

Government response to the House of Lords European Union Select Committee report '*Brexit: Future UK-EU Security and Police Cooperation*'

Introduction

The Government would like to thank the Committee for its report published on 16 December 2016.

Since the report was published the Government has officially triggered Article 50 of the Treaty on European Union (TEU), signalling the beginning of the process to leave the EU. Negotiations under Article 50 began this summer. The Government has also published a series of papers on its approach to the deep and special partnership we want with the EU, a number of which are relevant to the issues raised in the Committee's report.

Our current relationship with the EU in this area centres on a 'toolkit' of measures that have been developed in response to shared and evolving threats posed by crime and terrorism. The UK's participation in these measures is currently linked to our membership of the EU. The basis on which the UK cooperates with the EU in these areas will evidently be affected by the UK's withdrawal, but we believe that it is in the clear interest of all our citizens that the UK and the EU sustain the closest possible cooperation in tackling terrorism, organised crime and other threats to security.

Since the EU referendum vote last June, the Government, supported by our operational partners, has been examining our current participation in EU measures in this area and the capabilities they deliver. This work is being carried out alongside wider consideration of how we maintain and advance effective security and intelligence cooperation with the full range of our global allies. This includes cooperation with Interpol, the Five Eyes, the Council of Europe, NATO and bilateral work with individual countries.

The Committee has examined the UK's current relationship with the EU in significant detail and has identified the key challenges we will face in negotiating the UK's future relationship with the EU on security, law enforcement and criminal justice. The Government set out its negotiating objectives in the Article 50 notification letter to European Council President, Donald Tusk, on 29 March. In our recent future partnership paper on security, law enforcement and criminal justice¹, we set out our vision for the future partnership between the UK and the EU in this area. The UK's geographical proximity to its European neighbours, the volume of cross-border movements between the UK and the EU, and the high degree of alignment in the scale and nature of the threats faced call for a new, more ambitious model for cooperation. We believe that the UK and the EU should work together to design new, dynamic arrangements as part of our future partnership that go beyond the existing, often ad hoc arrangements for EU third-country relationships in this area, and draw on the legal models that the EU has used to structure cooperation with third countries in other fields, such as trade.

¹ Published 18 September: <https://www.gov.uk/government/publications/security-law-enforcement-and-criminal-justice-a-future-partnership-paper>

The UK's responsibilities as a good neighbour for the security of European citizens, as well as its own, will remain upon leaving the EU. The UK's future partnership with the EU should ensure those responsibilities can be met.

The Government's response to the specific conclusions and recommendations made by the Committee are below.

Conclusion/Recommendation 1:

We welcome the statement by the Secretary of State for Exiting the European Union that “maintaining the strong security cooperation we have with the EU” is one of the Government’s top four overarching objectives in the forthcoming negotiations on the UK’s exit from, and future relationship with, the European Union. The arrangements currently in place to facilitate police and security cooperation between the United Kingdom and other members of the European Union are mission-critical for the UK’s law enforcement agencies. The evidence we have heard over the course of this inquiry points to a real risk that any new arrangements the Government and EU-27 put in place by way of replacement when the UK leaves the EU will be sub-optimal relative to present arrangements, leaving the people of the United Kingdom less safe. (Paragraph 36)

Government Response

The Government agrees with the Committee's view that maintaining strong security cooperation with the EU remains in the interests of both the UK and EU. As the Committee notes, there is considerable consensus about the need for a continued relationship in this area.

Looking to the future, while the nature of the UK's relationship with the EU will change, it would be wrong to conclude at this stage that any future relationship with the EU will be sub-optimal in comparison to our present arrangements. This is new territory for both sides and it is too early to say exactly what that future relationship will look like.

Our cooperation with European partners has already intensified in the wake of the series of attacks across the continent. With the threats to our common security becoming more serious, our response cannot be to cooperate with one another less, but to work together more. The UK wants to continue to be the strongest friend and partner in every way, and that includes defending the safety and security of all of our citizens. It is in all our interests that we continue our deep cooperation with the EU and its Member States to tackle these threats together. The European Council's negotiating guidelines set out that “[the] EU stands ready to establish partnerships in areas unrelated to trade, in particular the fight against terrorism and international crime, as well as security, defence and foreign policy.”²

Conclusion/Recommendation 2

² 'Guidelines Following the United Kingdom's Notification under Article 50 TEU', European Council, April 2017.

