



Proposed UK-EU Security Treaty

Summary

As a member state of the European Union (EU), the UK participates in a variety of EU policing and criminal justice tools which enable data sharing and collaboration between members. These measures were extensively debated in Parliament in 2014, when the UK exercised its right to leave and then re-join selected justice and home affairs measures. At that time, the then Home Secretary, Theresa May, warned that losing access to these tools would “risk harmful individuals walking free and escaping justice, and would seriously harm the capability of our law enforcement agencies to keep the public safe”.

In September 2017, the UK published a document in which it stated that it would aim to negotiate a treaty between the UK and the EU providing a legal basis for continued cooperation on security. The Government stated that it is in the interest of the UK and the EU to sustain “the closest possible cooperation” in this area, and argued that the existing close working should provide a basis for an unprecedented level of cooperation between the EU and a third country. In a further paper published in May 2018, the Government restated these aims, and advocated establishing regular institutional engagement between the EU and UK in the area of security.

The European Council has stated that the EU is willing to establish a security partnership covering effective exchanges of information, support for operational cooperation between law enforcement authorities and judicial cooperation in criminal matters. However, the European Commission has stated that the EU’s interests must be protected, a non-member state cannot have the same rights as a member state, there must be a balance of rights and obligations and the EU must continue to have autonomy in making decisions.

Many EU justice and home affairs tools involve the transfer of data between parties. At present this is enabled by the UK’s membership of the EU and compliance with its data protection legislation. Once the UK leaves the EU, one option would be for it to pursue an ‘adequacy decision’, determining its data protection laws are essentially equivalent to those of the EU. However, it has been noted that a consequence of this would be that the UK would have to comply with standards it had not had a role in setting.

On 2 March 2018, the House of Lords European Union Home Affairs Sub-Committee announced it would be undertaking an inquiry into the proposed UK-EU security treaty.

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I. Existing EU-UK Cooperation

The UK currently has an arrangement under which by default it does not participate in EU justice and home affairs measures. It can, however, opt in to such measures if it so chooses.¹ A consequence of this is that each EU police and criminal justice measure that the UK participates in was the subject of a positive decision.

With the signing of the Lisbon Treaty in 2007, the UK negotiated an automatic opt-out from all new EU measures on justice and home affairs, with the possibility of opting in. It also won the right to decide whether to continue to be bound by the EU police and criminal justice measures it had already agreed to. In July 2013, the UK Government informed the EU's Council of Ministers that it would like to exercise its right to opt out of all measures pre-dating the Lisbon Treaty, but that it would like to immediately opt back into 35 of them. Advocating for the UK's re-joining of these measures in 2014 the then Home Secretary, Theresa May, warned in the House of Commons that failure to do so would "risk harmful individuals walking free and escaping justice, and would seriously harm the capability of our law enforcement agencies to keep the public safe".²

A December 2016 report by the House of Lords European Union Committee found that:

Access to EU law enforcement databases and data-sharing platforms is integral to day-to-day policing up and down the country. Were the UK to lose access to them upon leaving the EU, information that can currently be sourced in seconds or hours could take days or weeks to retrieve, delivering an abrupt shock to UK policing and posing a risk to the safety of the public. The UK therefore has a vital national interest in finding a way to sustain data-sharing for law enforcement purposes with the EU-27.³

The UK currently participates in the following EU security tools:

- European Arrest Warrant (EAW), a legal framework that facilitates the extradition of individuals between EU member states to face prosecution for a crime they are accused of, or to serve a prison sentence for an existing conviction;

¹ HM Government, [The UK's Cooperation with the EU on Justice and Home Affairs, and on Foreign Policy and Security Issues](#), 9 May 2016, p 1.

² [HC Hansard, 10 November 2014, col 1229](#).

³ House of Lords European Union Committee, [Brexit: Future UK-EU Security and Police Cooperation](#), 16 December 2017, HL Paper 77 of session 2016–17, p 33.

