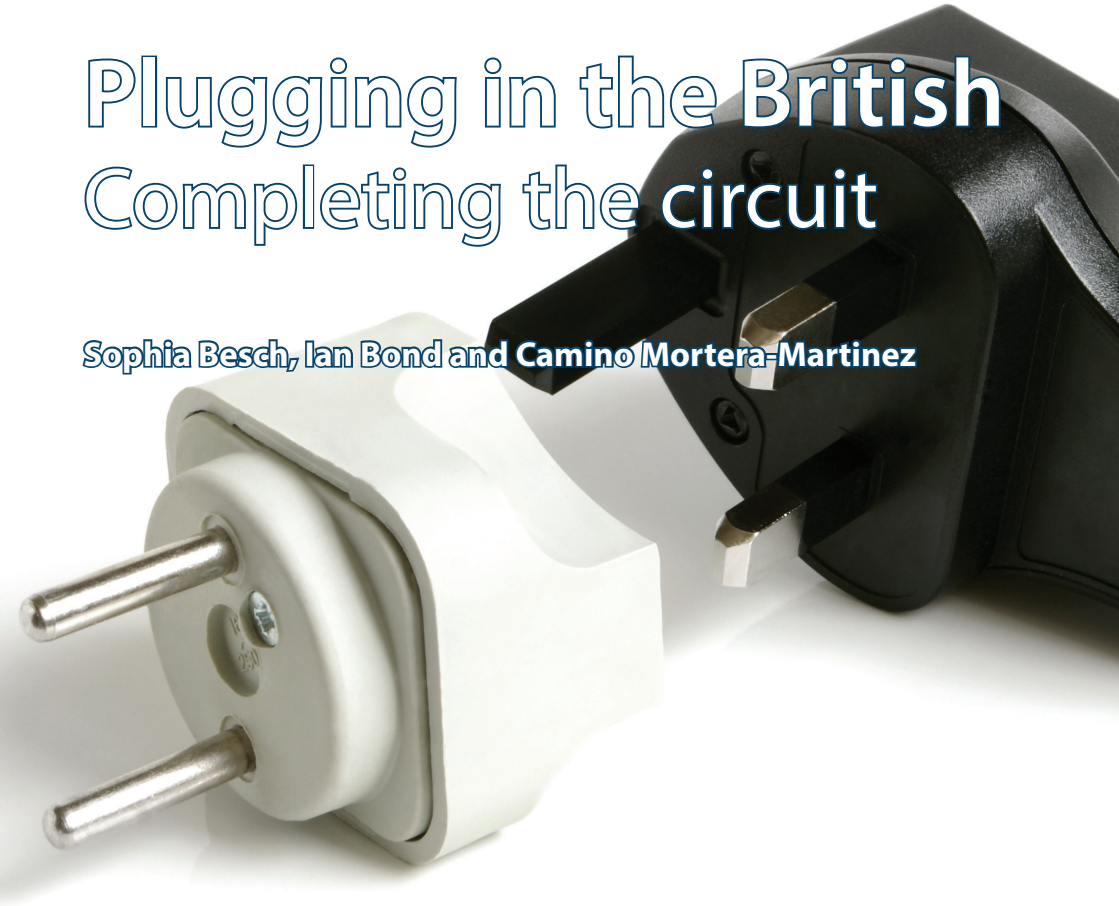
June 2018

Plugging in the British
Completing the circuit

Sophia Besch, Ian Bond and Camino Mortera-Martinez



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The Centre for European Reform (CER) is a think-tank devoted to making the European Union work better and strengthening its role in the world. The CER is pro-European but not uncritical.

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Summary

The main focus of debate on the UK's withdrawal from the EU has so far been on trade. But foreign and defence policy and law enforcement co-operation are also becoming important areas of disagreement. Plugging the UK into EU co-operation in these areas will not be straightforward.

Foreign policy

The EU has close relations with like-minded countries that offer various models for the UK/EU relationship. There is no single recipe for co-ordinating policy. Norway has almost no formal structures for foreign policy co-operation, while Canada has a legally binding treaty and the US a politically binding declaration. All formal structures are backed up by extensive informal contacts with the EU and the member-states. The EU wants to use these existing arrangements as templates; the UK argues that it should have a special status, with more influence in EU decision-making. The EU's Common Foreign and Security Policy (CFSP) is largely inter-governmental. That creates more flexibility to accommodate non-member states – but there will still be limits to the privileges the UK can expect. The UK will not get a veto in EU discussions of foreign policy. But it should seek a treaty, like Canada's, to ensure that its voice is always heard; and it should maintain formal and informal channels of communication to the EU institutions and the member-states. The British government has judged that EU development spending matches UK priorities and is well-managed, so it should look for ways to contribute to EU-run aid programmes.

In the transition period, the EU has said that the UK might have special arrangements for consultation on CFSP on a case by case basis. The UK wants a guarantee of consultation before the EU takes foreign policy decisions, including on sanctions. The UK will need to decide whether to seek maximum autonomy from the EU or maximum influence on it; it cannot have both.

Defence

Both the EU and the UK have an interest in agreeing a post-Brexit defence relationship as soon as possible, to prevent Britain falling out of European defence co-operation at a crucial time, when the Union

is developing new defence initiatives and has yet to determine the conditions for third party involvement. It will not be easy to find a compromise. The EU is keen to protect its decision-making autonomy on defence operations and missions. And defence industrial co-operation post-Brexit will depend in part on the broader trade and economic relationship between Britain and the EU.

Britain and the EU will have to negotiate an agreement to specify how the UK can participate in EU military operations after Brexit. Britain could commit to supplying a substantial number of troops or other military assets and continuing to pay into the EU's common financing scheme for operations, subject to close UK involvement in information sharing, force generation and planning.

With the European Defence Agency (EDA), the UK should seek an administrative agreement – which details the conditions under which a third country can participate in EDA joint capability projects – similar to Norway's. And it should agree arrangements with the EU to allow UK organisations to tender for EU-funded defence projects. On space security, the EU and the UK both have an interest in finding an agreement on satellite navigation co-operation and on access to Galileo's Public Regulated Service. But both sides are posturing in ways that will harm their interests, and risk poisoning the atmosphere for wider defence co-operation.

In the medium term, it is likely that Brexit will encourage the EU to rethink its relations with third states: first, to ensure that the UK continues to play a full part in EU missions and operations; and second, because the discussion with Britain will reveal shortcomings in existing agreements.

While negotiations continue, Britain should signal its goodwill. While the UK is still a member-state, it is technically free to veto EU defence initiatives, but it should refrain from doing so. Within NATO, Britain should make it a priority to champion a close partnership between the alliance and the EU.

If the EU excluded the UK from the Union's defence infrastructure, it would not only lose British expertise and assets, but also potentially undermine the EU's own efforts. The EU should not base its offer of a future defence relationship on Britain's history of obstructing EU defence initiatives. Theresa May and her government have repeatedly

stated their commitment to European security. The EU should take them at their word.

Justice and home affairs

Police and judicial co-operation in criminal matters is one of the issues yet to be agreed in the draft withdrawal agreement between the UK and the EU. The UK government wants a bespoke treaty with the EU, going beyond any existing deals the bloc has with third countries. But the EU's guiding principle for negotiations with the UK is 'no better out than in'. Both are opening positions in the negotiations and are likely to evolve over time. But time is a luxury neither the EU nor the UK has. Britain's continued inability to come up with precise ideas does not help its cause.

The EU distinguishes between partnerships with non-EU Schengen members, like Norway and Switzerland; and arrangements with non-Schengen countries like the US and Canada. Schengen members have better access to EU police and judicial co-operation than countries outside Schengen, but they also have more obligations.

On extradition, the UK is unlikely to retain the European Arrest Warrant (EAW), which is open only to EU countries. After Brexit, Britain will have three options: first, it could seek bilateral agreements with the EU-27. But a system of 27 bilateral treaties would be harder to negotiate and less efficient than a pan-European extradition treaty. Second, it could fall back on the 1957 Council of Europe convention on extradition. But extradition under the convention takes almost 20 times longer than it does with the EAW. Finally, Britain could try to negotiate a surrender agreement like the one Norway and Iceland have with the EU. This agreement took 13 years to negotiate, is still not in force and will allow countries to refuse to extradite their own nationals.

Britain is unlikely to retain direct access to Schengen's main law enforcement database, the Schengen Information System (which contains a wide range of data, from outstanding extradition requests and suspected crimes to details of stolen or lost passports). After Brexit, the UK could ask Europol or a friendly EU or Schengen country to run searches on its behalf. It will be easier for the UK to stay plugged into non-Schengen databases containing fingerprints or air passenger data insofar as Britain complies with EU privacy rules, as the British government has said it will.

Britain should be able to post liaison officers to Europol, but like Denmark it would not to have direct access to Europol's databases.

The major obstacle to an agreement is that Britain's negotiating red lines – no European Court of Justice (ECJ) jurisdiction, and no acceptance of the EU Charter of Fundamental Rights – are incompatible with its stated ambitions for the future security relationship. A future security treaty should include a dispute resolution mechanism which could be a totally new court, an arbitration mechanism or the ECJ. The more EU jurisdiction the UK accepts, the easier (and faster) it will be for Britain to get a good deal on law enforcement co-operation, as Brussels would have a way to monitor compliance and to ensure that Britain's laws and practices were in line with EU requirements.

The treaty should be part of the wider Brexit deal, to minimise the risk of it being rejected by the European Parliament, which has voted down standalone EU-US agreements on data-sharing. This would also allow Britain and the EU to include a chapter on data protection that could apply both to trade and law enforcement. If Britain and the EU fail to reach a deal on security, the only winners will be criminals.

To support their future relationship, the UK and the EU should arrange personnel exchanges, so that EU diplomats, development, security and military officials spend time in UK ministries and vice versa. And the UK will need an agreement on information sharing – vital across all aspects of external and internal security and defence industrial co-operation.

Whatever arrangements the UK ultimately chooses for its internal and external security relationships with the EU, it will need to resource them properly, in Brussels and other EU capitals. British Ministers will need to devote more time to relations with the rest of Europe.

Introduction

As Britain and the EU have wrangled over the terms of Britain's departure and its future relations with the Union, the main focus has been on trade and economic relations. That makes sense: the EU is by far the UK's largest trading partner; and after Brexit, the UK is likely to be the EU's second largest trading partner. But as the withdrawal process moves forward, the UK and the EU are also beginning to talk more about the other areas in which EU member-states work together, and how the UK might be able to co-operate with them in future.

In the trade and economic area, the UK will be both an important market for some member-states and a competitor with them in third countries. In non-economic areas, however, there are likely to be many areas in which both sides will want to preserve as much as possible of the existing patterns of co-operation. If law enforcement co-operation breaks down, it will be harder to combat cross-border crime and terrorism. If defence co-operation fails, the EU will lose access to the resources of Europe's strongest military power – even if the UK has not always been an enthusiastic supporter of EU defence initiatives. And if UK and EU foreign policies diverge, both will find they have less influence over events. The European Council's April 2017 negotiating guidelines for the withdrawal process implicitly reflected the assumption that co-operation would be easier on issues other than trade: in 28 paragraphs, there was only one short paragraph containing a brief reference to possible partnerships in "the fight against terrorism and international crime, as well as security, defence and foreign policy".[1]

Despite their common interests, however, in practice the EU and UK will not find it easy to maintain the current level of integration and co-operation after Brexit. The EU is a rules-based institution; and the rules are designed with the interests of member-states in mind, not those of third countries. For the UK, the most important Brexit slogan was 'Take back control'. Even if UK foreign policy objectives almost always correspond with those of the rest of the EU, and will still do so after Brexit, the UK will not want simply to accept policies decided by the EU-27: in a speech at the Munich Security Conference in February 2018, Prime Minister Theresa May said "it is right that the UK will pursue an independent foreign policy".[2] At the same time, in its negotiating

1: 'European Council (Art 50) guidelines following the United Kingdom's notification under Article 50 TEU', April 29th 2017.

2: 'Prime Minister Theresa May's speech at the 2018 Munich Security Conference', gov.uk website, February 17th 2018.

guidelines the EU listed "autonomy as regards its decision-making" as a core principle: the UK will not get a veto over decisions relating to foreign policy, defence or security issues. The EU's chief negotiator, Michel Barnier, underlined this in a speech to the EU Institute for Security Studies (EUISS) on May 14th 2018: "In the future, the EU will take decisions on the basis of the interests of the EU-27".[3]

Bearing in mind the stated wish of both sides to work together, and the political and legal constraints on EU co-operation with third countries, the CER and the Konrad-Adenauer-Stiftung (KAS) began work in 2017 on a series of workshops and publications to explore existing models of co-operation between the EU and like-minded non-members such as Canada, Norway and the United States in three areas: foreign and development policy; defence co-operation and defence industry; and law enforcement and counter-terrorism. The aim was to see what the advantages and disadvantages of each model were for each side, and what lessons the UK might learn from the experience of others.

This report pulls together and updates three policy briefs covering the three areas, on the basis of the three workshops held in 2017 and 2018.[4] It reflects papers published by the British government and the EU's Taskforce on Article 50 negotiations with the United Kingdom (Taskforce 50), and public statements by EU and UK officials; and a wide range of off-the-record discussions with representatives of the UK and other member-states and third countries, and with EU officials.

The EU and UK aim to finalise the withdrawal agreement by around October 2018; in parallel with this process they will agree on the framework for their future relationship. Once the UK formally leaves the EU on March 29th 2019, there will be a transition period of 21 months (unless the parties agree to extend it), during which the details of the long-term EU-UK relationship are supposed to be negotiated and ideally ratified. It may be possible for the foreign policy aspects and some of the defence and internal security aspects of the future relationship to be pinned down more quickly, however, in a separate EU-UK agreement. Both the EU and the UK have provided for a separate agreement on foreign policy in the draft transitional arrangements that each has proposed.[5]

3: 'Speech by Michel Barnier at the EU Institute for Security Studies conference, Brussels: "The future of the EU foreign security and defence policy post Brexit"', May 14th 2018.

4: Ian Bond, 'Plugging in the British: EU foreign policy', CER policy brief, March 2018; Sophia Besch, 'Plugging in the British: EU defence policy', CER policy brief, April 2018; Camino Mortera-Martinez, 'Plugging in the British: EU justice and home affairs', May 2018.

5: European Commission, Article 50 Task Force, 'Position paper "Transitional arrangements in the withdrawal agreement"', February 7th 2018; HM Government, 'Draft text for discussion: Implementation period', February 21st 2018.

Part one:

Foreign policy and development co-operation

This part looks at co-operation on foreign policy and on development policy. It starts by assessing the legal framework for the EU's Common Foreign and Security Policy and development co-operation policy. It examines what the British government has said about its future relations with the EU in these areas, in a series of papers setting out its thinking in increasing detail.[6] It analyses what the EU is saying, publicly and privately, about the sort of future foreign policy relationship it wants with the UK. It looks at the legal and political frameworks of relations between the EU and other partner countries, and what those countries think about the advantages and disadvantages of the different approaches that they have adopted. And it tries to draw some conclusions about the way forward for foreign policy and development co-operation, including during any transition period.

Common Foreign and Security Policy: The treaty provisions

Title V of the Treaty on European Union (TEU) sets out the framework of the Common Foreign and Security Policy (CFSP). It lists principles to guide the EU's international action, including democracy, the rule of law, and respect for international law and the principles of the United Nations Charter. The UK should have no difficulty endorsing the EU's principles.

But after Brexit, the UK will no longer be a member of the EU bodies where these principles are turned into actions. There is no explicit provision in the treaty for a third country to have a voice, let alone a veto. And once member-states have agreed to do something, they are supposed to "refrain from any action which is contrary to the interests

6: 'Foreign policy, defence and development: A future partnership paper', Department for Exiting the European Union, September 12th 2017; 'Framework for the UK-EU security partnership', Department for Exiting the European Union, updated May 9th 2018; 'Technical note: Consultation and co-operation on external security', Department for Exiting the European Union, updated May 24th 2018.

of the Union or likely to impair its effectiveness as a cohesive force in international relations" – hard for a non-member to sign up to.[7]

Unlike other areas of EU activity, which are supervised by the Committee of Permanent Representatives (COREPER), CFSP is the responsibility of a separate Political and Security Committee (PSC), made up of ambassador-level officials from the member-states, which "contribute[s] to the definition of policies by delivering opinions to the Council at the request of the Council or of the High Representative of the Union for Foreign Affairs and Security Policy or on its own initiative".[8] The PSC takes decisions by unanimity.

"A good deal of CFSP is declaratory rather than practical."

On the positive side (from a UK point of view), CFSP is a largely inter-governmental area of EU activity. A good deal of CFSP is declaratory rather than practical: the EU issues an enormous number of statements on conflicts, human rights issues and other international events, but relatively few of them lead to concrete EU actions. The Commission does not have the sole right of initiative; and, with very few exceptions, CFSP decisions do not involve the European Parliament and are not subject to challenge before the ECJ.

The European Parliament's main lever over CFSP is its right to amend the CFSP budget.[9] But the CFSP budget as such (€328 million for 2018, or 0.2 per cent of the overall EU budget) is only a small part of spending on EU external activity. Some CFSP activity (in particular Common Security and Defence Policy military operations) is paid for by the states that take part in it, or according to a separate budgetary system tied to gross domestic product.

The ECJ's role in CFSP is important only in relation to sanctions: individuals or entities who think that they have been wrongly targeted by restrictive measures can appeal to the court. The UK has been the leader among EU member-states in providing sanctions listings and ensuring that they are legally watertight; the Commission and other member-states acknowledge that after Brexit it will be hard to fill this role.[10]

7: Article 24.3 TEU.
8: Article 38 TEU.
9: Roland Blomeyer, Sebastian Paulo and Elsa Perreau, 'The budgetary tools for financing the EU external policy', study for the European Parliament's Directorate General for Internal Policies, January 18th 2017.
10: Alex Barker, 'EU and UK seek speedy Brexit deal on defence and security', *Financial Times*, February 4th 2018.

Development assistance: Legal framework

Development assistance does not form part of CFSP, and competence in the area of development co-operation and humanitarian assistance is shared between the EU and its member-states. But the EU and the states must co-ordinate their policies and consult each other on their aid programmes.[11] The Organisation for Economic Co-operation and Development's (OECD) Development Assistance Committee (DAC) reported that the EU institutions spent $15.7 billion (€14.8 billion) on official development assistance (ODA) in 2016; the Commission calculated that in total the institutions and the member-states spent €75.5 billion.[12]

Development spending by the institutions is divided between a number of programmes within the EU budget, and the European Development Fund (EDF), which is outside the EU budget. The EDF is made up of assessed national contributions from member-states, and disbursed just under €3 billion in ODA in 2016. The EDF is designed to support the Cotonou Agreement of 2000, between the EU member-states and 78 countries of the African, Caribbean and Pacific Group of States (known as the ACP countries). The agreement expires in 2020, and will have to be renegotiated.

The EU also operates a number of trust funds, made up of existing funding from the EU budget or the European Development Fund, additional money from member-states and contributions from non-EU donors such as Norway. Non-EU donors may sit on the strategic boards and operational committees of the funds (which may be useful to the UK after Brexit). The Commission, however, has a veto on the decisions of the strategic boards. The EU also allows third countries to contribute to 'joint programming' of aid at the country level. The primary purpose of joint programming is to increase the coherence of member-state and EU assistance, but it makes sense for this co-ordination to extend to non-EU donors. So far, Switzerland is the most active development partner, taking part in joint programming in more than 20 countries.[13]

11: Articles 4.4 and 210, 'Treaty on the functioning of the European Union' (TFEU).
12: European Commission fact sheet, 'Publication of figures on 2016 Official Development Assistance', April 11th 2017.
13: Capacity4dev.eu, Joint Programming Tracker, accessed May 30th 2018.

What does Britain want?

To judge from the British government's initial statement of its aspirations, 'Foreign policy, defence and development: A future partnership paper', a flippant answer might be: 'To keep everything as it is'. The UK will be "an indefatigable advocate" for the values it shares with the EU, which are "historic and deep-rooted in our societies"; and it supports a "strong, secure and successful EU with global reach and influence".