The UK has been a leading protagonist in shaping the nature of cooperation on police and security matters under the auspices of the European Union, as reflected in EU agencies, policy and practice in this area. Upon ceasing to be a member of the EU, the UK will lose the platform from which it has been able to exert that influence and help set an EU-wide agenda. This could have the effect of tilting the balance in intra-EU debates—for example in debates on the appropriate balance between security and privacy in relation to data protection—in a way detrimental to the UK’s interests. Although our report focuses on the individual tools and capabilities the UK should retain or replace upon leaving the EU, we judge that the Government will also need to consider how it can attempt to influence the EU security agenda—which inevitably will have implications for the UK’s own security—in future. This may mean trying to remain part of certain channels and structures, or finding adequate substitutes. (Paragraph 37)

The Government acknowledges the issue the Committee raises about the UK’s future ability to exert influence in this area. As the Committee highlights, we have played a key role in shaping the nature of cooperation on security, law enforcement and criminal justice matters within the European Union. The UK is widely acknowledged to have taken a leading role in developing several of the practical cooperation measures now in place across the EU. For example, we were at the forefront in pushing for an effective EU Directive on Passenger Name Records. Our expertise and drive for high standards are valued by EU partners.

Our pre-existing role on security issues within the EU now puts us in a unique position from which to develop and maintain a mutually beneficial model of cooperation from outside the Union. We have made clear that the ambition should be to construct a model that creates an ongoing dialogue in which law enforcement and criminal justice challenges and priorities can be shared and, where appropriate, tackled jointly. It should also ensure the UK-EU relationship can be kept versatile and dynamic enough to respond to the changing threat environment. Cooperation with wider, non-EU partners will also remain important as we structure our new relationship with the EU.

Conclusion/Recommendation 3

The UK and the EU-27 share a strong mutual interest in sustaining police and security cooperation after the UK leaves the EU. In contrast to other policy areas, all parties stand to gain from a positive outcome to this aspect of the Brexit negotiations. This could, however, lead to a false sense of optimism about how the negotiations will unfold. For example, it seems inevitable that there will in practice be limits to how closely the UK and EU-27 can work together if they are no longer accountable to, and subject to oversight and adjudication by, the same supranational EU institutions, notably the CJEU. (Paragraph 38)

Taken with

Conclusion/Recommendation 4

There must be some doubt as to whether the EU-27 will be willing to establish the ‘bespoke’ adjudication arrangements envisaged by the Government, and indeed over whether such arrangements can adequately substitute for the role of the supranational institutions from the perspective of the EU-27. We anticipate that this issue may pose a particular hurdle for negotiations on the UK’s future relationship with EU agencies such as Europol, and also affect the prospects for maintaining mutual recognition of judicial decisions in criminal matters. It seems conceivable, therefore, that the Government will encounter a tension between two of its four overarching objectives in the negotiation— bringing back control of laws to Westminster and maintaining strong security cooperation with the EU. In our view, the safety of the people of the UK should be the overriding consideration in attempting to resolve that tension, and we urge the Government to ensure that this is the case. (Paragraph 39)

Taken with

Conclusion/Recommendation 5:

The need to meet EU data protection standards in order to exchange data for law enforcement purposes means that after leaving the EU, the UK can expect to have to meet standards that it no longer has a role in framing. More generally, the police and criminal justice measures that the UK currently participates in and may continue to have a stake in are liable to be amended and updated with the passage of time, when the UK is no longer at the table to influence the pace and direction of change. In preparing for negotiations, the UK Government will therefore need to explore from the outset how any agreement struck with the EU-27 at the point of exit can address this prospect, and the attendant risk to the UK. (Paragraph 40)

Government Response

The Government shares the Committee’s opinion that there is mutual benefit in continuing UK-EU cooperation on security, law enforcement and criminal justice. The Government is committed to reaching an agreement that will ensure the safety and security of citizens in the UK and the EU. We also acknowledge the fact that the threats facing all of Europe are dynamic and fast changing; so we will be seeking a relationship that will allow us to address the changing threats we face together.

