Post-Brexit EU–UK cooperation on migration and asylum:
How to live apart, together

Alberto-Horst Neidhardt

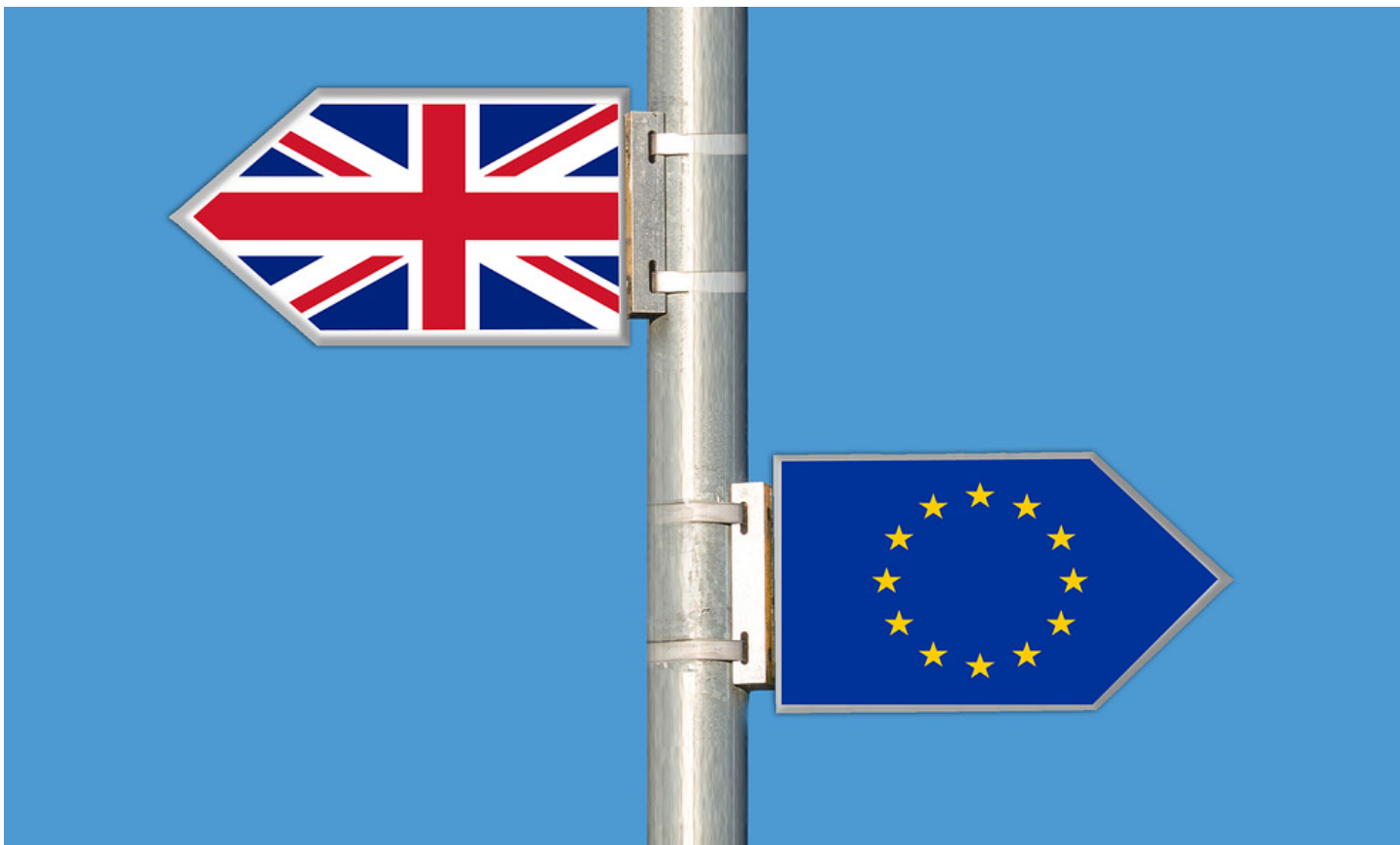Credit: PIXABAY

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ABOUT THE AUTHOR

Alberto-Horst Neidhardt is a Policy Analyst in the European Migration and Diversity programme.

Executive summary

The UK's withdrawal from the EU has created a policy, legal and operational vacuum in migration and asylum matters which undermines the interests of both sides. The UK is no longer bound to the Dublin and Eurodac regulations, or other elements of the Common European Asylum System. As a result, there is no binding framework which defines responsibility for asylum seekers and facilitates transfers between the EU and the UK. Brexit also made it harder to devise and implement effective anti-smuggling strategies with European partners.

Despite these gaps, a post-Brexit cooperation agreement is not on the horizon, with structural reforms pursued by each side reflecting conflicting priorities and a growing political disconnect. Following the 2020 proposals of the New Pact on Migration and Asylum, EU member states are still negotiating a mandatory responsibility-sharing mechanism. Unless a wide consensus is forged, post-Brexit relations on migration and asylum will likely not reach the EU agenda. Meanwhile, in April 2022, the UK overhauled its asylum and immigration law, undercutting safeguards for asylum seekers reaching the country irregularly. The same month, the UK government signed a deal with Rwanda to deport all asylum seekers arriving via the Channel – a move even the European Commission has criticised.

Recent post-Brexit tensions over other policy areas, most prominently the Northern Ireland Protocol, have reduced mutual trust to a historic minimum. This also makes an ambitious and comprehensive agreement over asylum and migration matters an unlikely prospect – at least for the time being. Yet, as neighbours, the EU and the UK will continue to depend on each other to pursue their respective policy objectives in migration and asylum. As such, they will continue to be under pressure to identify shared goals and create the conditions for mutually advantageous cooperation in the future.