- Europol, an agency which supports law enforcement authorities and facilitates cooperation between them by processing data and making links between crimes committed in different countries, and providing access to law enforcement intelligence from the other EU countries;
- Europol Information System (EIS), which pools information on criminals and terrorists from across the EU;
- Passenger Name Records (PNR), which comprise information collated by air carriers as part of the travel booking process and may include details of how travel was booked and for whom, contact details, and travel itinerary;
- Prüm, a mechanism that allows for the searching of DNA profiles, fingerprints and vehicle registration information against other member states' databases;
- Second Generation Schengen Information System (SIS II), a database of alerts about individuals and objects of interest to EU law enforcement agencies; and
- European Criminal Records Information System (ECRIS), a secure electronic system for the exchange of information on criminal convictions between member states' authorities.⁴

For a summary of the history of EU-UK cooperation on justice and home affairs, see the report from the House of Lords European Union Committee entitled [Brexit: Future UK-EU Security and Police Cooperation](#).⁵

2. Transition or Implementation Agreement

2.1 UK Position

In a speech in Florence in September 2017, the Prime Minister, Theresa May, proposed that after the UK leaves the EU there should be a time-limited period of implementation, during which the UK would continue to take part in existing security measures.⁶ This would be to avoid operational gaps created by the transition from the current relationship to new arrangements. In evidence submitted to the House of Commons Home Affairs Committee the Government said:

The Government believes it would help both sides to minimise unnecessary disruption and provide certainty if arrangements for an implementation period are agreed as early as possible. The details of

⁴ HM Government, [The UK's Cooperation with the EU on Justice and Home Affairs, and on Foreign Policy and Security Issues](#), 9 May 2016, pp 2–8.

⁵ House of Lords European Union Committee, [Brexit: Future UK-EU Security and Police Cooperation](#), 16 December 2017, HL Paper 77 of session 2016–17, pp 6–9.

⁶ Prime Minister's Office, [PM's Florence Speech: A New Era of Cooperation and Partnership Between the UK and the EU](#), 22 September 2017.

how the implementation period may work will be subject to negotiations.⁷

In a speech delivered on 26 January 2018, the Secretary of State for Leaving the European Union, David Davis, emphasised the importance of continued cooperation during the implementation period, stating that:

Throughout this period, as in our future partnership, the United Kingdom and European Union will need to work together and respond to the ever changing threats we face in areas from terrorism to cyber crime [...] there should not be any obstacles, any obstacles [at] all, to us jointly deciding to take action in the face of these shared challenges during that implementation period.⁸

2.2 EU Position

In papers published on 29 January 2018, the Council of the European Union set out its principles for a transitional arrangement with the UK, which it stated “should apply as from the date of entry into force of the Withdrawal Agreement and should not last beyond 31 December 2020”.⁹

The EU stated that if a ‘transition period’ is agreed, the UK would remain bound by EU legislation which it had already joined, and could choose to adopt new measures amending, replacing, or building on that legislation. However, the UK would not be able to join completely new justice and home affairs measures. According to the EU, during such a transition period, the UK would not participate in making decisions in EU agencies or institutions, but would continue to be governed by its institutions, including the Court of Justice of the European Union (CJEU). The document stated that:

[...] the Union acquis should apply to and in the United Kingdom as if it were a member state. Any changes to the Union acquis should automatically apply to and in the United Kingdom during the transition period. For acts adopted in the Area of Freedom, Security and Justice by which the United Kingdom is bound before its withdrawal, Articles 4a of Protocol (No 21) and 5 of Protocol (No 19) annexed to the Treaties, which allow the United Kingdom not to participate in an act amending a measure by which it is already bound, should continue

⁷ House of Commons Home Affairs Committee, [Written Submission from the Home Office](#), 23 January 2018, para 5.

⁸ Department for Exiting the European Union, [‘David Davis’ Teesport Speech: Implementation Period—A Bridge to the Future Partnership Between the UK & EU](#), 26 January 2018.

⁹ Council of the European Union, [Supplementary Directives for the Negotiation of an Agreement with the United Kingdom of Great Britain and Northern Ireland Setting Out the Arrangements for its Withdrawal from the European Union](#), 29 January 2018, para 22.

to apply during the transition [...] The United Kingdom should however no longer be allowed to opt in to measures in this Area other than those amending, replacing or building upon the above mentioned existing acts.¹⁰

2.3 Draft Withdrawal Agreement

On 19 March 2018, a draft agreement between the UK and EU was published.¹¹ The document set out what had been agreed in green text, areas where agreement on the policy objective had been achieved in yellow, and areas where discussions were ongoing in white. Article 122 of this agreement, in green, provided that EU law will continue to apply to the UK during the transition period, excepting measures the UK was not bound by before its exit. The UK will not, however, have equivalent rights to those of member states, and will not be involved in decision making in EU institutions.

