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The EU-UK future police cooperation

The difficult balancing between operational needs and legal frameworks



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Introduction

To any critic of Brexit, police cooperation is a domain characterised by strong paradoxes. Internal security has not been salient during the debates over the British withdrawal from the European Union (EU). [Only 6% of British citizens mentioned it as being a very important issue for their vote in the 2016 referendum.](#) In addition, neither the Leave nor the Remain sides focused on this topic during their respective campaigns: the pro-EU campaigners mostly stressed economic rationales while Brexiters rarely mentioned internal security, and when they did they argued that taking back control on national borders would help to guarantee a higher level of security (Carrapiço et al. 2019). Since the 2016 referendum, public comments and discussions have been much more intensively focused on trade, fisheries and migration than on internal security and police cooperation.

One could conclude from these observations that this domain is secondary and is not at the core of the current negotiations between the EU and the UK. However, British citizens are highly concerned by their security ([ranking just after Italians in 2017 in regard to their fear for their national security](#)), and this security is still thought by the British government to depend on the EU-UK relationship. Indeed, at the [2018 Munich Security Conference](#), Theresa May took a strong political stance, stating “Europe’s security is our security [...] the United Kingdom is unconditionally committed to maintaining it. The challenge for all of us today is finding the way to work together, through a deep and special partnership between the UK and the European Union, to retain the cooperation that we have built and go further in meeting the evolving threats we face together”. On its part, the EU seems to have also perceived this interdependence, even if it has been expressed with more nuances: [“the future EU-UK relations should guarantee Union's security interests \[as\] crime and terrorism do not stop at the borders”](#).

Nonetheless, two years later no major success has been achieved on this topic by the British and EU negotiators. This paper offers to explain why, although both parts seem to share mutual operational interests, they have not yet managed to conclude an agreement on police cooperation matters. It will argue that the UK and the EU have diverging views on how to balance those operational interests with legal constraints and frameworks. To this end, the paper is divided into four sections. After introducing the existing mechanisms for police cooperation and the British part in it, it analyses the respective positions of the UK then of the EU. This assessment is necessary to identify the stumbling blocks of the EU-UK talks and to discuss the future law enforcement cooperation, which will be at the core of the last section.

1. The state of play: thirty years of British contribution to EU police cooperation

The landscape of EU police cooperation

If transborder European police work can be traced back to the 18th century (Bigo, 1996), cooperation within the EU framework has officially started with the Maastricht Treaty, signed in 1992. Since then, this field has proved to be one of the most dynamic EU sectors and numerous tools have been developed.

This is notably the case of [Europol](#), the EU law enforcement agency. Set up by the 1995 convention and based in The Hague, Europol helps member States in preventing and fighting international crime affecting two or more member States (drug trafficking, trafficking in human beings, cybercrime etc.), terrorism and crime affecting an EU common interest. It does so by facilitating information exchange and storing data in Europol Information System (EIS), by offering analytical support and in-house expertise and by coordinating joint operations – even though Europol’s staff is deprived of any coercive or executive power.

Complementing Europol’s work, various EU databases have been created. Three of them are of a specific interest. Firstly, [the Schengen Information System \(SIS\)](#), updated in 2007 to become SIS II, contains data about, among other things, wanted or missing individuals, missing objects, and witnesses. It can send real-time alerts and can be consulted by competent law enforcement, immigration and border control authorities of member States and Schengen third countries on the field.

Secondly, the [Prüm system](#) was established in 2008. It enables police and judicial authorities of member States, Norway and Iceland, to perform searches in the databases containing fingerprints, DNA and vehicle registration data of the participating countries.

Thirdly, the [European Passenger Name Record \(PNR\)](#) directive, adopted in 2016, obligates air carriers to transfer PNR data to member States for flights entering or departing from the EU. Moreover, it allows voluntary member States to collect PNR data for intra-EU flights. These data will be stored in Passenger Information Units (PIUs) and PNR data could be transferred to the US, Canada, and Australia – the three third countries having concluded an agreement with the EU.

Finally, EU law enforcement cooperation also occurs through practical operational mechanisms, enabling some coordination of criminal investigations between different States. If some tools, such as cross-border pursuit are part of the Schengen acquis, others have been created by EU law. This is particularly the case of the [joint investigation team \(JIT\)](#), an international cooperation tool between law enforcement authorities of two or more States, to which Europol can contribute, for a specific criminal investigation.

The UK, an “awkward partner” in police cooperation

The UK’s role during the last three decades has been ambivalent regarding EU police cooperation, confirming its “awkward partner” reputation (George, 1998).

On one hand, the UK has proven to be a driving force and a leader in this domain – something the British decision-makers have not hesitated to insist upon since 2016. This role is illustrated clearly in

regard to the quantity of data sent by the UK to other member States. Hence, for instance, in 2017, the UK issued [1.4 million SIS alerts \(20% of the total number of national security alerts\)](#). Among those, a high number were useful as [13,100 of the alerts received hits across Europe](#), meaning national competent authorities were able to intercept 13,100 missing objects, wanted or missing people, witnesses etc. thanks to British data.