This Discussion Paper explores the reasons behind both sides' inability to agree to a comprehensive cooperation framework, focusing on border management, safe and legal routes from EU countries, and return operations from the UK. Although living separately and facing numerous unresolved tensions, the EU and the UK can and should pursue a post-Brexit cooperation framework in these matters. Without it, they would both be worse off.

As a first step, the two sides should focus on **rebuilding trust**. This can be achieved by pursuing less contentious goals within immediate reach, such as enhanced anti-smuggling efforts, while also diffusing political tensions across the board. Once an atmosphere of sincere cooperation is restored, as a second step, the EU and the UK should **define a broader and more ambitious partnership**. Safe and legal channels from the EU to the UK should be re-established. At the same time, equitable solutions for facilitating the return of third-country nationals from the UK to the EU, in full respect of procedural safeguards, should also be found. Although reciprocity would have to be at the heart of this new arrangement, the EU and the UK should go beyond a transactional approach, particularly by strengthening protection pathways and burden-sharing solutions, including with third countries, in line with their international commitments.

The European Commission should take the lead in the negotiation of a post-Brexit EU–UK cooperation framework. This would allow the EU to speak with one voice and pursue clear and coherent objectives across the different policy areas concerned. The newly established EU–UK Parliamentary Partnership Assembly should also be involved in the negotiations, helping to democratise the process and achieve a more balanced relationship in the interests of both sides.

Introduction

Since the end of the Brexit transition period, on 31 December 2020, the UK is no longer bound to the Dublin framework, the Eurodac fingerprint database, and other essential components of the European migration and asylum system. As a result, there is no longer a jointly agreed set of criteria to determine responsibility for asylum seekers. Nor is there a binding framework to identify and transfer asylum seekers and refugees to the responsible processing country, be it an EU member state or the UK. EU–UK anti-smuggling cooperation is also shaped by the UK's third-party status in Europol.[1]

The current legal, operational and policy vacuum makes both the EU and the UK worse off. With record-breaking numbers of irregular arrivals in 2021 and a correlated rise in asylum applications, the UK has conspicuously failed to meet its objective of 'taking back control' of its borders.[2] For its part, the EU continues to struggle to reduce secondary movements. Member states receiving the largest share of asylum applications also face further pressure on their systems, as they cannot request the UK to take responsibility for asylum seekers with family ties there.

The current legal, operational and policy vacuum in asylum and migration matters makes both the EU and the UK worse off. Nevertheless, the ones paying the highest price are those attempting to reach the UK via the English Channel.

Nevertheless, the ones paying the highest price are those attempting to reach the UK via the English Channel, with several serious incidents reported in 2021 and the years prior.[3]

Post-Brexit EU–UK cooperation on migration and asylum is nowhere in sight, either, with the two sides focused on their respective internal reforms and mutual trust at a historic low. The British government has overhauled its asylum system and turned to third countries to transfer unwanted asylum seekers abroad. However, these plans are at odds with the UK's obligations under international law and have been met with sharp criticism from civil society organisations (CSOs) and even public officials. The EU, on its end, remains occupied with the negotiations on the 2020 New Pact on Migration and Asylum, with member states still unable to reach an agreement on a permanent responsibility-sharing mechanism or reforms to the Dublin system.

Both the EU's and the UK's reform agendas face legal and internal political challenges. Yet, the prospect of a comprehensive and balanced post-Brexit agreement on migration and asylum is becoming increasingly less likely as their respective policies diverge further under the current leadership.

Both the EU's and the UK's reform agendas face legal and internal political challenges. Yet, the prospect of a comprehensive and balanced post-Brexit agreement on migration is becoming increasingly less likely as their respective policies diverge further under the current leadership.

Meanwhile, persistent disputes over other policy areas of post-Brexit cooperation and the British government's attempt to unilaterally disapply elements of the Northern Ireland Protocol have further undermined trust between the parties. In addition, they have put into question the current UK government's commitment to upholding its end of existing agreements.[4] This also casts serious doubts on the likelihood of a broader partnership covering asylum and migration matters.

Against this background, this Discussion Paper explores the reasons for and the consequences of the current lack of EU–UK cooperation on migration and asylum policy, focusing on border management, safe and legal routes from EU countries, and return operations from the UK. Any comprehensive EU–UK migration and asylum cooperation framework would also include other important fields, such as resettlement or joint partnerships with third countries. However, border management and the transfer of people seeking protection between the EU and UK are the areas where Brexit has created the deepest policy gaps and the strongest political tensions.

Despite the many stumbling blocks on the way to an ambitious partnership, as neighbours, the EU and the UK will continue to depend on each other to implement their migration and asylum policies. While acknowledging that the current political climate is not conducive to cooperation, this Discussion Paper identifies several ways forward. It argues that despite living separately, the EU and the UK can and should still pursue a (better) life together in the future.

The UK's withdrawal from the Dublin system

Pre-Brexit, the UK was bound to the first phase of EU asylum directives concerning reception conditions, qualifications and asylum procedures. The UK had also opted in the Eurodac and the Dublin III regulations; the latter is also referred to as the 'Dublin system'. These regulations, alongside other asylum measures which make up the Common European Asylum System, ceased to apply to the UK on 1 January 2021, following the inability of the UK and the EU to agree to an alternative migration and asylum framework.

The Dublin III Regulation 604/2013 – which remains in force in EU member states and associated third countries, such as Norway and Switzerland – defines the state responsible for processing asylum applications. The criteria for allocating responsibility are, in hierarchical order: (i) family ties; (ii) recent possession of a visa or residence permit; and (iii) irregular entry. If the first two criteria do not apply, then it is the 'Dublin state' where the asylum seeker first irregularly entered that should examine the asylum claim and host the applicant.

