



House of Commons
European Scrutiny Committee

Enhancing law enforcement cooperation and border control: strengthening the Schengen Information System

Sixth Report of Session 2017–19

Documents considered by the Committee on 13 December 2017
including the following recommendations for debate:

Enhancing law enforcement cooperation and border control:
strengthening the Schengen Information System

Report, together with formal minutes

*Ordered by the House of Commons
to be printed 13 December 2017*

Notes

Numbering of documents

Three separate numbering systems are used in this Report for European Union documents:

Numbers in brackets are the Committee's own reference numbers.

Numbers in the form "5467/05" are Council of Ministers reference numbers. This system is also used by UK Government Departments, by the House of Commons Vote Office and for proceedings in the House.

Numbers preceded by the letters COM or SEC or JOIN are Commission reference numbers.

Where only a Committee number is given, this usually indicates that no official text is available and the Government has submitted an "unnumbered Explanatory Memorandum" discussing what is likely to be included in the document or covering an unofficial text.

Abbreviations used in the headnotes and footnotes

| | |
|------|--|
| AFSJ | Area of Freedom Security and Justice |
| CFSP | Common Foreign and Security Policy |
| CSDP | Common Security and Defence Policy |
| ECA | European Court of Auditors |
| ECB | European Central Bank |
| EEAS | European External Action Service |
| EM | Explanatory Memorandum (submitted by the Government to the Committee)* |
| EP | European Parliament |
| EU | European Union |
| JHA | Justice and Home Affairs |
| OJ | Official Journal of the European Communities |
| QMV | Qualified majority voting |
| SEM | Supplementary Explanatory Memorandum |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |

Euros

Where figures in euros have been converted to pounds sterling, this is normally at the market rate for the last working day of the previous month.

Further information

Documents recommended by the Committee for debate, together with the times of forthcoming debates (where known), are listed in the European Union Documents list, which is published in the House of Commons Vote Bundle each Monday, and is also available on the parliamentary website. Documents awaiting consideration by the Committee are listed in "Remaining Business": www.parliament.uk/escom. The website also contains the Committee's Reports.

*Explanatory Memoranda (EMs) and letters issued by the Ministers can be downloaded from the Cabinet Office website: <http://europeanmemoranda.cabinetoffice.gov.uk/>.

Staff

The staff of the Committee are Dr Lynn Gardner (Clerk), Kilian Bourke, Alistair Dillon, Leigh Gibson, Nishana Jayawickrama and Foeke Noppert (Clerk Advisers), Arnold Ridout (Counsel for European Legislation), Françoise Spencer (Deputy Counsel for European Legislation), Joanne Dee (Assistant Counsel for European Legislation), Mike Winter (Second Clerk), Sarah Crandall (Senior Committee Assistant), Sue Beeby, Rob Dinsdale and Beatrice Woods (Committee Assistants), Ravi Abhayaratne and Paula Saunderson (Office Support Assistants).

Contacts

All correspondence should be addressed to the Clerk of the European Scrutiny Committee, House of Commons, London SW1P 3JA. The telephone number for general enquiries is (020) 7219 3292/5465. The Committee's email address is escom@parliament.uk.

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Documents for debate

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1 Enhancing law enforcement cooperation and border control: strengthening the Schengen Information System

| | |
|--------------------------------------|--|
| Committee's assessment | Legally and politically important |
| Committee's decision | Not cleared from scrutiny; further information requested; the Government's opt-in decision on document (a) and opt-out decision on document (c) recommended for debate on the floor of the House (decision reported on 13 November 2017); drawn to the attention of the Home Affairs Committee and the Committee on Exiting the European Union |
| Document details | <p>(a) Proposal for a Regulation on the use of the Schengen Information System for the return of illegally staying third country nationals</p> <p>(b) Proposal for a Regulation on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks</p> <p>(c) Proposal for a Regulation on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters</p> |
| Legal base | <p>(a) Article 79(2)(c) TFEU, ordinary legislative procedure, QMV</p> <p>(b) Articles 77(2)(b) and (d) and 79(2)(c) TFEU, ordinary legislative procedure, QMV</p> <p>(c) Articles 82(1)(d), 85(1), 87(2)(a) and 88(2)(a) TFEU, ordinary legislative procedure, QMV</p> |
| Department | Home Office |
| Document Numbers | <p>(a) (38426), 15812/16, COM(16) 881</p> <p>(b) (38427), 15813/16, COM(16) 882</p> <p>(c) (38428), 15814/16, COM(16) 883</p> |