Similarly, in 2015, only during the Prüm pilot project phase, [from the 2,500 DNA profiles the UK shared with four member States, 118 hits appeared for rape, sexual assault or burglary](#). Considering the UK currently possesses [five million DNA profiles and 500,000 DNA samples from unsolved crimes](#), the British data could hence prove very helpful to European national authorities.

The UK ranks also among the top four contributors to EIS (Trauner, 2019), and was even the number one for some specific forms of crime, such as [“firearms, child sexual exploitation and abuse, cybercrime, money laundering and modern slavery”](#).

In regard to Europol more broadly, it is interesting to shed light on the active British participation to the agency insofar as the UK has, for example, been involved in [40 JITs](#) and [ensures having offered “cutting-edge expertise and leadership to them](#), or has made over [7,400 intelligence contributions to all Europol analysis projects](#). In addition, the UK was the member State which sent the highest number of liaison officers to The Hague (Bossong and Rieger, 2019).

The UK also demonstrated a strong level of commitment to the EU police cooperation through its initiatives of creating various tools. This was clearly the case for [the PNR directive and the UK acted very quickly to create its own PIU](#).

Furthermore, the UK drew mostly from its own law enforcement model to offer different instruments within Europol. [Greatly benefitting from the British direction of Europol from 2009 to 2018 and from a good reputation in the domain of law enforcement to get these ideas adopted](#), these initiatives have been quite successful in the prevention and combat against crime and terrorism. For instance, [the Europol Internet Referral Unit, based on the Metropolitan Police Service’s Counter Terrorism one, was established in 2015 after the Charlie Hebdo attacks to find and combat terrorist propaganda on the Internet. In 2018, the Europol Internet Referral Unit obtained the removal of 28,000 items by online service providers](#). Another interesting illustration of this Europeanisation of the British model has been the preparation by Europol of threat assessments – [the Organised Crime Threat Assessments \(OCTA\), which became in 2011 the Serious Organised Crime Threat Assessments \(OCTA\)](#) – from which [the whole EU four-year policy cycle in the fight against crime](#) is now established. This dynamic is [a reproduction of the existing UK National Intelligence Model and Control Strategy](#).

If the UK has been a pillar for the development of operational police cooperation and information exchanges, it has turned out to be a much less accommodating EU partner in relation to the institutional framework. Indeed, since the early 1990s, the British government has repeatedly articulated its lack of desire for any supranationalised governance of law enforcement. The main rationale was its fear of losing control in this sovereign domain and of not being able to oppose a policy perceived as affecting national interests (Carrapiço et al., 2019). Therefore, in 1992 British decision-makers conditioned the integration of law enforcement cooperation within the EU to an intergovernmental governance.

Five years later, when the Schengen acquis was incorporated into the framework of the EU, the UK negotiated an opt-out and, if agreed by the rest of the member States, the right to opt-in to some

specific provisions, namely police and judicial cooperation. In doing so, they sent a clear message to their European counterparts: the UK would only participate in policies it agreed to.

Finally, when the Treaty of Lisbon was signed in 2007, the UK benefitted from an additional opt-out from the pre-Lisbon police and judicial cooperation in criminal matters measures as the Court of Justice of the EU (CJEU) would become competent for these. Just as in 1997, the UK also had the possibility to opt-in to the arrangements it wanted, with the approval of other member States. From the 130 mechanisms, British decision-makers chose to still contribute to 35 of them, including, among others, Europol and all the police information exchange mechanisms.

Consequently, the reputation of the UK as an “awkward partner” is clearly confirmed when tracing back the 30 years of its contribution to EU police cooperation and this historical perspective is crucial for fully understanding the current British position in the Brexit talks.

2. The search for a status quo by British negotiators before the withdrawal of the EU

The UK views on the future of police cooperation with the EU are defined in a succession of documents and speeches. From a chronological perspective, Theresa May articulated her conception of this relation for the first time [during her Lancaster speech in January 2017 setting out “the plan for Britain”](#). She then mentioned it again in the White Paper [“The United Kingdom’s Exit from and New Partnership with the European Union”](#) published in February 2017, and one month later in [the letter she sent to the President of the European Council officially triggering Article 50 of the Treaty of the EU](#).

However, the first paper entirely dedicated to Justice and Home Affairs (JHA), [“Security, Law Enforcement and Criminal Justice – a Future Partnership Paper”](#), was made public in September 2017. Theresa May took the chance to clarify the British wishes on these matters during [the Munich Security Conference in February 2018](#). Following the positioning of the EU in 2018, British decision-makers wrote down their views in May 2018 in the [“Framework for the UK-EU Security Partnership”](#) (embracing both internal and external security issues) and in the broader White Paper, [“The Future Relationship between the United Kingdom and the European Union”](#) in July 2018.

