



House of Commons  
Home Affairs Committee

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**UK-EU security  
cooperation after  
Brexit: Government  
Response to the  
Committee's Fourth  
Report of Session  
2017–19**

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**Ninth Special Report of Session  
2017–19**

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## Home Affairs Committee

The Home Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Home Office and its associated public bodies.

### Current membership

[Rt Hon Yvette Cooper MP](#) (*Labour, Normanton, Pontefract and Castleford*)

[Rehman Chishti MP](#) (*Conservative, Gillingham and Rainham*)

[Sir Christopher Chope MP](#) (*Conservative, Christchurch*)

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[John Woodcock MP](#) (*Independent, Barrow and Furness*)

### Powers

The Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the internet via [www.parliament.uk](http://www.parliament.uk).

### Publications

Committee reports are published on the Committee's website at [www.parliament.uk/homeaffairscom](http://www.parliament.uk/homeaffairscom) and in print by Order of the House.

Evidence relating to this report is published on the [inquiry publications page](#) of the Committee's website.

### Committee staff

The current staff of the Committee are Elizabeth Hunt (Clerk), Harriet Deane (Second Clerk), Simon Armitage (Committee Specialist), Penny McLean (Committee Specialist), David Gardner (Senior Committee Assistant), Mandy Sullivan (Committee Assistant) and George Perry (Senior Media and Communications Officer).

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# Ninth Special Report

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On 21 March 2018 the Home Affairs Committee published its Fourth Report of Session 2017–19, [UK-EU Security Cooperation after Brexit](#) (HC 635). The Government's response was received on 6 September 2018 and is appended to this report.

In the Government's Response the Committee's recommendations are shown in **bold** type; the Government's response is shown in plain type.

## Appendix: Government Response:

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### Introduction

The Government would like to thank the Committee for its report published on 21 March 2018.

Criminals and terrorists operate across borders. The threat has grown in intensity, complexity and severity. Criminal networks are increasingly resilient and adaptable, exploiting technology and becoming involved in almost every type of crime. In the face of these threats, the shared tools, measures, initiatives and capabilities that have been developed over the last 40 years are proven to save lives. We think it is imperative that we find ways to protect these mutually important capabilities and avoid operational gaps when we leave the European Union (EU).

To that end, we have set out our vision for the UK's future relationship with the EU in our White Paper.<sup>1</sup> The UK has commenced discussions with Task Force 50 on our future relationship, and published a number of documents which have informed those discussions,<sup>2</sup> including our White Paper on the future relationship between the United Kingdom and the EU.

Since the Committee's report was published, the government has also made significant progress on finalising the Withdrawal Agreement<sup>3</sup> – including agreeing a time limited implementation period (until 31 December 2020) in which we will continue to participate in EU Justice and Home Affairs (JHA) tools.

The Committee has examined the UK's current internal security relationship with the EU in great detail, informed by evidence from its witnesses. It has also identified challenges we will face in negotiating the UK's future relationship with the EU on security, law enforcement and criminal justice, and has made a number of conclusions and recommendations. We are grateful to the Committee for the valuable scrutiny it has provided. The Government's response to the specific conclusions and recommendations made by the Committee are below.

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1 Published 12 July 2018 – <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>

2 Published 9 May 2018 – <https://www.gov.uk/government/publications/framework-for-the-uk-eu-security-partnership>  
Published 24 May 2018 – <https://www.gov.uk/government/publications/technical-note-on-security-law-enforcement-and-criminal-justice>

3 Published 19 March – <https://www.gov.uk/government/publications/draft-withdrawal-agreement-19-march-2018>

The Government also notes the follow up report<sup>4</sup> published by the Committee on 24 July 2018, which the Government will respond to in due course.

## Conclusion and recommendation 1: Current security arrangements and Brexit objectives

**1. We welcome the objectives set out by the Government for negotiations with the European Union. We agree that there is a shared interest in continued policing and security cooperation, and we also agree that this requires pragmatism on both sides. Neither side should allow dogma to prevent solutions that are in the interests of our common security. In addition, both sides may need to be flexible about the timetable for transition. The EU should not be inflexible and try to restrict cooperation to existing third country models or existing precedents, and the UK should not be rigid about artificial “red lines” that could prevent effective cooperation. There is too much at stake, in terms of security and public safety, for either side to allow future cooperation to be diminished. (Paragraph 20)**

The Government welcomes the Committee's conclusion that it is in the shared interest of both the UK and EU – and its citizens – to continue close cooperation on security, law enforcement and criminal justice matters.

This conclusion echoes the Government's position, as set out in our White Paper,<sup>5</sup> on the desirability of securing an ambitious and pragmatic future security partnership that protects mutually important capabilities after we leave the EU. We are proposing a future relationship that protects operational law enforcement and criminal justice capabilities, including: mechanisms for rapid and secure data exchange; practical measures to support cross-border operational cooperation; and continued UK cooperation with EU law enforcement and criminal justice agencies.

While our relationship with the EU will change as a result of leaving the EU, the Prime Minister has made clear that the UK remains unconditionally committed to maintaining Europe's security – Europe's security has been and will remain the UK's security. We believe that the proposals set out in the White Paper are not only practical and pragmatic, but also provide security for citizens across the continent.