Summary and Committee's conclusions

1.1 At the end of 2016, the Commission presented a package of three proposed Regulations to improve the functioning of the Schengen Information System—SIS II—and strengthen border control and counter-terrorism efforts across the EU. The proposals are intended to close information gaps and enhance the exchange of information on terrorism, cross-

border crime and irregular migration so that “in the future, no critical information should ever be lost on potential terrorist suspects or irregular migrants crossing our external borders.”¹ Three Regulations are needed to reflect differing degrees of Member State participation in Schengen but the Commission says they have been drafted to “work seamlessly together” to ensure the “comprehensive operation and use” of SIS II.²

1.2 Document (a)—the proposed returns Regulation—would create a new alert category for third country (non-EEA) nationals who have been issued with a return decision under the procedures set out in the EU Return Directive. The new alert is intended to increase the detection of illegally staying third country nationals and support EU-wide enforcement of return decisions. The proposed Regulation is subject to the UK’s Title V (justice and home affairs) opt-in Protocol, meaning that the UK is entitled to opt in, but it is far from clear how effectively the UK could participate in this instrument, given its connection to the EU Return Directive in which the UK has chosen not to take part.

1.3 Document (b)—the proposed border checks Regulation—would require Member States to enter an alert in SIS II whenever they issue a Schengen-wide entry ban under the EU Return Directive. The Commission believes that increasing the visibility of entry bans should make their enforcement more effective at the EU’s external borders. The UK is not entitled to participate in this proposal as it builds wholly on parts of the Schengen rule book on border controls which do not apply to the UK.

1.4 Document (c)—the proposed police cooperation Regulation—would require Member States to create alerts on individuals or objects connected with terrorist activity, introduce a new “inquiry check” to question terrorist and other criminal suspects and establish a new alert category for “unknown wanted persons” based on palm or fingerprints recovered from a crime scene. The proposal would also enable Member States to create pre-emptive alerts for children considered to be at high risk of parental abduction, enabling authorities to act before a child is reported missing, and for other vulnerable individuals (for example, girls at risk of female genital mutilation or forced marriage). As the proposed Regulation builds on parts of the Schengen rule book dealing with law enforcement cooperation in which the UK already participates, it automatically applies to the UK unless the Government decides to opt out within the three month opt-out period specified in the Schengen Protocol. Should the Government decide to opt out, and the proposal takes effect before the UK leaves the EU, the UK would be at risk of losing its current level of access to SIS II.³ The risk is likely to be low, however, as the Commission expects it will take until 2021 to implement the envisaged technical and operational changes to SIS II.

1.5 Our predecessor Committee first considered the proposed Regulations at its meeting on 1 February and recommended that the Government’s *opt-in decision* on document (a) and its *opt-out decision* on document (c) should be debated in European Committee B before the three-month opt-in/opt-out deadline on each document expired. Home Office

1 See the European Commission’s [press release](#) on the proposed Regulations, issued on 21 December 2016, as well as its [Fact Sheet](#) and its [infographic](#).