[The priorities identified by the UK](#)

From an operational perspective, the British stance in respect of law enforcement has not massively changed since the beginning of the talks. In this domain, the UK is above all aiming to keep the same level of cooperation with the EU after it has withdrawn from the organization. Indeed, the post-Brexit law enforcement matter appears since 2017 as [one of the top priorities of the British government](#), as clearly expressed in the Lancaster speech and repeated since. This opinion is based on the British idea that [offering security to its citizens is the first duty of a government](#). To this end, the UK government has insisted in its public statements and White Papers that a strong level of cooperation is needed with the EU. This is due to the intricacy and the dependence of their respective security, as recalled in the first lines of this policy paper, mostly caused by the geographical proximity and the intensity of transborder movements between the island and the continent leading to the existence of common threats such as organised crime, terrorism and cybercrime.

Yet, Brexit appears as a disruptive element of the existing cooperation, threatening the British participation in the EU JHA agencies and its access to the EU databases and operational cooperation mechanisms. Bearing in mind these considerations, even before Article 50 was activated, the UK government has tried to mitigate the effects of its withdrawal from the EU in opting-in to Europol new legal basis, the 2016 regulation. If it had not, it would have put an end to the British contribution to Europol even before Brexit was formally achieved. This decision was strongly supported by the domestic law enforcement agencies, including the National Crime Agency. The government hence justified it by the “[valuable service](#)” offered by Europol to member States and stated that this opt-in would “[maintain operational continuity and minimize disruption for UK law enforcement ahead of the UK exiting the EU](#)”. Consequently, even if the UK has lost its seat and word in the decision-making procedures of the agency as it is no longer an EU Member State, it can still use the agency’s databases and networks.

Nonetheless, this solution is only temporary and meant to terminate once the transition period finished. Keeping in mind this idea of *status quo*, the British government defended the imperative of finding an agreement with the EU in order to fight their common threats together and thus to protect their mutual interests in three main dimensions: (1) the exchange of data through the main three databases (PNR, Prüm, SIS II), (2) cooperation with Europol and (3) operational practical police cooperation. On these three topics, some cooperation between the EU and third States already exists from which the EU-UK relation could draw:

- (1) - Non-EU member States are allowed to contribute to SIS II if they are part of the Schengen area;
 - Norway and Iceland participate to Prüm, and Switzerland and Liechtenstein are actively negotiating with the EU to also be able to do so;
 - The US and Australia have concluded an agreement with the EU to have access to some of their respective PNR data.
- (2) Europol has signed operational and strategic agreements with third States (table 1), such as the US or Colombia for the first category, and China or Russia for the second one. Moreover, Denmark has also been offered a specific deal with Europol after not having opted-in in the 2016 Europol regulation. This situation follows the rejection by Danish citizens in the December 2015 referendum to change the existing opting-out from JHA in a conditional opting-in.
- (3) Third States can be invited to join a JIT when an agreement with the EU has been agreed upon. This is currently the case of Norway, Iceland, the US, the Council of Europe countries and a number of South-East European States. JITs can also be created by international mechanisms, for instance United Nations conventions, but will not include Europol and will be much more limited in their scope and capabilities than the EU instrument.

[The advocating of a specific EU-UK relation](#)

Nevertheless, the British government has repeated in all its White Papers that the future EU-UK relation should be much deeper than the existing deals of the EU with third States. To convince its European partners, it has shed light [on the specificity of the EU-UK link in terms of geography, recalling the level of transborder activities](#).

It has also underlined the closeness of the UK to the EU. This is the case in terms of the “[shared values](#)” invoked by the May government: the respect for democracy, for the rule of law and human rights,

especially regarding data protection. According to the White Papers, the special EU-UK relationship is also based on the past British membership of the EU, contrary to all of the other third States. During these years, the UK has actively demonstrated its involvement within the EU mechanisms and has proved its leading contributions, reflected by the quantitative indicators mentioned in the first part of this policy paper.

Consequently, the British government has pointed out for each of the law enforcement dimensions the insufficiency of the existing modalities for cooperation with third States (summarized in table 2):

(1) - If some third States enjoy the same benefits as EU member States in regard to SIS II and Prüm, this is due to their membership of the Schengen area, which is not the case for the UK. Hence, no precedent exists for non-Schengen States.

- In respect of the PNR, the UK stressed that the existing agreements with the US, Canada or Australia “[fall short of the cooperation the UK and the EU share today. They do not provide for reciprocal exchange for police and judicial cooperation, and do not enable third countries to work with EU Member States’ PIUs to identify travel patterns in the same way](#)”.

(2) Table 2 introduces in a clear way the different benefits enjoyed by full members of Europol, third States having concluded a strategic agreement with the agency, an operational one and Denmark. Even if the latter is a member of the EU and of the Schengen area, after having opted-out of Europol regulation, it enjoys a more restricted access to EIS and a very limited role in the governance of the agency compared to the rest of the member States. While the UK finally accepted in 2018 not being able to steer Europol, it has strongly insisted in its White Papers in it being granted direct access to the databases of the agency.

