



House of Commons  
Home Affairs Committee

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# UK-EU security cooperation after Brexit

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Fourth Report of Session 2017–19

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**Fourth Report of Session 2017–19**

*Report, together with formal minutes relating  
to the report*

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## Home Affairs Committee

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

### Current membership

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

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### Publications

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

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

### Committee staff

The current staff of the Committee are Carol Oxborough (Clerk), Phil Jones (Second Clerk), Harriet Deane (Committee Specialist), Simon Armitage (Committee Specialist), David Gardner (Senior Committee Assistant), Mandy Sullivan (Committee Assistant) and George Perry (Senior Media and Communications Officer).

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## Summary

Cooperation in policing and law enforcement is one of most vital forms of EU activity, and the UK has both gained and contributed a great deal of intelligence and leadership, resulting in enhanced capabilities and operational successes. We agree with the Government that the UK should seek to maintain its capabilities in full after Brexit, through a comprehensive security treaty. We also welcome its commitment to remaining part of Europol, the European policing agency; maintaining the UK's extradition capabilities after Brexit; and retaining access to vital sources of EU data on crime, wanted or convicted people, and criminal activities.

Much more attention needs to be given, however, to the many complex technical and legal obstacles to achieving such a close degree of cooperation—unprecedented for any third country, particularly outside Schengen. Given these many potential hurdles, the Government and EU must remain open to extending the transition period for security arrangements beyond the EU's proposed end-date of December 2020.

Looking beyond transition, it is crucial that negotiations on a future security treaty begin imminently. There are many difficulties for the Government to overcome, and we have particularly strong concerns about the following issues:

- An operational agreement between the UK and Europol after Brexit, based on existing third country models, would represent a clear diminution in the UK's security capacity; and even Denmark's relationship with the EU—as a Member State under the jurisdiction of the Court of Justice of the EU (CJEU)—falls short. The Government should clarify whether the engaged, dynamic relationship it is seeking would preserve its current capabilities in full.
- The Government must also provide more clarity about whether it is seeking ongoing full participation in the European Arrest Warrant (unprecedented for a non-EU member state), a replication of the EU's surrender agreement with Norway and Iceland (not yet ratified, and with significant deficiencies compared with the EAW), or a bespoke arrangement. If it is the latter, the Government must be frank about the constraints that this would place on the UK's extradition arrangements.
- We are concerned about the implications of the UK's future access to EU data for the activities of the security services. As a third country, it is possible that the UK's surveillance and interception regime will be exposed to a new level of scrutiny by EU institutions. The Government must work closely with its EU partners to ensure that Brexit does not cause the UK's surveillance powers to become a source of conflict, nor an obstacle to vital forms of data exchange.
- The Prime Minister acknowledged recently that UK courts will need to take account of the CJEU's views on data protection. The reality is that the UK will be unable to depart from EU data protection law after Brexit, nor from the rulings of the CJEU. Where data protection is concerned, the extent of CJEU involvement in any meaningful agreement between the UK and the EU means that it would be unwise to make the jurisdiction of the CJEU a “red line” issue.

As these complex issues make clear, success in this area of Brexit will require pragmatism on both sides. The EU should not be so inflexible that it confines cooperation to existing models, but the UK should not be rigid about its own red lines, including the future jurisdiction of the CJEU. We agree with the Home Secretary that a no deal outcome in security should be unthinkable, but we are not convinced that the Government has a clear strategy to prevent the unthinkable from becoming a reality, and we have serious concerns about its apparent lack of investment and interest in contingency planning. It is time for the Government to flesh out the details of the ‘bespoke deal’ it says it hopes to secure in this area, and to be open with the public and Parliament, by explaining how it proposes to address the potential pitfalls and obstacles identified in this report.

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# 1 Introduction

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1. In an increasingly interconnected world, EU Member States have sought ways to work together against cross-border threats, including organised crime, terrorism and cybercrime, through different agencies and cooperative measures. This report examines the UK's interaction with those measures after Brexit, and the prospects for future security cooperation between the UK and the EU.

## Background to our inquiry

2. Following the result of the referendum on the UK's membership of the EU, our predecessor Committee took evidence on future UK-EU security cooperation from academics, the National Crime Agency (NCA), the National Police Chiefs' Council (NPCC), the European Commissioner for Security Union, Sir Julian King, and the Director of Europol, Rob Wainwright. When the current Committee was appointed after the 2017 General Election, we agreed to continue this work, which forms one strand of our inquiry into the Home Office's delivery of Brexit.

3. We have taken oral evidence from legal academics, the Information Commissioner and Deputy Information Commissioner, the Minister of State for Policing and the Fire Service, Rt Hon Nick Hurd MP, and the Home Office's Europe Director, Shona Riach. Some written submissions have also been received. We are grateful to all those who contributed to this inquiry.

4. We have examined the implications of Brexit for UK law enforcement capabilities; potential obstacles to achieving the Government's aims; data protection issues related to EU security cooperation; the future jurisdiction of the Court of Justice of the EU; and provisions for a 'no deal' scenario in policing and security, including the extent of the Government's contingency planning to date.

5. This report focuses predominantly on the three most significant forms of security cooperation identified by witnesses: Europol, the European Arrest Warrant, and data-sharing measures. We offer our assessment of the value gained by the UK from these forms of cooperation, the UK's aims in this area of the Brexit negotiations, models for 'third country' cooperation with the EU, and the impact of different end scenarios for the UK's policing and security capabilities.

## 2 Current security arrangements and Brexit objectives

### Introduction

6. The UK's security relationship with the EU covers various forms of operational and strategic cooperation, including the exchange of a wide range of criminal data and intelligence, speedy extradition arrangements, and collaboration between Member States' policing agencies on cross-European investigations. EU cooperation on justice and home affairs (JHA) has evolved from optional strategic cooperation to formal inclusion in the EU treaties. Over the years of its EU membership, the UK has negotiated a bespoke arrangement on JHA, which has allowed for its selective participation in measures considered to be in the national interest.

7. Using a special 'protocol' agreed during the Lisbon Treaty negotiations, the Government decided to opt out of all EU police and criminal justice measures agreed before December 2014, and then requested that year to remain part of 35 measures, including those related to the UK's membership of Europol and its use of the European Arrest Warrant.<sup>1</sup> These forms of cooperation—commonly referred to within EU institutions as 'internal security'—are distinct from EU foreign and security policy, which seeks to preserve peace and strengthen security on an international level, including through diplomacy and peacekeeping missions.<sup>2</sup> This report focuses on law enforcement aspects of the EU's justice and home affairs policy.

8. Member States have also retained a certain amount of independence from the EU on activities in the interests of national security: The Treaty on European Union (TEU) states that "national security remains the sole responsibility of each Member State"—although the scope of this exception has not been clearly defined in EU law.<sup>3</sup>

9. Two key foundations underpin EU cooperation on JHA. First, under the 'mutual recognition' of judicial decisions, certain rulings made by judges throughout the EU are implemented with a minimum of procedure and formality, meaning that they are treated differently from those made by non-EU courts.<sup>4</sup> Second, common data protection standards allow for 'real time' access to EU-wide data held on a variety of people and objects, including wanted criminals, individuals requiring surveillance, missing people and vehicles, stolen passports, and criminal convictions from EU courts.

### Key forms of security cooperation with the EU

10. This report considers three key forms of cooperation in detail:

- **Europol:** an agency which coordinates cooperation in policing across Europe. It was established in 1999 and became an EU agency in 2009. Europol enables law

1 Council of the European Union press release, [UK's block opt-out and partial re-opt-in to the ex-third pillar acquis](#), 1 December 2014

2 European Union website, [Foreign & Security Policy](#), accessed 14 February 2018

3 House of Commons Library, [Briefing Paper CBP7798, Brexit: implications for national security](#), 31 March 2017

4 Koen Lenaerts, Fourth Annual Sir Jeremy Lever Lecture: [The Principle of Mutual Recognition in the Area of Freedom, Security and Justice](#), 30 January 2015

enforcement officers from across the EU to work together on joint investigations, access a variety of Europol services, including forensics, analysis and training, communicate with ease, and share data on operational and intelligence matters.

- **The European Arrest Warrant (EAW):** an advanced surrender agreement, to allow for the rapid extradition of individuals who are wanted by one EU Member State for a serious crime, but who reside in or have travelled to another Member State. It is underpinned by the so-called ‘mutual recognition’ of judicial decisions.
- **Data-sharing:** EU criminal justice agencies enjoy real time access to EU-wide data on suspects wanted for arrest or questioning, stolen vehicles, missing people, criminal records, DNA and fingerprint data, and criminal offences and structures. The Government has identified a number of particularly valuable sources of EU data on criminal matters, including the Second Generation Schengen Information System (SIS II), the European Criminal Records Information System (ECRIS), the Prüm Decisions, and the Europol Information System. These are described in Chapter 5 of this report.

11. A number of additional measures and agencies were referenced by witnesses to this inquiry. These included the European Investigation Order, an EU legal instrument aimed at speeding up inter-state assistance in criminal investigations; and Eurojust, the EU agency responsible for coordinating cross-border investigations and prosecutions, which provides funding for law enforcement agencies to work together in Joint Investigation Teams. We have chosen to focus this inquiry on the three areas of cooperation most commonly identified by the Government, law enforcement agencies and inquiry witnesses as crucial to the UK’s policing capabilities. Other issues relating to security at the border were covered in our recent report, *Home Office delivery of Brexit: Immigration*.<sup>5</sup>

### The Government’s negotiating objectives

12. The Government’s official position on security cooperation was first set out in September 2017, in a ‘future partnership paper’ on security, law enforcement and criminal justice. It was then clarified in a speech by the Prime Minister to the Munich security conference on 17 February 2018. As of today, the Government’s stated objective in the Article 50 negotiations is to maintain the UK’s existing policing and security capabilities, as part of its future relationship with the European Union.<sup>6</sup>

13. The future partnership paper states that “it is in the clear interest of all citizens that the UK and the EU sustain the closest possible cooperation in tackling terrorism, organised crime and other threats to security”. The Government proposes that “new, dynamic arrangements” for cooperation “should allow both parties to continue and strengthen their close collaboration on internal security” after Brexit. It calls for a partnership that “goes beyond the existing, often ad hoc arrangements for EU third-country relationships in this area”, drawing on legal models for cooperation in other areas, such as trade.<sup>7</sup>

5 Home Affairs Committee, [Home Office delivery of Brexit: immigration](#) (HC421), 14 February 2018

6 [PM speech at Munich Security Conference](#): 17 February 2018

7 HM Government, [Security, law enforcement and criminal justice: a future partnership paper](#), 18 September 2017

14. The Government proposes that the UK and EU should negotiate “a strategic agreement that provides a comprehensive framework for future security, law enforcement and criminal justice cooperation”. It states that this should be achieved through a new security treaty, which would provide a clear legal basis for continued cooperation. It says that this will need to include:

- Mechanisms to “maintain operational capabilities”;
- Provisions to ensure that the relationship remains “versatile and dynamic enough to respond to the ever-changing threat environment”; and
- The creation of “an ongoing dialogue” for sharing criminal justice challenges and, where appropriate, tackling them jointly.

15. The Government suggests that such a model would be “underpinned by shared principles”, such as a “high standard of data protection and the safeguarding of human rights”, and that it would provide for dispute resolution over, for example, “interpretation or application of the agreement”. Such a mechanism would also need to be compatible with the Government’s oft-stated aim, reiterated in the paper, that “the UK will no longer be subject to direct jurisdiction of the CJEU [Court of Justice of the EU]” after Brexit.<sup>8</sup>

16. The Policing Minister told us in January that the Government’s “broad intention” in policing and security cooperation was to “emerge from these negotiations with an outcome that is as close to the status quo as possible”. He said that the Government will also seek “a treaty that allows us to have the kind of relationship where we continue to work together in the way that we worked together in the past”.<sup>9</sup>

17. On 17 February, the Prime Minister delivered a speech to the Munich security conference, calling for the UK and EU to “do whatever is most practical and pragmatic” to ensure collective security, to demonstrate “real creativity and ambition”, and to avoid allowing “competition between partners, rigid institutional restrictions or deep-seated ideology to inhibit our co-operation and jeopardise the security of our citizens”.<sup>10</sup> While acknowledging that there is no precedent for the sort of security relationship that the Government seeks, she argued that there is “no legal or operational reason why such an agreement could not be reached”, and said:

[ ... ] if the priority in the negotiations becomes avoiding any kind of new co-operation with a country outside the EU, then this political doctrine and ideology will have damaging real world consequences for the security of all our people, in the UK and the EU.<sup>11</sup>

18. The Prime Minister said that a future security treaty “must preserve our operational capabilities”, but will also need to fulfil three further requirements: it must be “respectful of the sovereignty of both the UK and the EU’s legal orders”, providing for a “strong and appropriate form of independent dispute resolution”; it must “recognise the importance of

8 HM Government, [Security, law enforcement and criminal justice: a future partnership paper](#), 18 September 2017

9 Oral evidence taken on [23 January 2018, Q121](#)

10 [PM speech at Munich Security Conference: 17 February 2018](#)

11 [PM speech at Munich Security Conference: 17 February 2018](#)

comprehensive and robust data protection arrangements”; and it must “ensure that as the threats we face change and adapt—as they surely will—our relationship has the capacity to move with them”.<sup>12</sup>

19. In the same speech, the Prime Minister said that “when participating in EU agencies the UK will respect the remit of the European Court of Justice”, but argued that a “principled but pragmatic solution” would be required, in order to “respect our unique status as a third country with our own sovereign legal order”.<sup>13</sup>

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

### Specific objectives in key areas of cooperation

21. The Government has repeatedly reiterated its desire to maintain its current relationship with Europol, and its future partnership paper says that it will be “seeking a bespoke relationship” with the agency.<sup>14</sup> The Home Secretary told us last year that she hoped that the UK would be able to “replicate, to a large degree, what we already have: a much more engaged, dynamic relationship”, when compared with the associate member status of countries such as the USA or Australia.<sup>15</sup> The Policing Minister also expressed optimism about maintaining a closer relationship with the agency than other third countries, stating: “We are a very major stakeholder in Europol, which is why we think the incentives are aligned to try to negotiate an outcome that is as close to the status quo as possible”.<sup>16</sup> The UK’s future relationship with Europol is explored in further detail in Chapter 3.