The Dublin Regulation also sets procedural rules to transfer asylum seekers to the responsible state if they move and apply for asylum again in a second state. To facilitate this process, Eurodac, the EU asylum fingerprint database, makes it possible to cross-check the identities of asylum seekers.

From the perspective of the British government, the benefits of the Dublin system were avoiding multiple applications in different member states ('asylum shopping') and the capacity to transfer asylum seekers back to other European countries, allowing for

an overall reduction of asylum applications.[5] However, in the run-up to Brexit, transfers into the UK outnumbered outward transfers for several years (see Figure 1).

From the perspective of the British government, the benefits of the Dublin system were avoiding 'asylum shopping' and the capacity to transfer asylum seekers back to other European countries, allowing for an overall reduction of asylum applications. However, in the run-up to Brexit, transfers into the UK outnumbered outward transfers for several years.

The transfers to the UK grew especially in 2015 and 2016, following the arrival of an unprecedented number of asylum seekers to the EU, specifically from Syria. By contrast, outbound transfers have declined steadily since 2008. Multiple factors contributed to the decline. The M.S.S. and N.S. rulings from 2011 likely played a role, as Dublin transfers became subject to closer judicial scrutiny over fundamental rights protections.[6] Other reasons may include a lack of trust and appropriate communication between the respective national authorities, or the reported dysfunctional working environment of the UK unit responsible for Dublin transfers.[7]

Fig. 1

NUMBER OF DUBLIN TRANSFERS IN AND OUT OF THE UK (2008-20)

■ Transfers out   ■ Transfers in
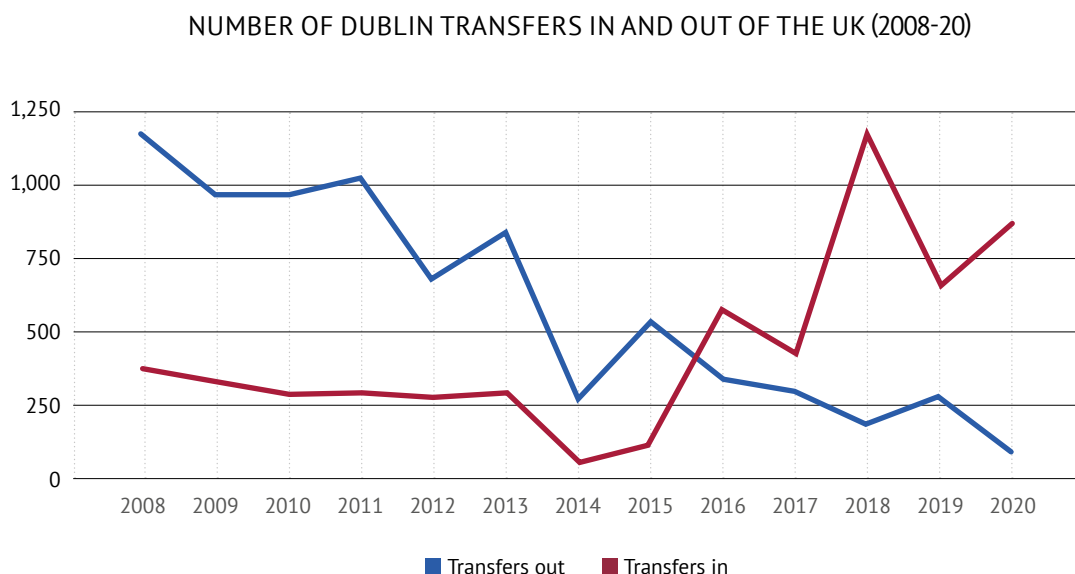
Sources: Author, based on *Migration Observatory* and *UK Home Office* (2021)[8]

The stronger judicial oversight over transfers and the perceived imbalance in responsibilities attributed to the Dublin system reduced its political attractiveness to British eyes, considering that 'taking back control' of UK borders and immigration policy was one of the most impactful slogans of the Brexit referendum campaign.[9] This led to the British government excluding re-joining the Dublin system as an associated country and shifted the EU's and UK's attention to immigration control when they started defining the terms of Brexit.[10] It also made it harder for both sides to agree on a framework to replace the Dublin system.

When negotiating the Trade and Cooperation Agreement (TCA), which governs the post-Brexit EU–UK relationship, the EU negotiating team stated its intention to set up a regular dialogue on irregular migration. Instead, the UK proposed two draft agreements, one on transferring unaccompanied, asylum-seeking children and the other on readmitting persons who entered or reside without authorisation.[11]

The European Commission rejected these proposals because they fell out of its mandate for the TCA negotiations, as member states had unanimously agreed to exclude asylum and return matters from it. EU officials also informally described the British proposals as "very unbalanced":[12] member states would be obliged to take back all asylum seekers who entered the UK irregularly after residing in or transiting through the EU.[13] By contrast, the UK would only admit unaccompanied children with family members residing in the country, and only at its discretion. The asymmetrical responsibilities inherent in the British 'offer' did not incentivise the member states to rewrite the Commission's mandate.

The TCA, which was eventually signed by the EU and the UK in December 2020, focuses on trade, fisheries, policing and security, and the overarching governance framework. The only clear migration-related commitment concerns anti-smuggling operations: the TCA establishes that Europol should continue its operational cooperation and information exchange with the UK, which is now a third party.

In relation to other elements of migration and asylum policies, such as family reunions and returns, the TCA includes not binding commitments but aspirations and long-term goals. More specifically, the annexed Joint Political Declaration highlights the importance of the "good management of migratory flows".[14] Due to its declaratory nature, it falls short of setting reciprocal obligations.[15] Instead, it signals the UK's intention to engage bilaterally with member states to identify "practical arrangements on asylum, family reunion for unaccompanied minors or illegal migration".[16]

Since the signing of the TCA, the UK has tried – and failed – to convince member states, including France, Belgium, Germany, Sweden and the Netherlands, to enter into bilateral return agreements. The Netherlands, Germany and France argued that these matters should be decided by the EU collectively. Others, like Belgium, stated that the UK can no longer count on "European solidarity".[17]

Since the signing of the TCA, the UK has tried – and failed – to convince member states, including France, Belgium, Germany, Sweden and the Netherlands, to enter into bilateral return agreements.