Table 1. Summary of existing models of participation in Europol (adapted from “[The EU-UK Relationship beyond Brexit: Options for Police Cooperation and Judicial Cooperation in Criminal Matters](#)”)

| Form of cooperation | Access to general intelligence and strategic technical information | Ability to exchange information, including personal data | Joint Analysis projects | Liaison Officers | Access to EIS | Membership of the Management Board | Joint Operational projects |
|------------------------------|--|--|-------------------------|------------------|--------------------|--|---|
| Strategic agreements | X | | | | | | |
| Operational agreements | X | X | X | X | No direct access | | If the purpose is relevant to the country, or agreed by all participating Member States |
| Danish operational agreement | X | X | X | X | Semi-direct access | Observer status (voting rights only upon invitation) | X |
| Full membership of Europol | X | X | X | X | X | X | X |

(3) Finally, the British government pointed out that even if third States can be invited to join a JIT, [“they cannot participate in JITs with just one Member State”](#). This is an even stronger problem for British law enforcement agencies as most of the JITs they take part in are bilateral, *i.e.* involving only the UK and another member State (Carrapiço et al., 2019). In addition, third countries cannot [“apply for funding or initiate the establishment of coordination meetings at Eurojust to discuss establishing a JIT”](#).

Table 2. Existing third country precedents (adapted from [“The Framework for the UK-EU Security Partnership”](#))

| Precedents | Examples of relevant EU measures of cooperation |
|---|---|
| Precedent for third country (Schengen) access | SIS II Prüm |
| Precedent for small capability gap | JITs |
| Precedent for significant capability gap | Europol PNR |

[The structure and content of the future UK-EU police partnership](#)

These observations therefore led the UK to ask for a [“new, deep and special relationship”](#) with the EU, incarnated in an EU-UK security treaty.

According to the British government, the operational content of this text should [“go beyond existing precedents in this area”](#) with third countries.

Firstly, the EU-UK treaty should encompass all security issues to not create a [“limited patchwork of cooperation falling well short of current capabilities”](#). This would differ from the existing cooperation insofar as third countries need to sign a deal with the EU for each instrument.

Secondly, the UK asks for a flexible agreement to accommodate changes in the tools and new threats.

Thirdly, the treaty should be [built on the existing foundations or going even further so as to avoid any operational gap and ensure global security](#). Indeed, the British wish is to keep things as they were before Brexit for each of the three dimensions of law enforcement cooperation discussed, as illustrated by the quotes below from the [2018 White Paper](#):

- (1) - “SIS II is a major shared operational capability for law enforcement and security agencies across Europe. The UK would protect that capability through maintaining the reciprocal ability to transmit alerts in real time, with access to systems that allow for a timely and efficient response to these alerts through SIS II”;
- About Prüm, “the UK seeks to protect this capability as part of its future relationship”;
- “The UK will therefore seek to maintain the UK’s and the EU’s capabilities on analysis of PNR”.

(2) After having underlined the restricted resources granted to third countries in relation to Europol, the 2018 White Paper asks for a more advanced and elaborated partnership through a negative bias by observing that “the UK would not be able to maintain its current contribution to Europol on the basis of an agreement along those lines, in part due to the sheer volume of activity the UK participates in and the data that the UK shares”;

(3) “The UK is therefore seeking full participation rights in JITs including the ability to initiate them”.

In conclusion, in spite of the UK statement that [“the relationship has changed \[...\] and leaving the EU will have consequences for the nature of the security relationship between the UK and the UK”](#), nothing seems to have evolved for the British negotiators on the operational dimension.

Nonetheless, on the matter of governance, the UK is looking for something similar to what third countries benefit from: full autonomy and sovereignty. In particular, in 2017, the British government stated that it would [“bring an end to the jurisdiction in the UK of CJEU”, the competence of a supranational institution on domestic law being one of the main rationales of the Leave vote](#). To defend its views, the UK highlights that some of the deals the EU has concluded with third countries are close to its project of a security treaty in their scope – extended cooperation – and in the governance – minimal constraints. It gives the specific examples of far-reaching agreements [“in relation to the free movement of goods, services, persons and capitals”](#) or [border controls with Schengen signed between third countries and the EU, but without any jurisdiction of the CJEU](#). Therefore, from the UK perspective, there should not be [“insurmountable legal barriers”](#) to the agreement of a comparable text.

In 2018, the British position slightly evolved after the EU stressed that the rejection of the CJEU jurisdiction would be very problematic to the conclusion of a deal. Consequently, the UK stipulated that while [in case of disputes not being solved by negotiations, an independent arbitration panel would be competent, the CJEU would be involved in relation to the British contribution to Europol, which operates under the CJEU jurisdiction as it is an EU agency, and for interpreting the EU law](#). Such repartition could hence appear as a way to ensure the [respect for the sovereignty of the UK and for the autonomy of EU decision-making](#), but this U-turn from Theresa May has been strongly criticised at the domestic level (Carrapiço et al., 2019).

A change also occurred on the UK side in 2017 and 2018 in respect of data protection and fundamental rights, protected by the European Convention on Human Rights (ECHR). In 2017, the UK was quite ambiguous about its commitment on both matters, only declaring its wish to include in the future treaty with the EU [“high standard of data protection and the safeguarding of human rights”](#). The following year, the UK made clear that, even after the official withdrawal from the EU, it [“will remain a party to the ECHR”](#) and [“a global leader on data protection”](#).