Article 122(5) of the draft withdrawal agreement states that “measures which amend, build upon or replace an existing measure” in the area of freedom, security and justice will apply to the UK. Article 122(2) provides that if the EU and UK reach an agreement governing their future relationship in the area of the Common Foreign and Security Policy and the Common Security and Defence Policy this could come into effect during the transition period, superseding existing EU law in this area as regards the UK.

3. UK Proposals for a Future Agreement

The Prime Minister stated, in a speech delivered in January 2017, that “our future relationship with the European Union [should] include practical arrangements on matters of law enforcement and the sharing of intelligence material with our EU allies”.¹² In her speech in Florence in September 2017, the Prime Minister declared her ambition to achieve “a bold new strategic agreement that provides a comprehensive framework for future security, law enforcement and criminal justice cooperation” which would be “unprecedented in its depth, in terms of the degree of engagement that we would aim to deliver”.¹³ Such an agreement would be built on “our shared principles, including high standards of data protection and human rights”.

¹⁰ Council of the European Union, [Supplementary Directives for the Negotiation of an Agreement with the United Kingdom of Great Britain and Northern Ireland Setting Out the Arrangements for its Withdrawal from the European Union](#), 29 January 2018, para 13.

¹¹ Department for Exiting the European Union, [Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#), 19 March 2018.

¹² Prime Minister’s Office, [‘The Government’s Negotiating Objectives for Exiting the EU: PM Speech’](#), 3 February 2017.

¹³ Prime Minister’s Office, [‘PM’s Florence Speech: A New Era of Cooperation and Partnership Between the UK and the EU’](#), 22 September 2017.

In September 2017, the UK published a document setting out its vision for UK-EU cooperation on security, law enforcement and criminal justice. In this paper, the Government argued 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 now and into the future”.¹⁴ The Government argued for a treaty between the UK and the EU which would provide a legal basis for continued cooperation on security.

In evidence submitted to the House of Commons Home Affairs Committee in January 2018, the Home Office stated that the UK will be seeking to ensure that future cooperation with the EU spans the three “core areas” of facilitating data-driven law enforcement, providing practical assistance to operations and enabling cooperation to be facilitated through the EU’s agencies in the field.¹⁵ The Government argued that future cooperation should be based on a commitment to:

- build on, and where possible enhance, the strong foundation of existing cooperation and work collaboratively against shared threats;
- cooperate across a range of measures, agencies and other fora and continue the facilitation of operational business across borders, avoiding operational gaps for law enforcement agencies and judicial authorities in the UK and the EU;
- continue to develop a dynamic relationship over time as threats change and opportunities for joint working develop; and
- assist one another when needed, if for example the UK or a member state is subject to a terrorist attack.¹⁶

While the EU currently has some arrangements with non-EU countries (or ‘third countries’) to cooperate on security, none are as extensive as those afforded to member states. In the Government’s future partnership paper, it argued that basing a future EU-UK security treaty on current arrangements with third countries would “result in a limited patchwork of cooperation falling well short of current capabilities [...] increasing the risk for citizens across Europe”.¹⁷ The Government emphasised the fact that “as a former member state, the UK will be a third country whose operational processes and data sharing systems are uniquely aligned with approaches adopted at an EU level”, and therefore more extensive cooperation than currently exists with third countries should be possible.¹⁸

¹⁴ HM Government, [Security, Law Enforcement and Criminal Justice: A Future Partnership Paper](#), 18 September 2017, p 2.

¹⁵ House of Commons Home Affairs Committee, [Written Submission from the Home Office](#), 23 January 2018, para 2.

¹⁶ HM Government, [Security, Law Enforcement and Criminal Justice: A Future Partnership Paper](#), 18 September 2017, pp 6–7.

¹⁷ *ibid*, p 13.

¹⁸ *ibid*, p 12.

