

Government response to the House of Lords EU Home Affairs Sub-Committee Report Brexit: judicial oversight of the European Arrest Warrant

The Government has made clear, most recently in the Prime Minister's speech in Florence in September, that the United Kingdom is unconditionally committed to maintaining Europe's security now and after we leave the EU. We continue to value our cooperation with the EU, including through measures such as the European Arrest Warrant (EAW), in our efforts to fight crime, prevent terrorism and uphold justice. Looking to the future, we are seeking a bold new strategic partnership with the EU, including a comprehensive agreement on security, law enforcement and criminal justice co-operation. This is new territory for both sides and it is too early to say exactly what that relationship will look like, but agreeing appropriate dispute resolution and enforcement mechanisms will form an important part of negotiations. Furthermore, we are proposing a strictly time-limited implementation period of around two years. During that period we would continue to take part in existing security measures to support a smooth transition to our future partnership with the EU.

We recognise that ensuring a fair and equitable implementation of a treaty to support our future relationship with the EU will require provision for dispute resolution. Dispute resolution mechanisms ensure that both parties share a single understanding of an agreement, both in terms of interpretation and application. These mechanisms can also help ensure uniform and fair enforcement of agreements. The Court of Justice of the EU (CJEU) is the ultimate arbiter of EU law within the EU and its Member States, but one of the Government's key commitments in leaving the EU, as set out in our future partnership paper on 'Enforcement and Dispute Resolution', is that we will bring about an end to the direct jurisdiction of the CJEU in the UK.¹ As part of the security partnership, the UK will seek to agree a new approach to interpretation and dispute resolution with the EU. It is in the interest of both sides to reassure organisations and individuals that the rights and obligations contained in the agreement can be relied upon, that both parties will have a common understanding of what the agreement means and that disputes can be resolved fairly and efficiently.

Dispute resolution mechanisms are common in EU-Third Country agreements and in other international agreements including those agreed by the UK. A number of examples are set out in the future partnership paper 'Enforcement and Dispute Resolution'. They illustrate the range of ways in which the parties to international agreements, including the EU, have obtained assurances that obligations in those agreements will be enforced, that divergence can be avoided, and that disputes can be resolved. One common feature of most international agreements, including all agreements between the EU and a third country, is that disputes are not resolved by giving the courts of one party direct jurisdiction over the other.

¹ Enforcement and dispute resolution: a future partnership paper:
<https://www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper>

The different models and approaches set out in the future partnership paper are not mutually exclusive and dispute resolution mechanisms can combine a number of these together. These examples should help inform discussions between the UK and the EU, but enforcement and dispute resolution in our future relationship will be a matter for negotiations and should not be constrained by precedent. In designing the future partnership, the UK's aims are to: maximise certainty for individuals and businesses; ensure that they can effectively enforce their rights in a timely way; respect the autonomy of EU law and UK legal systems while taking control of our own laws; and continue to respect our international obligations.

Whatever shape our future relationship with the EU takes, as the Committee points out, it should not compromise the safety of people in the UK or in the rest of Europe. The Government has set out its aims for future UK-EU cooperation in this area in the future partnership paper "Security, law enforcement and criminal justice"². We are focused on getting the right deal for Britain and as part of that work, we are looking at the risks and opportunities presented by our exit, which includes discussions around effective extradition provisions. The Government recognises the importance of the EAW which allows for a swift and cost-efficient extradition process between EU Member States on the basis of mutual recognition of judicial decisions. It has proven to be effective at facilitating the surrender of wanted individuals accused or convicted of crimes in other Member States and at securing the return of those wanted by the UK. Like the UK, other Member States find the EAW an effective way of handling extradition.

We are grateful for the Committee's report and the insight it provides. The Committee rightly identifies the complexities involved in negotiating our future relationship with the EU. Although we do not underestimate the scale of the challenge, the Government is confident that there is a shared understanding on both sides of these negotiations of the importance of securing a deal that has maintaining the safety of people across Europe at its heart. The Committee's specific conclusions are addressed below.