However, no further details were provided by the White Papers on how to achieve those outcomes from a technical or legal perspective, as the UK counts on some creativity and ambition to be displayed from the two negotiating parts due to the lack of precedent. These texts mostly introduce the negative consequences of not succeeding in obtaining those results, insofar as the absence of agreement [“would damage us both and would put all our citizens at greater risk”](#). In that sense, Theresa May exerted a strong pressure on EU decision-makers by warning that [“without the UK’s participation in, and contribution to, these data exchange tools, there would be a significant loss of capability which would reduce the UK’s and EU’s ability to protect citizens across Europe”](#), something [“as leaders, we cannot let \[...\] happen”](#). Therefore, Theresa May skilfully shifted the blame to the EU if no treaty were to be agreed on, in spite of the good will displayed by the UK insofar as it would be due to the EU favouring [“competition between partners, rigid institutional restrictions or deep-seated ideology”](#) to the expense of security.

3. Balancing operational needs and the status of third States: the difficult EU position

Except [the mention made by the European Council for the future Withdrawal Agreement to address law enforcement issues](#), no broad and strategic view of the EU about the post-Brexit police cooperation was public before the January 2018 [“Internal Preparatory Discussions on Framework for Future Relationship in Police and Judicial Cooperation in Criminal Matters”](#), prepared by the Task Force of the European Commission.

Four months later, it presented to the Council the [“Framework for the Future Relationship on Police and Judicial Cooperation in Criminal Matters”](#) and Michel Barnier made clear the main orientations of this document in his speech [at the European Union Agency for Fundamental Rights](#), acting from the new [guidelines adopted by the European Council](#) in March 2018.

The European Parliament also produced two outputs in regard of police cooperation: its [“Resolution on the Framework of the Future EU-UK Relationship”](#) of March 2018 and its July 2018 study [“The EU-UK Relationship beyond Brexit: Options for Police Cooperation and Judicial Cooperation in Criminal Matters”](#). In all these documents, the EU decision-makers seem to be torn between two antagonistic imperatives.

On one hand, the EU institutions share the British views on the necessity for both sides to cooperate on law enforcement matters in the [“light of the geographic proximity and shared threats faced by the Union and the UK”](#), as expressed by the EU heads of State and of government. The latter also agreed with the UK on the priority blocks to be negotiated: the exchange of information and the support for operational law enforcement cooperation, encompassing the cooperation with Europol.

On the other hand, regardless of how [“important”](#) the EU-UK cooperation is and how strong are their [“mutual interests”](#), the European institutions raised various limitations to the future EU-UK relationship in this domain. This is mostly due to the new status of the UK, becoming a third country outside Schengen, and to seeking the appropriate balance between rights and obligations. This idea was summarized by Donald Tusk, then President of the European Council: [“The EU cannot agree to grant the UK the rights of Norway with the obligations of Canada”](#). It was also expressed in a very direct way by [Michel Barnier](#):

“The UK has decided to leave the EU, its institutions, structures and safeguards. It will be a third country outside Schengen and outside the EU's legal order. This is a fact. Facts have consequences [...] If you leave this "ecosystem", you lose the benefits of this cooperation. You are a third country because you have decided to be so. And you need to build a new relationship. To negotiate an ambitious new relationship with the UK, which we all want, we need more realism on what is possible and what is not when a country is outside of the EU's area of justice, freedom and security and outside of Schengen”.

Considering hence that [“non-member cannot have the same benefits as a member”](#), the EU stated that the UK, once no longer a Member State, would lose its privileged access to EU instruments –

especially to EU or Schengen databases – and its participation in the EU strategic decision-making and governance. This change is justified by two main arguments.

The first one is the “[integrity of the JHA area and of the Schengen area](#)”. In that sense, enabling a third country to opt-in to the JHA measures could entail the autonomy of EU decision-making and could mean that not all States are obliged by the same rules and standards. In that sense, the European Commission warned the UK that the Danish case, having opted-out of JHA and having negotiated a special agreement on these matters with the EU, could not be a precedent for the EU-UK relation insofar as Denmark is both an EU and a Schengen member State and accepts both the full CJEU jurisdiction and the EU data protection legislation. The problem with the UK was even more acute insofar as before May 2018, as detailed above, the British position in regard of the CJEU, the ECHR and its level of data protection was unclear and failed to satisfy the EU’s wishes. Therefore, the EU was afraid of a [lowering of the standards of protection for individuals and clarified that only the CJEU would be competent for interpreting the EU law concepts](#), leading to the changes in the British position detailed above.

The second rationale of the EU’s opposition to offer specific rights to the UK is its fear of “[upsetting](#)” the existing relations with third countries. Indeed, granting stronger capabilities to the UK could create precedents for third countries which are observing closely the outputs of the EU-UK negotiations and which could ask for access to the same benefits. [This is, for instance, the case of Norway which already stated that it will also look for closer cooperation with the EU if the UK succeeded in securing a better deal than the current ones for third States](#)¹. Thus, interestingly, European decision-makers never made a reference to the existence of a “special” relationship with the UK.