The Committee rightly points out that the UK will no longer be subject to CJEU jurisdiction after our exit. As set out in our future partnership paper on enforcement and dispute resolution published on 23 August 2017, consideration will need to be given to dispute resolution as part of the new relationship.³ Any internal security arrangements in the UK’s future partnership with the EU should be subject to the same principles on dispute resolution that are set out in that paper. There is no precedent, and indeed no imperative driven by EU, UK or international law which demands that enforcement or dispute resolution of future UK-EU agreements falls under the direct jurisdiction of the CJEU.

³ Enforcement and dispute resolution - a future partnership paper:
<https://www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper>

Over the course of negotiations, the UK and the EU need to agree on how our new deep and special partnership can be monitored and implemented to the satisfaction of both sides, and how any disputes which arise can be resolved. The UK has a long record of, and remains fully committed to, complying with international law and we will take steps to implement and enforce our agreements with the EU within our domestic legal context. This will be underpinned by the creation of international law obligations which will flow from our agreements with the EU.

There are a number of existing precedents where the EU has reached agreements with third countries which provide for a close cooperative relationship without the CJEU having direct jurisdiction over those countries. Both on trade and on the Schengen association agreements there are examples of the EU's relationships being based on overarching legal frameworks that support close and dynamic cooperation with third countries. Neither of these arrangements involve direct jurisdiction of the Court of Justice of the European Union (CJEU) in those third countries.

The UK will engage constructively to negotiate an approach to enforcement and dispute resolution which meets the key objectives of the UK and the EU in underpinning the effective operation of a new, deep and special partnership.

Our ambition is to construct a model for cooperation that is underpinned by our shared principles, including a high standard of data protection. Any use of personal data to support law enforcement cooperation must of course be underpinned by appropriate safeguards. The UK already has robust data protection safeguards in place in line with existing EU law requirements and plans to implement the new EU Data Protection framework by May 2018. This will ensure that our domestic framework is aligned with EU law at the time of exit.

On 24 August the Government published a future partnership paper on the exchange and protection of personal data, setting out our approach to ensuring the continued protection and exchange of personal data between the EU and the UK in light of the UK's withdrawal from, and new partnership with, the EU.⁴ It is essential that as part of the UK's future partnership with the EU, we agree arrangements that allow for free flows of data to continue, based on mutual trust in each other's high data protection standards. We recognise the need for, and are one of the leading drivers of, high data protection standards across the globe. After our exit, the UK will remain a global leader on data protection, by promoting both the flow of data internationally and appropriate high levels of data protection rules. The UK will continue to work closely with the EU and our wider international partners to find an appropriate balance between privacy, innovation, and the ability of law enforcement bodies to protect citizens from crime and terrorism. Given that the UK will be compliant with EU data protection law and wider global data protection standards on exit, and given the important role of continued regulatory cooperation as part of a future economic relationship, the UK believes that a UK-EU model for exchanging and protecting personal data could provide for regulatory cooperation and ongoing certainty for businesses and public authorities.

⁴ The exchange and protection of personal data - a future partnership paper:
<https://www.gov.uk/government/publications/the-exchange-and-protection-of-personal-data-a-future-partnership-paper>

We note the Committee's recommendation that the safety of UK citizens should be the overriding consideration when looking at bringing back control of laws to Westminster and maintaining strong security cooperation with the EU.

Conclusion/Recommendation 6-8:

We welcome the Government's decision to opt into the new Europol Regulation. In addition to the substantive reasons we gave in our 2013 report for recommending that the Government should opt into the draft Europol Regulation, the UK's forthcoming exit from the EU means there is now an additional, strategic value in remaining a full member of Europol and its Management Board during a period when the modalities of the UK's future partnership with the EU on police and security matters are under negotiation. (Paragraph 50)

Taken with

Our witnesses were unequivocal in identifying the UK's future relationship with Europol as a critical priority. They also made clear that an operational agreement with Europol akin to those that other third countries have negotiated would not be sufficient to meet the UK's needs. The Government will therefore need to devise and secure agreement for an arrangement that protects the capabilities upon which UK law enforcement has come to rely, and which goes further than the operational agreements with Europol that other third countries have been able to reach thus far. (Paragraph 68)