2 See p.3 of document (c).

3 See Article 5 of [Protocol 19](#) on the Schengen *acquis* integrated into the framework of the European Union. If the UK were to opt out, it would be for the Council, European Council (or, if neither acts) the Commission to decide whether the UK could maintain its current level of access to SIS II. In reaching a decision, the EU institutions would be bound to “seek to retain the widest possible means of participation of the Member State concerned”—in this case, the UK—“without seriously affecting the practical operability of the various parts of the Schengen *acquis*, while respecting their coherence”.

officials notified Committee staff in April that the deadline was expected to expire on 2 July.⁴ The Minister for Policing and the Fire Service (Mr Nick Hurd) wrote on 20 July to inform us that the Government had decided *not to opt into* document (a) and *not to opt out of* document (c), meaning that the Government would be able to play a full part in negotiations on the proposed police cooperation Regulation dealing with the use of SIS II for law enforcement purposes and (if it is agreed while the UK remains a member of the EU) have a vote on the final text. He also issued a Written Ministerial Statement in which he made clear that the decision not to opt out of the proposed police cooperation Regulation would “have no implications for our general opt-out from the internal border-free zone established by Schengen”.⁵

1.6 In our first Report of this session we expressed concern that the Written Ministerial Statement was published on the last sitting day before the summer recess, reducing the opportunity for Parliament to question the Government’s position. We asked the Minister to confirm that the Government intended to seek some form of continued participation in SIS II post-Brexit—otherwise, we could see little reason for the UK to bind itself to changes to the police cooperation Regulation which would only take effect after exit day. We also sought further information on third country access to SIS II data—the proposed police cooperation Regulation prohibits it⁶—and on the mechanism associating Iceland and Norway with SIS II as well as the role of the Court of Justice in applying and interpreting Schengen rules (see the ‘Background’ section for further details). We invited the Minister to comment on the possibility that the EU might insist on EU-type protections (the EU Charter of Fundamental Rights or similar) continuing to apply to the UK as a condition of access to SIS II. We considered that Government’s opt-in and opt-out decisions—particularly its decision to remain bound by any changes agreed to the police cooperation Regulation—raised important questions about UK participation in SIS II post-Brexit and were likely to attract particularly strong Parliamentary interest. We suggested that the opt-in/out debate recommended by our predecessors in February should therefore take place on the floor of the House rather than in European Committee.

1.7 The Minister wrote on 7 November to inform us that COREPER (the Committee on which Member States’ ambassadors to the EU are represented) was expected to agree a general approach on the proposed Regulations on 8 November. The Government intended to vote against the proposed general approach on the police cooperation Regulation—the only one on which the UK is entitled to vote—as it remained under scrutiny and because the text to be agreed “does not adequately address our concerns about the current restrictions on the purpose for which the information in SIS II alerts can be used”.⁷ A press release issued after the COREPER meeting confirmed that the Council had agreed a mandate for the Council to begin negotiations with the European Parliament.⁸

1.8 In his letter of 1 December, the Minister provides details of the general approach agreed in November. He highlights two concerns with the text: an “overly restrictive” approach to the purposes for which information obtained from SIS II alerts can be used

4 The unusually long gap between the Commission presenting the proposed Regulations (on 23 December 2016) and the three-month opt-in/out deadline expiring (on 2 July) is a consequence of delays in translation. Time starts to run from the date on which the last language version is published.

5 See the Minister’s [Written Ministerial Statement](#) of 20 July 2017 on the Second Generation Schengen Information System, Hansard, 64WS.

6 See Article 62 of document (c).

7 See the Minister’s [letter](#) of 7 November 2017 to the Chair of the European Scrutiny Committee.

8 See the Council [press release](#) issued on 8 November 2017.

and insufficiently precise language on the conditions governing “inquiry checks” (used to elicit information through questioning) and “specific checks” (involving searches). Overall, however, he considers the general approach to be “broadly acceptable”.

