countries of origin.

In order for this recommendation to succeed, the EU can commit itself to further cooperate in controlling the external border -with the aid of FRONTEX- and coordinate activities with the UK to reduce migrant smuggling through joint operations. Additionally, this border agency could provide support for the readmission of migrants to their countries of origin when crossings are done illegally and there is no right to asylum under the international framework. In exchange, the UK can provide specific funding to the EU to carry out such activities as well as operational support for a more effective external border control between the EU and the UK.

This solution could also be advantageous for the EU, in case of an eventual reverse flow of migrants from the UK to any of the Member States if the migration landscape is perceived to be more achievable within the Union. Furthermore, implementing this recommendation can be used as leverage to convince the UK in partnering with the EU in other areas that are more of interest of the Union.

However, this scenario is unlikely to occur, as the EU has not a high interest in cooperating on external border control with the UK unless it represents additional operational and funding support to control illegal migration at more transited external borders, like those located at the Mediterranean Sea, such as those from Italy, Greece and Spain. Additionally, the UK does not necessarily need the EU to pursue its objectives. France as a single country has already expressed its intention to cooperate with the UK in controlling the border between them, in exchange of funding and operational support.

A second policy option could be to that linked to the Dublin regulations and the access to the EURODAC database. On this matter, however, there is a clear unbalance between the interests of the two parties. For the UK, this represents a key area of cooperation. In fact, since irregular migrants

have to transit through other EU countries to reach the UK, remaining part of the Dublin system would allow the government to relocate to other EU countries many of the irregular migrants reaching its territory, according to the hierarchical principle of first entry under the Dublin Regulations. By contrast, the EU has no clear interest in partnering with the UK on this matter.

This second option might prove more effective than entering into an agreement for juxtaposed border control at the EU level. In the case of the Dublin regulations, without an agreement with the EU, the UK has no other choice than processing all the asylum applications of the migrants approaching their territory and asking for international protection. There is no possibility for them to relocate these migrants to Europe, as they would do with many of them under Dublin Regulations.

As a solution to this problematic, the UK could enter into bilateral agreements with individual Member States if it does not secure an EU-wide agreement. However, this should take into consideration the limit between the jurisdiction of the EU and its Member States. In this sense, access to EURODAC, readmission or relocation agreements cannot be signed with individual countries. Therefore, it is recommended that the EU uses this favorable position as leverage to obtain advantageous partnerships in other migration areas in which no agreement with the UK has been reached so far.

## Policy Recommendations

The EU has two main leverage options towards the UK in regard to border management: either supporting the country in border control management along the Channel or allowing it to remain part of the Dublin system. The first one will allow to reduce illegal immigration flows on transit from the EU to the UK while institutionalizing operational and financial support for FRONTEX. The second one enables UK's government to use the EURODAC database and relocate irregular migrants reaching its territory to other EU member states under the Dublin Regulations.

It is recommended that the EU pursues the second option and, thus, allows the UK to remain part of or replicate the Dublin system outside of the Union. This, indeed, would represent a more effective leverage tool for the EU to negotiate future cooperation on external migration matters with the UK. In fact, the UK does not strictly "need" the EU for controlling the migration flows along the Channel, as it can also cooperate with France and Belgium, who have already expressed their willingness, as single countries to control external borders. Conversely, there is no other way for the UK to relocate most of the migrants reaching the borders to the EU by crossing the Channel, if the country does not manage to remain part of the Dublin system. Without an agreement with the EU, the UK would have no other choice than processing all the asylum applications of the migrants approaching their territory and asking for international protection. This would represent a great drawback for the country, which claimed the reduction of migration flows as one of the reasons to exit the Union.

In exchange, the EU should request the UK to continue to provide support to address the root causes of migration and limiting the migration flows to Europe. Firstly, it should advocate for the UK to keep providing financial resources to the Trust Funds and, thus, continue to contribute to the development strategies aimed at addressing the root causes of migration. At the same time, to make this proposal more appealing to the UK, the EU should give the UK space for making its own proposals on joint external migration control, so that it would be able to bring forward its policy goals together with the ones shared with the EU.

Further, the EU should propose that the UK contributes with financial and operational activities to control EU external borders, especially at the Mediterranean Sea. The western migration flow[61], which includes the Mediterranean and Western African routes, have seen an increase in migrant smugglers in recent years. To tackle this problematic, the EU has deployed FRONTEX operations to rescue migrants at risk and a naval military operation (IRINI) to disrupt the business model of human

[61] European Council. Infographic – *Migration flows: Eastern, Central and Western route*. Available at: https://www.consilium.europa.eu/en/infographics/migration-flows/

smuggling and trafficking networks. Continued cooperation on this subject by both blocks will allow to reduce immigration flows to Member States of the EU, including those aiming to reach UK's territory. The UK Government could be willing to agree on this, as it expressed its interest to continue to cooperate with the EU to strengthen the Union's external borders and combat organized immigration crime.

Including these components in a partnership agreement would lead to a balanced framework for future cooperation. On one side, the UK would be able to keep incoming migration under control by continuing to relocate most of the migrants reaching its territory from the EU to other Member States, following the Dublin regulations. On the other side, the EU will maintain financial support as well as its relationship with a strong partner to further reduce external migration issues within the Union and address the challenges faced by its Member States on this regard.

In addition to this, it is recommended that the EU includes in the agreement a partnership with the UK in cooperating with third countries. The UK and the EU, together, hold a higher leverage to address the roots of migration in third countries, especially regarding cooperation with country members of the Commonwealth. This partnership would be equally advantageous for both sides. Addressing the roots of migration has proven efficient to reduce illegal migration flows coming into Europe and will allow both blocks to join forces to confront common challenges on this matter. This is recommended, even if the two parties do not find an agreement on the other aforementioned aspects and recommendations.

As a last consideration, being part of the EU readmission agreements with third countries would be of a higher relevance for the UK, especially in the case in which the EU and UK do not find an agreement on the aforementioned aspects. This, would allow the UK to send back those migrants for which the asylum applications were not accepted within its territory. The readmission agreements, however, are signed by the third countries and the EU for its member states and including a non-EU member to these agreements would require the ratification by each third country. Therefore, both parties would need to work together for this option to succeed.

# EU-UK security cooperation post-Brexit

*Finding ways forward to ensure continued fruitful information sharing and law enforcement cooperation*

*Authors: Anette Sonnbäck, Giulia Pasquali, Letitia Roman and Yasmina Alaoui*

Multilateralism lies at the very heart of the European Union's (EU) approach to foreign and security policy. History shows that EU Member States can have a crucial impact on multilateral affairs when they act cohesively. It is no secret, however, that the United Kingdom's (UK) withdrawal threatens European cohesion and thus undermines the EU's leverage in the international system, especially as foreign affairs, external security and defence was not covered by the December Agreement. As a leading economic and military force in Europe with extensive international diplomatic reach, the UK shaped Europe's foreign and security policy for years. Ranked eighth in the world by the Global Firepower Index 2020[62], Britain possesses considerable military power, it remains a nuclear deterrent and is among the top four defence spenders in NATO by share of GDP[63] and it is only one of two European permanent members of the UN Security Council. The fact that no cooperative framework in this area remains in place after the 31 December 2020 mark is unfortunate as it could lead to a weakening of both parties in an increasingly polarised world. The result of the December negotiations, however, showed a stronger willingness to focus cooperation on internal security, an area in which important concessions were made.