The paper gave a number of examples of areas in which the UK wants to continue to work with its European partners: continued co-operation through NATO and CSDP missions and operations; tackling serious and organised crime; challenging state-based threats and upholding the rules-based international order through aligning sanctions regimes. In return, it offered "a deep and special partnership that will make available UK assets, capabilities and influence to the EU and European partners". In commenting on the paper, British officials suggested that the UK aspired to have more of a voice in EU decision-making than other partners have.

"Britain is offering a partnership that will make available UK assets."

Subsequent papers have fleshed out UK thinking in more detail. In its 'Framework for the UK-EU security partnership', the UK outlines a security partnership "maintaining and strengthening our ability to meet the ever evolving threats we both face". The partnership would be underpinned by agreements on the exchange of data and secondees (which would also apply in the areas of defence and of internal security). The 'technical note' sets out in considerable detail the UK's aim of agreeing a "framework of consultation and co-operation" that would allow the EU and UK to "combine our foreign policy efforts around the world to the greatest effect". The arrangements should be flexible enough "to allow for more intensive consultation and co-operation during times of crisis".

The technical note proposes UK talks with the European External Action Service (EEAS) and the Commission at all levels from EEAS Secretary General to regional directors, as well as weekly meetings between the chair of the EU Political and Security Committee (PSC – the EEAS-chaired committee of the member-states with responsibility for CFSP) and the UK mission to the EU. In addition, it suggests that the UK could have ad hoc meetings with the PSC and the Foreign Affairs Council in informal

sessions, or attend sessions of informal councils (presumably a reference to the Gymnich, the regular informal meeting of EU foreign ministers held once in each rotating presidency of the Council of Ministers in the country holding the presidency). These meetings might produce joint statements or other joint initiatives. In third countries and multilateral bodies, the UK would like to have regular contact with the EU head of delegation, and to be invited on an ad hoc basis to attend informal meetings of EU heads of mission, again with the possibility of "joint or mutually supportive" statements. It proposes a permanent UK liaison presence in the EU Intelligence Centre (INTCEN), to facilitate sharing of intelligence and analysis. And it highlights the importance of continuing to work together on sanctions.

These proposals are consistent with evidence to the House of Commons Foreign Affairs Committee from the Foreign and Commonwealth Office's (FCO) Permanent Under-Secretary, Sir Simon McDonald, in which he said that the government's objective was "to secure continuous, transparent and automatic access to CFSP and CSDP decision-making mechanisms".[14]

In the development area, the UK has published relatively little of its thinking, though it has circulated two 'non-papers' (informal discussion papers which do not commit the UK) on development issues to EU institutions and member-states and some development NGOs. The 'Framework for the UK-EU security partnership' notes that the UK and EU are both committed to the UN Sustainable Development Goals, and says that the UK is "open to participation in EU external spending programmes and instruments". It proposes that the EU and UK should co-ordinate their actions in particular regions or on particular themes; that they should exchange secondees and hold structured and ad hoc discussions of development. And it calls for a mechanism allowing the UK to contribute to EU programmes or instruments, in return for "an appropriate role in the relevant decision-making mechanisms", and the right for UK entities to deliver EU programmes and receive EU funding.

The latest non-paper, shared with EU member-states and institutions on May 24th 2018 but not (yet) published, says that the UK wishes to be able to co-operate strategically with the EU in development after Brexit; but it will assess rigorously whether working with the EU offers the best value for money. It also stresses the importance of ensuring that existing and future EU funding mechanisms make it easier for third countries to participate. It proposes a strategic partnership on development

14: House of Commons Foreign Affairs Committee, 'The future of British diplomacy in Europe', January 23rd 2018.

co-operation between the EU and the UK, covering three areas: peace and security; humanitarian aid; and migration, with "close mutual (ie side-by-side) programming" and possibly joint funding. As in the foreign policy area, the UK wants a partnership that goes further than other third country partnerships, including "mechanisms that give us an equal voice in shaping our approach and oversight of our funds".

The UK and the EU already agree that the UK will need an agreement on exchanging classified information. The UK has set out possible arrangements in detail in a technical note on the exchange and protection of classified information, designed to cover both foreign policy, defence, counter-terrorism and cyber-security. The UK is also keen to exchange experience and expertise with the EU in foreign and development policy through mutual secondments.

What will the EU offer?

The EU has so far said less than the UK about its post-Brexit foreign policy co-operation with the UK. The foreign ministers of the EU-27 issued a statement for the minutes after the General Affairs Council discussion of Brexit on January 29th 2018, reiterating the EU's readiness to establish partnerships with the UK in the areas of security, defence and foreign policy as well as the fight against terrorism and international crime, and proposing that "specific arrangements with the UK in these areas could also be considered during the transition period, taking into account the framework for the future relationship".[15]

"Barnier called for an ambitious partnership in the interests of the Union."

For the transition period, the Commission is in principle willing to accept that foreign policy should be subject to rules that differ from those applied to the trade and economic areas. In the latter case, the EU will insist on the status quo, but with the UK having no vote in EU bodies, and only very limited access to meetings when issues affecting the UK directly are under discussion. The Commission and the member-states discussed the future foreign policy relationship on January 23rd 2018; in briefing notes published afterwards, the Commission suggested

15: General Secretariat of the Council, 'Council Decision supplementing the Council Decision of May 22nd 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the EU', January 29th 2018.

that after the transition period the UK would have no obligation to stay aligned with EU positions; during the transition period after March 2019, however, it would be bound by CFSP decisions. The EU has proposed the possibility of consultation on a case-by-case basis in relation to sanctions and some other issues, but certainly falling short of a veto. In the transition period, the UK would still have to contribute to external relations budgets.[16] The Commission also argued that the EU's interests lay in co-operating with the UK as a significant foreign, security and defence player; and in working with the UK to promote policies in other third countries and international organisations – though that presupposes that the EU and UK will continue to have similar policies and objectives.

When it comes to the longer term relationship, however, there is caution about offering the UK influence in EU decision-making that other partners might then also ask for. Letting Norway or Canada into the room in some circumstances might not be so difficult; Turkey or the US would raise much larger problems. In a speech devoted to future defence and security co-operation, the Commission's Brexit negotiator, Michel Barnier, said categorically in November 2017 that the UK would no longer take part in ministerial meetings, or have an ambassador in the PSC. In its January briefing notes, Taskforce 50 noted that after Brexit the UK would not take part in Brussels working groups and other meetings, or in EU co-ordination meetings in third countries and international organisations. But Barnier also stressed the UK's assets as major power, and called for an "ambitious partnership in the interests of the Union" – while warning that the EU-UK relationship should not discriminate against other third countries.[17] In his May 14th speech, Barnier set out a more detailed vision of the relationship after the transition period, while again stressing the likely limitations.While he acknowledged that EU and UK interests were likely to overlap, and that the UK would be one of the EU's most important partners, he also stressed that it would not have the same rights as member-states: "it will no longer participate in the decision-making of the EU; it will no longer have the ability to shape and lead the EU's collective actions". More positively, Barnier identified five "dimensions" of future partnership:

★ Close and regular consultations on foreign policy. The aim would be "a shared assessment of geopolitical challenges", and especially "the UK's alignment with the EU" on sanctions.

16: European Commission, 'Internal EU-27 preparatory discussions on the framework for the future relationship: "Security, defence and foreign policy'", January 24th 2018.
17: European Commission, 'Speech by Michel Barnier at the Berlin Security Conference', November 29th 2017.

★ Openness to UK contributions to EU development aid, including through joint programming; and to EU-led military and civilian operations "considering that the UK has strategic military assets".

★ The possibility of taking part "where it will add value" in European Defence Agency research and technology projects (though with a warning that defence industrial issues are "intertwined with EU rules underpinning the single market" (see Part two).

★ Exchange of information on cyber incidents.

★ Agreement on the exchange and protection of classified information, to facilitate intelligence exchanges (see Part three below).

Barnier gave one hint, however, that the EU might offer 'more for more' to the UK, saying that the more the UK converged with EU foreign policy "and substantially engage[d] alongside the EU", the closer the co-operation was likely to be.

Other third countries and their co-operation with the EU

The EU discusses foreign policy issues with a wide range of countries, some more like-minded than others. The degree of institutionalisation of relations also varies. This at least gives the UK a variety of models to look at and build on. The EU's relations with three non-EU NATO countries are particularly relevant to the UK, which will be in a similar position to them after March 2019; these are Canada, Norway and the United States – all of which have close relations with the Union, but with very different legal and institutional underpinnings. It is also worth looking at the EU-Ukraine Association Agreement, which has been cited as a possible model for the UK's future trade relationship with the EU.[18] The agreement includes legally binding provisions on political dialogue, including on foreign and security policy, though most of it is devoted to trade and economic issues.

"The EU's relations with three non-EU NATO countries are particularly relevant."

18: See, for example, Joe Owen, Alex Stojanovic and Jill Rutter, 'Trade after Brexit: Options for the UK's relationship with the EU', Institute for Government, December 2017.

Canada

Canada and the EU have co-operated on foreign policy issues for many years. Much goes on informally, in meetings on the margins of international conferences or at international organisations. But there is also more formal co-operation, starting from a 'Declaration on transatlantic relations' agreed by the (then) European Community and Canada in 1990. It set out a number of thematic areas for co-operation, including supporting democracy, the rule of law and human rights; promoting international security; strengthening the multilateral trading system; improving development assistance; combating terrorism, drugs-trafficking and weapons proliferation; protecting the environment; and dealing with large-scale migration.

The declaration also set out the institutional arrangements to take forward this co-operation.

★ Regular meetings in Canada and in Europe between the prime minister of Canada, the president of the European Council and the president of the Commission.

★ Bi-annual meetings between the foreign minister of the member-state holding the rotating Council Presidency, with the Commission, and the Canadian foreign minister.

★ Annual consultations between the Commission and the Canadian Government.

★ Briefings by the Presidency to Canadian representatives following European foreign ministers' meetings.

Over time, contacts developed further, until around 20 EU CFSP working groups on regional and thematic foreign policy issues met their Canadian counterparts once in each six-month rotating Presidency. These were often analytical rather than operational exchanges, but there were also less formal contacts on urgent issues, such as conflict resolution in the former Yugoslavia. The 'Canada-EU Partnership Agenda' of 2004 subsequently created an EU-Canada 'Co-ordination Group' to prepare decisions taken at ministerial summit meetings and ensure their implementation.

The culmination of the foreign policy partnership between the EU and Canada is the 'Strategic Partnership Agreement' (SPA), signed in 2016 and awaiting ratification by most EU member-states. This is a legally-binding international treaty, unlike its predecessors. It goes well beyond foreign policy co-operation, covering trade and justice and home affairs (JHA) co-operation, among other topics.

In the foreign policy area, it contains a mixture of agreed policy goals (such as promoting accession by all states to the statute of the International Criminal Court) and consultation mechanisms on issues including human rights, non-proliferation and disarmament, and counter-terrorism ("with a view to promoting effective joint counter-terrorism operational efforts … regular exchanges on terrorist listings, countering violent extremism strategies and approaches to emerging counter-terrorism issues").

"The US has an elaborate structure of regular meetings with the EU."

In addition, the SPA establishes two bodies with an over-arching responsibility for guiding the EU/Canada relationship. These are a Joint Co-operation Committee (JCC) and a Joint Ministerial Committee (JMC).

The JCC is co-chaired by one senior official from each party. It recommends priority areas for co-operation and keeps an eye on the development of the EU-Canada relationship and the implementation of the SPA. It can ask existing EU-Canada bodies to report to it on their work, and can establish sub-committees to deal with new issues. It recommends ways in which the parties can work together more efficiently and effectively. And it is the first stage in resolving any disputes "in areas of co-operation not governed by a specific agreement" – that is, areas other than trade and investment. The annual meetings of the JCC alternate between the EU and Canada, though special meetings of the JCC can be held at the request of either party.

The JCC reports to the JMC annually on the state of the relationship and can recommend new areas for future co-operation, as well as possible solutions to any disputes over implementation of the agreement. The JCC report is designed for publication. The JMC is co-chaired by the Canadian foreign minister and the EU High Representative for CFSP. Like the JCC, it meets at least annually (and can meet more often by mutual agreement). Any decisions it takes need the approval of both parties.

Though the SPA is still pending ratification, the JCC and JMC have held their first meetings, in June and December 2017 respectively. The JCC discussed a wide range of issues arising from working-level meetings, including on defence and security, human rights, the Middle East and North Africa and Sub-Saharan Africa.

The JMC also had a very broad agenda, including security and defence co-operation; co-operation in third countries in Latin America, the Caribbean and Africa (including co-ordination of development aid); and current international crises including Ukraine, North Korea, Venezuela and Myanmar. One practical step to facilitate future co-operation (including Canadian participation in EU CSDP missions) was an agreement on the exchange of classified information. The committee highlighted various areas in which the EU and Canada could do more together, such as countering hybrid warfare and cyber threats. The two agreed to exchange information on their post-conflict stabilisation and security sector reform activities in Iraq.

The United States

Like Canada, the US has an elaborate structure of regular meetings and forums for discussion with the EU, evolved over time, as well as frequent less formal contacts, including at the highest levels. The multilateral relationship is backed up by strong bilateral ties between the US and most EU member-states. Formal foreign policy co-operation started, as in the case of Canada, with a Transatlantic Declaration in November 1990. The themes are very similar: in the foreign policy arena, the parties aim to support democracy, the rule of law and respect for human rights and individual liberty, and to promote prosperity and social progress world-wide; to safeguard peace and promote international security, including by reinforcing the role of the UN; to help developing countries towards political and economic reforms; and to support the countries of Eastern and Central Europe in their transition.

The institutional arrangements envisage a higher tempo of meetings than those for the relationship with Canada:

★ Bi-annual consultations between the US president and the presidents of the European Commission and the European Council (a 'Senior Level Group' of European and US officials became a sort of secretariat for these summits, responsible also for keeping an eye on the overall relationship).

★ Bi-annual consultations between European foreign ministers and the US secretary of state.

★ Ad hoc consultations between the US secretary of state and the foreign minister of the member-state holding the rotating Presidency – or the Troika (at that time the Troika consisted of the past, present and future holders of the rotating presidency of the Council, plus the Commission).

★ Bi-annual consultations between the Commission and the US government at ministerial level.

★ Briefings given to the US by the Presidency after each ministerial meeting on foreign policy.

The declaration was superseded in 1995 by the 'New Transatlantic Agenda', which dealt both with foreign and development policy, and with trade and economic links. A detailed 'Joint Action Plan', with around 150 'actions', accompanied the agenda. The top priority in the agenda and action plan, agreed a month after the Dayton peace conference ended the war in Bosnia-Herzegovina, was support for recovery in the former Yugoslavia. The documents also focused on support for the accession of the Central and Eastern European countries to the EU and NATO, and strengthening the OSCE's role in conflict prevention. There were few explicit institutional innovations (the parties established a 'High Level Consultative Group' to co-ordinate development and humanitarian assistance activities). But other contacts developed, so that by 2005, when the Commission invited a group of independent experts to review EU-US relations, they found that (as with Canada) about 20 working groups took part in regular dialogues with the US, normally once in each six-month EU presidency.[19] In addition, by the late 2000s there were regular video-conferences between the US State Department and the EEAS and Commission.

"Norway seconds experts to the EEAS, where they can contribute their expertise."

One problem with the EU-US relationship, however, identified by the 2005 review, was a lack of coherence. Some important issues in which both the EU and US had a stake were discussed outside any of the formal frameworks: Western co-ordination on Iran's nuclear programme and the agreement that eventually constrained it took place between the US on

19: John Peterson and others, 'Review of the framework for relations between the European Union and the United States: An independent study', European Commission, April 2005.

one side and France, Germany, the UK and the External Action Service on the other. The Commission considered in 2005 whether to work with the US on a more binding partnership agreement covering all aspects of the transatlantic relationship, but in the end focused only on trade and economic issues, in what ultimately evolved into the negotiations on the Transatlantic Trade and Investment Partnership (TTIP).[20] Separately, the EU and US negotiated a number of legally binding agreements on data protection, data privacy and access to financial information relevant to terrorism. The foreign policy relationship, however, was left as a more informal set of close, regular but non-binding arrangements, as it remains now. The only exception is a short legally binding agreement on the security of classified information, which entered into force in 2007.

Norway

By contrast with Canada and the US, the EU's foreign policy relationship with Norway does not have a great deal of institutional underpinning. As the Norwegian government website says, "Norway has no formalised agreements with the EU on co-operation in the field of foreign policy. Nevertheless, we enjoy close and constructive co-operation". Norway relies on formal machinery largely on the provisions of the European Economic Area Agreement of 1994, to which it is a party (together with Iceland and Liechtenstein). In a declaration attached to the treaty, both sides agreed to strengthen political dialogue on foreign policy. There are informal exchanges of view at ministerial level at the annual meetings of the European Economic Area (EEA) Council, prepared as necessary by meetings at political directors' level. The EEA countries also meet collectively with a number of CFSP working groups. Given the disparity in foreign policy resources between the three EEA countries, Norway is inevitably the main interlocutor for the EU in these meetings.

Norway supplements these multilateral meetings with active bilateral contacts with the EU in Brussels and at international organisations such as the Organisation for Security and Co-operation in Europe. It has formal bilateral discussions with the EU high representative every six months, focusing on topical international issues, and a mixture of regular and ad hoc contacts with EEAS officials at senior and working levels on topics including the Middle East and the Western Balkans. Norwegian peace negotiators involved in trying to solve regional conflicts in the Middle East and elsewhere are periodically invited to the Political and Security Committee. Norway also seconds national experts to the EEAS, where they can contribute their regional or thematic expertise. They do not have full access to EU classified information, however. It is not clear

20: Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, 'A stronger EU-US Partnership and a more open market for the 21st century', May 18th 2005.

whether this gives Norway any additional direct influence over policy; but the EEAS values the knowledge that the secondees bring. Though other countries including the US may have one or two seconded staff in the EEAS for a year at a time, Norway has two or three, on secondment for three to four years.

For Norway, one of the world's most generous development aid donors, co-ordination with the EU on assistance programmes is also important. There is a good deal of informal consultation in addition to formal joint programming. There is particularly close co-ordination over assistance to the Palestinian people: Norway chairs the Ad Hoc Liaison Committee of donors, with EU and US support.

Ukraine

Ukraine offers a final model for a foreign policy partnership. Its Association Agreement with the EU, signed in 2014, takes a comprehensive approach to the relationship with the Union. Though the vast majority of the treaty deals with the Deep and Comprehensive Free Trade Agreement (the most comprehensive FTA the EU currently has, and therefore a possible model for any future UK-EU agreement), the agreement also provides for a close relationship between the EU and Ukraine in foreign policy.

"Britain's foreign policy co-operation with the EU should promote international stability."

Even though Ukraine's aim in its overall relationship with the EU is to converge with the Union wherever possible, while the UK's is to diverge where desirable, some of the basic aims and institutional arrangements in the association agreement may still be applicable. The UK would probably agree that its future foreign and security policy co-operation with the EU should promote international stability and security; strengthen co-operation on international security and crisis management; and foster practical co-operation for achieving peace, security and stability on the European continent.

Institutionally, the association agreement foresees regular summits; ministerial meetings (in the annual Association Council or separately); meetings of foreign ministry political directors; meetings with the EU Political and Security Committee; and expert level meetings on specific regions and issues. These include regional stability in the European neighbourhood; conflict prevention, crisis management and military-

technological co-operation (extending to close contacts between Ukraine and the European Defence Agency); non-proliferation and export controls (including regular political dialogue on this issue – probably with a view to bringing Ukraine into line with EU export control standards); and counter-terrorism. One aim of all this dialogue is "joint policy planning". There should also be EU/Ukraine meetings in third countries and at the UN and other international organisations.