Taken with

Bearing in mind the contribution the UK makes to Europol, and the mutual benefit to be derived from a pragmatic solution, we regard this as a legitimate objective for the UK to pursue in negotiations with the EU-27. Achieving it, however, may be problematic: there seems likely to be a tension with other policy goals on both sides, notably in regard to the role of the supranational EU institutions. To the extent that Europol remains accountable to these institutions—and we note that the direction of travel in the new Regulation is towards enhancing that accountability—this could present a significant practical hurdle to sustaining the level of cooperation that might otherwise be advantageous to both sides. In 2014, the Government said it would “never put politics before the protection of the British public.” In our view, that calculation has not changed, and we urge the Government to work towards a pragmatic solution that protects the safety of the people of the United Kingdom. (Paragraph 69)

Government Response

The Government notes the Committee's positive comments on the decision to seek to opt-in to the new Europol Regulation and since the publication date of this report, the European Commission have confirmed the UK's participation in the new Regulation, which came into force in May. The Government welcomes this decision and a Written Ministerial Statement (WMS)⁵ was laid before Parliament on 28 March. Opting into the new regulation means that until we leave the EU, the UK will remain a full member of

⁵ “Europol Regulation Opt-in”, Hansard 28 March 2017, Volume 624:
<http://hansard.parliament.uk/commons/2017-03-28/debates/1703288800020/EuropolRegulationOpt-In>

Europol, enabling us to maintain our current access to the agency and benefit from its cooperation and operational advantages. This decision demonstrates our commitment to work together with our European partners to fight crime and prevent terrorism, helping keep the people of Britain safe.

The Government is aware of the importance attached to Europol by operational partners and is working with them to understand their needs and to help ensure that our future relationship with the EU delivers the capabilities they need to keep people safe. The Government notes the recommendation that the UK should look for a deal that goes further than those currently enjoyed by non-EU countries. Our wide and ambitious strategic agreement with the EU, as outlined in the Government's recent future partnership paper in this area, would provide a comprehensive overarching framework for our future security, law enforcement and criminal justice cooperation. Public safety in the UK and the rest of Europe is of the utmost importance, and we will address the issue of Europol as part of our negotiations for this agreement.

The UK's future participation in Europol will therefore have to be agreed as part of wider negotiations establishing our future relationship with the EU on security, law enforcement and criminal justice cooperation.

Conclusion/Recommendation 9-12

The timeliness and effectiveness of the work of the Crown Prosecution Service rely on the ability to work multilaterally and in real time with partners in the EU—a capability currently provided by the UK's membership of Eurojust. A continuing close partnership with Eurojust is therefore likely to be essential. (Paragraph 82)

Taken with

A third-country agreement with Eurojust involving a Liaison Prosecutor, for which precedents already exist, may come closer to meeting the UK's needs than the equivalent precedents for third country-agreements with Europol. This may therefore be a fruitful avenue for the Government to explore in the forthcoming negotiation. Ideally any such agreement would provide for closer cooperation than has thus far been available to other third countries—for example by providing access to the Eurojust Case Management System. As with Europol, however, the role of the supranational EU institutions in providing accountability and oversight for Eurojust's activities may present a political obstacle to forging the sort of partnership that would best meet the UK's operational needs. (Paragraph 83)

Taken with

We share the Director of Public Prosecution's concerns regarding the length of time it could take to negotiate an agreement with Eurojust, and the importance of avoiding an operational gap. (Paragraph 84)

Taken with

Our witnesses were optimistic about the prospect of retaining access to Joint Investigation Teams, based on the model that already exists for certain third countries to participate in JITs with the agreement of all other participants. We

recommend that the Government explores the practical steps that would be needed to allow the UK to benefit from a similar arrangement, with a view to pursuing that objective in a future negotiation. (Paragraph 85)

Government Response

The Government notes the Committee's positive comments on the precedents set by existing third-country agreements with Eurojust. As with Europol, Eurojust provides a valuable service to the UK in the fight against transnational serious organised crime and terrorism. We are committed to ongoing judicial cooperation with our EU partners and will seek a future agreement that does not compromise the timely delivery of justice. The Government is aware of the importance attached to Eurojust by operational partners and is working with them to help ensure that our future relationship with the agency delivers the capabilities they need.