We agree with the Committee's conclusion that pragmatism is required from both sides, and that we should not restrict our future cooperation to existing third country precedents – none of which capture the breadth and depth of the relationship we are seeking.

The shared tools, measures, and capabilities that have been developed over the last 40 years have been proven to save lives. As set out in our White Paper – and our technical note on security, law enforcement, and criminal justice<sup>6</sup> – an approach to future cooperation which draws on precedents for EU agreements with third countries on individual measures or functions would result in unnecessary gaps in operational capabilities.

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4 Published 24 July 2018 – <https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1356/1356.pdf>

5 Published 12 July 2018 – <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>

6 Published 24 May 2018 – <https://www.gov.uk/government/publications/technical-note-on-security-law-enforcement-and-criminal-justice>

That is why we are proposing a new, coherent and legally binding agreement on internal security which protects mutually beneficial aspects of cooperation in this area and ensures that both the UK and the EU can continue to tackle fast evolving security threats. This agreement would need to have clearly defined scope, enable dynamic cooperation that can evolve to confront new threats and reflect new technologies, and include appropriate safeguards to underpin cooperation.

## **Conclusion and recommendation 2 – 6: Current security arrangements and Brexit objectives – Specific objectives in key areas of cooperation**

2. We welcome the Government's intention to maintain the intensive participation of the UK in Europol after Brexit, and we agree that the UK should be aiming for a bespoke arrangement rather than adopting existing third country arrangements. However, we urge the Home Office to set out precisely what it is aiming for in legal and operational terms; particularly in relation to the role of the CJEU. We believe that the value of the UK's participation in Europol—both to the UK and EU—means that the best outcome would be for the UK to retain what is effectively full membership of Europol. This should include direct access to Europol databases and the ability to lead joint operations—although we set out some of the likely obstacles to achieving this aim in Chapter 3. If the Government's aim falls short of full membership of Europol after Brexit, it should say so, and explain why. The Government should also further clarify whether the engaged, dynamic relationship it is seeking would preserve its current capabilities in full. (Paragraph 22)

3. Ministers are right to stress the vital importance of maintaining the sophisticated and efficient extradition arrangements made possible by the European Arrest Warrant. We believe that the best criminal justice outcome for both the UK and the EU would be for the current extradition arrangements under the European Arrest Warrant to be replicated after Brexit. However, we are concerned that the Government has been insufficiently clear about its intentions. There remains excessive uncertainty about whether the Government is seeking ongoing full participation in the European Arrest Warrant (unprecedented for a non-EU member state), a replication of existing third party arrangements, or a bespoke agreement. If it is the second or third option that the Government seeks, it must explain why, and be forthcoming and frank in setting out the additional constraints that this would place on the UK's extradition capabilities, as well as the time needed to negotiate them. It must also provide more clarity about its intended relationship with the CJEU in this field. (Paragraph 24)

4. We welcome the Government's ambition to retain the same full access to EU databases, and urge them to set out their plans more formally, in relation to SIS II, Prüm, PNR, ECRIS and the Europol Information System. (Paragraph 26)

5. We commend the Prime Minister for her commitment to maintaining a close security relationship with the European Union, and we agree that the UK should seek to maintain its capabilities in full after Brexit. This means seeking to retain Europol membership, replicating the provisions of the European Arrest Warrant, and retaining full access to EU data-sharing mechanisms. However, we believe Parliament should

**be given more clarity over the Government's precise intentions in each area. If its detailed negotiating objectives would result in inferior arrangements in practice, then Parliament should have the opportunity to debate those objectives.** (Paragraph 27)

**6. While replicating existing arrangements would be the most desirable outcome, we also believe that the Government should be honest with the public about the complex technical and legal obstacles to achieving such a close degree of cooperation as a third country, as we explore in detail in this report.** (Paragraph 28)

We continue to value our cooperation and information sharing through measures such as the European Arrest Warrant, Europol, and EU data-sharing measures. During our membership of the EU, the UK has worked with all Member States to develop a significant suite of tools, which supports the UK's and the EU's combined operational capabilities and helps keep citizens safe. It is important that the UK and the EU continue that cooperation, avoiding gaps in operational capability after the UK's withdrawal.

As the evidence to the Committee highlighted, the UK is a significant contributor to both Europol and the European Arrest Warrant. While we recognise our relationship will change as a third country, we must protect these shared capabilities. We have been clear in our White Paper<sup>7</sup> on our vision for our future security relationship with the EU – in both legal and operational terms. The UK currently participates in around 40 EU measures that support and enhance police and judicial cooperation in criminal matters under Chapters 4 and 5 of Title V of Part Three TFEU. We want a relationship which protects operational law enforcement and criminal justice capabilities, including: mechanisms for rapid and secure data exchange; practical measures to support cross-border operational cooperation; and UK cooperation with EU law enforcement and criminal justice agencies (such as Europol).

We welcome the Committee's conclusion that the UK should be aiming for a bespoke agreement, one which should not be restricted to third country precedents for cooperation on individual measures or functions. Working together through different legal structures should not be at the expense of protecting the public. The security of UK and EU citizens must be our overriding priority and that will not be achieved by a marked – and avoidable – reduction in our ability to combat serious crime and terrorism. Our analysis suggests that the operational outcomes we are seeking would be delivered most effectively by a new, coherent and legally binding internal security agreement.