The UK has had a leading role in contributing to the internal security of the Union, which made it of utmost importance to establish a close relationship between the UK and the EU on internal security policy issues. The UK's major intelligence capability as well as the EU's information sharing regime are but two crucial areas that have helped tackle serious threats to the continent, such as terrorism, organised crime and cyberthreats. It was clear that an end to cooperation would severely damage the parties' capabilities in this regard and restrict the abilities of law enforcement agencies[64]. The protection of European citizen's security was therefore established as one of four pillars of cooperation in the negotiated Trade and Cooperation Agreement[65] (henceforth TCA or Agreement).

[62] Global Firepower (2020). *2020 Military Strength Ranking*. Available at: https://www.globalfirepower.com/countries-listing.asp
[63] NATO (2019). *Defence Expenditure of NATO Countries (2012-2019)*. Available at: https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2019_06/20190625_PR2019-069-EN.pdf
[64] Brière, C., (2020). *Brexit and its consequences for cooperation in criminal matters*. Available at: https://europeanlawblog.eu/2020/02/03/brexit-and-its-consequences-for-cooperation-in-criminal-matters/

This Chapter will focus on the Europe-wide need for security cooperation and analyse how this will be impacted by Brexit and the Agreement. It will particularly focus on cooperation within the Europol framework as the EU's law enforcement agency and one of the main bodies for maintaining European security. Based on this, two policy options for the future of EU-UK security cooperation are presented along with a final recommendation. It is concluded that the UK will have to balance its desire to use Brexit as an opportunity to regain its influence as a global sovereign power with its continuous interest in the stability and security of Europe, while the EU must not shy away from continued negotiation and further concessions to strengthen the partnership by developing a unique tailor-made agreement to ensure the continued strength of its collaboration with the UK.

## Maintaining European security: the need for strong cooperation

Understanding the character of the threat to European security is key to outlining the need for multilateral cooperation, and therefore a first step to analysing the necessary scope of such a cooperation. Organised crime and terrorism have taken on new dimensions since the turn of the century and presents a diverse threat to European security. In the interconnected world of today where information technologies are constantly developing, perpetrators know no borders[66]. A newer threat to European security that has also been employed by criminals and terrorists is cybercrime, which has become a reality for several European states that have seen the use of disinformation, cyberattacks, and social manipulation as techniques for destabilising their societies[67]. Close collaboration between neighbouring states in an era of cross-border criminal activity is therefore not only desirable but crucial. In the case of the UK, the collaboration that its EU membership allowed for proved to be of great support to its law enforcement agencies, and thereby continuously helped ensure the protection of the UK's security. The opposite is also true, as the EU and member states' law enforcement agencies have benefited immensely from the exchange of expertise with the UK and not least from the access to the UK's intelligence data[68]. With relationships, structures and channels between the two being so intertwined, it would be impossible to have a functional system

[65] European Commission (2020). Trade And Cooperation Agreement Between The European Union And The European Atomic Energy Community, Of The One Part, And The United Kingdom Of Great Britain And Northern Ireland, Of The Other Part. *Official Journal of the European Union.* Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN

[66] Clingendael (2020). *Transnational Organised Crime*. Available at: https://www.clingendael.org/pub/2017/monitor2017/transnational_organised_crime/

[67] European Commission (2020). *EU Threat Landscape Report: Cyber attacks are becoming more sophisticated, targeted and widespread*. Available at: https://ec.europa.eu/digital-single-market/en/news/eu-threat-landscape-report-cyber-attacks-are-becoming-more-sophisticated-targeted-and

[68] UK In a Changing Europe (2016). *Europol: its origins, functions, and future development*. Available at: https://ukandeu.ac.uk/explainers/europol-its-origins-functions-and-future-development/#:~:text=Europol's%20mandate%20is%20to%20improve,combating%20serious%20cross%2Dborder%20crime.&text=As%20a%20result%2C%20Europol%20might,real%20law%20enforcing%20police%20office

without having compelling areas of cooperation.

In tackling organised crime, terrorism and cyber threats that have become more transnational in nature, intelligence and information sharing tools have proven to be vital for identifying and responding to possible threats around Europe[69]. Swift data exchange and access therefore remains essential for the functioning of the EU-UK security apparatus. Europol, the European Union Agency for Law Enforcement Cooperation, and its different tools and mechanisms of cooperation is central for enabling such exchange[70]. Intelligence and information sharing, as well as cooperation with and within Europol will therefore be the main focus of this analysis, addressing the importance of existing tools and why it is in the interest of both parties to find strong means of cooperation, along with the prospects for this, considering the Agreement and data protection regimes. There is no doubt that the UK has a lot to offer when it comes to diplomacy and security, but it is clear that it also has a lot to gain from continued cooperation with security authorities in the EU and across the 27 EU Member States.

[69] Brown, R., (2018). Understanding law enforcement information sharing for criminal intelligence purposes. *Australian Institute of Criminology*.
[70] Europol (2020). *Information exchange*. Available at: https://www.europol.europa.eu/activities-services/services-support/information-exchange

# Policy Analysis

## The path towards a fruitful EU-UK security cooperation

The previous section identified intelligence and information sharing as crucial for maintaining security in Europe, and this section will explore some of the main frameworks of cooperation in these areas, with a focus on Europol tools, and how cooperation through the outlined tools has worked to uphold the security in Europe. It will proceed to analyse how the EU-UK Trade and Cooperation Agreement concluded on the 24 December 2020 will impact these structures and frameworks, and how it might impede or enable a fruitful EU-UK security cooperation.

### Europol: The EU's central agency for tackling terrorism, serious crime, and cyber threats

Working as its law enforcement agency, Europol has the important task of supporting Member States in tackling internal security threats such as terrorism, organised crime, and cyberthreats. One of its main contributions is its analytical capabilities where experts draw on law enforcement information provided by Europol members to establish patterns between crime cases[71]. This can consequently expose cross-border crime and enable strategic planning. Information sharing is at the core of its activities as it allows for effective crime analysis. Its information sharing systems also give EU Member States the possibility to access law enforcement data from other EU countries, which can support investigations. While the Agency is not an intelligence service and thereby has no direct authority in such matters, it has gained indirect intelligence competencies as its members increasingly share information and sensitive intelligence leads, especially after the Paris terrorist attack in November 2015[72]. Cyber-intelligence has also gained attention and become an important part of Europol's work, which makes the fight against cybercrime embedded in its daily activities[73]. These activities make Europol the most important body within the EU in charge of intelligence and information sharing.