In January 2018, the Minister of State for Policing, Nick Hurd, told the House of Commons Home Affairs Committee that the Government would seek to continue participating in the existing justice and home affairs information databases. He also said that the Government would aim to negotiate an agreement with the EU which would go beyond ensuring continued cooperation on existing measures and would create an “ongoing strategic partnership that is more forward leaning and dynamic, which reflects the environment that we are trying to manage, both in terms of risk but also the opportunity that continues to emerge from technology to create new mechanisms and do better together”.¹⁹

The Government acknowledged that a future security treaty would have to be supported by a dispute resolution mechanism and mechanisms allowing the transfer of data. The future partnership paper on security did not go into detail on these aspects. However, in evidence given to the House of Commons Home Affairs Committee, the Government emphasised that the UK would not accept the direct jurisdiction of the Court of Justice of the European Union (CJEU) after it leaves the EU, and therefore an alternative dispute resolution mechanism would need to be put in place.²⁰

In February 2018, the Prime Minister made a speech at the Munich Security Conference in which she set out the Government’s aims for future cooperation with the EU on internal and external security. In this speech the Prime Minister argued that “there is no legal or operation reason” why an unprecedented agreement could not be reached between the EU and the UK on security.²¹

On 14 May 2018, the Government published a document building on the Munich speech.²² The *Framework for the UK-EU Security Partnership* covered both internal security, policing and justice measures, and foreign policy and defence. In the ‘future partnership papers’ published in September 2017, these topics were addressed separately, with a treaty being proposed on internal security, and foreign policy, defence and international development being discussed in terms of cooperation and partnership. In the document published in May 2018, these topics are presented together in terms of a future “security partnership”, which is then broken down into internal and external security. The Government stated that the security partnership should be flexible and contain “a mix of legal and political agreements”.²³

¹⁹ House of Commons Home Affairs Committee, [Oral evidence: Home Office Delivery of Brexit: Policing and Security Cooperation](#), 23 January 2018, Q118.

²⁰ House of Commons Home Affairs Committee, [Written Submission from the Home Office](#), 23 January 2018, para 6.

²¹ Prime Minister’s Office, [‘PM Speech at Munich Security Conference’](#), 17 February 2018.

²² HM Government, [Framework for the UK-EU Security Partnership](#), May 2018.

²³ *ibid*, p 8.

On internal security, the Government reiterated its proposal for a treaty which would provide the legal basis for on-going cooperation. The Government restated its aspiration that “cooperation should continue in areas of mutual operational benefit, across three areas: practical operational cooperation; multilateral cooperation through EU agencies; and data-driven law enforcement”.²⁴ The Government also stated that future cooperation should include “reciprocal safeguards to ensure mutual trust, respect for human rights, effective enforcement and dispute settlement mechanisms, and rely on robust data protection arrangements”.²⁵ The Government reiterated its argument that in some cases there are no precedents for third country involvement that would allow for continued cooperation with no loss of capability, therefore an unprecedented partnership agreement would be required in order to preserve current capabilities.²⁶ The Government argued that “there are no insurmountable legal barriers to our proposal”.²⁷

In the paper published in May 2018, the Government proposed developing regular institutional engagement between the UK and the EU.²⁸ This would include regular UK-EU discussions on shared law enforcement and security and criminal justice priorities, establishing a reciprocal secondment programme covering EU and UK institutions and agencies, and creating a framework for sharing and protecting classified information. The Government also argued that a new security treaty should enable EU-UK cooperation to evolve, rather than be limited to continuing current collaboration. The Government suggested a new treaty should enable the UK to continue to cooperate on future versions of current tools, and “allow for new tools and measures to be incorporated [...] where in the interests of both parties”.²⁹

The Government said there would be a need for a “strong and appropriate form of dispute resolution”, though did not specify further what form this would take.³⁰ It also reiterated its desire to establish a bespoke model for exchanging and protecting personal data which builds on the existing adequacy model.³¹ The Government listed other areas which could be included in a future security cooperation agreement, including: cyber security; health security and protection and civil protection; asylum and illegal migration; sensitive information and intelligence; and counter-terrorism and countering violent extremism.³²

²⁴ HM Government, [Framework for the UK-EU Security Partnership](#), May 2018, pp 15–16.

²⁵ *ibid.*

²⁶ *ibid.*, p 21.

²⁷ *ibid.*, p 15.

²⁸ *ibid.*, p 24.

²⁹ *ibid.*, p 23.

³⁰ *ibid.*, p 25.

³¹ *ibid.*

³² *ibid.*, p 26.