The exact contours of our future relationship with the EU are a matter for negotiation, but the UK proposals are both legally viable and operationally important. We believe this kind of relationship is in the interests of both the UK and the EU. The capabilities developed by the EU and its Member States are mutually reinforcing, from the initial stages of identification and investigation of a suspect, through to arrest, prosecution and prisoner management. Together, they prevent criminals from using international borders to avoid detection and justice, safeguard against threats to public security and protect citizens and victims of crime.

We have also been clear that in leaving the EU, we will end the jurisdiction of the CJEU in the UK. The White Paper outlined in detail the UK's proposals for a new set of robust

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7 Published 12 July 2018 – <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>

institutional and governance arrangements, which will include a mechanism for addressing disputes through a Joint Committee so they can be resolved fairly and quickly. The Joint Committee would also keep under review the case law of both the senior courts of the UK and the CJEU, where this was relevant to the interpretation of the future agreement. If significant divergences were found between respective courts' interpretation of the agreements, the Joint Committee could be empowered to act to preserve the consistent interpretation of the agreements.

The ability of law enforcement agencies to transfer data both within the EU and with third countries is important to our collective security. It helps keep people safe by maximising the effectiveness of law enforcement agencies and bringing more criminals to justice. The UK believes that the EU's adequacy framework provides the right starting point for the arrangements the UK and the EU should agree on data protection, and we want to go beyond the framework in some respects. The UK and the EU start from a position of trust in each other's standards and regulatory alignment on data protection. The UK is ready to begin preliminary discussions on an adequacy assessment so that a data protection agreement is in place by the end of the implementation period at the latest.

### **Conclusion and recommendation 7 – 8: Current security arrangements and Brexit objectives - Transitional arrangements**

**7. We welcome the commitment of the UK Government to continue taking part in existing security measures during a transition period, and the commitment of the EU to extend effective Member State status to the UK during this time. It is important that these commitments are translated into legal text as swiftly as possible. However, the European Union's proposals for this period would seemingly not allow the UK to retain its governance role in Europol, nor opt into new criminal justice initiatives during that period, unless they build on or amend existing measures. Given the UK's unique and substantial contribution to policing and security cooperation in Europe, we urge the EU to reconsider. Disrupting Europol's governance arrangements next March, in advance of a wider negotiation about how the new relationship should work, would not benefit anyone's security or safety. Restrictions on Europol membership, or on participation in new measures during transition, would not be conducive to developing a future security relationship that is as dynamic as exists now. More importantly, an inferior relationship would be a gift to all those who wish to do us harm. (Paragraph 32)**

**8. Both the UK and the EU are right to distinguish these negotiations from other elements of the future partnership, and we agree with the Government that the two parties should conclude a separate, comprehensive security treaty. Nevertheless, it is crucial that the negotiations start imminently. We are concerned that there may be significant hurdles in the way of preserving the UK's existing capabilities, even if it is the intention of all parties to do so. Moreover, given the complex technical and legal obstacles that it must overcome, the Government and the EU must remain open to extending the transition period for security arrangements beyond the EU's proposed end-date of December 2020. (Paragraph 33)**

Since the publication of the Committee's report, the UK and the EU have reached an in principle agreement on the terms of the implementation period, that will start on



30 March 2019 and last until 31 December 2020. The draft Withdrawal Agreement, published on 19 March<sup>8</sup> and endorsed at the March European Council, includes the agreed legal text.

During the implementation period the UK will continue to participate in Europol and other existing EU Justice and Home Affairs (JHA) tools and will also be able to choose to take part in any amendments or updates to them. This will enable the UK to continue making a valuable contribution to the security of all EU Member States during the implementation period.

The UK will no longer be an EU Member State during the implementation period. However, as set out in the agreement reached in March, common rules will remain in place and representatives or experts from the UK may continue to participate in the meetings of EU agencies and bodies where the presence of the United Kingdom is necessary and in the interest of the Union, or where the discussion concerns acts addressed to the UK and its citizens. The exact nature of the UK's participation is a matter for further discussion.

Since the publication of the Committee's report, the UK has also commenced discussions with Task Force 50 on our future relationship. On the basis of the proposal set out in this White Paper,<sup>9</sup> the UK's negotiating team will continue to engage with the EU at pace, in order to reach agreement on a framework for the future relationship and to finalise the Withdrawal Agreement by the autumn.

## Conclusion and recommendation 9 – 13: Europol

### *Existing third country models*

9. Existing operational agreements between Europol and third countries allow for extensive cooperation across a number of areas, including considerable access to Europol products and a physical presence at Europol headquarters. However, such arrangements fall significantly short of the full membership currently enjoyed by the UK. It is clear that an operational agreement between the UK and the EU after Brexit, based on existing third country models, would represent a significant diminution in the UK's security capacity. (Paragraph 41)

### *Existing 'bespoke' relationships*

10. There are no direct comparators for the relationship with Europol that the UK is seeking. Denmark's operational agreement with Europol is the best precedent, short of full membership, which is reserved for EU Member States. It allows the country better access to databases and data-sharing than other operational partners, and the ability to attend meetings of the Management Board as a non-voting observer. Under this arrangement, Denmark fully respects the direct jurisdiction of the CJEU. It nevertheless falls short of full membership, and does not give it direct access to the agency's main database, even though it remains a full EU Member State. (Paragraph 45)