For UK law enforcement, the role of Europol gained importance over the years and has been used more by the UK than most other countries in the EU. Former Europol Chief of Staff Brian Donald

[71] Europol (2020). *About Europol*. Available at: https://www.europol.europa.eu/about-europol
[72] Bossong, R., (2018). Intelligence Support for EU Security Policy. *Stiftung Wissenschaft und Politik*. Avaliable at: https://www.swp-berlin.org/en/publication/intelligence-support-for-eu-security-policy/
[73] Europol (2020). *Cyber Intelligence*. Available at: https://www.europol.europa.eu/activities-services/services-support/intelligence-analysis/cyber-intelligence

explained in 2016 that around 40 percent of Europol's cases involved UK law enforcement[74]. The Home Affairs Committee of the UK House of Commons furthermore reaffirmed that Europol's analyses has facilitated the exposure of criminality, as it allowed the country to identify leads that might not have been visible with the UK's data alone[75]. Furthermore, the UK has been one of the main contributors to Europol's crime intelligence analysis and provided extensive data. In 2016, it made over 7400 intelligence contributions to Europol Analysis Projects while leading many law enforcement priority projects[76]. The UK has not only led many operational projects, but also led the direction of Europol as such. As a third country, the UK has lost its Europol membership and will no longer have this central role in the Agency, which is a loss for both parties. The UK will no longer enjoy the same access to the agency's tools and databases and will not have a say in its decisions or a role in its governance[77], which could lead to a great loss of expertise.

The following section will outline how the UK's Europol membership has benefitted law enforcement activities in the fight against terrorism, organised crime and cyber security, with a focus on key tools and cooperation frameworks. The analysis will focus on three tools and mechanisms of cooperation in particular, namely the Europol Information System and the Europol Secure Information Exchange Network Application, both crucial for swift, secure and smooth information and intelligence exchange, as well as the European Cybercrime Center, a unit focused on coordinating and supporting intelligence sharing that demonstrates Europol's importance for the work of law enforcements throughout the EU.

## Tools within Europol for information exchange and intelligence activities

As mentioned, Europol has a crucial analytical role, as it anchors databases of significant law enforcement data that can be connected to better facilitate intelligence-led investigations[78]. Under this framework, two noteworthy bodies of information and intelligence sharing are the Europol

[74] Picken, A., (2016). Scots Europol boss warns Brexit vote could be a 'huge boost for criminals'. *Sunday Post.* Available at: https://www.sundaypost.com/politics/scots-europol-boss-warns-brexit-vote-huge-boost-criminals/

[75] UK Parliament (2018). *EU-UK Cooperation After Brexit: Europol*. Available at: https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/635/63506.htm#footnote-144

[76] HM Government (2017). *Security, law enforcement and criminal justice: a future partnership paper*. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645416/Security_law_enforcement_and_criminal_justice_-_a_future_partnership_paper.PDF

[77] European Commission (2020). *Questions & Answers: EU-UK Trade and Cooperation Agreement*. Available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532

[78] HM Government (2018). *The Future Relationship Between The United Kingdom And The European Union*, p. 62. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786626/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf

Information System (EIS) and the Europol Secure Information Exchange Network Application (SIENA).

### The Europol Information System (EIS)

The Europol membership provides countries with the great advantage of accessing cross-country data that can be decisive for criminal investigations. The Europol Information System (EIS) is Europol's central database storing information related to criminal activities. The system contains data on suspected and convicted criminals as well as objects connected to crime, such as guns. The system has expanded exponentially during the last few years and contained data on approximately 213 000 persons in 2018, when EIS searches exceeded four million[79]. An important function of the EIS includes the linking of data to create structured information on crime cases[80]. As such, countries can use the system to identify connections to different leads in on-going investigations, which is a great support for law enforcement agencies across the EU. This is not least true in the case of the UK. One example highlighted in a UK report showed how the cross-matching of data from Belgium and Poland allowed Europol to identify organised crime linked to the UK, which in this case led to the disruption of a smuggling ring that smuggled 50 migrants a week into the UK[81]. Such an interconnected system is therefore crucial in times of cross-border crimes.

Several UK reports and assessments have highlighted that the future relationship with Europol is a critical priority as UK law enforcement agencies were relying on systems such as the EIS. The UK's National Crime Agency (NCA) has benefitted from the possibilities that the EIS provides and has been vocal about the risks and negative effects associated with an exclusion from the system[82]. Experts have additionally been outspoken about the negative consequences that the exit from the Europol system will bring in terms of (mention statements by King etc. on EIS). While it was reported that the UK requested to retain access to the EIS earlier in 2020[83], illustrating the importance of its concerns, it has indeed been excluded from it with the Trade and Cooperation Agreement, meaning that the UK will not have direct access to the system under the current partnership agreement.

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[79] Europol (2018). *Europol in Brief 2018*. Available at: https://www.europol.europa.eu/activities-services/main-reports/europol-in-brief-2018

[80] Europol (2020). *Europol Information System (EIS)*. Available at: https://www.europol.europa.eu/activities-services/services-support/information-exchange/europol-information-system

[81] HM Government (2016). *The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues*. Available at: https://www.statewatch.org/media/documents/news/2016/may/eu-uk-jha-fa-coop.pdf

[82] UK Parliament (2018) *Written evidence submitted by the National Crime Agency (PSC0009).* Available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/home-office-delivery-of-brexit-policing-and-security-cooperation/written/78338.pdf

[83] Schengen Visa (2020). *UK Negotiates to Retain Access to Europol and SIS After Brexit*. Available at: https://www.schengen-visa.com/news/uk-negotiates-to-retain-access-to-europol-and-sis-after-brexit/

## The Europol Secure Information Exchange Network Application (SIENA)

As is visible with the EIS, one vital aspect in achieving a secure environment in Europe is through the means of intelligence and information exchange. However, it is as important that information is exchanged securely. The Europol Secure Information Exchange Network Application (SIENA) has been in place since 2009, and the tool is focused on data protection and confidentiality to ensure compliance with all legal requirements. SIENA has emerged as the pillar of secure information exchange. This system was created with the purpose of enabling a secure exchange of sensitive crime-related intelligence and information between member states, Europol and third parties - mostly law enforcement cooperation partners. The users of SIENA consist of Europol officials, Member State liaison officers and competent authorities in the Member States. What the system brings new to the table is a swift, user-friendly interface that facilitates the exchange of sensitive and operational intelligence that connects the aforementioned users with the strategic cooperation partners: Australia, Croatia, Iceland, Norway, and Switzerland.