1.9 The Minister tells us that it is “too early to say” whether SIS II will be one of the measures which the Government will seek to include in a new post-Brexit agreement with the EU on security, law enforcement and criminal justice cooperation but makes clear that “agreeing efficient means of transferring information to support ongoing cooperation will be an important part of negotiations”. On the role of the Court of Justice, he comments:

“Many other countries have agreements with the EU on both economic and law enforcement matters, including cooperation closely aligned to areas of EU law, without accepting the direct jurisdiction of the CJEU. An example is the agreement on the surrender procedure between the EU Member States, Iceland and Norway. There is therefore significant precedent for the EU to cooperate with third countries, including in fields closely aligned to areas of EU law. There is no precedent for a third country to submit to the jurisdiction of the CJEU, but there are a number of ways in which the parties to those agreements have obtained assurances that obligations in those agreements will be enforced, that divergence can be managed where necessary and that disputes can be resolved.”

1.10 Responding to our suggestion that the EU might insist on the continued application of EU-type protections (the EU Charter or similar) as a condition of granting access to SIS II, the Minister says that “matters such as complying with the EU Charter on Fundamental Rights will need to be addressed in the course of negotiations”.

1.11 Turning first to Parliamentary scrutiny of the SIS II package, we acknowledge that Home Office officials notified the Committee on 18 April that the three-month opt-in and opt-out deadlines would expire on 2 July and apologise for this oversight in our earlier Report. Nonetheless, given that the Government’s decision to participate in the proposed police cooperation Regulation would appear to signal an intention to negotiate some form of continued access to SIS II post-Brexit (since the changes are unlikely to take effect before the UK leaves the EU), we consider that the Government could and should have scheduled the opt-in/out debate requested on 1 February before Parliament prorogued on 27 April, ahead of the general election.

1.12 A Council press release issued on 8 November states that “COREPER endorsed, on behalf of the Council, a mandate for negotiations” with the European Parliament on the SIS II package. We ask the Minister to confirm that the “general approach” to which he refers in his correspondence was agreed by the Council itself. As he will be aware, our scrutiny reserve resolution applies to decisions taken by Ministers and is an important means of ensuring that Ministers are accountable to Parliament.

1.13 The Government’s future partnership paper, *Security, law enforcement and criminal justice* underlines the importance of SIS II for circulating European Arrest Warrants and apprehending “people wanted for arrest, as well as acting as a watch-listing system to follow the movements of sex offenders and suspected terrorists”.⁹ It highlights SIS II’s “state-of-the-art technology for flagging people and objects

9 See the [future partnership paper](#) on *Security, law enforcement and criminal justice*.

of interest to law enforcement” and its “particularly important functionality in preventing criminality and terrorism by allowing participating states to share real-time information on wanted criminals or suspected terrorists”. Despite this positive assessment of SIS II, the Minister is still unwilling to confirm that the Government intends to seek some form of participation in the police cooperation elements of SIS II post-Brexit. We can see no justification for this reticence. We expect the Minister to be far more forthcoming about the Government’s intentions in relation to SIS II during the floor debate.

1.14 We are similarly perplexed by the Government’s apparent lack of engagement on the provision of the proposed police cooperation Regulation prohibiting third country access to SIS II data. We reiterate our request to the Minister to explain whether changes to this provision would be necessary to accommodate any agreement on UK access to SIS II data post-Brexit. We ask him whether he anticipates that the overarching agreement the Government intends to seek on security, law enforcement and criminal justice cooperation would establish bespoke structures and procedures associating the UK with parts of the EU’s justice and home affairs rule book without requiring changes to third country provisions in EU secondary legislation (see the ‘Background’ section for further details). We also ask the Minister whether, in the absence of such an agreement with the EU, it would be possible for the UK to obtain the same information contained in SIS II alerts on a bilateral basis with individual Member States.