8 Published 19 March – <https://www.gov.uk/government/publications/draft-withdrawal-agreement-19-march-2018>

9 Published 12 July 2018 – <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>



### ***Prospects of a 'bespoke' deal for the UK***

11. Europol is the jewel in the crown of EU law enforcement cooperation. Under the able and effective leadership of its current Director, Rob Wainwright, it has become an invaluable tool in the fight against international terrorism, serious organised crime and cybercrime. In an increasingly interconnected world, with many serious crimes crossing borders or taking place online, it has never been more vital for UK law enforcement agencies to work in partnership with their counterparts across Europe. From the evidence received, it is clear to us that there can be no substitute for UK access to Europol's capabilities and services, and that maintaining this should be a key priority in the Brexit negotiations. (Paragraph 52)

12. The UK Government should do all it can to achieve the negotiating objective of a future relationship with Europol that maintains the operational status quo in full. It is therefore welcome that the Prime Minister has indicated willingness to accept the remit of the CJEU in this area. The commitments she has given suggest that if the UK and Europol are in dispute in future, the CJEU would be the ultimate arbiter. We welcome this flexibility in the Prime Minister's approach, as a way of ensuring continued security cooperation, which is in the interests of both the UK and the EU. For the operational status quo to be maintained, the future relationship must provide for more than Europol's operational partnership with Denmark, including:

- A seat on the Europol Management Board, with a formal say in the strategic priorities and direction of the agency, reflecting the UK's leadership role in the organisation since 2009, and its world-leading strength in policing and intelligence;
- The stationing of UK officers and staff and national experts at the Europol headquarters, with the capacity to lead cross-border operations, as they have done regularly in the past; and
- Direct access to the full menu of data-sharing and intelligence products, including the Europol Information System, given the volume of requests made by UK law enforcement. (Paragraph 53)

13. Although it would be premature to second-guess the outcome of negotiations, the evidence we have received leaves us concerned that it will be difficult for the UK to achieve a relationship with Europol which is closer than Denmark was able to obtain. We hope that the volume of data exchanged between the UK and Europol might enable a bespoke mechanism to be negotiated, to avoid delays in the UK and EU's ability to share vital crime-fighting data. We urge the Government to make the security relationship a priority in the negotiations, and to work proactively to develop bespoke arrangements, in order to minimise the risks generated by the UK's possible relegation from a leading member of Europol to an operational partner of the agency. (Paragraph 54)

The Government welcomes the Committee's findings which highlight the significant contribution which the UK makes to Europol. As Rob Wainwright (the former Executive

Director of Europol) noted in his oral evidence<sup>10</sup> to the EU Home Affairs Sub-Committee, the UK is in the top three of member states that contribute intelligence each day to the different databases at Europol. Overall, the UK is the highest contributor of data to Europol's Analysis Projects relating to serious and organised crime.

The UK highly values the role of Europol in supporting and facilitating law enforcement cooperation to tackle serious and organised cross border crime. The agency provides important analytical support and houses databases of significant law enforcement data that can be connected to better facilitate intelligence-led investigations. There are precedents for third country agreements with Europol, enabling those third countries to contribute to the work of the agency. However, we have been clear in the White Paper<sup>11</sup> – and in our technical note on security, law enforcement and criminal justice<sup>12</sup> – on the limitations of relying on third country precedent for Europol – for the UK, Europol and our EU partners. As outlined in the White Paper, the existing third country agreements with Europol do not provide direct access to Europol's databases and the streamlined exchange of data, generally do not allow national experts to be embedded within Europol, and do not enable the third country to initiate activity in the same way.

The Committee's conclusion notes the significant volume of data exchanged between the UK and Europol and its implications for negotiations on a bespoke relationship. We agree with the thrust of the Committee's conclusion in regard to the scale of the UK's contribution to Europol and its implications – that the UK has a different starting point, and that our priority should be to avoid delays in the ability to exchange time-sensitive crime-fighting data. If our relationship were based on existing third country agreements with Europol, the UK would not be able to maintain its current contribution to Europol, in part due to the sheer volume of activity the UK participates in and the data that the UK shares.

In setting out our ambition to agree a new, coherent and legally binding internal security agreement with the EU, the Prime Minister outlined that such an agreement should preserve our operational capabilities, while being respectful of the sovereignty of both the UK and the EU's legal orders. So, for example, when the UK is participating in EU agencies the UK would respect the remit of the CJEU such that if there was a challenge to a decision made by an agency that affected the UK, this could be resolved by the CJEU, noting that this would not involve giving the CJEU jurisdiction over the UK.

