

House of Lords European Union Select Committee Report *Beyond Brexit: policing, law enforcement and security*, 26 March 2021

HMG Response to Recommendations

This is the Government's response to the House of Lords European Union Select Committee report *Beyond Brexit: policing, law enforcement and security*.

The Government is grateful to the Committee for the consideration they have given to this topic and for giving us the opportunity to provide evidence for this inquiry.

The Government recognises the importance of ongoing Parliamentary scrutiny and will always endeavour to cooperate with Select Committees to facilitate this where appropriate.

Our response to the recommendations posed to Government is set out below. For ease, these have been numbered as per the Conclusions and Recommendations section in the report (from page 50 onwards).

Background

The EU/UK Trade and Cooperation Agreement (referred to as 'the TCA' hereafter) delivers a comprehensive package of law enforcement and criminal justice capabilities which ensure the UK can work with counterparts across Europe to tackle serious crime and terrorism – protecting the public and bringing criminals to justice.

This includes:

- **streamlined extradition arrangements** which prevent disproportionate extradition requests and long-periods of pre-trial detention;
- arrangements with **Europol and Eurojust** that reflect the scale of our contribution to these agencies and facilitate continued operational cooperation;
- arrangements enabling the **fast and effective exchange of national DNA, fingerprint and vehicle registration** data via the Prüm system to aid law enforcement agencies in investigating crime and terrorism;
- arrangements enabling the **fast and effective exchange of criminal records** data via shared technical infrastructure; and
- arrangements providing for continued transfers of **Passenger Name Record (PNR)** data to protect the public from serious crime and terrorism.

The TCA, and the law enforcement and criminal justice elements within it, were implemented in the UK by the European Union (Future Relationship) Act 2020 which received Royal Assent on 30 December 2020. We have been cooperating with EU Member States via the new arrangements since 1 January, and the indications so far

are that, in general, the new arrangements are working well in practice. We are working closely with domestic operational partners and counterparts in the EU to monitor the operation of the new arrangements and will take steps to address any issues as they arise.

The Government is committed to working together with European partners to counter the threats we all face, within Europe and beyond.

The report also contains a chapter on civil and family law, which as the Committee notes, is not addressed in the TCA.

Recommendation 1 (p50)

We regret the Government’s decision to defer establishing the Partnership Council and other bodies and urge it to review this position. We urge the Government to work with the European Commission to set up the Committee swiftly, and for it to operate inclusively and with transparency. (Paragraph 13)

Government Response:

The TCA was originally provisionally applied until 28 February 2021, but in February, this period was extended until 30 April, at the EU’s request, to allow for it to complete its outstanding processes, including the European Parliament giving its consent. We did not consider it appropriate that the TCA committees would formally begin their work in this period, unless there were necessary decisions that could not be deferred, such as extending the period of provisional application.

Now that ratification is complete, we can move forward with formally standing up the TCA institutions. The first meeting of the TCA committees, including the Partnership Council, will be agreed with the EU, and we will update Parliament on those meetings. It is right that Parliament should be updated ahead of and following meetings of the Partnership Council, which must occur at least once a year under the terms of the TCA. The Government will issue a Written Ministerial Statement both before and after each meeting of the Council. Pre-meeting Written Ministerial Statements will include the provisional agenda, and we will aim to issue these at least seven days in advance. The post-meeting Written Ministerial Statement will detail the key discussion points. We will also ensure that Parliament has sight of agendas in advance of meetings of TCA Specialised Committees.

Recommendation 4 (p50)

We welcome the provisions that establish the rule of law and human rights as “essential elements” of the entire Trade and Cooperation Agreement, and those that tie termination and/or suspension of aspects of the Agreement to either denunciation of the ECHR or deficiencies within either Party in the protection of fundamental rights. It is essential that cooperation between the UK and the EU of the kind facilitated by this Agreement is tied to respect for

the rights embodied in the European Convention on Human Rights, and to respect for data protection rules. (Paragraph 31)

Government Response:

The Government has always made clear that the TCA should be underpinned by the EU and UK's shared values of human rights and the rule of law.