**22. We welcome the Government’s intention to maintain the intensive participation of the UK in Europol after Brexit, and we agree that the UK should be aiming for a bespoke arrangement rather than adopting existing third country arrangements. However, we urge the Home Office to set out precisely what it is aiming for in legal and operational terms; particularly in relation to the role of the CJEU. We believe that the value of the UK’s participation in Europol—both to the UK and EU—means that the best outcome would be for the UK to retain what is effectively full membership of Europol. This should include direct access to Europol databases and the ability to lead joint operations—although we set out some of the likely obstacles to achieving this aim in Chapter 3. If the Government’s aim falls short of full membership of Europol after**

12 [PM speech at Munich Security Conference: 17 February 2018](#)

13 [PM speech at Munich Security Conference: 17 February 2018](#)

14 HM Government, [Security, law enforcement and criminal justice: a future partnership paper](#), 18 September 2017

15 Oral evidence taken on [17 October 2017, Q47](#)

16 Oral evidence taken on [23 January 2018, Q148](#)



**Brexit, it should say so, and explain why. The Government should also further clarify whether the engaged, dynamic relationship it is seeking would preserve its current capabilities in full.**

23. The Government's future partnership paper on security and law enforcement referred to the European Arrest Warrant as one aspect of the internal security "toolkit" assembled by Member States, but did not refer to it within its proposals for a new partnership in this area. The Home Secretary, Rt Hon Amber Rudd MP, told us in October that she was "optimistic that we can reach a treaty with the EU, which will include Europol, European Arrest Warrants, and the various structures and databases".<sup>17</sup> Full participation in the EAW is currently restricted to Member States of the EU. The Policing Minister said in January that the EAW is "one of the tools in the toolbox that we want to preserve, and we want to preserve that capability as close to the existing status quo as possible".<sup>18</sup> The EAW is examined in Chapter 4 of this report, which considers the future of the UK's extradition arrangements with the EU.

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

25. The Policing Minister confirmed to us in January that it was the Government's intention to "stay in all of the existing information databases".<sup>19</sup> These are described in detail in Chapter 5 of this report. The Government's future partnership paper does not specify which systems might be prioritised in the Brexit negotiations, but it provides the most detailed arguments in favour of retaining access to SIS II, which enables authorities to enter and consult alerts on missing and wanted individuals and lost and stolen objects, including clear instructions on what to do when the person or object has been found.

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

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

17 Oral evidence taken on [17 October 2017, Q45](#)

18 Oral evidence taken on [23 January 2018, Q157](#)

19 Oral evidence taken on [23 January 2018, Q117](#)

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

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

## Transitional arrangements

29. This report focuses predominantly on the UK's long-term future security relationship with the EU, although the status of security cooperation immediately after 29 March 2019 remains uncertain. In September, the Prime Minister proposed an "implementation period" of around two years, during which the UK "should continue to take part in existing security measures". The Government has indicated that it is willing to accept the jurisdiction of the CJEU during that time,<sup>20</sup> and the Prime Minister has stated that the framework for this "strictly time-limited period" would be "the existing structure of EU rules and regulations".<sup>21</sup>

30. The EU's proposals for a "transition period" also suggest extending the full EU *acquis*, with a proposed end date of December 2020, but without giving the UK rights to participate in decision-making during that period. The Commission's draft withdrawal agreement provides for ongoing data exchange and the use of the European Arrest Warrant, but it explicitly states that the UK will not be involved in the decision-making of agencies.<sup>22</sup> This generates uncertainty about the UK's relationship with Europol during transition. In November, Michel Barnier, the EU's lead Brexit negotiator, said that on 30 March 2019, "the United Kingdom will, as is its wish, become a third country when it comes to defence and security issues", and will no longer be a member of Europol.<sup>23</sup>

31. The two parties are yet to reach agreement over a number of matters, including whether the UK would be able to opt into new JHA measures during the transition or implementation period. The EU wants to limit the UK's opt-in to amendments or replacements to the JHA measures in which it currently participates; the UK, according to press reports, wants to be able to opt into new initiatives during this period.<sup>24</sup>

**32. We welcome the commitment of the UK Government to continue taking part in existing security measures during a transition period, and the commitment of the EU to extend effective Member State status to the UK during this time. It is important that these commitments are translated into legal text as swiftly as possible. However, the European Union's proposals for this period would seemingly not allow the UK to retain its governance role in Europol, nor opt into new criminal justice initiatives during that period, unless they build on or amend existing measures. Given the UK's unique and substantial contribution to policing and security cooperation in Europe, we urge the EU to reconsider. Disrupting Europol's governance arrangements next March, in**

20 For example: [David Davis' speech to the Suddeutsche Zeitung Economic Summit](#), 16 November 2017

21 Prime Minister's Office, [PM's Florence speech: a new era of cooperation and partnership between the UK and the EU](#), 22 September 2017

22 European Commission [Draft Withdrawal Agreement](#), TF50 (2018) 33 – Commission to EU 27, 28 February 2018

23 European Commission, [Speech by Michel Barnier at the Berlin Security Conference](#), 29 November 2017

24 *Politico*, [Barnier warns UK objections put Brexit transition period at risk](#), 12 February 2018

advance of a wider negotiation about how the new relationship should work, would not benefit anyone's security or safety. Restrictions on Europol membership, or on participation in new measures during transition, would not be conducive to developing a future security relationship that is as dynamic as exists now. More importantly, an inferior relationship would be a gift to all those who wish to do us harm.

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

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### 3 Europol

34. Europol is an EU law enforcement agency based in The Hague in the Netherlands, providing support and coordination functions to Member States and non-EU partners. It employs more than 1,000 members of staff and around 100 crime analysts, and serves as a hub for over 200 liaison officers from 42 Member States and operational partners, including third countries.<sup>25</sup> Europol supports over 40,000 international criminal investigations every year, with a focus on illicit drugs, human trafficking, cybercrime, smuggling, fraud, money laundering, organised criminal groups and terrorism.<sup>26</sup> Established in 1999, it formally became an EU agency in 2009. It has been led since then by the British ex-MI5 analyst Rob Wainwright, whose term of office ends in May.<sup>27</sup> Europol's services and support tools include information exchange, such as through SIENA, its secure messaging platform, and intelligence and forensics analysis, including generating and processing cyber-intelligence.<sup>28</sup>

35. David Armond, then Deputy Director General of the National Crime Agency (NCA), told our predecessors that Rob Wainwright has transformed Europol into a much more effective organisation, which is now “unrecognisable from the one that went before”, and that “most of the systems that make Europol effective are a complete lift and shift from the UK intelligence model.” The Government has frequently emphasised the importance of the UK's role in Europol. Its future partnership paper said that Europol's intelligence model and its counter-terrorism internet referral unit are both based on British models; that the UK was a “key instigator” in the creation of the Joint Cybercrime Action Taskforce, which leads and coordinates cybercrime campaigns; and that over 7,400 British intelligence contributions have been made to Europol Analysis Projects.<sup>29</sup> As of September 2017, the UK was participating in at least 40 Joint Investigation Teams (JITs) supported by Europol and Eurojust, the EU agency responsible for coordinating cross-border investigations and prosecutions.<sup>30</sup> Successful JITs have resulted in many arrests for cross-European criminal operations, including serious offences linked to human trafficking and child sexual exploitation.<sup>31</sup> The UK has 49 British Europol officers and staff, as well as 17 liaison officers, which Rob Wainwright said resulted in “greater leverage and influence on a day-to-day basis on the way in which Europol works”.<sup>32</sup>

36. The Government said recently that Europol's cross-EU analysis and expertise has enabled it to “pick up links and patterns in order to expose widespread criminality that would not have been within any single country's capacity to identify”.<sup>33</sup> David Armond stated that the presence of British liaison officers in The Hague is one of the most important

25 Europol website, [About Europol](#), accessed February 2018

26 Europol website, [About Europol](#), accessed February 2018

27 Council of the EU press release, [Coreper puts forward Catherine De Bolle as new executive director of Europol](#), 6 December 2017

28 Europol website, [Services & Support](#), accessed February 2018

29 HM Government, [Security, law enforcement and criminal justice: a future partnership paper](#), 18 September 2017

30 HM Government, [Security, law enforcement and criminal justice: a future partnership paper](#), 18 September 2017

31 Europol website, [Joint Investigation Teams - JITs](#), accessed February 2018; and HM Government, [Security, law enforcement and criminal justice: a future partnership paper](#), 18 September 2017

32 Oral evidence taken on 7 March 2017, Q141

33 HM Government, [Security, law enforcement and criminal justice: a future partnership paper](#), 18 September 2017

functions: if an officer hears that an operation needs to be “planned and run today”, they can “quickly get a meeting with four other member states [and] put together an operational plan [ ... ] which would have taken months before the bureau existed.”<sup>34</sup>

### Existing third country models

37. Europol has a strong record of operational cooperation with non-EU countries, although its membership is limited to EU Member States. It has two distinct forms of partnership with third countries: ‘strategic agreements’, which provide for the exchange of general intelligence and strategic and technical information, and more extensive ‘operational agreements’.<sup>35</sup> Its 20 operational partners, which include the USA, Switzerland and Australia, as well as agencies such as Interpol and Frontex, can access many Europol services, station liaison officers at the Europol headquarters, and access Europol’s messaging facility, SIENA.<sup>36</sup> Operational partners do not generally contribute regular members of Europol staff, and do not sit on the Europol Management Board, so they have no formal say in the strategic priorities or direction of the agency. Third countries cannot lead operational projects, but can join them, subject to the unanimous agreement of all Member States.<sup>37</sup>

38. A significant difference between full membership and operational partnership is the level of access provided to Europol’s main database, the Europol Information System. Rob Wainwright told our predecessors that full members have direct access “even from the field—for example, in terminals around the United Kingdom” and the NCA has since told us that there are 217 British officers trained to access the EIS from the UK.<sup>38</sup> In contrast, Mr Wainwright said, third countries can only “channel information and make inquiries of our database”.<sup>39</sup> This results in some delays in accessing the information, because the request to search the database comes, for example, “from Washington DC to the representative in our head office. He passes it on to our unit and we find a hit and it comes back down the channel; so there is a time lag.”<sup>40</sup>

39. The NCA’s evidence also suggested that the UK’s day-to-day relationship with Europol would change drastically if British officers could no longer lead operational projects. David Armond said in December 2016 that the EU policy cycle had determined 13 priority crime areas, and that the UK was leading four of those, with “co-driver status in a number of others”.<sup>41</sup> The NCA’s recent evidence stated that the UK currently has ‘project driver’ status in two priorities and co-driver status in a further four, and is leading 25 of the 150 operational actions planned for 2018.<sup>42</sup> Existing partnership models would not allow the UK to lead Europol operations after Brexit.

40. Europol’s existing operational agreements were concluded before its current legal framework—the Europol Regulation—came into effect. Mr Wainwright pointed out that the UK might be the first country to seek operational cooperation with Europol under the

34 Oral evidence taken on [6 December 2016, Q36](#)

35 Europol website, [Partners & Agreements](#), accessed February 2018

36 Oral evidence taken on [7 March 2017, Q141](#)

37 Oral evidence taken on [7 March 2017, Q141](#)

38 National Crime Agency written evidence ([PSC009](#)), 20 February 2018

39 Oral evidence taken on [7 March 2017, Q141](#)

40 Oral evidence taken on [7 March 2017, Q144](#)

41 Oral evidence taken on [6 December 2016, Q41](#)

42 National Crime Agency written evidence ([PSC009](#)), 20 February 2018

new arrangements; as a result, “it will no longer be a tried and tested route: effectively, the UK will have to test a new procedure”.<sup>43</sup> He explained that the new Regulation provides for “two possibilities”: either for the EU to conclude an international agreement with a third country, including a justice and home affairs chapter; or, alternatively, for the Commission to make a data adequacy decision. He said that either of these scenarios would enable Europol to conclude an “operational arrangement” with a third party.<sup>44</sup> Since then, the Commission has put forward recommendations for eight Council Decisions, which would authorise it to negotiate agreements enabling Europol to exchange personal data with the law enforcement authorities of eight countries, including Turkey, Israel and Lebanon.<sup>45</sup>

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

### Existing ‘bespoke’ relationships

42. The UK Government has set out its intention to seek a “bespoke relationship” with Europol, above and beyond any current relationship between the agency and a third country. The only precedent for a deal beyond an operational agreement, but falling short of full membership, is the relationship between Denmark and the agency. Crucially, however, Denmark has negotiated a bespoke arrangement while remaining an EU Member State: it was forced to renegotiate its relationship with Europol last year, after Danish voters rejected a proposal that would have allowed its continued membership.