## Conclusion and recommendation 14 – 18: The European Arrest Warrant

**14. In our view, the efficiency and effectiveness of the European Arrest Warrant is beyond doubt—particularly when compared to previous arrangements, which were far more lengthy and costly. The EAW has enabled the extradition of over 12,000 individuals from the UK to the EU in the last nine years. In the Prime Minister's own words, losing access to the EAW could render the UK a “honeypot” for criminals escaping the**

10 Uncorrected oral evidence: Brexit: the proposed UK-EU security treaty, EU Home Affairs Sub-Committee, 7 March 2018 – <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-the-proposed-ukeu-security-treaty/oral/80534.html>

11 Published 12 July 2018 – <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>

12 Published 24 May 2018 – <https://www.gov.uk/government/publications/technical-note-on-security-law-enforcement-and-criminal-justice>

law. It is reassuring, therefore, that both sides of the negotiation are committed to the UK's full participation in the European Arrest Warrant during the transition period. However, we have real concerns about the consequences for extradition arrangements once the UK is no longer considered an EU Member State for extradition purposes. (Paragraph 61)

### The viability of existing models

15. It is imperative that the UK's future relationship with the EU includes speedy and simple extradition arrangements for serious crime, based on mutual recognition of judicial decisions, and that these arrangements are as similar as possible to the EAW model. In particular, being forced to fall back on the 1957 European Convention on Extradition would be a catastrophic outcome. (Paragraph 69)

16. We do not understand why the Government's future partnership paper on security and law enforcement cooperation makes no proposals for a future extradition arrangement with the EU. Based on comments by Ministers, we assume that the Government plans to include an extradition agreement in its overarching security treaty with the EU. However, if it is planning to try to achieve the extradition agreement through a parallel route instead, it should make that clear to Parliament and the public. (Paragraph 70)

17. We are concerned that there are serious legal and constitutional obstacles to achieving an extradition agreement that is equivalent to the existing European Arrest Warrant. In particular, we are alarmed by evidence that any agreement requiring Member States to extradite their own citizens could cause serious delays to ratification, as it would be inconsistent with some countries' constitutions. Based on the evidence we have received, the closer the UK wants to remain to the status quo in its extradition arrangements after Brexit, the more likely it is that the EU will demand a stronger role for the Court of Justice of the EU. It might be possible to replicate Norway and Iceland's extradition agreement without direct CJEU jurisdiction, but the UK could then lose the ability both to extradite individuals whose crimes could be considered political in nature, and to require some (or all) Member States to extradite their own citizens to the UK. (Paragraph 71)

18. We call on the Government to publish a full risk assessment of the likely impact of such a scenario, including the number of individuals whose recent extraditions would have been made impossible by such arrangements, and the crimes for which they were extradited. We recognise that there has been some criticism of the EAW, but there is also some risk that the UK may be forced to abandon the proportionality tests introduced to it more recently, in order to reach a speedy agreement. If the Government is planning to abandon these features of the EAW to ensure that a treaty can be agreed and ratified in good time, it must first make it clear what the impact would be on UK justice and security. (Paragraph 72)

The Government agrees with the Committee's views on the effectiveness of the European Arrest Warrant (EAW) – it is the most effective means available to apprehend individuals wanted by other EU Member States and to ensure those that have fled the UK are returned

to face justice. As the report highlights, the EAW provides for a faster and cost-effective way of handling extradition, helping us tackle serious cross-border criminality and keep UK and EU citizens safe.

Since the publication of the Committee's report, the UK and the EU have reached an agreement on the terms of the implementation period. The draft Withdrawal Agreement, published on 19 March<sup>13</sup> and endorsed at the March European Council, includes the agreed legal text. The UK will continue to be able to use the European Arrest Warrant to extradite people from the EU during the implementation period, and other EU Member States will be able to extradite people from the UK.

The Committee has correctly noted that some EU Member States have domestic constitutional barriers which prevent them from extraditing their own nationals to non-EU Member States. The UK recognises that being a third country creates some challenges for the full operation of the EAW as it stands, and the Withdrawal Agreement will address this issue as part of the implementation period. As set out in the White Paper,<sup>14</sup> the UK believes the arrangements for the EAW during the implementation period, which will take account of constitutional barriers in some Member States, should be the basis for the future relationship on extradition.

In regard to our Future Security Partnership, our White Paper – as well as our previous publications<sup>15</sup> have been clear in setting out our ambition for our future security relationship with the EU. These publications outline a number of tools which facilitate operational cooperation – including the European Arrest Warrant. Effective extradition arrangements are an important part of the negotiations and of mutual interest to the UK and EU Member States. The Government's evidence to the Committee reiterated that extradition arrangements form part of our ambition for a security agreement.

Our White Paper and technical note<sup>16</sup> outlined that existing EU agreements with third countries on extradition do not provide the same level of capability as the EAW. The agreement with Norway and Iceland, once implemented, will leave a capability gap relative to the EAW, including additional grounds for refusal to surrender. Likewise, reverting to the Council of Europe Convention on extradition would result in cumbersome, slow and significantly more expensive arrangements between the UK and the EU, delaying justice and reducing shared capabilities to keep citizens safe.

The UK starts from a position of strong cooperation with EU Member States and full alignment in our current extradition rules, as well as consensus among EU Member States that practical cooperation between operational partners should continue. While the exact terms of the Future Security Partnership are subject to negotiation, we consider that a pragmatic solution on our future extradition relationship is in the interests of both EU Member States and the UK.

