

European Scrutiny Committee

House of Commons, London, SW1A 0AA

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From: Sir William Cash MP

16 July 2020

Rt Hon. James Brokenshire MP
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UK participation in the Schengen Information System (Council documents 6463/20 and 6554/20) (ESC 41107 and 41120)

Thank you for your [letter of 26 June 2020](#) and [Explanatory Memorandum](#) of the same date on two EU documents: the first, a [Council Implementing Decision](#) setting out a series of recommendations to address “very serious deficiencies” in the UK’s implementation of the Schengen Information System (“SIS II”); the second, a [Commission report](#) examining the progress made by countries currently connected to SIS II (including the UK during the transition period) in preparing for its phased upgrade by the end of 2021.

Turning first to the Council Implementing Decision, you accept that “many of the recommendations are not without merit” and indicate that “significant progress has been made in addressing the (largely technical) concerns raised”. You add that “we are well placed to deliver against many of the recommendations should there be negotiated access to SIS II beyond the transition period”. As we noted in our [Thirteenth Report of Session 2019-21](#), a [Resolution](#) adopted by the European Parliament in February 2020 not only ruled out UK access to SIS II as a third country after transition, but also stated that arrangements for future cooperation between the EU and the UK in the area of law enforcement should only be discussed once the UK had implemented all the recommendations made in the Council Decision.¹ **It would therefore be helpful to know how many of the Council’s recommendations you intend to implement, the timescale for doing so, and which (if any) you consider to be**

¹ See para 94 of the EP Resolution on the proposed mandate for negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland, P9_TA(2020)0033.

without merit. We also reiterate the request made in our [letter of 18 June 2020](#) for details of the European Commission’s assessment of the adequacy of the action plan drawn up by the UK in response to the Council Implementing Decision.

We appreciate that the Government’s approach to the upgrade of SIS II (to take effect in 2021) is “cautious and necessarily pragmatic”, given the degree of uncertainty about the prospects for continued UK access to SIS II after transition. **We nonetheless ask you to confirm whether the UK has already deployed the Automated Fingerprint Identification System (AFIS) for fingerprint searches in SIS II or intends to do so before the end of 2020.**

We note your view that it is legally possible for the EU and the UK to agree capabilities similar to SIS II as part of a new relationship after transition. As you are aware, however, existing precedents for third country access to SIS II extend only to third countries (Iceland, Norway, Switzerland and Liechtenstein) which are part of the Schengen free movement area (having lifted their internal border controls with EU/Schengen countries). These non-EU Schengen countries are required, under their agreements with the EU, to apply the full Schengen rule book as it applies to EU Member States, as well as changes made to the rule book over time.²

While, as you note, the EU’s Court of Justice (“CJEU”) has no direct jurisdiction under these agreements, it does have a role to play under the mechanism established to ensure “the most uniform possible application and interpretation” of the Schengen rule book. Each non-EU Schengen country is required to report each year to a “Mixed Committee”³ on the way in which its administrative authorities and national courts have interpreted and applied the Schengen rule book, “as interpreted, where relevant, by the CJEU”. There is also a requirement to “keep under constant review” relevant case law (cases decided in the CJEU and in domestic courts in Iceland, Norway, Switzerland and Liechtenstein) and to ensure the “regular mutual transmission” of this case law. Recognising that the way in which the CJEU interprets the Schengen rule book will be of direct interest to non-EU Schengen countries, their agreements with the EU include a right to submit their own statements or observations if a court in an EU Member State requests a ruling from the CJEU. Any “substantial divergence” in the way that the Schengen rule book is interpreted and applied would trigger a dispute and, potentially, the termination of the agreement if the Mixed Committee cannot settle the dispute within a specified time limit.

² See the [EU’s Schengen Association Agreement with Iceland and Norway](#), its [Schengen Association Agreement with Switzerland](#) and its [Protocol with Liechtenstein](#).

³ The Mixed Committee consists of representatives of the relevant Schengen third country Government and members of the Council and Commission.

As you mention these precedents to support your view that an agreement with the EU on SIS II capabilities is legally possible, we would welcome your view on the provisions discussed above which seek to ensure “as uniform an application and interpretation as possible” of the Schengen rule book. Would provisions of this nature be compatible with the Government’s position, set out in its Command Paper, *The Future Relationship with the European Union*, that “we will not agree to any obligations for our laws to be aligned with the EU’s, or for the EU’s institutions, including the Court of Justice, to have any jurisdiction in the UK”?⁴ Would access to SIS II on the terms set out in the EU’s agreements with the non-EU Schengen-associated countries be acceptable to the Government?

Finally, I very much welcome your commitment to ensuring effective scrutiny during the post-exit transition period and the direction you have given to officials to investigate and resolve any shortcomings in your Department’s performance. I trust this will yield rapid results.

I look forward to receiving your response within 10 working days.

I am copying this letter to the Chair (Yvette Cooper MP) and Clerk (Elizabeth Hunt) of the Home Affairs Committee, the Chair (Sir Bob Neill MP) and Clerk (David Weir) of the Justice Committee; the Chair (Hilary Benn MP) and Clerk (Gordon Clarke) of the Future Relationship with the European Union Committee, the Chair (the Earl of Kinnoull) and Clerk (Christopher Johnson) of the EU Committee in the House of Lords; Alex Bernal, your Departmental Scrutiny Coordinator; and Les Saunders and Donald Harris in the Cabinet Office.

CHAIR

⁴ See p.3 of [Command Paper 211](#).