1. In its White Paper on The United Kingdom's exit from and new partnership with the European Union, the Government confirmed that it plans to "bring an end to the jurisdiction in the UK of the Court of Justice of the European Union". In practice, the jurisdiction of the CJEU will end automatically when the UK ceases to be an EU Member State. But this change leaves open the question of how the role of the CJEU in providing a level playing field between the UK and EU in criminal justice matters is to be provided for in any future agreement between the two parties, and what status the case law of the CJEU will have post-Brexit. (Paragraph 36)

² Published 28 September: <https://www.gov.uk/government/publications/security-law-enforcement-and-criminal-justice-a-future-partnership-paper>

Taken with:

2. The CJEU will have at least an indirect role in the interpretation of any agreement between the UK and the EU. In any agreement, on any subject between the UK and the EU, the terms of the agreement will—on the EU side—be subject to the jurisdiction of the CJEU, whose interpretation will be binding on the EU and its Member States. (Paragraph 37)

Taken with:

3. As for the CJEU's case law, the Government has already accepted that existing case law will stand the day after Brexit, because the European Union (Withdrawal) Bill "will provide that historic CJEU case law be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court". The Government also said that the European Union (Withdrawal) Bill would not require the domestic courts to consider the CJEU's jurisprudence, implying that new CJEU case law that develops post-Brexit will have no formal status in the UK. However, our witnesses were clear that CJEU case law is likely still to have persuasive authority. Indeed, it is conceivable that it could be a requirement of any future UK-EU extradition agreement for the UK formally to take account of relevant CJEU case law that develops post-Brexit. (Paragraph 38)

Taken with:

4. It was suggested to us that in the field of criminal justice, any alternative to the CJEU must be a court and not an arbitration mechanism, since only a court can review decisions affecting the liberty of the individual. The EFTA Court model has the advantage that individuals and businesses, as well as the Contracting Parties to the EEA agreement, can bring actions before the Court, replicating one of the more effective features of the CJEU. But it should be noted that at present, this model applies only to internal market-related disputes. Its jurisdiction was not expanded to cover Norway and Iceland's participation in the EAW. Furthermore, the section of the Government's White Paper dealing with dispute resolution mechanisms does not mention the EFTA model—perhaps implying that the Government has already ruled out this option. (Paragraph 39)

The Government is clear that it does not consider that the CJEU should have direct jurisdiction in the UK as part of future UK-EU agreements that comprise the deep and special partnership. The UK and the EU need therefore to agree on how both the provisions of the Withdrawal Agreement, and 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 views enforcement and dispute resolution as two distinct issues. It is not necessary, or indeed common, for one body to carry out both functions. We are committed to a constructive dialogue in order to agree an appropriate means of enforcing future agreements, and to design an effective dispute resolution mechanism.

Following the UK's withdrawal, the CJEU will continue to interpret EU law and be the ultimate arbiter of EU law within the EU and its Member States. In the UK, the European Union (Withdrawal) Bill will give pre-exit CJEU case law the same binding, or precedent, status in UK courts as decisions of our own Supreme Court to ensure a smooth and orderly exit.

5. We question, moreover, whether in the context of the EAW the EU-27 will be willing to establish bespoke adjudication arrangements such as a parallel court in order to accommodate the UK's objectives. We observe in this context that the UK has already had to decide, as recently as the Protocol 36 Decision in 2014, whether to accept the jurisdiction of the CJEU in return for continued use of tools like the EAW. Now as then, the safety of the people of the UK should be the Government's overriding consideration.

Taken with:

6. We welcome the Home Secretary's announcement that it is a priority for the Government to ensure that the UK remains part of the European Arrest Warrant. However, it is not clear how this objective is compatible with the Government's objectives in relation to the CJEU, let alone other aspects of the UK's withdrawal from the European Union.