What makes SIENA such a reliable platform is the flexibility and fast-growing integration of crucial law-enforcement units and initiatives integrated on the communication platforms in order to enhance the scope and stakeholders of intelligence exchange, all under the veil of a strong, data-protected platform[84]. The high level of information sharing that happens through SIENA is essential for Europol's success, and it has enabled the UK to offer a vital contribution to Europol operations through safe information and intelligence sharing. Data placed the UK as the highest contributor to serious crime intelligence analysis and the second highest contributor overall, which makes such a platform invaluable. While the EU-UK agreed that the UK would continue to have access to SIENA with the TCA, as per standard third-country operational agreements, these examples show that the use of the system is particularly valuable for enabling swift exchange of information in a secure way. Without direct access to the EIS, the UK will however rely on a request-based system of information exchange, which means that cooperation through SIENA, even if important, might not be adequate when tackling cross-border crime where quick handling is crucial.

## Cyber threat intelligence and the European Cybercrime Center (EC3)

Cybercrime has become a growing threat and thereby a priority for states around the world. This is also true for the UK. As outlined in the UK's 2015 National Security Strategy and Strategic Defence and Security Review[85] as well as in subsequent additional documents, cybersecurity is and will

[84] Europol (2020). *Secure Information Exchange Network Application (SIENA).* Available at: https://www.europol.europa.eu/activities-services/services-support/information-exchange/secure-information-exchange-network-application-siena

remain a key priority. At the international level, and more specifically in relation to the EU, the UK has stressed its willingness to maintain close cooperation in this field. Indeed, cybersecurity was given explicit attention in the Political Declaration of November 2018[86], recognising cooperation in cyber threat intelligence-sharing and sustained partnerships with main EU cyber security institutions as strategic priorities for both parties. Cooperation on cyber issues was also included in the TCA. While there are different tools within the EU that target cybersecurity issues, the Europol has an important function for providing cyber threat intelligence and analyses in particular. With Germany, the UK has been the main contributor of information to several Europol cyber-intelligence projects, and was often at the head of the agency's operations[87]. Due to the central role of the UK in these activities, it is clear that diminished EU-UK cooperation within Europol could reduce both parties' capability to tackle cyber threats.

As a non-Europol member, the UK will no longer be part of Europol's subsidiary, the European Cybercrime Centre (EC3). Europol's EC3 launched in January 2013 and is tasked with supporting Member States and the EU in their efforts to identify, disrupt and put an end to cybercrime networks, as well as developing operational and analytical tools for investigations and international cooperation[88]. The EC3 was established with the intent of reducing a series of challenges faced by member states in the investigation of cybercrime and prosecution of offenders, such as jurisdictional obstacles, lack of sufficient intelligence-sharing capabilities, trained staff and investigative and forensic capacities[89]. Indeed, according to Rob Wainwright, former Director of Europol, the EC3 has a very unique role, because it serves as a coordinating and supporting platform drawing people and intelligence together across EU countries[90]. At the same time, the EC3 plays a strategic role thanks to its yearly Internet Organised Crime Threat Assessment (IOCTA), which provides unique law enforcement recommendations through contributions from the member states and complements them

[85] HM Government (2015). *National Security Strategy and Strategic Defence and Security Review 2015*. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/555607/2015_Strategic_Defence_and_Security_Review.pdf

[86] European Commission (2018). *Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom*. Available at: https://ec.europa.eu/commission/publications/political-declaration-setting-out-framework-future-relationship-between-european-union-and-united-kingdom_en

[87] Stevens, T., and O'Brien, K., (2019). Brexit and Cyber Security, *The RUSI Journal*, vol. 164, no. 3. p. 25-28

[88] UK Parliament (2013). *The UK opt-in to the Europol Regulation*. Available at: https://publications.parliament.uk/pa/ld201314/ldselect/ldeucom/16/1603.htm

[89] The NATO Cooperative Cyber Defence Centre of Excellence (2013). *A Collective EU Response to Cybercrime: EUROPOL's European Cybercrime Centre*. Available at: https://ccdcoe.org/incyder-articles/a-collective-eu-response-to-cybercrime-europols-european-cybercrime-centre/

[90] Association of Certified Fraud Examiners (2018). *Europol is uniting EU against fraud*. Available at: https://www.acfe.com/article.aspx?id=4295000924

with insights and reflections from Europol's public and private partners[91].

In the past, the UK has considerably benefitted from the various services provided by the EC3. If we look at the payment frauds operation *Focal Point Terminal*, for instance, we see that, in 2013 only, it successfully dismantled three international networks of credit card fraudsters, one of which had important ties in the UK. Thanks to this operation, illegal electronic equipment, cloned cards, cash, and financial data were seized during house searches in the country. This, in turn, resulted in 44 arrests and the dismantling of the organised crime group, which had affected nearly 36 000 bank and credit cardholders in 16 European countries[92]. Similarly, in 2019, the EC3 delivered important operational support for a cryptocurrency theft case, which saw the UK and the Netherlands involved, by coordinating the international cooperation of the two EU Member States[93]. Following its departure from the European Union and consequent loss of Europol membership, the UK will lose access to the European Cybercrime Centre and will not be involved in the EC3's Cyber Intelligence Team (CIT), which is unfortunate as the UK has been an important partner that both benefited from this collaboration and contributed to its development and investigative capabilities. EC3's cybercrime activities are furthermore another important illustration of the central role of Europol as an informal intelligence agency with vast expertise, enabling the work of law enforcements throughout the EU.

## How will these tools and means of cooperation with Europol be affected by Brexit and the EU-UK Trade and Cooperation Agreement?

As seen, with the UK leaving the EU's area of freedom, security and justice, many concerns were raised by UK's law enforcement agencies as well as security experts and politicians that flagged for the consequences to be expected in case of a limited cooperation agreement on internal security, stating the damage it would cause to the country's security capabilities. It is indeed true that the UK possesses important capabilities that will help it tackle today's threats, but dismissing the strength of its collaboration with the EU Member States in this regard would have greatly weakened its capabilities, as highlighted in the sections above. Both the EU and the UK understood the importance of strong cooperation between the countries and their relevant authorities to ensure the continued strength of the EU-UK collaboration on internal security matters. One of the four pillars of

[91] Europol (2020). *Internet Organised Crime Threat Assessment (Iocta).* Available at: https://www.europol.europa.eu/iocta-report
[92] Europol (2014). *European Cybercrime Center (EC3) - First year report*. Available at: https://www.europol.europa.eu/publications-documents/european-cybercrime-center-ec3-first-year-report
[93] Europol (2019). *6 Arrested In the UK and Netherlands In €24 Million Cryptocurrency Theft*. *Available at:* https://www.europol.europa.eu/newsroom/news/6-arrested-in-uk-and-netherlands-in-%E2%82%AC24-million-cryptocurrency-theft

cooperation in the Trade and Cooperation agreement is therefore including citizens' security[94], and they did agree that the UK should continue collaborating with Europol as a third country. The framework of cooperation that they have agreed on is therefore an important step towards continued security cooperation and can only be beneficial for both the EU and the UK, but it is clear that the parties will not enjoy the same benefits as before, which could lead to reduced capabilities to deal with security challenges in Europe. An analysis of the consequences with the agreement can reveal areas of improvement.

