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# Brexit, the “Area of Freedom, Security, and Justice” and Migration

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# Brexit, the “Area of Freedom, Security, and Justice” and Migration

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## Abstract

This policy brief focuses on EU–UK negotiations on the movements of third-country nationals. It presents the formation of preferences of both sides and creates a map of existing external differentiation in this area, which supplies models for the future EU–UK relationship. Current negotiating positions show the continuation of previous trends and the potential for close cooperation. This policy brief details two scenarios of cooperation. Close cooperation would continue the current willingness to cooperate and minimise policy changes after the transition period. Loose cooperation could stem from the collapse of trade talks, breaking confidence between the two sides and resulting in a suboptimal scenario for each of them. No scenario, however, is likely to result in significantly lower effectiveness or cohesion in the EU. The UK will always be worse off in comparison to EU membership – particularly under loose cooperation.

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## Executive summary

The UK has wanted for 30 years to cooperate with other EU countries and EU institutions to keep third-country immigration under control. Brexit has not changed this preference.

This policy brief argues in favour of close cooperation, which would minimise disruptions and maximise each side's preferences. Under this scenario, the UK would continue taking part in most current EU policies relating to third-country immigration, including the Dublin system, cooperation with third countries of origin or transit, enforcement of the EU's external borders, and Europol. This cooperation would allow the UK to keep control over immigration, while the EU would keep receiving UK contributions. The impact on EU effectiveness would be small. There would not be a negative effect on EU cohesion, because the deal is less attractive for the UK than its EU membership was. The UK would lose representation and access to intelligence in the Schengen Information System while contributing the same.

Under loose cooperation, fewer options for the UK to return immigrants to the EU and the possibility of reducing internal differentiation may also maintain EU policy effectiveness. While regaining some budgetary means, the UK could access less information, would face more immigration, and would have fewer options to return those immigrants. This scenario is worse for the UK than the close cooperation scenario.

Therefore, both sides have an interest in keeping close cooperation, even though the EU is likely to be less affected and wields more bargaining power.

# Introduction

This policy brief analyses the negotiations between the European Union and the United Kingdom concerning the movements of third-country nationals. It recalls the background of policy preferences, puts forward existing models for future EU–UK cooperation and describes current negotiating positions to highlight scenarios for future EU–UK relations in this area. Close cooperation is likely. Brexit should not harm EU policy effectiveness and cohesion, even in the worst case of loose cooperation. The reason is that the UK will be worse off in all scenarios, and EU institutions may transform UK departure into an opportunity to reduce differentiation.

## 1. Object and background of EU and UK negotiations

The paradox of Brexit in European cooperation on third-country nationals is that in the last three decades the UK has been an active member willing to cooperate in control-oriented measures. The UK did not take part in European cooperation in this area when it refused, 30 years ago, to abolish checks at its borders with other EU countries under the Schengen agreements. Great Britain is an island, which has made British controls more effective and less time-consuming. At internal borders within continental Europe, many unguarded roads made it possible to circumvent the checks at the major entry points, where they were the only source of delays (Comte 2018: 150-151). Even though most European cooperation on third-country nationals stemmed from this abolition of internal border controls, the UK has wanted to take part in those developments.

As early as June 1990, the UK signed the Dublin Convention, distributing asylum seekers among member countries. As the inflow of asylum seekers in the UK was increasing and this agreement made front-line Mediterranean member states responsible for most applications, it gave the UK more options to return asylum seekers to other countries.<sup>1</sup> After the 1997 Treaty of Amsterdam included the Schengen *acquis* in EU treaties, the UK opted out of agreements that could increase immigration – those on abolishing internal border checks, on Schengen visas for third-country nationals and on legal migration, including family reunification (Council Directive 2003/86/EC). However, the UK took part in European measures that could foster better control of asylum seekers and irregular migrants, including the Schengen Information System (Adler-Nissen 2009: 71, El-Enany 2017: 3-4).