1.15 The Minister says that there is “significant precedent for the EU to cooperate with third countries, including in fields closely aligned to areas of EU law”, and that “there is no precedent for a third country to submit to the jurisdiction of the CJEU”. He refers us to the agreement between the EU and Iceland and Norway on the surrender procedure (extradition) which provides for disputes concerning its interpretation or application to be settled by representatives of the governments of the Member States and Iceland and Norway, taking account of relevant case law of the Court of Justice and of the Icelandic and Norwegian courts. We note, however, that there are other models in which the Court of Justice has a more direct role for matters involving a high degree of regulatory approximation. For example, dispute settlement procedures in EU agreements with Ukraine, Georgia and Moldova involve an arbitration panel which is *required* to seek a ruling from the Court of Justice on questions concerning the interpretation of relevant EU law provisions. In these cases, the Court’s ruling is binding on the arbitration panel and the ruling of the arbitration panel must be unconditionally accepted by the Parties.¹⁰ We highlight these examples to illustrate the point that there is a wide spectrum of possible outcomes on the role and jurisdiction of the Court of Justice. We invite the Minister to indicate which the Government would prefer (or rule out) in any future agreement between the EU and the UK on security, law enforcement and criminal justice cooperation.

1.16 The proposed police cooperation Regulation includes an introductory recital stating that it “respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union”.¹¹ The Minister tells us that “matters such as complying with the EU Charter on Fundamental Rights” will need to be addressed during the UK’s exit negotiations. Since clause 5(4)

10 See Articles 402–3 of the Association Agreement with Ukraine, Articles 321–2 of the Association Agreement with Moldova and Articles 266–7 of the Association Agreement with Georgia.

11 See recital (52) of the Commission’s original proposal.

of the EU (Withdrawal) Bill envisages that the Charter will *not* form part of domestic law “on or after exit day”, we ask the Minister to explain how the Government intends to address the Charter as part of the UK’s exit negotiations. Does he anticipate that it will be necessary to identify equivalent Charter-type protections in UK law in order to secure continued UK participation in SIS II and other similar EU justice and home affairs measures post-Brexit?

1.17 We note that the Council and European Parliament have already started trilogue discussions with a view to reaching a “first reading” agreement. We would welcome the Government’s view on the main elements of the negotiating mandate agreed by the European Parliament. We also request updates on the progress of trilogue discussions and the prospects for securing the changes the Minister has outlined in his latest letter and his predecessor’s earlier Explanatory Memorandum.

1.18 We trust that the Minister will address many of the questions and concerns we raise in this report in the forthcoming debate which will take place on the floor of the House. We expect the debate to focus on the Government’s decision to participate in the proposed police cooperation Regulation—document (c). As the Commission has presented the proposed Regulations as a package of measures which are intended to “work seamlessly together”, we are holding all three under scrutiny. We draw this report to the attention of the Home Affairs Committee and the Committee on Exiting the European Union.

Full details of the documents

(a) Proposal for a Regulation on the use of the Schengen Information System for the return of illegally staying third country nationals: (38426), [15812/16](#), COM(16) 881;
 (b) Proposal for a Regulation on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, amending Regulation (EU) No 515/2014 and repealing Regulation (EC) No 1987/2006: (38427), [15813/16](#), COM(16) 882;
 (c) Proposal for a Regulation on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending Regulation (EU) No 515/2014 and repealing Regulation (EC) No 1986/2006, Council Decision 2007/533/JHA and Commission Decision 2010/261/EU: (38428), [15814/16](#), COM(16) 883.

Background

1.19 Our earlier Reports listed at the end of this chapter provide a detailed overview of the proposed Regulations, the Government’s position and the questions we have raised.

1.20 The Government’s decision to participate in the proposed police cooperation Regulation, even though the changes it will introduce are only likely to take effect after the UK leaves the EU, has led us to explore possible models for UK participation in SIS II post-Brexit. Under existing EU rules governing SIS II, only EU Member States are entitled to participate. The proposed police cooperation Regulation maintains this prohibition, stating that data processed in SIS II shall not be transferred or made available to third countries (Article 62).

1.21 Despite this prohibition, four non-EU countries—Iceland, Norway, Switzerland and Liechtenstein—participate in SIS II by virtue of agreements concluded with the EU associating them with the implementation, application and development of the Schengen rule book. The agreements identify the Schengen rules that these non-EU Schengen countries are required to implement and apply and establish special structures and procedures to enable them to keep pace with changes to the Schengen rule book.¹² The agreements operate in a way that avoids the need to make extensive changes to provisions in EU secondary legislation limiting participation to EU Member States.