43. In a referendum held in December 2015, Danish voters decided to maintain their opt-out of EU criminal justice and police cooperation measures, including the proposed new Europol Regulation, so the Danish Government sought an operational agreement with Europol. This was concluded quite rapidly—Rob Wainwright said that it was “a matter of months”, although he noted that it was “a very different case to that of the United Kingdom, not least because Denmark is not leaving the EU”.<sup>46</sup> Danish officers can access Europol data through a 24-hour “contact point”, with information exchange taking place “without delay”. They do not have direct access from the field. Neither does Denmark have a full place on the Management Board—it “may be invited” to attend meetings, but without the right to vote.<sup>47</sup>

44. When the Danish agreement was concluded, the European Commission said that it was a “tailor-made” solution, “allowing for a sufficient level of cooperation, including the exchange of operational data and the deployment of liaison officers”. It added: “Being fully in line with European data protection rules, Denmark will have a unique status which

43 Oral evidence taken on [7 March 2017, Q141](#)

44 Oral evidence taken on [7 March 2017, Q141](#)

45 European Scrutiny Committee, Documents considered by the Committee on 7 February 2018, [Europol: exchanging personal data with third countries](#)

46 Oral evidence taken on [7 March 2017, Q176](#)

47 Europol, [Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and Europol](#)

will allow for much closer ties with Europol without amounting to full membership”.<sup>48</sup> Rob Wainwright noted that the Danish deal is a “hybrid arrangement [ ... ] , somewhat between a full member and a third party”, which recognises that Denmark is not leaving the European Union.<sup>49</sup> The deal requires Denmark to recognise the jurisdiction of the CJEU, although its EU membership brings it under the Court’s jurisdiction anyway. In 2016, *Reuters* reported that Denmark had sought a “parallel deal” to allow it to retain the same relationship with Europol as full members, but the Vice-President of the European Commission, Frans Timmerman, had told a Danish broadcaster:

I’m afraid not. You can’t be slightly pregnant, you’re either pregnant or you’re not. If you vote to be out of Europol, you’re out of Europol. I don’t see on the basis of the legal situation any alternative for that, [ ... ] The vote of the Danish people was very clear, and the consequence of that vote is that Denmark will not be in Europol.<sup>50</sup>

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

### Prospects of a ‘bespoke’ deal for the UK

46. Evidence from the NCA demonstrates the extent of the UK’s contribution to Europol intelligence and operations. During 2017, the UK sent and received almost 47,000 messages through Europol channels. In 2016, it was the highest contributor to Europol serious organised crime analysis projects and the second highest contributor overall (after Germany). British intelligence is the highest contributor of information related to firearms, child sexual abuse and exploitation, money laundering, cybercrime and modern slavery, and the UK is the second-highest contributor to the Organised Immigration Crime Analysis Project.<sup>51</sup>

47. Nevertheless, neither Mr Wainwright nor Mr Armond were optimistic about the chances of the UK obtaining the ‘bespoke’ deal on Europol desired by UK Government. David Armond told our predecessors that his “early informal soundings with officials” had indicated that “there are no bespoke deals to be done”: the UK could either have an operational agreement like the USA and Australia, or a strategic arrangement like Russia, China and Turkey—and that the latter would bring “almost no operational tactical intelligence sharing”.<sup>52</sup> Despite the UK’s dominant role within the agency, Mr Wainwright said:

48 European Commission press release, [Commission welcomes Europol’s new mandate and cooperation agreement with Denmark](#), 29 April 2017

49 Oral evidence taken on [7 March 2017, Q141](#)

50 *Reuters*, [EU Commissioner says Denmark can’t have ‘parallel’ Europol deal](#), 27 September 2016

51 National Crime Agency written evidence ([PSC009](#)), 20 February 2018

52 Oral evidence taken on [6 December 2016, Q46](#)

[ ... ] I would not expect the full membership rights that are currently given to member states of Europol to be granted to any current or future non-member of Europol. I would expect the qualitative difference that exists today to continue to exist, in one way or another, in any future arrangements with non-EU member states.<sup>53</sup>

48. Academic witnesses were similarly sceptical about the prospects for a closer relationship than other operational partners have achieved. Michael Levi, Professor of Criminology at Cardiff University, told our predecessors that he would be “astonished if we had a deal in which we had direct access to Europol databases”;<sup>54</sup> Steve Peers, Professor of EU Law at the University of Essex, said that “I do not know of any EU agency which has non-EU countries with places on the management board”;<sup>55</sup> and Valsamis Mitsilegas, Professor of European Criminal Law at Queen Mary University of London, said that he found it “hard to see how the UK will retain its unlimited access to the Europol intelligence products, as a third country”.<sup>56</sup> Sir Alan Dashwood QC, Emeritus Professor of European Law at the University of Cambridge, was more optimistic, but he agreed with his fellow witnesses that a relationship akin to full membership would require the UK to accept the full jurisdiction of the CJEU.<sup>57</sup>

49. In particular, the new legal framework for Europol, the Europol Regulation (effective May 2017) gives the CJEU jurisdiction over any arbitration relating to a Europol contract. It also allows the European Data Protection Supervisor (EDPS) to oversee the processing of personal data by Europol, and allows the EDPS to refer a matter to the CJEU, or intervene in actions brought before the CJEU.<sup>58</sup> The Prime Minister’s Munich speech suggested that the Government would be willing to “respect the remit of the European Court of Justice” when participating in EU agencies.<sup>59</sup>

50. The Commission’s emphasis on “European data protection rules” within its statement on the Danish agreement also highlights the potential importance of data adequacy to the UK’s future relationship with Europol (a process elaborated upon in Chapter 5 of this report). Professor Peers said that “Europol is quite closely connected to other EU legislation on data sharing”, so “it might be difficult to think about a deal on Europol access in isolation”.<sup>60</sup> The fact that the Commission is seeking to negotiate agreements to allow Europol to exchange personal data with a further eight non-EU countries, including Egypt, Morocco and Tunisia, suggests that some level of post-Brexit data exchange is likely to be achievable. What is less clear is whether it will allow the UK direct access to Europol databases.

51. Rob Wainwright pointed to a concern within Europol at the prospect of a relationship with the UK that did *not* incorporate direct access to data. He said that the UK is “one of the most active users of our platforms”, so channelling its requests “on a daily basis”

53 Oral evidence taken on [7 March 2017, Q151](#)

54 Oral evidence taken on [6 December 2016, Q6](#)

55 Oral evidence taken on [6 December 2016, Q18](#)

56 Oral evidence taken on [5 December 2017, Q10](#)

57 Oral evidence taken on [5 December 2017, Qs 11 and 58](#)

58 [Regulation \(EU\) 2016/794 of the European Parliament and of the Council](#), 11 May 2016

59 [PM speech at Munich Security Conference: 17 February 2018](#)

60 Oral evidence taken on [6 December 2016, Q11](#)



would “create an enormous burden on the organisation”. As a result, he said, some “business imperative” might influence the position taken by the Commission in the Brexit negotiations.<sup>61</sup>

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

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

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

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

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61 Oral evidence taken on [7 March 2017, Q145](#)

## 4 The European Arrest Warrant

### Introduction

55. The European Arrest Warrant (EAW) is a simplified procedure through which EU Member States can issue a warrant for arrest and extradition, which is valid throughout the bloc. The EAW enables extradition decisions to be made by judicial authorities alone (based on the principle of ‘mutual recognition’), without political involvement. Warrants are subject to strict time limits: final decisions in the extraditing country must be made within 60 days of arrest, or within 10 days if the defendant consents to the surrender.<sup>62</sup> Other advantages of the EAW over standard extradition arrangements include Member States’ inability to refuse to surrender their own nationals; much more limited grounds for refusal; and the absence of “double criminality”, which means that the offence does not have to be an offence in both countries for the extradition to take place, provided it is sufficiently serious.<sup>63</sup> As a result, the EAW is significantly faster and cheaper than its predecessor arrangements, based on the 1957 European Convention on Extradition.<sup>64</sup>

56. The UK’s use of the EAW is significant. In 2016–17, it resulted in 1,735 individuals being arrested in the UK; in total, there have been over 12,000 EAW arrests since April 2009, and over 1,000 people have been surrendered by other EU Member States to the UK.<sup>65</sup> Before the EAW entered into force in 2004, the UK extradited fewer than 60 people per year to any country, and Spain was apparently the “destination of choice” for British criminals seeking to avoid arrest.<sup>66</sup> The extradition to France of Rachid Ramda, one of the perpetrators of the Paris bombings of 1995, took 10 years under the previous surrender arrangements.<sup>67</sup>

57. The Government has been emphatic about the value of the EAW. As Home Secretary in 2014, Theresa May told *The Sunday Times* that losing access to it would make the UK “a honeypot for all of Europe’s criminals on the run from justice”.<sup>68</sup> At the time, she was seeking parliamentary approval for the Government’s request to opt into continued participation in a number of EU justice and home affairs measures, including the EAW. Rob Wainwright also emphasised its value, stating that it is “far better for Britain’s security [ . . . ] that those 2,000 criminals a year are taken off our streets and back to their countries”, and that losing this capability would be a “public security issue” for the UK.<sup>69</sup>

58. Use of the EAW is currently restricted to Member States of the EU, and Sir Julian King told our predecessors that it would be “the most challenging of the areas” of security cooperation to retain access to after Brexit. He said that he would find it “quite difficult to conceive” of a scenario in which the UK and its EU partners “could not find a way to extradite”, but that it would “not be as quick or as straightforward as the EAW model.”<sup>70</sup>

62 European Justice Portal, [European Arrest Warrant](#), accessed February 2018

63 European Justice Portal, [European Arrest Warrant](#), accessed February 2018

64 House of Commons Library, [Briefing Paper 07016, The European Arrest Warrant](#), 18 April 2017

65 National Crime Agency written evidence (PSC009), 20 February 2018

66 *The Times*, [Leaked document: the Home Office assessment of post-Brexit terror and crime risks](#), 23 August 2017

67 *The Times*, [Leaked document: the Home Office assessment of post-Brexit terror and crime risks](#), 23 August 2017

68 *The Times*, [May warns Tory rebels will make Britain a honeypot for criminals](#), 26 October 2014

69 Oral evidence taken on [7 March 2017, Q153](#)

70 Oral evidence taken on [28 February 2017, Q103](#)

59. Subject to the outcome of negotiations, the UK and EU’s proposals for a transition or implementation period after 29 March 2019 appear consistent with continued access to the European Arrest Warrant. If the UK and EU cannot conclude and ratify an extradition agreement by the end of that period, however, or if an overarching security treaty (including extradition arrangements) is not agreed in time, the UK may have to fall back on the 1957 European Convention on Extradition.

60. Like most international extradition agreements, the Convention operates through diplomatic channels, so extraditions would require political approval in the extraditing country. It does not impose the sort of strict time limits imposed by the EAW, and does not require participating countries to extradite their own citizens.<sup>71</sup> The Director of Public Prosecutions, Alison Saunders, has described the EAW as “three times faster” and “four times less expensive” than alternative arrangements, including the Convention, and highlighted in 2016 that many Member States have repealed domestic legislation underpinning the Convention, which could limit their ability to extradite to the UK.<sup>72</sup>

**61. In our view, the efficiency and effectiveness of the European Arrest Warrant is beyond doubt—particularly when compared to previous arrangements, which were far more lengthy and costly. The EAW has enabled the extradition of over 12,000 individuals from the UK to the EU in the last nine years. In the Prime Minister’s own words, losing access to the EAW could render the UK a “honeypot” for criminals escaping the law. It is reassuring, therefore, that both sides of the negotiation are committed to the UK’s full participation in the European Arrest Warrant during the transition period. However, we have real concerns about the consequences for extradition arrangements once the UK is no longer considered an EU Member State for extradition purposes.**

### The Government’s aims

62. The Government’s future partnership paper on security and law enforcement referred to the EAW as one aspect of the internal security “toolkit” assembled by Member States, but did not refer to it within its proposals for a new partnership in this area. The Home Secretary told us in October that she was “optimistic that we can reach a treaty with the EU, which will include Europol, European Arrest Warrants, and the various structures and databases”.<sup>73</sup> The Policing Minister said in January that the EAW is “one of the tools in the toolbox that we want to preserve, and we want to preserve that capability as close to the existing status quo as possible”.<sup>74</sup>

### The viability of existing models

63. Norway and Iceland are the only non-EU countries to have negotiated a surrender arrangement with the EU that shares many of the benefits of the EAW, such as simplified procedures. The only significant differences between the two arrangements are that the Norway/Iceland model enables all parties to refuse to extradite their own nationals, and

71 House of Commons Library, [Briefing Paper 07016, The European Arrest Warrant](#), 18 April 2017

72 Oral evidence to the Home Affairs Sub-Committee of the House of Lords Select Committee on the European Union, [2 November 2016](#)

73 Oral evidence taken on [17 October 2017, Q45](#)

74 Oral evidence taken on [23 January 2018, Q157](#)



it includes a “political offence” exception in relation to terrorism offences.<sup>75</sup> Such an exclusion, if applied to a UK-EU agreement, would mean that EU countries could refuse to extradite suspected terrorists to the UK if their crimes are regarded as political in nature. Professor Peers told our predecessors that the exceptions demanded from both sides in the Norway/Iceland negotiations had an impact on how long they took to conclude.<sup>76</sup> The agreement was finalised in 2014 after 13 years of negotiation, but has still not been fully ratified, so is not in operation.<sup>77</sup>

64. According to Professor Peers, the more that an agreement between the UK and EU differs from the EAW for various reasons—to include a proportionality test, for example—the longer it will take to negotiate and agree.<sup>78</sup> He also pointed out that there are constitutional reasons why some Member States cannot extradite their own citizens outside the European Union.<sup>79</sup> Prior to the EAW, 13 of the then 25 Member States refused to extradite their own nationals for constitutional reasons, and some of them—including Portugal, Slovakia, Latvia and Slovenia—revised their constitutions to avoid negative rulings from their constitutional courts.<sup>80</sup> Germany’s constitutional amendment allows the surrender of a German citizen to an EU Member State or international Court, but not to non-EU domestic courts,<sup>81</sup> and Slovakia is subject to the same limitations.<sup>82</sup> The Law Society of Scotland noted that Ireland would also have to amend its domestic law in order to give effect to any UK-EU extradition agreement.<sup>83</sup> As a result of these restrictions, Professor Peers said that “the likelihood is that the European Union side at least would insist that it cannot cover the extradition of its own citizens to the UK”.<sup>84</sup>

65. Of the 1,773 EAW extradition requests made by UK authorities between 2009 and 2016, 983 were for UK nationals and 790 were for individuals from other countries, including those of unknown nationality.<sup>85</sup> 698 were identified as EU nationals,<sup>86</sup> and the NCA advised us that around 300 extraditions to the UK (out of over 1,000 surrendered individuals) were of “own nationals” of EU Member States.<sup>87</sup> The value of the EAW was illustrated by the case of Zdenko Turtak, who raped an 18-year-old woman in Leeds in March 2015, after dragging her from a bus stop and beating her with a rock. A DNA match traced the offender to his home country of Slovakia. He was extradited under an

75 Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway - Declarations, [Official Journal L 292 , 21/10/2006](#)

76 Oral evidence taken on [6 December 2016, Q22](#)

77 [Council Decision 2014/835/EU](#), 27 November 2014

78 Oral evidence taken on [6 December 2016, Q22](#)

79 Oral evidence taken on [6 December 2016, Q25](#)

80 Pollicino, O., [European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems](#), *German Law Journal* Vol 9(10)

81 Pollicino, O., [European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems](#), *German Law Journal* Vol 9(10)

82 Camino Mortera-Martinez, [Arrested development: Why Brexit Britain cannot keep the European Arrest Warrant](#), Published by the Centre for European Reform, 10 July 2017

83 Law Society of Scotland written evidence ([EUR0003](#))

84 Oral evidence taken on [6 December 2016, Q25](#)

85 NCA, [Wanted by the UK: European Arrest Warrant statistics 2009 - 2017 \(Calendar Year\)](#), published 9 November 2017

86 NCA, [Wanted by the UK: European Arrest Warrant statistics 2009 - 2017 \(Calendar Year\)](#), published 9 November 2017

87 National Crime Agency written evidence ([PSC009](#)), 20 February 2018

EAW, convicted in Leeds Crown Court in October of the same year, and sentenced to 14 years' imprisonment.<sup>88</sup> Slovakia would not have been able to surrender one of its own nationals under any agreement other than the EAW.