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13 Published 19 March – <https://www.gov.uk/government/publications/draft-withdrawal-agreement-19-march-2018>

14 Published 12 July 2018 – <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>

15 Published 18 September 2017 – <https://www.gov.uk/government/publications/security-law-enforcement-and-criminal-justice-a-future-partnership-paper> Published 9 May 2018 – <https://www.gov.uk/government/publications/framework-for-the-uk-eu-security-partnership>

16 Published 24 May 2018 – <https://www.gov.uk/government/publications/technical-note-on-security-law-enforcement-and-criminal-justice>

## Conclusion and recommendation 19 – 29: EU data-sharing

19. The UK's "Five Eyes" partnerships are vital to its intelligence capabilities, demonstrating that the EU is not the only important partner in the fight against terrorism and serious crime. It is clear, however, that there can be no substitute for the criminal intelligence and data gained from the UK's access to EU databases. Other existing data exchange mechanisms may complement access to EU tools, but they are not potential replacements for them. It is vital for both the UK and the EU that their future relationship allows for the continued free flow of data on criminal matters on a 'real-time' basis, including full access to the Second Generation Schengen Information System (SIS II) and other EU databases. (Paragraph 82)

### Retaining access to EU data after Brexit

20. We agree with the Government that the sharing of criminal data must continue after Brexit, and that UK access to EU criminal justice and intelligence databases is extremely important for both the UK and the EU. At present, access to these vital databases is dependent on either EU membership or Schengen membership—there is no other precedent for third countries. We welcome the EU's commitment to maintaining the UK's current use of these measures during a transition or implementation period. After that, the Government has said that a new framework for data exchange on criminal matters will be needed, and we agree that this should form part of an overarching security treaty. (Paragraph 92)

21. We note that EU position is to require a data 'adequacy decision' to be made by the European Commission, in order for EU countries and agencies to share law enforcement data in such a wide-ranging manner with a third country. Based on the evidence we have received, alternative models are likely to be more costly and onerous. The Government proposes a future arrangement for data exchange with the EU that builds on the adequacy model, including a role for the Information Commissioner. We welcome this proposal, but it remains to be seen whether the EU is willing or able to depart from its existing rules on data exchange with third countries in order to accommodate the UK's wishes, and how long it will take to address some of the complex technical and legal obstacles. We urge the EU to show flexibility and not to confine its approach to existing models or arrangements, given the unique and leading role the UK has played in developing these databases and sharing information through them, as well as the clear shared interest in continued cooperation in this area. (Paragraph 93)

### Potential obstacles to data adequacy

22. We agree with the Government that the UK should be aiming for a data adequacy model which would allow both for the continued transfer of EU criminal data (including access to the key databases) and for the existing surveillance and protective activities of the UK security services to continue. A negotiation process that pitted the national security operations of the UK security services against European crossborder policing and crime fighting would be in nobody's interest, and we urge EU and UK negotiators to recognise this. (Paragraph 112)



23. We are concerned about the implications for the activities of the UK security services if existing EU data adequacy processes for third countries are applied to the UK. We are also concerned about the risk of the CJEU striking down an adequacy decision, in the way that it has in relation to far less ambitious agreements with the USA and Canada. As an EU Member State, the UK can rely, to some degree, on the fact that national security remains an exclusive competency of Member States. As a third country, there is a significant risk that the UK's surveillance and interception regime will be exposed to a new level of scrutiny by EU institutions, including capabilities that have enabled the security services to save lives and prevent serious harm. The Government must work closely with its EU partners to ensure that Brexit does not cause the UK's surveillance powers to become a source of conflict, nor an obstacle to vital forms of data exchange. (Paragraph 113)

24. These particular challenges posed by Brexit have received very little public attention to date. Based on the Minister's evidence, we are concerned that the Government is not yet engaging sufficiently with the implications of an EU data adequacy assessment, nor preparing properly for such an assessment to take place. In addition, we believe that substantial contingency planning is required, in case this process takes considerably longer than the transition period, or in the scenario that it is not possible to achieve the UK's objectives. The Government should be carrying out an impact assessment, in conjunction with the EU, of the consequences of failing to find a resolution to this important issue. (Paragraph 114)

### The EU Charter on Fundamental Rights

25. The Government has emphasised that UK data protection law will be consistent with EU law at the point of Brexit, but it has not fully incorporated EU data protection rights into domestic legislation. It claims that the Data Protection Bill contains the required provisions, but that Bill may in fact act as an obstacle to data adequacy, because it denies data protection rights to certain people subject to immigration controls—a scope sufficiently wide that it is likely to include EU citizens. Given the importance of a data adequacy decision for future law enforcement cooperation, we recommend that the Government incorporate Article 8 of the EU Charter of Fundamental Rights into UK law. It must also ensure that the Data Protection Bill contains adequate protections for all data subjects. This would provide some assurances to the EU that the UK will respect the data rights of EU citizens in future. (Paragraph 120)

### Onward transfer to Five Eyes partners

26. The UK benefits greatly from its Five Eyes intelligence-sharing capabilities, which may face new levels of scrutiny by the EU when a data adequacy decision is sought. It is essential that this cooperation continues in an effective way, and it is in the strong interests of both the UK and the EU to find a solution to this issue. Those relationships and surveillance capabilities need to operate with strong legal protections, but we agree with the Government that the exchange of intelligence data should take place within the UK's own legal framework, beyond the scope of EU law. Nevertheless, the short period before Brexit does not allow time for a CJEU ruling against any plans for UK-EU data transfer. We recommend that the Government works proactively with EU institutions to ensure that the UK's onward data transfer regime to the USA and other