Since 2003, the UK has taken part in EU naval operations, including Operation Sophia, tasked with stemming irregular immigration to Europe in the Mediterranean (Newson 2016). Three ships of the Royal Navy were active in November 2015 (House of Lords 2016). In 2018, the UK was the largest contributor to Europol and had the largest

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1 Interview by phone with a migration expert at the UK mission in Brussels on 27 April 2020. See also Woodbridge et al. (2000).

liaison bureau at Europol (Mortera-Martinez 2021). To better control the growing flow of immigrants from outside the EU, the UK needs to continue cooperating.<sup>2</sup>

Only on asylum seekers has British willingness to cooperate declined. With increasing numbers of asylum seekers, the EU has tried to correct the imbalances at the expense of front-line Mediterranean member states in the Dublin system. In September 2015, the UK used its “opt-out” to remain outside of this negotiation (Comte 2020: 11). Also, incoming Dublin transfers have recently outstripped outgoing transfers in the UK: 553 against 355 in 2016, 461 against 314 in 2017, 1215 against 209 in 2018 and 714 against 263 in 2019.<sup>3</sup> Not requests, however, but their rate of implementation explains those surpluses – over 60 per cent for incoming transfers compared to below 20 per cent for outgoing transfers in 2019 (Eurostat 2020).<sup>4</sup>

## 2. Existing models of external differentiation for cooperation on the movements of third-country nationals

Concerning the Dublin system, cooperation on migration with third countries of origin or transit, and Europol, there are many examples of non-EU countries cooperating with the EU. Iceland, Norway and Switzerland take part in most of those frameworks. Switzerland acts as a donor in various EU funds for third countries of origin or transit, helping to reduce migration. Non-EU member states have also taken part in EU naval operations (Newson 2016). They include Montenegro, Norway, Serbia and Ukraine, which took part in EUNAVFOR Atalanta, against piracy off the Horn of Africa (Tardy 2014). If there was to be another EU naval operation in the Mediterranean to control illegal immigration, the UK could, in principle, take part.

In Europol too, there are various degrees of involvement of non-EU members. Non-EU European countries, along with Australia, Canada and the United States, have operational agreements with Europol. Those agreements entail sharing general intelligence, technical information and personal data. Third countries can contribute funding to the agency and inputs to its databases. Norway, Switzerland, the US and Canada can also post a few liaison officers to the agency. They can join a special task force or investigation teams. However, no non-EU member has a seat on Europol’s Management Board or direct access to Europol’s databases. Even Denmark – which decided by referendum in December 2015 to stay entirely out of EU cooperation on Justice and Home Affairs – cannot interrogate Europol databases on its own (Mortera-Martinez 2021). Likewise, no non-EU or non-Schengen member state can

2 Office of National Statistics: *Long-Term International Migration in the UK, 2010-2020*, <https://www.ons.gov.uk/search?q=Long-Term%20International%20Migration>.

3 Eurostat: *Incoming ‘Dublin’ Transfers*, [https://ec.europa.eu/eurostat/databrowser/view/migr\\_dubti/default/table?lang=en](https://ec.europa.eu/eurostat/databrowser/view/migr_dubti/default/table?lang=en); and *Outgoing ‘Dublin’ Transfers*, [https://ec.europa.eu/eurostat/databrowser/view/migr\\_dubto/default/table?lang=en](https://ec.europa.eu/eurostat/databrowser/view/migr_dubto/default/table?lang=en).

4 Interview, 27 April 2020.

be part of the Schengen Information System (Newson 2016: 21).

Even though most information sharing on third-country nationals occurs inside EU structures with Eurodac (the database of registered asylum seekers) and the Schengen Information System, some intelligence sharing occurs outside of EU structures, with the Counter-Terrorism Group (CTG), which includes the 27 EU member states, Norway, Switzerland and the UK (Newson 2016: 19). The CTG specialises in jihadi terrorism. Created after 9/11, it established a more permanent structure after the November 2015 attacks in France, when it emerged that some perpetrators had been on a watch list in other countries.

Last, a recent trend of bilateral agreements between the UK and strategic EU countries creates models for broader EU–UK relations and bodes well for those relations. In January 2019, the Home Secretary and the French Interior Minister agreed on a joint action plan to prevent migrants from crossing the English Channel illegally in small boats (UK and France 2019). In April 2020, farther from British shores, the UK signed an agreement with Greece to develop a border force in Greece and help process returns and deportations to third countries – under the assumption that many migrants crossing the Greek-Turkish border are considering a journey to the UK (UK and Greece 2020).