## The Trade and Cooperation Agreement: internal security cooperation

The negotiation of the Trade and Cooperation Agreement was a complicated affair. It was not until the 24 December, 8 days before the UK would formally become a third country to the EU, that the parties agreed to extensive concessions and decided on the final version of the agreement. Up until that points, it was unclear if the parties would find common ground, and insights into the process and possible progress on the different issue addressed by the agreement was limited. It was therefore comforting to see that many important points for security cooperation were included in the final version, as it will bring the parties closer towards the goal of a strong security partnership. The agreement includes a provision on the transfer and processing of passenger name record data (PNR)[95] (Title III: Transfer and processing of passenger name record data)[96], an important tool for law enforcements to prevent, detect and investigate crime, which is laid out in extensive detail. It includes a provision for exchange of Prüm data, which includes DNA, fingerprint and vehicle registration data (Title VII: Exchange of DNA, fingerprints and vehicle registration data)[97]. The parties also agreed on an extradition system and a mechanism of surrender (Title VII: Surrender)[98], with a level of cooperation that is unprecedented for a non-Schengen third country. The latter point demonstrates the willingness of the parties, and the EU in particular, to find unprecedented compromises in order for European security to be kept intact.

As noted in this paper, Europol and specific cooperation tools within the agency is a crucial part of the security architecture that has been built up in Europe. Cooperation with Europol was indeed

[94] European Commission (2020). EU-UK Trade and Cooperation Agreement: A New Relationship, With Big Changes. Available at: https://ec.europa.eu/info/sites/info/files/eu-uk_trade_and_cooperation_agreement-a_new_relationship_with_big_changes-brochure.pdf
[95] European Commission (2020). *Passenger Name Record (PNR).* Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/police-cooperation/information-exchange/pnr_en
[96] European Commission (2020). Trade and Cooperation Agreement Between The European Union And The European Atomic Energy Community, Of The One Part, And The United Kingdom Of Great Britain And Northern Ireland, Of The Other Part. *Official Journal of the European Union,* p. 309. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN
[97] *Ibid*. p. 303
[98] *Ibid*. p. 332

included in the Agreement (Title V: cooperation with Europol), but the parties did not set a great precedent as with the extradition system. Instead, they concluded a classical third country operational agreement with certain modifications. This is a common form of partnership agreement between Europol and third countries. Countries hitherto employing operational agreements with Europol include the United States of America, Canada, Norway, Moldova, Montenegro, among others[99]. An operational agreement facilitates cooperation between Europol and the UK as related to their joint fight against transnational crime. It allows for the exchange of general intelligence and strategic information, including general situation reports, specialist knowledge, information on criminal investigation procedures and crime prevention methods, as well as results of strategic analyses. While the specific working and administrative arrangements will be concluded between Europol and the UK in this case, the TCA entails these common components of third country operational agreements, as well as a similar objective and scope of cooperation[100].

Furthermore, the TCA enables the exchange of personal data regarding individual criminal investigations. Yet, the fact that the UK is now a third country outside the Schengen area poses a challenge to achieving a high degree of cooperation, considering that non-Schengen third countries "do not benefit from any privileged access to EU instruments, including databases, in this field, nor can they take part in setting priorities and the development of the multiannual strategic goals or lead operational action plans in the context of the EU policy cycle.[101]" This works as a hindrance to direct EIS access and was accordingly not included in the agreement. The scope of information exchange and supply from both Europol and the UK have thereby been delineated. Liability and dispute settlement have been considered, as to who shall be liable for damage caused to an individual as a result of legal or factual errors in data exchange and how conflicts that are not settled amicably shall be solved. Additionally, the procedures that safeguards data protection have been outlined, which is an essential prerequisite to concluding such an agreement.

The Agreement will also not allow for participation in units like the EC3 and their intelligence work and the UK will be excluded from the Management Board and thus will no longer have Management Board voting rights. It should however be noted that the UK will appoint national contact points and liaison officers, and its representatives will have the right to participate in meetings of Heads of

[99] Europol (2020). *Operational Agreements*. Available at: https://www.europol.europa.eu/partners-agreements/operational-agreements

[100] European Commission (2020). Trade and Cooperation Agreement Between The European Union And The European Atomic Energy Community, Of The One Part, And The United Kingdom Of Great Britain And Northern Ireland, Of The Other Part. *Official Journal of the European Union*, p. 321-327. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN

[101] European Parliament (2018). *Resolution of 14 March 2018 on the framework of the future EU/UK relationship (2018/2573(RSP))*. Available at: https://www.europarl.europa.eu/doceo/document/TA-8-2018-0069_EN.pdf

Europol National Units, which could include a formal participation of the British designated authorities to discuss, shape and contribute to policy issues and matters of common interest under the umbrella of Europol. The UK will also be able to participate in operational analysis projects, albeit not lead operational projects. This goes further than traditional third country agreements that do not allow for such involvement.

### Consequences for Europol cooperation

While third country operational agreements are a common framework of cooperation between Europol and third countries, it is questionable whether it is the most adequate option for the future relationship with the UK. Even though it was important that the parties included this agreement in the TCA as it ensures continuous cooperation, it limits the cooperation with the UK in this field considerably, especially with regard to intelligence and information sharing. Under an operational agreement, the UK will have access to SIENA but no direct access to EIS. They must request data from Europol, which will increase the time it takes to receive crucial information. This is greatly damaging to an investigation where speed is key. One alternative for the UK would be to engage with Interpol[102], but this will not be able to replace Europol's information sharing tools since the data is less reliable and the members are more hesitant to provide large quantities of data due to the lack of trust that arises with 194 member countries. Without the UK's current intelligence contribution, both the UK's security cooperation and the level of security of other Europol members will be significantly weakened[103]. While the impact on the EU will be less extensive than for the UK that has lost access to the EIS, it is indeed true that there will be important consequences for the EU as well, since non-Member States cannot directly submit data to the EIS. According to Europol's former Director Rob Wainwright, the UK was one of the top three contributors of EIS data[104], and the success of Europol is dependent on the level of information sharing taking place through tools such as EIS. The call for a pragmatic solution should therefore be in the interest of both parties for the future. Continued access to SIENA is key to secure data transfer, but will not be enough if it does not allow for extensive access and data transfer on the UK's part.