66. Some witnesses were optimistic about the UK's prospects for securing an agreement similar to the EAW or the Norway/Iceland agreement. Sir Alan Dashwood said: "I see no reason why it should not be possible to negotiate an arrangement that corresponds to the existing situation".<sup>89</sup> The high number of extraditions between the UK and EU may provide an impetus for reaching a favourable agreement, but political considerations may well stand in the way. In a paper published before the EU referendum, the then Government said that there is "no guarantee that the UK could secure a similar agreement [to Norway and Iceland] outside the EU given that we are not a member of the Schengen border-free area".<sup>90</sup> An Explanatory Memorandum by the Commission, which accompanied a proposed Council Decision to enter into a surrender agreement with the two countries, included the following statement:

Despite the decision not to link the European arrest warrant to Schengen, the Council agreed that it would be useful to apply the surrender procedure model to the Schengen countries, given their privileged partnership with the EU Member States.<sup>91</sup>

67. The CJEU's jurisdiction is also relevant to the UK's future extradition arrangements. Professor Mitsilegas highlighted that the Norway/Iceland agreement requires both countries to keep under constant review the case law of the CJEU, which is "not a very binding kind of provision on the jurisdiction of the court but it is something that leaves the door open for courts to look at what each other is doing". With an agreement entirely analogous to the EAW, however, he asserted that the UK would "have to comply 100% with the case law of the Court of Justice. I see no other way, personally". Sir Alan Dashwood concurred that this was "probably true", and Sir Julian King also highlighted it as an issue:

The closer you are to questions of co-operation with the legislative framework—you have taken the example of the European arrest warrant—the more that question is posed, because the legislative framework exists under ECJ jurisdiction. There you have that problem in its most pronounced form.<sup>92</sup>

68. The Norway/Iceland agreement provides for the establishment of a "mechanism [ ... ] to ensure regular mutual transmission of such case law" between the CJEU and the national courts. The agreement also provides for a dispute settlement procedure involving "a meeting of representatives of the governments of the Member States of the European Union and of Iceland and Norway, with a view to its settlement within six months".<sup>93</sup> The

88 *BBC News*, [Beeston rape: Zdenko Turtak handed a 20-year sentence](#), 20 October 2015

89 Oral evidence taken on [5 December 2017, Q54](#)

90 HM Government, [The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues](#) (Background Note), 9 May 2016

91 European Commission, [Proposal for a Council Decision on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway](#), 17 December 2009

92 Oral evidence taken on [28 February 2017, Q132](#)

93 Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway - Declarations, [Official Journal L 292, 21/10/2006](#)

Lords EU Committee concluded last year that such a mechanism would be compatible with the Government's desire to end the direct jurisdiction of the CJEU.<sup>94</sup> Ultimately, if there is a substantive divergence in interpretation of the Norway/Iceland agreement, it may be terminated with six months' notice.<sup>95</sup>

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

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

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

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

94 House of Lords European Union Committee, [Brexit: judicial oversight of the European Arrest Warrant](#), 27 July 2017

95 Article 41 of the [Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway](#) on the surrender procedure between the Member States of the European Union and Iceland and Norway

## 5 EU data-sharing

### Introduction

73. The EU's data-sharing tools are a central aspect of Member States' cooperation in policing and security, allowing for a wide range of information to be exchanged on a 'real-time' basis. This includes data on suspects wanted for arrest or questioning, stolen vehicles, missing people, criminal records, DNA and fingerprint data, and criminal offences and structures. These tools are underpinned by a number of EU legislative instruments, so the UK would need new agreements with the EU to retain access to them after the transition or implementation period—potentially as part of a wider security treaty, as the Government proposes. This Chapter explores key EU measures and tools, precedents for third country access, EU processes involved in exchanging data with non-Member States, and potential obstacles to achieving the Government's aims.

74. The Government's future partnership paper emphasised the value gained by the UK from the following tools:

- **The Second Generation Schengen Information System (SIS II)**, which enables authorities to enter and consult alerts on missing and wanted individuals and lost and stolen objects, including clear instructions on what to do when the person or object has been found. This can enable the arrest of a wanted individual or raise awareness of a potential threat to national security. SIS II is also used to disseminate European Arrest Warrants throughout participating Member States.<sup>96</sup>
- **The Prüm Decisions**, which require Member States to allow the reciprocal searching of each other's databases for DNA profiles, vehicle registration data and fingerprints. A UK pilot in 2015 demonstrated the potential value of the system when it found 118 "hits" from Prüm data on 2,500 DNA profiles from UK police forces.<sup>97</sup> The Government subsequently decided to seek to join Prüm, and the system was due to become operational in the UK in late 2017.<sup>98</sup>
- **The EU's recent Directive on passenger name record (PNR) data**, which will create a "pan-EU" approach to sharing travel-related data. As well as flagging known individuals, the Government states that this will allow identification, "from their patterns of travel", of "otherwise unknown individuals involved in terrorism-related activity and serious crime, including victims of trafficking and individuals vulnerable to radicalisation". This Directive will take effect in May.

75. Other data-sharing measures not referenced directly in the future partnership paper include:

- **The European Criminal Records Information System (ECRIS)**, which ensures speedy exchange of information on convictions made in other Member States.

96 European Commission website, [Schengen Information System](#), accessed February 2018

97 Home Office, [Prüm Business and Implementation Case](#), November 2015

98 House of Commons Hansard, [Vol 619 Col 961](#), Leaving the EU: Security, Law Enforcement and Criminal Justice, 18 January 2017

- The **Europol Information System (EIS)**, which contains information on suspected and convicted individuals, criminal structures and serious offences, including the means used to commit them. The EIS also allows for DNA and cybercrime-related data to be stored and automatically cross-checked by Member States.<sup>99</sup> The UK accesses the EIS through two main channels: individuals based at the Europol headquarters, including liaison officers and seconded national experts, and through 217 officers trained to access it in the UK.<sup>100</sup>

## The value gained from EU data-sharing measures

76. The Government has been emphatic about the value gained from these tools. Its future partnership paper states that law enforcement agencies' ability to conduct "point-to-point" data exchange is "critical for developing lines of enquiry, identifying suspects and informing appropriate action". It emphasises the importance to the UK of agreeing a future model of cooperation to "facilitate data-driven law enforcement", and provides the example of a "prolific" child sex offender who fled the UK while on bail, who was arrested after being involved in a car accident in Cahors. He gave a fake name to French police, but was identified via a SIS II alert entered by UK law enforcement, and was returned to the UK to face trial and imprisonment.<sup>101</sup>

77. Law enforcement representatives were equally enthusiastic. David Armond, then Deputy Director of the NCA, told our predecessors in December 2016 that SIS II had been a "game-changer" for UK law enforcement, making 66 million records available to police officers via the Police National Computer. He said that the capabilities enabled by the Prüm decisions were "something we have been looking for" for a long time, and that biometric data are "fairly essential for us in knowing whether the subject we think is a terrorist subject is actually the guy who was found in Syria".<sup>102</sup> Deputy Assistant Commissioner (DAC) Richard Martin, the NPCC's Lead on EU exit, emphasised the importance of ECRIS in assisting custody sergeants with pre-court bail decisions, based on previous convictions handed down by EU courts.<sup>103</sup>

78. Updated figures provided by the NCA in February demonstrate the extent to which the UK both contributes to and gains from EU data-sharing measures. In a letter from the Deputy Director General, Matthew Horne, we were told that:

- By the end of 2017, there were over 3.2 million UK alerts in circulation on SIS II; over the course of that year, there were 9,832 UK hits on non-UK alerts and 16,782 non-UK hits on UK alerts.
- Of the UK hits on non-UK alerts, 97% were "person alerts", including "terrorists, travelling sex offenders and fugitives", and 94.3% of the non-UK hits on UK alerts also fell into this category.
- In 2016, the ACRO Criminal Records Office (a national police unit hosted by Hampshire Constabulary) sent and received 173,251 requests and notifications

99 Europol website, [Europol Information System \(EIS\)](#), accessed February 2018

100 National Crime Agency written evidence ([PSC009](#)), 20 February 2018

101 HM Government, [Security, law enforcement and criminal justice: a future partnership paper](#), 18 September 2017

102 Oral evidence taken on [6 December 2016, Q73](#)

103 Oral evidence taken on [6 December 2016, Q36](#)



via the EU, a large proportion of which were submitted via ECRIS; it also notified EU Member States of 35,509 convictions handed down to their nationals in the UK.<sup>104</sup>

79. Clearly, the UK's ability to share data and intelligence with international partners is not limited to EU measures. As we have outlined, Article 4(2) of the TEU states that “national security remains the sole responsibility of each Member State”,<sup>105</sup> and it is generally acknowledged that “core” intelligence sharing in the interests of national security—particularly between security services—takes place beyond the remit of the EU, at an inter-governmental level.<sup>106</sup> For example, the UK's participation in the “Five Eyes” arrangement with the USA, New Zealand, Australia and Canada was described by David Armond as “our closest intelligence partnership”,<sup>107</sup> and the Policing Minister told us that it was “especially important” for counter-terrorism.<sup>108</sup>

80. Nevertheless, the evidence we received demonstrated the wide range of data made accessible to the UK through its EU membership—including vital intelligence linked to global threats such as serious organised crime, child sexual abuse, human trafficking and terrorism. The British Director of Europol, Rob Wainwright—who previously worked for MI5—said that he could “absolutely accept the vital importance of the intelligence co-operation that is done outside the EU framework”; but he argued that EU intelligence is complementary to other international arrangements:

The UK does a very good job of maximising its world-leading strength in the intelligence community while also receiving complementary capability from its access to EU and other police co-operation instruments. As a package it is formidable.<sup>109</sup>

81. Our predecessors pressed Mr Armond and DAC Martin on the potential risks posed to UK citizens and residents if British agencies lose access to EU databases. DAC Martin told us that “we have to have a really good intelligence picture” in order to “really identify threat, harm and risk in all its various phases, as it happens”. That picture is “a jigsaw put together from as many different sources as we can get”, including from overseas. Any curtailment in access to intelligence systems “may risk people hurting children or committing harm because we cannot put that picture together”. Some of the EU databases detailed in this report have only become available to the UK relatively recently. Nevertheless, Mr Armond's view was that “I can't honestly say to you that the risk wouldn't increase if we no longer saw that material”.<sup>110</sup>

**82. The UK's “Five Eyes” partnerships are vital to its intelligence capabilities, demonstrating that the EU is not the only important partner in the fight against terrorism and serious crime. It is clear, however, that there can be no substitute for the criminal intelligence and data gained from the UK's access to EU databases. Other existing data exchange mechanisms may complement access to EU tools, but they are not potential replacements for them. It is vital for both the UK and the EU that their**

104 National Crime Agency written evidence ([PSC009](#)), 20 February 2018

105 [Treaty on the European Union](#), Article 4(2)

106 House of Commons Library, [Briefing Paper CBP7798, Brexit: implications for national security](#), 31 March 2017

107 Oral evidence taken on [6 December 2016, Q43](#)

108 Oral evidence taken on [23 January 2018, Q168](#)

109 Oral evidence taken on [7 March 2017, Q166](#)

110 Oral evidence taken on [6 December 2016, Q77](#)

**future relationship allows for the continued free flow of data on criminal matters on a 'real-time' basis, including full access to the Second Generation Schengen Information System (SIS II) and other EU databases.**

### Existing third country models

83. Direct access to the databases outlined above is limited either to EU Member States exclusively, or to Member States and non-EU countries within the Schengen Area, which commit to shared rules on migration and border control. To summarise:

- SIS II (including alerts on suspects and vehicles) is operational in 26 EU Member States and four non-EU Schengen countries (Switzerland, Norway, Liechtenstein and Iceland). The database is a core part of the Schengen framework for cross-border cooperation in migration and security.<sup>111</sup>
- ECRIS (criminal records) is accessible only to EU Member States, with no access for Schengen third countries. Professor Peers stated that UK access would be “a big ask, because other non-EU countries have not had access to it”.<sup>112</sup>
- The Prüm decisions (DNA and fingerprint data) were extended (in effect) to Norway and Iceland via an agreement that explicitly considered “the current relationships between the Contracting Parties”, including “application and development of the Schengen acquis”.<sup>113</sup> Switzerland and Liechtenstein, also Schengen countries, are currently negotiating access to Prüm.
- The Europol Information System is only directly accessible to EU Member States, excluding Denmark, which has a special relationship with the agency as a result of its JHA opt-out (outlined in Chapter 3). Third countries (including Schengen countries) are able to exchange data, but cannot access the database directly.

84. An analysis last year by Camino Mortera-Martinez from the Centre for European Reform argued that negotiating access to SIS “will not be easy”, because “There is no legal basis in the EU treaties for a non-EU, non-Schengen country to participate in Schengen”. She pointed to the EU Council’s refusal to allow the UK to access the Schengen-related Visa Information System, even from within the EU, and the 2010 CJEU ruling in favour of the Council, when the UK challenged the Council’s decision.