4. EU Proposals for a Future Agreement

The European Council’s negotiating guidelines of April 2017 stated that “the EU stands ready to establish partnerships in areas unrelated to trade, in particular the fight against terrorism and international crime, as well as security, defence and foreign policy”.³³ In the European Council’s subsequent guidelines adopted at the December 2017 European Council meeting this position was confirmed.³⁴

On 24 January 2018, the European Commission released a presentation summarising its view of the main issues affecting police and judicial cooperation between the EU and UK after the UK leaves the EU, and possibilities for future cooperation. The Commission outlined the EU’s principles for a future agreement with the UK, stating that while it aims for a partnership with the UK to combat terrorism and international crime, the EU’s interests must be protected, a non-member state cannot have the same rights as a member state, there must be a balance of rights and obligations and the EU must continue to have autonomy in making decisions.³⁵ The Commission then listed “factors determining the degree of the EU cooperation with third countries”:

- EU-27 security interest;
- shared threats and geographic proximity;
- existence of a common framework of obligations with third countries (eg Schengen, free movement);
- risk of upsetting relations with other countries;
- respect for fundamental rights [and] essentially equivalent data protection standards; and
- strength of enforcement and dispute settlement mechanisms.³⁶

On 23 March 2018, the European Council adopted a new set of guidelines on the framework for the future relationship between the EU and UK, which built on those previously adopted. The March 2018 guidelines restated the Council’s desire to establish a partnership with the UK, covering “in particular the fight against terrorism and international crime, as well as security, defence and foreign policy”.³⁷ The Council stated that a future partnership should cover effective exchanges of information, support for operational cooperation between law enforcement authorities and judicial

³³ European Council, ‘[Guidelines for Brexit Negotiations](#)’, 29 April 2017.

³⁴ European Council, ‘[European Council \(Art. 50\) Meeting—Guidelines](#)’, 15 December 2017.

³⁵ European Commission, [Police and Judicial Cooperation in Criminal Matters](#), 23 January 2018, p 6.

³⁶ *ibid.*

³⁷ European Council, [European Council \(Art. 50\) \(23 March 2018\)—Guidelines](#), 23 March 2018, p 2.

cooperation in criminal matters.³⁸ The Council also stated that “strong safeguards will need to be established that ensure full respect of fundamental rights and effective enforcement and dispute settlement mechanisms”.

Regarding data, the Council’s guidelines stated that the future relationship should include rules on data, and that protection of personal data should be governed by Union rules on adequacy.³⁹

In a speech delivered on 14 May 2018, Michel Barnier, the EU’s Chief Negotiator for the UK’s exit from the EU, addressed possible future collaboration between the UK and EU on security. He said that “being a third country does not mean that the UK cannot have an ambitious partnership with the EU”, but that “political and legal arrangements with a third country cannot be a substitute for all the benefits of EU membership”.⁴⁰ Mr Barnier stated that the future security relationship should be underpinned by a Security of Information Agreement which would provide for the exchange and protection of classified information, facilitating the exchange of intelligence.

5. Data Protection

Several of the EU security tools in which the UK currently participates are primarily data-sharing platforms. These include the Second Generation Schengen Information System, the European Criminal Records Information System, Passenger Name Records and Prüm.⁴¹ In evidence submitted to the House of Commons Home Affairs Committee, the Government stated that “the ability of law enforcement agencies to transfer data both within the EU and with third countries is crucial in our efforts to fight cross border crime and prevent terrorism”.⁴²

The House of Lords European Union Committee found that “compliance with EU data protection standards is likely to be a necessary pre-condition for exchanging data for law enforcement purposes”.⁴³ As a member of the EU, the UK is currently obliged to comply with EU data protection standards. In order to facilitate data transfers after the UK leaves the EU, the Government could seek an ‘adequacy decision’ from the EU. This is a

³⁸ European Council, [European Council \(Art. 50\) \(23 March 2018\)—Guidelines](#), 23 March 2018, p 6.

³⁹ *ibid.*

⁴⁰ European Commission, ‘[Speech by Michel Barnier at the EU Institute for Security Studies Conference](#)’, 14 May 2018.

⁴¹ House of Lords European Union Committee, [Brexit: Future UK-EU Security and Police Cooperation](#), 16 December 2016, HL Paper 77 of session 2016–17, pp 25–9.

⁴² House of Commons Home Affairs Committee, [Written Submission from the Home Office](#), 23 January 2018, para 11.