As a non-Europol member with a third country operational agreement, the UK is also losing access

[102] European Parliament (2018). The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters, *Policy Department for Citizens' Rights and Constitutional Affairs*, p. 37. Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604975/IPOL_STU(2018)604975_EN.pdf

[103] Casciani, D., (2020). Crime Agency Warning Over Post-Brexit Security. *BBC*. Available at: https://www.bbc.com/news/uk-54978865

[104] Durrant, T.,, Lloyd, L., and Jack, Maddy T., (2018). Negotiating Brexit: Policing and Criminal Justice. *Institute for Government,* p. 16-17. Available at: https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_policing_criminal_justice_web.pdf

to its involvement in EC3. The loss of data and mechanisms for the exchange of cyber threat intelligence through this could seriously affect policing and judicial counter-cybercrime abilities, as both the UK and the EU's capacity to respond to cybercrime could be critically reduced[105]. Cyber security specialists have previously expressed frustration over this and the loss of access to units such as the EC3. "This is hugely disappointing," McAfee's chief scientist Raj Samani commented. "Europol has a proven record of success and one would hope a degree of compromise can be reached since the safety of all citizens across the globe is our joint mission"[106]. Indeed, losing access to the EC3 will impair the UK police's ability to fight cybercrime, as it will no longer benefit from intelligence sharing between EU countries, as well as from the far-reaching support network offered by Europol's cyber specialists. What is more is the loss of leadership and expertise for the EU, as the UK has not only been identified as the head of operations, but also as a key instigator in the creation of cooperative systems for law enforcement activities, such as J-CAT[107], the EC3's international branch. This further illustrates the central role of the UK for developing cross-border crime fighting systems and arrangements that will continue to benefit Europol members. Moreover, having the UK outside of the Management Board could be a great loss for Europol, since the UK has led the direction of the agency and been an important actor for strategic decision-making, as illustrated. It is clear that both parties could benefit from extended Europol cooperation. This calls for continued negotiation between the EU and the UK to strengthen the partnership

## The central issue of data protection: its impact on the possibilities for extended intelligence and information sharing

Before moving on to proposing possible policy options for future cooperation, it is important to highlight the issue of data protection. One main concern in the areas of continued intelligence and information sharing post-Brexit is regulatory compliance with data protection and privacy laws. Protection of personal data is recognised by the Charter of Fundamental Rights of the European Union (Article 8)[108] and is indeed a requirement for continued data flow between the two parties, and for gaining access to EU databases. The European Commission issues an adequacy decision[109] when the data protection regime of a third country is deemed in line with EU regulations, as this ensures

[105] Stevens, T., and O'Brien, K., (2019). Brexit and Cyber Security, *The RUSI Journal*, vol. 164, no. 3. p. 25-28
[106] Shepherd, A., (2017). UK cops to lose access to Europol's Cyber Crime Resources After Brexit. *IT Pro*. Available at: https://www.itpro.co.uk/cyber-crime/30078/uk-cops-to-lose-access-to-europols-cyber-crime-resources-after-brexit
[107] UK Parliament (2018). *UK-EU Security Cooperation after Brexit: Europol*. Available at: https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/635/63506.htm
[108] European Union Law (2012). *Charter of Fundamental Rights of the European Union*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT
[109] European Commission (2020). *Adequacy Decisions*. Available at: https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en

the safety of sensitive EU data that could impact its citizens. In 2017, a new Europol regulation entered into force, which set out a robust data protection regime. The EU-UK agreement on Europol will be the first one concluded under the new regulation. To allow transfer of personal data, it requires the third country partner to have been granted an adequacy decision, or the Union can conclude an international agreement pursuant to Article 218 TFEU which offers adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals[110]. With the TCA, the parties have agreed on procedures and safeguards for information exchange, but these hinder the free flow of data. The EU is yet to decide on its adequacy decision, meaning that data exchange will continue under the current regime for a limited interim period of up to 4-6 months[111]. The final decision could indicate the current prospects for further information sharing possibilities.

The UK has argued that it does not wish to depart from EU rules but rather stay in line with EU-wide data protection measures, and the adoption of the General Data Protection Regulation (GDPR) by UK law in 2018 demonstrates this. The UK's privacy and surveillance laws have however proven to be more problematic, with the EU directing extensive doubts regarding its compliance with EU law. In October 2020, the European Court of Justice (ECJ) ruled[112] that legislations such as the UK's Investigatory Powers Act is illegal under EU law[113], as it violates the right to data protection and privacy. The retention of personal data in a "general and indiscriminate way" is deemed incompatible with EU law, and the Court found that bulk data was collected by national security agencies in the UK. However, the Court also ruled that, if a nation is facing a serious threat to national security or combating a serious crime, such retention of data could be allowed when deemed appropriate by a court or independent body. These aspects and concerns are visible in the Agreement as it offers clear safeguards. In light of such aspects, it becomes clear that the UK's data protection regime is a core issue for any future security cooperation.

[110] European Union (2016). *Regulation (EU) 2016/794 of the European Parliament and of the Council*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0794
[111] McKenna, B., (2020). UK-EU Brexit Deal Passes Commons With Six-Month Data Adequacy Bridge. *Computer Weekly*. Available at: https://www.computerweekly.com/news/252494208/UK-EU-Brexit-deal-passes-Commons-with-six-month-data-adequacy-bridge
[112] Court of Justice of the European Union (2020). *Press Release No 123/20*. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-10/cp200123en.pdf
[113] källa

# Policy Options

## Options for a future EU-UK partnership agreement

As the UK will not be entitled to Europol membership outside of the Union, it is forced to enter an agreement as a third country if collaboration is to continue. As seen, an agreement has indeed been concluded with the Trade and Cooperation Agreement, but this is limited and will lead to reduced cooperation on policing. This section will present two further options for future cooperation, outlining how an agreement could look like that would include the UK as part of an extensive security framework, and how it would affect the EU-UK security cooperation in the future.

### Policy option 1: a tailor-made agreement

One lens that could be deployed when analysing the policy options available on the table for the UK-EU cooperation is the development and implementation of a tailored agreement. The provision on Europol in the TCA has already been modified to correspond to the needs of both parties and thereby goes beyond traditional third country agreements, but it only goes so far. It would be appropriate to continue in the direction taken and allow for negotiations to proceed on matters of intelligence and information sharing, and on the UK's involvement in the activities of units such as the EC3. In order to analyse the feasibility of such a policy path, we must establish the parameters of operationality, as well as briefly look at previous cases in which such an agreement has been made. After settling the ground, we can proceed to analyse the specification of a possible agreement and weigh the positive and negative aspects of adopting this framework.

The concept of a tailor-made agreement is not, by any means, new. The steppingstone of a cooperative framework between an EU Member State with a special statute and Europol was the joint European-Danish initiative called "the Agreement on Operational and Strategic Cooperation between the United Kingdom of Denmark and Europol" (2017). The foundation of the agreement is similar, if not identical with the needs previously claimed by the United Kingdom in relation to a possible collaboration with Europol and the European Union in the field of security[114].