The EU's aim in the association agreement is to bring Ukraine into closer alignment with it. Ukraine is willing to accept the status of a junior partner in the hope that the EU will come to see it as worthy of having a prospect of eventual EU membership. It is too early to tell whether these arrangements will nonetheless allow Ukraine to influence EU decision-making, or result in more co-ordinated policy.[21]

Assessment of the existing models and relationships

Despite the differences of detail between the various models, the consensus view of the EU and its partners seems to be that the formal dialogues are a necessary but not sufficient basis for practical co-operation. The EU position has to be agreed in advance by member-states, leaving little room for manoeuvre or negotiation. Third countries find it frustrating to be presented with *faits accomplis*. Summits seem particularly unpopular. There is constant pressure to come up with 'deliverables' for leaders to announce, though often there is no follow-up to the announcements. Meanwhile more substantial but less eye-catching international problems may be neglected, or relegated to declarations that are long on rhetoric but short on concrete action. The EU-Canada SPA may turn out to be a partial exception to these criticisms: perhaps because it is a legally binding agreement, Canada has found that the EU pays more attention to what it says on foreign policy since the SPA was signed. Even so, Canada has mixed feelings about the loss of flexibility inherent in having such an agreement.

On the other hand, the formal dialogues are valuable in several ways. First, they give the EU's institutions a justification for talking to third countries without seeking permission from the member-states on each occasion. Second, the timetable of high-level meetings gives officials an incentive to find agreement by a deadline, rather than postponing difficult issues. And third, they create a network of officials in Brussels

21: Beth Oppenheim, 'The Ukraine model for Brexit: Is dissociation just like association?', CER insight, February 2018.

and the third country capitals that know each other and remain in contact between face-to-face meetings. That in turn gives third countries the opportunity to influence the thinking of member-states and the EEAS at an early stage in the decision-making process. The EEAS welcomes input from third countries that may have information that the EU itself does not, though it is careful to make sure that it keeps member-states informed about its contacts with third countries. Partner countries find it easier to talk bilaterally and informally to the EEAS than to a formal Troika forced to stick within the parameters of an agreed EU position.

Even without a seat in the room, countries like the US are able to work with influential EU member-states and the EU institutions to agree on goals, and then to co-ordinate the steps needed to pursue them. But there is no single recipe for achieving this convergence, and third countries have to adapt to the way that the EU chooses to achieve its objectives. One UK official describes the EU as "an eco-system, not a machine".

In the US case, sometimes the US State Department and the Commission have co-ordinated directly, for example on policy in the Western Balkans, ensuring that EU programmes to support eventual EU membership for the countries in the region and US assistance are mutually supportive. Successive US Secretaries of State have developed good relations with EU High Representatives. But High Representatives may not always be able to get other commissioners to fall into line even when the US and EU agree to do something: the EU still does not have an answer to Henry Kissinger's question about who to call to speak to 'Europe'.

"High Representatives cannot always get other commissioners to fall into line."

Third countries need networks in Brussels that stretch beyond the EEAS, even for foreign policy problems. They need strong teams in their EU representations, able to talk to the Commission at an expert level; and sectoral ministries in capitals, which focus primarily on domestic policy issues, should also be willing to engage with the EU. Norway and the US can both contribute to the EU's debates on energy security and reducing gas dependency on Russia; good bilateral relations between their energy ministers on one side, and Commissioners Maroš Šefčovič and Miguel Arias Cañete on the other, facilitate policy co-ordination. Strong EU delegations in third countries

can also be a useful channel for the EU and its partners to share analysis and co-ordinate responses to problems.

In other cases, third countries' main interlocutors may be among member-states: because the EU sub-contracted lead responsibility for resolving the conflict in Ukraine to France and Germany, the US and Canada dealt primarily with them rather than the EEAS. When it came to sanctions, France and Germany sometimes made use of the US to 'whip' reluctant member-states, to ensure that they did not block renewal of the EU's restrictive measures against Russia. Third countries, including the US, also played an important role in ensuring that countries that depended on Iran for energy supplies did not block EU sanctions as part of the process that led to the deal to restrain Iran's nuclear weapons programme.

A good deal of co-ordination between the EU and its partners takes place in other countries. Canada, with a large Ukrainian diaspora, has been heavily involved in supporting Ukraine since the overthrow of Yanukovych in 2014; the EU has been Ukraine's most generous financial donor. Norway, with its extensive aid programmes, also stresses the value of in-country donor co-ordination with the EU (and other donors). The EU's 'Consensus on Development' of 2017 foresees joint implementation of aid programmes with like-minded governments and international organisations on a case-by-case basis.[22] But EU tenders for development contracts are generally not open to non-EU donors, with the exception of EEA countries. In general, the more a third country brings to the table (whether in expertise or cash), the more chance it has of influencing EU policy – either to promote good ideas, or head off bad ones.

The increased use of sanctions as a tool of EU foreign policy has posed challenges to both formal and informal co-operation between the EU and its partners. Modern sanctions tend to be targeted at individuals or specific legal entities, such as private companies or government agencies, rather than a whole national economy. Asset freezes or bans on doing business have to be supported by evidence that will stand up in court; and sensitive intelligence cannot be used in court. It is therefore difficult if not impossible for the EU and partners to adopt identical restrictions. It has taken an enormous effort to get EU and US sanctions against Russia aligned as closely as they now are – but there are still some Russian individuals and firms who are named on one sanctions list but not another. Norway has come closest to following

22: Joint statement by the Council and the Representatives of the governments of the member-states meeting within the Council, the European Parliament and the Commission, 'The new European consensus on development: Our world, our dignity, our future', June 30th 2017.

EU sanctions against Russia and others *en masse*: it has used secondary legislation to transpose more than 90 per cent of EU restrictive measures into Norwegian law, though it has retained the freedom not to adopt those that it disagrees with on policy grounds, or those relating to peace processes in which Norway is a mediator.

What sort of foreign policy relationship should the UK try to get?

The UK may say that it wants a closer relationship in the foreign policy area than any of the EU's existing partners has. But despite the close identity of views on many issues, this may take more effort to achieve than the UK supposes, for a number of reasons.

First, the UK thinks of itself as being more special than any of the other like-minded countries, because it is a departing member-state and therefore intimately involved in EU policy formation and implementation at present. But the EU wants to minimise any perception of unjustified discrimination in favour of the UK and against other like-minded countries. Barnier and his taskforce have frequently stressed that the UK will become a third country, even if it is one which shares many values and interests with the EU, and with which the EU wants to work. As Barnier told the European Union Institute for Security Studies: "We will keep the door open to the UK as a third country". The UK's technical note on external security, however, argues for a relationship that goes "beyond current arrangements between the EU and third countries".

"Ill-tempered clashes over trade will contaminate other areas of the relationship."

The extent to which the UK continues to have values and policy goals in common with the EU, and is prepared to compromise its own policy autonomy in order to continue to enjoy some of the benefits of being part of an EU-led foreign policy consensus, is likely to determine how close the foreign policy partnership can be. The EU knows that there is a mutual interest in co-operation with the UK in foreign and security policy, but it will stand firmly on the principle of autonomy in decision-making. And the more that the UK emphasises the independence of its future foreign policy, encouraging the EU to believe that the UK's position on foreign policy issues might diverge from its own, the more

likely it is that the EU will try to keep the UK at arm's length from the decision-making process.

Second, the EU's willingness to keep doors open to the UK is likely to be influenced by developments elsewhere in the relationship, as well as pure foreign policy considerations. The more difficult EU-UK negotiations on future trade and economic relations are, the harder it is to imagine the EU creating a novel position for the UK in the foreign policy sphere (or, indeed, in other areas such as justice and home affairs). For all that Barnier said in his EUISS speech that "Any trade-off between security and trade would lead to an historic failure", the reality is that ill-tempered clashes over trade or the Irish border (for example) will contaminate other areas of the relationship. It is also hard to imagine in circumstances where economic and trade relations were in a bad state, that the UK would wish to be so closely tied to the EU in foreign policy or other areas.

At the same time, the British government must make a political judgement of how much fuss the most extreme supporters of Brexit would make about continued alignment between EU and UK foreign policy – a subject that got very little attention during the referendum campaign in 2016, and has been an afterthought throughout the negotiations so far. If the government decides that it can stand up to the anti-EU fundamentalists in this area, it should try to design a system to preserve as much common action as possible, in pursuit of shared objectives.

Based on the lessons of the EU's other partners, the system could have the following elements:

★ **A treaty or a political declaration.** The UK seems to envisage a patchwork of legally and politically binding agreements on foreign and development policy, rather than a single treaty. Such a collection of deals would be more flexible, but it runs the risk that the less binding parts of it would be ignored or neglected, either for political reasons or simply because in crowded ministerial and official timetables meetings that are not obligatory are more likely to be postponed indefinitely.

Like Canada, the UK could use a treaty to ensure that the EU paid attention to its views, and held consultations with London according to whatever schedule was laid down in the treaty. A treaty could also create a legal base for British staff to be seconded to the EEAS or the Commission in foreign and development policy related jobs, and for

staff to be seconded from the European institutions to UK departments. And it could guarantee consultations on sanctions, ensuring that the EU could draw on UK intelligence insights to impose well-targeted sanctions. At the same time, it could prevent the EU imposing measures with extra-territorial effects on the UK. In return, the British government could promise the EU that the City of London would continue to follow the EU's lead on sanctions. The UK might agree that where an EU position already existed or was subsequently adopted, it would not circumvent it; but in cases where there was no agreed EU position, the UK would reserve the right to act autonomously.

"The EEAS might meet senior British officials before each Foreign Affairs Council."

A political declaration might be easier to negotiate than a treaty, so could be a fall-back. A treaty, even if limited to CFSP issues and excluding development and other shared competences, would require ratification by all member-states; if it went beyond CFSP (and there is an argument that sanctions policy affects the internal market), the European Parliament would also have to approve it (as it did with the EU-Canada SPA).

A political declaration would be less binding on both sides, giving the UK more freedom to diverge from EU positions, but at the expense of not being able to insist on a regular schedule of meetings and not having a binding commitment to try to reach common positions. Unless the British government has concrete areas in which it plans to pursue a significantly different foreign policy from the EU-27, a foreign policy based only on a political declaration looks less attractive than having a treaty.

★ **Formal machinery.** Regular, programmed meetings of foreign and development ministers, senior officials and geographical and thematic experts would provide a focus for decisions on co-operation. The EEAS might hold meetings with senior British officials before each Foreign Affairs Council or European Council, to enable the UK to comment on the main issues on the agenda. The aim would be for the UK to contribute information or policy ideas to the EU's decision-making process, and where possible to associate itself with the outcome of EU discussions. The UK would have to resist the temptation to measure success by the length of the list of deliverables, however.

★ **Informal machinery.** The EU goes into formal meetings with its positions already agreed; it is very difficult to move a consensus of 27 states. The UK will therefore need intensive consultations with member-states, the EEAS and the Commission (and with its fellow like-minded states) if it is to shape decisions before they are taken. Again, the aim should be for the UK to be able to associate itself with EU statements or other decisions, or take steps of its own in parallel with the EU, in the way that other like-minded countries already do. It might also be possible for EU heads of mission in third countries to include the UK in their meetings and their démarches to host governments on a case-by-case basis, especially in countries where the UK plays an important role (for instance in Commonwealth countries, or places where there is a large UK aid programme).

In the development sphere also, the UK is likely to face a choice between autonomy and influence. Barnier's speech to the EUISS only refers to "contributions from third countries and local joint programming", which falls far short of the UK's ambitions. Britain is therefore likely to face a choice between:

★ Continuing to channel some assistance via the EU, and getting involved in formal joint programming; and contributing to EU trust funds and taking part in their management (but subject to the Commission's veto on projects);

★ or operating independently, co-ordinating with the EU ad hoc in some or all countries of operation.

In 2016, the UK's contribution to development instruments in the EU budget was about £1 billion, with an additional £473 million going to the EDF, so the sums at stake are significant.[23]

In December 2016, when the Department for International Development (DFID) last reviewed multilateral aid agencies to which the UK contributes, it judged that the EU's Development Co-operation Instrument and the European Development Fund had a "very good" match with UK priorities, and had "good" organisational strengths.[24] A good deal of UK aid is already spent via multilateral agencies such as the World Bank and UNICEF; it would seem sensible, therefore, to continue to spend a significant part of it via EU-managed programmes, since DFID rated the EU near the top of the league table of agencies. The UK could

23: Heather Evennett, 'Brexit: Overseas development assistance', House of Lords Library Briefing, February 6th 2018.
24: The Department for International Development, 'Raising the standard: The Multilateral Development Review 2016', MDR one page assessment summary for the European Commission Development Co-operation Instrument and European Development Fund, www.gov.uk, December 1st 2016.

also seek a formal consultation mechanism on development issues, to parallel that suggested above, to discuss foreign policy before meetings of EU ministers or the European Council.

One complication in establishing future co-operation between the UK and the EU in the development area is that the Commission and the European Parliament would like to bring the European Development Fund inside the normal EU budget system as part of the renegotiation of the Cotonou Agreement, which would potentially make it harder for the UK to contribute financially to EU programmes. DFID has opposed this change.

The transition period

In some ways, the transition period may prove to be more of a problem in the CFSP area than the long-term relationship will be. After 2021, or earlier if there is an agreement between the UK and the EU on their future relationship, the UK should have at least formal foreign policy autonomy, even if it voluntarily limited it in some areas, as suggested above. But from March 2019 till the end of the transition period, the UK will continue to be bound by the EU *acquis*, which includes CFSP measures.

The UK clearly thinks it would be unreasonable for the EU to insist that the Britain should be bound by CFSP decisions taken without its participation. The EU, on the other hand, regards the *acquis* as an indissoluble whole, to which the UK will remain bound until the transition period ends or until an agreement on CFSP and CSDP enters into force. But – unlike other parts of the *acquis* – a member-state's refusal to accept a CFSP decision cannot be referred to the ECJ; there is no enforcement mechanism. Even so, it would be a mistake for the UK simply to announce that it would ignore CFSP decisions that it disagreed with. It needs to lobby member-states to support the idea of a 'specific consultation mechanism' during the transition period, and to flesh out how it might work. And indeed, the UK accepts that it will still have a general obligation not to do anything "likely to be prejudicial to the Union's interests" in any international setting.[25]

"After 2021, the UK should have at least formal foreign policy autonomy."

25: European Commission, Article 50 Task Force, 'Position paper "Transitional arrangements in the withdrawal agreement"', February 7th 2018

The two sides differ on whether the UK should have a guarantee that it will be consulted on certain issues during the transition period, or whether it should be a matter for the EU to decide case-by-case. Provided that it is clear that the UK is not seeking an implicit veto on EU decisions, the EU should accept that consultation, at least on sanctions decisions, should be routine.

Again, the more the UK chooses to go along with the consensus of the EU-27 once reached, the more likely it is to get a hearing as policies are being formulated. In ascending order of autonomy for the UK, options might include:

★ The UK could have the right to object to a decision before it is taken; the EU could then decide not to approve the proposal, or to delay approval pending further discussions with the UK; but if it decided to proceed anyway, then the UK would have to implement the decision.

★ The UK might have the right not to implement a decision, but not to undercut it either (so it might not impose a formal arms embargo on a country embargoed by the EU; but it would not actively market arms there, or license the sale of an item that the EU had previously refused to export).

★ The UK might have the right to consult the EU if it objected to a sanctions decision, with the right to ignore the decision if no compromise could be found. If many such cases arose, however, trust between the EU and the UK would be quickly eroded, affecting both transition arrangements and the prospects for long-term foreign policy co-operation: member-states would not want to see the UK taking business from EU firms prevented by sanctions from working with particular countries.

It would be easy for the UK to commit itself to respect existing sanctions regimes, adopted with UK participation in the decision, but much harder if a fresh international crisis led to new sanctions in the design of which the UK had not taken part. It is likely that a number of British politicians would object if Britain followed the Norwegian example, copying EU sanctions into UK law without having been consulted. The UK's best option may be to try to negotiate a right to be listened to when new sanctions regimes are under consideration, but without any right to veto steps agreed by the 27. The assumption would

be that once the decision was taken the UK would respect it. Such a system could be coupled with intense bilateral contacts with the EEAS and member-states to explain and seek protection for UK interests.

Part two:

Common Security and Defence Policy

This part examines co-operation on defence policy and on research, development and procurement of defence capabilities. It starts by assessing the legal framework of the EU's Common Security and Defence Policy and defence industrial policy. Then it examines what the British government has said about its future relations with the EU in defence, as well as what the EU is saying, publicly and privately, about the sort of defence policy relationship it wants with the UK. This part considers the legal and political frameworks of relations between the EU and third countries in the area of defence. It points out the overlap between defence arrangements and the future economic relationship: the defence industrial relationship is closely interlinked with whatever arrangements the EU and UK reach on their future trade and economic relationship – whether a customs union, a free trade agreement or something else. It should be possible, however, for at least some of the defence policy aspects of the future relationship to be pinned down more quickly and become effective during the transition, possibly in a range of separate EU-UK agreements.

Common Security and Defence Policy: The treaty provisions

The EU's CSDP provides the framework for military operations and civilian missions conducted in support of the overarching EU CFSP. Title V of the Treaty on European Union covers both CFSP and CSDP. The 2009 Lisbon Treaty confirmed the EU's commitment to progressively build a common defence policy, while respecting member-states' military competences as well as their commitments to NATO.

Common defence policy is conducted on a largely inter-governmental basis. The European Council and the Council of Ministers take decisions relating to the CSDP by unanimity. The EU's High Representative for Foreign Affairs and Security Policy, Federica Mogherini, represents the EU institutions in CSDP discussions, chairing the Foreign Affairs Council and acting as the head of the EDA, which supports member-states that want to develop capabilities together.

From its inception CSDP has been a paper tiger. The UK and other pro-NATO EU member-states viewed it with suspicion, fearing that France and others might use it to undermine or supplant NATO's role in the defence of Europe. Because of mistrust and protectionism, defence procurement has remained a bastion of national sovereignty, largely immune to the disciplines of the EU's internal market. Over the last two years, however, the European Commission and the EEAS, (the EU's diplomatic arm) have taken more interest in EU defence. The EEAS wants to create effective structures to plan and execute military operations and give the EU 'strategic autonomy' – the ability to deploy troops without the help of the United States. And the Commission is keen to build a strong European defence industrial base able to supply EU militaries.

"The Commission is keen to build a strong European defence industrial base."

What military structures does the EU have access to? The Union maintains 'battlegroups' – rotating troop contingents from member-states – which are in theory ready to deploy at ten days' notice. On a rotational basis, two battlegroups are always on standby for a period of 6 months. Their deployment is subject to a unanimous decision by the Council. Though they have been fully operational since 2007, they have yet to be used. This is partly due to the 'Athena' system of financing, which places the bulk of an operation's cost on the countries supplying the forces that deploy.[26]

As part of the effort to strengthen its defence and crisis management capacity, in 2017 the EU set up its own permanent operational headquarters, or 'Military Planning and Conduct Capability' (MPCC). The MPCC is limited to actions in support of a host nation, like the EU training missions in the Central African Republic, Mali and Somalia. It is currently limited to a staff of 25, but is up for review and possible enlargement in 2018. For executive EU operations (where EU forces

26: The rules on contributions to Athena are set out in article 41.2 of the Treaty on the European Union. Member-states contribute an annual share based on their Gross National Income.

operate independently of any host state, including on the high seas) the Union relies on national military headquarters (offered in advance by the UK, France, Germany, Greece and Italy) that can be made available on a case-by-case basis. Italy, for example, provides the headquarters for Operation Sophia, which tries to stop people-smuggling in the central Mediterranean. Alternatively the EU can resort to NATO structures through the so-called Berlin Plus agreements, which allow it to have access to the assets and capabilities of NATO members for an EU-led operation. This includes using NATO's Deputy Supreme Allied Commander Europe (DSACEUR) – a position traditionally held by the UK – as an operational commander.