⁴³ House of Lords European Union Committee, [Brexit: Future UK-EU Security and Police Cooperation](#), 16 December 2016, HL Paper 77 of session 2016–17, p 32.

decision by the EU that a country outside the EU offers an adequate level of data protection, and means that personal data can flow from the EU (and Norway, Liechtenstein and Iceland) to that third country without the need for any further safeguards.⁴⁴ Although initially adequacy decisions only applied to data transfers in the commercial sector, under the 2016 General Data Protection Regulation the EU can now adopt adequacy decisions for the law enforcement sector.⁴⁵

The Government has not stated directly that it will seek an adequacy decision, but has said that “the UK wants to explore a UK-EU model for exchanging and protecting personal data, which could build on the existing adequacy model”.⁴⁶ However, there are several potential obstacles to the use of an adequacy decision to facilitate uninterrupted data flows between the EU and the UK. The House of Lords European Union Committee found that existing adequacy decisions have taken many years to negotiate, and the UK would need to be a third country before it could be subject to an adequacy decision, posing a risk that there could be a gap between the end of any implementation or transition period and an adequacy decision taking effect.⁴⁷

In addition, in order to achieve an adequacy decision the UK’s legal framework for data processing for national security purposes would be taken into account. Data processing for national security purposes is out of the scope of EU law, and therefore while the UK is a member of the EU this area of data protection cannot be scrutinised by the EU.⁴⁸ However, when a legal case was launched challenging the adequacy agreement given to the USA, the European Court of Justice “invalidated the European Commission’s adequacy decision on the ground[s] that there was an insufficient examination of the powers of the US National Security Agency to access the personal data of EU citizens once they reach US shores”.⁴⁹ As a result of this decision, it is likely that the UK’s data protection framework in the area of national security will be taken into account when it negotiates the sharing of data with the EU.

An adequacy decision is not granted for a specific time, but is reviewed by the EU Commission at least every four years.⁵⁰ The Government has stated

⁴⁴ European Commission, ‘[Adequacy Decisions](#)’, accessed 24 January 2018.

⁴⁵ European Commission, ‘[Digital Single Market—Communication on Exchanging and Protecting Personal Data in a Globalised World: Questions and Answers](#)’, 10 January 2017.

⁴⁶ HM Government, *The Exchange and Protection of Personal Data: A Future Partnership Paper*, 24 August 2017, p 2.

⁴⁷ House of Lords European Union Committee, *Brexit: The EU Data Protection Package*, 18 July 2017, HL Paper 7 of session 2017–19, p 32.

⁴⁸ [Treaty on European Union, Article 4\(2\)](#).

⁴⁹ European Parliament, *The Implications of the United Kingdom’s Withdrawal from the European Union for the Area of Freedom, Security and Justice*, December 2017, p 63.

⁵⁰ European Commission, ‘[Digital Single Market—Communication on Exchanging and Protecting Personal Data in a Globalised World: Questions and Answers](#)’, 10 January 2017.

that it currently has “no plans to diverge from EU law in this area”.⁵¹ However, as EU data protection law continues to develop, both in legislation and case law, the UK would have to keep up with these changes in order to maintain its adequacy status. In its report on data security in the light of Brexit, the House of Lords European Union Committee found that if an adequacy decision was pursued the UK would continue to be bound indirectly by EU law:

If the UK were to obtain an adequacy decision, the way that EU institutions such as the new European Data Protection Board and the Court of Justice of the European Union interpret the EU’s data protection laws could have an effect, albeit indirectly, by altering the standards that the UK would need to meet to maintain an adequate level of protection.⁵²

In its report on future UK-EU security and police cooperation, the House of Lords European Union Committee concluded that “the need to meet EU data protection standards in order to exchange data for law enforcement purposes means that after leaving the EU, the UK can expect to have to meet standards that it no longer has a role in framing”.⁵³

6. Existing Arrangements with Third Countries

While the Government has stated that it wishes future EU-UK security cooperation to go beyond what currently exists with third countries, the EU has emphasised that after it leaves the EU the UK will be a third country.⁵⁴ For some of the EU security and justice tools the UK participates in there is precedent for cooperation with third countries, though not at the same level as member states. For others, there is no precedent for participation by a non-EU or non-Schengen country. In its December 2016 report the House of Lords European Union Committee found that:

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

⁵¹ House of Commons Home Affairs Committee, [Written Submission from the Home Office](#), 23 January 2018, para 15.