Consequently, the EU starting position in the negotiation was quite far away from the British one. This is already true in regard to the form of the EU-UK agreement in law enforcement matters. Contrary to the British idea to differentiate security issues from the rest by negotiating an EU-UK security partnership, the EU made it clear that [security was part of the wider EU-UK partnership](#).

Furthermore, it pointed out that while [PNR and Prüm cooperation with the UK could be possible and while the British law enforcement agencies could still exchange information with Europol, be invited to participate to Europol analyses projects and send liaison officers, they would have limited access to EIS and no seat at the management board of the agency](#). No access to SIS II was mentioned, excluding completely the UK from this model of cooperation as it is not a Schengen Member State.

In addition, to get that level of cooperation, the EU established [three requirements](#) for the UK to meet:

1. An agreement on an effective enforcement and dispute resolution mechanism will be required to ensure the deal is applied in a reciprocal way.
2. The UK will need to remain a party to the ECHR: should it leave it or be condemned by the ECHR, the cooperation with the EU will end (“guillotine clause”).
3. An adequacy decision will need to be adopted by the EU to confirm the UK data protection standards are robust enough and compatible with those of the EU. Once again, should the

¹ [The UK answered to this concern by proposing that the EU could also offer more to Schengen non-EU countries based on the EU-UK partnership](#).

adequacy decision be withdrawn or declared invalid by the CJEU, the cooperation will terminate (“guillotine clause”).

In conclusion, dismissing the pressure exerted by the British government, which claimed that no political or institutional obstacles should block the adoption of an agreement on the future of EU-UK police cooperation, Michel Barnier defended the vision of the EU in his May 2018 speech, described as a [“fair offer \[...\] constrained by the UK's red lines”](#). [He added:](#)

“Some in the UK would like to go further. They want to maintain all the benefits of the current relationship, while leaving the EU regulatory, supervision, and application framework. And they try to blame us for the consequences of their choice. Once again, we will not be drawn into this blame game. It would mean wasting time we don't have. In this field of internal security, it is particularly hard to speak about what will no longer be possible. But we have, I have, to speak the truth [...] If we want to build a new relationship, we need a basis of good will and confidence. We also need more realism about what is and what is not possible.”

This pressure from the British side was judged even less admissible by the EU negotiator in chief as, in 2017, he already depicted Brexit as a selfish decision by the UK, almost a “betrayal of European principles and solidarity” (Carrapiço et al., 2019, p. 48) due to its timing, just some months after various terrorist attacks on European ground: [“Never had the need to be together, to protect ourselves together, to act together been so strong, so manifest. Yet rather than stay shoulder to shoulder with the Union, the British chose to be on their own again”](#).

4. From the withdrawal agreement to the current situation: a difficult convergence of views

While the EU and the UK had very different starting points in regard to their future police relation in 2017, they have already converged on two texts: the Withdrawal Agreement and the accompanying political declaration. After analysing what they managed to agree on, the final subsection is dedicated to the current state of the negotiations.

[The 2019 Withdrawal Agreement](#)

[The EU and the UK have established the arrangements for the transition period, running from February 1st 2019 to December 31st 2020](#). The two sides shared the objective of avoiding any operational gap and mitigating the effects of this political situation on police cooperation.

Consequently, no major change has been set for EU-UK relations during the transition period as the UK still has access to EU practical operational mechanisms, databases and Europol for 11 months. In addition, all the investigations and requests for information or for assistance between the EU and the UK initiated before the end of 2021 will not be interrupted. Furthermore, British law enforcement

agencies will be able to use the Schengen Communication Infrastructure and the Secure Information Exchange Network Application of Europol three months and one year respectively after the end of the transition period. Interestingly, [this option was not offered in the draft agreement prepared by the European Commission](#) and was added with the start of the talks with the UK for operational reasons. Indeed, British police officers will this way continue to benefit from the main European police platforms in exchanging further information with their European counterparts. Nevertheless, the UK will have to reimburse the EU for the costs this modality entails.

Hence, while from an operational perspective *status quo* is the rule, bigger evolutions are brought to governance and decision-making insofar as since February 2020, the UK no longer participates in EU institutions or in the management board of Europol. It is thus deprived of any influence on the steering and orientation of EU law enforcement policies.

If finding an agreement seemed quite easy for the transition period due to converging concerns on operational needs and on the postponement of the Brexit effects, this situation is designed to be temporary.