The EU also launched Permanent Structured Co-operation (PESCO) in 2017. PESCO is a political framework that aims to help high-performing EU countries develop military capabilities together and improve their ability to deploy them; it therefore has an operational and an industrial aspect to it. The EU launched PESCO at a Foreign Affairs Council meeting in December 2017, with a total of 25 member-states participating. The defence ministers of PESCO members are responsible for overall policy direction and decision-making within the framework: only PESCO members may vote, and decisions are taken by unanimity, except decisions regarding the suspension of membership and entry of new members, which are taken by qualified majority.

European defence industrial policy: Legal framework

EU member-states cannot take part in CSDP missions and operations without the necessary military equipment. The European Commission's defence industrial policy, which began in 2009, is intended to promote competition and innovation, support small and medium-sized enterprises, and provide a strong industrial base for CSDP. In 2009, the Commission issued two directives known as the EU's 'defence package'. One, on intra-EU transfers of defence-related products, aims to make it easier to move defence goods between states. The other, on defence and security procurement, aims to counter protectionism by requiring member-states to open procurement to foreign companies.

Until now, governments have not consistently complied with the defence package. Most major military equipment contracts are still awarded without an EU-wide tender. Governments have only applied

the procurement directive's provisions to contracts that deal with maintenance and repair or facilities management. In 2018, however, the Commission opened infringement procedures against Denmark, Italy, the Netherlands, Poland and Portugal – the first time it has taken such action in relation to the procurement directive. If these member-states repeatedly fail to comply, the Commission may decide to refer the matter to the European Court of Justice (ECJ).

In June 2017, the Commission launched a proposal for a new European Defence Fund to be included in the EU's multiannual financial framework for the first time. Through the Defence Fund the Commission wants to incentivise member-states both to spend more money on defence capability research and development, and to spend more wisely by working together. From 2020 the Commission wants to spend €500 million a year on defence research. To test the waters before the fully-fledged fund is launched, the Commission plans to spend a total of €90 million over the next three years in a 'preparatory action'.

"The Commission wants member-states to spend more on defence R and D."

In addition to providing money for research, the Commission also wants to support joint capability development. If the member-states agree to the Commission's proposal, the Defence Fund will co-finance new military prototypes, paying 20 per cent of the member-states' costs in the development phase. The Commission wants to provide €500 million between 2019 and 2020 for such co-financing, rising to €1 billion annually from 2021. Finally, in an effort to link the fund with other recent EU defence initiatives, the Commission is also offering countries that want to take part in PESCO an additional 10 per cent bonus on EU co-financing of joint capabilities.

The EDA helps the Commission to manage the European Defence Fund, and is in charge of the Capability Development Plan (CDP), which outlines the priority capabilities that member-states have agreed to jointly invest in. The agency is governed by a steering board made up of national representatives. Defence ministers decide on the annual budget, the three year work programme, and the annual work plan, as well as new initiatives. Member-states, most prominently the UK, have long been reluctant to delegate real responsibility or funds to the EDA:

its budget stayed frozen at €30.5 million from 2010-2015, and was only increased to €32.5m for 2018, with a further increase proposed for 2019.

In 2017 the EU also launched the Co-ordinated Annual Review on Defence (CARD), designed to analyse member-states' implementation of the priorities identified in the CDP. The EDA, acting as the 'CARD secretariat', analyses member-states' planned defence budgets and procurement plans, in order to identify shortfalls and opportunities for collaboration.

EU space policy: Security implications

The Treaty of Lisbon made the EU responsible for some aspects of space policy, with the objective of promoting scientific and technical progress and industrial competitiveness. To achieve this, the EU co-operates with the European Space Agency (ESA). The ESA is an inter-governmental organisation with 22 members, including some non-EU countries. Its main mission is to advance Europe's space capability, through exploratory programmes; to develop satellite-based technologies and services; and to promote European industries. Membership of the ESA is independent of the EU, but ESA projects are partly financed by EU funds.

The EU's space programmes have long been explicitly civilian, but the Commission's 2016 Space Strategy called for stronger alignment between civil and security space activities, and the EU's Defence Action Plan includes a commitment to develop security and defence space programmes. Two satellite programmes, Copernicus, which provides Europe with earth observation data, and Galileo, Europe's global navigation system, can make especially important contributions to CSDP.

Copernicus contributes to the EU's defence by sending data to the European Union Satellite Centre (SatCen). The SatCen – an EU agency – can then use the satellite imagery to analyse critical infrastructure, survey borders or plan humanitarian support, as well as providing decision-makers with early warning of potential crises.

Galileo was conceived as a competitor to the United States' GPS, Russia's GLONASS, and China's Beidou, and was declared operational in 2016 and should be completed by 2020. While Galileo's basic

services of positioning and timing information will be open to all, the EU is also developing the so-called Public Regulated Service (PRS), which is encrypted and reserved for EU member-states' militaries and governments. PRS will use a range of different radio frequencies to broadcast encrypted signals, ensuring that service remains functional even if an adversary jams all other GPS and Galileo transmissions.

What does Britain want?

The UK government paper on the future defence partnership stresses shared values and shared threats, and sets out an ambition for close co-operation with the EU after Brexit.[27] While the paper does not go into much detail, the few specifics that it does provide clearly indicate that the UK wants a closer defence relationship than the EU has with any other third country. Prime Minister Theresa May reiterated these proposals in a speech at the Munich Security Conference in February 2018 and alluded to some of the challenges Britain will face in negotiating its future partnership.[28] The UK government has also published an outline for its desired UK-EU security partnership, which it presented to the EU in May 2018.

In her speech, May said that the UK was open to making continued contributions to EU operations or missions. But the future partnership paper and the security partnership slides made clear that the UK would want its involvement in the operational planning to be "commensurate and scalable" to its contribution, meaning that the higher the risk to troops and the bigger the UK's contribution, the more influence London wants to have over decision-making.[29]

"Participation in CSDP missions and operations is not Britain's most urgent priority."

It is worth noting that participation in CSDP missions and operations is not Britain's most urgent priority. The UK government is confident that it will be able to deploy with its European partners if a crisis develops, either through NATO, through a flexible 'coalition of the willing' or through a new format: France has recently proposed a European Intervention Initiative, which would enable European countries to develop a shared understanding of crises and a shared strategic and military culture. Paris has made clear that it intends to set up the initiative outside the EU's institutional structures, in part to increase

27: 'Foreign policy, defence and development: A future partnership paper', Department for Exiting the European Union, September 12th 2017.
28: 'Prime Minister Theresa May's speech at the 2018 Munich Security Conference', gov.uk website, February 17th 2018.
29: 'Framework for the UK-EU security partnership', Department for Exiting the European Union, updated May 9th 2018.

operational flexibility and speed, and in part as a means of involving the UK in European military operations after Brexit.

More importantly, the UK hopes the EU-27 will take an open and inclusive approach to British participation in European capability development. It wants to find a way to participate in the EU Defence Fund (both in the research programme and in the capability development programme), and it wants the option of participating in PESCO projects, as the 'framework for the UK-EU security partnership' makes clear.

Similarly, the UK wants to continue its role in the development of the Galileo and Copernicus programmes. Britain has played an important role in the design and manufacture of Galileo satellites. It wants to continue to have the right to work on Galileo security contracts, and ensure that its own armed forces can use Galileo's PRS signal. In a technical note on UK participation in Galileo, published in May 2018, the UK asks for unrestricted use of and access to PRS. The UK also wants access to all programme information, including an agreement that the UK has access to all security-related sensitive information on a 'need to know' basis, as well as the right to continue to manufacture PRS receivers. The UK wants its companies to continue to be able to bid even for security-sensitive contracts related to the development of Galileo and PRS, and it wants to be able to continue to attend and influence programme discussions related to the design of PRS.[30]

In her speech in Munich, May signalled the UK's interest in agreeing distinct arrangements for defence policy co-operation that could be implemented during the transition period, so that some aspects of the UK-EU future defence partnership would already be effective from as early as April 2019. In defence Britain wants to keep the transition period as short as possible, because in a crisis the UK would be bound by the EU defence policy *acquis* but would have no voting rights.

What will the EU offer?

The Commission's objectives in negotiating the future defence relationship with the UK are fairly clear.[31] They are to ensure that there will be no security vacuum in Europe after Britain's withdrawal; to make sure that bilateral defence and security co-operation between the UK and EU member-states is not put at risk; to prevent Brexit from having

30: 'Technical note: UK participation in Galileo', HM Government, May 2018.

31: They were first set out in in Barnier's November 2017 Berlin speech. The January 2018 'Slides on security, defence and foreign policy' of Barnier's Task Force 50 negotiation team on the future defence relationship went into further detail.

any impact on the EU-NATO strategic partnership; and to achieve an unconditional UK commitment to maintaining European security, even after Brexit.

At the same time, the EU wants to safeguard some core principles: protecting the autonomy of its decision-making process; making sure that a non-member of the Union cannot have the same benefits as a member; and following on from that, ensuring that the settlement with the UK does not disturb defence relationships with other third countries. That means that the Union has to take into account existing frameworks for co-operation with third countries, and make sure that there are no obvious losers. Norway and other third countries are already fretting about the possibility that Britain might be given more rights than they have, or that fall-out from the highly political Brexit negotiation process might negatively affect the rights they have secured for themselves over the years. From these objectives one can deduce the EU's interests in relation to British participation in CSDP missions and operations, capability development and space security.

On CSDP, the EU wants to be able to plan and conduct missions and operations autonomously. After Brexit, Britain will not be able to participate in the decision-making or governance of any EU "bodies, offices and agencies", participate in any expert groups or take a lead role in any EU-funded organisation. Britain cannot therefore be given a vote or a veto over the decision to launch a mission or operation; that means that there can be no question of the UK's participation in the PSC. The EU's insistence on its own decision-making autonomy also means that, as a third country, the UK will no longer be able to take command of EU-led operations or lead an EU battlegroup. The Commission wants the UK to give up command of the EU's counter-piracy operation Atalanta, currently headquartered in Northwood, outside London. And it has asked the UK to give up its lead nation status for the EU battlegroups in the second half of 2019. The Commission also wants the UK to transfer responsibility for the command of Operation Althea to another EU member-state. Althea is a joint NATO-EU operation that protects the Bosnian peace agreements and provides capacity-building and training to the armed forces of Bosnia and Herzegovina; it is led by NATO's Deputy Supreme Allied Commander Europe, a British general.

"The EU wants to be able to plan and conduct operations autonomously."

On the development of new defence equipment, the EU has acknowledged its desire to benefit from the UK's expertise. But it has also made clear that the UK will not be able to access EU funds in the same way as member-states. Thus, Britain cannot be a fully-fledged member of the Defence Fund, nor a full member of the European Defence Agency. UK participation in PESCO projects will be "upon invitation" and "subject to meeting the general conditions for third countries".[32]

After Brexit the UK will no longer be able to host sensitive facilities on British territory.[33] This has implications for collaboration in space security. The EU has already initiated the move of a Galileo back-up centre from Southampton to Spain. The Commission has also made clear that Brexit will have an impact on the UK's ability to participate in Galileo's PRS programme, because of concerns over third country access to sensitive, security-related information.[34] The Commission insists that for the UK to get access to PRS, it would have to give security guarantees to protect sensitive EU information after Brexit, and conclude an information-sharing agreement as well as a PRS agreement. The Commission insists that it cannot let UK-based firms provide the most sensitive technology for Galileo's PRS, because that would make the EU dependent on a third country for an essential part of the system. The EU's rules for access to the public regulated service state that third countries are not allowed to manufacture particularly security-sensitive parts of the system.[35] The Commission argues that if the EU had to rely on Britain it would endanger the integrity of Galileo's PRS, and would be irreconcilable with the EU's ambition to achieve 'strategic autonomy', the ability to pursue its defence interests independently.[36]

Current third country agreements: CSDP missions and operations

To understand how third countries currently plug into CSDP it is useful to unpack the process of planning and launching EU missions and operations. First, member-states' foreign ministers, meeting in the Foreign Affairs Council, take a unanimous decision to launch a mission,

32: 'Slides on security, defence and foreign policy', EU Commission, January 2018. However, a member-state-led paper on "Third state participation in PESCO projects" calls for greater involvement of third countries in PESCO.
33: European Commission, Article 50 Task Force, 'Position paper "Transitional arrangements in the withdrawal agreement"', February 7th 2018
34: 'Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community', Department for Exiting the European Union, March 2018.
35: 'Decision No 1104/2011/EU of the European Parliament and of the Council of 25 October 2011 on the rules for access to the public regulated service provided by the global navigation satellite system established under the Galileo programme'.
36: Sophia Besch, 'A hitchhiker's guide to Galileo and Brexit', CER insight, May 2018.

and agree on its aims and objectives. Either a framework nation then provides an operational headquarters for operations with an executive mandate, like Operation Sophia in the Central Mediterranean; or the MPCC acts as the headquarters for training missions, like those in Mali, Somalia and the Central African Republic. Once a headquarters has been found, its staff draw up more detailed plans for the operation. Then the formal force generation process begins, in which member-states volunteer the assets and personnel required for the operation.

Once planning and force generation are completed, the Council formally launches the operation, and places it under the political control and strategic direction of the member-states' EU ambassadors in the PSC. Alternatively, the Council can hand over the planning and command of an operation to a group of willing and able member-states in the PESCO framework, in the hope of creating greater flexibility and speeding up reaction time.

Non-EU member-states have taken part in almost all CSDP operations and missions. They contribute to EU crisis management operations on the basis of so-called Framework Participation Agreements (FPAs), which can be signed for a specific operation, or cover all of them. EU battlegroups may also include non-EU countries, as is the case in the Nordic Battlegroup, which comprises six member-states plus Norway. Troop-contributing countries have the same rights and obligations in terms of day-to-day management of the operation as EU member-states.

But one principle of FPAs is that the contribution of third countries to CSDP operations should be without prejudice to the decision-making autonomy of the Union. This means that third countries are not involved in shaping the strategic direction of operations, including through the drafting of detailed plans for the operation or participation in force generation meetings. Only once the operational planning has been completed does the Council decide whether it will invite particular third countries to join a mission or operation, and they are only given full access to EU information once their participation has been accepted by the PSC. Third countries do not have representatives at the PSC. Meetings between the PSC and third countries sometimes take place, but the latter do not get to influence the agenda, and the discussions are often more cordial than substantial.

"Third countries are not involved in shaping the strategic direction of operations."

If a third country is invited to participate, and decides to join an operation, the EU military staff committee can set up force generation meetings, where countries offer up troops to be deployed. Third countries exercise some oversight over how operations are conducted through the so-called committee of contributors, but they hardly play any role in the planning that happens before the operation begins. In exchange, third countries only assume the costs associated with their participation. In FPAs, third country contributions are calculated as the lowest figure of either their share of the total budget, or the proportion of personnel provided. That means that if the UK were to put in one person to a mission of 100, it would pay 1 per cent of the commonly funded costs. Third countries can be exempted from paying even that share if their contribution is deemed significant. Third countries do not provide operational headquarters, and they cannot be a lead nation, or take on the post of the operation commander, or any other senior positions. Once a third country has joined a mission, however, it can send officers to work in the mission's operational headquarters and thus gain some insight into the conduct of the operation.

As set out above, non-EU NATO member-states can participate in CSDP missions through the so-called Berlin Plus arrangements. For example, Turkey provided troops to the EUFOR Operation Althea. Because the operation was commanded at a strategic level from NATO's headquarters, Turkey had access to the operational planning processes. Berlin Plus, however, has only been used for two EU operations – Operation Concordia in the Former Yugoslav Republic of Macedonia, which took place in 2003, and EUFOR Althea, which replaced NATO's operation in Bosnia in 2004. Political disagreements, and in particular the conflict between Cyprus and Turkey, have prevented the EU from making full use of NATO's resources.

Current third country agreements: Capability development

Despite its limited budget and powers, the EDA has been in charge of EU co-operation in research, development and procurement, and thus matters to third countries wanting to participate. The EDA has signed 'Administrative Arrangements' with Norway, Switzerland, Serbia and Ukraine. These agreements establish procedures for the exchange of information, and give third countries the opportunity to present their views on the EDA's activities. They also allow for participation in the

EDA's projects and programmes, albeit without strategic decision-making power – third countries can participate in discussions but not decisions – and applying to join a new or additional project or programme is often a cumbersome process, requiring a written procedure and unanimous EDA Steering Board authorisation.

In the future, PESCO members may decide to invite third countries to participate in operations and projects if they provide "substantial added value", with the understanding that they have no decision-making powers in the governance of PESCO. Third countries will also be able to strike agreements to participate in the CARD mechanism through a deal with the EDA.

Things will get more complicated for third countries with the Defence Fund, however. No arrangements currently exist for third countries to participate in the Defence Fund's programme to support capability development. The EU has proposed a regulation to clarify who may be eligible to benefit from the 20 per cent co-funding of military prototypes; the principle is that a capability project should involve the co-operation of at least three businesses, which are established in at least two member-states. The regulation specifies that only defence firms that are established on EU territory and controlled by member-states or their nationals should be eligible for support.[37] That does not necessarily exclude co-operation with third-country firms, as long as they do not benefit from the fund's resources, and as long as their involvement does not put the EU's security interests at risk.

"The EU often fails to make good use of third country co-operation."

Third countries can negotiate associate country status with the EU's (civilian) research programmes. They pay a contribution based on their GDP in exchange for having the opportunity to participate in the EU's research projects; 16 third countries have signed associated country agreements with Horizon 2020, the EU's current framework programme for research and innovation. For now, Norway is the only third country that participates in the EU's preparatory action on defence research (Norway contributed €585,000 for 2017).[38] It matters in this context that Norway has implemented the EU's defence directives. As a member of the European Economic Area, Norway is integrated into the European market, and accepts the authority of the EFTA court, which monitors compliance with the directives. That means that an EU company could

37: 'Proposal for a regulation: European Defence Fund and EU Defence Industrial Development', Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs Programme, June 2017.

38: 'Annual report on the implementation of the Common Security and Defence Policy', European Parliament, December 2017.

take the Norwegian government to court if Norway sought to protect its defence sector illegally.

Third countries participate in Galileo and Copernicus through bilateral agreements. Non-EU NATO states can receive intelligence from the SatCen and be involved in the centre's activities, they can send national image analysts to SatCen, for example. However, currently no non-EU country has concluded an agreement to access the PRS service. Both the Norwegian government and the United States Defence Department have said that they would like access to the encrypted PRS programme, and have entered negotiations with the EU. In order to get access to PRS, third states would have to conclude a security of information agreement. Each nation using PRS, whether an EU or a third country, would also have to create a specialised agency responsible for its use, and allow the Commission access to inspect agencies and companies working with PRS, in order to guarantee compliance with security safeguards.

Assessment of the existing third country agreements and relationships

Almost all CSDP missions and operations are supported by non-EU members. But the process of plugging in third countries is not perfect – institutional red lines and political pitfalls mean that the EU often fails to make good use of third country co-operation.

The family of third countries that have signed Framework Participation Agreements with the EU is very diverse. It ranges from traditional Western allies and members of NATO, like Norway, the US or Canada; to third countries where CSDP missions or operations have been deployed, such as Georgia, Ukraine or the former Yugoslav Republic of Macedonia, to 'like-minded' partner countries around the globe, like New Zealand, Australia or South Korea.

As a consequence, the Council invitation for third countries to join missions and operations is not automatic, and is sometimes controversial. On the one hand, the EU benefits from the capabilities third countries can provide, and from the political symbolism of a non-EU power supporting and contributing to a CSDP mission, as was the case when the US contributed to the EU's Kosovo missions. But on the other hand, EU member-states sometimes want to avoid

political association with a third country, however willing it may be to help. At the 1999 Helsinki European Council, Norway asked for a closer relationship with CSDP, with guaranteed participation in meetings, access to all relevant information and the right to speak and make proposals. But Greece and other member-states were unwilling to offer similar rights to Turkey – because of the Cyprus conflict, and rule of law issues – and rejected the Norwegian demands for more access as a consequence.