⁵² House of Lords European Union Committee, [Brexit: The EU Data Protection Package](#), 18 July 2017, HL Paper 7 of session 2017–19, p 4.

⁵³ House of Lords European Union Committee, [Brexit: Future UK-EU Security and Police Cooperation](#), 16 December 2016, HL Paper 77 of session 2016–17, p 13.

⁵⁴ European Commission, [Speech by Michel Barnier at the Berlin Security Conference](#), 29 November 2017.

would be particularly ambitious.⁵⁵

6.1 Europol

Europol is an agency which supports law enforcement authorities and facilitates cooperation between them by processing data and making links between crimes committed in different countries, and providing access to law enforcement intelligence from the other EU countries. A number of non-EU countries have operational agreements with Europol, including the USA, Canada and Serbia. Under these agreements, third countries are allowed to participate in Europol analysis projects but only with the agreement of relevant member states, they can exchange data but do not have direct access to Europol's database, they are invited to meetings of Heads of Europol National Units but they are not invited to Management Board and Management Board working group meetings.⁵⁶

A new EU Regulation updating Europol's governance structure, objectives and tasks, which the UK opted in to, was adopted in May 2016.⁵⁷ Denmark, however, is unable to participate in the new Regulation as it has an opt-out from all EU justice and home affairs legislation adopted after the Lisbon Treaty entered into force and has no ability to selectively opt in, as the UK does. As a consequence, Denmark was not able to continue participating in Europol as a full member. In February 2017, Denmark was designated a third country with respect to Europol, which enabled Europol and Denmark to conclude a cooperation agreement.⁵⁸ As a result of this agreement Denmark interacts with Europol on broadly the same footing as other third countries, though it also has observer status at Europol's Management Board and Management Board working groups.⁵⁹

In December 2016, Brandon Lewis, then Minister of State for Policing, told the House of Lords European Union Committee that "we will be looking at what happens with Denmark with great interest".⁶⁰ However, in a statement by the President of the European Commission, Jean-Claude Juncker, the President of the European Council, Donald Tusk, and the Prime Minister of Denmark, Lars Løkke Rasmussen, it was emphasised that this agreement falls short of the current level of cooperation with Europol enjoyed by full

⁵⁵ House of Lords European Union Committee, [Brexit: Future UK-EU Security and Police Cooperation](#), 16 December 2016, HL Paper 77 of session 2016–17, p 44.

⁵⁶ European Commission, [Police and Judicial Cooperation in Criminal Matters](#), 23 January 2018, p 11.

⁵⁷ House of Commons European Union Scrutiny Committee, [Documents Considered by the Committee on 22 February 2017](#), 28 February 2017, HC 71 of session 2016–17, p 83.

⁵⁸ European Parliament, [List of Third States and Organisations with Which Europol Shall Conclude Agreements](#), 14 February 2017.

⁵⁹ European Commission, [Police and Judicial Cooperation in Criminal Matters](#), 23 January 2018, p 11.

⁶⁰ House of Lords European Union Committee, [Corrected Oral Evidence: Brexit: Future UK-EU Security and Policing Co-operation](#), 19 October 2016, Q28.

members, as the agreement must “not in any way equal full membership of Europol, ie provide access to Europol’s data repositories, or for full participation in Europol’s operational work and database, or give decision-making rights in the governing bodies of Europol”.⁶¹ In addition, the agreement was predicated on Denmark’s continued membership of the European Union and of the Schengen area, its obligation to fully implement in Danish law the relevant EU directive on data protection in police matters, and on its agreement to the application of the jurisdiction of the CJEU and the competence of the European Data Protection Supervisor.

6.2 European Arrest Warrant

The European Arrest Warrant (EAW) is a legal framework that facilitates the extradition of individuals between EU member states to face prosecution for a crime they are accused of, or to serve a prison sentence for an existing conviction. While no third country has joined the European Arrest Warrant, there are other tools which enable extradition between the EU and third countries: the 1957 Council of Europe Convention on Extradition contains provisions relating to extradition, and the EU has concluded an agreement with Norway and Iceland, countries which are not in the EU but are members of the Schengen area. The EU also has an extradition agreement with the USA, which complements bi-lateral agreements.