Cooperation regarding law enforcement and criminal justice may be suspended by either party in the event of serious and systemic deficiencies within the other party regarding the protection of human rights, the rule of law, or the protection of data. This ensures that cooperation protects individuals' rights, whilst also ensuring that the UK can give effect to its long standing strong human rights protections autonomously.

The Agreement enables us to cease cooperation if we are not confident that rights are being respected – which is as important for us as it is for the EU. In any case, in addition to the general termination provision in the Agreement, Part Three includes a separate provision which allows either party to terminate law enforcement and criminal justice cooperation for any reason.

Recommendation 5 (p50)

Alongside the TCA's wider review clause, Part Three has its own five-year review clause and a complex array of provisions covering its termination and suspension based on the Parties' conduct linked either to the fulfilment of specific obligations and/or compliance with human rights and data protection standards. We anticipate that Parliament and our successor Committee will wish to be fully consulted as part of the review process, and we look to the Government to facilitate this nearer the time. (Paragraph 32)

Government Response:

There is a dedicated review clause in Part Three of the TCA, as the Committee's report highlights.

The Committee's report is also correct in identifying that the Law Enforcement arrangements in the TCA contain a number of provisions to enable either Party to suspend or end cooperation in this area, including:

- Where one side considers there are serious and systemic deficiencies with the way the other Party is protecting fundamental rights, the rule of law or data protection, it may suspend some or all of the Law Enforcement Part.
- The right for either Party to terminate law enforcement cooperation on giving nine months' notice.

- The right for the UK to suspend law enforcement cooperation with a particular Member State where that Member State no longer cooperates with other Member States in a particular area.

The Government is committed to facilitating parliamentary scrutiny of our new relationship with the EU as we do with other international agreements. While we wish to maintain flexibility around how scrutiny of the TCA is delivered, we are committed to making sure that Parliament is consulted and kept up to date as appropriate with regards to all provisions of the Agreement.

Recommendation 14 (p51)

We therefore remain concerned about the effect of the loss of access to SIS II on the operational effectiveness of UK police and law enforcement agencies. We recommend that the Government report on a regular basis to relevant committees of both Houses on progress in improving current processes for uploading Interpol alerts onto the Police National Computer, and on its progress in encouraging EU Member States to ‘double-key’ data into Interpol databases. (Paragraph 87)

Government Response:

We remain committed to sharing important operational information with our EU partners. Using Interpol channels, we are routinely exchanging information with EU Member States on persons of interest, including missing and wanted individuals, and on lost and stolen documents.

There is an automated upload of incoming Interpol circulations to domestic systems. Information is available via policing systems within minutes of receipt and is available at the border within 24 hours. If the National Crime Agency is notified a case is urgent, then specific alerts can be uploaded to domestic systems more rapidly. Information is therefore already quickly accessible and technical work is in train to further expedite access.

As the Committee’s report notes, we are investing in longer-term technical capabilities to support law enforcement data sharing by developing a single technical mechanism for law enforcement agencies to access and share alerts related to people, documents and objects with international partners on a reciprocal basis. The current priority of the programme, which is at an early stage of development, is to enhance the UK’s connectivity to Interpol.

Ensuring positive operational outcomes will require commitment to routine and intelligent use of the full range of available capabilities, rather than specific system comparisons. Working with our EU partners, we will continue to strengthen international law enforcement co-operation to tackle shared threats.

As previously set out, the Government recognises the importance of ongoing Parliamentary scrutiny and will always endeavour to cooperate with Select Committees to facilitate this where appropriate.

Recommendation 16 (p52)

Similarly, it is clear to us that to maintain the necessary confidence among the UK's EU partners about its policing and criminal justice data sharing processes, the Home Office should always ensure the highest standards of data handling. (Paragraph 102)

Government Response:

We have always been clear on the importance of high data protection standards in the UK and in the EU. We agree good data protection underpins international law enforcement cooperation, which is why the UK is firmly committed to maintaining high data protection standards - now and in the future. Going forward, both the UK and the EU will keep each other's data protection regimes under regular review.