The objectives and scope of cooperation would not represent a major shift from the cooperation between the UK and Europol laid out in the TCA, but it would enhance the UK's competencies and participation in Europol's activities. The UK and Europol should agree on a national contact point

[114] UK Parliament (2018) *Written evidence submitted by the National Crime Agency (PSC0009).* Available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/home-office-delivery-of-brexit-policing-and-security-cooperation/written/78338.pdf

that will serve the purpose of transmitting personal data from private parties to Europol and second a liaison officers from the UK, who will have direct access to the national databases and who, under Protocol No 7, will have privileges and immunities. While a representative of the national contact point will be able to attend the meetings of the Heads of Europol National Units[115] as set out in the TCA as well, one important difference between the provisions in the TCA and this tailor-made agreement would be the right of a British representative to be invited to meetings with the Europol Management Board, albeit from the position of an observer with no right to vote. This option was not included in the TCA and would be an important addition in order for the partier to benefit further from each other's insights and expertise.

Regarding information and intelligence sharing, this kind of tailor-made agreement based on the Danish model would offer the UK greater freedom to request information, as it is not obliged to justify why it asks for access to the Agency's databases and has national staff at Europol's headquarters that would be available 24/7 to treat UK's request to input, receive, retrieve and cross-check data[116]. This does however not mean direct access to databases such as the EIS by competent authorities (British law enforcement agencies). Instead, the exchange of information has this indirect character and will still have to be rigorously regulated. Provisions will outline access restrictions, and transmission of personal data and classified information will have to be stored and transferred according to the respective legal framework on data protection.

After having established the scope of such a tailor-made agreement, we must pursue a feasibility analysis. With the United Kingdom not being a member of the Schengen area, the process of intelligence gathering will become more difficult, resulting in a more challenging process of cooperation, from both a logistic and a bureaucratic standpoint. However, following the Danish case, those challenges are not absolute and most of the time they require the willingness of the parts to work together. On a similar note, such an agreement would require the UK to implement the rules laid down in Directive (EU) 2016/680- on the protection of natural persons with regards to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties implemented in its national law. Under those circumstances, a solid judicial liability and jurisdiction of the European Court of Justice is required. If a tailor-made agreement were to be modelled on the Danish case, the

[115] Europol (2017). *Agreement On Operational And Strategic Cooperation Between The Kingdom Of Denmark And Europol*. Available at: https://www.europol.europa.eu/publications-documents/agreement-operational-and-strategic-cooperation-between-kingdom-of-denmark-and-europol

[116] European Parliament (2018). The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters, *Policy Department for Citizens' Rights and Constitutional Affairs*. Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604975/IPOL_STU(2018)604975_EN.pdf

UK would thereby have to recognise the jurisdiction of the ECJ as provided for in Article 48 of the Europol Regulation. Complementary to that, the relevant provisions of the European Treaties administrating proceedings before the ECJ should be applicable.

When it comes to possible obstacles and contentions, the jurisdiction of the ECJ will most likely inhibit the feasibility of an agreement based on the Danish model. The UK has been very clear on this point, stating that it will not allow for ECJ oversight once it has left the Union. That this would change in the future is rather unlikely, as independence from the court was important for the UK for regaining its sovereignty. The fact that Denmark does not enjoy direct access to Europol's databases, despite the ECJ oversight, further enhances the problem with pursuing this option. As a result, this type of agreement will most likely not enter into force in its current form, but would need modifications to its liability and dispute resolution mechanisms. Whil the TCA has included dispute resolution mechanisms, access to Europol databases would require the willingness of the EU to go beyond previously concluded frameworks of cooperation and set a precedent in its unique relationship with the UK. When weighing the advantages and disadvantages of an option allowing for greater data access and a greater role of the UK in the Agency, there is not much persuasion needed to show the overwhelming benefits on both parties when establishing a strong, solid, cooperative framework. Given the interdependent nature of the EU-UK relationship in the crime fighting realm, with the UK benefiting from the information, especially in the field of terrorism, and the Europol having the United Kingdom as the biggest intelligence contributor, the case for optimising the information exchange and having, holistically, more data and evenly distributed access to data is a solid one. This leads us to the second policy option, developing a hybrid model.

## Policy option 2: a hybrid model

As seen with the previous option, a precedent has been set for how the UK's future cooperation with Europol could look like. However, it was also noted that this is not without flaws. Cooperation modelled on the Danish agreement would prove difficult as it involves ECJ oversight, despite limited data access. In March 2018, the Home Affairs Committee of the UK House of Commons expressed the desire to develop a close partnership with Europol after Brexit with an agreement that went further than existing models in that the UK would maintain direct data access and keep its central role in the agency due to its historically important role in the agency and vast use of its system. This desire to negotiate a "bespoke" agreement was still very much alive during the negotiation of the current Agreement. There are however many legal and technical challenges to this approach, and the EU had rejected such an idea from the beginning of post-Brexit negotiations. The UK has made it clear that it will not accept ECJ oversight of future relationship agreements, which continues to be a point of contention as more direct data access presupposes the adoption of EU data regulations and thereby

ECJ oversight. This issue is making an agreement modelled on the Danish one less feasible and the EU furthermore strongly opposes the possibility that a state outside of the EU and Schengen would have more rights than an EU Member State like Denmark. Data protection rules will come into play no matter what agreement the parties will decide for because of the new Europol regulations and the high standards required for an adequacy decision, but it will be particularly important if data access is to be extended beyond a third country operational agreement. Despite the challenges connected to these issues, one can argue that the loss will be too great for both sides if the EU does not consider a special agreement with the UK in terms of information and intelligence sharing capabilities and exchange of expertise, due to its vast contribution to Europol, both in terms of data and historical leadership. This third option will therefore discuss how an agreement could look like that would allow access to Europol databases without ECJ oversight and allow for UK's continued involvement in the development of strategic goals. Besides defining the areas of cooperation and the criminal offences covered by such an agreement, agreeing on provisions for data access as well as mechanisms for liability and dispute settlement will be central to this hybrid model. We analyse how challenges to this kind of agreement can be addressed and if this option would be a realistic and desirable option for EU-UK's future partnership.

Any form of cooperation will include the designation of representatives in Europol and the UK, such as the designation of a national contact point between Europol and competent authorities (British law enforcement agencies), and the stationing of at least one liaison officer at Europol. While this has been concluded with the agreement set out in the TCA, closer cooperation and involvement of the UK in strategic decisions would greatly benefit the Agency that has been under the UK's leadership for years. It will require greater coordination, communication and cooperation between the different parties involved. Regular consultations should therefore be held between these parties dealing with strategic and operational directions, while establishing common interests. UK representatives should be invited to operational meetings, such as with the Heads of Europol National Units, as concluded in the TCA, but also to the Management Board to make sure that both parties agree on the most effective ways to meet their interests and to keep the UK's expertise within the Agency. It should also be included in the analytical work generating strategic reports and analyses, as the EU will benefit greatly from its expertise on matters related to Europe-wide crime. The benefits of the latter would however increase with expanded rights for the UK to access databases.