When the UK leaves the EU it will remain a member of the Council of Europe and as such will remain a party to the 1957 Council of Europe Convention on Extradition. The Convention on Extradition provides for the extradition between parties of persons wanted for criminal proceedings or for the carrying out of a sentence. According to evidence given by the Law Society of Scotland to the House of Lords European Union Committee, there are three main differences between the EAW and the 1957 Convention:

- The EAW can be described as a transaction between judicial authorities where the role of the executive is removed. By contrast, applications under the 1957 Convention would need to be made via diplomatic channels, with Secretary of State approval required at a number of points in the process.
- The EAW framework imposes strict time limits at each stage of the process. The 1957 Convention does not impose the same time limits.

⁶¹ European Commission, [‘Declaration by the President of the European Commission, Jean-Claude Juncker, the President of the European Council, Donald Tusk and the Prime Minister of Denmark, Lars Løkke Rasmussen’](#), 15 December 2016.

- Article 6 of the 1957 Convention provides that states can refuse an extradition request for one of their own nationals. The EAW framework abolished the own nationals exception based on the concept of EU citizenship.⁶²

An arrangement on extradition has been agreed between Norway and Iceland, neither of which is a member of the EU, and the EU. These negotiations began in 2001 and the agreement was concluded in 2014, however it is not yet in force.⁶³ The provisions of this agreement are largely the same as the EAW, however it includes the option for both parties to refuse to extradite their own nationals.

Giving evidence to the House of Commons Home Affairs Committee, Emeritus Professor of European Law Sir Alan Dashwood argued that it would be possible to negotiate an agreement replicating the EAW, saying “I see no reason why it should not be possible to negotiate an arrangement [on extradition] that corresponds to the existing situation”.⁶⁴ Valsamis Mitsilegas, Professor of European Criminal Law at Queen Mary University of London, argued, however, that such a close relationship would necessitate a role for the European Court of Justice, which the Government has ruled out:

If you have an arrangement, though, in the way that Sir Alan has proposed, then you have to comply 100 percent with the case law of the Court of Justice. I see no other way, personally. I think it is a political choice about how close you want to be. The closer the relationship you want to have, the closer you will have to follow what the court is saying on these matters.⁶⁵

7. Negotiation and Ratification Procedures

A Withdrawal Agreement setting out the terms of the UK’s exit from the EU is currently being negotiated under Article 50 of the Treaty on European Union, whilst the UK is a member of the EU. However, the EU treaties require that agreements governing the future relationship between the UK and EU can only be legally concluded once the UK has left the EU. Therefore, a treaty between the EU and UK on security cooperation is likely to be a separate agreement concluded after the UK becomes a third country.

⁶² House of Lords European Union Committee, [Brexit: Future UK-EU Security and Police Cooperation](#), 16 December 2016, HL Paper 77 of session 2016–17, p 36.

⁶³ *ibid*, p 35.

⁶⁴ House of Commons Home Affairs Committee, [Oral Evidence: Home Office Delivery of Brexit: Policing and Security Cooperation](#), 5 December 2017, Q54.

⁶⁵ *ibid*, Q54.

Security and justice are areas of shared competence for the EU. This means that both the EU and its member states may adopt legally binding acts in this area, however the member states can do so only where the EU has not exercised its competence or has explicitly ceased to do so.⁶⁶ An agreement between the EU and a third country in an area of shared competence is known as a 'mixed agreement'.⁶⁷ This means it is concluded both by the EU and by the member states of the EU, which must give their consent.

In the UK, if the proposed security treaty is subject to ratification the Constitutional Reform and Governance Act 2010 would require the Government to place a copy before both Houses of Parliament for a period of at least 21 sitting days, after which the treaty may be ratified unless there is a resolution against this.⁶⁸ If the House of Commons resolves against ratification the Government can lay a statement explaining why it considers the treaty should still be ratified and there is then a further 21 sitting days during which the House of Commons may decide whether to resolve again against ratification. The Government is only able to ratify the agreement if the House of Commons does not resolve against the agreement. Where necessary, the Government can introduce further legislation to implement the terms of the future relationship into UK law.

⁶⁶ European Commission, '[FAQ on the EU Competences and the European Commission Powers](#)', accessed 29 January 2018.

⁶⁷ EUR-Lex, '[International Agreements and the EU's External Competences](#)', accessed 29 January 2018.

⁶⁸ House of Commons, '[Written Statement: Procedures for the Approval and Implementation of EU Exit Agreements](#)', 13 December 2017, HCWS324.