1.22 The agreements do not give the Court of Justice direct jurisdiction to resolve any disputes concerning their interpretation or application. The Court nevertheless has an important indirect role. The agreements include provisions which seek to ensure “as uniform an application and interpretation as possible” of common Schengen rules (based on the regular mutual transmission of relevant case law) and to avert any “substantial difference” in the case law of the Court of Justice and the courts of the non-EU Schengen countries. A failure to do so can lead to the termination of the agreements.

The Minister’s letters of 7 November and 1 December 2017

1.23 In his first letter, the Minister sets out the Government’s position ahead of the COREPER meeting on 8 November:

“We intend to vote against the proposed General Approach on the police and judicial cooperation measure because the proposed legislation has yet to clear Parliamentary scrutiny and because the text does not adequately address our concerns about the current restrictions on purpose for which the information in SIS II alerts can be used. We do not have a vote on the General Approach on the other two measures as we are not participating in them.”

1.24 In his second letter, the Minister responds to the questions and concerns we raised in our Report agreed on 13 November. We noted that it had taken more than five months for the Government to provide an initial response to the questions raised by our predecessors in early February and that the opportunity to schedule a debate on the Government’s opt-in and opt-out decisions before Parliament prorogued on 27 April (ahead of the general election) had been missed. We sought an assurance that the Minister would adhere to its Code of Practice on parliamentary scrutiny of Title V (justice and home affairs) opt-in and Schengen opt-out decisions and fulfil the commitments made in January 2011 to “significantly strengthen Parliament’s oversight of EU justice and home affairs matters and make the Government more accountable for the decisions it makes in the EU”.

1.25 The Minister responds:

“I am happy to give a commitment that the Government will adhere to the Code of Practice on parliamentary scrutiny and to the commitments made by the then Minister for Europe in January 2011. The opt-in deadline was

12 For Iceland and Norway, see the [Agreement](#) associating them with the implementation, application and development of the Schengen *acquis* and [Council Decision 1999/437/EC](#). For Switzerland, see the [Agreement](#) associating Switzerland with the implementation, application and development of the Schengen *acquis* and [Council Decision 2008/146/EC](#). For Liechtenstein, see the [Protocol](#) on Liechtenstein’s accession to the EU-Switzerland Agreement.

2 July, and my officials communicated this to your Committee clerks when we became aware of it in April. We also informed Parliament of our opt-out and opt-in decisions by WMS and letters to both Scrutiny Committees on 20 July. I am nevertheless sorry you feel that we did not comply fully with the Code of Practice on this occasion, and we will seek to learn from this situation to improve our practices.”

1.26 We asked the Minister to confirm the Government’s intention to seek some form of participation in the police cooperation and law enforcement parts of SIS II post-Brexit. He comments:

“As we set out in the future partnership paper *Security, law enforcement and criminal justice*, published in September, we are seeking an overarching agreement with the EU that supports future cooperation on security, law enforcement and criminal justice. Agreeing efficient means of transferring information to support ongoing cooperation will be an important part of negotiations but it is too early to say what future cooperation we may have in relation to individual measures. We recognise the challenges in negotiating a new relationship, but it is in the clear interest of both the UK and European partners that we find a way to continue to cooperate and exchange this kind of information.”

1.27 We noted that there was no precedent or provision for third (non-EU) countries to participate in SIS II unless they also participated in the Schengen free movement area. As the Minister had previously confirmed that the UK would “not join the Schengen border-free zone”,¹³ we asked whether the Government had made, or intended to make, any interventions on the provisions in the proposed Regulations prohibiting third country access to SIS II data. We also asked whether changes to these provisions would be necessary to accommodate any agreement on UK access to SIS II data post-Brexit and whether, in the absence of such an agreement with the EU, it would be possible for the UK to obtain the same information on a bilateral basis from countries participating in SIS II.