Taken with:

7. For this reason, we have explored how the most promising avenue for the Government to pursue might 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. That agreement has taken a long time to negotiate, and applies to two European states ostensibly moving towards EU membership that also participate in the Schengen Area. It has yet to enter into force, so it has not been tested in practice. Nevertheless, it contains provision for a political dispute resolution mechanism, which would be compatible with the Government's desire for such a mechanism as it seeks to end the CJEU's jurisdiction in the UK.

Taken with:

8. Falling back on the 1957 Council of Europe Convention on Extradition would significantly slow down extradition proceedings, since it would mean going back to making routine extradition requests—as well as resolving disputes about extradition requests—through diplomatic channels.

The final details of the UK's future relationship with the EU, including provisions on extradition, will need to be agreed in the course of negotiations. Agreeing effective extradition arrangements will be an important part of negotiations and of mutual interest to both the UK and EU Member States. During those negotiations, the UK considers that the focus should be on the areas of cooperation that deliver the most significant operational benefit, to ensure the best possible outcome for both the UK and its EU partners.

When looking to our future partnership with the EU, the UK is in a unique starting point with a strong history of working closely with Member States as partners and allies. We make a key contribution to security and justice in Europe and globally. The UK will approach negotiations on our new relationship as an opportunity to build on what has already been achieved through decades of collaboration, integrated working, and joint systems and procedures.

As a former Member State, the UK will be a third country whose operational processes and data sharing systems are uniquely aligned with approaches adopted at an EU level. Those EU processes, which have been developed over recent decades, are often interconnected, enhancing capabilities through each different stage of a law enforcement operation and associated criminal justice processes.

It is in the interests of both the UK and the EU to maintain close cooperation on security, law enforcement and criminal justice. Our European neighbours share our view on the importance of reaching an agreement that protects the safety and security of citizens and upholds justice in the UK and across the EU. 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."

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. Agreeing an effective and efficient means of surrendering those who would evade justice by fleeing across country borders will form an important element of our future partnership.

While previous examples of the EU's cooperation with third countries on security, law enforcement and criminal justice have generally been limited to tool-by-tool solutions, other approaches are legally viable. Precedents demonstrate that direct CJEU jurisdiction is not a requirement for such agreements.

The UK sees a strong case for developing a treaty that provides a comprehensive framework for future security, law enforcement and criminal justice cooperation between the UK and the EU. This treaty would provide a legal basis for continued cooperation between the UK and the EU including what mechanism should apply to resolve disputes. In order to function properly, these arrangements will need to be supported by a means of resolving any disputes between the UK and the EU.

9. The Government has indicated that it is contemplating a “phased process of implementation” in which the UK, the EU institutions and Member States prepare for new arrangements, specifying explicitly that this could include cooperation on criminal justice matters. We agree with those witnesses who suggested that any transitional arrangement is likely to include accepting, at least in part, the jurisdiction of the CJEU, if only because any other interim arrangement would itself take time to negotiate and agree—time that is already at a premium in the run-up to March 2019.

Taken with:

10. We stress, however, that a transitional arrangement that simply extends the status quo in relation to the EAW will be difficult to secure. In leaving the EU, the UK will no longer be party to other, related EU arrangements, such as the EU Charter of Fundamental Rights, EU data protection laws, and laws on EU citizenship. We therefore remain concerned about the prospect of a “cliff-edge”, and emphasise that an operational gap between the EAW ceasing to apply and a suitable replacement coming into force would pose an unacceptable risk.

As the Government has set out, we will need to build a bridge from our exit to our future partnership, to allow business and people time to adjust, and to allow new systems to be put in place. It makes sense for there to be only one set of changes. As stated previously, the Prime Minister has announced, a strictly time-limited implementation period where we continue to have access to one another’s markets on current terms and take part in existing security measures such as the EAW.

The aim should be to move swiftly to the new arrangements, but the aim should also be to ensure legal certainty about cooperation. The Government believes it would help both sides to minimise unnecessary disruption and provide certainty if this approach is agreed early in the process. Evidently, this will be subject to the agreement of the EU but it is our view that it should be agreed as early as possible, in order to provide certainty.