Recommendation 21 (p52)

The detailed working arrangements of the UK's involvement are yet to be concluded. There is also potential, over time, for the UK's relationship with both agencies to develop, under the auspices of the Specialised Committee on Law Enforcement and Judicial Cooperation. We call on the Government to report to relevant select committees of both Houses, at least annually, on the development of UK's important relationships with Europol and Eurojust. (Paragraph 120)

Government Response:

The Agreement provides for a relationship with Europol and Eurojust that is in line with third country precedent but one which reflects the scale of our contribution to the work of the Agencies.

In addition, discussions are underway between the UK and both Agencies to put in place Administrative/Working Arrangements. These arrangements will set out the practical details of cooperation and underpin the relevant provisions in the TCA. In the meantime, operational cooperation between UK partners and Europol and Eurojust has continued to operate effectively under the TCA since 1st January 2021.

We agree with the Committee's assertion that the UK has much to offer both Agencies and we believe that, together, the TCA and Administrative/Working Arrangements will form the basis for a strong, effective and evolving partnership between the UK, Europol and Eurojust on mutual threats going forward. The Government recognises the importance of ongoing Parliamentary scrutiny and will

always endeavour to cooperate with Select Committees to facilitate this where appropriate.

Recommendation 24 (p53)

The Government has welcomed the inclusion of a principle of proportionality and the provision addressing a range of individual rights. We note, however, that these rights are all made subject to national law and that the Trade and Cooperation Agreement explicitly states that it does not confer any rights on individuals to be directly invoked in domestic courts, but the EU is exempt in this regard by virtue of Article COMPROV.16. We call on the Government, therefore, to explain the extent to which UK citizens subject to extradition requests under the terms of the TCA will be able to rely upon the rights set out in the Agreement in UK courts. We also ask the Government to provide the rationale for the apparent imbalance embodied in Article COMPROV.16 between the rights enjoyed and enforceable by citizens in the EU before their national courts in comparison to those who are resident in the UK. (Paragraph 141)

Government Response:

The UK has a long history of protecting the rights of accused and convicted persons. UK citizens subject to extradition proceedings will be able to rely on the full rights set out in the Agreement in UK courts – there is no asymmetry with the rights conferred on EU citizens. Article COMPROV 16 only affects the legal mechanism through which this effect is delivered, because the Agreement has direct effect in the EU Member States' domestic legal systems, whereas in the UK it must be implemented to have effect in domestic law. It is for this reason that the UK required that Article COMPROV.16 be drafted in the way that it is – as a matter of law, the provisions in the LECJ section of the Agreement cannot apply directly to UK citizens because the UK cannot be subject to direct effect when it is outside of the EU.

Because the Agreement (and any rights conferred within it) does not have direct effect in UK domestic law, the Agreement was implemented in domestic law in order to take effect. In relation to extradition, it is implemented by Part 1 of the Extradition Act 2003, as amended by the European Union (Future Relationship) Act 2020.

The Agreement includes safeguards to make clear that a person cannot be surrendered if their fundamental rights are at risk, if extradition would be disproportionate, or if they are likely to face long periods of pre-trial detention.

The Agreement also enshrines the principle of proportionality, allowing UK courts to reject warrants where extradition would not be proportionate to the alleged conduct or where other, less intrusive, measures can be used to progress an investigation.

The high-level provisions on procedural rights include protections for both UK and EU citizens at the point of their arrest and within the ensuing proceedings and are

familiar to the law and practice of the UK. The rights we have included reflect existing practice in the UK and guarantee important rights for UK nationals arrested in the EU, for example, access to a lawyer and consular assistance.

In addition, UK citizens can rely on the ECHR at any point throughout the proceedings.

Recommendation 25 (p53)

The European Arrest Warrant operates between the Member States on the basis that they respect the rights and freedoms set out in the Charter of Fundamental Rights, the ECHR and their common constitutional traditions (Article 6 TEU). The decision by a Dutch court in February to refuse to extradite an individual to Poland, citing concerns about judicial independence in that country, could have significant implications for the operation of the EAW and the UK-EU arrest warrant agreement, particularly because Part Three of the TCA does not appear to include a means for a UK court to refuse a surrender warrant on similar grounds. We ask the Government to explain, therefore, what impact this decision will have on those surrender arrangements. (Paragraph 142)

Government Response:

It was already the case, and remains the case, that under the provisions of the Extradition Act 2003, if the fundamental rights of a requested person, including their right to a fair trial, are in doubt then a UK court can refuse extradition. In addition, the TCA states in Article LAW.GEN.3 that the Agreement is based on the parties' "longstanding respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically".