[The 2019 Political Declaration on the future EU-UK relationship](#)

The Withdrawal Agreement was accompanied by a [“Political Declaration setting out the Framework for the Future Relationship between the European Union and the United Kingdom”](#). In this document, the EU and the UK stated that they were willing to establish a “broad, comprehensive and balanced security partnership” encompassing, among other things, law enforcement. This declaration affirms the convergence of the EU and the UK on the need for such collaboration due to “geographic proximity” and “shared principles, values and interests”, and draws a clear red line on the respect for British sovereignty and EU autonomy. In this regard, it should be highlighted that the cooperation aims to be “close, balanced and reciprocal”. This wording is in compliance with the EU views of not creating a “special” relationship and of insisting on the UK not being able to enjoy the benefits of the EU without any constraint, especially as, recalled in the same paragraph, the UK will be a non-Schengen third country. In that sense, the Declaration stated that the degree of closeness and depth of EU-UK relations will above all depends on the degree of obligations the UK accepts on dispute resolution and protection of fundamental rights and data protection.

Therefore, while PNR and Prüm cooperation seem to be possible, the exchange of the types of data collected in SIS II and the setting up of JITs appear quite hypothetical and strongly dependent on the British status and the legal framework. Moreover, the future British participation in Europol is fuzzy as it is only stressed in the Declaration that the EU and the UK will “work together to identify the terms” of this matter.

In conclusion, in this text, the agreement on the post-Brexit EU-UK police relation remains limited to a minimal consensus on the need to find some arrangements and is bounded by what the British government is willing to accept.

[The New EU-UK Partnership v. The Future Relation with the EU](#)

The current EU position in the rounds of negotiation with the UK is based on the “[Draft Text of the Agreement on the New Partnership with the United Kingdom](#)” finalised by the Task Force in March 2020. In this text, the Task Force offers more technical details on the future of police cooperation, encompassed in the broader security partnership. However, even before specifying the technical modalities of each mechanism, the draft insists on the need for the UK to respect the ECHR and to obtain an adequacy decision from the European Commission in regard to data protection.

If the UK does so, it will benefit from the same capabilities as the other member States regarding the Prüm convention. It will also enjoy a stronger PNR cooperation with the EU as the Task Force suggests that the EU will “ensure that air carriers transfer PNR data” to the UK relating to the flights those carriers operate between the EU and the UK and to the information they incorporate or store in the EU about flights to or from the UK. On its part, the UK will share “as soon as possible” with Europol or national agencies the analytical information containing PNR data, and will satisfy the request from Europol or a member State agency if they ask for the results of the processing of PNR data or analytical information containing this data. The quasi-systematic transfer of data goes further than what the US and Canada agreed on with the EU, but the UK is still limited as, for instance, it cannot share PNR data with a third country whose level of data protection has not been approved by the EU. Further, there is no mention of the option of working with member States’ PIUS to identify travel patterns.

The exchange of information is also presented as possible between British and member States law enforcement authorities directly. In this respect, the EU-UK relations are ruled by the same principle as that during the British membership to the EU: “No conditions stricter than those applicable at domestic level for providing and requesting information and intelligence shall be applied by States for providing information and intelligence to competent law enforcement authorities”.

Finally, the exchange of information is made possible between Europol and the UK. These flows are not restricted to personal data. The Task Force offers some exchanges of specialist and expert knowledge or strategic information. The scope of cooperation with Europol also includes training, operational cooperation, support and advice for individual criminal investigations and the posting of liaison officers. Nevertheless, the UK is excluded from all the decision-making processes and does not hold any power over the governance of Europol. In addition, it does not have access to EIS and its databases.

In conclusion, the position of the EU seems to partially meet the British one, especially regarding Prüm as the UK, not a Schengen non-EU third country, benefits from important rights. Nonetheless, the EC’s proposal is not based on a *status quo*. Some changes have been clearly introduced in the possibilities offered to the UK in relation to PNR, Europol, access to SIS II or to any EU database in comparison with what the British government asked for in 2017 and 2018.

There is today no certainty in relation to the conclusion of an agreement between the EU and the UK. Along with the broader difficulties encountered in other domains, the 2020 rounds of negotiation have been tarnished by a sudden about-turn from the British delegation. Indeed, after having committed to remain party to the ECHR and to maintain high standards of data protection and as well to accept the jurisdiction of the CJEU for interpretation of the EU law, the British government, in its White Paper

[“The Future Relationship with the EU. The UK’s Approach to Negotiations”](#) published in February 2020, declared that it will no longer observe these roles. Regarding the former, the British government stated that the EU and the UK should remain autonomous in their protection and enforcement of human rights and the rule of law. About the latter, the UK argued that providing a role to the CJEU would harm the “autonomy of the UK’s legal system” and would be inconsistent with the other agreements concluded by the EU with third countries, as the CJEU is not responsible for dispute resolution in regard to SIS II or Prüm. This White Paper also made clear that the British government was still trying to negotiate separate agreements with the EU. One of these will be fully dedicated to security with its own “appropriate and proportionate governance mechanism” and will include a clause allowing each party to “suspend or terminate some or all of the agreement” without any justification needed. At the same time, the UK did not revise its operational ambitions downwards: it was still requesting some access to SIS II and an agreement with Europol going beyond existing precedents, considering its leading contributions. Interestingly, the section of this White Paper dedicated to law enforcement cooperation emphasized less strongly cooperation on shared threats and mutual interests than the previous British texts. In addition, it stated clearly that British security would be stronger at the end of the transition period, once the UK regained control of borders and migrations.

