



House of Commons
Home Affairs Committee

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

**Tenth 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.

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Committee staff

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

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Tenth Special Report

On 24 July 2018 the Home Affairs Committee published its Seventh Report of Session 2017–19, [UK-EU security cooperation after Brexit: Follow-up report](#) (HC 1356). The Government's response was received on 21 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

Introduction

The Government would like to thank the Committee for its report published on 24 July 2018.

The Committee's follow up report has examined developments in the internal security aspects of the Article 50 negotiations, the negotiating position of Taskforce 50, the internal security and dispute resolution aspects of the Government's White Paper,¹ and the Government's contingency planning.

The Committee has drawn a number of conclusions and made recommendations. The Government's response to the specific conclusions and recommendations made by the Committee are below. We are grateful to the Committee for the valuable scrutiny it has provided.

Conclusions and recommendations 1–3: The transition period

- 1. The current draft of the withdrawal agreement will allow the UK to remain part of the European Arrest Warrant during the transition period, which we welcome. But it will also allow Member States to refuse to extradite their own nationals to the UK during that period, and for the UK to reciprocate by refusing to extradite British nationals to the same countries. The extradition of 'own nationals' to a non-member state would require some EU countries to amend their constitutions via a referendum, and the Government's White Paper appear to accept that this exemption will remain. This will undoubtedly lead to cases in which justice for victims is frustrated or denied, and criminals are able to evade arrest for longer. (Paragraph 12)**
- 2. This is a stark illustration of the sort of complexities involved in any attempt to maintain the 'status quo' in UK-EU security cooperation after Brexit. We reiterate our recommendation that the Government should publish a full impact assessment of the extradition aspects of the withdrawal agreement, and explain what it plans to do to mitigate their effects on the UK's ability to bring offenders to justice. (Paragraph 13)**
- 3. With eight months left before Brexit, the UK's status within Europol after 29 March next year remains unclear. The Government and the EU must clarify, at the earliest opportunity, whether the UK will retain any role or function relating to the Europol Management Board, and whether it will be able to lead operational projects**

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

during the transition period. We urge the EU to show flexibility and allow the UK to remain on the Management Board during transition, to avoid instability while a new agreement is drawn up. If it is likely that alternative arrangements will be in place, then the Government needs to set out what their impact will be on the UK's law enforcement capabilities. (Paragraph 17)

As the Committee has outlined, the draft Withdrawal Agreement² - endorsed at the March European Council - will allow the UK to remain part of the European Arrest Warrant (EAW) during the implementation period. The UK will no longer be a member of the European Union (EU) at this point. The Withdrawal Agreement will therefore take account of constitutional barriers in some Member States to the extradition of their own nationals to countries that are not in the EU.

It will be a matter for those Member States with constitutional barriers to decide how they intend to implement the Withdrawal Agreement. However, Article 168 of the Withdrawal Agreement has not yet been finalised. We believe it is in the interests of both the UK and EU Member States that important operational capabilities, including swift and effective extradition arrangements provided for by the EAW, are preserved during the implementation period. Member States which bar the surrender of their own nationals tend to have wider-ranging extraterritorial jurisdiction. Therefore, where surrender is not possible, we could look to explore the possibility of transferring proceedings and sentences to the Member States concerned.

The terms of our future Security Partnership with the EU are subject to negotiation, but the arrangements for the Withdrawal Agreement should be the basis for the future relationship on extradition.

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 measures amending or updating them. The UK can also be invited to cooperate in any new EU tools and measures that are introduced during the implementation period.

While the UK will no longer be a EU Member State during the implementation period, as set out in the Withdrawal Agreement, 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 the UK and its citizens. We consider that there is no barrier to the UK leading operational projects during the implementation period, as we do not consider this activity requires participation in formal EU governance structures. However, the exact nature of the UK's participation is a matter for further discussion.

Conclusions and recommendations 4–7: The long-term future security relationship – Data sharing

4. Without UK access to SIS II, individuals who pose a genuine threat will be able to enter the UK or the EU without important intelligence being flagged to border officials. Losing access to it would be a calamitous outcome for the UK, which would

² Published 19 March - <https://www.gov.uk/government/publications/draft-withdrawal-agreement-19-march-2018>

pose a severe threat to the Government's ability to prevent serious crime and secure the border effectively, but it is an increasingly likely prospect. Retaining SIS II access should be a primary negotiating objective for the Government: it should publish a detailed assessment of the impact of losing access, and focus significant efforts on persuading the EU27 to widen its negotiating mandate on data exchange. We are very concerned about the vast distance between the EU and UK's positions on this extremely significant issue, and the Government's recent White Paper does nothing to close that gap. (Paragraph 36)