### 3. Current positions in the EU–UK negotiations

In the current negotiations between the EU and the UK about Brexit, the two parties have agreed to continue their cooperation on immigration (Newson 2016). In 2016, the British Secretary of State for Defence, Michael Fallon, exposed in the House of Commons British interest in cooperating with other European countries to curb illegal immigration not only to the UK but also to Europe:

We have a very strong interest in trying to curb illegal migration from the African littoral into Europe. [...] We will certainly have a national interest in the success of those missions, because if they are not successful our [...] immigration will be affected. (House of Commons Defence Committee 2016: Q19)

In May 2018, the Head of the British Security Service (MI5) described the Counter-Terrorism Group as the “largest multinational counter-terrorism enterprise in the world”, in which the UK should continue taking part (MacAskill 2018). In October 2019, the Revised Political Declaration on the framework for the future relationship between the EU and the UK reiterated the prospect of cooperation from the original Political Declaration from November 2018 (Owen 2020):

The Parties will cooperate to tackle illegal migration, including its drivers and its consequences [...]. This cooperation will cover: a) operational cooperation

with Europol to combat organised immigration crime; b) working with the European Border and Coastguard Agency to strengthen the Union's external border; and c) [...] cooperation, including in third countries and international fora, to tackle illegal migration upstream. (European Commission Task Force for Relations with the United Kingdom 2019: 21)

The UK would have wished to stay in Europol, but knows it is impossible.<sup>5</sup> Where the UK has been ready to loosen cooperation with the EU relates to asylum seekers. In the negotiations, the UK has attempted to select the most beneficial elements to send back the maximum number of asylum seekers to EU countries. The UK proposed to bypass family reunification rules, which have accounted for many Dublin transfers to the UK, as well as the Dublin rule of six-month presence in a country, after which that country could no longer return an asylum seeker to another member state (UK Negotiating Team 2020a). Only for unaccompanied minors has the UK seemed to be willing to keep a scheme to reunify families (UK Negotiating Team 2020b). In the meantime, the UK showed readiness to continue sharing the Eurodac database of fingerprints of asylum seekers, which is helpful to return them. On its side the EU has been unwilling to continue sharing information if the UK withdraws from the essential parts of the Dublin system.<sup>6</sup>

## 4. Close cooperation scenario vs. loose cooperation scenario, and their likelihood

The British attempts to return maximum numbers of migrants to the EU show how necessary cooperation with the EU is for the UK. Under these conditions, a close cooperation scenario in this policy area is likely. However, the evolution of trade talks between the two parties will play a significant role in their negotiations relating to the movement of third-country nationals. The failure of trade negotiations may end up in looser cooperation in other areas (Mortera-Martinez 2021).

Close cooperation would combine maximal UK contribution with maximal UK inclusion in EU structures. The UK would continue paying into Europol's budget and would contribute to the proposed EU Neighbourhood, Development & International Cooperation Instrument (NDICI) of the 2021–27 Multiannual Financial Framework (Sherriff 2020). The Commission considers giving 10 per cent of this funding for migration-related actions (Okyay et al. 2020). Similarly to Switzerland and Norway, the UK would be part of the Emergency Trust Fund for Africa within the Valletta Action Plan. It could continue paying in the funding planned in the 2016 EU–Turkey statement. In exchange for UK contributions, the EU would keep the UK as a beneficiary of the readmission agreements it has passed with third countries

5 Interview, 27 April 2020.

6 Ibid.

(Grütters et al. 2018: 19). The UK could post liaison officers from HM Revenue and Customs, the National Crime Agency and MI5 to Europol. Even though the UK would lose access to Europol databases, the EU could also accept an agreement on data transfers (Mortera-Martinez 2021).

A remarkably close cooperation scenario would be that the UK keeps taking part in the Dublin system on asylum seekers, which would also imply that it keeps access to the Eurodac database. This aspect of the close cooperation scenario is less likely than the others. The recent proposal by the Commission for a new relocation system for asylum seekers may put an extra demand on the UK for incoming Dublin transfers – even though there should not be relocation obligations (European Commission 2020). This proposal may be sufficient to reinforce British reluctance to continue taking part in Dublin.

In a loose cooperation scenario, the UK will withdraw from the Dublin system on asylum seekers, which now is likely. The UK would also significantly reduce spending in funds with third countries of origin or transit of migrants to Europe. In addition, it could, like Norway, stop paying into Europol's budget. The UK would lose access to Europol's information system (SIENA) and would no longer station British staff at the agency. It would lose the benefit of EU readmission agreements with third countries. This loose cooperation scenario – except its Dublin dimension – is less likely.