Because of their very limited influence over the planning of CSDP missions and operations, third countries sometimes decide that they do not want to participate even when they have been invited.[39] Some have drawn different conclusions: the US has an FPA with the EU stipulating that it will only contribute to civilian CSDP missions, because it insists on its troops operating under US command and control. Others who do contribute rely on their EU partners acting outside official channels. Norway's participation in the EU's Nordic battlegroup is in reality only possible because Sweden, as the battlegroup's framework nation, makes sure that Norway gets the information necessary to decide whether or not to participate in an operation in time.

"The more institutionalised EU defence becomes, the less flexible it will be."

The Defence Fund in particular holds a new set of challenges for third countries, because so many uncertainties currently exist. If they were to negotiate an access agreement now, third states would have to trust that the fund would be a part of the next Multiannual Financial Framework (MFF), and that EU member-states would use the Commission's incentives to invest in significant capability projects that would at the same time be commercially and practically attractive to the defence industries and governments of third countries. They would also have to trust the EU to award these contracts purely on competitive bidding between EU member-states and third countries, which is not necessarily a given.

The Defence Fund was conceived by the EU as one of the tools to implement the EU Global Strategy, which outlined the ambition of 'strategic autonomy' for the Union. The industrial dimension of strategic autonomy entails establishing a European defence industrial base that can produce all the equipment that the EU requires to deploy autonomously in operations. The concern for third countries is that

39: 'Brexit: Common Security and Defence Policy (CSDP) missions inquiry', House of Lords EU External Affairs Sub-Committee, January 2018.

European ambitions for industrial autonomy could turn into European protectionism, shutting out third countries that want to contribute, even if that means missing out on their industrial expertise.

Norway, for example, paid to participate in the EU's preparatory action for defence research, bid for contracts, and was awarded none. The government in Oslo is now looking at whether this was due to discrimination, or because Norwegian firms were not the most qualified contenders. Despite the fact that it will not leave the single market until the end of 2020, Britain is already concerned that the EU may be prioritising the industrial interests of other member-states. A British company has been the contractor for Galileo's electronics in previous years; but ahead of the next round of contracts the EU has introduced a break clause. This will give it the right to cancel existing Galileo deals without penalty once a supplier is no longer based in an EU member-state. In effect, this will prevent UK companies from bidding even while the UK is still an EU member. The EU argues that the UK as a third country cannot be granted access to sensitive EU-only information; the UK suspects that other member-states want to grab the business. This shows that fall-out from post-Brexit industrial competition can impact broader security discussions.

What sort of relationship should the UK try to get?

The EU's increased efforts on defence are not primarily motivated by the Brexit vote. But Britain's decision to leave has encouraged the EU to work harder in two ways: it has opened up areas of institutional co-operation that Britain would previously have vetoed, and it has boosted member-states' political will to prove the EU's credibility as a defence actor.

This development puts Britain in a difficult position: the more institutionalised EU defence becomes, the less flexible it will be, and the more difficult for a third country to plug into after Brexit. In addition, it is challenging for the UK to negotiate a deal right now, when the EU has yet to determine the conditions for third party involvement in the new initiatives that the Union is developing – even if these later turn out to offer Britain opportunities. And while Britain should undeniably occupy a 'special' role in EU defence as a third country – because of its considerable military abilities and defence industrial expertise, and because of the close links already established with its European

partners – it has also had a complicated relationship with CSDP since it began, and has previously undermined some of the Union's efforts in this area.

For its part, the EU struggles with the idea that it should discriminate between different third countries. Granting a 'special' partnership to the UK on defence and security could set a precedent that other third countries might want to follow. This could put the EU in a difficult position, in particular with regard to Turkey, which has contributed large numbers of troops to CSDP operations in the past. The idea of 'differentiation', which entails making sure that a non-EU member-state does not have more rights and fewer obligations than a member ('no better out than in'), also poses a challenge for the EU in the field of CSDP. EU defence policy comes with very few obligations, even for member-states. Even PESCO, which the EU initially designed to be more binding, in its current form has few mechanisms to hold members to account if they do not fulfil their obligations. What then can be the obligations for third countries? How can the EU make sure that the UK and others do not just pick and choose from the menu of EU defence options?

"The EU is uncomfortable with a UK 'pay-for-play' opt-in."

These problems mean that the EU is uncomfortable with the idea of a 'pay-for-play' opt-in for the UK, whereby Britain provides cash, troops, or kit and in return can choose which operations and especially which capability projects it participates in. Some in Brussels are reluctant to do the UK any special favours – they remember that in previous years Britain blocked EU defence initiatives that London perceived might duplicate NATO's role. And some in the EU believe that Brexit Britain can no longer be trusted as a strategic partner. They see Britain's decision to leave as an attack on the fundamentals of European co-operation. The EU's position on Galileo and its exclusion of Britain on security grounds, for example, imply that the Commission will be unwilling, in this case and in future defence negotiations, to adapt the approach it takes towards third countries, even if there are long-term benefits to co-operating closely with Britain.

How can the tension between the UK's demand for a 'special' relationship and the EU's reluctance to change the rules for Britain be solved? Since the referendum, Britain has repeatedly pledged its commitment to European security. The EU should encourage this

approach and negotiate the future defence relationship with a view to the contributions the UK could make. For its part, the UK's threat to launch a competitor to Galileo suggests to hardliners among the EU-27 that British commitment to European security co-operation is weaker than Theresa May promised in her Munich Security Conference speech in 2018. The first priority for both sides must be to overcome the bad blood of the Galileo negotiations, and to negotiate a range of tailored agreements in the defence sphere, together with an overarching security of information agreement and an agreement on personnel exchanges (referred to in Part one). In the medium-to-long term Brexit may boost the EU's political will to reform some of the mechanisms of third country co-operation – or so some EU defence insiders hope. The following sections outline the deals that the EU and the UK should strike, as well as some of the reforms the EU should pursue.

CSDP missions and operations

In its partnership paper, the UK government aims for an "ambitious" partnership with the EU that would allow the UK to "work with the EU during mandate development and detailed operational planning." This request goes beyond any of the current arrangements the EU has with third countries that want to participate in EU missions and operations.

The EU has an interest in keeping the UK involved in missions and operations. In previous years the UK has contributed limited numbers of personnel to CSDP missions and operations – Barnier in his EUISS speech called its contributions "rather marginal so far" – but Britain remains one of the few EU member-states capable of providing military assets that can fulfil specialist functions, such as strategic airlift, intelligence, surveillance and reconnaissance. The UK's permanent seat on the UN Security Council is of value to the EU, since many member-states will not engage in a CSDP operation without a UN mandate, and Britain can help shepherd EU requests through the Security Council.

The UK and the EU will have to negotiate an FPA to specify the arrangements under which the UK can supply troops to CSDP missions and operations. While Britain will not be given any formal voting rights, the specifics of the agreement should account for the UK's special status as an outgoing member-state. Britain could negotiate an agreement whereby a substantial commitment of troops or assets would guarantee close consultation as well as information sharing in

the early stages of CSDP operational planning. It could ask for a right to have informal meetings with EU ambassadors on the same day as PSC and EU Military Committee meetings, and regular meetings between the UK and the Committee of Permanent Representatives (COREPER). As the Council's main preparatory body, COREPER examines all defence-related items to be included on the Council's agenda, and the chance to feed into its discussions would be valuable to the UK.

"Brexit will encourage the EU to rethink its relations with third countries."

To sweeten the deal for the EU, and to formalise its own special status, the UK could also offer to continue to pay into Athena's common cost distribution mechanism, even as a third country. And the UK should strike a third country agreement to participate in the EU's battlegroups, while accepting that it will be required to withdraw from its lead nation status.

The UK and the EU should also arrange personnel exchanges, so that EEAS officials and military staff spend time in UK ministries and headquarters and vice versa. Investment in a regular and institutionalised staff-to-staff exchange would automatically lead to more intimate contact and more intense consultation and discussions.

In the medium term, it is likely that Brexit will encourage the EU to rethink its relations with third countries: first, to ensure that the UK continues to play a full part in EU missions and operations; and second, because the discussion with Britain will show up anomalies and shortcomings in existing agreements. The EEAS has already set in motion a process to review how it engages with third countries on defence.

A clear challenge for the EU will be to differentiate between the diverse family of third countries without overtly discriminating against any of them. While the EEAS could design a formal method of grouping partner countries – similar to NATO's special partnerships with countries across the globe – that raises the difficult question of the criteria for distinguishing between partners. Should third countries be granted access to the EU's planning processes according to their level of commitment to CSDP missions? Should it be according to their proximity to the EU's interests and values? While logically the innermost

circle of third countries would be non-EU NATO countries, that would immediately raise the political problem of relations with Turkey, which has long bedevilled EU-NATO co-operation. The EEAS may prefer not to formalise any distinction between potential CSDP partners, and instead maintain its ability to discriminate against whomever, whenever.

Even if the EU does not change its approach radically, that does not rule out less dramatic but still useful reforms of existing ways of dealing with third countries. For example, member-states tend not to send senior officials to meetings with third countries that contribute troops. However, when the committee of contributors was first set up, the intention was to give these countries the opportunity to provide guidance on how operations should be conducted.[40] The committee could and should be given this role once more. The EEAS and the High Representative might also look at increasing the frequency of bilateral meetings with the defence ministers of third countries. Bilateral meetings would increase the value of discussion for both sides, and at the same time make it easier for the EU to differentiate between partners. Britain can encourage these reform efforts, but not force them – in fact, too much British involvement, and any sense that the EEAS is 'tailoring' its new arrangements to the UK, might be counterproductive.

Research, development and procurement of defence capabilities

Two issues matter to Britain's defence industry. First, UK defence firms, most of which rely on international supply chains, would like barrier-free market access and easy migration for skilled workers. Second, they would like the continued ability to take part in big European defence contracts: the UK has worked with European defence partners on existing multinational programmes, such as the Eurofighter Typhoon or the A400M transport aircraft. While participation in many of these multinational programmes has in the past not been dependent on EU membership, that could change with the money made available by the Defence Fund. Britain is concerned about the possibility that it might be excluded from new multilateral capability development projects, either through restrictive regulation or with the justification of wanting to keep sensitive information inside the EU.

Around 40 per cent of Europe's total defence R&D expenditure comes from Britain, and the EU should be interested in keeping the UK's highly

40: Angus Lapsley, 'Brexit: Common Security and Defence Policy (CSDP) missions', House of Lords Select Committee on the European Union External Affairs Sub-Committee, corrected oral evidence, January 2018.

sophisticated defence industry involved in future projects. However, some European governments also see an economic opportunity in Britain leaving.

To enable Britain to participate in the European defence market in the future, the EU and the UK will need to strike several agreements.

The UK should seek an administrative agreement with the EDA, similar to the one Norway has. It would not have voting or veto rights, but could contribute to EDA projects and attend some committee meetings. Britain could also continue to participate in ongoing projects to which it is already an important contributor, such as the agency's efforts to improve governmental satellite communication. The UK already participates in a trial-run of CARD, and should strike an agreement with the EDA that will allow it to continue to be a part of it once the mechanism is fully operational.

Britain should also seek a third country co-operation agreement for the Defence Fund. Some in the Commission question whether the EDA has the resources to handle the influx of new money from the fund; or they do not want the Commission's role restricted to supporting defence capability projects identified in the agency-led Capability Development Plan. So while the EDA will manage the projects supported by the Defence Fund, the UK also needs to make a deal with the Commission. The Commission will probably ask for a substantial financial contribution for access to the fund, instead of allowing a 'pay-for-play' arrangement, where third countries pay to participate in certain projects. In order to access money from EU-funded research programmes after Brexit, the UK should apply for 'associated country status'. This would allow British organisations to tender for EU funding, in exchange for regular payments of a small share of GDP.

"Britain should seek a third country co-operation agreement for the Defence Fund."

For this arrangement to work, the UK will have to guarantee a degree of regulatory alignment with the EU's defence directives. Though the UK has in the past made more use than other member-states of the EU defence directives' procedures, the Commission is concerned that future British governments would want to implement a more flexible regime to benefit domestic industries.[41] The EU will require some arbitration

41: European Parliament, 'Study on the impact of the 'defence package' directives on European defence', 2015.

mechanism to ensure British compliance, as a precondition for UK firms to continue to be involved in EU capability development projects.

In order to continue to be able to access Galileo's PRS, in addition to an agreement on information sharing Britain will also have to sign an agreement on satellite navigation co-operation. It will also have to prove to the EU that it fulfils a number of minimum security standards. Similarly, on space security, Britain should sign a bilateral agreement with the EU's Satellite Centre, to retain access to the Centre's image analysis, keeping open an option to send British image analysts to work in the Centre.

The transition period

Security and defence policy is part of the EU *acquis*, and during the transition, the *acquis*, including all existing Union regulations, will apply to Britain. That means that Britain will no longer participate in the EU institutions, nor in the decision-making of Union bodies. Britain can, however, be invited to committee meetings on an exceptional and case-by-case basis, though it will have no voting rights.

The UK can continue to contribute personnel and assets to CSDP missions and operations, if it chooses to. It will still contribute to the financing of CSDP common costs through the Athena mechanism and will pay towards the budgets of relevant agencies, including the EDA and SatCen. And it will in principle be bound by EU Council decisions, though the draft withdrawal treaty states that the UK "may make a formal declaration to the high representative of the Union for Foreign Affairs and Security Policy, indicating that, for vital and stated reasons of national policy" it will not apply a decision. It would therefore be reasonable to design a specific consultation mechanism between the UK and the EU that would allow the UK to follow the EU's decision-making processes closely, ideally minimising the likelihood that the UK will decide not to implement a CFSP or CSDP decision. UK defence firms will still be eligible to bid for EU-supported projects unless there is a need to exclude them for security-related reasons, for example, if a project involves dealing with sensitive information and Britain and the EU have not yet struck an information-sharing agreement.

Both the EU and the UK have said they would prefer to agree a post-Brexit defence relationship as soon as possible, so Britain does not

fall out of European defence co-operation during the transition. But because many aspects of the future defence relationship are heavily dependent on subsequent decisions on British access to the internal market, an early deal on defence industrial co-operation is unlikely.

The draft withdrawal agreement allows for a CSDP agreement to be implemented during the transition period, without waiting for finalisation of the post-2020 relationship. But that is limited to activities covered by Title V of the Treaty on European Union. Agreements on UK participation in the EU's satellite programmes, or on access to the defence fund, would fall outside any CSDP deal. Therefore, the more the British government wants to include in an agreement on defence, the less likely it is that there will be an early agreement.

"Britain should signal its desire to remain involved in European defence architecture."

While negotiations are ongoing, Britain should signal its goodwill and its desire to remain involved in European defence architecture. The main issue is the use of the UK veto. While Britain is still a member-state, it is technically free to veto EU defence initiatives, but it should refrain from doing so. A forthcoming review of the EU's new operational headquarters will be a critical test case. Britain has traditionally vetoed EU efforts to develop its own command structures. Should the EU now seek to improve and extend the new structure, many will pay close attention to whether the UK delays EU efforts on its way out. Some in the EU also fear that the UK will try to use its position in NATO to undermine the EU's efforts in defence operations and capability development. The two organisations have in recent years developed an exceptionally good working relationship, with NATO supporting the EU's attempts to raise its defence profile. Within NATO, Britain should make it a priority to champion close partnership between the alliance and the EU, and it should participate actively in joint EU-NATO initiatives.

Part three:

EU justice and home affairs

This part looks at police and judicial co-operation. It starts by assessing the EU legal framework for justice and home affairs and the UK's particular position in that framework. It examines what the British government has said about its future relations with the EU in this area, in particular in three papers on options for its future partnership with the EU-27 published in September 2017 and May 2018.[42] It analyses what the EU is saying, publicly and privately, about the sort of future security relationship it wants with the UK. It looks at the legal and political frameworks of relations between the EU and third countries in the security area, and, in particular, extradition, databases and co-operation with EU law enforcement agencies. And it examines what those countries think about the advantages and disadvantages of the approaches they have adopted.

Justice and home affairs: The background

EU JHA comprises a set of policies designed to help member-states manage the negative side-effects of closer economic integration and the abolition of border controls. As EU countries progressively stopped checking people at the borders between them, and in parallel goods, services and capital moved more freely, both law-abiding Europeans and criminals became increasingly mobile. The free flow of capital made money-laundering easier. The development of the four freedoms also led to more people from different nationalities getting married, having children, entering into contracts and buying property in another country. Meanwhile, migrants and asylum-seekers were arriving from outside Europe, looking to settle in different EU countries.

In response to these trends, the 1999 Treaty of Amsterdam stated that one of the EU's main objectives should be "to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration

42: 'Security, law enforcement and criminal justice: A future partnership paper', Department for Exiting the European Union and Home Office, September 18th 2017; 'Framework for the UK-EU security partnership', May 9th 2018; 'Technical note on security, law enforcement and criminal justice', Department for Exiting the European Union, May 24th 2018.

and the prevention and combating of crime." Even so, member-states were reluctant to allow the EU to extend its competence into such sensitive areas of national sovereignty. Consequently, EU JHA remained largely inter-governmental until 2009, when the Lisbon treaty entered into force, placing this domain under the competence of the EU institutions and the supervision of the European Court of Justice (ECJ).

Much like the single market, the Area of Freedom, Security and Justice (AFSJ) uses the principle of mutual recognition. In the single market, that means that member-states recognise and accept each other's lawfully marketed products. In the criminal domain, it implies that national authorities recognise and execute each other's judicial decisions, on the basis that they trust each other's judicial systems.[43]

"Schengen countries agreed to work together to protect the area's external border."

To promote mutual trust, the EU has harmonised laws and procedures where feasible. The EU Charter of Fundamental Rights (the Charter) facilitates co-operation in this area, by harmonising human rights standards across the EU whenever member-states apply EU law.

Title V of the Treaty on the Functioning of the European Union (TFEU) regulates the AFSJ. It covers a wide range of issues:

★ Judicial co-operation in civil matters (such as what happens to a child of Polish and Italian parents if they divorce).

★ Judicial co-operation in criminal matters (for instance, how to extradite a suspected criminal from Britain to Germany).

★ Harmonisation of criminal law (ensuring that every member-state punishes terrorist offences).

★ Police co-operation (creating an EU police agency, Europol).

★ Asylum and migration policies (what to do with an asylum-seeker when he or she first arrives in Europe).

★ JHA agencies like Eurojust (the EU's agency for judicial co-operation) and Frontex (the European border and coast guard agency).

43: Camino Mortera-Martinez, 'The European Arrest Warrant: A British affair', CER insight, November 2014.

★ Border controls (agreeing on a common visa policy and making sure that criminals do not go in and out of the Schengen area undetected).

The Schengen area

The establishment of a passport-free travel area was the driving force behind the development of the AFSJ. In exchange for abolishing most internal border controls, Schengen countries agreed to work together to protect the area's external border, and to co-operate on judicial matters, law enforcement, migration and security.

But while all member-states (except for Denmark, Ireland and the UK, as explained below) are bound by EU measures on police and judicial co-operation, not all of them are part of Schengen. And whereas many EU JHA measures, such as the EAW are only open to EU member-states, some non-EU countries are part of the Schengen area (see map 1). This situation is due to Schengen's peculiar history.

Belgium, France, Germany, Luxembourg and the Netherlands signed the Schengen Convention, designed to remove internal border controls, in June 1985. It eventually entered into force in 1995, with Italy, Portugal and Spain also signing up. The Convention was later extended to include Austria, Denmark, Finland, Greece and Sweden.

Schengen countries had to come up with a number of 'compensatory' laws to ensure that they could remove checks without a corresponding loss of security.[44] These measures included a common visa policy, an embryonic migration policy and laws governing the exchange of data. The Convention, and all the laws implementing it are known as the Schengen *acquis*. The *acquis* was not part of the EU treaties but rather an inter-governmental agreement. EU member-states decided to integrate the *acquis* into EU law in 1999, with the Treaty of Amsterdam. The Schengen *acquis* was then placed under the supervision of the ECJ, ten years before the Treaty of Lisbon brought the rest of JHA into the court's ambit.