In sum, there is no formal agreement that allows the UK to return asylum seekers to any EU member state. Safe and legal routes to the UK under the Dublin system, for instance, for asylum seekers seeking to reunite with their family members, are also closed.

The rise in asylum applications and Channel crossings post-Brexit

While asylum seekers can no longer reach the UK via safe and legal routes previously available under the Dublin system, the country has experienced an unprecedented rise in irregular arrivals by small boat via the English Channel post-Brexit. This has also contributed to an overall increase in asylum applications in the UK.

Before Brexit, the UK generally received fewer asylum applications than EU member states. As late as 2020, the UK saw the arrival of a total of approximately 37,000 asylum applicants (including dependant family members). In comparison, Germany received 102,000; France, 81,000; Spain, 86,000; and Greece, 37,000. The situation changed significantly in 2021 when Germany received 148,000 applications; France, 103,000; Spain, 62,000; Greece, 22,000; and the UK, 56,000 (see Figure 2).

The UK and most EU member states saw a rise in applications between 2020 and 2021, partly due to the lifting of border restrictions set during the COVID-19

FIRST-TIME ASYLUM APPLICANTS (2017-21)

Germany   Greece   Spain   France   UK
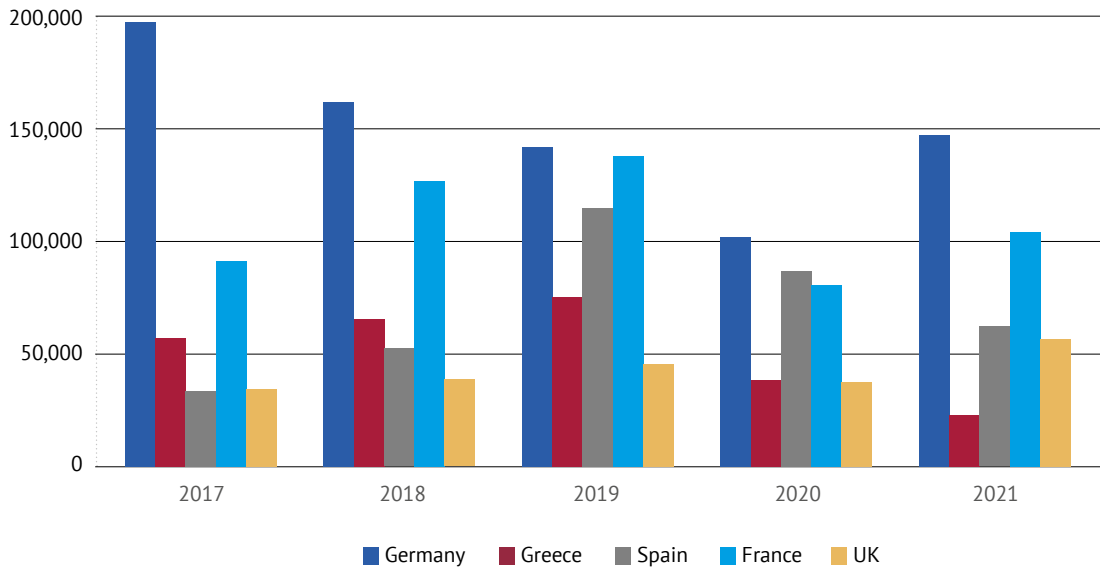
pandemic. However, while the increase was between 27% (France) and 45% (Germany) in the EU, the UK received 52% more applications. The UK's 2021 figure for main asylum applicants is also the highest in almost two decades, overtaking even the levels experienced at the peak of the so-called EU migration crisis (see Figure 3).[19]

The rise in irregular arrivals following Brexit is what fuelled the increase in asylum applications in the UK.[21] While reaching the country by hiding in tracks has become more difficult,[22] Channel crossings by boat reached a record high of 28,000 in 2021, up from 2,000 in 2019 and 8,000 in 2020.[23] More than 9,000 people have

ASYLUM APPLICANTS W/O DEPENDENT FAMILY MEMBERS IN THE UK (2003-21)
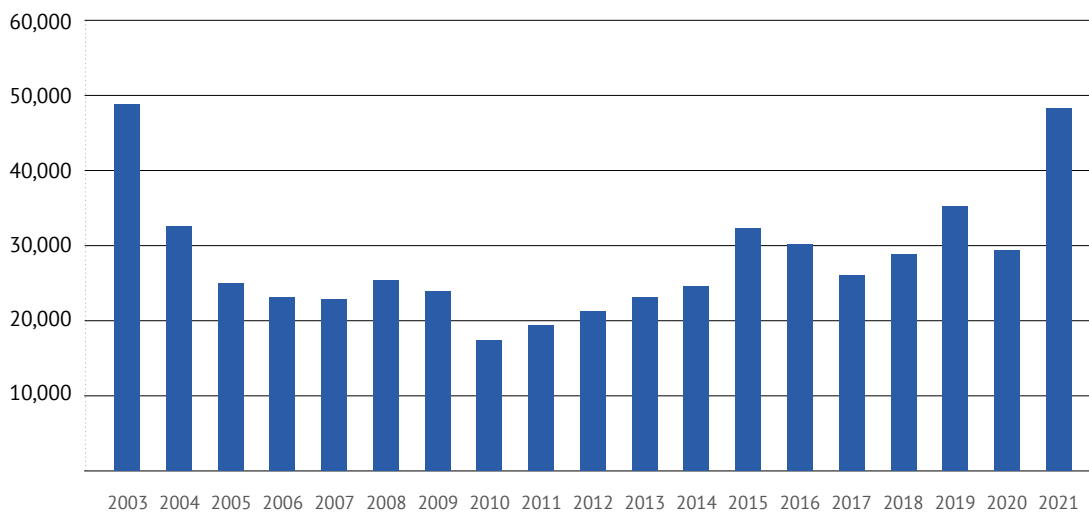
crossed in small boats so far this year, which is reportedly more than double the number recorded in the same period in 2021.[24]