5. We urge the EU to outline the conditions that it would expect the UK to meet in order to retain access to SIS II. We have already argued that the Government must make concessions to ensure that the EU entrusts it with highly sensitive data on EU citizens, including compliance with EU data protection standards and adherence to Article 8 of the EU Charter on Fundamental Rights, by incorporating it into UK law. The Government must urgently set out its plan for securing data adequacy, including how it intends to deal with sensitive national security and surveillance issues. It should also remove the immigration exemption from the Data Protection Act—both to ensure proper transparency in its immigration policy, and to avoid undermining a data adequacy decision. (Paragraph 37)

6. Based on evidence from Guy Verhofstadt, we are unconvinced that all of those involved in the Brexit negotiations fully understand the implications of cutting the UK out of shared data platforms, and moving to a model of 'reciprocal' data exchange. While we acknowledge that SIS II remains part of the Schengen package of measures, we call on EU27 countries to look beyond political considerations, consult their own law enforcement agencies, and engage fully with the operational impact of locking the UK out of EU law enforcement databases after Brexit. (Paragraph 38)

7. We reiterate our previous conclusion that the extent of ECJ involvement in any meaningful data-sharing agreement between the UK and the EU means that it would be unwise to make the jurisdiction of the European Court a 'red line' issue in the negotiations. More broadly, both the UK and EU need to drop some of their rigid red lines in order to ensure that crucial policing and security information is shared. Both sides should avoid putting short-term political considerations before the safety and security of citizens. It would be utterly irresponsible to fail to secure a deal in this area. (Paragraph 39)

SIS II is a major shared operational capability for law enforcement and security agencies across Europe. The Government agrees with the Committee's conclusion that the loss of UK access to SIS II would be detrimental – both for the UK and the EU Member States. For example, as outlined in our technical note on security, law enforcement, and criminal justice³ – if the UK were no longer to have access to SIS II, alerts from participating countries would not be checked against passengers entering the UK which would represent a loss of operational capability for the law enforcement and security agencies of those countries.

As the UK leaves the EU, free movement of people will end. But the numbers of EU nationals living in the UK and the volume of passenger arrivals entering the UK, approximately 130

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

million in the year ending June 2017, demonstrate just how important it is to continue to share information that can prevent and detect serious crime and terrorism. That is why the UK would protect that capability through maintaining the reciprocal ability to transmit alerts in real time, with access to systems that allow for a timely and efficient response to these alerts through SIS II. We are clear, as outlined in our White Paper,⁴ that by continuing to participate in SIS II, the UK would remain bound by its rules, including peer evaluation.

The Committee highlights the UK position on the jurisdiction of the CJEU and the application of the Charter of Fundamental Rights in regard to the negotiation of a data sharing agreement. The Government does not consider our position on the CJEU or the Charter of Fundamental Rights to be an impediment to a future data sharing agreement, given wider EU precedent for strategic agreements with third countries. For example, the Schengen Association Agreements provide for direct access to certain EU internal security tools – including SIS II - without requiring the non-EU Schengen states to submit to the direct jurisdiction of the CJEU or the application of the Charter of Fundamental Rights.

In regard to the UK securing an agreement with the EU on the continued exchange and protection of personal data, 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.

We believe 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 the 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.

The Committee also raised the immigration exemption in the Data Protection Act, suggesting that it could undermine a data adequacy decision. We consider that the immigration exemption is entirely compatible with both the UK's commitment to protect data and respect an individual's privacy, and with European data protection law. Article 23 of the General Data Protection Regulation (GDPR) allows Member States to restrict rights in certain areas where it involves an important objective of general public interest of the Union or a Member State. The UK Government considers that the need to maintain effective immigration control is one such objective.

A deal on data must respect UK sovereignty, including the UK's ability to protect the security of its citizens. 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

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

and legality. 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 8: The long-term future security relationship – Europol

8. The EU's treatment of Denmark does not bode well for the UK's ability to maintain its influence on the strategic direction of Europol, nor to retain direct access to the Europol Information System. We urge the EU to place the operational needs of Europol above its own political considerations, and to work closely with the agency to identify an optimal model for the UK's future role within Europol, accounting for its intensive use of the EIS and extensive involvement in cross-border operations. It will be in the best interests of the EU, UK and Europol for the UK to retain its prominent role within the agency, advising on strategic priorities and leading operational projects after Brexit. The Government must also take steps to ensure that it has the necessary data protection framework in place. (Paragraph 43)

The Government agrees with Committee's conclusion that it is in the best interests of the EU, UK and Europol for the UK to maintain its ongoing role with the agency. As outlined in our White Paper,⁵ the UK is one of the biggest contributors of data, information and expertise to Europol. For example, in 2016 the UK was the highest contributor to Europol serious and organised crime analysis projects, and the highest contributor of information in relation to firearms, child sexual exploitation and abuse, money laundering, cyber, and modern slavery.⁶ UK liaison officers offer valuable expertise in dealing with other countries' policing systems and helping progress EU wide investigations.