Today, all EU countries are part of Schengen except for the UK and Ireland (which have their own border controls in the Common Travel Area, although they participate in some Schengen measures on law enforcement and migration); and Bulgaria, Croatia, Cyprus and Romania, which should join Schengen fully once the EU deems they are

44: Steve Peers, 'Justice and Home Affairs Law', Oxford University Press, 2013.

ready. Denmark is part of Schengen but applies the *acquis* as a matter of international, and not EU, law (see section on Denmark below). Iceland, Liechtenstein, Norway and Switzerland are not part of the EU but are in Schengen. This matters for Brexit Britain because EU co-operation with third countries on JHA discriminates between non-EU, Schengen countries, and non-EU, non-Schengen countries.

The EU has Schengen association agreements with non-EU Schengen members like Norway and Switzerland. These contain a rolling obligation to adopt new EU laws and ECJ case law to ensure coherence across all the areas covered by the agreement. If the ECJ and Norwegian or Swiss courts disagree on the interpretation of one of their agreements with the EU, the agreement will be terminated. Even though both countries have a say, ultimately, it is up to the EU to decide what EU laws need to be transposed into domestic law. If they are not, the EU has the power to scrap the agreement.[45]

"The EU decides what EU laws must be transposed into domestic law."

Britain and EU JHA

The UK has never been a full partner in JHA. At best, other countries have seen it as a slightly annoying but necessary partner, tolerated because of its vast expertise in policing and security. At worst, it has irritated others by cherry-picking JHA policies.[46]

The UK and Ireland have secured an opt-in/opt-out regime for EU JHA. This regime covers two different areas:

1) Title V TFEU

The UK enjoys an opt-in to measures under Title V, which allows it to choose whether to take part in them, sometimes even after they have been adopted.[47] For example, the British government did not opt in to the regulation covering cross-border maintenance payments to children and former partners until after it was adopted, once it had made sure that the regulation met UK needs.[48]

45: German Parliament, 'Consequences of Brexit for the realm of justice and home affairs. Scope for future EU co-operation with the United Kingdom', August 18th 2016.

46: Ian Bond, Sophia Besch, Agata Gostyńska-Jakubowska, Rem Korteweg, Camino Mortera-Martinez, Christian Odendahl and John Springford, 'Europe after Bremain: A strong team?', CER policy brief, June 2016.

47: Protocol 21 FTEU.

48: Camino Mortera-Martinez, 'Britain's participation in the European Union's area of Justice and Home Affairs after Brexit', written evidence for the Home Affairs Committee of the House of Commons, November 2016.

2) Schengen

The UK is not a member of Schengen, but it has the right to participate in some Schengen-related measures (including the Schengen Information System (SIS), a database of stolen identity documents and wanted people). Britain and Ireland participate in most of Schengen's criminal and policing laws, but not the rules regulating border controls, visas and free movement of travellers. If Britain has opted out of a whole area, like migration, it cannot opt in to any measures linked to that area.[49]

In 2014, with Theresa May as home secretary, the British government exercised its right to opt out of 130 JHA measures adopted before the Lisbon treaty entered into force. Simultaneously, it announced that, for reasons of national security, it would opt back in to 35 of them, including Europol, Eurojust and the EAW.

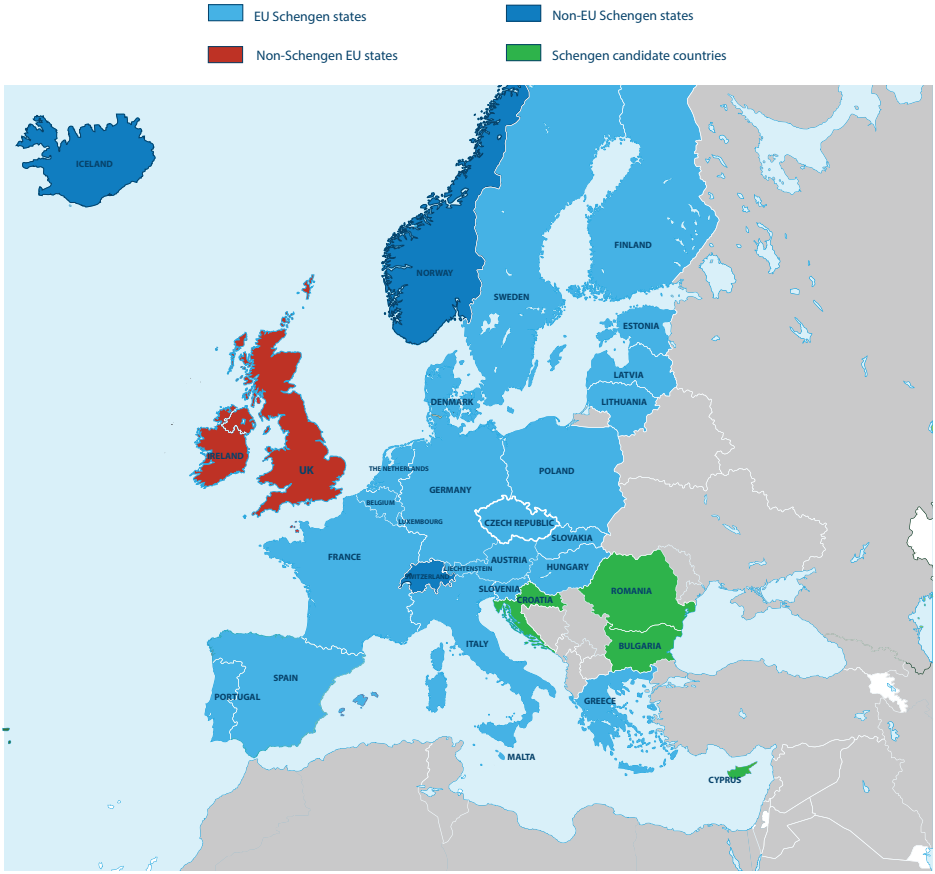
In practice, the UK and Ireland have opted into most measures on civil co-operation; the so-called Dublin Regulation, which governs the management of asylum claims in Europe; several instruments on law enforcement and police co-operation, like the EAW; and some EU laws to fight irregular migration.[50]

Britain is not the only awkward partner in JHA. Denmark participates in Schengen measures, but applies them as international law, and not EU law. This means that Copenhagen has no voting rights in the Council of Ministers on Schengen matters and that the ECJ has no authority over Denmark unless it opts in to the *acquis*. Unlike the UK, Denmark does not participate in JHA measures adopted after the Lisbon treaty entered into force. The Danish government needs to negotiate access to every post-Lisbon JHA law, like the new Europol regulation, almost on the same terms as non-EU countries.

Despite its opt-outs, the UK generally enjoys a good reputation in the EU as a reliable security partner. The UK has been the driving force behind some of the most important JHA measures, including the EAW, the EU's counter-terrorism and anti-radicalisation strategies and the Passenger Name Record (PNR) system, used for exchanging information about airline passengers travelling to or from third countries. Paradoxically, the UK has always advocated pan-European solutions to security threats and crime, to plug security gaps and catch cross-border criminals.

49: Protocol 19 TFEU.
50: Steve Peers 'Justice and Home Affairs Law', Oxford University Press, 2013.

Map 1: Schengen map



What does Britain want?

To judge from the government's September 2017 'Future Partnership' paper and its May 2018 note and slides on a framework for co-operation, in essence Britain wants to leave the EU but stay in those parts of law enforcement and judicial co-operation it likes, on more or less the same terms it enjoys now. From a British perspective, this makes sense: the UK has been picking and choosing between EU JHA measures for many years.

The British government's documents underline shared security threats like terrorism, cyber crime and irregular migration, and stress the UK's contribution to EU law enforcement and judicial co-operation.[51]

The government aspires to have a bespoke agreement on JHA, going beyond existing co-operation deals between the EU and third countries, and focusing on three main areas:

★ Access to EU law enforcement databases, such as Eurodac (which stores fingerprints of asylum-seekers), the Prüm national databases (storing DNA profiles, fingerprints and vehicle registration data), PNR, and the SIS.

★ EU measures to support practical law enforcement co-operation, such as the European Investigation Order (which allows one member-state to ask another to carry out investigations and gather evidence on its behalf, within a deadline of 90 days), and the EAW.

★ Co-operation through EU agencies like Europol and Eurojust.[52]

In exchange, the UK is willing to apply EU data protection rules in full, and would be open to exploring dispute resolution mechanisms, in the shape of an international court, a mediator or another adjudacating body.

Both the government's future partnership paper and Prime Minister Theresa May's speech to the Munich Security Conference in February 2018 indicate that the UK's preferred option for its future security relationship is an overarching treaty with the EU, covering favoured areas of co-operation in JHA, rather than piecemeal agreements with each member-state, or with the EU as a whole.

The partnership paper and the May 2018 note and slides suggest that the UK and the EU could sign a deal similar to the Schengen countries' association agreements – whereby the UK would be a sort of 'associated' member of EU JHA, but without most of the requirements Schengen members must follow (see section on co-operation models).

The government's vision is certainly ambitious. It assumes that a bespoke agreement in this area is simply a matter of will. It fails to acknowledge the rules and structures underpinning EU law enforcement

51: For example, Britain received over 9,500 'alerts' through the Schengen Information System between April 2016 and March 2017; over the past 14 years, the UK has extradited over 10,000 people to other EU member-states.

52: These are the British government's priority areas for co-operation. But the UK would also like to include other things, like migration and asylum, cyber security and counter-terrorism in the new security partnership.

and judicial co-operation, for example, the government's paper does not differentiate between Schengen and non-Schengen countries when assessing existing models of co-operation. Moreover, whereas May and the rest of her government have been loud and clear on what they want, they are less so on what they are prepared to offer: the British government has only recently accepted that it will need to comply with EU privacy rules – but has not explained how it intends to do so, beyond saying it will look for an overarching privacy deal with the EU. The UK has also been ambiguous about the role of the ECJ in this area: at the Munich Security Conference, May said she would be open to some form of ECJ oversight. But neither she nor her officials, have yet spelled out what they mean by that, much to the frustration of their counterparts in Brussels.

"Over the years, Britain's ad hoc approach to JHA has faced little resistance."

What will the EU offer?

Over the years, Britain's ad hoc approach to JHA has faced very little resistance in Brussels. EU member-states were more interested in building the EU's AFSJ than spending time and political capital arguing with the UK. After Brexit, the UK will face tougher scrutiny.

The European Commission outlined its position in January.[53] The Commission identifies the same three priority areas of co-operation as the UK. The paper also sets out the EU's guiding principles for JHA negotiations:

★ Protecting the Union's interests and the autonomy of its decision-making process.

★ Making sure that non-EU countries cannot have the same rights as EU member-states.

★ Preserving Schengen and co-operation deals with non-EU countries, without upsetting the bloc's security partners.

★ Ensuring that Britain complies with EU data protection standards and EU fundamental rights.

53: European Commission, Article 50 Task Force, 'Internal preparatory discussions on framework for future relationship: Police and judicial co-operation in criminal matters', Brussels, January 24th 2018.

★ Finding appropriate mechanisms to enforce an EU-UK security deal and solve any disputes which may arise.

For the EU, a guiding principle is to preserve the integrity of JHA co-operation across the board: Brussels has carefully crafted a complex partnership structure which it does not want to upset. While non-EU countries (Schengen and otherwise) want the EU and UK to co-operate closely on law-enforcement, non-EU Schengen countries may be unhappy if the UK gets a similar deal to the one they enjoy. Schengen is hardly more popular in Berne than in London, and Swiss politicians may struggle to explain to their voters the point of being in Schengen if, for instance, an outsider can have access to Schengen databases but still maintain its own border controls.[54] Brussels also cares about the position of EU countries: Denmark's 2017 partnership agreement with Europol, for example, was hard to negotiate, provides fewer benefits than full membership and is only valid for as long as Denmark remains a member of both Schengen and the EU (see section on Europol). The EU is unlikely to give a non-EU country more privileges than those provided to members of the club.

The EU also wants to ensure that the European Parliament is consulted about security negotiations with the UK. In the past, the Parliament has voted down counter-terrorism arrangements with non-EU countries on the grounds that its concerns had not been taken into account. The EU wants to avoid such an outcome in the Brexit talks.

As law enforcement and judicial co-operation rely heavily on information exchanges between countries, the EU wants to make sure that the UK continues to comply with the bloc's stringent privacy standards. For the EU, the easiest way to do that is to replicate the system of 'adequacy decisions' that it already has with other third countries. An adequacy decision certifies that a country's privacy standards are good enough for the EU to transfer the data of European citizens to it. The Commission issues these decisions and reviews them periodically, to ensure that standards have not been lowered.

While many in the EU appreciate the importance of the UK as a security partner, not everybody is convinced that Britain deserves a bespoke deal. In private, some senior EU officials dismiss the British government's claim that the UK is a net security contributor. Recent EU evaluations on the UK's participation in the SIS and Prüm databases, which are not yet public, show that, in some areas Britain uses more data than it puts in.

54: Camino Mortera-Martinez, 'Hard Brexit, soft data: how to keep Britain plugged into EU databases', CER insight, June 2017.

Other third countries and their co-operation with the EU

The EU has built a network of informal and formal co-operation channels with third countries on police and judicial matters. Because much of this co-operation touches upon Schengen, Brussels tends to differentiate between non-EU countries which are Schengen members (like Norway and Switzerland); and non-EU countries which are not part of Schengen (like Canada and the US).

This section examines EU law enforcement and security co-operation with four non-EU countries: Canada and the US, which are close security allies and, for the most part, like-minded countries while not being part of the Schengen area; and Norway and Switzerland, which are European, non-EU countries and Schengen members. The section focuses on the UK government's and the EU's priority areas for JHA co-operation: extradition, access to law enforcement databases and association agreements with Europol. The section also reviews the influence that non-EU countries have over EU policy making in the field of JHA.[55]

"No other extradition treaty allows for as much co-operation as the EAW."

EU-third country agreements on extradition

Since 2004, extradition between EU member-states has been governed by the EAW, which allows member-states to issue warrants requesting a suspect's surrender within 90 days. The EAW differs from other extradition treaties in four ways.

First, under the EAW, member-states should surrender people suspected of one of 32 serious offences, even if what they are accused of is not considered a crime in the country where they are located. Second, the EAW abolished constitutional bans on extraditing a country's own nationals: thus Germany, for example, can extradite German nationals to other member-states. Third, the EAW does not allow EU countries to refuse extradition on the basis that the crime they are wanted for is regarded as a political rather than a criminal act in the country where they are located (the 'political exception'). Finally, extradition under the EAW is exceptionally swift: the average time for

55: This section builds upon earlier research pieces as well as conversations with EU and UK officials and a closed-door workshop organised in Brussels by the CER and the Konrad-Adenauer-Stiftung in March 2018. See Camino Mortera-Martinez, 'Arrested development: Why Brexit Britain cannot keep the European Arrest Warrant'; 'Hard Brexit, soft data: How to keep Britain plugged into EU databases'; and 'Good cop, bad cop: How to keep Britain inside Europol', CER insights, May-July 2017.

extraditing a suspect is 15 days for uncontested cases, and 48 days for contested ones.

The ECJ cannot issue warrants, but it has an important role in reviewing the application of the EAW agreement. For example, the Irish High Court has recently asked the ECJ to rule on whether Ireland should extradite a Polish national to Poland in view of Warsaw's recent judicial reforms, as the European Commission considers that these reforms erode the rule of law. The Irish court has also asked the ECJ whether or not Ireland should extradite an Irish national to Britain to serve a sentence that would continue after Brexit.

No extradition treaty in the world allows for as much co-operation between countries as the EAW. Norway and Iceland have a multilateral extradition treaty with the EU, with procedures similar to the EAW, although with some important differences.[56] The Norway/Iceland treaty took 13 years to negotiate: there have been problems in amending the national laws of some EU countries and Iceland.[57] Ireland and Italy have still not ratified the treaty.

The Norway/Iceland agreement does not give a role to the ECJ, and the EFTA court (which polices internal market disputes for the non-EU members of the European Economic Area (EEA), including Norway and Iceland) has no jurisdiction over justice and home affairs. Instead, the deal specifies that the parties should establish a 'mechanism' ensuring that they stay up to date with each other's case law.

Extradition between the EU and Switzerland is governed by the 1957 Council of Europe Convention on extradition, a non-EU treaty which regulated extradition in Europe before the EAW entered into force.[58] Extraditions under the Convention are not automatic and the state of bilateral relations can influence decisions. It takes 18 months on average to extradite a suspect under the Convention. According to Swiss officials, Switzerland sends around 365 people per year to EU member-states and receives around 250 suspects. Berne extradites suspects faster than other members of the 1957 Convention: the average time for surrender is around six months, during which time the Swiss administration has to pay for detention.

56: 'Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway', October 21st, 2006.
57: Iceland, Germany and the Netherlands have solved their constitutional problems.
58: Council of Europe, European Convention on Extradition, Paris, December 13th 1957.

The United States has signed bilateral extradition agreements with 26 EU member-states (all except for Croatia and Slovenia). It also has an extradition agreement with the EU as a whole.[59] And to facilitate investigation and prosecution, the EU and the US have signed a mutual legal assistance treaty (MLAT).[60] While both deals were concluded in 2003, they only entered into force in 2010. And the scope of these multilateral agreements is limited: the surrender deal is focused on enhancing co-operation across the Atlantic by complementing, and not replacing, bilateral agreements; and procedures under the EU-US MLAT are slow and inefficient.

Canada has neither an extradition treaty nor an MLAT with the EU. The EU-Canada Strategic Partnership Agreement (SPA), signed in 2016, says that the parties should try to boost "co-operation on mutual legal assistance and extradition based on relevant international agreements", as well as looking for new ways to make co-operation easier.[61] Canada has extradition deals in force with at least 12 EU member-states.[62] Canada's Department of Justice has seconded an expert to Brussels to work with EU member-states on extradition.

"Canada has extradition deals in force with at least 12 EU member-states."

Access of third countries to EU JHA databases

Over the past 20 years, the EU has built an array of databases (see Table 1). Every database serves a different purpose, from catching criminals to gathering information on visa applications. Each has one or more different legal bases, depending on its purpose: if one part of a database is used for law enforcement, and another to secure Schengen's external borders, that means different legal bases. This matters for Britain because its negotiating leverage for retaining access to a Schengen database is not the same as for remaining part of a database containing information on air passengers – as there is no provision in the EU treaties allowing a non-Schengen country to participate in Schengen measures. Table 1 gives an overview of EU law enforcement databases. Table 2 shows whether third countries have access to them and, if so, what kind of access.

59: 'Agreement on extradition between the European Union and the United States of America', July 19th 2003.

60: 'Agreement on mutual legal assistance between the European Union and the United States of America', July 19th 2003.

61: Council of the European Union, 'Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada', of the other part, August 5th 2016. Articles 18 et seq.

62: The Canadian government's treaty list says that Canada has extradition treaties in force with Austria, Belgium, Denmark, Estonia, Finland, France, Greece, Germany, Italy, the Netherlands, Spain and Sweden. It also lists extradition treaties with the former republic of Czechoslovakia, Hungary, Latvia, Lithuania, Luxembourg, Portugal and Romania, but these are either outdated or relate to state structures which no longer exist.