1.28 The Minister responds:

“The issue of third country access to SIS II data, and the possible exchange of information on a bilateral basis, would need to be addressed as appropriate in the course of negotiations on our future partnership. We have proposed a treaty with the EU on security, law enforcement and criminal justice.”

1.29 We noted that the agreement associating Iceland and Norway with Schengen which requires both countries to report annually on the way in which their courts have applied and interpreted the Schengen rule book, “as interpreted by the Court of Justice”, with a view to avoiding any “substantial difference” in case law and ensuring “a uniform application and interpretation”.¹⁴ We asked whether a similar mechanism which avoided “direct CJEU jurisdiction” would be an acceptable model for the UK and whether the Government accepted that, under this model, UK courts would in practice have to follow the rulings of the Court of Justice or risk losing access to SIS II data.

13 See his [letter](#) of 20 July 2017 to the Chair of the European Scrutiny Committee.

14 See the [Agreement](#) concluded between the EU and Iceland and Norway on their association with the implementation, application and development of the Schengen *acquis*.

1.30 The Minister comments:

“Many other countries have agreements with the EU on both economic and law enforcement matters, including cooperation closely aligned to areas of EU law, without accepting the direct jurisdiction of the CJEU. An example is the agreement on the surrender procedure between the EU Member States, Iceland and Norway. There is therefore significant precedent for the EU to cooperate with third countries, including in fields closely aligned to areas of EU law. There is no precedent for a third country to submit to the jurisdiction of the CJEU, but there are a number of ways in which the parties to those agreements have obtained assurances that obligations in those agreements will be enforced, that divergence can be managed where necessary and that disputes can be resolved.”

1.31 We noted that all three proposed Regulations require compliance with EU data protection laws and with fundamental rights enshrined in the EU Charter of Fundamental Rights.¹⁵ The European Union (Withdrawal) Bill makes clear that the EU Charter will not form part of domestic law “on or after exit day”.¹⁶ We asked the Minister to comment on the possibility that the EU might insist on the continued application of EU-type protections (the EU Charter or similar) as a condition of granting access to SIS II, since any action taken by UK law enforcement authorities on the basis of an alert in SIS II (such as questioning or detaining a suspect in the UK who is an EU citizen) might engage rights protected by the Charter. The Minister responds:

“Any provisions in the withdrawal agreement and the proposed treaty on security, law enforcement and criminal justice cooperation that we aim to agree with the EU will be designed to enable the agreed relationship to operate effectively. Matters such as complying with the EU Charter on Fundamental Rights will need to be addressed in the course of negotiations.”

1.32 The Minister confirms that the Council has agreed a general approach on all three Regulations and provides further details:

“We had no vote on the Border Checks and Returns measures, but voted against the General Approach on the Police Cooperation Regulation because it did not adequately address our concerns about the current restrictions on the purpose for which the information in SIS II alerts can be used.

“The text retains the position in the current SIS II Council Decision under which an alert can only be used for a purpose other than that for which it was created if:

- this is ‘justified by the need to prevent an imminent serious threat to public policy or public security, on serious grounds of national security or for the purposes of preventing a serious criminal offence’; *and*
- the Member State creating the alert gives prior authorisation for the information to be used for a different purpose.

¹⁵ See, for example, recital (52) to the proposed police cooperation Regulation which provides: “This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union”.

¹⁶ See clause 5(4) of the Bill.

“In our view, the requirement for prior authorisation even where there is an imminent threat is overly restrictive and could put public security at risk. As the General Approach did not make any changes to this position, we did not think the text was ready for negotiations with the European Parliament.

“As well as this, we did not believe the wording of the General Approach stated clearly enough that law enforcement officers in a Member State should only be required to ask questions as part of the new inquiry check proposed in the text (see Articles 36 and 37), or to conduct specific checks such as searches, if such action is allowed under their domestic law. The text does provide that an inquiry and specific check cannot be performed where the national law does not allow it. But Article 37(7) as drafted then provides that this is ‘without prejudice’ to a Member State’s obligation to obtain all the information requested, which could imply that they should conduct a search if that is the only way of getting it. We believe the text needed to be clearer on this point.”