85. Giving evidence to us in January, the Policing Minister conceded that “there are areas in which we are in new territory”, but expressed hope that EU partners would take account of “the level of mutual interest in this and the degree to which the UK is a valid player inside those systems”. He highlighted the fact that, in 2016, “the UK shared over 7,400 intelligence contributions relating to serious organised crime and counterterrorism” with EU partners. The Home Office’s Europe Director, Shona Riach, said that the Government is seeking “something that is fundamentally different from existing precedent because the UK is starting from a different place”.<sup>114</sup>

111 For example, the [2006 SIS II Regulation](#) on border control states that “SIS II should constitute a compensatory measure contributing to maintaining a high level of security within the area of freedom, security and justice of the European Union by supporting the implementation of policies linked to the movement of persons that are part of the Schengen acquis, as integrated into Title IV of Part Three of the Treaty.”

112 Oral evidence taken on [6 December 2016, Q29](#)

113 [Council Decision 2009/1023/JHA](#), 21 September 2009

114 Oral evidence taken on [23 January 2018, Q159](#)

## Retaining access to EU data after Brexit

86. The Policing Minister also confirmed to us in January that it is the Government's intention to "stay in all of the existing information databases".<sup>115</sup> The Government's future partnership paper acknowledges that the legal framework underpinning law enforcement cooperation between the UK and the EU will no longer apply after Brexit, and states that future arrangements should enable sustained cooperation "across a wide range of [ ... ] structures and measures". It then lists "the types of capability that a future partnership should encompass", starting with "data-driven law enforcement". It goes on to describe "point-to-point data exchange" as "critical for developing lines of enquiry, identifying suspects and informing appropriate action", and provides the most detailed arguments in favour of retaining access to SIS II. ECRIS is not mentioned, but the paper refers to the "systematic nature of exchange of information such as criminal records", stating that it can "help to deliver fair and robust justice".<sup>116</sup> On that basis, it can be inferred that the Government wants to include ongoing access to EU data-exchange measures in its proposed security treaty.

87. Without a relevant agreement between the two parties, it seems clear that the default or 'fall-back' position would be that access to these databases would cease after the transition or implementation period. Article 7 of the Commission's draft withdrawal agreement states: "At the end of the transition period, the United Kingdom shall cease to be entitled to access any network, any information system, and any database established on the basis of Union law".<sup>117</sup> The draft agreement provides for ongoing data exchange and access to JHA measures during transition, as outlined in Chapter 2.

88. The EU has a specified process to allow third countries to share data with Member States on criminal and judicial matters. Those agreements are underpinned by Chapter V of the Law Enforcement Directive, which states:

Member States shall provide that a transfer of personal data to a third country or an international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question **ensures an adequate level of protection**.<sup>118</sup> [emphasis added]

89. According to that Directive, the Commission will consider an extensive number of elements when assessing so called "data adequacy". These include the rule of law, respect for human rights, rules for the onward transfer of personal data to another third country or international organisation, and "relevant legislation, both general and sectoral, including concerning public security, defence, national security and criminal law and the access of public authorities to personal data".<sup>119</sup> There are some provisions in the Law Enforcement Directive for transfers to a third country without an adequacy decision, but these are much more cumbersome,<sup>120</sup> and require a "legally binding instrument" to provide for

115 Oral evidence taken on [23 January 2018](#)

116 HM Government, [Security, law enforcement and criminal justice: a future partnership paper](#), 18 September 2017

117 European Commission, [Position paper transmitted to EU27 on the Use of Data and Protection of Information Obtained or Processed before the Withdrawal Date](#), 6 September 2017

118 [EU Directive 2016/680](#), 27 April 2016

119 [EU Directive 2016/680](#), 27 April 2016

120 Professor Steve Peers (EU Law Analysis blog), [Lions or Unicorns? Theresa May and Boris Johnson's speeches on the UK's future relationship with the EU](#), 19 February 2018



“appropriate safeguards”. Without these safeguards, transfer may only take place under strict criteria, such as for the “prevention of an immediate and serious threat to public security of a Member State or a third country”.<sup>121</sup>

90. The latest European Council draft negotiating guidelines, set out on 7 March 2018, stipulate that personal data protection in the future relationship will have to be “governed by Union rules on adequacy”, to ensure “a level of protection essentially equivalent to that of the Union”.<sup>122</sup> On this basis, the UK will need an adequacy decision in order to retain the level of data exchange it seeks after Brexit. Sir Julian King told our predecessors that “there is no basis for personal data being shared between an EU member state or at least an EEA country and a non-EEA country, other than a data adequacy agreement”.<sup>123</sup> Lorna Woods, Professor of Law at University of Essex and an expert in data protection law, told us that an adequacy decision would be “the obvious way to go” to maintain data exchange after Brexit.<sup>124</sup>

91. The Government also acknowledges that an adequacy decision is the best course of action, but it wants a tailored approach to adequacy. Its future partnership paper proposed a UK-EU model for data exchange which could “build on the existing adequacy model” to maintain a free flow of personal data between the UK and the EU. It wants this model to respect UK sovereignty, including “the UK’s ability to protect the security of its citizens and its ability to maintain and develop its position as a leader in data protection”, and for it to provide for “ongoing regulatory cooperation between the EU and the UK on current and future data protection issues”, including a role for the UK Information Commissioner in EU regulatory fora. The Government also wants to ensure that flows of data between the UK and third countries with existing EU adequacy decisions can “continue on the same basis after the UK’s withdrawal, given such transfers could conceivably include EU data”.<sup>125</sup>

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

**93. We note that EU position is to require a data ‘adequacy decision’ to be made by the European Commission, in order for EU countries and agencies to share law enforcement data in such a wide-ranging manner with a third country. Based on the evidence we have received, alternative models are likely to be more costly and onerous. The Government proposes a future arrangement for data exchange with the EU that builds on the adequacy model, including a role for the Information Commissioner. We welcome this proposal, but it remains to be seen whether the EU is willing or able to depart from its existing rules on data exchange with third countries in order to**

121 [EU Directive 2016/680](#), 27 April 2016

122 [European Council \(Art.50\) - Draft guidelines](#), 23 March 2018

123 Oral evidence taken on [28 February 2017, Q114](#)

124 Oral evidence taken on [5 December 2017, Q75](#)

125 HM Government, [The exchange and protection of personal data: a future partnership paper](#), 24 August 2017

**accommodate the UK’s wishes, and how long it will take to address some of the complex technical and legal obstacles. We urge the EU to show flexibility and not to confine its approach to existing models or arrangements, given the unique and leading role the UK has played in developing these databases and sharing information through them, as well as the clear shared interest in continued cooperation in this area.**

### Potential obstacles to data adequacy

94. Based on the adequacy process outlined above, the evidence that we have received suggests that the UK’s current compliance with EU data protection law is no guarantee of obtaining a data adequacy decision without encountering challenges, for a number of reasons:

- In the process of making an adequacy decision, the EU may examine the UK’s data protection regime relating to national security legislation, including controversial powers conferred by the Investigatory Powers Act 2016;
- It is not clear that the Government has sufficiently incorporated the EU Charter of Fundamental Rights into UK law, most importantly in relation to data protection;
- The Data Protection Bill, which the Government claims incorporates the Charter’s data protection elements, contains provisions that may cause problems when seeking an adequacy decision;
- The UK’s onward transfer of EU data to “Five Eyes” countries, including the USA, is likely to come under scrutiny by the EU; and
- The Government’s red line on the future direct jurisdiction of the CJEU may also cause problems for UK negotiators.

95. This section examines each of these potential obstacles in turn, the first of which concerns the UK’s surveillance powers. According to the EU Law Enforcement Directive, an adequacy assessment on third countries will take account of legislation concerning national security, which may include the surveillance practices of the security services. As a Member State, the UK relies on the Article 4(2) national security exemption (outlined at paragraph 8) in order to exclude the activities of the security services from EU data protection law. As a third country, the UK will no longer be able to rely on this exemption.

96. Professor Woods told us that the Commission will “look right the way across the board, and the surveillance practices of the security services come into play as a third country”, whereas “they are excluded when we are a member of the EU because of the division of competence.” She noted that, as a third country, more of the UK’s practices will be subject to review than at present.<sup>126</sup> The Deputy Information Commissioner, Steve Wood, also said that the Commission’s examination of UK surveillance law would “probably be the pinch-point” in the adequacy process.<sup>127</sup> This may include EU scrutiny of the Investigatory Powers Act 2016—the most significant piece of surveillance legislation to be passed in recent years.

126 Oral evidence taken on [5 December 2017, Q75](#)

127 Oral evidence taken on [5 December 2017, Q76](#)

## *The Investigatory Powers Act 2016*

97. The Investigatory Powers Act (IPA) provides an updated framework for the use of investigatory powers to obtain, intercept and retain communications and communications data. It lays out which powers can be used by different authorities, including the security services, law enforcement agencies and other public bodies, sets out statutory tests and safeguards for the powers contained within it, and creates a new Investigatory Powers Commissioner to oversee the use of those powers.<sup>128</sup> Two aspects of the IPA have attracted controversy, and may cause issues for the Government in future: the retention of communications data (“data retention”) and the so-called “bulk powers” of the UK security services. This section outlines those powers, relevant recent and ongoing legal cases, and the challenges they may pose when the Government seeks some form of adequacy decision from the EU.

### *Data retention*

98. The IPA allows the Secretary of State to require a telecommunications operator to retain relevant communications data for up to 12 months. The data may then be acquired by specific public authorities when certain proportionality tests are met.<sup>129</sup>

99. A recent ruling by the CJEU required the Government to amend these powers in order to comply with the EU Charter on Fundamental Rights. In December 2016, the CJEU ruled on the legality under EU law of the retention powers provided for by the IPA’s predecessor legislation, the Data Retention and Investigatory Powers Act 2014 (DRIPA).<sup>130</sup> DRIPA included a ‘sunset clause’, so it effectively expired, but the same data retention provisions were provided for by the IPA. The CJEU ruled that EU law precludes national legislation that prescribes general and indiscriminate retention of data, and that derogations from the protection of personal data should apply “only in so far as is strictly necessary”, with the objective of “fighting serious crime”.<sup>131</sup>

100. In November, the Home Office launched a consultation on its proposed amendments to the IPA, with the aim of ensuring compliance with EU law. The consultation states that the Government is clear that “national security activities fall outside the scope of EU law and are not subject to the requirements of the CJEU’s judgment”.<sup>132</sup> It proposes a new definition and threshold of “serious crime” in relation to communications data, to cover offences “capable” of attracting a custodial sentence of six months or more, and the creation of a new Office for Communications Data Authorisations to authorise communications data requests.<sup>133</sup>

101. The Home Office’s submission to this inquiry stated that its proposals are consistent with the EU Charter of Fundamental Rights, noting that there is “broad agreement across

128 [Investigatory Powers Act 2016](#)

129 [Investigatory Powers Act 2016](#)

130 Cases C-203/15 and C-698/15

131 CJEU press release, [The Members States may not impose a general obligation to retain data on providers of electronic communications services](#), 21 December 2016

132 Home Office, [Investigatory Powers Act 2016: Consultation on the Government’s proposed response to the ruling of the Court of Justice of the European Union on 21 December 2016 regarding the retention of communications data](#), November 2017

133 Home Office, [Investigatory Powers Act 2016: Consultation on the Government’s proposed response to the ruling of the Court of Justice of the European Union on 21 December 2016 regarding the retention of communications data](#), November 2017

Member States that data retention is a vital tool in investigating crime and safeguarding the public”.<sup>134</sup> But it also referenced an upcoming case which may have an impact on the UK’s regime: in *Ministerio Fiscal*, a Spanish court has requested a CJEU judgment regarding the definition of ‘serious crime’ as a justification for data retention.<sup>135</sup> Depending on the outcome, this may lead to further amendments to the legislation in due course.

### Bulk powers

102. The second set of IPA powers relevant to an EU adequacy decision are the so-called “bulk powers”, exclusively used by the security services. These enable MI5, MI6 and GCHQ to acquire large quantities of data for specified purposes, even when not associated with specific suspects.<sup>136</sup> A review of these powers by the then Independent Reviewer of Terrorism Legislation, David Anderson QC, was published during the Investigatory Powers Bill’s passage through Parliament. This concluded that “bulk powers play an important part in identifying, understanding and averting threats”, and that, “Where alternative methods exist, they are often less effective, more dangerous, more resource-intensive, more intrusive or slower”. He said that the bulk acquisition power, which allows the security services to obtain “large amounts of communications data, most of it relating to individuals who are unlikely to be of any intelligence interest”, has “contributed significantly to the disruption of terrorist operations and the saving of lives”.<sup>137</sup>

103. The Government maintains that the CJEU judgment described above does not apply to the bulk powers, as a result of the Article 4(2) national security exemption.<sup>138</sup> An upcoming CJEU ruling will address this further. In October, the Investigatory Powers Tribunal (IPT) made a referral to the Luxembourg Court for a ruling on whether the acquisition and use of bulk communications data by the security services falls under the scope of EU law.<sup>139</sup>

### Implications for adequacy

104. The issues outlined above have two key implications for future UK-EU data exchange. First, regardless of the CJEU’s ruling in the IPT-referred case, which will apply to the extent of the Article 4(2) national security exemption for Member States, the EU Law Enforcement Directive makes it clear that the European Commission will examine legislation related to national security when making an adequacy decision. The Information Commissioner told us that the IPA is a “pinch-point” and a “vulnerability to achieving adequacy”. She added that “the closer we want to be and the more integrated we want to be in co-operative policing, [ ... ] the more that we are going to have to pay attention to the European Union concerns” on data protection.