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This steady increase cannot be explained on the basis of changes to or a weakening of bilateral security arrangements. Brexit did not affect the UK's border management agreements with its neighbouring coastal states, France and Belgium.[25] In fact, cooperation at the bilateral level *increased* following the UK's departure from the EU.

Border controls between the UK and France are regulated by the Le Touquet (2003) and Sandhurst (2018) treaties. Under the former, French authorities must prevent non-EU nationals from entering the UK without a visa. The latter reinforced French–UK border cooperation, leading to the creation of the UK-France Coordination and Information Centre to exchange real-time intelligence on traffic flows across the Channel. In 2021, the UK also agreed to pay €63 million to strengthen France's surveillance capabilities and stop departures of small boats from its coasts.[26]

Similarly, Belgium increased the control of its transit points following an agreement reached in 2018 with the UK. In November 2021, the British and Belgian governments also signed a Joint Declaration, renewing their commitment to preventing irregular migration to the UK through mutual information exchange and effective security technology and operational enhancements.

Bilateral border management and surveillance arrangements benefitted from more resources in recent years, not less.[27] This resulted in an unprecedented number of interceptions in the Channel, despite UK officials accusing European national border forces of not doing enough to stop irregular departures.[28]

Multilateral anti-smuggling cooperation also continued after Brexit, although the UK now has third-party status in Europol.[29] Europol provides advanced and sophisticated instruments for joint efforts against cross-border crime, like the European Multidisciplinary Platform Against Criminal Threats and the European Migrant Smuggling Centre (EMSC).[30] British authorities actively cooperate with Europol and the EMSC and so continue to play a role in tracking cross-border smuggling networks active across Europe and the UK.[31]

And yet, these efforts at bilateral and multilateral levels did not prevent Channel crossings from reaching record highs in 2020 and 2021.[32]

The reasons for the rise in crossings are complex. Nevertheless, anti-smuggling and deterrence strategies in particular have become weak spots following the UK's departure from the EU.[33]

Firstly, the Channel route has seen a swift professionalisation and internationalisation of criminal activities, with smuggling networks going as far as establishing procurement cells abroad and outsourcing logistics to specialised criminal facilitators.[34] Prompt and effective anti-smuggling information exchange has become essential to issuing early warnings and preventing both criminal activities and incidents. Intelligence and operational gaps have remained unaddressed in this respect, with the UK government's attention long focused on maritime surveillance and on making the Channel route 'unviable'.

Secondly, 2021 and 2022 statistics suggest that increased maritime surveillance alone will not discourage asylum seekers from crossing the Channel. Those reaching the UK irregularly are driven by a variety of personal motivations and may include persons who previously applied for asylum in a Dublin state but wish to be reunited with their family members, or else have language or other cultural links with the UK.[35]

Without safe and legal routes, asylum seekers were left with arguably no other option but to embark on boats. Trying to stop these Chanel crossings only treated the symptoms without offering sustainable solutions.

It is significant that independent of their reasons, most asylum seekers who arrived in the UK via the Channel in 2021 were eventually recognised as refugees.[36] Without safe and legal routes, these asylum seekers were left with arguably no other option but to embark on boats.[37] Trying to stop these crossings only treated the "symptoms" without offering sustainable solutions, as European Commission officials stated.[38]

The lack of opportunities to reach the UK via safe and legal routes combined with increased border surveillance have pushed asylum seekers – and other third-country nationals (TCNs) – into the hands of smugglers and to take greater risks to cross irregularly.[39]

Tragedy struck on 24 November 2021 when at least 27 persons lost their lives while trying to reach the UK on a small boat, the worst incident ever recorded in the

English Channel.[40] In the immediate aftermath of the shipwreck, France hosted an emergency meeting in Calais with European Commission, Belgian, Dutch and German representatives. Although the presence of the British government was foreseen, UK Home Secretary Priti Patel was eventually "disinvited" due to a diplomatic row with France following reciprocal accusations about the tragedy and its causes.[41]

The EU and national representatives at the Calais meeting underlined "the need to […] break the business model of criminal networks".[42] The Commission and the four member states also committed to strengthening police and judicial cooperation and deploying Frontex resources, albeit limited to aerial surveillance, in the North Sea region. They also acknowledged that the EU must work with the UK on these issues. However, the tensions which culminated in the diplomatic fallout preceding the Calais meeting made it impossible to review current strategies; only worsening bilateral France–UK relations further.[43]

Combined with the lack of safe and legal alternatives, the inability to address current shortcomings increases the chances of serious or even deadly incidents in the Channel in the future.

The widening gaps between EU and UK asylum policies

Post-Brexit developments suggest that the UK, the EU and member states would be better off with a strengthened and balanced partnership on migration and asylum. Asylum seekers and refugees would also benefit from more humane cooperation to ensure safe and legal channels to the UK. Instead, diverging migration and asylum agendas pursued by each side of the Channel point to an ever-growing political cleavage.