We want to continue making a significant contribution to the work of the agency. However, as the Committee's conclusion (and our own analysis)⁷ has outlined, an agreement based on existing third country agreements with Europol would not permit this. Our White Paper highlighted that existing third country agreements with Europol do not provide direct access to Europol's databases and the streamlined exchange of data; 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 UK would not be able to maintain its current contribution to Europol on the basis of an agreement along those lines, in part due to the sheer volume of activity the UK participates in and the data that the UK shares.

That is why we are proposing a new, coherent and legally binding agreement on internal security, which goes beyond existing precedents in this area, and includes continued participation by the UK in key EU agencies (such as Europol).

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

6 National Crime Agency written evidence to Home Affairs Committee inquiry into 'UK-EU security cooperation after Brexit' (PSC009), Home Affairs Committee, February 2018 – <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/home-office-delivery-of-brex-it-policing-and-security-cooperation/written/78338.pdf>

7 Published 12 July 2018 - <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>
Published 24 May 2018 - <https://www.gov.uk/government/publications/technical-note-on-security-law-enforcement-and-criminal-justice>

Conclusion and recommendation 9: The long-term future security relationship – The European Arrest Warrant

9. The EU's initial proposals for a future extradition agreement are significantly inferior to the European Arrest Warrant, and could cause major delays to the UK's ability to bring offenders to justice. Our previous report concluded that being forced to fall back on the 1957 Convention on Extradition would be a catastrophic outcome—and the EU proposes basing its future extradition arrangements with the UK on the Convention. We recognise that Member States will seek necessary protections for their citizens' rights after Brexit. But we see no reason why the EU cannot pursue a more ambitious extradition agreement with the UK, based on the mutual recognition of judicial decisions, and underpinned by necessary safeguards. Given the limited time available, the UK and EU must commence negotiations on this vital issue at the earliest opportunity. (Paragraph 49)

We agree with the Committee's conclusion that the EU and UK should pursue an ambitious extradition arrangement, and believe that effective extradition arrangements should form part of a new, coherent and legally binding agreement on internal security. The Government has been clear – as outlined in our White Paper⁸ and Technical Note⁹ – that existing EU agreements with third countries on extradition do not provide the same level of capability as the EAW. While the terms of the future Security Partnership are subject to negotiation, there are no legal or operational reasons why we could not reach an effective extradition arrangement. Therefore, we consider that a pragmatic solution on our future extradition relationship is in the interests of both EU Member States and the UK.

Conclusions and recommendations 10–12: The long-term future security relationship – Conclusions

10. The European Commission's negotiating mandate on internal security, based on instructions from the EU27, is a disappointingly rigid opening position. It fails to acknowledge any precedent for cooperation with non-EU countries in this field, and suggests that the EU will treat the UK in the same manner as any other third country. It contains no explicit recognition of the deep level of security cooperation between the UK and EU27 to date, the operational needs of all 28 countries, the UK's capabilities in this field, nor the potential for a bespoke solution, which would be in the clear interests of UK and EU citizens. Ultimately, it appears to be driven more by political considerations than by operational needs. It is understandable that Member States would want to retain advantages to EU membership that are unavailable to third countries. But it is unacceptable for such considerations to take precedence over our shared ability to prevent and respond to terrorism and serious crime. (Paragraph 53)

11. The EU's opening position makes it clear that the Government must do much more to ensure that a comprehensive security deal with the EU can be agreed. In our previous report, we called for the Government to incorporate Article 8 of the

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

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

EU Charter of Fundamental Rights (concerning data protection) into UK law; for it to make necessary preparations for a long-term data adequacy decision as early as possible in the Brexit process; and for it to avoid making the ECJ's jurisdiction a 'red line' issue in the security negotiations. It must now take urgent action on all fronts, so that rapid progress can be made. (Paragraph 54)

12. We have serious concerns about the impact on security cooperation of the Government's position on the jurisdiction of the ECJ. The Government proposes an alternative form of dispute resolution, involving a Joint Committee and an independent arbitration panel, with the option to refer a matter to the ECJ for an interpretation of EU law. But our previous report concluded that the UK will be unable to depart from EU data protection law after Brexit, nor from the rulings of the ECJ. If the Government is willing to respect the remit of the European Court in relation to Europol, we see no reason why it should not apply this principle to other forms of security cooperation, including data protection and extradition. This could assist the UK with retaining access to SIS II, as well as the speed of negotiations on an extradition agreement, which might otherwise extend far beyond the end of the transition period. At present, the UK is at severe risk of a cliff-edge in its extradition arrangements after Brexit, with serious ramifications for the administration of justice across the European Union. (Paragraph 55)