1.33 Overall, however, the Minister considers that the general approach on the proposed police cooperation Regulation is “broadly acceptable” and highlights the following changes which the Government supports:

“We have secured amendments to Article 21 of the proposal, which would (as originally drafted) have made it compulsory to create an alert in cases where a person or object is sought in relation to a terrorist offence. The text now contains an exception that provides that Member States will not need to create an alert where doing so ‘is likely to obstruct official or legal inquiries, investigations or procedures related to public or national security’. I consider this will give us sufficient discretion over the creation of alerts in practice.

“We have also been able to amend the proposed requirement to respond to all requests for supplementary information within 12 hours so it is now an aspiration rather than an obligation.

“As well as this, we have improved the text dealing with the proposal to allow a pre-emptive alert to be created for children who are in danger of going missing (Article 32) so the test that needs to be met before an alert can be created will not require any significant changes to the practice we follow domestically when creating alerts for children at risk of abduction.”

1.34 The Minister says that the Council and European Parliament have already begun negotiations on the text. He anticipates that the incoming Bulgarian Presidency will seek to reach political agreement in the first half of 2018.

Previous Committee Reports

First Report HC 302–i (2017–19), [chapter 1](#) (13 November 2017); and Thirtieth Report HC 71–xxviii (2016–17), [chapter 1](#) (1 February 2017).

Formal Minutes

Wednesday 13 December 2017

Members present:

Sir William Cash, in the Chair

| | |
|-----------------|-------------------|
| Douglas Chapman | David Jones |
| Steve Double | Andrew Lewer |
| Marcus Fysh | Michael Tomlinson |
| Kelvin Hopkins | |

Draft Report, *Enhancing law enforcement cooperation and border control: strengthening the Schengen Information System*, proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 1.34 read and agreed to.

Resolved, That the Report be the Sixth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

[Adjourned till Tuesday 19 December at 10.00am.]

Standing Order and membership

The European Scrutiny Committee is appointed under Standing Order No.143 to examine European Union documents and—

- a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;
- b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Committees); and
- c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression “European Union document” covers—

- i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;
- ii) any document which is published for submission to the European Council, the Council or the European Central Bank;
- iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;
- iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;
- v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;
- vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

The Committee’s powers are set out in Standing Order No. 143.

The scrutiny reserve resolution, passed by the House, provides that Ministers should not give agreement to EU proposals which have not been cleared by the European Scrutiny Committee, or on which, when they have been recommended by the Committee for debate, the House has not yet agreed a resolution. The scrutiny reserve resolution is printed with the House’s Standing Orders, which are available at www.parliament.uk.

Current membership

[Sir William Cash MP](#) (*Conservative, Stone*) (Chair)

[Douglas Chapman MP](#) (*Scottish National Party, Dunfermline and West Fife*)

[Geraint Davies MP](#) (*Labour/Cooperative, Swansea West*)

[Steve Double MP](#) (*Conservative, St Austell and Newquay*)

[Richard Drax MP](#) (*Conservative, South Dorset*)

[Mr Marcus Fysh MP](#) (*Conservative, Yeovil*)

[Kate Green MP](#) (*Labour, Stretford and Urmston*)

[Kate Hoey MP](#) (*Labour, Vauxhall*)

[Kelvin Hopkins MP](#) (*Independent, Luton North*)

[Darren Jones MP](#) (*Labour, Bristol North West*)

[Mr David Jones MP](#) (*Conservative, Clwyd West*)

[Stephen Kinnock MP](#) (*Labour, Aberavon*)

[Andrew Lewer MP](#) (*Conservative, Northampton South*)

[Michael Tomlinson MP](#) (*Conservative, Mid Dorset and North Poole*)

[David Warburton MP](#) (*Conservative, Somerton and Frome*)

[Dr Philippa Whitford MP](#) (*Scottish National Party, Central Ayrshire*)