EXPANDED RESPONSIBILITY CRITERIA AND THE NEW PACT ON MIGRATION AND ASYLUM

In September 2020, in the midst of the TCA negotiations, the European Commission put forward its long-awaited New Pact on Migration and Asylum to address systemic imbalances and unlock a protracted stalemate in the negotiations of EU asylum reforms.[44]

Since 2015, Southern European countries have called for mandatory relocations to compensate for the uneven responsibilities which, in their view, stem from the Dublin system. An opposing group, led by the Visegrád Four, rejects such mandatory redistributions. Northern European states emphasise the need to end secondary movements (i.e. the onward movement of migrants, including refugees and asylum seekers, which contravenes the current rules).

In response, the New Pact proposes a corrective mechanism of mandatory yet flexible solidarity. This would allow member states to make solidarity contributions through a variety of support measures, including relocation and other forms of operational assistance.[45]

At the same time, in its proposal for an Asylum and Migration Management Regulation (RAMM), the Commission proposed reviewing the responsibility criteria in the Dublin system by expanding the scope of family ties and introducing a new criterion based on prior education in a member state.

While the RAMM proposal inherited many shortcomings of the current Dublin system,[46] expanding the scope of responsibility criteria could help reduce secondary movements by creating positive incentives for asylum seekers to reach their intended destinations through regular routes.[47]

These measures reflect the New Pact's goal of achieving "a fresh start" in EU migration and asylum while also embracing a "pragmatic and realistic" approach.[48] Despite efforts by the Portuguese, German and French EU Council Presidencies to move the negotiations forward, however, they have failed to forge a new consensus on a permanent and mandatory responsibility-sharing mechanism. As of June 2022, member states remain divided over the nature and scope of solidarity, suggesting that the stalemate will remain for the foreseeable time.

The uncertain outcome of the New Pact negotiations also blocks a prospective post-Brexit EU–UK arrangement concerning asylum policy. This became clear during the French EU Council Presidency of the first half of 2022. While France intended to use its Presidency to put the file on the EU agenda, Italy reportedly threatened to veto any EU–UK migration and asylum agreement. In a context where Southern European states are already struggling to promote stronger solidarity commitments at the EU level, helping the UK – for example, by accepting returns of asylum seekers without further conditions – would be a hard sell. Southern Europe thus declared off the record that countries at the EU's external borders might only be willing to green-light a post-Brexit agreement once an EU responsibility-sharing mechanism has been agreed to.[49]

As a result, most member states continue to oppose the idea of the EU negotiating a comprehensive post-Brexit migration and asylum framework.[50] Considering the protracted negotiations on the New Pact reforms, the current impasse may indefinitely postpone dialogue with the UK.

Even if the New Pact negotiations were to move forward, however, an immediate breakthrough in post-Brexit EU–UK relations would be unlikely. In fact, an agreement on the New Pact's proposals could *widen* the policy cleavage between the EU and the UK. More specifically, the RAMM's expanded responsibility criteria in relation to family ties and prior education would entail a notable departure from the *status quo ante* Brexit. The UK is already uninterested in re-joining the current Dublin system as an associated country. It will have even less appetite to model its future relations with the EU in this field on any alternative, Dublin-like arrangements with expanded responsibility grounds.

Regardless of their outcome, the current EU-level asylum reforms create concrete obstacles to the Union's new terms of cooperation with the UK.

The EU's New Pact stresses the importance of strengthened cooperation, among others, with Turkey, the Western Balkans and the African Union, but not the UK.

The overall political distance between the two sides is reflected in the New Pact's lack of a specific reference to the UK. Third countries generally play a strategic role in the implementation of the EU's new migration agenda.[51] The New Pact's accompanying Communication stresses the importance of strengthened cooperation, among others, with Turkey, the Western Balkans and the African Union, but not the UK.[52]

This partly reflects the UK's unique geopolitical position. Unlike the other relevant third states, the UK is not a 'country of origin or transit'. But it does remain the neighbour with the deepest economic, cultural, historical and – at least, until Brexit – political ties with the EU. The EU and the UK also share an interest in and commitment to strengthening the international response to large refugee movements and providing protection for asylum seekers. However, the Pact does not point to, let alone emphasise, the importance of developing a comprehensive, balanced and ambitious EU–UK relationship in the future.

MOVING FURTHER APART: THE UK NATIONALITY AND BORDERS ACT

On the other side of the Channel, reforms to UK migration and asylum policy have widened its distance from the EU even further.

In July 2021, as part of its New Plan for Immigration, the British government introduced the Nationality and Borders Bill. After a long review process, the Bill became an Act of Parliament on 28 April 2022. The legislation introduced sweeping changes to the UK asylum system. Among others, it created a two-tier system dependent on whether asylum seekers reached the UK regularly or not. Those who reach the UK via irregular routes, including those crossing the English Channel by boat, could be granted less favourable entitlements: a form of temporary protection with limited access to welfare benefits and limited rights to family reunions. They would also face the constant threat of removal.[53] These changes led to intense criticism from experts and CSOs, and even the UN High Commissioner for Refugees (UNHCR).[54]

Officially, the legislation's premise is that asylum seekers should not reach the UK via the Channel but rather via regular routes. However, the UK government has not opened any new safe and legal channels post-Brexit.[55] It also did not swiftly implement its emergency programmes for Afghanis and Ukrainians,[56] although its new immigration agenda includes an explicit commitment to ensure that resettlement schemes are "responsive to emerging international crises".[57]

The two-tier system thus appears to be the culmination of a long-term endeavour to create a "hostile environment" for asylum seekers – as well as other mobile persons –, in line with the uncorroborated assumption that this would dissuade Channel crossings and facilitate removals.[58]

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Despite the UK government's tougher stance, deeper cooperation with its European neighbours will nevertheless remain essential to implement its plans. This is also reflected in the extension of the "rebuttable presumption" to EU countries, another key component of the Nationality and Borders Act.[59] Following this extension, an application for international protection is to be regarded as inadmissible if, before reaching the UK, the asylum seeker benefitted from refugee status or some other form of protection in a member state, had made or could make an application for asylum there, or was refused asylum.