Five Eyes countries allows both for an EU adequacy decision and for the continuance of the existing Five Eyes relationship. We urge the EU to recognise the value of these parallel security relationships, and to work flexibly to come to an agreed solution. (Paragraph 123)

## CJEU jurisdiction

27. The evidence we have received suggests that it may be very difficult for the Government to negotiate ongoing access to EU law enforcement databases while maintaining its 'red line' on the direct jurisdiction of the CJEU. The Prime Minister acknowledged recently that UK courts will need to take account of the European Court's views on data protection, because the CJEU determines whether EU agreements with third countries are compliant with EU law. Even if an alternative dispute resolution mechanism is negotiated as part of a security treaty, or as part of the adequacy process, the CJEU's rulings on the transfer of EU data to the USA and Canada—effectively striking down adequacy decisions made by the European Commission—illustrate that the UK cannot avoid the direct impact of the Court's rulings in future. (Paragraph 127)

28. Any comprehensive security treaty negotiated between the UK and the EU could be subject to referral to the CJEU prior to its ratification, to ensure its compatibility with primary EU law and the Charter of Fundamental Rights, even if the EU Commission is content with its provisions. As a result, the reality is that the UK will be unable to depart from EU data protection law after Brexit, nor from the rulings of the CJEU. Where data protection is concerned, the extent of CJEU involvement in any meaningful agreement between the UK and the EU means that it would be unwise to make the jurisdiction of the CJEU a "red line" issue in negotiations. (Paragraph 128)

## Timeline for adequacy

29. Based on the evidence received, we have serious concerns about the number of potential obstacles to the UK achieving an EU adequacy decision within two years. The Government's position—that the UK's current compliance with EU data protection law should enable consistency after Brexit Day—takes no account of the different rules governing third countries' access to EU data. At best, this response is evasive; at worst, it suggests that the Government is worryingly complacent about the UK's future access to EU data. The Government must make necessary preparations for a long-term adequacy decision as early as possible in the Brexit process, to ensure that UK law enforcement authorities do not face a 'cliff-edge' in their ability to exchange data with their EU counterparts. (Paragraph 130)

The Government published a future partnership paper<sup>17</sup> on 24 August 2017 on ensuring the continued protection and exchange of personal data between the EU and the UK, as well as a presentation<sup>18</sup> and a technical note<sup>19</sup> on the UK's proposals (published in May and June 2018 respectively), and a section on data protection included in the White Paper.<sup>20</sup>

The ability of law enforcement agencies to transfer data both within the EU and with third countries is important to our collective security. It helps keep people safe by maximising the effectiveness of law enforcement agencies and bringing more criminals to justice. We are clear that an internal security agreement will need to be supported by a separate UK-EU agreement on the exchange and protection of personal data. The March European Council's Guidelines<sup>21</sup> point to a shared recognition of the importance of data flows for several components of the future UK-EU relationship, and a consequent desire to reach an agreement on data.

The UK is a global leader in strong data protection standards. As a member of the EU, the UK has worked closely with other Member States and the EU institutions to develop robust protections for personal data, ensuring law enforcement agencies can share data safely and smoothly. The UK and the EU start from a position of trust in each other's standards and regulatory alignment on data protection. The UK's recent Data Protection Act 2018 strengthened UK standards in line with the EU's General Data Protection Regulation (GDPR) and the Law Enforcement Directive, providing a unique starting point for an extensive agreement on the exchange of personal data that builds on the existing adequacy framework.

The UK believes that the EU's adequacy framework provides the right starting point for the arrangements the UK and the EU should agree on data protection (though we want to go beyond the framework to facilitate regulatory cooperation between Information Commissioner's Office (ICO) and EU Data Protection Authorities). The UK is ready to begin preliminary discussions on an adequacy assessment so that a data protection agreement is in place by the end of the implementation period at the latest, to provide the earliest possible reassurance that data flows can continue.

In leaving the EU, we will bring about an end to the jurisdiction of the CJEU in the UK. The White Paper outlined in detail the UK's proposals for a new set of robust institutional and governance arrangements, which will include a mechanism for addressing disputes through a Joint Committee so they can be resolved fairly and quickly.

A deal on data must respect UK sovereignty, including the UK's ability to protect the security of its citizens and its ability to maintain and develop its position as a leader in data protection. The activities of UK security and intelligence agencies are governed by one of the world's most robust legal frameworks and oversight arrangements, which ensure UK intelligence activity adheres to strict principles of necessity, proportionality and legality. The Data Protection Act 2018 also provides for a bespoke regime which

17 Published 24 August 2017 – <https://www.gov.uk/government/publications/the-exchange-and-protection-of-personal-data-a-future-partnership-paper>

18 Published 23 May 2018 – <https://www.gov.uk/government/publications/framework-for-the-uk-eu-partnership-data-protection>

19 Published 7 June 2018 – <https://www.gov.uk/government/publications/technical-note-on-data-protection>

20 Published 12 July 2018 – <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>

21 European Council (Art.50) Guidelines, European Council, 23 March 2018 – <http://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf>

governs the processing of personal data by or for the intelligence services, which is based on the international standards found in the modernised Convention 108. As a result of this comprehensive legal framework, we do not consider that the legislation governing the UK security and intelligence services will impede data protection negotiations.