The new Agreement also explicitly sets out that UK courts may seek additional guarantees from an EU Member State if there are concerns about respect for fundamental rights and may also refuse a warrant if they believe it has been issued for the purpose of prosecuting someone because of their political views, their sexual orientation, race or religion. These specific provisions did not exist in the European Arrest Warrant Framework Decision. Each case is considered on its individual merits.

We have also secured the right in the TCA for the UK to suspend law enforcement cooperation with a particular Member State where they no longer cooperate with other Member States in a given area.

Recommendation 26 (p54)

We call on the Government also to maintain the existing practice of regularly publishing statistics on the issuing and execution of extradition warrants between the Parties under the new arrangements. This information should include data on the extent to which EU Member States are fulfilling the timing requirements for the execution of warrants under the new system and on the numbers of surrenders made and refused. (Paragraph 143)

Government Response:

The streamlined extradition arrangements agreed under the TCA are intended to be as fast and effective as those under the European Arrest Warrant, while providing greater safeguards for those who are arrested. They are based on the exchange of warrants between judicial authorities, which is similar to the arrangements in place between the EU and Norway and Iceland. The new arrangements contain identical time limits to those under the European Arrest Warrant Framework Decision.

The National Crime Agency is responsible for the collation and publication of data in relation to extradition requests. The data includes figures for individuals wanted from the UK by other states (under Part 1 Extradition Act 2003) and individuals wanted by the UK (under Part 3 Extradition Act 2003). The NCA has recently confirmed it will continue to publish data in relation to extradition requests on an annual basis.

Recommendation 30 (p54)

Unfortunately, the Government waited until April 2020 to make its application to join the Lugano Convention. We note also that the EU and Denmark have failed to signify their support for the UK's application to join Lugano. There has accordingly been an avoidable hiatus between the end of the transition period and the safety net provided by membership of the Lugano Convention. We call on the Government to explain the reasons for this delay, and to outline the steps it is taking to engage with the EU to reach a resolution. (Paragraph 160)

Government Response:

The Government has been consistent in making the case that international civil judicial cooperation has benefits for all parties. In August 2017 the UK indicated that it would continue to be a leading member in the Hague Conference, including by participating in the Hague Conventions to which we are already a party. In addition, the present government has maintained the same position as its predecessor on seeking accession to the Lugano Convention 2007, as set out in the document: "The Future Relationship with the EU: The UK's Approach to Negotiations" (published in February 2020) at paragraph 64. However, as the Committee's report acknowledges, the unanimous agreement of all the Parties to the Convention (EU, Denmark,

Iceland, Norway and Switzerland) is needed before the UK can join and participate in the Convention as an independent contracting party.

The Government made its application to join the Convention in April 2020 and, as the Committee's report indicates, it was hoped that this process would conclude before the end of the Transition Period. But as Lord Keen indicated, it was not possible to second-guess the EU position (paragraph 156 of the Committee's report). In fact, the EU position was that it would not consider the UK's application until the Trade and Cooperation Agreement had been negotiated. As the Committee is aware, this was not concluded until late December 2020.

It is worth noting that the remaining contracting parties, namely: Switzerland, Norway and Iceland have all notified the Swiss Depository (which takes delivery of all the documentation relating to the question of accession to the Lugano Convention) that they are content for the UK to join Lugano.

The Lord Chancellor is liaising with the EU institutions (including the Justice Commissioner and the Chair of the JURI Committee of the European Parliament) and with the Justice Ministers of EU Member States on the matter of the UK's application. The Commission has recently issued a Communication to the European Parliament and European Council setting out its assessment that the UK should not be permitted to accede to Lugano. However, this does not represent a decision on the part of the EU and the UK will continue to engage with Member States and businesses ahead of a formal outcome; subject to this decision the Government stands ready to take the necessary steps to implement the Convention.