This extension implies that the UK could, in principle, return asylum applicants to any designated safe country, including EU member states. Considering that virtually all asylum seekers who reach the UK irregularly do so after transiting through the EU and that member states will

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However, without an EU-wide agreement or bilateral arrangements with member states, the UK will not be able to remove to the EU asylum seekers whose claims are to be regarded as inadmissible under the new law. Instead, because of the two-tier system, persons apprehended after crossing the Channel will likely end up in legal limbo, facing destitution and exploitation.[60]

THE UK–RWANDA MEMORANDUM OF UNDERSTANDING

In April 2022, the UK government signed a Memorandum of Understanding (MoU) with Rwanda. Under the MoU, asylum seekers arriving via the Channel would be transferred to and have their applications processed in Rwanda. The UNHCR, the Council of Europe and virtually all refugee rights organisations in the UK sharply criticised this 'offshoring arrangement' for promoting the use of detention, shifting international obligations to third countries, and increasing risks for asylum seekers.[61] The European Commission also took the unusual step of criticising the UK's plans for similar reasons, despite it being a sovereign third country. This only goes to confirm the policy and political cleavage between the two sides.[62]

From the perspective of the British government, the MoU makes a post-Brexit deal with the EU less urgent, or even redundant. When announcing the plan to the press, UK Prime Minister Boris Johnson pointed to what he described as the UK's "repeated and generous offers" to set in place a return agreement with France or the EU. However, he also highlighted that the UK must develop an alternative framework to end irregular arrivals and step up returns instead of "waiting for a deal [with the EU or France] that just doesn't exist".[63]

Despite the British government's hopes, it is far from certain whether the MoU with Rwanda will allow the UK to pursue its plans without wider cooperation with the EU or member states.

Firstly, the British government declared that the partnership with Rwanda is the best solution to end irregular arrivals by boat, claiming that it would deter those considering crossing the Channel.[64] But the unabating number of recorded crossings following the announcement of the MoU put this claim into question.[65] Even a top civil servant of the UK Home Office, Matthew Rycroft, challenged the claim, stating that there is no hard evidence supporting it.[66] The UK would still need the coastal states and the EU at large to help limit the number of Channel crossings in the future.

Secondly, the MoU stands in contrast with the UK's international obligations. According to the UNHCR, it is contrary to the spirit and letter of the 1951 Refugee Convention.[67] In addition, under the European Convention on Human Rights, removing an asylum seeker is unlawful if it leads to prolonged arbitrary detention, torture or inhumane or degrading treatment.[68] Refugees in Rwanda enjoy stronger legal protections and a more welcoming environment than in other third countries. But Rwanda also has a worrying human rights track record.[69] A string of legal challenges was mounted against deportations and the MoU following its announcement, a prospect that both the British government and experts had anticipated.[70]

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Against this background, a return agreement between the UK, and member states and the EU would not only have lower economic and political costs compared to the MoU with Rwanda.[71] It would also not face the same operational and legal challenges.[72] The question then is what the EU and its member states will consider an offer balanced enough to convince them to sit at the negotiating table in the future. Another question is what procedural safeguards would be included to ensure conformity with human rights obligations.

Better alone than in bad company?

Despite a growing political and policy divide from the EU, the UK will have virtually no choice but to continue seeking an agreement with the EU. Without it, newly introduced reforms – including future asylum and migration policies – are at serious risk of becoming a dead letter. English Channel crossings will most probably remain high, putting the UK government under further pressure to deliver on its Brexit promise of controlling entries into the country in an 'orderly' fashion.

Far from undermining UK priorities alone, the absence of a cooperation framework also runs against the EU's interest. There are concrete risks of further serious incidents in the Channel. The EU also faces the prospect of sustained secondary movements and additional pressure on the asylum and reception systems at its external borders.

Firstly, and as already highlighted above, the failure to develop an alternative framework to the Dublin system makes it virtually impossible for asylum seekers in the EU who do not belong to national groups benefitting from special emergency schemes, such as Ukrainians, to reach the UK.

Despite being unpopular with many human rights groups before Brexit, the Dublin system offered some asylum seekers a legal and safe route to the UK. According to Safe Passage International, between the late 2000s and 2016, over 3,000 people were reunited with their family members under the Dublin system.[73] Although these numbers appear negligible compared to yearly arrivals to the UK via the Channel, this safe and legal route was lost altogether after Brexit.[74]

This creates a barrier for asylum seekers hoping to enter the UK safely to be reunited with family members.[75] As warned by Safe Passage, in the absence of the Dublin scheme, children and separated families will "have no choice but to risk their lives crossing the Channel."[76]

The absence of the Dublin scheme poses a life threat to asylum seekers. It also constitutes a problem for European coastal states and the EU as a whole. Member states and the EU cannot afford more reputational damage due to further fatal incidents along their coasts.

This poses a life threat to asylum seekers. It also constitutes a problem for European coastal states and the EU as a whole. Member states and the EU cannot afford more reputational damage due to further fatal incidents along their coasts. As declared by French President Emmanuel Macron after the shipwreck of 24 November 2021, the Channel cannot become "a cemetery".[77] While the deadly incident brought tensions with the UK to the fore, it also showed that a strengthened anti-smuggling partnership and broader dialogue on migration and asylum are crucial to both the EU and the UK.