This new position has been strongly disapproved by Michel Barnier who asked the British delegation [not to go back on its former commitment, to display some respect and reciprocity and to respect the EU’s independence and autonomous decision-making](#). If not, the EU Chief Negotiator warned that [post-Brexit law enforcement cooperation would be limited to the existing international mechanisms and be less ambitious than both parties were anticipating](#).

In spite of these tensions, some changes seem to have happened recently. In June, Michel Barnier stressed that he had had a [“slightly more constructive discussion on the question of commitment to the ECHR”](#) with the British delegation. In October, Michel Barnier explained to the European Parliament that the EU and the UK made [“progress on the question of the ECHR, on data protection, Europol”](#), which was gradually creating [“the outline of an agreement”](#). Nonetheless, no further detail has been offered by the British nor the EU negotiators on the extent and content of the agreement, leaving some doubts and skepticism on the current state of the discussion. Therefore, it seems there is still a long way to go before the EU and the UK agreed on their security partnership. This is due to various reasons.

Firstly, the talks on police cooperation are strongly dependent on the rest of the policy sectors. This is especially true if the EU is willing to conclude one broad agreement encompassing the whole future EU-UK relation, as discussions are complicated on some issues, just as the level playing field. However, even if the UK manages to impose its views on having a separate security treaty, any progress on law enforcement issues could still be hindered by the lack of agreement on justice in criminal matters or on foreign policy.

Secondly, the relations between the EU and the UK are increasingly tense. The British reputation has been heavily impacted by some recent events, especially in JHA. [The unlawful copy of data from SIS II by British law enforcement agencies and its sharing with US companies](#) and the British failure to alert about [“75,000 convictions of foreign criminals to their home EU countries”](#) added to [the mistrust of some EU leaders, describing the UK as an “awkward partner” following its requests for opt-outs of Lisbon JHA measures](#).

The deterioration of Britain's reputation has been amplified by U-turns of the Johnson government from what had been agreed on with the EU, not only in JHA but in several domains. These turnarounds in the name of sovereignty and autonomy have strongly upset EU leaders, even leading the European Commission to take infringement proceedings [on October 1st against the UK after the "United Kingdom Internal Market Bill"](#). Therefore, in spite of the urgency to conclude a deal, EU decision-makers seem to be less accommodating with the UK and the British government appears even more reluctant to compromise on the powers of supranational institutions, all the more so as it has not obtained full satisfaction for its operational requests – the access to SIS II still conditioned by the EU to Schengen membership in particular.

If no agreement was to be found between the EU and the UK, cooperation between their respective law enforcement agencies will not stop from one day to the next. It must be highlighted that police also work together at the international level, exchanging information, for instance, through Interpol or in some "clubs". Among others, the "Club de Berne" gathers intelligence services from the 27 EU member States, the UK, the US, Switzerland and Norway. Information exchange also occurs in an informal way, between police officers knowing each other. Loose networks or associations also exist to put together representatives of EU Member States and of the UK, for instance the Radicalisation Awareness Network or the EU Internet Forum (De Vries, 2019).

Moreover, the failure of the EU-UK talks to reach a satisfactory agreement does not impede the adoption of bilateral agreements between the UK and EU member States or between the UK and Europol. Nevertheless, none of these arrangements will provide the same level of cooperation from a quantitative – amount of information – or qualitative – the speed of exchange and the scope of the possibilities – perspective. Furthermore, concluding agreements with a State or with an EU agency can take years, especially considering that the UK would be the first third country to conclude an operational agreement under the new Europol legislation. Those two problems could consequently create operational gaps. Besides, the current issues will not be resolved if the UK had to conclude an agreement with Europol. An adequacy decision would still be required for the UK to cooperate with Europol, which could also take years, and should the EU standard of protection be raised, the British legislation will need to adapt as a result. The UK will also need to recognize the CJEU jurisdiction for dispute resolutions related to Europol.

5. Conclusion

In a counterintuitive way, while Europeans are still very concerned by their internal security, the EU-UK future police cooperation has not been under the spotlight in recent years. One may have assumed this relative silence to be due to a strong convergence of the EU and the UK on this topic, negotiators of each side being mostly driven by their wish to offer more security to their citizens. Nonetheless, this policy brief has demonstrated that, in spite of shared views on operational imperatives and common threats, no agreement has been found for the moment, while the transition period will come to an end in less than two months. If the UK is asking the EU to be more flexible and to favour operational issues above governance aspects, the EU is looking for the preservation of its institutional framework and of the balance between security and liberty. The mutual understanding seems increasingly complex in the current talks, especially due to the broader context leading the UK to be

more and more entrenched in its vision of national sovereignty, and the EU not focused primarily on the Brexit negotiations. Therefore, the future of their security partnership remains very uncertain. It will depend not only on the capacity of both sides to agree on other dimensions of their relationship, but also on the security situation given that exogenous shocks could create some solidarity and facilitate a compromise.

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