Table 1: EU databases in the field of justice and home affairs			
Exclusive Schengen databases			
Name of database	**Scope**	**Purpose**	**Who can access it**
Schengen Information System (SIS)	Centralised EU database	Stores 'alerts' (information on people and objects), so that countries can: control people at borders, identify and detain criminals (including terrorists) and track persons of interest and stolen goods.	Full access: border guards, police bodies, custom officers and judges. Partial access: Europol, Eurojust, visa and migration authorities.
Visa Information System (VIS)	Centralised EU database	Store fingerprints and digital photographs of those applying for a Schengen visa. Upon entry into the Schengen area, countries can check visa holders against the database, to verify their identity, detect potential fraud and fight against crime.	Full access: competent visa authorities and border guards. Partial access: asylum authorities, Europol, national bodies dealing with counter-terrorism and third countries (in specific cases).
Non-exclusive and non-Schengen databases			
Eurodac	Centralised EU database	Stores fingerprints of asylum seekers, to determine the country responsible for their application. It can also be used for law enforcement purposes, to identify criminals.	Full access: asylum and migration authorities. Partial access: police.
Prüm databases	National databases, accessible to all EU countries	National databases storing DNA profiles, fingerprint data and certain national vehicle registration data. EU countries must make this data available to other member-states. They must also provide information in relation to major events, and terrorist activity.	National law in each member-state determines who has access to this data. This can include police forces and security and intelligence agencies.
European Criminal Records Information System (ECRIS)	National databases, accessible to all EU countries	National databases storing information on criminal records for EU nationals committing crimes in countries other than their own.	National law in each member-state determines who has access to this data. This includes judicial authorities but may, in some cases, include others like prospective employers.
Passenger Name Records (PNR)	National databases, accessible to all EU countries	National databases storing information on air passengers, including name and address of the passenger, baggage information, banking data, itinerary and emergency contact details. It is used to investigate and prosecute serious crimes, including terrorism.	Full access: national authorities competent to detect, investigate and prosecute serious crimes.

Source: Centre for European Policy Studies and the Centre for European Reform's own research.

Table 2: Third country access to EU databases						
Country	**SIS**	**VIS**	**Eurodac**	**Prüm**	**ECRIS**	**PNR**
UK	Partial access to law enforcement data, but not border control data[63]	No[64]	Yes	Yes	Yes	Yes
Norway	Yes	Yes	Yes	Yes	No	No
Switzerland	Yes	Yes	Yes	No	No	No
USA	No	No	No	No	No	Yes[65]
Canada	No	No	No	No	No	No

Third country agreements with Europol

Europol has association agreements with many countries (see Table 3). Strategic agreements allow police forces to share general intelligence and technical information (such as threat assessments). Operational agreements also permit the exchange of personal data. But none of the existing agreements give third countries direct access to Europol's databases, like the Europol Information System.

Norway, Switzerland, the US and Canada all have operational agreements with Europol, and can post liaison officers to the agency. Norway has three liaison officers and Switzerland has four. Switzerland puts more information on Europol's databases than some EU member-states and is the leading third country contributor.

"Strategic agreements allow police forces to share intelligence and technical information."

The US agreement with Europol is fairly comprehensive. The US has liaison officers from six different agencies stationed at Europol, ranging from the Bureau of Alcohol, Tobacco, Firearms and Explosives to the Secret Service. Europol has senior liaison officers working in Washington. Europol also oversees US implementation of the EU-US Terrorist Finance Tracking Programme. In addition to the operational partnership, the US and Europol have also signed an agreement regulating the exchange of personal data and related information.

Canada's operational agreement with Europol is more restricted in scope, and, by the government's own admission, only represents a small part of EU-Canada law enforcement co-operation, much of which happens outside the EU framework and through international forums.

63: London cannot, for example, input or receive data on irregular migrants who have been removed from the EU.
64: In 2010, the UK asked for access to VIS only for the purposes of fighting crime, but the ECJ denied it, arguing that the UK was not part of Schengen and as such should not benefit from information in Schengen databases.
65: The US has a PNR agreement with the EU.

Canada has two members of the Royal Canadian Mounted Police at Europol and is negotiating to post a third.

The four countries are allowed to participate in Europol's projects and initiatives.[66] For example, they can participate in Joint Investigation Teams (a legal tool allowing multinational police teams to work together on an investigation).[67] Norway and Switzerland recently joined Europol's taskforce to combat cyber crime. But third countries have no say over how Europol works. Only EU member-states have a seat on Europol's Management Board (the agency's governing body). Since its 2015 referendum decision to pull out of EU JHA, **Denmark** has retained its seat on the Board, but can no longer vote.

Table 3: Third country agreements with Europol

Country	Operational agreement	Strategic agreement
Albania	✓	
Australia	✓	
Bosnia and Herzegovina	✓	
Canada	✓	
China		✓
Colombia	✓	
Former Yugoslav Republic of Macedonia	✓	
Georgia	✓	
Iceland	✓	
Liechtenstein	✓	
Moldova	✓	
Monaco	✓	
Montenegro	✓	
Norway	✓	
Russia		✓
Serbia	✓	
Switzerland	✓	
Turkey		✓
Ukraine	✓	
United States	✓	

Source: Europol.

66: European Commission, Article 50 Task Force, 'Internal preparatory discussions on framework for future relationship: Police and judicial co-operation in criminal matters', Brussels, January 24th 2018.

67: Hugo Brady, 'Europe's crime without frontiers', The Yorkshire Post, June 21st 2006. Council of the European Union, Joint Investigation Teams Manual, Brussels, November 4th 2011.

Third countries' influence over EU JHA policy making

Non-EU Schengen countries have a better chance of influencing the EU's thinking on justice and home affairs than their non-Schengen counterparts. Norway and Switzerland participate in Council working groups and COREPER meetings. They also take part in some Commission working groups, and their ministers attend Council meetings on JHA. Schengen countries often find that being in the room matters. As an official from one of the countries concerned put it, "because decisions are often taken by consensus, a seat at the negotiating table is crucial – regardless of whether or not you are allowed to vote."

"The British government thinks no current partnership fits the UK's special position."

Norway, Switzerland and Iceland often negotiate together, which strengthens their hand. In contrast, Canada and the US do not sit in EU meetings and have to rely on EU 'insiders' both to get information and influence Brussels on their behalf. Traditionally, the UK has played that role. After Brexit, non-EU countries will need to rely on other friendly member-states.

Assessment of the existing models of co-operation

Much to the UK government's dismay, the EU seems determined to apply the principle of 'differentiation' ('no better out than in': a non-EU country must not have more rights and fewer obligations than a member) in all areas of the Brexit negotiations, as set out in Part two in relation to defence. In the field of JHA, this means that the EU will try to replicate existing models of law enforcement and judicial co-operation with third countries. This is not (only) a question of legal rigidity, as some in the British government like to think, but rather one of both strategy and efficiency: by following tried-and-tested models, the EU is protecting the system's carefully designed balance between Schengen and non-Schengen members while using its negotiating resources wisely. For its part, the British government thinks that none of the current partnerships fit the UK's special position as a security partner, and is seeking a bespoke agreement. There are benefits and shortcomings of existing models of EU-third country co-operation in the three priority areas identified above: extradition, databases and Europol.

Extradition

If Britain fails to secure a deal on extradition akin to the EAW after Brexit, it will have three options.

First, Britain could seek bilateral extradition agreements with other European countries (the American and Canadian model). The UK could prioritise partnerships with countries like Poland, from which it receives a particularly high number of warrants. A system of 27 bilateral treaties would comply with one of Britain's red lines, as it would give no role to the ECJ. But recent case law from the ECJ shows that escaping the Luxembourg court's jurisdiction may not be that easy, even in cases where bilateral treaties apply.

In April 2018, the ECJ was asked about the extradition to the US of an Italian citizen, Romano Pisciotti, who had been arrested while in transit in Germany.[68] After serving his sentence, Pisciotti sued the German government on the basis that, by virtue of his free movement rights, Germany should have treated him as a German citizen and thus not extradited him to the US. The Court dismissed his claim but said that, in cases like this, the home state of the suspect (in this case Italy) should be allowed to issue a European Arrest Warrant and get its national back. The home state should then consider the extradition request from the third country (if they have a bilateral extradition agreement). This ruling complicates the surrender of EU citizens to non-EU countries, as not all have bilateral agreements with all 27 members of the EU, and some surrender agreements may be more generous than others.

A system of 27 bilateral treaties would be harder to negotiate and less efficient than a single, pan-European extradition treaty. Canada and the US do not have deals with all EU member-states, making it easier for criminals to seek safe havens. If current bilateral treaties are anything to go by, most EU member-states would refuse to extradite their own nationals to the UK. In 2011 Portugal refused to surrender George Wright, a Portuguese citizen convicted of murder in the US. This could create problems for Britain: if Ireland refused to extradite its own nationals to the UK, Irish gangs and criminals could escape justice by simply crossing the border.

Second, Britain could fall back on the 1957 Convention (the Swiss model). This would have the advantage that no further negotiation with EU countries would be required (unless the UK wanted to supplement the Convention with additional bilateral agreements with strategic

68: Case C-191/16, Romano Pisciotti v. Bundesrepublik Deutschland, April 10th 2018.

partners). One potential problem however, is that, as the EAW was supposed to replace the Convention completely, some EU member-states may need to enact new laws to re-implement it vis-à-vis the UK. (The UK itself would need to amend its 2003 Extradition Act). This means that it might take some time for EU countries and Britain to be able to apply the Convention.

Finally, Britain could seek a surrender agreement similar to the one Norway and Iceland have with the EU (the Norwegian model). Of all the existing models, the Norway/Iceland agreement is the closest to the EAW. The deal works around the problem of judicial oversight by setting up an autonomous dispute resolution mechanism. That makes this model very attractive for the UK. But the Norway/Iceland deal has four main shortcomings: first, it allows any party to refuse to extradite their own nationals.[69] So far, 14 countries have said they would only extradite their own nationals under certain conditions; and seven member-states (including Ireland) will not surrender their own nationals to Iceland and Norway.[70] Second, it allows parties to trigger the political exception (nine countries have said they would only surrender people suspected of political crimes under certain conditions).[71] Third, it is unclear how the mechanism set up by the surrender agreement would work, who would be part of it and what would happen if it were asked to rule on issues of criminal procedure and fundamental rights, such as whether or not to extradite somebody (as only courts can do this). Finally, the Norway/Iceland agreement took a long time to negotiate and is still not in force.

"The Norway/Iceland deal took a long time to negotiate and is still not in force."

Databases

There is no legal base in the EU treaties for a non-EU, non-Schengen country to access Schengen data.

If Britain seeks to retain access to the Schengen Information System (SIS), it will have three options.

The first would be to ask Europol, or a friendly EU or Schengen member, to run a search every time UK authorities need information from SIS (the Canadian and American model). British law enforcement

69: Over three quarters of those surrendered to Britain by Estonia, Latvia, Lithuania, Poland, Romania and Slovakia are own nationals; 50 per cent of people extradited from Ireland to the UK are Irish citizens.

70: Countries that would extradite their own nationals only under certain conditions are: Austria, Belgium, Croatia, Cyprus, Estonia, Greece, Hungary, Iceland, Luxembourg, Norway, Poland, Portugal, Romania, and Spain. Countries that would not extradite their own nationals are: The Czech Republic, France, Germany, Ireland (provisional position), the Netherlands, Slovenia and Slovakia.

71: Belgium, Croatia, France, Greece, Iceland, Ireland (provisional position), Luxembourg, Malta and Poland.

authorities would not have direct access to SIS and it would take some time for them to get information. Indirect searches can only yield a 'hit/no-hit' answer, so British authorities would know that a person (or a stolen item) is indeed in SIS but would have no further information, unless the member-state that 'owned' the data granted Britain access. For this option to happen, the UK would need to conclude bilateral deals with several or all EU member-states so that they could run searches on behalf of the UK and grant British authorities access to further information.

The second option would be to follow the Norwegian and Swiss model. Norway and Switzerland have direct access to SIS on the basis of their Schengen association agreements. The UK would retain direct access to the law enforcement part of SIS but would need to pay a small sum into the EU budget (in 2015 Norway paid €6 million to participate in JHA); accept ECJ supremacy over British courts on issues related to Schengen data; and follow EU privacy standards, including on matters of national security like surveillance.

But this model may simply not be on offer: currently, the Schengen Information System is open only to Schengen members and EU countries. So a third option for the British government would be to seek a bespoke agreement which maintained as much of the status quo as possible. For that, the EU and the UK would need to negotiate a new legal base and agree on data protection rules and judicial oversight.

To keep Eurodac, the UK will have two options: either following the Canadian model, whereby Canada can ask an EU country to run a search for them through Europol; or retaining access in the way Norway and Switzerland do by remaining in the EU's asylum system (which makes the country where asylum-seekers first enter the EU responsible for looking after them). The first option would require bilateral agreements with EU member-states (Canada cannot yet make use of the system as these bilateral agreements are not in place). The second would mean that Britain would remain bound by EU legislation in the field of migration and asylum, including the EU Charter of Fundamental Rights.

Non-EU, non-Schengen countries do not have access to the Prüm databases. If the UK wants to stay connected, it would again need to follow the Norwegian model (direct access), under the conditions of judicial oversight, budget payments and regulatory alignment for

Schengen countries mentioned above. By contrast, as Norway and Switzerland do not have a passenger name records (PNR) agreement with the EU, Britain would be interested in following the American model. The US signed a deal with the EU in 2012 to exchange PNR.[72] The EU-US 2012 PNR agreement is the latest in a series of transatlantic treaties to exchange air passenger information, beginning in 2004.

"The UK government cannot move beyond the vague idea of a bespoke agreement."

Although the Commission's latest review of the 2012 PNR deal praises transatlantic co-operation in the matter, it took the US a long time to forge an agreement with the EU. A 2004 treaty was annulled by the ECJ at the request of the European Parliament.[73] It took three years for the EU and the US to negotiate a new PNR agreement – which still did not entirely satisfy the Commission and the Parliament. The latest 2012 agreement is subject to periodic review by the European Commission. Similarly, the ECJ brought down a 2014 EU-Canada PNR deal, forcing the Canadian government to renegotiate a treaty to share air travel information.

Europol

Assuming that the UK will seek the closest partnership possible with Europol, it could follow any of the available models (Norwegian, Swiss, American or Canadian). All of these countries have deals with Europol allowing them to exchange information and to post liaison officers to the agency. But none of these countries has direct access to Europol's databases, which makes operational co-operation harder. No third country has a seat on the agency's Management Board, nor are they required to pay into Europol's budget.

Britain may also want to consider the Danish model. Denmark's new partnership with Europol allows Copenhagen to request information from the agency. But Danish police and security services can no longer interrogate databases on their own: only Danish liaison officers can access the Europol Information System, which means that searches take more time. And in exchange for having limited access to Europol's data, Copenhagen has to pay into the agency's budget and accept the oversight of the ECJ.[74]

72: 'Agreement between the USA and the European Union on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security', August 11th 2012.

73: The Parliament brought the Luxembourg case because it thought the deal was disproportionate. The ECJ dismissed that claim, but declared the treaty void because of the misuse of its legal base instead.

74: According to the UK government, "seven times more information is exchanged between the UK and Europol than between Denmark and Europol, and the UK is involved in 10 times the number of operational cases". HM Government, Technical note: Security, law enforcement and criminal justice, May 2018.

What sort of relationship should the UK try to get? An EU-UK security treaty

Britain has two-and-a-half years to negotiate a new security relationship with the EU. EU law will apply to Britain during the transition period. The aim of this period is to avoid a 'cliff-edge' situation for the UK, and allow the parties enough time to reach an agreement on some of the thorniest Brexit questions. Once this period is over, in December 2020, EU JHA measures will no longer apply to the UK.

The draft withdrawal agreement also suggests a solution for specific cases of police and judicial co-operation which are continuing at the end of the transitional period. Articles 58 and 59 say that EU laws regulating judicial co-operation on police, law enforcement and criminal matters, as well as exchange of data, should apply to acts initiated before the end of the transition period and not completed by the end of this period (as of December 31st 2020). For example, the EAW would apply to a French request to extradite somebody from Britain issued in November 2020 that had still not been dealt with by December 31st. But if the surrender order were made on January 1st, 2021, a new extradition deal would apply. The British government has still not agreed to this.

The major obstacle to an agreement on the transitional provisions is that Britain's red lines and its stated ambitions for the future security relationship are incompatible. Initially, the government excluded any role for the ECJ (although this position has somewhat softened over time); it does not want to align UK law fully with EU law; and would prefer to pull out of the EU Charter of Fundamental Rights altogether.[75] The time for finding a solution is running out. But the British government seems to be unable to move beyond the vague idea of a bespoke agreement, whereas the EU insists that, whatever this means, it is not on offer.

To speed up negotiations in this area, the EU and the UK should first clarify what their future security partnership will cover; second, they should spell out what both parties would be prepared to give in exchange; and, finally, London and Brussels should agree on the shape of their partnership – whether this is best served by a treaty or stand-alone agreements.

75: The UK secured what Catherine Barnard, professor of EU law at Cambridge, has called a 'non opt-out opt-out' from the Charter. The Charter only applies to member-states when they are implementing EU law (for example, when they are executing a European Arrest Warrant). But the UK and Poland insisted on having a Protocol attached to the Lisbon Treaty (Protocol 30) saying that the Charter would not create any further rights in national British or Polish law.

What would the future security partnership cover?

To judge from both parties' current negotiating positions, the future EU-UK security partnership will focus on three issues.[76]

On extradition, Britain is unlikely to convince its partners to replicate the EAW just for the UK. The biggest problem would be getting countries to lift constitutional bans on extraditing their own nationals, because this would require constitutional changes and even referendums in some EU countries. Germany and Slovenia, for example, would need to change their constitutions. In Slovenia, constitutional change can trigger a referendum.[77] In fact, these constitutional bans will start to apply on Brexit day, in March 2019 – member-states are allowed to refuse to extradite their own nationals to Britain after it formally leaves the EU, according to Article 168 of the withdrawal agreement.

"Britain is unlikely to convince its partners to replicate the EAW just for the UK."

The least damaging and most realistic option for Britain would be then to seek a surrender agreement similar to the one Norway and Iceland have with the EU. But even if the UK can start negotiating a surrender agreement before it leaves the EU in March 2019, inevitably it will be faced with a gap before the new treaty can enter into force – as the European Parliament will need to approve it and EU countries may need to make some changes to their criminal laws. In that interim period it will have to revert to the inefficient 1957 Convention. The question is how long that interim period would last. Apart from time pressure, the biggest problem in negotiating a surrender agreement is likely to be the issue of judicial oversight.

There are several options to solve this problem, none of which is perfect. First, the UK could try to replicate Norway and Iceland's dispute resolution mechanism for extradition with the EU. Second, the UK and the EU could devise a totally new EU-UK court with jurisdiction over extradition (and perhaps other EU JHA matters). This court could be built from scratch or be a separate part of the ECJ, such as a panel with jurisdiction over criminal justice, as suggested by Petra Bárd.[78] While this would be attractive for the British government, the EU is unlikely

76: For the sake of brevity, this paper does not examine other mutual recognition instruments like the European Investigation Order.

77: Camino Mortera-Martinez, 'Arrested development: Why Brexit Britain cannot keep the European Arrest Warrant', CER insight, July 2017.

78: Petra Bárd, 'The effect of Brexit on European Arrest Warrants', Centre for European Policy Studies paper in Liberty and Security in Europe, No. 2018-02, April 2018.

to agree to such a court, as it would undermine the integrity of EU law (this court would have jurisdiction over intra-EU warrants). Finally, the UK could agree to accept the oversight of the ECJ over surrender procedures between Britain and the EU-27.

On Schengen databases, London and Brussels will need to be creative if Britain is to retain access to the SIS, as there is no legal basis for a non-Schengen, non-EU country to do so. It is technically possible to create ways for the UK to stay in the law enforcement part of Schengen (the EU could devise a new system whereby Britain, as a special security partner which had access in the past, could be allowed direct access to SIS). But this would be legally and politically complicated. The EU would need to find a new legal base to keep Britain plugged into Schengen databases, risking alienating Schengen and non-Schengen members alike. As it stands, the more realistic option for the UK is to retain indirect access to SIS through Europol or the national authorities of a Schengen country, as Canada and the US do.