Secondly, the absence of a comprehensive partnership may lead to further secondary movements within the EU. The EU's new Action Plan against migrant smuggling (2021-25), launched in September 2021, suggests this. Echoing the New Pact, the Action Plan does not acknowledge the UK among strategic partner countries. However, it recognises that many "irregular migrants" try to reach the EU "or the United Kingdom" if they have family, friends or an extended community there.[78]

The Action Plan stresses the importance for the EU to reinforce international cooperation "to reduce the incentives to embark on dangerous journeys". This would involve not only strengthening border and migration management but also "promoting legal migration and safe legal pathways".[79]

Should the EU fail to develop a balanced EU–UK partnership which combines anti-smuggling efforts with safe and legal routes, continued secondary movements will generate especially high economic and political costs for France and other coastal EU countries that receive asylum seekers and migrants wishing to reach the UK.

Should the EU fail to develop a balanced EU–UK partnership which combines anti-smuggling efforts with safe and legal routes, continued secondary movements will generate especially high economic and political costs for France and other coastal EU countries that receive asylum seekers and migrants wishing to reach the UK. They would also add to the tensions between member states and the systemic problems concerning the functioning of the Common European Asylum System.

Thirdly, the absence of a comprehensive and balanced partnership is not in the interest of member states at the EU's external borders, especially in Southern Europe. This is the region from which most transfers to the UK under the Dublin system originated.[80] Member states like Italy and Greece currently have no institutionalised framework to facilitate transfers to the UK, even if asylum seekers have relatives or cultural links there. Without rules to organise such transfers, the responsibility for processing claims will remain with these countries and thus increase pressure on their asylum and reception systems.

Failing forward towards a mutually advantageous future partnership?

Reflective of the broader political dynamics, EU–UK cooperation on asylum and migration has reached new record lows post-Brexit. With the relationship already strained, current tensions over the Northern Ireland Protocol make a comprehensive and ambitious partnership covering asylum and migration matters an unlikely prospect – at least for the time being.[81]

But the absence of a cooperation framework on migration and asylum creates a legal, operational and policy vacuum that undermines the objectives and interests of both the EU and the UK. The current developments also point to a worrying departure from international standards and fundamental rights protections. Despite the unconducive political climate and the many inevitable stumbling blocks that lie ahead, the costs of no EU–UK cooperation should prompt both sides to explore avenues to bridge the growing divide over migration and asylum.

Despite the unconducive political climate and the many stumbling blocks that lie ahead, the costs of no EU–UK cooperation should prompt both sides to explore avenues to bridge the growing divide over migration and asylum.

This Discussion Paper advances a series of progressive actions which would allow the EU and the UK to achieve a mutually advantageous relationship. In due time, the two parties should also formalise a more structural and comprehensive arrangement. But given the current state of EU–UK relations, in the first instance, efforts should be undertaken to restore trust and bring about suitable conditions for pursuing a broader agenda. To this end, both sides should take the following actions:

► **Strengthen operational cooperation in line with shared policy objectives.** The UK and the EU should **improve information-sharing** and **enhance anti-smuggling strategies**. This targeted partnership should not be limited to reducing Channel crossings, however. It should ensure more effective life-saving operations as well.

► Find ways to cooperate on other uncontentious policy areas, such as pursuing more **effective cooperation with third countries, enhancing coordination on resettlement efforts and developing joint emergency responses to humanitarian emergencies**. Identifying further areas and avenues of cooperation need not be limited to governmental initiatives. The newly established EU–UK Parliamentary Partnership Assembly – which brings together 35 members of the European and UK parliaments each – could play a useful role in this respect while also helping transcend ideological partisanship.

Once relations between the EU and the UK are on a more stable footing and an atmosphere of sincere cooperation is restored, the two sides should take steps to establish a more comprehensive framework:

► **Work towards creating safe and legal channels from the EU** and, at the same time, **find equitable solutions for facilitating the return of TCNs from the UK in specific circumstances**. Although this arrangement would fill the gap left by the UK's departure from the Dublin system, the political costs of re-joining Dublin would be too high for the British side.[82] Meanwhile, EU member states would not consent to a partnership focused exclusively on returns. Overall reciprocity would thus have to be at the heart of this new arrangement.

► When determining the criteria for responsibility under this new transfer arrangement, the experience – and shortcomings – of the Dublin system should be taken into account. While the two sides should **take steps to revise and improve previously applicable rules and procedures** to facilitate more effective transfers, this should neither lead to disproportionate responsibilities nor hinder the chances of a fair outcome for asylum applicants and other persons falling within the scope of the agreement. There should also be a legally binding guarantee that those reaching the UK via routes established through EU–UK cooperation will not be deported to processing centres in third countries.

► **Go beyond a transactional approach**, particularly by developing safe pathways and swift passage for specific categories of vulnerable asylum seekers and specific national groups with immediate protection needs. Groups who are eligible for emergency schemes, such as Ukrainians, should be excluded from the general transfer framework. Unaccompanied children should also be offered the possibility of reaching the UK under separate schemes.

► **Seek solutions to improve the management of migration while respecting the human rights of migrants and forcibly displaced persons.** Shared international commitments under the Global Compact for Migration and the Global Compact on Refugees should inspire specific objectives. Together with international and human rights obligations, these cooperation frameworks reflect the aspirations of the international community. As such, they constitute a solid foundation to build an ambitious future EU–UK partnership on migration and asylum upon.

Across the board, and at each step of this process, the European Commission should take the lead in negotiating the future partnership on behalf of the EU. Asylum and migration matters are an issue of interest to the whole of the EU. The Commission should request a negotiating mandate on this account, to which member states should consent if the UK demonstrates a genuine commitment to enter – and adhere to – an equitable cooperation framework in line with international obligations. In this process, the EU and UK parliaments should also be granted supervisory powers through the Parliamentary Partnership Assembly. The Assembly's involvement involvement would democratise the negotiations, guarantee the implementation of any agreement, and help achieve a more balanced relationship that is in the interests of both sides.

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