134 Home Office written evidence (PSC0007)

135 European Criminal Law Academic Network website, [Ministerio Fiscal](#), accessed February 2018

136 David Anderson QC, [Report of the Bulk Powers Review](#), August 2016

137 David Anderson QC, [Report of the Bulk Powers Review](#), August 2016

138 Home Office, [Investigatory Powers Act 2016: Consultation on the Government’s proposed response to the ruling of the Court of Justice of the European Union on 21 December 2016 regarding the retention of communications data](#), November 2017

139 *Privacy International v Secretary of State for Foreign and Commonwealth Office, Secretary of State for the Home Office, GCHQ, Security Service and Secret Intelligence Service*: [Order for a Preliminary Ruling request dated 17 October 2017](#).

105. Second, even if the Commission makes a positive assessment of the UK's data protection regime, any agreement between the UK and EU could be referred to the CJEU prior to EU ratification. Based on the evidence we have received, this has two major implications: first, it may be struck down on the basis of the activities of the UK security services, or the indiscriminate transfer of sensitive data on EU citizens. Second, it could cause significant delays to the ratification and implementation of the agreement concerned—which could be the proposed security treaty. Piet Eeckhout, Professor of EU Law at University College London, told us that “any negotiated agreement can be referred to the Court of Justice”, and that “We see increasingly there are more of these cases”.<sup>140</sup> Professor Mitsilegas said that, due to the implications of security co-operation for the protection of human rights, “it is very likely that we will have a reference to the Court of Justice on any EU-UK security agreement”.<sup>141</sup>

106. The consequence of this is that the CJEU could end up having a more significant impact on UK data protection law once the UK is outside the EU than it does while the UK remains a member state. As a result, it is relevant to consider the Court's recent rulings in relation to the exchange of data with third countries.

### Relevant precedents for third country data exchange

107. There are no existing models for third country data exchange covering the degree of data-sharing in criminal justice that the UK will be seeking after Brexit. However, recent EU agreements over much more limited levels of data exchange with the US and Canada have encountered major legal obstacles, with the CJEU taking a strict approach to privacy and data protection rights. These rulings are relevant to the UK's prospects of achieving an adequacy decision capable of standing up to the CJEU's scrutiny.

#### EU-US 'Umbrella Agreement'

108. In 2000, the European Commission made an adequacy decision permitting the exchange of data with the USA for commercial purposes—the so-called “Safe Harbour” decision. However, a landmark CJEU ruling on the transfer of data to the USA in the case of *Schrems* resulted in the striking down of this adequacy decision. In effect, it concluded that even the interests of national security were not considered sufficient for the bulk transfer of data without adequate protections. The implications of this ruling for the UK are significant. As outlined above, it demonstrates that even if the Commission considers the UK's IPA powers to be permissible in the interests of national security, the CJEU may strike down any agreement between the UK and the EU if it regards it as a violation of Charter rights. Professor Woods told us that the Court's view has been that “bulk collection of content data [ ... ] undermines the essence of a right to privacy”, adding: “There are some things that are just not going to be acceptable.”<sup>142</sup>

109. The EU-US 'Umbrella Agreement' was formally signed in June 2016, taking account of the ruling in *Schrems*, to establish a “framework” for the protection of personal data in the field of law-enforcement cooperation. This nevertheless falls short of providing a lawful authority for the transfer of data from the EU to the US. It includes restrictions on retention periods and onward transmission of personal data, and provides EU citizens

140 Oral evidence taken on [5 December 2017, Q37](#)

141 Oral evidence taken on [5 December 2017, Q57](#)

142 Oral evidence taken on [5 December 2017, Q85](#)



with the right to judicial redress before US courts.<sup>143</sup> Even the safeguards afforded by the Umbrella Agreement may not be enough for all EU institutions, however. A leaked opinion by the European Parliament’s Legal Service concluded that the Agreement is “not compatible with primary EU law and the respect for fundamental rights”, because it does not allow non-EU citizens to seek judicial redress in the US, even if they are covered by EU law.<sup>144</sup>

### *EU-Canada sharing of passenger name records (PNR)*

110. Canada’s experiences may hold further lessons for the UK. In July 2017, the CJEU ruled that a draft agreement between the EU and Canada on the sharing of passenger name record (PNR) data was not compliant with EU law, forcing both parties to return to the negotiating table. Professor Woods told us that the Court had particular concerns about the bulk transfer of sensitive data.<sup>145</sup> The ruling states that “a transfer of sensitive data to Canada requires a precise and particularly solid justification, based on grounds other than the protection of public security against terrorism and serious transnational crime”.<sup>146</sup> This suggests that, as far as the CJEU is concerned, the fight against terrorism and serious crime may not in itself be sufficient justification for the transfer of EU data to a third country.

111. It is not clear whether the Government is engaging with these potential obstacles to adequacy, although its future partnership paper on data protection does propose a data adequacy model that “respects UK sovereignty, including the UK’s ability to protect the security of its citizens”.<sup>147</sup> When asked whether the Commission would look at the activities of the security services when making an adequacy decision, Shona Riach said that “National security is outside the EU data protection regime”, but that “the expectation would be that there would be consultation with the UK security services”. When asked whether the Government would prioritise bulk powers over access to EU data, she said: “we would not see it as a choice because the UK regime is fully in line with the EU regime on data protection”. The Policing Minister said: “I don’t necessarily recognise the choice but, even if we did, I am sure you would understand why we would not articulate it at this stage in the negotiation.”<sup>148</sup>

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

**113. We are concerned about the implications for the activities of the UK security services if existing EU data adequacy processes for third countries are applied to the**

143 European Commission press release, [Fact Sheet - Questions and Answers on the EU-U.S. Data Protection “Umbrella Agreement”](#), 1 December 2016

144 European Parliament, [Legal Opinion Re: EU-US Umbrella agreement concerning the protection of personal data and cooperation between law enforcement authorities in the EU and the US](#), stamped 14 January 2016

145 Oral evidence taken on [5 December 2017, Q90](#)

146 CJEU, [Opinion 1/15 of the Court \(Grand Chamber\)](#), 26 July 2017

147 HM Government, [The exchange and protection of personal data: a future partnership paper](#), 24 August 2017

148 Oral evidence taken on [23 January 2018, Q187](#)

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

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

### The EU Charter on Fundamental Rights

115. The second potential obstacle to data adequacy is the Government's apparent failure to incorporate the data protection provisions of the EU's Charter on Fundamental Rights into UK law. The Charter sets out, at a high level, a range of EU citizens' civil, social, political and economic rights, and is legally binding on EU Member States. All EU legislation must respect the Charter, which is more extensive than the UK's Human Rights Act. Article 8 of the Charter sets out the right to protection of personal data; its states that such data:

[ ... ] must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.<sup>149</sup>

116. Clause 5(4) of the European Union (Withdrawal) Bill states that "The Charter of Fundamental Rights is not part of domestic law on or after exit day".<sup>150</sup> The Government has published a "Right by Right Analysis" of the Charter, in which it suggests that the Data Protection Bill will be the means of incorporating Article 8 into UK law.<sup>151</sup> In response to a proposed amendment on Charter rights to the EU (Withdrawal) Bill, the then Justice Minister Dominic Raab MP said:

It is not required because the Data Protection Bill will set high standards for protecting personal data, linked to the General Data Protection Regulation. We will continue to maintain the highest standards of data protection after we leave the European Union.<sup>152</sup>

149 [Charter of the Fundamental Rights of the European Union](#), 2000/C364/01

150 [European Union \(Withdrawal\) Bill 2017–19](#), as introduced to the House of Lords (HL Bill 79),

151 HM Government, [Charter of Fundamental Rights of the EU Right by Right Analysis](#), 5 December 2017

152 House of Commons Hansard, [Vol 631 Col 902](#), European Union (Withdrawal) Bill, 21 November 2017

117. A recent report by the Joint Committee on Human Rights critiqued this analysis. It acknowledged that the Data Protection Bill contains “numerous rights for data subjects”, but stated:

[ ... ] the Bill does not explicitly incorporate Article 8 of the Charter. Given the vast number of exemptions and derogations from these rights provided for in the Bill, there is a question as to whether the Bill offers protection that is equivalent to Article 8 of the Charter.<sup>153</sup>

118. In fact, there are concerns that the Data Protection Bill could itself stand in the way of an adequacy decision, which is the third potential obstacle that we have identified. The Bill includes exemptions to data subjects’ rights for the purposes of maintaining effective immigration control, or for the investigation or detection of activities that would undermine it. Liberty argued that this “removes all of the Home Office’s data protection obligations as they relate to its activities to control immigration”,<sup>154</sup> although the Government states that the exceptions would only apply when the applications of data subjects’ rights would prejudice “the investigation or detection of activities that would undermine the maintenance of effective immigration control”. Defined in this way, the exceptions still have a wide scope, which could potentially cover significant forms of data about EU citizens in future.<sup>155</sup> The Chair of the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), Claude Moraes MEP, claimed recently that this aspect of the Bill would “flout” EU protections on fundamental rights, lowering the UK’s chances of obtaining an adequacy decision.<sup>156</sup>

119. The Information Commissioner told us that her office has “always welcomed” the Article 8 Charter right, because it “recognises data protection as a distinct fundamental right not wrapped up into other rights”. She suggested that “reaffirming this qualified right to data protection in legal form would go a long way towards satisfying some of the concerns that our European colleagues have”, as well as ensuring protection for UK citizens, and that it would be “an important signal to both our citizens and to the European Union.”<sup>157</sup>

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

153 Joint Committee on Human Rights, [Legislative Scrutiny: The EU \(Withdrawal\) Bill: A Right by Right Analysis](#), 26 January 2018

154 Liberty, [Liberty’s briefing on the Data Protection Bill 2017 for Committee Stage in the House of Lords](#), October 2017

155 [Data Protection Bill \[HL\] Explanatory Notes](#) (as brought from the House of Lords)

156 *The Guardian* (Claude Moraes), [New UK data protection rules are a cynical attack on immigrants](#), 5 February 2018

157 Oral evidence taken on [5 December 2017, Q86](#)



## Onward transfer to Five Eyes partners

121. The fourth potential obstacle to adequacy relates to the UK's relationship with its fellow "Five Eyes" partners, including the USA. The Information Commissioner highlighted the importance to the EU of the onward transfer of data to non-EU countries. She said: "I cannot emphasise enough [the importance of] getting our ducks in a row in terms of the onward transfer regime that we are going to have. [ ... ] We have a lot of work to do, and it is practical work that really needs to start soon."<sup>158</sup>

122. The CJEU's ruling in *Schrems* (outlined above) highlights the acute sensitivities attached to any transfer of EU personal data to the USA. The UK and USA already have close intelligence-sharing arrangements, and media reports suggest that they are seeking to extend these further. Downing Street announced in February that the Prime Minister had spoken to President Donald Trump about data-sharing on serious crime and terrorism, and the US Senate is due to consider legislation to authorise the US Attorney General to enter into agreements to allow mutual compliance with court orders. The Prime Minister's Office has indicated that the legislation would empower law enforcement officials in the USA and UK "to investigate their citizens suspected of terrorism and serious crimes like murder, human trafficking and the sexual abuse of children regardless of where the suspect's emails or messages happen to be stored".<sup>159</sup>

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

## CJEU jurisdiction

124. The fifth and final potential obstacle concerns the jurisdiction of the Court of Justice of the EU. In her recent speech on the future economic partnership with the EU, the Prime Minister acknowledged that the CJEU will determine "whether agreements the EU has struck are legal under the EU's own law", referring to the *Schrems* case as an example, and conceded that, "where appropriate, our courts will continue to look at the ECJ's judgments, as they do for the appropriate jurisprudence of other countries' courts."<sup>160</sup> Nevertheless, the Government has made it clear that the UK will no longer be subject to the direct jurisdiction of the CJEU after the end of the transition or implementation period.<sup>161</sup> The

158 Oral evidence taken on [5 December 2017, Q96](#)

159 Prime Minister's Office, [PM call with President Trump](#), 6 February 2018

160 [PM speech on our future economic partnership with the European Union](#), 2 March 2018

161 HM Government, [Enforcement and dispute resolution: a future partnership paper](#), 23 August 2017; and [PM's Florence speech: a new era of cooperation and partnership between the UK and the EU](#), 22 September 2017

Prime Minister's Munich speech suggested that the Government may be willing to respect CJEU rulings in relation to specific areas of cooperation, such as Europol, but asserted that a "principled but pragmatic solution to close legal co-operation will be needed to respect our unique status as a third country with our own sovereign legal order".<sup>162</sup>

125. There is some precedent for access to EU data without direct CJEU jurisdiction: non-EU countries within the Schengen area are not under its direct rule, but are able to access SIS II. This is not straightforward, however: Camino Mortera-Martinez has pointed out that, if there is a substantial difference between the CJEU and Norwegian, Icelandic or Swiss courts on the interpretation of one of their agreements with the EU, the agreement may be terminated. The courts of non-EU Schengen countries must also follow the case law of the CJEU when incorporating any aspect of the Schengen *acquis* into their own law.<sup>163</sup>

126. The Information Commissioner was not optimistic about the UK's prospects of maintaining data-sharing on law enforcement without the jurisdiction of the CJEU. She said: "It is hard to think of how we could be outside of the scope of the European Court of Justice in terms of data protection for the data that are used and shared in that environment". Professor Mitsilegas was similarly doubtful, stating: "I don't think that full membership in databases or in agencies is possible without the full jurisdiction of the Court of Justice".<sup>164</sup> Professor Eeckhout and Sir Alan Dashwood agreed.<sup>165</sup>

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

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

### Timeline for adequacy

129. Subject to the outcome of the current stage of negotiations, the Government plans to maintain the status quo on data exchange during the transition/implementation period,

162 [PM speech at Munich Security Conference](#): 17 February 2018

163 Camino Mortera-Martinez, [Hard Brexit, soft data: How to keep Britain plugged into EU databases](#), published by the Centre for European Reform, 23 June 2017

164 Oral evidence taken on [5 December 2017, Q58](#)

165 Oral evidence taken on [5 December 2017, Q58](#)

adhering to EU data protection standards and accepting the jurisdiction of the CJEU during that time.<sup>166</sup> But the number of complex legal issues linked to adequacy, and the time needed for ratification on both sides, cast doubt on the feasibility of achieving an adequacy decision before the EU's proposed end date for transition in December 2020. The Information Commissioner said that it would be “really challenging”, because “On average it takes two years and is now more detailed and more wider-ranging [ ... ] than it has been in the past.” She did point out, however, that when the USA and EU had to renegotiate a new arrangement after the *Schrems* ruling, “that was pretty darn quick. It was about a year”.<sup>167</sup>

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

166 European Commission Article 50 Task Force, [Position paper: “Transitional Arrangements in the Withdrawal Agreement”](#), 7 February 2018

167 Oral evidence taken on [5 December 2017, Q110](#)

## 6 Brexit negotiations and contingency planning

### The state of negotiations

131. The EU has not yet opened negotiations with the UK on future security cooperation, although the current stage of negotiations should determine the extent to which the status quo can be maintained during a transition or implementation period. Slides published by the Article 50 Taskforce of the Commission (to inform discussions about the future relationship) make no mention of any bespoke arrangements for the UK, merely outlining third country models for participation in JHA measures, and the likely impact of those models on future UK-EU cooperation.<sup>168</sup> It may be that they are intended to act as a starting point for discussions on alternative models for the future relationship, so it would be premature to assume that they represent the negotiating position of the EU27.