### **Conclusion and recommendation 30 – 34: Brexit negotiations and contingency planning**

30. We have set out in this report our assessment of the extent to which the UK's ambitions for future security cooperation with the EU are consistent with the likely negotiating 'red lines' of the EU, based on the evidence received about third country cooperation on EU security. That analysis is based on the assumption—and hope—that the Brexit negotiations remain on course for a stable transition or implementation period, until December 2020 at the earliest, and that they are not derailed at any stage by insurmountable differences. It is not the purpose of this report to comment at length on the progress made to date in the Brexit negotiations more broadly. Nevertheless, we consider it relevant to this inquiry for us to consider what happens if no deal is reached with the EU, either for a transition or implementation period from 30 March 2019, or for the long-term relationship when that period comes to an end. (Paragraph 133)

31. It is understandable that UK law enforcement agencies wish to refrain from making public assertions about the implications of Brexit—and of different forms of Brexit—for the UK's policing and intelligence capabilities. The result of this risk-aversion, however, is that the public debate on this aspect of Brexit has been seriously lacking in detail and urgency. We were disappointed that the leading policing agencies were unwilling to provide evidence in public on Brexit contingency planning, including what emergency capabilities will be required in the event of a 'no deal' scenario, and what further resources they wish the Government to provide. (Paragraph 137)

32. The Policing Minister was not able to give us any information on the Home Office's contingency planning in this area of Brexit, and could not even say whether the Department had specifically allocated any funds towards it. We were left with the impression that the policing and security elements of Brexit are receiving very little focus at the Ministerial level. Given the emphasis placed by the Prime Minister on the importance of law enforcement cooperation with the EU, and the large sum devoted by the Chancellor towards Brexit preparations, we were amazed by this approach to contingency planning in this field. The Government appears to assume that the UK's dominant role in Europol and other forms of cooperation will make it easy to secure a bespoke future security relationship with the EU, going far beyond any forms of third country involvement to date. This attitude, along with lack of planning for alternative scenarios, suggests that the Government is at risk of sleep walking into a highly detrimental outcome. We recommend that the Government dedicates a substantial proportion of the £3 billion Brexit planning fund to policing and security cooperation, to include:

- Detailed impact assessments of different scenarios, including losing access to some or all EU internal security measures, to be published to inform public debate; and

- **Fully costed plans for contingency arrangements, such as UK-based call centres for bilateral coordination with law enforcement agencies across the EU, and use of the European Convention on Extradition, in case the UK loses access to the European Arrest Warrant.** (Paragraph 138)

33. **If the authorities of an EU country are aware, in future, of a terrorist plot against the UK, we have no doubt that this intelligence will be passed onto the UK security services, regardless of the outcome of the Brexit negotiations. In the event of a ‘no deal’ scenario in security, however, the UK risks losing information and capabilities linked to the wider intelligence picture for a range of serious crimes, including terrorism. This might include the ability to check whether an otherwise unknown individual, found in the company of a child, has a history of child sexual offences in their home country; the ability to flag the identity of a missing child to EU authorities, so that border security can apprehend their kidnapping relative before they board a flight to South America; and the ability to extradite an EU national who has fled home after committing a serious violent crime, to face charges in the UK. It is in these scenarios that people may be put at greater risk of harm if the UK and EU do not secure a comprehensive security agreement. We agree with the Home Secretary that such an outcome should be unthinkable, but we are not convinced that the Government has a clear strategy to prevent the unthinkable from becoming a reality.** (Paragraph 139)

34. **Given the uncertain prospects for a comprehensive deal on law enforcement cooperation, we see no alternative to contingency planning for the loss of some or all EU security measures. It is time for the Government to flesh out the details of the ‘bespoke deal’ it says it hopes to secure in this area, and be open with the public and Parliament, by explaining how it proposes to address the potential pitfalls and obstacles identified in this report.** (Paragraph 140)

We approach these negotiations anticipating that an ambitious agreement on future security cooperation can be reached, as it is in all our interests to keep our citizens safe. However, as a responsible Government we are preparing for all eventualities - including the unlikely scenario in which the current mechanisms we use to cooperate with EU Member States are not available when we exit the EU in March 2019.

The Home Office has therefore co-ordinated the preparation of robust contingency plans for our security, law enforcement and criminal justice cooperation with EU partners. We continue to work closely with operational partners, and with the Devolved Administrations, to put those plans into action and ensure that we transition our cooperation with European partners, and continue to work together through alternative channels (where those are available) to protect the citizens of the UK and the EU.

While we have other ways of working together in such a scenario, both bilaterally and through other multilateral fora such as Interpol and the Council of Europe, the Government has been clear that this kind of cooperation is often complementary to, rather than a direct replacement for the EU mechanisms we currently use. That is why we are seeking a coherent and legally binding internal security agreement, which protects mutually beneficial aspects of cooperation in this area and ensures that both the UK and the EU can continue to tackle fast evolving security threats.

HM Treasury have provided an additional £395m to the Home Office to support EU Exit planning and delivery in the financial year 2018/19. We continue to assess how the Government's priorities and the ongoing negotiations will impact the department and this funding has been provided so that the department can plan properly for all eventualities in the negotiations.