As the Committee points out, third country agreements allow countries to base Liaison Prosecutors at Eurojust headquarters where they can provide valuable assistance by opening cases on behalf of their home authorities, requesting assistance and co-operation in connection with their own investigations and conduct prosecutions from the EU National Desks at Eurojust. They are also able to join Joint Investigation Teams (JITs) with EU Member States, subject to their domestic law.

We are carefully considering how to continue cooperating with Eurojust. The UK's future cooperation with Eurojust will have to be agreed as part of wider negotiations when establishing our relationship with the EU on security, law enforcement and criminal justice cooperation. Therefore, as with Europol, we will address cooperation through Eurojust as part of our negotiations for the overarching strategic agreement that we are proposing should govern our future partnership with the EU in this important area.

The Government notes the Committee's concern that a delay in negotiating an agreement could create an operational gap. As the Prime Minister has outlined, it is in no one's interest for there to be a cliff-edge: that would not be good for Britain, nor for the EU. Instead, we will work hard to ensure a smooth and orderly transition to any new arrangement.

The UK values the role of JITs in supporting effective joint working between law enforcement agencies and prosecuting authorities across Europe. As the Committee indicates, there is an existing model for third country participation in JITs which, in certain circumstances, allows non-EU Member States to participate with the agreement of all other participating parties.

The Government is considering the differences between the third country model and other possible options for future cooperation and how to enable the UK to continue to work effectively with our EU partners via JITs after we have left the EU.

Conclusion/Recommendation 13

As recently as 2014 and 2015, the Government and Parliament judged that it would be in the national interest for the UK to participate in flagship EU data-sharing platforms such as the Second Generation Schengen Information

System, the European Criminal Records Information System and the Prüm Decisions. We see no reason to change that assessment, not least as the threat from terrorism in particular has escalated further—and the EU has responded, for example by adopting the Passenger Name Record Directive earlier this year. (Paragraph 119)

Taken with

Access to EU law enforcement databases and data-sharing platforms is integral to day-to-day policing up and down the country. Were the UK to lose access to them upon leaving the EU, information that can currently be sourced in seconds or hours could take days or weeks to retrieve, delivering an abrupt shock to UK policing and posing a risk to the safety of the public. The UK therefore has a vital national interest in finding a way to sustain data-sharing for law enforcement purposes with the EU-27. (Paragraph 120)

Taken with

The starting point for the UK in seeking to negotiate access to these tools is different from that of any other third country, both because of the UK's pre-existing relationship with the EU-27 and because of the value it can add through the data it has to offer. We therefore accept the Government's view that the precedents for access to EU data-sharing tools by non-EU and non-Schengen members may fail to capture the range of options that could be available to the UK. With that in mind, we believe there is a strong case for the Government to pursue a bespoke solution and seek access to the full suite of data-sharing tools on which the UK currently relies, as well as those it is still planning for. (Paragraph 121)

Taken with

At the same time, we recognise that the two data-sharing tools that witnesses identified as the top priorities for the UK—SIS II and ECRIS—are also those for which there is no precedent for access by non-EU (ECRIS) or non-Schengen (SIS II) countries. The price of accessing these databases has thus far been membership of the EU and/or Schengen. Therefore a UK negotiating objective of seeking continued access to these vital tools would be particularly ambitious. (Paragraph 122)

Taken with

With regard to Passenger Name Records, the Government should explore the precedents for EU agreements with third countries. We note, however, that losing access to intra-EU PNR data would be a serious handicap, and that the CJEU's ruling on the EU-Canada PNR agreement does not bode well for the EU's ability to conclude similar agreements promptly and reliably in future. (Paragraph 123)

Government Response

The Government agrees with the Committee's assessment of the value delivered by measures such as the Second Generation Schengen Information System (SIS II), European Criminal Records Information System (ECRIS) and Passenger Name

Records (PNR) in combatting crime and terrorism. Our aim is to ensure that we, and our EU partners, can continue to facilitate data-driven law enforcement – subject to the appropriate safeguards.

The Committee's report draws attention to the precedent set by existing third country agreements on PNR. The Government has always been clear on the importance of processing passenger data for law enforcement purposes. Our operational capability is the most well-established across Europe and it already extends to PNR data from well beyond Europe. The European Commission in its first progress report: "*Towards an effective and genuine Security Union*" has acknowledged that the UK is the only Member State with a fully functioning PNR system.