132. Clearly, the UK's future security relationship with the EU is dependent on more than the two parties' ability to reach agreement on that subject alone. The Prime Minister and Brexit Secretary have said as recently as December that "no deal is better than a bad deal", making it clear that they would be willing to walk away from negotiations if the terms of the future relationship were unfavourable.<sup>169</sup> The Chancellor committed an additional £3 billion of funds in the Autumn Budget to preparations for "every possible outcome" on Brexit, and Sir Jeremy Heywood, the Cabinet Secretary and Head of the Civil Service, told the Public Administration and Constitutional Affairs Committee in January that preparations for a 'no deal' Brexit were being reviewed by Ministers on a weekly basis.<sup>170</sup> The Home Secretary told us in October that it was "unthinkable that there would be no deal" on security,<sup>171</sup> and the Policing Minister said in January that "it is always safe to agree with your boss but I do on this occasion".<sup>172</sup>

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

168 European Commission, Internal EU27 preparatory discussions on the framework for the future relationship: "Police & judicial cooperation in criminal matters", TF50 (2018) 26 - Commission to EU 27, 24 January 2018

169 For example: House of Commons Hansard, Oral Answers to Questions: Exiting the European Union, Vol 633 [Col 588](#)

170 The Sun, [Brexit Planning: Plans for a No Deal Brexit are being reviewed every week, says top civil servant](#), 16 January 2018

171 Oral evidence taken on [17 October 2017, Q12](#)

172 Oral evidence taken on [23 January 2018, Q133](#)

## Contingency planning for a ‘no deal’ Brexit

134. The Home Office has acknowledged that, although it does not “want or expect a no deal outcome”, a responsible Government should prepare for such a scenario. It said that “Preparation and planning is underway across the whole of Government to prepare for the outcome of negotiations”, but it gave no indication of the nature or extent of this planning in relation to security.<sup>173</sup> We approached the NCA with a view to taking oral evidence on its role in Brexit contingency planning, but we were advised that representatives would be unable to provide such information in public. Instead, we received a private briefing on Brexit planning during a visit to the Agency in January.

135. We asked the Policing Minister when the Government would begin contingency planning for a ‘no deal’ outcome on security, and we were told that “The contingency planning is there”, but he was “reluctant to get drawn on the timing of drawing down contingency plans”, because “we are about to embark on a negotiation”.<sup>174</sup> In October, the Home Secretary told us that the Home Office had received £50 million from the Treasury to prepare for additional Brexit costs and planning.<sup>175</sup> We asked the Policing Minister what proportion of this budget was being spent on contingency planning for policing and security cooperation, and he responded: “I am not spending it, that I know. [ ... ] I think it is mostly in the immigration area”. The Europe Director confirmed that “The money that has been set aside is predominantly for contingency planning on the immigration side”. Subsequently, the Minister told us that £60 million had now been provided by the Treasury to support the Department’s Brexit planning, but did not specify how much was being spent on policing and security cooperation, merely stating that the money has “funded an increase in staff numbers to support the policy and operational response to the decision to Exit the EU, including its implications for policing and security cooperation”.<sup>176</sup>

136. In the Chancellor’s Spring Statement on 13 March, it was announced that the first £1.5 billion of the £3 billion Brexit planning fund would be allocated to central government departments and devolved administrations during the 2018–19 financial year. The Home Office will receive the largest proportion of this budget, with £395 million allocated.<sup>177</sup> It is not yet clear what proportion of this sum will be spent on policing and security cooperation, rather than immigration and Border Force.

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

**138. The Policing Minister was not able to give us any information on the Home Office’s contingency planning in this area of Brexit, and could not even say whether the Department had specifically allocated any funds towards it. We were left with the**

173 Home Office written evidence (PSC0007)

174 Oral evidence taken on [23 January 2018, Q131](#)

175 Oral evidence taken on [17 October 2017, Q52](#)

176 Home Office supplementary written evidence (PSC0008)

177 Spring Statement: [Written statement - HCWS540](#), 13 March 2018



impression that the policing and security elements of Brexit are receiving very little focus at the Ministerial level. Given the emphasis placed by the Prime Minister on the importance of law enforcement cooperation with the EU, and the large sum devoted by the Chancellor towards Brexit preparations, we were amazed by this approach to contingency planning in this field. The Government appears to assume that the UK's dominant role in Europol and other forms of cooperation will make it easy to secure a bespoke future security relationship with the EU, going far beyond any forms of third country involvement to date. This attitude, along with lack of planning for alternative scenarios, suggests that the Government is at risk of sleep-walking into a highly detrimental outcome. We recommend that the Government dedicates a substantial proportion of the £3 billion Brexit planning fund to policing and security cooperation, to include:

- Detailed impact assessments of different scenarios, including losing access to some or all EU internal security measures, to be published to inform public debate; and
- Fully costed plans for contingency arrangements, such as UK-based call centres for bilateral coordination with law enforcement agencies across the EU, and use of the European Convention on Extradition, in case the UK loses access to the European Arrest Warrant.

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

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



# Conclusions and recommendations

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## Current security arrangements and Brexit objectives

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

## *Specific objectives in key areas of cooperation*

2. We welcome the Government’s intention to maintain the intensive participation of the UK in Europol after Brexit, and we agree that the UK should be aiming for a bespoke arrangement rather than adopting existing third country arrangements. However, we urge the Home Office to set out precisely what it is aiming for in legal and operational terms; particularly in relation to the role of the CJEU. We believe that the value of the UK’s participation in Europol—both to the UK and EU—means that the best outcome would be for the UK to retain what is effectively full membership of Europol. This should include direct access to Europol databases and the ability to lead joint operations—although we set out some of the likely obstacles to achieving this aim in Chapter 3. If the Government’s aim falls short of full membership of Europol after Brexit, it should say so, and explain why. The Government should also further clarify whether the engaged, dynamic relationship it is seeking would preserve its current capabilities in full. (Paragraph 22)
3. Ministers are right to stress the vital importance of maintaining the sophisticated and efficient extradition arrangements made possible by the European Arrest Warrant. We believe that the best criminal justice outcome for both the UK and the EU would be for the current extradition arrangements under the European Arrest Warrant to be replicated after Brexit. However, we are concerned that the Government has been insufficiently clear about its intentions. There remains excessive uncertainty about whether the Government is seeking ongoing full participation in the European Arrest Warrant (unprecedented for a non-EU member state), a replication of existing third party arrangements, or a bespoke agreement. If it is the second or third option that the Government seeks, it must explain why, and be forthcoming and frank in setting out the additional constraints that this would place on the UK’s extradition capabilities, as well as the time needed to negotiate them. It must also provide more clarity about its intended relationship with the CJEU in this field. (Paragraph 24)
4. We welcome the Government’s ambition to retain the same full access to EU databases, and urge them to set out their plans more formally, in relation to SIS II, Prüm, PNR, ECRIS and the Europol Information System. (Paragraph 26)

5. We commend the Prime Minister for her commitment to maintaining a close security relationship with the European Union, and we agree that the UK should seek to maintain its capabilities in full after Brexit. This means seeking to retain Europol membership, replicating the provisions of the European Arrest Warrant, and retaining full access to EU data-sharing mechanisms. However, we believe Parliament should be given more clarity over the Government's precise intentions in each area. If its detailed negotiating objectives would result in inferior arrangements in practice, then Parliament should have the opportunity to debate those objectives. (Paragraph 27)
6. While replicating existing arrangements would be the most desirable outcome, we also believe that the Government should be honest with the public about the complex technical and legal obstacles to achieving such a close degree of cooperation as a third country, as we explore in detail in this report. (Paragraph 28)

### *Transitional arrangements*

7. We welcome the commitment of the UK Government to continue taking part in existing security measures during a transition period, and the commitment of the EU to extend effective Member State status to the UK during this time. It is important that these commitments are translated into legal text as swiftly as possible. However, the European Union's proposals for this period would seemingly not allow the UK to retain its governance role in Europol, nor opt into new criminal justice initiatives during that period, unless they build on or amend existing measures. Given the UK's unique and substantial contribution to policing and security cooperation in Europe, we urge the EU to reconsider. Disrupting Europol's governance arrangements next March, in advance of a wider negotiation about how the new relationship should work, would not benefit anyone's security or safety. Restrictions on Europol membership, or on participation in new measures during transition, would not be conducive to developing a future security relationship that is as dynamic as exists now. More importantly, an inferior relationship would be a gift to all those who wish to do us harm. (Paragraph 32)
8. Both the UK and the EU are right to distinguish these negotiations from other elements of the future partnership, and we agree with the Government that the two parties should conclude a separate, comprehensive security treaty. Nevertheless, it is crucial that the negotiations start imminently. We are concerned that there may be significant hurdles in the way of preserving the UK's existing capabilities, even if it is the intention of all parties to do so. Moreover, given the complex technical and legal obstacles that it must overcome, the Government and the EU must remain open to extending the transition period for security arrangements beyond the EU's proposed end-date of December 2020. (Paragraph 33)

## **Europol**

### *Existing third country models*

9. Existing operational agreements between Europol and third countries allow for extensive cooperation across a number of areas, including considerable access to

Europol products and a physical presence at Europol headquarters. However, such arrangements fall significantly short of the full membership currently enjoyed by the UK. It is clear that an operational agreement between the UK and the EU after Brexit, based on existing third country models, would represent a significant diminution in the UK's security capacity. (Paragraph 41)

#### *Existing 'bespoke' relationships*

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

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

11. Europol is the jewel in the crown of EU law enforcement cooperation. Under the able and effective leadership of its current Director, Rob Wainwright, it has become an invaluable tool in the fight against international terrorism, serious organised crime and cybercrime. In an increasingly interconnected world, with many serious crimes crossing borders or taking place online, it has never been more vital for UK law enforcement agencies to work in partnership with their counterparts across Europe. From the evidence received, it is clear to us that there can be no substitute for UK access to Europol's capabilities and services, and that maintaining this should be a key priority in the Brexit negotiations. (Paragraph 52)
12. The UK Government should do all it can to achieve the negotiating objective of a future relationship with Europol that maintains the operational status quo in full. It is therefore welcome that the Prime Minister has indicated willingness to accept the remit of the CJEU in this area. The commitments she has given suggest that if the UK and Europol are in dispute in future, the CJEU would be the ultimate arbiter. We welcome this flexibility in the Prime Minister's approach, as a way of ensuring continued security cooperation, which is in the interests of both the UK and the EU. For the operational status quo to be maintained, the future relationship must provide for more than Europol's operational partnership with Denmark, including:
  - A seat on the Europol Management Board, with a formal say in the strategic priorities and direction of the agency, reflecting the UK's leadership role in the organisation since 2009, and its world-leading strength in policing and intelligence;
  - The stationing of UK officers and staff and national experts at the Europol headquarters, with the capacity to lead cross-border operations, as they have done regularly in the past; and

- Direct access to the full menu of data-sharing and intelligence products, including the Europol Information System, given the volume of requests made by UK law enforcement. (Paragraph 53)
13. Although it would be premature to second-guess the outcome of negotiations, the evidence we have received leaves us concerned that it will be difficult for the UK to achieve a relationship with Europol which is closer than Denmark was able to obtain. We hope that the volume of data exchanged between the UK and Europol might enable a bespoke mechanism to be negotiated, to avoid delays in the UK and EU's ability to share vital crime-fighting data. We urge the Government to make the security relationship a priority in the negotiations, and to work proactively to develop bespoke arrangements, in order to minimise the risks generated by the UK's possible relegation from a leading member of Europol to an operational partner of the agency. (Paragraph 54)

### The European Arrest Warrant

14. In our view, the efficiency and effectiveness of the European Arrest Warrant is beyond doubt—particularly when compared to previous arrangements, which were far more lengthy and costly. The EAW has enabled the extradition of over 12,000 individuals from the UK to the EU in the last nine years. In the Prime Minister's own words, losing access to the EAW could render the UK a “honeypot” for criminals escaping the law. It is reassuring, therefore, that both sides of the negotiation are committed to the UK's full participation in the European Arrest Warrant during the transition period. However, we have real concerns about the consequences for extradition arrangements once the UK is no longer considered an EU Member State for extradition purposes. (Paragraph 61)