The Government agrees with the Committee's conclusion that it would be unacceptable for other considerations to be prioritised over our capability to prevent and respond to terrorism and serious crime. We believe our approach to a new legal relationship should be guided by a single overriding aim: affording maximum protection to our citizens. While the UK fully accepts that our relationship will change as a result of leaving the EU, working together through different structures should not be at the expense of protecting the public.

We also agree with the Committee's observation about the deep security cooperation between the UK and EU, as well as the relevance of existing precedents for EU cooperation with third countries. The shared tools, measures, initiatives and capabilities that have been developed over the last 40 years have been proven to save lives. The UK proposals are both legally viable and operationally important – so a practical and pragmatic approach is required to avoid unnecessary gaps in our operational capabilities, for both the UK and EU Member States.

The White Paper¹⁰ 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. 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.

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

In respect to 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).

Conclusions and recommendations 13–16: Progress and contingency planning

13. **Four months on from our initial report on post-Brexit security cooperation, we are becoming increasingly frustrated and concerned about the lack of progress in the negotiations to date. The UK and EU agree that future security cooperation is in all our interests, but the vast gap between their respective proposals demonstrates that the negotiations on the long-term future security relationship will be challenging and highly complex. The Home Secretary has expressed hope to us that the EU's position will change to reflect the attitudes of the EU27 interior ministers, but the Commission's proposal reflects a consensus reached among all 27 Member States, so we do not share his optimism. (Paragraph 62)**

14. **We agree with Claude Moraes MEP that “the time for philosophical discussions is over”. The Government's recent White Paper moves us no closer to agreement with the EU on many difficult issues. Progress in the security aspects of the negotiations will require both sides to devote considerable time and energy to this subject, putting forward detailed proposals or draft agreements for discussion. Time is running out to get this right. (Paragraph 63)**

15. **The framework for the future relationship remains unclear, but any security agreement might require ratification by all 27 Member States, as well as the UK and the EU. Based on the current state of the negotiations, we reiterate our recommendation that the UK Government and the EU must remain open to extending the transition period for security arrangements beyond the proposed end-date of December 2020. (Paragraph 64)**

16. **It is often said that the primary purpose of any Government is to protect its citizens from violence and harm—yet crucial questions about the UK's future security relationship with the EU remain unanswered, and the issue continues to be sidelined by public debate about customs, borders and immigration after Brexit. The limited evidence available suggests that the Government is still failing to focus requisite energy on security cooperation at a ministerial level, and that the Home Office's Brexit planning budget is largely (if not entirely) devoted to the UK's future immigration system. A ‘no deal’ Brexit is an increasingly plausible outcome, but we are unconvinced that the Government is planning adequately to prevent the most unthinkable of outcomes from becoming a reality. Without urgent action to make progress in these negotiations, and to put workable contingency plans in place for a ‘no deal’ scenario, the safety and security of UK and EU citizens will be put at serious and unnecessary risk. (Paragraph 65)**

We disagree with the Committee's conclusion that the White Paper¹¹ brings the UK and EU no closer to an agreement. Whilst we accept that any negotiations of this nature will be complex, we believe the White Paper sets out clear proposals for the future relationship

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

we want to build with the EU, building on our previous publications¹² which outlined clearly the Government's ambition for a comprehensive and legally binding agreement on internal security. It is on the basis of the proposals set out in this White Paper, that 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.

On the implementation period, both the UK and the EU agree that it has to be time-limited and the legal text sets an end date of 31 December 2020. We are working at pace to ensure that all the necessary arrangements are in place for 31 December 2020.

We strongly agree that the priority of any Government must be to protect its citizens from violence and harm. However, we disagree with the Committee's suggestion that the Government is not planning adequately for a 'no-deal' outcome. The continued safety and security of both UK and EU citizens remains our top priority.

That is why 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. We are co-ordinating 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 to protect the citizens of the UK and the EU, should that be required.

12 Published 24 May 2018 - <https://www.gov.uk/government/publications/technical-note-on-security-law-enforcement-and-criminal-justice>
Published 9 May 2018 - <https://www.gov.uk/government/publications/framework-for-the-uk-eu-security-partnership>
Published 18 September 2017 - <https://www.gov.uk/government/publications/security-law-enforcement-and-criminal-justice-a-future-partnership-paper>