The Government notes the Committee's view that the precedents for access to EU data-sharing tools by non-EU and non-Schengen member may fail to capture the range of options that could be available to the UK. While we note that existing models of cooperation offer a basis to help inform discussions, we have been clear that limiting cooperation to those areas where a precedent for cooperation between the EU and third countries already exists would result in a limited patchwork of cooperation, and that they are not the right starting point for a future UK-EU partnership.

Conclusion/Recommendation 18 - 20

Government Response

The European Arrest Warrant is a critical component of the UK's law enforcement capabilities. We see no reason to revise our assessment—and that of the Government in 2014—that the 1957 Council of Europe Convention on Extradition cannot adequately substitute for the European Arrest Warrant. Accordingly, the most promising avenue for the Government to pursue may be to follow the precedent set by Norway and Iceland and seek a bilateral extradition agreement with the EU that mirrors the EAW's provisions as far as possible. The length of time it has taken to implement that agreement—which was signed a decade ago but is still not in force—is, however, a cause for concern. An operational gap between the EAW ceasing to apply and a suitable replacement coming into force would pose an unacceptable risk. (Paragraph 141)

Taken with

Although the EU's agreement with Norway and Iceland contains the option of applying the nationality exception in Article 7, it is not self-evident that the UK should seek to negotiate an equivalent provision in any future extradition agreement with the EU, bearing in mind the loophole that such an exemption can create. At the same time, it is conceivable that the EU27 may not be willing to waive the right to refuse to extradite their own nationals outside the framework of the EAW and without the concept of EU citizenship that underpins it. (Paragraph 142)

Taken with

The scope of our inquiry has necessarily been limited to the most significant measures facilitating police and security cooperation. We note, however, that measures in this area are part of a complex and interconnected network of

agreements and arrangements that can be difficult to compartmentalise. For example, high-profile measures such as the European Arrest Warrant may work more satisfactorily alongside complementary measures such as the European Supervision Order. It follows that the Government's approach to negotiations will need to take account of the risk that relinquishing less well known measures could undermine the effectiveness of tools that are higher up the list of priorities. (Paragraph 156)

Government Response

The Government recognises the importance of the European Arrest Warrant (EAW). We agree that it offers a more effective means than non-EU alternatives to surrender individuals wanted by other EU Member States and to ensure those who have fled the UK are returned to face justice. Like the UK, other EU Member States also find the EAW an effective way of handling extradition.

Agreeing effective extradition arrangements will be an important part of negotiations and of mutual interest to both the UK and EU Member States. The Committee rightly draws attention to the time it has taken to agree bilateral extradition agreements between Norway and Iceland and the EU. Public safety in the UK and the rest of Europe will be at the heart of these negotiations and we will address the issue of the EAW within that context.

Conclusion

Looking to the future, the Government will work to ensure that we have the practical mechanisms in place to achieve the fundamental aims that we undoubtedly share with our European partners – to keep our citizens safe – namely through tracking down criminals and bringing them to justice, continuing the fight against cross border crime and preventing and disrupting terrorist activity.

The Government recognises the challenges in negotiating a new relationship, but we are committed to finding innovative solutions that enable us to continue to work together for collective security in Europe and globally.

It is important that we find a way forward that works for the mutual benefit of both the UK and EU collectively. We will approach the negotiations from the perspective of what is best for the safety of all EU citizens, with an outcome that maximises our collective efforts to be as tough as possible on those who would seek to cause serious harm to our shared democratic values. As recent terror attacks across Europe have reinforced, we must continue to forge the closest possible security co-operation to keep our people safe. It is for this reason that public safety in the UK and the rest of Europe will be at the heart of this aspect of our negotiations.

During the negotiations, we will look to establish a new relationship that builds on the cooperation that currently exists with our European partners. We recognise that the nature of this future relationship will need to be decided in negotiation with the European Union, and we are confident that all citizens will be safer if we continue to work and cooperate closely together.

The Government would like to conclude its response by reassuring the Committee that cooperation on security, law enforcement and criminal justice remains a top priority both whilst we remain a member of the EU, and when we leave.