An agreement on data access and exchange is one of the key requirements for the success of law enforcement agencies in combating crimes, with the speedy transfer of such information being particularly important for both parties. Free data flows and direct access to Europol databases have been widely discussed and advocated by the UK, but is something that the Member State Denmark

does not even have, as mentioned in the previous option, and the idea has been resisted by the EU, at least with the forms of cooperation that have been discussed thus far. Despite the fact that the UK will leave the Union, this reluctance from the side of the EU has to do with the question of the ECJ oversight and, most importantly, the uncertainty in regard to data protection. Recent indications demonstrate that it is not certain that data protection and privacy laws will be followed by the UK, especially without ECJ oversight. The EU's cautiousness is therefore understandable in light of the sensitivity of the data at play and the necessity to ensure safe transfer and storage of such data to protect the fundamental rights of EU citizens. It will however be vital to allow wider data sharing capabilities than allowed though a third country operational agreement if information exchange is to continue having an important function and effect on crime fighting abilities of law enforcements in the UK in particular, but EU-wide as well. This hybrid option would therefore allow for direct access to databases such as the EIS and SIENA through competent authorities, but with modified liability and dispute resolution mechanisms. To avoid ECJ oversight and allow the EU enough safety measures to open up its databases, the UK should be subject to an extensive "adequacy decision" unique to the British case. This would be connected to terms in a specific agreement, either a standalone agreement between the UK and Europol, or as part of a more extensive security agreement that lays out the conditions to be met for the data protection levels to be deemed adequate. To enhance the certainty of uninterrupted free data flows and access, the agreement should include higher data protection standards than EU law specifies. The decision as such would be granted for an unlimited period of time but, as with all adequacy decisions, it could be revoked when deemed necessary. If the UK would infringe the terms of the agreement and not keep the data protection standards necessary, an arbitration court will have been established to resolve the dispute. If they see that the UK has broken the terms of the agreement, the UK should be given up to 6 months to revise their policies where necessary. This procedure would give more certainty that data flows can continue within the specified time, as the standards would be higher than the EU requires by law, and would not call for an ECJ ruling, unless the UK lowers their standards considerably. This is where the agreement will differ from the use of standard adequacy decisions. This Chapter has demonstrated that several UK governmental officials and expert have called for direct access, so such an option might offer an incentive to the UK to proceed with revisions of its data protection and privacy regime if necessary, as it would otherwise loose this crucial partnership.

This type of hybrid agreement would indeed set a precedent and would imply compromises on both sides. While this would result in a complex negotiation process involving technical details and precarious legal issues, it is nevertheless the most beneficial option in terms of crime fighting capabilities, as it would answer to the main concerns of both parties as well as that of law enforcement agencies in the UK and beyond. As examples have shown, the contribution of the UK to Europol and

the ability of law enforcement agencies to exchange information with ease on pressing matters has helped stop and defeat cross-border criminal activities in Europe to a great extent. While it is true that the UK will lose its central role in the agency which it has tried to maintain during negotiations, and while the EU would have to budge on important principles it has reiterated throughout the negotiation process, it is nonetheless a compromise that both parties should be willing to make if they are to continue this successful cooperation. The main downside will be the complexity of such negotiation, which could take years to conclude. It could therefore be proposed to cooperate within the current extended third country operational model outlined in the TCA as an interim solution. This would be in place until a decision has been reached on this hybrid model, and would allow for cooperation to continue without extensive disruption.

## Recommendations

Based on the analysis of EU-UK cooperation through Europol and its tools for information and intelligence sharing, it has been made clear that there is an interest for both parties to continue negotiating for a stronger partnership agreement in the future. Taking the UK's historical ties with the EU into account, as well as its central leading role in an agency such as Europol, along with its vast databases and intelligence capabilities, the EU should strongly consider moving beyond the TCA to reach a more extensive collaborative framework that would strengthen the scope and impact of information and intelligence sharing activities.

We recommend that the UK and the EU strive towards realising the proposals laid out with our second policy option where the UK would have direct access to Europol databases, such as the EIS, and have a greater role in the Agency. The parties should treat the TCA as an interim agreement that allows for continuous law enforcement cooperation, albeit in a different capacity, while pursuing greater collaboration.

As a first step, we thereby recommend that the parties take up negotiations for a separate security treaty where Europol cooperation and information sharing is included, if not a specific treaty for UK-Europol cooperation. This should happen once the pressure to find a comprehensive deal has settled, as the parties could then specifically focus on security cooperation in a less politicised environment where the parties could be open to further concessions. One important next step that the UK is already awaiting is a standard adequacy decision connected to the current agreement, which will come within the next 4-6 month. This will indicate if the UK data protection standards are enough. A suggestion is to conclude this adequacy decision during the coming months in close dialogue with the UK, especially if their data protection scheme is deemed inadequate, to ensure the possibility to adapt accordingly. To incentivise possible necessary revisions, the EU should open up for the possibility of direct data access by initiating the negotiations on a new agreement within the coming months.

Once negotiations are initiated, the parties should agree to the extent of the adequate levels required for an agreement allowing direct access to Europol databases, including the EIS, as well as dispute resolution mechanisms, as set out in the proposal. As the EU will be hesitant to allowing competent authorities have direct data access, it is an idea to allow for access to databases such as the EIS through liaison officers as a first step during an assessment period. The levels agreed upon and the assessment period will work as a basis for the EU's "adequacy decision".

In addition to data access, the parties should include extended involvement in Europol as part of the agreement, such as invitation to the Management Board, to ensure a continued central role of the UK

in the Agency. The UK should however be prepared to contribute financially to the Agency with this privileged position. Without the UK's financial contribution, it would lose such privileges and go back to the levels of involvement agreed upon through the current Agreement.

While the EU and the UK have not been shifting their position on future intelligence and information sharing during the transition period and the negotiation of the extensive Trade and Cooperation agreement, the future cooperation with Europol should not be caught up in political disputes but should have crime fighting capabilities at the centre of negotiations. The parties will hopefully be prepared to move on standpoints that they previously would not with this kind of compromise outlined with this recommendation.

## About A Path for Europe (PfEU)

A Path for Europe (PfEU) is an open and independent non-profit think tank based in Berlin.

We conduct research and develop policy advice on several issues relevant to the future of Europe. We aim to foster wide-scale engagement with these topics through our innovative Future Hubs, which offer events and an invaluable platform for dialogues between the public and EU stakeholders. Our team is exclusively comprised of young professionals, PhD students or university students.