### *The viability of existing models*

15. It is imperative that the UK's future relationship with the EU includes speedy and simple extradition arrangements for serious crime, based on mutual recognition of judicial decisions, and that these arrangements are as similar as possible to the EAW model. In particular, being forced to fall back on the 1957 European Convention on Extradition would be a catastrophic outcome. (Paragraph 69)
16. We do not understand why the Government's future partnership paper on security and law enforcement cooperation makes no proposals for a future extradition arrangement with the EU. Based on comments by Ministers, we assume that the Government plans to include an extradition agreement in its overarching security treaty with the EU. However, if it is planning to try to achieve the extradition agreement through a parallel route instead, it should make that clear to Parliament and the public. (Paragraph 70)
17. We are concerned that there are serious legal and constitutional obstacles to achieving an extradition agreement that is equivalent to the existing European Arrest Warrant. In particular, we are alarmed by evidence that any agreement requiring Member States to extradite their own citizens could cause serious delays to ratification, as it would be inconsistent with some countries' constitutions. Based on the evidence we

have received, the closer the UK wants to remain to the status quo in its extradition arrangements after Brexit, the more likely it is that the EU will demand a stronger role for the Court of Justice of the EU. It might be possible to replicate Norway and Iceland's extradition agreement without direct CJEU jurisdiction, but the UK could then lose the ability both to extradite individuals whose crimes could be considered political in nature, and to require some (or all) Member States to extradite their own citizens to the UK. (Paragraph 71)

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

### EU data-sharing

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

### *Retaining access to EU data after Brexit*

20. We agree with the Government that the sharing of criminal data must continue after Brexit, and that UK access to EU criminal justice and intelligence databases is extremely important for both the UK and the EU. At present, access to these vital databases is dependent on either EU membership or Schengen membership—there is no other precedent for third countries. We welcome the EU's commitment to maintaining the UK's current use of these measures during a transition or implementation period. After that, the Government has said that a new framework for data exchange on criminal matters will be needed, and we agree that this should form part of an overarching security treaty. (Paragraph 92)
21. We note that EU position is to require a data 'adequacy decision' to be made by the European Commission, in order for EU countries and agencies to share law enforcement data in such a wide-ranging manner with a third country. Based on the evidence we have received, alternative models are likely to be more costly and onerous. The Government proposes a future arrangement for data exchange with the EU that builds on the adequacy model, including a role for the Information Commissioner. We welcome this proposal, but it remains to be seen whether the



EU is willing or able to depart from its existing rules on data exchange with third countries in order to accommodate the UK's wishes, and how long it will take to address some of the complex technical and legal obstacles. We urge the EU to show flexibility and not to confine its approach to existing models or arrangements, given the unique and leading role the UK has played in developing these databases and sharing information through them, as well as the clear shared interest in continued cooperation in this area. (Paragraph 93)

#### *Potential obstacles to data adequacy*

22. We agree with the Government that the UK should be aiming for a data adequacy model which would allow both for the continued transfer of EU criminal data (including access to the key databases) and for the existing surveillance and protective activities of the UK security services to continue. A negotiation process that pitted the national security operations of the UK security services against European cross-border policing and crime fighting would be in nobody's interest, and we urge EU and UK negotiators to recognise this. (Paragraph 112)
23. We are concerned about the implications for the activities of the UK security services if existing EU data adequacy processes for third countries are applied to the UK. We are also concerned about the risk of the CJEU striking down an adequacy decision, in the way that it has in relation to far less ambitious agreements with the USA and Canada. As an EU Member State, the UK can rely, to some degree, on the fact that national security remains an exclusive competency of Member States. As a third country, there is a significant risk that the UK's surveillance and interception regime will be exposed to a new level of scrutiny by EU institutions, including capabilities that have enabled the security services to save lives and prevent serious harm. The Government must work closely with its EU partners to ensure that Brexit does not cause the UK's surveillance powers to become a source of conflict, nor an obstacle to vital forms of data exchange. (Paragraph 113)
24. These particular challenges posed by Brexit have received very little public attention to date. Based on the Minister's evidence, we are concerned that the Government is not yet engaging sufficiently with the implications of an EU data adequacy assessment, nor preparing properly for such an assessment to take place. In addition, we believe that substantial contingency planning is required, in case this process takes considerably longer than the transition period, or in the scenario that it is not possible to achieve the UK's objectives. The Government should be carrying out an impact assessment, in conjunction with the EU, of the consequences of failing to find a resolution to this important issue. (Paragraph 114)

#### *The EU Charter on Fundamental Rights*

25. The Government has emphasised that UK data protection law will be consistent with EU law at the point of Brexit, but it has not fully incorporated EU data protection rights into domestic legislation. It claims that the Data Protection Bill contains the required provisions, but that Bill may in fact act as an obstacle to data adequacy, because it denies data protection rights to certain people subject to immigration controls—a scope sufficiently wide that it is likely to include EU citizens. Given the



importance of a data adequacy decision for future law enforcement cooperation, we recommend that the Government incorporate Article 8 of the EU Charter of Fundamental Rights into UK law. It must also ensure that the Data Protection Bill contains adequate protections for all data subjects. This would provide some assurances to the EU that the UK will respect the data rights of EU citizens in future. (Paragraph 120)

### *Onward transfer to Five Eyes partners*

26. The UK benefits greatly from its Five Eyes intelligence-sharing capabilities, which may face new levels of scrutiny by the EU when a data adequacy decision is sought. It is essential that this cooperation continues in an effective way, and it is in the strong interests of both the UK and the EU to find a solution to this issue. Those relationships and surveillance capabilities need to operate with strong legal protections, but we agree with the Government that the exchange of intelligence data should take place within the UK's own legal framework, beyond the scope of EU law. Nevertheless, the short period before Brexit does not allow time for a CJEU ruling against any plans for UK-EU data transfer. We recommend that the Government works proactively with EU institutions to ensure that the UK's onward data transfer regime to the USA and other Five Eyes countries allows both for an EU adequacy decision and for the continuance of the existing Five Eyes relationship. We urge the EU to recognise the value of these parallel security relationships, and to work flexibly to come to an agreed solution. (Paragraph 123)

### *CJEU jurisdiction*

27. The evidence we have received suggests that it may be very difficult for the Government to negotiate ongoing access to EU law enforcement databases while maintaining its 'red line' on the direct jurisdiction of the CJEU. The Prime Minister acknowledged recently that UK courts will need to take account of the European Court's views on data protection, because the CJEU determines whether EU agreements with third countries are compliant with EU law. Even if an alternative dispute resolution mechanism is negotiated as part of a security treaty, or as part of the adequacy process, the CJEU's rulings on the transfer of EU data to the USA and Canada—effectively striking down adequacy decisions made by the European Commission—illustrate that the UK cannot avoid the direct impact of the Court's rulings in future. (Paragraph 127)
28. Any comprehensive security treaty negotiated between the UK and the EU could be subject to referral to the CJEU prior to its ratification, to ensure its compatibility with primary EU law and the Charter of Fundamental Rights, even if the EU Commission is content with its provisions. As a result, the reality is that the UK will be unable to depart from EU data protection law after Brexit, nor from the rulings of the CJEU. Where data protection is concerned, the extent of CJEU involvement in any meaningful agreement between the UK and the EU means that it would be unwise to make the jurisdiction of the CJEU a "red line" issue in negotiations. (Paragraph 128)

*Timeline for adequacy*

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

**Brexit negotiations and contingency planning**

30. We have set out in this report our assessment of the extent to which the UK's ambitions for future security cooperation with the EU are consistent with the likely negotiating 'red lines' of the EU, based on the evidence received about third country cooperation on EU security. That analysis is based on the assumption—and hope—that the Brexit negotiations remain on course for a stable transition or implementation period, until December 2020 at the earliest, and that they are not derailed at any stage by insurmountable differences. It is not the purpose of this report to comment at length on the progress made to date in the Brexit negotiations more broadly. Nevertheless, we consider it relevant to this inquiry for us to consider what happens if no deal is reached with the EU, either for a transition or implementation period from 30 March 2019, or for the long-term relationship when that period comes to an end. (Paragraph 133)
31. It is understandable that UK law enforcement agencies wish to refrain from making public assertions about the implications of Brexit—and of different forms of Brexit—for the UK's policing and intelligence capabilities. The result of this risk-aversion, however, is that the public debate on this aspect of Brexit has been seriously lacking in detail and urgency. We were disappointed that the leading policing agencies were unwilling to provide evidence in public on Brexit contingency planning, including what emergency capabilities will be required in the event of a 'no deal' scenario, and what further resources they wish the Government to provide. (Paragraph 137)
32. The Policing Minister was not able to give us any information on the Home Office's contingency planning in this area of Brexit, and could not even say whether the Department had specifically allocated any funds towards it. We were left with the impression that the policing and security elements of Brexit are receiving very little focus at the Ministerial level. Given the emphasis placed by the Prime Minister on the importance of law enforcement cooperation with the EU, and the large sum devoted by the Chancellor towards Brexit preparations, we were amazed by this approach to contingency planning in this field. The Government appears to assume that the UK's dominant role in Europol and other forms of cooperation will make it easy to secure a bespoke future security relationship with the EU, going far beyond any forms of third country involvement to date. This attitude, along with lack of planning for alternative scenarios, suggests that the Government is at risk of sleep-

walking into a highly detrimental outcome. We recommend that the Government dedicates a substantial proportion of the £3 billion Brexit planning fund to policing and security cooperation, to include:

- Detailed impact assessments of different scenarios, including losing access to some or all EU internal security measures, to be published to inform public debate; and
  - Fully costed plans for contingency arrangements, such as UK-based call centres for bilateral coordination with law enforcement agencies across the EU, and use of the European Convention on Extradition, in case the UK loses access to the European Arrest Warrant. (Paragraph 138)
33. If the authorities of an EU country are aware, in future, of a terrorist plot against the UK, we have no doubt that this intelligence will be passed onto the UK security services, regardless of the outcome of the Brexit negotiations. In the event of a ‘no deal’ scenario in security, however, the UK risks losing information and capabilities linked to the wider intelligence picture for a range of serious crimes, including terrorism. This might include the ability to check whether an otherwise unknown individual, found in the company of a child, has a history of child sexual offences in their home country; the ability to flag the identity of a missing child to EU authorities, so that border security can apprehend their kidnapping relative before they board a flight to South America; and the ability to extradite an EU national who has fled home after committing a serious violent crime, to face charges in the UK. It is in these scenarios that people may be put at greater risk of harm if the UK and EU do not secure a comprehensive security agreement. We agree with the Home Secretary that such an outcome should be unthinkable, but we are not convinced that the Government has a clear strategy to prevent the unthinkable from becoming a reality. (Paragraph 139)
34. Given the uncertain prospects for a comprehensive deal on law enforcement cooperation, we see no alternative to contingency planning for the loss of some or all EU security measures. It is time for the Government to flesh out the details of the ‘bespoke deal’ it says it hopes to secure in this area, and be open with the public and Parliament, by explaining how it proposes to address the potential pitfalls and obstacles identified in this report. (Paragraph 140)

## Formal minutes

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**Wednesday 14 March 2018**

Members present:

Yvette Cooper, in the Chair

Kirstene Hair	Stuart C McDonald
Sarah Jones	Douglas Ross
Tim Loughton	John Woodcock

Draft Report (*UK-EU security cooperation after Brexit*), proposed by the Chair, brought up and read.

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

Paragraphs 1 to 140 read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the Fourth Report of the Committee to the House.

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

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 20 March at 2.15 pm.]

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## Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

### Tuesday 5 December 2017

**Sir Alan Dashwood QC**, Emeritus Professor of European Law, University of Cambridge, Barrister at Henderson Chambers, **Piet Eeckhout**, Professor of EU Law, University College London, and **Valsamis Mitsilegas**, Professor of European Criminal Law, Queen Mary University of London

[Q1-72](#)

**Elizabeth Denham**, Information Commissioner, **Steve Wood**, Deputy Information Commissioner (Policy), and **Professor Lorna Woods**, Director of Research, School of Law, University of Essex

[Q73-112](#)

### Tuesday 23 January 2018

**Rt Hon Nick Hurd MP**, Minister of State for Policing and the Fire Service, and **Shona Riach**, Europe Director, Home Office

[Q113-215](#)

The following witnesses gave evidence on EU Policing and security issues inquiry to the Home Affairs Committee in the previous Parliament. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

### Tuesday 6 December 2016

**Professor Elspeth Guild**, Professor of Law, Queen Mary University of London, **Professor Michael Levi**, Professor of Criminology, University of Cardiff, and **Professor Steve Peers**, Professor of EU Law and Human Rights Law, University of Essex

[Q1-35](#)

**David Armond**, Deputy Director General, National Crime Agency, and **Richard Martin**, Temporary Deputy Assistant Commissioner, National Police Chiefs' Council

[Q36-77](#)

### Tuesday 28 February 2017

**Sir Julian King**, EU Commissioner for Security Union, European Commission

[Q78-140](#)

### Tuesday 7 March 2017

**Rob Wainwright**, Director, Europol

[Q141-191](#)

## Published written evidence

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The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

PSC numbers are generated by the evidence processing system and so may not be complete.

- 1 ADS Group ([PSC0003](#))
- 2 Anti-Slavery International ([PSC0005](#))
- 3 City of London Police ([PSC0004](#))
- 4 Daniel Schofield ([PSC0002](#))
- 5 Home Office ([PSC0007](#))
- 6 Home Office ([PSC0008](#))
- 7 National Crime Agency ([PSC0009](#))
- 8 Security Institute ([PSC0006](#))

The following evidence was received by the previous Home Affairs Committee before the general election in 2017. It can be viewed on the [inquiry publications page](#) of the Committee's website.

EUR numbers are generated by the evidence processing system and so may not be complete.

- 9 David Armond, Deputy Director General, National Crime Agency ([EUR0004](#))
- 10 Law Society of Scotland ([EUR0003](#))
- 11 Rt Hon Brandon Lewis MP, Minister of State for Policing ([EUR0001](#))

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## List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

### Session 2017–19

First Report	Home Office delivery of Brexit: customs operations	HC 540
Second Report	Immigration policy: basis for building consensus	HC 500
Third Report	Home Office delivery of Brexit: immigration	HC 421
First Special Report	The work of the Immigration Directorates (Q1 2016): Government Response to the Committee's Sixth Report of Session 2016–17	HC 541
Second Special Report	Asylum accommodation: Government Response to the Committee's Twelfth Report of Session 2016–17	HC 551
Third Special Report	Unaccompanied child migrants: Government Response to the Committee's Thirteenth Report of Session 2016–17	HC 684
Fourth Special Report	Home Office Delivery of Brexit: customs operations: Government Response to the Committee's First Report	HC 754

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