Negotiating access to non-exclusive and non-Schengen databases should be easier: if Britain wants to retain access to Eurodac, it will probably have to remain a part of the EU's Dublin asylum system. Staying in Dublin while leaving the EU may seem counter-intuitive, but the UK, as a member of the 1951 Geneva Refugee Convention, is obliged to take in refugees and forbidden to send them back to unsafe countries (although it can send them back to safe countries). The UK is a net beneficiary of the Dublin system (in 2016, the last year for which data are available, the UK sent 553 asylum-seekers to other member-states and received 355), so it should have an interest in staying in, at least as some sort of associate member.[79]

It should be fairly straightforward to negotiate associate status for the UK in the EU PNR scheme. After all, Britain drove the adoption of the system, and it already has all the necessary technical requirements in place. Associate status in the existing EU scheme would be better for the UK than trying to negotiate a separate EU-UK PNR agreement. Although there is no precedent for a non-EU country accessing ECRIS (not even non-EU Schengen countries do), the British government could try to convince its EU counterparts of the added value of having Britain connected to the system, as the UK is the fourth largest user of ECRIS.[80] Finally, the UK could negotiate an agreement similar to the one Norway has to retain access to the Prüm databases. But if Britain wants

79: Eurostat, 'Dublin statistics on countries responsible for asylum application', updated May 2018.

80: According to the British government, in 2016, the UK responded to 13,000 requests from other EU countries and sent over 35,000 notifications.

to retain access to EU JHA databases, it will need to comply with EU data protection standards (see next section).

The UK should try to negotiate a close partnership with **Europol**, an agency it has done much to shape over the past decade. Britain already has the largest liaison bureau at Europol and will be able to post liaison officers from key agencies and bodies, for example, from HM Revenue and Customs, the National Crime Agency or the Security Service (MI5). But Britain's co-operation with Europol would be easier if it could, in addition, retain some positions on the agency's permanent staff, to facilitate communication between Europol and the British authorities, including on access to information. The UK is, however, unlikely to retain direct access to Europol's databases, as the EU has denied this option to an EU country (Denmark). Paying into Europol's budget is not compulsory for third countries (Norway does not), but it would be a sign of good will and could earn Britain a few more perks, especially if London wants to keep British staff stationed at Europol. London would need to chip in enough money at least to support Europol's operations on, for example, disrupting smuggling networks or dealing with the aftermath of large-scale cyber attacks. Unlike previous partnership deals, any agreement between Europol and the UK would need to be approved by the European Parliament, in line with the new Europol regulation.[81]

"The UK should try to negotiate a close partnership with Europol."

What would the price of a security treaty be?

There are three main things the EU is likely to insist on before agreeing to a security treaty with the UK.

First, Theresa May and her government would have to accept that some sort of international court will be needed after Brexit – not only to review extradition requests, but also to ensure that Britain complies with EU data protection standards, and to rule on the validity and interpretation of the security treaty. Whether this is an entirely new court or draws from existing tribunals would depend very much on the shape of the treaty and the outcome of negotiations on the wider Brexit deal. In any case, the British government will need to come to terms with the fact that the ECJ, by shaping what EU countries are able to do

81: Regulation (EU) 2016/794 on the European Union Agency for Law Enforcement Co-operation (Europol), May 24th 2016.

in relation to the EAW, information sharing and police co-operation, will also influence how any future EU-UK security agreement operates.

Second, if Britain wants to retain access to EU law enforcement databases, it will have to comply with EU privacy standards. This may sound relatively straightforward (after all, EU data protection standards have been part of British law for 20 years, and the UK has said it will continue to apply the new EU data protection regulation, which came into force on May 25th 2018), but Brussels and London disagree on how to make it happen.

To justify giving the UK a special status, the EU may demand that London not only retains EU privacy laws, but is also willing to allow the European Commission to scrutinise British data protection standards periodically. The EU may demand to know exactly what London is going to do with the data and with whom it plans to share it. The EU would prefer to do that through an adequacy decision. That would enable the Commission to look at British data protection laws; and also to examine legislation on national security, such as the UK's 'Data Retention and Investigatory Powers Act', (DRIPA), which also affects the transfer of EU law enforcement data to and from the UK. Given the EU's dislike of Britain's intelligence regulations – the ECJ said in 2016 that parts of DRIPA were illegal – and Brussels' suspicions of the UK's 'special relationship' with the US in intelligence, the EU will want to be reassured that EU data is always treated in a way it deems compatible with its stringent privacy standards. The European Parliament can ask the Commission to withdraw or amend an adequacy decision at any point.

The British government, for its part, would prefer to have an overarching information sharing agreement with the EU, covering data and information transfers for commercial, law enforcement and even military purposes.[82] A similar treaty already exists: the US has negotiated a 'Privacy Shield' agreement with the EU for the transfer of commercial data and an 'Umbrella Agreement' for the transfer of law enforcement information. The ECJ has the power to review both agreements and did strike down a previous data sharing treaty with the US in 2015.[83] The EU has so far refused to open negotiations on an all-encompassing data sharing agreement with Canada, citing privacy concerns.

Third, the UK government might find negotiations on a bespoke security treaty easier if it were willing not to withdraw from the EU

82: Sophia Besch, 'A hitchhiker's guide to Galileo and Brexit', CER insight, May 2018.
83: The 2000 EU-US 'Safe Harbour' agreement.

Charter of Fundamental Rights. The Withdrawal Bill, which will transfer most EU statutes into British law after Brexit, specifically rejects the Charter. In April, the House of Lords, Britain's upper chamber, amended the Withdrawal Bill to include the Charter. But this amendment is likely to be rejected once the Bill returns to the House of Commons, the UK's lower chamber, which ultimately approves legislation. The rights and freedoms contained in the Charter underpin co-operation in the AFSJ by making sure that all EU member-states adhere to the same human rights standards when applying EU law. The British government is right to say that the UK's Human Rights Act (which made it easier for people in the UK to assert their rights under the Council of Europe's European Convention on Human Rights) already offers a high level of protection against human rights abuses in Britain. And, of course, the UK is unlikely to morph into an autocratic regime. But the protections afforded by the Charter go beyond those of the Convention, and are crucial for EU co-operation on matters like extradition and information sharing. All EU countries should follow the principles of the Charter when executing arrest warrants, presumption of innocence, or right not to be tried twice for the same criminal offence, for example. Exchange of data on European citizens should comply with the requirements of Article 8 of the Charter (protection of personal data, right to access and rectify own data and the need for express consent for the gathering of personal information, among others). Retaining access to EU databases or striking a good deal on extradition would be easier if Britain decided to stay in the Charter.

"Police and judicial co-operation could be part of the wider Brexit deal."

What would the shape of a security treaty be?

The UK government wants to negotiate something akin to Norway and Iceland's Schengen association agreements.[84] Technically, this suggestion makes sense: it would comply with both the UK's government demand for a 'dynamic' security partnership, and the EU's insistence on replicating existing models. But politically, it would be virtually impossible for the EU to put the UK on the same footing as non-EU, Schengen countries. As senior officials put it, the only way Britain could get something similar to a Schengen association agreement would be if London signed up to Schengen. That, of course, will never happen.

84: While previous UK position papers were careful not to mention the Schengen association agreements by name (although they did effectively suggest a similar treaty), the latest technical note specifies that "the UK is not seeking to join the Schengen association agreements". 'Technical note on security, law enforcement and criminal justice', Department for Exiting the European Union, May 24th 2018.

It may be wiser, then, for the British government to seek a fresh treaty. This could be a stand-alone agreement or part of the wider arrangement governing EU-UK relations after Brexit. Either way, the agreement would need the European Parliament's approval. A stand-alone treaty will probably be faster to negotiate, but would carry the risk of the European Parliament voting it down or referring it to the ECJ, as it has done in the past with agreements on data transfers for counter-terrorism purposes between the EU, the US and Canada.

Police and judicial co-operation in criminal matters could be part of the wider Brexit deal, with sections spelling out the future arrangements on extradition, access to databases and the UK's participation in EU JHA agencies like Europol. This could be complemented by a chapter on data protection with separate sections for data transfers for commercial and law enforcement purposes.

If the security treaty was part of the wider Brexit deal, it would make it more difficult for the European Parliament to dismiss it, as that would endanger the entire set of EU-UK agreements. And it would reflect the fact that data protection is important both for trade and security; the deal would be more likely to be sustainable in the longer term if it took account of both economic and law enforcement aspects of privacy and data transfers.

The main risk of including security in the wider Brexit negotiations is that it might delay a deal in an area where nobody wants to see a cliff-edge. JHA is not like trade, which creates winners and losers: the only losers from increased co-operation in law enforcement are criminals. But, as negotiations progress, it is less clear that a security treaty will be easier (and faster) to negotiate than a trade agreement. Deals on extradition and data exchanges with other third countries have sometimes taken longer to negotiate than trade agreements. One way to mitigate the risk of a cliff-edge would be for the EU to agree to extend the transition period for matters of police and judicial co-operation only. The current withdrawal agreement does not include a mechanism to extend the transition period, as the EU is keen to ensure that the UK does not use transition as an indefinite 'half-in/half-out' period. But given that nobody voted for the UK to leave EU police and judicial co-operation, it would be wise to exempt this area from Brexit hard-ball, and allow for some legal flexibility. None of this can happen, though, unless and until the UK clarifies its position on the European Court of Justice and the EU Charter of Fundamental Rights.

Conclusion

It is no surprise that negotiations between the EU and the UK on the withdrawal agreement and arrangements for Northern Ireland have been difficult: they create economic and political winners and losers, and it was always going to be difficult to find the sweet spot where all the pains and gains would balance out. The only unpredictable element is how hard it has been for the British government to agree internally on its desired end-state and the compromises needed to reach it.

Issues of internal and external security should have been easier to solve. There are fewer obvious areas of competition, and it is clear that the closer future relations are, the less damage will be done to the interests of the EU and the UK. Notwithstanding that, it is proving just as hard to find compromises on key aspects of the future relationship in these areas as it is in the economic sphere. In some cases, EU law gets in the way, and the EU-27 are – not unreasonably – unwilling to rewrite law that works well for them in order to accommodate a country that is leaving the club. In the defence sector, security and economic considerations are entangled.

The over-arching problem is that the UK sees its relationship with the EU after Brexit as more special than the EU-27 think it will or should be. That is clear from the number of references in British government papers to arrangements that go beyond any current partnership with a third country, and the number of references in EU documents and statements to existing third country relationships. The UK thinks that its contributions in foreign policy, development co-operation, defence operations, defence industry and law enforcement are so indispensable that the EU should give it some sort of continuing role, at least informally, in shaping EU policy and operational decisions; the EU (rightly or wrongly) sees the UK as a useful but not a unique partner which is not entitled to much special treatment. The domestic political need of the British government to proclaim that it can do things on its own, whether in relation to an 'independent foreign policy' or a national alternative to Galileo, only makes things worse. It makes more

sense for the EU to work on the basis that it will not have UK support, whether in devising sanctions, mounting military operations or fighting crime; then it can welcome any help it gets from Britain as a bonus. Both parties need to be a little more humble about what they can do without the other, and a little more flexible about what they can do to accommodate the other's requirements.

In foreign policy, the UK has long seen itself as a country that 'punches above its weight' internationally. But it has often underestimated how much the extra power came from its EU membership, and the UK's success in persuading other EU member-states to follow the UK lead in areas where few except Britain had any interests. At the same time, the EU has consistently failed to turn its economic power into foreign policy influence, and has relied on activist powers like the UK and France to increase the Union's effectiveness as a foreign policy actor. Brexit has the potential to make things worse for both sides: the UK will be more autonomous but less influential; the EU will be more united but less active.

"This is a bad time for Europe's foreign policy strength to be reduced."

This is a bad time for Europe's foreign policy strength to be reduced. It faces problems in its eastern and southern neighbourhoods. US President Donald Trump has challenged Europeans who assumed that in a crisis the US would support Europe unconditionally, with his criticism of both the EU and NATO and his unhealthy admiration for authoritarian leaders in Russia, Turkey and elsewhere. China is rising and flexing its foreign policy muscles.

Most foreign policy experts in the EU and the UK see the value in the closest possible foreign policy co-operation continuing after Brexit. But when the British government emphasises that its future foreign policy will be independent, it implies that the EU will not be able to rely on UK agreement. If the UK means what it says about support for a strong, secure and successful EU in the world, then it should move quickly to make a generous proposal, accepting limits on its freedom of action internationally in order to maximise its continued influence on EU decision-making. The UK stands to lose more in terms of its national security if the EU becomes a weaker and less active international player than it can gain by pursuing an independent foreign policy

with different goals from those of the EU: UK national foreign policy priorities are already reflected in EU priorities.

Equally, while the EU has every right to assert its need for autonomy in decision-making, it should show some flexibility to allow the UK to continue to contribute to an effective European foreign policy. It should not offer the UK a veto, but it should allow it a voice. In particular, it should look for a framework in which the UK and EU impose sanctions in co-ordination wherever possible. Given the size of the financial services sector in the UK, any financial measures imposed by the EU will be ineffective if they do not cover the City; but the UK is bound to push back against EU measures that have extra-territorial effect. Even when its closest ally, the US, has tried to impose such measures, the UK has rejected them, for example in the context of Trump's withdrawal from the Iran nuclear deal and the threat of US sanctions on UK and other EU firms doing business with Iran.

Even though the UK – with France – invented EU defence policy, CSDP has not been a priority for British governments for years. Other member-states, meanwhile, have often been happy to support EU defence rhetorically, while cutting defence budgets and concentrating their spending on national priorities. The irony of current EU debates on defence is twofold: first, the EU is starting to get more serious about financing defence industrial co-operation, and thus become potentially more interesting to London, just as the UK is on its way out. Second, Britain cannot afford to lose the EU's goodwill in other areas of Brexit negotiations for the sake of defence and so finds itself giving at least a tacit blessing to new initiatives, some of which it would have previously blocked.

Being plugged into CSDP operations matters to Britain to a limited extent because of their operational value, but more because the UK has a clear interest in influencing the EU's strategic direction, regional orientation and level of ambition, and in preventing EU-NATO duplication. In order to be able to remain part of the EU's CSDP debate, however, Britain will have to demonstrate its commitment to CSDP missions and operations. Any Brussels-London deal providing for the UK to contribute troops will be judged by EU member-states and institutions according to the real benefit to EU defence in terms of quality and quantity.

Defence industrial co-operation post-Brexit will depend on the economic relationship that the EU and the UK agree on, which renders the negotiations more complex. Two additional difficulties arise. First, how to future-proof arrangements? EU initiatives like the Defence Fund are currently being developed, and it is still unclear what third country arrangements will be, or who in the EU will be negotiating these agreements. Second, there is still uncertainty over how successful the EU initiatives will be, and how much political and financial capital the UK should spend to be a part of them from the beginning.

Even if the UK and EU negotiating teams succeed in designing privileged arrangements with the EDA, PESCO and the Defence Fund, the question will be how to sell these arrangements to a UK domestic audience. A common theme in all likely post-Brexit defence deals is that the UK will have to pay for access. At a time when defence budget cuts are highly likely, will the UK's defence secretary spend political capital to support investment in EU defence initiatives, when these are traditionally viewed with scepticism in the UK, and are as yet untested?

On the other side, if Brussels excludes the UK from the Union's defence infrastructure, it would not only lose British expertise and assets, but it would also potentially undermine the EU's own efforts. If France's European Intervention Initiative allowed the UK to take part in non-NATO European operations, but without having to accept any obligations to the EU, then that would risk leaving PESCO as a sideshow, without any significant operational capability. And if the only way to co-operate with UK defence firms on capability projects in the future would be through inter-governmental non-EU structures, the usefulness of the Defence Fund would be called into question. EU defence structures need UK involvement to be credible.

"Theresa May has repeatedly stated her commitment to European defence."

The EU should not base its offer of a future defence relationship on Britain's limited past contributions and frequent naysayer status. Rather, it should look ahead to the important difference a closely aligned UK defence partner could make to the effectiveness of EU defence efforts. Theresa May and her government have, since the referendum, repeatedly stated their commitment to European defence. The EU should take them at their word. Galileo might be a test case: the EU should look for ways to keep the UK in, with whatever legally-binding

assurances it needs to feel confident that the UK will not pass on sensitive technology or withdraw its support for the system in future. That would be better for both parties than the EU sticking rigidly to the line that the UK will be a third country, and insisting that third countries are not allowed access to Galileo's 'crown jewels', while the UK threatens (however implausibly) to waste a large chunk of its already stretched defence budget on a rival system.

Both sides also need to show some pragmatism in devising ways to preserve as much JHA co-operation as possible. Instead of building a security relationship with a partner, as it often does, Brussels needs to first untangle an existing arrangement, before it can engineer a new deal. Perhaps unsurprisingly, the EU is doing what it does best: using existing rules to protect carefully crafted compromises between multiple countries. In some ways, it is legally and politically easier for the EU to treat the UK like any other third country than it is to upset this balance in order to accommodate a partner that is already half way out of the door, no matter how important that partner may be.

The UK government, for its part, has its hands tied because Britain's domestic politics make it impossible for negotiators to clarify London's position on the European Court of Justice and the EU Charter of Fundamental Rights. As a result, the government is asking for a special deal but is unable to say what it could offer in exchange.

Both are opening positions in a negotiation, and likely to evolve over time. But time is a luxury neither the EU nor the UK has: once the transition period is over, in December 2020, London and Brussels will face a cliff-edge unless they have agreed how to keep Britain closely associated with EU police and judicial co-operation while respecting the UK's wish to 'take back control'.

None of the EU's security partners have a perfect, all-encompassing relationship with the EU. Non-EU Schengen countries like Norway and Switzerland have better police and judicial co-operation with the EU, but in exchange they have abolished border controls and accepted the jurisdiction of the ECJ. Non-EU, non-Schengen countries like Canada and the US are (relatively) free to do what they want because their co-operation with the EU on extradition and databases is fairly loose. Then again, these countries are not on the EU's doorstep, and neither has previously been a member of the EU.

On JHA, as in other parts of the Brexit conundrum, the solution needs to be a half-way house. The EU and the UK could sign a security deal combining elements from existing models but shaped in a different way. The future EU-UK security partnership could be a stand-alone treaty or part of the wider Brexit deal – the latter would minimise the risk of the European Parliament voting it down. And the partnership could draw on the Norway/Iceland extradition treaty and the US relationship with Europol, while keeping Britain plugged into EU law enforcement databases, whether directly or indirectly. Brussels and London could also negotiate a new data protection agreement covering both commercial data exchanges and law enforcement, to underpin their new security deal. For that, both parties would need to agree on mechanisms to solve disputes and ensure compliance with both the treaty and EU data protection and human rights standards.

"The UK must maintain a strong team in Brussels to work with EU institutions."

Whatever the outcome, however, the UK will lose much of its influence on EU JHA. And that is bad news for everybody except the criminals that stand to benefit from a less stringent cross-border regime, from drug gangs in the Netherlands to Eastern European people smugglers and British crooks looking to revive Spain's infamous 'Costa del Crime'.

Finally, whatever arrangements the EU and UK agree on for their future internal and external security relationship, both sides should also resource their future co-operation properly. The EU delegation in London will inevitably have most of its staff dealing with trade and economic issues, and with the City of London; it will also need foreign, defence, development and security policy experts able to work with their British counterparts. The Foreign Office will need to rebuild political sections in British embassies in member-states that it has run down in the last decade, and both it, the Ministry of Defence and the Department for International Development must maintain strong teams in Brussels to work with the Commission and the EEAS.

If the UK wants to maximise its influence on EU decisions affecting Britain's security, it will also need more ministerial engagement. If ministers can no longer lobby their counterparts over coffee in the margins of meetings in Brussels, they will have to reconcile themselves to spending more time travelling to European capitals and hosting

their European counterparts in London. Whatever the prime minister's rhetoric of 'Global Britain', the UK's first priority will have to be reconnecting all the loose wiring left in Europe after Brexit.

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Plugging in the British
Completing the circuit

Sophia Besch, Ian Bond and Camino Mortera-Martinez

The EU's future relationship with the UK will encompass more than trade, citizens' rights and the Irish border. It must also cover issues such as foreign policy co-operation, international development assistance, military operations, defence industrial collaboration, law enforcement and information-sharing. The EU's starting point is that the UK will become a third country like any other. The UK's view is that it should have a special status. It is in the interests of both sides that co-operation should continue to contribute to European security, so both are likely to have to compromise on their opening positions. This report explores the EU's existing relationships with like-minded third countries, and what elements of them might be relevant to the future EU-UK partnership.

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