Since a close cooperation scenario is preferable for both parties, the most likely is an intermediate scenario that combines the features of the close cooperation scenario with a British withdrawal from the Dublin system.

## 5. Implications of those scenarios for policy effectiveness and EU cohesion

A close cooperation scenario, in its version with the UK staying in the Dublin system, would minimise the disturbances related to Brexit for the management of the movement of third-country nationals, as most current policies would continue. The main impact of Brexit would be that the UK could no longer interrogate the Europol database directly and would lose its seat on Europol's Management Board. As most policies would continue, it would not affect the effectiveness of those policies. Since the British position would not be better than that of a normal EU member state – with the UK contributing as much, while losing representation – there is no evidence such a scenario would have any centrifugal effect in the EU.

The intermediary scenario with the UK leaving the Dublin system would also let many current policies subsist. There would be disturbances as the UK would stop applying Dublin rules. As, under this scenario, the UK would continue cooperating with EU countries to stem migration flows in the Mediterranean, the impact on EU policy effectiveness would be small. In recent years, the UK has not been a significant player in the Dublin system. Even in 2019, when there was a substantial surplus of



incoming Dublin transfers in the UK compared to outgoing Dublin transfers, the UK stood well behind the biggest recipients of Dublin transfers. Even Poland's surplus of 636 was 40 per cent higher than the UK's (451). In terms of absolute numbers, the UK, especially compared to its size, processes few Dublin transfers (Eurostat 2020). Therefore, the contribution of the UK is not vital for the stability of the Dublin system, and British withdrawal should not seriously affect EU policy effectiveness in that area. In terms of EU cohesion, there is still no evidence of any centrifugal effect. The reasons are, first, the limited impact on the effectiveness of EU policies and, second, that the EU has not allowed cherry-picking on the part of the UK, which had to accept Dublin cooperation entirely or leave it. An alternative method could have created a precedent and led to centrifugal forces.

Even though unsatisfactory for both parties, there is again no evidence that a loose cooperation scenario would harm EU cohesion. Admittedly, the impact on policy effectiveness could be higher. UK withdrawal would mean smaller budgets to cooperate with third countries to reduce migration flows and enforce external borders. It would also mean less intelligence sharing to control migration flows. However, fewer options for the UK to return illegal migrants to the EU could offset the impact on immigration in the EU. For the EU, there would also be less differentiation in this policy area. Denmark would remain the only opt-out country in this area (Adler-Nissen 2009: 64). This situation would introduce a certain degree of additional pressure on all EU countries to take full part in the Dublin system, Schengen cooperation, Europol and migration agreements with third countries. Thus, if EU institutions could transform this loose cooperation scenario into an opportunity to reduce internal differentiation, it could reinforce the effectiveness of the current framework and strengthen EU cohesion. As far as the UK is concerned, it would lose access to intelligence and face more immigration with fewer options to return immigrants.

To conclude, there is no evidence that any country will want to follow the British example, because the UK will be worse off in all scenarios compared to full membership – giving the EU more bargaining power in this negotiation.

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EU Integration and Differentiation  
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**Differentiation has become the new normal in the European Union (EU)** and one of the most crucial matters in defining its future. A certain degree of differentiation has always been part of the European integration project since its early days. The Eurozone and the Schengen area have further consolidated this trend into long-term projects of differentiated integration among EU Member States.

A number of unprecedented internal and external challenges to the EU, however, including the financial and economic crisis, the migration phenomenon, renewed geopolitical tensions and Brexit, have reinforced today the belief that **more flexibility is needed within the complex EU machinery**. A Permanent Structured Cooperation, for example, has been launched in the field of defence, enabling groups of willing and able Member States to join forces through new, flexible arrangements. Differentiation could offer a way forward also in many other key policy fields within the Union, where uniformity is undesirable or unattainable, as well as in the design of EU external action within an increasingly unstable global environment, offering manifold models of cooperation between the EU and candidate countries, potential accession countries and associated third countries.

EU IDEA's key goal is to address **whether, how much and what form of differentiation is not only compatible with, but is also conducive to a more effective, cohesive and democratic EU**. The basic claim of the project is that differentiation is not only necessary to address current challenges more effectively, by making the Union more resilient and responsive to citizens. Differentiation is also desirable as long as such flexibility is compatible with the core principles of the EU's constitutionalism and identity, sustainable in terms of governance, and acceptable to EU citizens, Member States and affected third partners.



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